



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR1383/12

In the matter between:

WILFORD WANDEKHA MKHANDAWIRE

Applicant

and

AIR TRAFFIC NAVIGATION SERVICES (PTY) LTD

Respondent

In re:

AIR TRAFFIC NAVIGATION SERVICES (PTY) LTD

Applicant

and

**COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION**

First Respondent

NASIMA RAFFEE N.O.

Second Respondent

WILFORD WANDEKHA MKHANDAWIRE

Third Respondent

VIRTUAL HR (PTY) LTD t/a CONTRACT ACCOUNTS

Fourth Respondent

Date: 13 January 2016

Decided in chambers.

JUDGMENT - APPLICATION FOR LEAVE TO APPEAL

TLHOTLHALEMAJE, J

- [1] This application for leave to appeal was launched pursuant to a judgment that was delivered on 16 September 2015. In the judgment, the arbitration award issued under case number GAJB33921-11 by the Commissioner was reviewed, set aside and substituted with a finding that the CCMA had lacked the necessary jurisdiction to determine the dispute referred to it by the Applicant.
- [2] Aligned to the application for leave to appeal is an application to condone its late filing. In terms of Rule 30 of the Rules of this Court, an application for leave to appeal to the Labour Appeal Court must be made and the grounds for appeal furnished within 15 days of the date of the judgment or order against which leave to appeal is sought, except that the court may, on good cause shown, extend that period.
- [3] The above Rule should be read together with clause 15.2 of this Court's Practice Manual which provides that;

“Within 10 days of the filing of the application for leave to appeal, the party seeking leave must file its submissions in terms of Rule 30(3A) and the party opposing the leave must file its submissions five days thereafter. An application for leave to appeal will be decided by the judge in Chambers on the basis of the submissions filed in terms of Rule 30 (3A), unless the judge directs that the application be heard in open court.”

- [4] The notice of application for leave to appeal was filed on 26 October 2015, some 24 days outside of the time frames contemplated in Rule 30 (3) of the Rules of this Court. The legal principles applicable to applications for condonations are well known as set out in *Melane v Santam Insurance Co Ltd*¹ as follows;

“In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor,

¹ 1962 (4) SA 531 (A)

the prospects of success and the importance of the case. Ordinarily these facts are interrelated, they are not individually decisive, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation may help to compensate prospects which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent's interests in finality must not be overlooked."

- [5] In explaining the delay, the applicant averred that on 15 October 2015, he had attended at the Court only to discover that judgment had been handed down on 16 September 2015. He had immediately contacted his erstwhile attorneys of record (Werkmans) and there was no agreement in taking the matter forward. According to the Applicant, his erstwhile attorneys were equally not aware of the judgment as their addresses were never on record in the matter, and that only his postal address was on record.
- [6] The Applicant subsequently sought the assistance of the Wits Law Clinic and the Legal Aid Board to lodge an appeal but was unsuccessful. On 19 October 2015 he had sought the assistance of the *Pro Bono* office and was advised that he could not be assisted as the matter was at the stage of an appeal. The Applicant thereafter met with his new set of attorneys (S Mosomane Attorneys) on 20 October 2015 who then attended to the preparation of the applications for leave to appeal and condonation, which were filed on 26 October 2015. S Mosomane Attorneys subsequently withdrew as the Applicant's attorneys of record on 4 December 2015.
- [7] The Applicant further averred that a delay of twelve days in lodging the application for leave to appeal was not excessive, that he has overwhelming prospects of success in another court coming to a different finding, that the Respondent would not suffer any prejudice if condonation were to be granted, and consequently that he had shown good cause.

- [8] Both applications before the court remain unopposed. A delay of twenty-four days (not twelve as contended by the Applicant) in lodging the application for leave to appeal is not excessive in the extreme. In regards to the reasons proffered for the delay however, it is found that it is implausible that the Applicant or his erstwhile attorneys of record could not have known of the date that the judgment was to be delivered. A notification in this regard was sent to the representatives of the parties and to the Applicant by e-mail on 15 September 2015, and it is not correct as alleged by the Applicant that the Court did not have his erstwhile attorneys' details on record.
- [9] Notwithstanding the implausible and unacceptable nature of the explanation proffered, a further consideration is whether the Applicant has prospects of success with his application for leave to appeal. This requires a consideration of the grounds upon which leave to appeal is sought. In this regard, the Applicant submitted that;
- a) the Court erred in finding that he was not an Employee of the Respondent. He had averred that there was overwhelming evidence to this effect;
 - b) the Court erred in finding that he had not submitted proof of his qualifications in order for them to be verified;
 - c) that the Court erred by not considering that the Respondent had failed to deal with allegations raised by the him in his answering affidavit in the review application;
 - d) the Court erred in finding that the Commissioner had committed a reviewable irregularity;
 - e) the Court erred in substituting the finding of the Commissioner instead of referring the matter back to the CCMA for a hearing *de novo*.
- [10] Having had regard to the facts of this case and the legal principles applicable to the nature of the Applicant's employment as dealt with at length in the judgment, and further having had regard to the grounds relied upon in seeking leave to appeal and submissions made in that regard, I am not persuaded,

having reflected on my judgment, that the Applicant has reasonable prospects of success with his appeal.

[11] It is trite that the test applicable in applications for leave to appeal is whether there are reasonable prospects that another court may come to a different finding as reached by the court *a quo*. In this case, the award was reviewed and set aside in circumstances where it was found that there was no legal basis for a finding made by the Commissioner that the Applicant was an employee. It therefore followed that where there was no employment relationship, there would have been no basis for a finding to be made that there was a procedurally and substantively unfair dismissal. These issues were succinctly dealt with in the judgment and no purpose would be served in repeating them herein.

[12] In conclusion, it is accepted that the delay in lodging the application for leave to appeal is not excessive. The explanation proffered for the delay is however less than satisfactory. Crucially though, there are no reasonable prospects that based on the grounds relied upon in seeking leave to appeal, another court would come to a different finding to that arrived at in my judgment. In the light of these factors, it is not necessary to deal with other considerations pertinent to applications for condonations, and accordingly, the following order is made;

Order:

- i. The application for condonation for the late filing of the application for leave to appeal is dismissed.
- ii. The application for leave to appeal is dismissed.



Tlhotlhalenajie, J

Judge of the Labour Court of South Africa

LABOUR COURT