



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR1045/2011

In the matter between:

BENJAMIN LEHLOHONOLO MOSIKILI

Applicant

and

MASS CASH (PTY) LTD t/a QWAQWA

CASH & CARRY

First Respondent

COMMISSIONER NQOBILE KENNETH DUBE

Second Respondent

COMMISSION FOR CONCILIATION, MEDIATION &

ARBITRATION

Third Respondent

Decided: 15 September 2015

Decided in Chambers.

RULING – LEAVE TO APPEAL

TLHOTLHALEMAJE, AJ

Introduction:

- [1] Judgement was delivered on 27 August 2014 in terms of which the Applicant's application to review and set aside the arbitration award issued by the Second Respondent was dismissed. On 26 February 2015, a Notice of Appeal was

filed in terms of which the Applicant seeks to appeal against the whole of that judgment. An application for condonation was also filed on the same date in respect of the late filing of the leave to appeal. Both applications are opposed.

- [2] In terms of Rule 30 (3) of the Rules of this Court, the application for leave to appeal must be made within 10 days after the date on which the reasons are given, except that the court may, on good cause shown, extend that period.
- [3] Judgment having been delivered on 27 August 2014, the application for leave to appeal ought to have been filed on no later than 8 September 2014. The delay in filing the application is therefore about 172 days, which is excessive in the extreme.
- [4] Prior to dealing with the applications, a few concerns raised by the First Respondent in regard to the manner with which the applications were served needs to be dealt with. The complaint is that having delivered the application for condonation together with the application for leave to appeal on 26 February 2015, these applications were nevertheless not served on it. The First Respondent became aware of these applications in March 2015 when it was so advised by the Judge's Associate, Ms Davies.
- [5] The First Respondent's attorneys of record had formally responded that service of these applications was not received and Ms Davies had then scanned and e-mailed copies to them. Despite the applications not having been properly served on the First Respondent, its attorneys served and filed answering affidavits to the condonation application on 2 June 2015.
- [6] As at 17 July 2015, the Applicant had not properly served the applications on the First Respondent, nor had proof of service in that regard been filed. On 30 July 2015 the Applicant had filed and served his applications for leave to appeal together with an application for condonation for its late filing on the First Respondent and in Court. The second application for condonation is completely different from the first application initially filed on 26 February 2015.

- [7] No attempts have been made by the Applicant to furnish an explanation as to the reasons the initial applications were not properly served on the First Respondent. To the extent that this is the case, and further to the extent that both applications were ultimately properly served on 30 July 2015, this implies that the delay is beyond the 172 days pointed out above.
- [8] It is now trite that whether the applicant has shown good cause involves an exercise of a discretion after a consideration of a variety of factors including the degree of lateness, the explanation therefor, the prospects of success and the importance of the case. The factors to be considered are interrelated and are not individually decisive. However, where there are no prospects of success, there would be no point in granting condonation. A slight delay and a good explanation may nevertheless help to compensate prospects which are not strong, whilst the importance of the issue and strong prospects may compensate for a long delay. The Respondent's interests in finality on the matter is equally important¹.
- [9] It is equally trite that without a reasonable and acceptable explanation for the delay, the prospects of success should be deemed immaterial and without prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused². Ultimately, the interests of justice should be an overall consideration when dealing with applications for condonation³.
- [10] As already indicated, the delay in filing the application for leave to appeal is excessive in the extreme. The Applicant's explanation for the delay was that his previous attorneys of record did not inform him of the date of handing down of the judgment, and it was only when he uplifted the Court's file on his own that he realised that judgment was handed down five months earlier. He had then on his own launched the application for leave to appeal and was advised by Ms Davies that he had not complied with the Rules of this Court in bringing the application. He then sought legal advice in order to comply with

¹*Melane v Santam Insurance Co. Ltd* 1962 (4) SA 531 (A) at 532B-E

² *NUM v Council for Mineral Technology* 1999 3 BLLR 209 (LAC) at p211 paragraph G-H

³ *Brummer v Gorfil Brothers Investments (Pty) Ltd* [2000] (2) SA 837 (CC) at 839 F

the Rules of the Court. He submitted that although the delay was excessive and that he had contributed to it, it was not due to negligence.

- [11] I am in agreement with the First Respondent's contentions that the application for condonation has no merit; that the delay was so excessive that it was inexcusable; that the Applicant had not proffered a reasonable and complete explanation for the delay, and clearly that his prospects of success in the main application are weak.
- [12] The Applicant's explanation for the delay is lacking in detail and not all the facts and circumstances relating to the delay were set out in the application, nor had each period of the delay been accounted for⁴. No explanation as to when attempts were made to establish from the Applicant's previous attorneys whether and when the judgment was handed down. It is not stated when the Applicant had on his own uplifted the file, and when his mandate with his attorneys was terminated. It is also improbable that his attorneys could not have known or informed him of the handing down of the judgment in that as evident from the court's file, those attorneys had always made enquiries through correspondence about when judgment was to be delivered prior to August 2014.
- [13] As also correctly pointed out on behalf of the First Respondent, there is a limit to which a litigant can be absolved from the inaction of his or her own chosen legal representatives, and at most, it would have been expected of the attorneys to have informed him of the judgment as soon as it was delivered, or at most, for the Applicant to have demonstrated what steps he had taken in ensuring that his previous attorneys informed him in time of the judgment.
- [14] On the whole, in the light of the explanation being thin in particularity and substance that explanation amounts to no explanation at all⁵. Other factors important in exercising a discretion are whether the application for condonation was filed without delay as soon as the Applicant became aware of the need to file such an application⁶. In this regard, the Applicant had

⁴ See *NUMSA and another v Hillside Aluminium* [2005] 6 BLLR 601 (LC)

⁵ *Moila v Shai N.O. and Others* (2007) 28 ILJ 1028 (LAC) at para 34

⁶ See *Meintjies v HD Combrinck (Edms) Bpk* 1961 (1) SA 262 (A) at 263 H-264B.

initially filed both applications in February 2015, and he was informed that service was not in compliance with the Rules of this Court. It nevertheless took him until July 2015 to make any attempts at effecting proper service. Even then, his contention that he had to seek legal advice is thin in particularity in that it is not known from whom and when such advice was sought.

[15] In *Molia*⁷, it was further stated that where in an application for condonation, the delay is excessive and no explanation has been given for that delay or an “explanation” has been given but such “explanation” amounts to no explanation at all, it would not be necessary to consider the prospects of success. In his application for condonation, the Applicant merely stated that he had reasonable prospects of success on appeal. No attempt was made to substantiate what those prospects were.

[16] An analysis of the grounds upon which leave to appeal is sought nevertheless also reveals no prospects that the Labour Appeal Court may come to a different conclusion to that arrived at by the court a *quo*. This being the test⁸, the Applicant has not demonstrated that on proper grounds, he has prospects of success on appeal, and that those prospects are not remote, but have a realistic chance of succeeding. There is no sound or rational basis for any conclusion to be made that there are prospects of success on appeal⁹.

[17] The circumstances giving rise to the order were fully canvassed in the judgment and no purpose will be served by repeating the factual background in that regard. The shortcomings of the grounds of appeal are succinctly dealt with in the First Respondent's opposition to the application and can be summarised as follows;

17.1 In contending that the Court erred in certain respects, the applicant's grounds are not only repetitious but also vague and unintelligible.

⁷ *ibid*

⁸ *Minister of Safety and Security and Another v Madyibi* (1034/2004) [2008] ZAECHC 180 (30 October 2008)

⁹ See *S v Smith* 2012 (1) SACR 567 (SCA) at para [7]

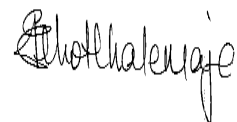
17.2 A number of grounds upon which the review of the award of the Third Respondent were dealt with extensively in the judgment, and in particular, whether there was inconsistent application of the rules and discipline; whether there were rules in place regulating the conduct in question that led to the dismissal; and the issue of the alleged bias on the Commissioner.

17.3 Even more startling is that the Applicant alleges that his contentions regarding unfair discrimination were disregarded by the Court. This issue was nevertheless raised in the context where the dispute and award under review pertained to an alleged unfair dismissal.

[18] In the light of the above, it is concluded that, the delay in filing the application for leave to appeal is excessive in the extreme. The explanation proffered in that regard amounts to no explanation at all. The Applicant's prospects of succeeding on appeal are non-existent. In the light of these factors, the First Respondent is entitled to finality on the matter, and it follows that the interest of justice dictate that the application for condonation in respect of the leave to appeal should not be granted, especially where it is apparent that it is the First Respondent that stands to suffer extreme prejudice if a contrary ruling were to be made. Accordingly, the following order is made;

Order:

- i. The application for condonation for the late filing of an application for leave to appeal is dismissed.
- ii. The application for leave to appeal is dismissed.
- iii. There is no order as to costs.



Tlhotlhalameje, AJ

Acting Judge of the Labour Court of South Africa