REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR 1482/11

In the matter between:

COMMUNICATIONS WORKERS UNION	**First Applicant**
I KHALA	**Second Applicant**
And	
COMMISSION FOR CONCILIATION MEDIATION AND ABRIBRATION	**First Respondent**
A H SWANEPOEL N.O (Commissioner)	**Second Respondent**
TELKOM	**Third Respondent**

Date: 24 February 2015

Summary: Late filing of submissions regarding application for leave to appeal. Time periods in Rules and Practice Manual considered. Basis for condonation considered. Ignorance of the provisions of the Practice Manual not a valid excuse.

JUDGMENT: LEAVE TO APPEAL

LEPPAN AJ

[1] This is an application for leave to appeal against the whole of the judgment handed down by this Court on 22 August 2014. In the matter, the First and Second Applicants (the "Applicants") applied jointly to have the decision of the Commission for Conciliation, Mediation and Arbitration ("CCMA") and related Arbitration Award[1], reviewed and set aside in accordance with the provisions of section 145 of the Labour Relations Act[2] ("LRA").

Background information

[2] The review application was heard on 10 July 2014 and, on conclusion of the proceedings, judgment was reserved. After a thorough consideration of the issues, judgment was handed down on 22 August 2014.

[3] The review application of the Applicants was dismissed for the reasons set out in that judgment. The Applicants were also ordered to pay the costs.

[4] On 5 September 2014, the Applicants served a notice of their intention to apply for leave to appeal against the whole judgment and Order of this Court. On 9 September 2014, the Third Respondent served notice of its intention to oppose the Applicants' application for leave to appeal.

[5] On 3 November 2014, some 40 days later, the Applicants served their further submissions.[3] Same was not served on the Third Respondent. The Third Respondent served its submissions in response to the Applicants' written submissions on 04 December 2014. This was also accompanied by an explanatory affidavit setting out the reasons for the delay in serving their submissions, including the fact of lack of service and that such delay had not been through any fault on their part. If it had not been for their endeavours to obtain a copy of the Applicants' written submissions, same would not have come to their attention.

[6] The First and Second Respondents did not respond to the application for leave to appeal, nor to the further submissions made by the Applicants.

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[1] Granted under case number GAJB 2276-11.
[2] Act No 66 of 1995.
[3] Published by the Rules Board in terms of s 159(3) of the LRA and published under Government Notice 1665 in Government Gazette 17495 of 14 October 1996, as amended.

<u>Point *in limine*</u>

[7] The process to be followed, should an applicant wish to lodge an application for leave to appeal the decision of the Labour Court, is prescribed by Rule 30 of the Rules of Conduct of Proceedings in the Labour Court ("Labour Court Rules") and paragraph 15 of the Practice Manual of the Labour Court of South Africa[4] ("Practice Manual"). Strict adherence to the requirements imposed by the Court Rules is axiomatic.

[8] In the recent judgment of *3G Mobile (Pty) Ltd v Raphela NO and Others*[5] *("3G Mobile (Pty) Ltd*") Snyman AJ confirmed the binding nature of the Practice Manual. Its purpose is not simply to act as a guideline for parties who institute proceedings at the Labour Court, but is a document geared at expediting the judicial process. Should an applicant act outside the timeframes provided for in the Practice Manual they are effectively required to request the Court to condone a delay on good cause shown. Similar considerations applicable to applications for condonation equally apply when the Court considers a failure to comply with the processes provided for in the Practice Manual.[6]

[9] Rule 30(3) which finds application in the present circumstances, requires an applicant, who applies for leave to appeal, to serve its notice of intention to do so within 10 days of the judgment having been handed down. Such period can be extended, should the applicant show good cause why a late submission ought to be condoned. Rule 30(3A), in expansion, requires that the applicant tender further submissions in which the reasons for, and prospects of success on appeal, should be explained. Notably the Court Rules do not expressly identify the time period within which such documents are to be served. Clearly the purpose of these submissions would be to emphasise the prospects of success on appeal. [7]

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[4] Paragraph 15.2

[5] Case no.JR1910/2013

[6] *Moraka v National Bargaining Council for the Chemical Industry and Others* (2011) 32 *ILJ* 667 (LC) at paras 20 – 21

[7] *National Union of Metalworkers of SA and Others v Fry's Metals* (*Pty*) *Ltd* 2005 (5) SA 433 (SCA); also see *FAWU obo Mbatha andOthers v Pioneer Foods (Pty) Ltd t/a Sasko Milling & Baking and Others* [2012] 4 BLLR 317 (SCA).

[10] Paragraph 15 of the Practice Manual expands on the processes that must be followed should an applicant wish to file leave to appeal. Paragraph 15.2, in relation to the further submissions, requires that such an applicant deliver further submissions within 10 days of filing the application. This requirement is peremptory. The paragraph requires that the applicant "must file its submissions in terms of Rule 30(3A)." Failure to do such will be to the detriment of the applicant.

[11] Paragraph 15.2 also entitles the parties opposing the application for leave to appeal to file replying submissions within 5 days.

[12] In the present application the Applicants served and filed their intention to appeal the decision of this Court on 5 September 2014. The further submissions made in terms of paragraph 15.2 of the Practice Manual were only served on 3 November 2014. The Applicants' further submissions were filed 40 days after the original notice of intention to appeal the decision was served, and 30 days later than is prescribed by the Practice Manual.

[13] To determine whether the Applicants are entitled to have the Court consider the late submissions, requirements similar to normal condonation applications must be met. Generally speaking applicants are required to show good cause why the Court should consider such late submissions that disregard the prescribed time periods. Such an evaluation must include a consideration of the degree of lateness[8], reasons for the lateness[9], prospects of success should condonation be granted[10], prejudice to be suffered by the other party[11] and any other factor that the Court deems relevant.[12]

[14] The Applicants have addressed condonation in paragraph 5 of their further submissions. The application for condonation commences by identifying that the submissions are 27 days late. This is not correct. The Applicant also incorrectly identifies 24 September 2014 as the date on which such

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8 *Commissioner for Inland Revenue v Burger* 1956 (4) SA 446 (A) at 449G.
9 *National Union of Mineworkers v Council for Mineral technology* [1999] 3 BLLR 209 (LAC).
10 *Ibid.*
11 *Academic & Professional Staff Association v Pretorius NO and Others* (2008) 29 *ILJ* 318 (LC).
12 *Melanie v Santam Insurance Co Ltd* 1962 (4) 531 (A).

submissions were due. The identification of 24 September 2014 is wrong for two reasons: the submissions were due on 19 September 2014, which is the 10th day after the date on which the original notice of intention to appeal was filed, and 24 September 2014 is Heritage Day, a national public holiday, and therefore could not be the date on which the submissions were due, it being excluded from Court days.

[15] The reason for lateness tendered by the Applicants is that they ‘were of the view that the Court will give directions as to when the submissions will be made’ (sic). According to the Applicants, it was only upon them enquiring when the further submissions were due that they were informed that Judge's directives are no longer practice, and that the process is now regulated by the "new directive". The good cause that the Applicant intends to rely upon is that they were not familiar with the content of the Practice Manual, and that this should be considered as to why their lateness should be condoned.

[16] Plainly this is not a reason that this Court can accept and is not good cause for condonation. The Practice Manual came into effect on 2 April 2013, which is more than a year before the Applicants lodged their notice of intention to apply for leave to appeal. The lack of knowledge on the part of the Applicants' legal practitioners is not a good reason at all.

[17] Upon a consideration of the Applicants’ further submissions, they were found to be verbatim the grounds listed and identified in the notice of intention to appeal. The further submissions, with the exception of paragraph 5 (which is the request for condonation) is an exact replica of the notice. The submissions are completely superfluous and do not provide any clarification.

[18] The Applicant therefore fails in all respects to provide good cause why the late filing should be condoned.

Right of leave to appeal

[19] Principally all parties to a dispute are entitled to make application for leave to appeal a decision of this Court.[13] In the application for leave to appeal the appellant is required to substantively make out a case on identifiable grounds as to why the decision of the Court should be set aside.

[20] In *National Union of Metalworkers of SA & others v Fry's Metals (Pty) Ltd*[14], it was held that an Applicant is required to identify both the grounds upon which the appeal will be brought and to clearly indicate why such grounds give rise to a reasonable prospect of success on appeal. Should the Applicant identify the grounds but fail to substantiate why such grounds indicate a reasonable prospect of success, the application for leave to appeal must fail.

Grounds of appeal

[21] In its application for leave to appeal, the Applicants collectively identify 19 grounds upon which they intend to rely. Having merely regurgitated the grounds in its further submissions, the greater majority of the grounds relied upon are vague and in many instances fail to identify in succinct, clear and unambiguous language what the grounds are. The last 7 grounds, furthermore, are not grounds, upon which leave to appeal is sought, but rather statements of what the Court ought to have decided.

[22] The Applicants divided the grounds into two categories: the failure of the Court in fact and law, and what the Court ought to have done.

[23] The errors of fact and law upon which the Applicant relies are that the Court erred in finding that:

23.1 the sanction of dismissal was appropriate within the circumstances due to gross insubordination being a serious offence, and which is

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[13] Rule 30 of the Rules For The Conduct Of Proceedings In The Labour Court published under Government Notice 1665 in *Government Gazette* 17495 of 14 October 1996, as amended.

[14] 2005 (5) SA 433; also see *FAWU obo Mbatha and Others v Pioneer Foods (Pty) Ltd t/a Sasko Milling and Baking and Others* [2012] 4 BLLR 317 (SCA).

"fatally detrimental" to the trust relationship, and that the sanction of dismissal is permitted by the disciplinary code;

23.2 the alleged disruptive behaviour of the Second Applicant subsequent to his dismissal and during the arbitration proceedings which had a destructive effect on the trust relationship that existed between the Second Applicant and the Third Respondent, and the fact that the Second Applicant's owed a duty to his employer;

23.3 the Second Respondent applied her mind to the evidence that she had at her disposal and that the conclusions she reached were sound and reasonable;

23.4 the Second Respondent satisfied herself that the Second Applicant was indeed guilty of the misconduct of which he was accused;

23.5 that there was no objection to the arbitration proceedings set down for 28 March 2011;

23.6 the dispute was set down for a process of Con/Arb on 28 March 2011, and that it was combined with another dispute for which a certificate of outcome had already been issued;

23.7 the key issues were not whether the matter was the subject of a conciliation process, but whether it was correct to proceed with arbitration proceedings on 28 March 2011;

23.8 the Second Applicant's objection to the arbitration process was due to an outstanding issue that still had to be conciliated; when the true contention was that the arbitration had not yet been set down;

23.9 the Third Respondent "dropped the objection" in order to continue with the arbitration proceedings, and that this was never canvassed in the arbitration or review proceedings;

23.10 it can rely on the certificate of outcome for the matter with case number "1034/11", the matter never having been set down for arbitration from the outset;

23.11 the attorneys for the Applicants made a conscious decision not to have the record of the arbitration proceedings reconstructed and is therefore not entitled to raise objections at such a late stage;

23.12 the failure of reconstruction was due to the Applicants attorneys when in reality the reason of failure to reconstruct the record was because of the uncooperative conduct of the Second Respondent.

[24] The Applicants are of the opinion that the Court ought to have found that:-

24.1 the dismissal of the Second Applicant was unfair and ought to have ordered re-instatement;

24.2 the Third Respondent failed to prove that the Second Applicant was indeed guilty of the misconduct of which he was accused, due to there being no direct instruction by the Third Respondent to the Second Applicant;

24.3 Second Applicant had the necessary permission to attend the workshop due to not having been expressly prohibited from doing so;

24.4 Third Respondent sent a letter to the Second Respondent when the offices of the First Applicant were closed and that the Second Respondent did not have access to an email account;

24.5 the matter be remitted to the CCMA to be heard by a different commissioner;

24.6 the Second Applicant be reinstated; or

24.7 First Respondent should bear the costs of the review application.

24.8 these grounds of appeal will each be dealt with separately below.

<u>Severe insubordination and dismissal as a sanction</u>. [ad para 1.1]

[25] It is common cause that the Second Applicant was disciplined for an offence in terms of clause 2.17 of the Third Respondent's Disciplinary Code, which expressly identifies insubordination as a ground of misconduct. It is furthermore common cause that clause 2.17 has to be read with note 4 of the Disciplinary Code, which unambiguously states that any first time misconduct on the part of an employee which is sufficiently serious can be appropriate grounds for dismissal.

[26] From the outset the charge against the Second Applicant was couched in a manner that clearly illustrated the severity of the misconduct of which he was accused. Such conduct could warrant dismissal in accordance with the prescripts of the Disciplinary Code.

[27] The Applicants assert that the trier of fact failed to appreciate the requirements imposed by the Third Respondent's disciplinary code. This is not correct. The assertion is raised without identifying a particular clause in the disciplinary code upon which the Applicants rely. In stark contrast, the Third Respondent quotes Note 4 of its Disciplinary Code verbatim. The ground as asserted by the Applicants therefore is without merit.

[28] In the greater employment law framework gross insubordination has, on a number of occasions, been held to be a justifiable ground upon which an employee can be dismissed.[15] It is uncertain whether the Applicants in the present matter are asserting that the Second Applicant was not guilty of insubordination or that insubordination is not a ground upon which an employee can be dismissed.

[29] Not having elucidated the ground in the further submissions, and severe misconduct and gross insubordination both being grounds upon which the

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[15] *FAWU v Rainbow Chicken Farms* 2000 1 BLLR 70 (LC) (unauthorised absence); *Drake v Professional Career Services (Pty) Ltd* 2001 *ILJ* 2658 (LC) (insubordination); *Nedcor Bank Ltd v Frank* 2002 *ILJ* 1243 (LAC); *SACCAWU v Mahawarane Country Club* 2002 *ILJ* 902 (LAC*); Papane v Van Aarde* NO 2007 *ILJ* 2561 (LAC) (disobedience); *Maneche and Others v CCMA* 2007 *ILJ* 2594 (LC) (justifiable refusal); *NUMSA v Kromberg and Schubert (East Cape*) 2008 *ILJ* 1343 (BCA) (refusal not justified); Mischke 1999 CLL 41

Second Applicant could justifiably have been dismissed, the ground is without merit and must fail.

<u>The conduct of the Second Applicant subsequent to his dismissal</u>. [ad para 1.2]

[30] The very nature of the employment relationship is premised on good faith and the *ex lege* fiduciary relationship that must exist between the employer and its employees.[16] The centrality of the trust relationship cannot be over emphasised.

[31] The Applicants assert that this Court incorrectly found that the Second Applicant in the period following his dismissal behaved in a manner that was destructive of the trust relationship existing between the Second Applicant and Third Respondent. The Applicants fail to provide any further information in support of this bald assertion or any reason why this observation by this Court was incorrect.

[32] The Third Respondent, in stark contrast to the Applicants in their submission, at paragraphs 1.1 to 1.11, detail the conduct of the Second Applicant before and after his dismissal. From the assertions made by the Third Respondent it is clear that the Second Applicant showed a reckless disregard for the authority of the Third Respondent. The persistent conduct of the Second Applicant evidences that the required mutual respect between the parties was lacking and that the relationship had reached a stage of irretrievable breakdown.[17]

[33] The failure of the Applicants to bolster the assertion and to prove that this relationship could be restored, or that the Second Applicant never behaved in the manner identified by the Third Respondent, results in this ground being without merit. This ground accordingly has to fail.[18]

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[16] *Humphries and Jewell* (*Pty*) *Ltd v FCRAWU and Others (*1991) *ILJ* 1032 (LAC); *Baudach v United Tobacco Co Ltd* 2000 3 All SA 153 (A); 2000 4 SA 436 (SCA); 2000 *ILJ* 2241 (SCA); Van Jaarsveld *The Interplay between Common Law and Statutory Law in South African Labour Law* (2007) thesis 220 et seq

[17] See paragraphs 32 and 33 of the judgment.

[18] See specifically paragraph 31 of the judgment.

<u>Reviewability of the decision of the Second Respondent [ad para 1.3, 1.4]</u>

[34] Section 145 of the LRA permits a party to arbitration proceedings at the CCMA to apply to have the decision of the Commissioner set aside. To do so, an applicant is required to identify a defect either in the manner in which the award was made, or in the substance of the award itself. The ambit of such grounds are, however, expressly restricted in the LRA to misconduct on the part of the Commissioner[19], the Commissioner committing a gross irregularity[20], or instances where the Commissioner exceeded his or her powers.[21] In essence an applicant in review would have to prove that the Second Respondent had misconceived the nature of the enquiry or arrived at an unreasonable result.[22]

[35] In the notice of intention to appeal, the Applicants assert that the Second Respondent failed to apply her mind to the evidence that she had at her disposal, and in the alternative that this Court failed to satisfy itself that the Second Applicant had committed the misconduct of which he was accused. The Applicants do so without providing any further material evidence in pursuance thereof.

[36] In my judgment, based on the evidence that the Court had at its disposal, it was reasoned that the Commissioner *in casu* applied her mind to the evidence and was satisfied that the Second Applicant committed the misconduct of which he stood accused.[23] The conclusion reached by the Second Respondent was not a decision that a reasonable decision maker could not have reached.[24]

[37] This ground is without merit and that the decision of the Court must stand.

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19 Section 143(2)(a)(i) of the LRA.
20 Section 143(2)(a)(ii) of the LRA.
21 Section 143(2)(a)(iii) of the LRA.
22 *Herold v Nedbank (Congress of South African Trade Union Amicus Curiae)* 2013 (6) SA 224 (SCA).
23 See specifically paragraphs 16 and 17 of the main judgment.
24 See specifically paragraphs of the judgment.

The issue that still had to be subjected to a process of conciliation. [ad paras 1.6 – 1.11]

[38] The Applicants assert that this Court erred in finding that the dispute was set down for a process of Con/Arb on 28 March 2011, due to an outstanding objection of the Third Respondent who objected to the second unfair dismissal dispute. It is alleged that the processes were never joined, and that a procedural irregularity occurred when the parties entered into a process of arbitration while the second unfair dismissal dispute had not yet been subjected to a process of conciliation.

[39] In this regard specific reference is made to paragraphs 43 and 44 of the judgment of this Court. In these paragraphs it is clearly set out that the parties to the dispute reached agreement and that the processes were joined. The matters were consolidated and set down under case number GAJB 1034/11.

[40] Should the Applicants wish to assert that the objections persisted, evidence to that effect should have been adduced. [41] Based on the evidence before this Court there is no reason to believe that any procedural irregularity occurred.

[42] The Applicants not providing any further reasons, apart from the assertions which were considered by the Court and found to be without merit, leaves this ground of appeal baseless.

[43] This ground of appeal therefore fails.

Reasonableness of the reward

[44] By applying the test as delineated in *Sidumo*[25], the court *in casu* came to the conclusion that the award made by the Commissioner was one that a reasonable decision maker could have reached, and therefore upheld that decision.[26] The function of the Court cannot and has never been to set

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[25] *Supra.*
[26] See paragraph 34 of the main judgment.

aside awards because the presiding officer prefers a different result. Should the Court do so, it would be acting as an appeal body which it is not.

[45] The Applicants list 7 conclusions which the Court ought to have reached. Two of the findings listed call for relief that can only be grated in very exceptional circumstances. Not having been provided with any reasons why the Applicants are of the opinion that the award is one which a reasonable decision maker could not make nor why exceptional circumstances exist, the suggested findings are without merit, and must fail.

<u>The decisions which the Court ought to have made</u>

[46] As has been confirmed on multitude occasions, it is not the function of the Court to decide whether in the opinion of the Court[27] the Commissioner made the correct decision, but only whether the decision made by the Commissioner is one that a reasonable Commissioner could have made.[28] This would require that the Court consider whether the Commissioner came to the conclusion by having regard to the totality of the evidence that the Commissioner had at his or her disposal. Such evidence would have to be evaluated in the context of the legal issues in dispute. A central consideration of the Court is whether the Commissioner applied his/her mind.[29] Without a positive finding in this regard, it cannot be reasoned that the decision meets the Constitutional standard[30] of lawfulness, reasonableness and procedural fairness.[31]

[47] If it is found that the Commissioner did indeed apply his/her mind, it does not denounce the possibility that the same evidence and evaluation process could result in another award being possible. The investigation and determination of the existence of alternative outcomes is, however, not the function of this Court.

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[27] See per example *Lekota v First National Bank of SA Ltd* [1998] 10 BLLR 1021 (LC) at para 16.
[28] *Sidumo v Rustenburg Platinum Mines Ltd* [2007] 28 *ILJ* 2405 (CC).
[29] *CUSA v Tao Ying Metal Industries and Others* (2008) 29 *ILJ* 2461 (CC) at para 134
[30] Section 33 of the Constitution of the Republic of South Africa, 1996.
[31] *Fidelity Cash Management Service v CCMA and Others* (2008) 29 ILJ 964 (LAC) at para 96.

[48] One of the primary differences between a review and an appeal, is the power that the Court has in terms of the relief that it can grant.[32] The power of the reviewing Court is circumscribed and restricted to a determination whether the decision is lawful, reasonable and procedurally fair.[33] Should the presiding officer be of the opinion that the standard required for same is not met the Court has the discretion to decide what relief, if any, to award.[34]

[49] The relief that the providing officer could order, should be relief premised on deference. It would be incorrect for this Court to make an order on the premise that it is in a better decision, subject to the facts *in casu*. The only exception where this Court can make an order other than remitting the dispute to the CCMA is when the circumstances and the dictates of justice require such.

[50] In the present circumstances, the Applicants do not provide a reason why the Order of this Court is incorrect, why this Court should have made the seven findings that it suggests or why the Applicants are entitled to that relief sought. One should appreciate that the Applicants' assertions are without merit.

[51] The seven grounds, being unsubstantiated and without merit fail and cannot serve as a basis upon which leave to appeal should be granted.

<u>Cost order</u>

[52] The decision to award costs is not an aspect of the judgment that is generally susceptible to appeal.[35] The costs in a judgment can only be appealed should the applicant for leave to appeal provide grounds indicating that the Court in awarding the costs had misdirected itself.[36]

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32 *Carephone (Pty) Ltd v Marcus NO and Others* 1998 (10) BCLR 1326 (LAC)

33 Section 33 of the Constitution, 1996; *Sidumo and Another V Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 (CC).

34 *Oudekraal Estates (Pty) Ltd v City of Cape Town and others* [2004] 3 All SA 1 (SCA)

35 *Masuku v Score Supermarkets (Pty) Ltd* (2013) 34 *ILJ* 147 (LC).

36 *Ibid.*

[53] In the present application, the ground of appeal is restricted to an unsubstantiated claim by the Applicants stating that the Court erred in making a cost order against the Applicants. Not having provided any indication as to why the Court misdirected itself in making such cost order against the Applicants, the ground of appeal is without merit. The ground of appeal therefore does not succeed.

Conclusion

[54] In the judgment that the Applicants wish to appeal, in reliance on *Herold v Nedbank Ltd (Congress of South African Trade Unions Amicus Curiae)*[37] only the narrowest possible grounds exist upon which awards made by the CCMA can be taken on review, and even then the powers of this Court are circumscribed. The whole purpose of this approach is to ensure that labour disputes are resolved in a speedy and effective manner.

[55] The current application stands in stark contrast with the requirements imposed. It is a shot gun approach whereby the Applicants rely on every possible avenue of appeal to have the decision of this Court set aside, without any consideration of the merits upon which they rely. In many instances the Applicants raised grounds but had no regard to the main judgment before identifying any grounds and lodging the appeal.

[56] For the reasons set out above none of the grounds are sufficiently cogent to persuade the Court to grant leave to appeal. For these reasons the application for leave to appeal is refused.

[37] 2013 (6) SA 224 (SCA).

Order

[57] On these premises, I make the following order:

57.1 Condonation for the late filing of the further submissions is refused.

57.2 Leave to appeal to the Labour Appeal Court is dismissed and the Applicants' attorneys are required to pay the costs of this application.

Leppan, AJ

Acting Judge of the Labour Court of South Africa