



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: J 2106 /2013

In the matter between:

SAMWU

First Applicant

MEMBERS WHO'S NAME ARE LISTED

IN ANNEXURE "A"

Second and Further Applicants

and

THABA CHWEU LOCAL MUNICIPALITY

First Respondent

THE MUNICIPAL MANAGER –

JOSEPH MISHACK MNISI

Second Respondent

Heard: Considered in Chambers

Delivered: 20 April 2015

Summary: Application for leave to appeal – Test to be applied – reasonable prospect of different conclusion

Leave to appeal – no proper grounds made out – application for leave to appeal dismissed

JUDGMENT

SNYMAN AJ:-

Introduction

- [1] This matter concerned an application by the applicants seeking that the respondents be held in contempt of Court, which was countered by a rescission application by the first respondent seeking to rescind and set aside the order granted against it by default and which formed the subject matter of the contempt application. What I was also called on to decide was the issue of condonation for the late filing of the rescission application of the first respondent.
- [2] The application was argued before me on 15 October 2014 by both parties and in a judgment handed down on 11 February 2015, I dismissed the contempt application, and granted the first respondent condonation and granted its rescission application, subject to certain conditions.
- [3] The applicants then filed an application for leave to appeal with the Labour Court on 4 March 2015.
- [4] Both parties filed written submissions in the leave to appeal in terms of Clause 15.2 of the Practice Manual. Clause 15.2 of the Practice Manual further determines that an application for leave to appeal will be determined by a Judge in chambers, unless the Judge directs otherwise. I see no reason to direct otherwise and will therefore determine the applicant's leave to appeal application in chambers, based on the written submissions filed by both parties.

Test for leave to appeal

[5] In deciding whether to grant leave to appeal to the Labour Appeal Court, the Labour Court must determine whether there is a reasonable prospect that another Court might come to a different conclusion to that of the Court a quo.¹

[6] As was specifically said in *Karbochem Sasolburg (A Division of Sentrachem Ltd) v Kriel and Others*:²

‘I have understood that the test in deciding whether to grant leave to appeal is the traditional test. It requires a judge to ask whether there is a reasonable prospect that another court may come to a different conclusion. See *North East Cape Forests v SAAPAWU and others* (1997) 18 ILJ 729 (LC); [1997] 6 BLLR 705 (LC) at 710A-B; *NEWU v LMK Manufacturing (Pty) Ltd and Others* [1997] 7 BLLR 901 (LC) and Landman and Van Niekerk *Practice in the Labour Courts* (Service 1) at A-41.’

[7] The applicants for leave to appeal thus have to show in this instance that there is a reasonable prospect of another Court coming to a different conclusion. The individual grounds upon which the applicants’ application for leave to appeal is based, will be addressed in this judgment hereunder.

The merits of the application for leave to appeal

[8] A substantial part of the applicants’ leave to appeal grounds relate, in general, to the issue of condonation being granted for the late filing of the first respondent’s rescission application. The applicants contend that first respondent never applied for condonation for such late filing, that the notice of motion contained no prayer for condonation, and thus it was simply not competent to grant

¹ See *National Education Health and Allied Workers Union v University of Cape Town and Others* (2003) 24 ILJ 95 (CC) ; *Ngcobo v Tente Casters (Pty) Ltd* (2002) 23 ILJ 1442 (LC) ; *Volkswagen SA (Pty) Ltd v Brand NO and Others* (2001) 22 ILJ 993 (LC) ; *Singh and Others v Mondi Paper* (2000) 21 ILJ 966 (LC) ; *Glaxo Wellcome SA (Pty) Ltd v Mashaba and Others* (2000) 21 ILJ 1114 (LC)).

² (1999) 20 ILJ 2889 (LC) at 2890D.

condonation in the absence of it being sought. The applicants also contend that no proper explanation for the delay was submitted. I deal with these contentions next.

- [9] Whilst I accept that the notice of motion for rescission contained no prayer for condonation, it is simply not so that the first respondent did not apply for condonation. In fact, this whole issue must be seen in the proper context. When the applicants raised as objection *in limine* in the answering affidavit to the rescission application that the rescission was brought out of time, the applicant replied stating that its rescission application was brought in terms of what it called the 'common law' and thus had to be brought in a reasonable time and was not late. It is thus not that the first respondent simply flouted the Court Rules, as it was of the bona fide view that these Rules did not apply in this particular instance. This obviously explains why, in the initial rescission application, condonation was not sought. As stated in my judgment³, I did not agree with this contention of the first respondent and held that Rule 16A applied and condonation was required. In the absence of the first respondent asking for condonation, that would have been the end of the matter insofar as it concerns the rescission application. But, and fortunately for the first respondent, having been alerted the applicants' objections in the answering affidavit, the first respondent said the following in the replying affidavit (referring to its rescission application):⁴

'.... However, if it is late and for the reasons appearing in paragraphs 5 to 24 of the founding affidavit, I respectfully submit that condonation should be granted.'

In my view, this is tantamount to the first respondent seeking condonation, and this brought the consideration of condonation squarely into play. Significantly also, both parties filed further sets of replying affidavits, and the applicants never

³ See para 44 of the judgment.

⁴ See para 11 of the replying affidavit.

raised as a complaint, for example, that the first respondent could not ask for condonation on the basis that it did in the replying affidavit.

- [10] Further, and when this matter was argued before me, the first respondent did make submissions in support of condonation being granted, and this at least was tantamount to applying for condonation from the bar. Even though such applications for condonation from the bar must be discouraged, it is not incompetent to do so, and can be permitted in circumstances where justice and fairness so dictate, and the time limit not complied with is not a jurisdictional fact imposed by a statute.⁵ In particular, all the evidence necessary to decide condonation was already before me in the affidavits, and in this regard, the following approach as stipulated in *Els Transport v Du Plessis and Others*⁶ was competent:

‘.... An application for condonation was therefore warranted. As the evidence in support of such an application was already on the papers before court, it could have been made from the bar (*Northam v UUNet GInternet Africa (Pty) Ltd and Others* (1998) 19 ILJ 862 (LC)).’

- [11] Accordingly, there is simply no merit in the ground of leave to appeal advanced the applicants, to the effect that the first respondent did not seek condonation and that an application for condonation was not before me. There is no reasonable prospect that another Court may come to a different conclusion in this respect.
- [12] The applicants then contend that the explanation offered by the first respondent was in any event insufficient so as to justify the granting of condonation. The fact of the matter is that it is virtually the same explanation as the one that relates to

⁵ See *City of Johannesburg v SA Municipal Workers Union and Others* (2010) 31 ILJ 1175 (LC) at para 13; *SA Broadcasting Corporation Ltd v Grogan NO and Another* (2006) 27 ILJ 1519 (LC) at para 19; *Siegelaar v Minister of Safety and Security* (2005) 26 ILJ 133 (LC) at para 26; *Lumka and Associates v Maqubela* (2004) 25 ILJ 2326 (LAC) at para 31.

⁶ (2001) 22 ILJ 1390 (LC) at para 8.

the rescission application. In short, the explanation for condonation and explanation for rescission largely overlap. This is actually said by the first respondent, having regard to the extract from the replying affidavit referred to above. I have dealt with this explanation in detail in my judgment, and I do not propose to do so again. The simple point is that in deciding to grant either rescission, or condonation, I must exercise a discretion. In *Foster v Stewart Scott Inc*,⁷ the court stated that:

‘It is well settled that in considering applications for condonation the court has a discretion, to be exercised judicially upon a consideration of all the facts’

A higher Court will only interfere with such discretion if it is shown to have been exercised in a mala fide manner, or some or other gross irregularity was committed in the exercise of the discretion or where the Court *a quo* exceeded its powers. None of this was shown or even alleged in this instance. The applicants in effect simply want a higher Court to exercise the same discretion in another way. This cannot support any conclusion of another Court coming to a different conclusion.

[13] One can do no better than to refer to what the Court specifically said in *Coates Brothers Ltd v Shanker and Others*⁸ where the Court held as follows with specific reference to a refusal by the Court *a quo* to grant condonation:

‘An appellant must show, in an appeal from a decision in a lower court, that the court *a quo* ‘acted capriciously, or acted upon a wrong principle, or in a biased manner, or for insubstantial reasons, or committed a misdirection or an irregularity, or exercised its discretion improperly or unfairly.’

⁷ (1997) 18 ILJ 367 (LAC) at 369C-E.

⁸ (2003) 24 ILJ 2284 (LAC) at para 5.

Even if it is accepted that I erred on the issue of the explanation (which I reiterate is simply not the case), then the following ratio from the judgment in *Coates Brothers* is quite apposite:⁹

‘As I have said earlier, the court a quo erred in its finding in regard to the lack of explanation for its stance on the absence of the employee’s signature and I accept that it may have erred in its findings as to the prospects of success and the weight given thereto. Let it be assumed, in favour of the employer, that these errors were made by the court a quo. They would not, however, constitute misdirections of such a kind that they would warrant interference with the discretion exercised by the court a quo. The court a quo did not exercise its discretion improperly or unreasonably; such errors as may have been made were not serious within the context of the issues which were before the learned judge.’

- [14] The same considerations would apply to the rescission application, with the following added dimension, as said in *Shoprite Checkers (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*¹⁰:

‘.... Broadly speaking, the exercise of the Court’s discretionary power appears to have been influenced by considerations of justice and fairness, I having regard to all the facts and circumstances of the particular case.’

I remain of the view that in this particular case, justice and fairness, as well, demanded that the issues forming the foundation of the first respondent’s rescission application need to be properly ventilated, and not finally determined by default.

- [15] Accordingly, it is my view that there is no reasonable prospect that another Court could come to a different conclusion with regard to the discretions I have exercised, where it comes to rescission, and condonation, especially with regard to the issue of the explanation. This basis for seeking leave to appeal thus falls to

⁹ Id at para 6.

¹⁰ (2007) 28 ILJ 2246 (LAC) para 28.

be rejected as well.

[16] The applicants further contend that I mischaracterized the first respondent's defences. But this is not the case. What is the case is that I did not ascribe to the characterization the applicants sought to attach to the first respondent's defences, which, understandably, is motivated by their objective of defeating such defences. The fact that I disagree with the applicants does not make the characterization of the defences I chose to adopt appealable or wrong. I may mention that in their written submissions in support of the leave to appeal application, the applicants quote from the first respondent's founding affidavit in the rescission application, but do so rather selectively. A prime example is the applicants relying only on certain passages quoted from the founding affidavit in support of contending that I was incorrect in saying that the first defence of the first respondent was that Koma was coerced into signing the agreement by misconduct of the individual applicants. But what the applicants do not refer to is the specific contention in the founding affidavit where it is recorded that 'Koma was pressured to enter into the settlement agreement', with specific reference to the misconduct of the individual applicants in this regard.¹¹ Once again, I am simply not convinced that there is a reasonable prospect of another court coming to a different conclusion in this respect.

[17] The applicants place much emphasis on the first respondent's defence that it was entitled to refuse to honour the settlement agreement. But what the applicants seem to fail to appreciate is that I rejected that defence. I specifically held that the first respondent was not entitled to simply refuse to comply with the agreement even if it thought it was unlawful, and it was compelled to take steps to challenge the agreement. I concluded that the first respondent laboured under a misapprehension, but, and considering the issues and the facts of this matter, the first respondent should be afforded the opportunity to take the relevant and

¹¹ See paras 28.6 to 28.10 of the founding affidavit in the rescission application.

required steps. It is in fact the applicants that completely misread what I have said in my judgment, and their contention of a mischaracterization of the first respondent's defence in this regard has no substance. There is accordingly equally no reasonable prospect of another court coming to a different conclusion on this issue.

[18] Finally, and as to the issue of my dismissal of the contempt application, I remain unconvinced that that the judgment in *Bruckner*¹² is not equally applicable in this case, especially considering the frequent changes in municipal managers. After all, it is a particular individual person, who was not the municipal manager at the time of the order, that the applicants are now seeking to commit to prison for contempt. Also, the simple fact is that the first respondent did file a rescission application to the order the applicant sought to contend the respondents were in contempt of. This has to dispel any mala fides, for the reasons I have addressed in detail in my judgment. I am satisfied that there is no reasonable prospect of another court coming to a different conclusion on the issue of the contempt application.

[19] I thus conclude that the applicants in the application for leave to appeal have shown no reasonable prospect that another Court may come to a different conclusion. There is no reason why costs should not follow the result in this leave to appeal application.

Order

[20] In the premises, I make the following order:

1. The applicants' application for leave to appeal is dismissed with costs.

¹² *Minister of Health and Another v Bruckner* (2007) 28 ILJ 612 (LAC).

Snyman AJ

Acting Judge of the Labour Court

APPEARANCES:

For the Applicants: Ruth Edmonds Attorneys

For the Respondents: Phungo Inc Attorneys