



Not reportable

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: J 2988/14

In the matter between:

AAIM INVESTMENTS (PTY) LTD T/A

PONGOLA HOSPITAL

DR M PRAMCHAND

and

SOLIDARITY obo STEENKAMP & 3 OTHERS

FIRST APPLICANT

SECOND APPLICANT

RESPONDENT

RULING: APPLICATION FOR LEAVE TO APPEAL

VAN NIEKERK J

- [1] The applicants seek leave to appeal against the whole of the judgment delivered by this court on 11 November 2015, when the court refused to condone the late filing of an application to rescind an order granted in terms of s 158 (1) (c), in terms of which certain settlement agreements were made an order of this court..
- [2] To the extent that the applicants submit that the “Rules of Court” provide for a hearing of the present application in open court, that submission ignores the long-standing practice in this Court, as reflected by the terms of the Practice Manual, that applications for leave to appeal are ordinarily decided in Chambers. (See paragraph 15 of the Practice Manual). This matter is not of such an exceptional nature so as to warrant it being argued other than in terms of the submissions filed.
- [3] The test to be applied in an application such as the present is not, as the applicants submit, whether another court hearing the same matter might come to a different conclusion. The test to be applied is that referred to in s 17 of the Superior Courts Act, 10 of 2013. Section 17(1) provides:
- Leave to appeal may only be given where the judge or judges concerned are of the opinion that –
- (a) (i) the appeal would have a reasonable prospect of success; or
 - (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;
 - (b) the decision sought on appeal does not fall within the ambit of section 16 (2) (a); and
 - (c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.
- [4] The traditional formulation of the test that is applicable in an application such as the present requires the court to determine whether there is a reasonable

prospect that another court may come to a different conclusion to that reached in the judgment that is sought to be taken on appeal. The use of the word “would” in s17 (1) (a) (i) is indicative of a raising of the threshold since previously, all that was required for the applicant to demonstrate was that there was a reasonable prospect that another court might come to a different conclusion (see *Daantjie Community and others v Crocodile Valley Citrus Company (Pty) Ltd and another* (75/2008) [2015] ZALCC 7 (28 July 2015). Further, this is not a test to be applied lightly – the Labour Appeal Court has recently had occasion to observe that this court ought to be cautious when leave to appeal is granted, as should the Labour Appeal Court when petitions are granted. The statutory imperative of the expeditious resolution of labour disputes necessarily requires that appeals be limited to those matters in which there is a reasonable prospect that the factual matrix could receive a different treatment or where there is some legitimate dispute on the law (See the judgment by Davis JA in *Martin & East (Pty) Ltd v NUM* (2014) 35 ILJ 2399 (LAC), and also *Kruger v S* 2014 (1) SACR 369 (SCA) and the ruling by Steenkamp J in *Oasys Innovations (Pty) Ltd v Henning & another* (C 536/15, 6 November 2015).

- [5] The first ground of appeal is that the court erred in dismissing the application to condone the late filing of the application to rescind the orders in terms of S 158 (1) (c) granted by default because the court ignored the service by email that had been effected by the applicants within the prescribed time period and that the court erred in rejecting the submission that the applicants had a bona fide defence to the respondent's claim. The fact that the application was sent by email to the respondents on 14 July 2015 is not service in terms of the Rules, but the relevant issue in this regard is not the mode of service in itself but the respondents' failure to explain why service and filing was effected only on 28 August 2015. This delay remains unexplained, other than to say that on 28 August 2015, it was considered prudent 'to also again file a copy of the rescission application personally on the Respondent's representatives'. It warrants repetition that the application was not filed 'on or around 14 July 2015' – the registrar's date stamp bears the date of 28 August 2015. It also bears

mentioning that the applicants' current attorneys are the third set to be instructed in this litigation. In circumstances where the basis of the rescission application was primarily the failure by the applicants' first set of attorneys to oppose the s 158(1) (c) application as they were ostensibly instructed to do, one might have expected the applicants to exercise a degree of diligence in respect of the handling of the application to rescind.

- [6] Turning next to the applicants' submissions regarding the court's finding that they had failed to establish prospects of success in the main application on account of their failure to articulate any *prima facie* defence to the s 158(1) (c) proceedings, the applicants make much of misrepresentations that were supposedly made by the individual respondents in respect of the settlement agreements it now contends are null and void. A cursory reference to the founding affidavit reveals no more than a bald allegation that the respondents misrepresented the number of unpaid leave days due to them which in turn led to an incorrect calculation of monies due. No further detail is provided in relation, for example, to the number of leave days that the applicants contained was actually due to the respondents or the basis on which any incorrect calculation was made, nor is any indication given as to the differential between the figures agreed by way of the settlement and those which the applicants now contend is owing. A further leg of the applicants' defence appears to be the discovery that medical supplies and other consumables were later found to be unaccounted for. However, the basis on which the applicants contend that the respondents are liable for that loss is simply not explained but for a vague allegation to the effect that Theron, one of the individual respondents, had been implicated in an incident involving a missing generator. Again, this averment does not extend beyond the level of bald allegation. In any event, this is not a basis on which to withhold payment to any or all of the individual respondents— should the applicants contend that the respondents are responsible for any losses it suffered, they are fully entitled to institute proceedings to recover that loss. To withhold what amounts to no more than statutory payments due on termination of employment (as contemplated by

the terms of the settlement agreement) amounts to an unlawful deduction for the purposes of s 34 of the BCEA.

[7] I am not persuaded that another court would come to a different conclusion.

I make the following order:

1. The application for leave to appeal is dismissed.

ANDRE VAN NIEKERK
JUDGE OF THE LABOUR COURT
Chambers
26 February 2016