

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
(HELD IN CAPE TOWN)

Case No.: **CA 8/01**

In the matter between:

WESTERN CAPE WORKERS ASSOCIATION

Applicant

and

HALGANG PROPERTIES CC

Respondent

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JUDGMENT : 16 JULY 2003

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COMRIE AJA :

[1.] This purports to be an application for leave to appeal directly to the Constitutional Court from the judgment of this Court (the LAC) which was handed down on 8 August 2002. There is also an opposed application for condonation. In this judgment I shall refer to the applicant as the union, to the respondent as Halgang, and to the purchaser of the business as Wembley.

[2.] In a sense the application before us is misconceived, since it is the prerogative of the Constitutional Court to grant or refuse leave to appeal. Procedurally the matter is governed by rule 18 of that Court's rules. *Nehawu v. University of Cape Town and Others* 2003 (2) BCLR 154 (CC). Rule 18 (2) –

(6) requires the LAC to furnish a certificate with regard to certain questions. Such certificate (which takes the form of a judgment) is then included with the prospective appellant's application to the Constitutional Court for leave to appeal. See rule 18 (8)(c). I propose to treat the application now before us as an application for a certificate in terms of rule 18. I shall first deal with the certificate, then with condonation, and finally with costs.

THE CERTIFICATE

- [3.]** As a first step it is necessary to identify the constitutional matter or matters which are raised by the case. For this purpose a thumbnail sketch of our judgment may prove helpful. We held that with effect from 29 September 1999 there was a transfer of Halgang's mini-mall business to Wembley as a going concern in terms of s. 197 of the Labour Relations Act 66 of 1995 (para. 43 of the typed judgment). Halgang's two employees were dismissed by Halgang on 20 September 1999 in circumstances which are canvassed in the judgment. It followed that unless the two employees were fairly dismissed on 20 September, they would have become employees of Wembley on 29 September. The text of the judgment (para. 44) says "unfairly dismissed", but in context it clearly should read "fairly". We assumed, without deciding, that the dismissals were unfair. We held, however, that having regard to s. 193 (2) (c) of the Labour Relations Act it was inappropriate for the Labour Court to have ordered reinstatement against Halgang (and only reinstatement was claimed). We reached that conclusion on the basis that Halgang had disposed of the mini-mall business, and had no other known business, and that it was therefore not reasonably practicable for Halgang to reinstate or re-employ the two employees. See para.s 44 and 45 of the judgment. Wembley was not a

party to the proceedings. We rejected the “springboard” argument urged by the union, namely that a reinstatement order against Halgang could be used as a springboard in subsequent proceedings against Wembley. The basis for the argument was the judgment of the LAC in the *Success Panelbeaters* case. That judgment was based on waiver, and we distinguished it on the ground that in our view there was no waiver of joinder by Wembley in the present matter (para.s 45 to 47 of the judgment). Hence the appeal succeeded.

[4.] I should perhaps interpose two comments. First, the following sentence appears four lines from the bottom of p. 2 of the union’s application: “That there was a transfer of business was never in dispute”. According to my recollection that is correct on appeal but incorrect at first instance (see e.g. para. 46 of the judgment). Second, our judgment was given before the decision of the Constitutional Court in *Nehawu v. UCT, supra*. Upon reconsideration, our conclusion that there was a transfer to Wembley as a going concern seems to me to accord with the Constitutional Court judgment; so too our conclusion that but for the dismissals (if fair) the two employees would have become employees of Wembley.

[5.] In *Nehawu v. UCT, supra*, at para 14, the Constitutional Court held: “Therefore the proper interpretation and application of the Labour Relations Act will raise a constitutional issue”. Further, at para. 31 the Court said: “This Court will therefore be slow to hear appeals from the LAC unless they raise important issues of principle”. See too the decision of the Constitutional Court in *Numsa and Others v. Bader Bop (Pty) Ltd and Another* [2003] 2 BCLR 182 (CC) at para. 16. We have been referred to several provisions of the Constitution and of the Labour Relations Act (both before and after

amendment). I do not propose to recite them. It appears to me that the principal matter of constitutional import raised by the present case is whether, in refusing reinstatement, we correctly interpreted and applied s. 193 (2)(c) of the Labour Relations Act. That is the central issue, although I naturally accept that other provisions of the statute, and of the Constitution, will come into play in the process of interpretation. A second possible issue, connected to the first, may be whether the Labour Court or the LAC should have granted a reinstatement order against Halgang for the potential purpose of holding Wembley liable where Wembley was neither joined nor waived the right to joinder. A third possible issue may arise from the provisions of s. 189 of the Labour Relations Act in relation to the fairness or otherwise of the dismissals (a question which we found it unnecessary to decide).

- [6.]** I turn to sub-rule (6)(a). Are all or any of the above issues matters of substance on which a ruling by the Constitutional Court is desirable? On the unusual facts of the present case, I think not. If an employee or a union seeks relief which will be binding on the purchaser (or other acquirer) of a business or part thereof, then as a matter of ordinary fairness (and of standard procedure) one would expect the purchaser to be joined as a party. That was the procedure adopted in *Nehawu v. UCT, supra*, and one of the contractors (Supercare Cleaning) was represented all the way to the Constitutional Court. Aside from joinder, it can be argued that reinstatement against Halgang would have entitled the employees to claim payment of monies (if any) owing to them up to 29 September, i.e. for 9 or 10 days, but without binding Wembley from the 29th onwards. I hardly think that that would raise a matter of constitutional substance. In my opinion the certificate in terms of sub-rule (6) (a) (i) should be in the negative.

[7.] With regard to sub-rule (6) (a) (ii) the evidence appears to me to be sufficient within the contemplation of the sub-rule. We asked Mr. Oosthuizen, for Halgang, about this and his response was that the evidence appeared to him to be complete. My certificate would accordingly be a positive one.

[8.] As for sub-rule (6) (a) (iii) I am of opinion that the union does not enjoy reasonable prospects of success on appeal, and that such prospects are meagre . I would accordingly certify in the negative.

[9.] Sub-rule (6) (b) requires us to indicate whether in our opinion it is in the interests of justice for the appeal to be brought directly to the Constitutional Court. Focussing on the word “directly”, and assuming that there will be an appeal, then considerations of expedition and costs indicate that an appeal to the Constitutional Court would be preferable to an appeal to, or *via*, the Supreme Court of Appeal. That is unless the Constitutional Court particularly wishes to have the views of the Supreme Court of Appeal on joinder and waiver thereof, which I regard as unlikely in the present instance. But “directly” is qualified by the phrase “in the interests of justice”, the meaning of which has been developed by the Constitutional Court. See *Numsa v. Bader Bop, supra*, at para.s 16 ff and the cases cited in at footnote 12 of the judgment of **O'Regan J.** It appears that while each application for leave to appeal must be decided on its own facts and circumstances, a large number of factors may be taken into account. They include the importance of the constitutional issue(s), who (beyond the immediate parties) might be affected, and the prospects of success. No single factor is necessarily dispositive, although prospects of success are usually required. I have indicated earlier that in my view the constitutional issues are not of importance, in the context of this case, and that the union’s prospects of success are meagre. It also seems to me that the only people affected are the union, the two employees, Halgang and Wembley (which has not been joined). I conclude therefore that it is not in the interests of justice that the appeal be brought directly to the Constitutional Court.

CONDONATION

[10.] The union is some two months out of time. This application should have been brought within 15 Court days of 8 August 2002, that is by about the end of August. In fact it was only lodged with the registrar on 1 November 2002 (according to the date stamp). The explanation proffered by Mr. August, the official who appeared for the union, is overwork and lack of legal training. The

delay being substantial, the excuse weak, and the prospects of success meagre, it might be thought that condonation should not readily be granted.

[11.] We must first decide, however, whether this Court (the LAC) has the power to grant or refuse condonation of a late application in terms of Constitutional Court rule 18. Such power is not expressly conferred on the LAC or the High Court by the rule. On the contrary the power is expressly conferred on the Constitutional Court by its rule 31, which empowers that Court, on sufficient cause shown, to excuse non-compliance with any of the rules. None the less Erasmus *et al* : *Superior Court Practice* (ad rules 19 and 31) opine that the High Court may grant or refuse condonation. (I shall assume that the LAC's powers under s. 174 (b) *in fine* of the Labour Relations Act match the High Court's inherent powers). The learned authors base their view on *Mistry v. Interim National Medical and Dental Council of South Africa* 1998 (4) SA 1127 (CC); 1998 (7) BCLR 880 (CC) and *Minister of Home Affairs and Others v. Dawood, v. Shalabi, v. Thomas* 2000 (1) SA 1074 (C); 2000 (3) BCLR 331 (C). In the former case **Chaskalson P.** (as he then was) reacted to a comment by the Judge *a quo* that there was uncertainty as to how applications under rule 18 should be dealt with, and whether the certificate should be accompanied by a judgment. It was in this context that **Chaskalson P.** observed that there were similarities between an application for a certificate and an application for leave to appeal, and said:

“It is appropriate, therefore, that an application for a certificate in terms of Rule 18 should be dealt with in the same manner as a conventional application for leave to appeal. In both instances a judgment on the application is required.”

[12.] In the *Minister of Home Affairs case, supra*, **Van Heerden AJ** (as she then was) concluded that the High Court enjoyed the power to grant or refuse condonation. Her reasoning (at pp 1081 - 2 of the SALR report) was based on the inherent power of the High Court to regulate its own procedure, on the rules of the High Court, and on the remarks of **Chaskalson P** referred to above. I respectfully disagree. First, it will be noted that the learned President was not dealing specifically with the question of condonation. Nor, secondly, was he dealing with the powers of the High Court in other than general terms; he referred to the “manner”. Third, he did not lay down a rule that the powers of the [High] Court were identical in both types of application. Plainly the opposite is true. Fourth, in an application under rule 18 the High Court or LAC grants no relief. It furnishes a certificate (positive, negative or mixed as the case must be). That is the clear intent of the rule. The underlying purpose must be that the Constitutional Court welcomes the views of the High Court or LAC, and that such views may assist the Constitutional Court in deciding whether to grant or refuse leave to appeal. If condonation were to be refused, and a certificate consequently denied, then at least in theory an applicant could not proceed to the next stage (see rule 18(7)). I say in theory because, as I have already pointed out, the Constitutional Court itself is possessed under rule 31 of the undoubted power to condone non-compliance “with any of the foregoing rules” (emphasis supplied). To decline to furnish a certificate on the ground that the late application does not merit condonation would therefore undermine what seems to me to be the purpose of rule 18 (2) - (6). Finally, rule 18 (6) (a) provides that the Court *a quo* “shall certify” and rule 18 (6) (b) provides that: “The certificate shall also indicate”. The word “shall” is *prima facie* peremptory. It certainly lends no weight to the view that the High Court or LAC may decline to certify consequent upon refusing condonation.

[13.] My conclusion accordingly is that this Court (the LAC) has no power to grant or refuse condonation of lateness when determining an application for a certificate in terms of Constitutional Court rule 18. Such condonation is a matter for that Court to determine under its rule 31. It follows that no order should be made in the present case on the prayer for condonation.

COSTS

[14.] Ordinarily the costs of an application for a certificate would be costs in the application to the Constitutional Court for leave to appeal (or if leave be granted by that Court, then costs in the appeal). However, there is one contingency, albeit improbable, for which provision should be made, namely that the union decides not to pursue the matter further. I have catered for this contingency in the order which I propose.

THE ORDER

[15.] No order is made on the prayer for condonation. A certificate is furnished in terms of Constitutional Court rule 18 (b) as follows:

sub-rule (a)(i) – negative

sub-rule (a)(ii) – positive

sub-rule (a)(iii) – negative

sub-rule (b) – negative

The costs of this application shall be costs in the application to the Constitutional Court for leave to appeal; provided that if the applicant union does not pursue such application in terms of rule 18, then it shall pay the costs of the present application.

R.G. COMRIE
ACTING JUDGE OF APPEAL

I agree.

C.R. NICHOLSON
JUDGE OF APPEAL

I agree.

M.R.T. MOGOENG
JUDGE OF APPEAL

APPEARANCES:

For the applicant	:	Mr. Z. August, trade union official.
For the respondent	:	Mr. A.C. Oosthuizen SC instructed by Hofmeyr Herbstein & Gihwala Inc,

Cape Town.

Date of hearing : 13 June 2003

Judgment delivered : 16 July 2003