

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

Case no: C 206 / 2006

In the matter between:

SILPLAT (PTY) LTD

Applicant

and

CCMA

First respondent

Mr VUYISWA MAZWI N.O.

Second respondent

STEPHEN MARINE

Third respondent

RULING ON LEAVE TO APPEAL

STEENKAMP J:

INTRODUCTION

1] The applicant, Silplat (Pty) Ltd, seeks leave to appeal against my judgement of 21 January 2011.¹

¹ The parties filed their submissions in this regard on 3 and 11 March 2011 respectively. The application for leave to appeal was decided in chambers in terms of rule 30(3A) and clause 14 of the Consolidated Practice Directive of 2010.

- 2] In my judgment, I made the following orders:
- 2.1 The application for condonation for the late filing of the review application pertaining to the award of 3 December 2005 is dismissed.
 - 2.2 The application for condonation for the late filing of the rule 7A notice is dismissed.
 - 2.3 The application for review of the rescission ruling dated 2 March 2006 is dismissed.
 - 2.4 The applicant is ordered to pay the third respondent's costs.
- 3] The applicant states that the application for leave to appeal "focuses on the review of the rescission application". It is not entirely clear whether the applicant also seeks leave to appeal against the orders in respect of condonation. I shall assume, for the sake of argument, that it seeks leave to appeal against the whole of the judgement.
- 4] As the applicant points out in its heads of argument, a central pillar in the judgment is the principal that there is a point beyond which the negligence of an attorney cannot be used by his client as a ground or explanation in support of a rescission or condonation application. This is indeed so. What the applicant fails to mention, is that I also pointed out specifically that the company could not blame only its attorneys for the delay. I pertinently addressed the company's own negligence.²

The test

- 5] I agree with the applicant that it is trite law that it needs to demonstrate that there is a reasonable prospect that another court may come to a different finding with regard to the merits of the proposed appeal.

² See e.g. para [54] – [60] of the judgment

- 6] In considering the ruling on condonation, the decision not to grant it is a matter that falls within the court's discretion. The decision in this regard is not appealable simply on the basis that another court could reasonably differ.
- 7] In *NUMSA v Fibre Flair cc t/a Kango Canopies*³ the Labour Appeal Court laid down in the applicable test. It is whether or not it can be said that, in exercising its discretion, the court *a quo* did so "capriciously, or upon a wrong principle, or in a biased manner, or for insubstantial reasons, or committed a misdirection or irregularity, or failed to exercise discretion, or exercised it improperly or unfairly."
- 8] This test was followed by the LAC in *Coates Bros Ltd v Shanker and Ors*⁴ where it was also pointed out that a simple misdirection is insufficient – "the misdirection must be of such a nature, degree or seriousness that shows that the court did not exercise his discretion at all, or exercised it improperly or unreasonably."
- 9] And in *Fibre Flair*, Willis JA pointed out that the fact that the Labour Appeal Court might "in various instances have reached a somewhat different conclusion from the court *a quo*, would not in itself justify a departure" from the "general rule against interference" in regard to the exercise of the court's discretion. This was because "policy reasons, in particular the need for expeditious finality in labour disputes" militated against the Labour Appeal Court interfering with decisions involving the exercise of a discretion.
- 10] In *A Hardrodt (SA) (Pty) Ltd v Behardien*⁵ the Labour Appeal Court restated the principles and noted that the court has "an unfettered discretion to grant condonation taking into consideration all the circumstances of the case, including the degree of lateness, the explanation therefor, the prospects of success on the merits and the

3 (2000) 21 *ILJ* 1079 (LAC) 1081G – 1082A

4 (2003) 24 *ILJ* 2284 (LAC) para [6]

5 (2002) 23 *ILJ* 1229 (LAC) 1231C

importance of the case." In that case, it was held that, given the degree of remissness on the part of the applicant's legal representatives, and, given that no acceptable explanation for such remissness and delay was given, it was not necessary to even consider the prospects of success, and the application for condonation was rightly dismissed on this ground alone.

Evaluation

- 11] With regard to the ruling on condonation, I am satisfied that I properly considered all the relevant factors exercised a judicial discretion not to grant condonation. As I stated above, I took into account the excessive delay; the gross negligence and incompetence of the applicants erstwhile attorneys; and the numerous instances where the company itself had been remiss or dilatory, or had failed to give a satisfactory explanation.
- 12] Together with the applicant's poor prospects of success in the review application, I am satisfied that another court will not come to a different conclusion with regard to my rulings on condonation.

The review of the rescission application

- 13] Even if I were to grant condonation, I cannot see how another court could come to a different conclusion on the merits.
- 14] In its application for leave to appeal, the applicant submits that I have "overlooked" the fact that the applicant, in its founding affidavit in support of the application for rescission [at the CCMA] made out a case in support of what it terms "a *bona fide* defence." But, as counsel for the third respondent pointed out, that argument is disingenuous. In its supplementary heads of argument on review, the applicant stated that its attack on the arbitration award was "limited to the procedural finding." With regard to substantive fairness, therefore, the prospects that another court may come to another finding is non-existent. And I found that the applicant had no prospects of success with regard to procedural unfairness, and set out the reasons therefor.⁶
- 15] The applicant further submits that I did not take into account "that the

6 Para [63]

arbitrator completely failed to consider the applicant's explanation for the failure to appear at the arbitration". That is not correct. In my judgement, I set out in detail why the arbitrator decided to proceed with the arbitration in circumstances where the company was in default.⁷

Conclusion

16] I am of the view that there is no reasonable prospect that another court could come to a different finding with regard to the condonation rulings or the review of the rescission application.

17] The application for leave to appeal is dismissed with costs.

STEENKAMP J

Date of ruling: 31 March 2011

For the applicants: Adv F Rautenbach

Instructed by Ward Ward & Pienaar

For the third respondent: Adv ML Sher

Instructed by Bernadt Vukic Potash & Getz

⁷ Paras [70] – [85] the

