

**IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG**

Case no: JR2166/08

In the matter between:

**MALOBOLA, NOMSA
SEEMA, TABETA
NTULI, PRETTY**

Applicant

and

**COMMISSIONER MA HAWYES
THE COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION
SHOPRITE CHECKERS (PTY) LTD (EASTLYNN)**

First Respondent

Second Respondent

Third Respondent

RULING

VAN VOORE AJ

1. This is a Ruling in respect of an application for leave to appeal. The application for leave to appeal is opposed by the third respondent.
2. Paragraphs 5 to 5.19 of the applicants' notice of application for leave to appeal is a summary (not necessarily accurate) of the written reasons.
3. The applicants contend that the Court *a quo* "*did not attach the appropriate weight or failed to consider ... the numerous steps taken by the Applicant...*"

(paragraph 7 of the notice of application for leave to appeal). In view of the facts of this matter (largely common cause and undisputed) this contention is unsustainable.

4. Paragraphs 6.1 to 6.12 of the notice of application for leave to appeal is largely a summary (not necessarily accurate) of the affidavit filed in opposing the third respondent's application to have the review application dismissed.
5. The applicants make, *inter alia*, the following submissions:
 - 5.1 Towards the end of November 2008 the CCMA was telephonically contacted and undertook to lodge the documents and audio recording with the Registrar of the Labour Court (the Registrar).
 - 5.2 On 15 January 2009 a letter was sent to the CCMA requesting that it complies with the notice of motion in the review application. On 2 February 2009 the applicants launched an application to compel the CCMA to comply with Rule 7A(4) of the Rules of the Labour Court. On 16 February 2009 the CCMA delivered a notice of compliance. However the material lodged did not include the audio recordings. During July 2009 the applicants received a further notice from the CCMA informing them that four audio tapes had been delivered to the Office of the Registrar. The union informed the third respondent of this on 7 August 2009.
 - 5.3 Telephonic enquires were apparently made of the transcription service and on 13 May 2010 a letter was sent to the transcription service.
 - 5.4 On or about 1 September 2010 the applicants were apparently informed that the audio recordings were of poor quality.
6. The contention that the CCMA was contacted telephonically towards the end of November 2008 formed no part of the affidavit opposing the third

respondent's application to dismiss the review application. Even if such telephonic contact was made, it does not take matters any further.

7. Paragraph 6.9 of the application for leave to appeal refers to an 8 (eight) week period. This however takes the matter no further.
8. It appears that it is contended that the written reasons did not deal with the steps taken by the applicants during the period October 2008 to August 2009. However, this contention is incorrect. The applicants contend that the Court *a quo* did not "*attach the appropriate weight or failed to consider ... the numerous steps taken by the Applicant*". The written reasons for the order expressly and at paragraphs 7, 8 and 9, *inter alia*, refers to the developments in relation to the lodging of the documents and audio recordings with the office of the Registrar. The written reasons take account of the steps taken by the applicants in relation to the lodging of the documents and audio recordings with the Registrar. Those steps were taken over the period mid-October 2008 to mid-July 2009. The written reasons specifically record that those steps were wholly insufficient.
9. In the notice of application for leave to appeal the applicants contend that the Court *a quo* erred in dismissing the review application because the reason for the delay was not attributable to "*the applicants alone let alone the RAWU*" but rather because of:

"8.1 The CCMA by failing to deliver a record timeously which resulted in an application to compel being launched.

8.2 the CCMA second by deliver incomplete record without audio recordings (tapes) of arbitration proceedings;

...

8.5 audio recording of the matter to be review timeously which resulted in an application to

compel being launched; was launched the Applicants attorney of record.”

10. The above submissions has been dealt with at paragraphs 7, 8 and 9 above.
11. The Applicants specifically contend that the Court *a quo* did not “*attach the appropriate weight or failed to consider the ... numerous steps taken by the Applicant*”. However, this is misguided and incorrect. The written reasons dealt extensively with the various periods whilst the review application was still live and before 8 October 2010, when the third respondent launched an application to have the review application dismissed. The written reasons do in fact take into account the developments and contentions referred to at 6.1 to 6.8 and paragraphs 8.1 to 8.3 of the notice of application for leave to appeal, being the period in which the CCMA was taking various steps. Notwithstanding, this it remains the case that over the period 13 October 2008 to July 2009 wholly insufficient steps were taken by the applicants in pursuit of or in prosecution of the review application. Over that same period the third respondent made regular written enquiries as to progress in the review application. There is no real factual dispute as to what transpired between the period October 2008 to July 2009. These developments are dealt with in the written reasons for the order. On the basis of those facts, which are to a large extent common cause and certainly not the subject of any serious dispute, it cannot genuinely be contended that there is a reasonable possibility that another Court would come to a different conclusion.
12. The applicants also in notice of application for leave to appeal attempt to attribute the delay, in part, to the CCMA and others. On the common cause and undisputed facts of this matter, this contention is wholly unsustainable. This too is dealt with expressly in the written reasons.
13. The written reasons also took into account the period July/August 2009 to October 2010. Some of the developments are dealt with in the submissions at paragraphs 6.9 to 6.14 and 8.4 and 8.5 of the notice of application for leave to appeal. The facts as to what transpired between the period July/August

2009 to October 2010 are in the main common cause and undisputed. The assessment that very little was done in pursuit of the review application, that the applicants took wholly insufficient steps and that no substantive steps were taken is based on those facts. This assessment is further underscored by the content of paragraphs 6.9 and 6.10 of the notice of application for leave to appeal. These paragraphs refer in vague, generalised and unspecific terms to '*telephonic enquiries*' following '*the end of October 2009*' and 13 May 2010 and '*a letter*' also of 13 May 2010. It is beyond reasonable dispute that in the period July/August 2009 to October 2010 very little was done in the prosecution or pursuit of the review application. Over that same period the third respondent made numerous and regular written enquiries as to progress in the review application.

14. At 8.3 of the notice of application for leave to appeal it is contended that the Court *a quo* erred in dismissing the review application because the reason for the delay was that the CCMA delivered "*inaudible tapes*". The written reasons deal with this aspect fully. By July 2009 the CCMA had dispatched audio recordings to the office of the Registrar. After the lodging of the audio recordings with the Registrar's office very little way by way of substantive steps were taken in the further prosecution of the review application. This is dealt with at length at, *inter alia*, paragraphs 10 to 18 of the written reasons. The fact that it later transpired that the audio recordings were of a poor quality does not change matters. That the audio recordings were apparently of a poor quality emerged during August 2010. This fact cannot assist the applicants in an application for leave to appeal. The fact remains that by August 2010 nearly two years have passed since the review application was launched in October 2008.
15. The applicants also contend that a reason for the delay was the failure by the respondents to "*meet to endeavour reconstruction of the arbitration record*". At no time prior to 3 September 2010 was the third respondent called upon to meet with the applicants in an attempt to endeavour to reconstruct a record of the arbitration proceedings. Accordingly, this contention cannot assist the applicants and it is entirely misplaced in the application for leave to appeal.

16. The ground at 8.5 of the notice of application for leave to appeal is merely a restatement of the issues referred to at 8.1 and 8.2 of the notice of application for leave to appeal. I have dealt with those grounds above.
17. As is apparent, the applicants' alleged grounds of appeal including those referred to at 8.1 to 8.5 of the notice of application for leave to appeal are wholly unsustainable.
18. Further, there is a suggestion at paragraph 9 of the notice of application for leave to appeal that another Court in balancing the competing interests of the party "*could find that justice favours the applicants*". In the face of the facts of this matter, mainly common cause and the balance largely undisputed, this too is not sustainable. The Court *a quo* did have regard to the competing interests of the party and this is expressly dealt with in the written reasons. Moreover, the relevant legal principles were considered and applied to the facts and circumstances of this case.¹
19. It is within the discretion of the Labour Court to debar or preclude an applicant from persisting with a review application in circumstances where, *inter alia*, wholly inadequate or insufficient steps have been taken in the prosecution of a review application.² The factors taken into account in the exercise of that discretion are dealt with expressly at, *inter alia*, paragraphs 18, 19, 20 and 21 of the written reasons.
20. On the facts of this matter there can be little doubt that the applicants took wholly insufficient steps in the prosecution of the review application. It is not contended that the application to dismiss the review application could not be brought.³

¹ Sishuba v National Commissioner of SAPS (2007) 28 ILJ 2073 (LC) at para [9] – [12]; Cassimjee v Minister of Finance (455/11) [2012] ZA SCA 101 (1 June 2012) at para [11] – [12]

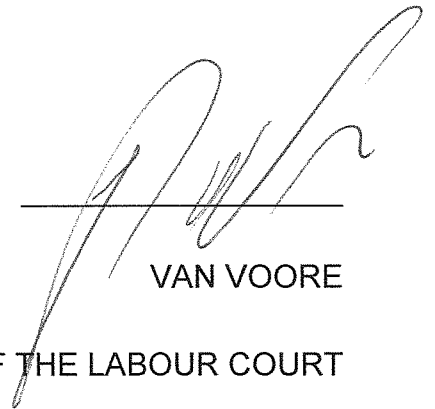
² Sishubu v National Commissioner of SAPS [2007] to BLLR, at 991B - D

³ Bernstein v Bernstein 1948(2) SA 205 (W); Kuiper & Others v Benson 1984 (1) SA 474(W); Sishuba v National Commissioner of SAPS (2007) 28 ILJ 2073 (LC) at para [9] – [12]

21. In all of the circumstances, there is no reasonable possibility that the Labour Appeal Court will come to a different conclusion. Moreover, an Appeal Court will overturn a decision of the kind which forms the subject matter of the application for leave to appeal in circumstances where, *inter alia*, the Court *a quo* misdirected itself concerning the applicable legal principles and did not properly (judiciously) exercise the discretion conferred upon it. The facts of this matter and the grounds identified in the application for leave to appeal do not present as such a case.

Order

22. The Application for leave to appeal is refused.
23. There is no order as to costs.



A handwritten signature in black ink, appearing to read 'P. van Voore', is written over a horizontal line.

VAN VOORE

ACTING JUDGE OF THE LABOUR COURT

4 JULY 2013