



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Case no: JA 89/2013

In the matter between:

CENTRAL UNIVERSITY OF TECHNOLOGY

FREE STATE

and

NICHOLAS ISMAEL MORGAN

Appellant

Respondent

JUDGMENT

WAGLAY JP

Introduction

[1] On 10 March 2015, this Court handed down the following order:

- (i) This matter is struck off the roll with costs.
- (ii) The costs aforesaid are to be paid by the appellant's attorneys *de bonis propriis* unless this Court on representations made by the said

attorneys within seven days of the date of this order reviews the said order of costs.

- [2] The appellant's attorneys have duly made representations to review the said order of costs and this judgment relates thereto.

Background

- [3] The appeal in this matter was deemed to have been withdrawn because of the appellant's failure to file the appeal record within the period prescribed in terms of the Rules that govern proceedings in the Labour Appeal Court ("Rules").

- [4] In terms of the Rules, an appellant must file its record of appeal within 60 days of leave to appeal being granted or such other period as may be prescribed.¹ The Rules further provide that if the appellant is unable to file its record within the prescribed time period: (i) it can file the record after the prescribed period provided that the respondent has agreed to extend the prescribed period and the record is filed within the period consented to by the respondent. (ii) Where the respondent fails to consent to an extension of time, the appellant must by way of a notice of motion supported by affidavit apply to the Judge President of this Court for an extension of time to file its record. The application must be served on the respondent who may file an answering affidavit in opposition. The Judge President will then consider the application in chambers. In determining the matter, the Judge President will look at the reasons why the appellant will not be able to file the record timeously. The Judge President may then grant an extension of the time limit within which the appellant must file its record.²

¹ Rule 5(8) of the Rules reads that: "The record must be delivered within 60 days of the date of the order granting leave to appeal, unless the appeal is noted after a successful petition for leave to appeal, in which case the record must be delivered within the period fixed by the court under rule 4(9)."

² Rule 5(17) of the Rules reads that: "If the appellant fails to lodge the record within the prescribed period, the appellant will be deemed to have withdrawn the appeal, unless the appellant has within that period applied to the respondent or the respondent's representative for consent to an extension of time and consent has been given. If consent is refused the appellant may, after delivery to the respondent of the notice of motion supported by affidavit, apply to the Judge President in chambers for an extension of time. The application must be accompanied by proof of service on all other parties."

[5] In the absence of an extension either by the respondent or the Judge President and the time period within which the appellant is obliged to file its record has lapsed then, in terms of the Rules, the appeal is deemed to be withdrawn.³ The appellant is nonetheless entitled to file its record after the prescribed period and seek to reinstate the appeal.

[6] In order to reinstate the appeal, the appellant must, and, this has been done since this Labour Appeal Court has come into existence, bring an application to reinstate the appeal. Where the record is filed *albeit* out of time and an application to reinstate the appeal is made, the Registrar will allocate for hearing the application for reinstatement of the appeal together with the appeal. This is so because one of the factors to consider in granting or refusing the reinstatement of the appeal is the merits of the appeal itself. Hence if the application for reinstatement is granted or refused the appeal is dealt with at the same time.

[7] In this matter, the appellant failed to file its record timeously. It failed to obtain consent from the respondent prior to the expiration of the period prescribed by the Rules to file its record nor did it make an application to the Judge President for an extension of the prescribed period prior to its expiration. Having its appeal deemed to have been withdrawn, the appellant then filed its record and launched an application to reinstate the appeal.

[8] The respondent in opposing the application for reinstatement raised the point that the appellant had followed the wrong procedure and that it was obliged to make an application to the Judge President to grant an extension to the time limit and not apply to reinstate the appeal. The appellant allowed itself to be guided by the respondent and instead of persisting with its application effectively withdrew/substituted its application for reinstatement of the appeal with an application to the Judge President in terms of Rule 5(17) for an extension of time within which to file the record which had by then been filed.

Any party wishing to oppose the grant of an extension of time may deliver an answering affidavit within 10 days of service on such party of a copy of the application."

³ Rule 5(17) of the Rules.

[9] A proper reading of the Rules would have alerted the attorneys that only where the appellant is unable to file its record on time must an application be made to the Judge President for an extension. This clearly means it must be done before the time period for filing the record has prescribed because the Judge President cannot extend the time frame to file a record in an appeal which has already deemed to be withdrawn.

[10] In the absence of an application before the Court to reinstate the appeal, it could not be entertained. What is of greater concern is the failure on the part of the legal representatives; here I include both counsel, not only for failing to appreciate what the Rules actually say but also for failing to consult case law to establish the route it should follow. The respondent's legal representatives appear to be equally culpable for the course followed by the appellant.

[11] For the above reasons, I am satisfied that the order of 10 March 2015 be set aside and replaced with the following:

The matter is struck from the roll with costs to stand over for determination at the appeal hearing.

Dated 16 July 2015

Waglay JP

I agree

Davis JA

I agree

Mngqibisa-Thusi AJA

APPEARANCES:

FOR THE APPELLANT: Bruce Blair of Blair Attorneys

FOR THE RESPONDENT: Adv M C Louw

Instructed by Horn & Van Rensburg Attorneys

LABOUR APPEAL COURT