



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR 555/14

In the matter between

NUM OBO M. MAGULA

Applicant

and

**COMMISSION FOR CONCILIATION
MEDIATION AND ARBITRATION**

First Respondent

COMMISSIONER MONDE BOYCE

Second Respondent

HARMONY GOLD MINING COMPANY LTD

Third Respondent

Decided: In chambers

Delivered: 31 August 2017

JUDGMENT: APPLICATION FOR LEAVE TO APPEAL

DEALE, AJ:

- [1] This is an application by the Applicant (the Union) on behalf of M Magula (Magula) for leave to appeal to the Labour Appeal Court (LAC) against my judgment and order handed down on 13 July 2017.
- [2] The Third Respondent ("**Harmony**") has opposed the application and filed written submissions.

- [3] In terms of Clause 15.2 of the Practice Manual of the Labour Court an application for leave to appeal will be decided by a 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. It is in the interest of justice that this application be disposed of without delay. Therefore, it would not be necessary for it to be heard in open Court.
- [4] For convenience, I will consider each of Magula's reasons read with Harmony's submissions in summary format before making conclusions on each.

Preliminary point in terms of Rule 11 to dismiss the review

- [5] Magula submits that Harmony was incorrect to raise this preliminary point in its heads of argument. It should instead have done so in terms of a substantive Rule 11 application. This would have enabled Magula to respond by way of affidavit in the usual manner.
- [6] Harmony submits that the Court did not raise the point *meru moto* – Harmony did so in its heads of argument. The sole issue in Harmony's Rule 11 Application was Magula's unexplained and unreasonable delay.
- [7] It is evident from the pleadings and heads of argument before the Court that Magula would certainly not have been "taken by surprise" and thus been prejudiced by Harmony's preliminary point to dismiss the review for unreasonable delay.
- [8] The timelines and contents of the submissions in the papers suggest otherwise. The review hearing was on 13 July 2017. Harmony had filed its answering affidavit nearly 4 weeks earlier on 15 June 2017. It had also filed its heads of argument about 2 weeks earlier. Both these documents raised the point of unreasonable delay and were served on Magula's legal representatives. There is no doubt that Magula would thus have been aware of the point long before the hearing on 13 July 2017.

- [9] The timelines also show that there was more than enough time for Magula to have dealt with the point before the hearing of the review. He could have done so in a replying affidavit and again in heads of argument. His legal counsel could also have done so at the hearing of the review. However, he failed to use any of these readily available opportunities – with no explanation.
- [10] I conclude that there is no merit in Magula's request for leave to appeal on the ground that the Court raised the point *meru motu* and that it was wrong to deal with Harmony's Rule 11 application to dismiss the review application for unreasonable delay. Preliminary point to archive review application
- [10] Magula submits that the Court should have archived the review application and that it went too far by *meru moto* dismissing the review for unreasonable delay.
- [11] Magula had not raised this issue until this application for leave to appeal. There were plenty of opportunities for him to have raised the point at this stage. In any event, even if he had raised the point earlier, it is highly unlikely that the Court would have accepted it as the basis to dismiss the review application. It will be evident from this judgment that there were more than enough reasons for the Court to entertain the Rule 11 application and to dismiss the review.
- [12] In addition, and as Harmony has properly indicated in its papers, Magula would have needed to show good cause in an application why the matter should not have been archived. This in turn would have required him to provide a reasonable explanation for the delay in doing so.
- [13] Magula gave no plausible reason for the delay in prosecuting the review application. It is therefore improbable that he would have been able to do so in an application to archive the review.
- [14] I conclude that there is no merit in Magula's submissions on this point.

No hearing on the merits of the review

- [15] Magula submits that the Court was wrong to dismiss the review without hearing the merits of the application.
- [16] Despite the imperfections in the record and Magula's failure to perform the preparatory tasks required of a *dominus litus* party, both parties were present and represented by lawyers at the hearing on 13 July. Mr Olivier, for Harmony indicated he was ready and able to proceed with the hearing on the merits of the review.
- [17] The Court was prepared to proceed with the hearing of the review on the merits to dispose of the matter after many years of protracted delays. The Court invited Magula's representative to proceed and to present Magula's submissions on the merits. It went further to warn the representative that the Court would consider dismissing the review for unreasonable delay if Magula chose not to proceed.
- [18] The Court stood the matter down for a short while to enable Magula's legal counsel to take instructions from his instructing attorney. The latter was regrettably not in attendance at court to hear the proceedings and to give instructions.
- [19] When the court reconvened, Magula's counsel indicated that his instructions were not to proceed with the hearing.
- [20] I conclude that Magula had a fair opportunity to present his case on the merits of the review, but he failed to do so for no good reason. There is therefore no merit in this point as a reason to grant leave to appeal.

The test applicable in applications for leave to appeal.

- [21] It is trite that there exists no automatic right for leave to appeal in our law. An applicant must satisfy this Court that another the Labour Appeal Court could come to a different conclusion than that of this Court. In the matter of *Smith v S*¹ the Supreme Court of Appeal held as follows:

¹ [(475/10) [2011] ZASCA 15 (15 March 2011) at para 7

“What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal”.

[22] In *Dince and others v Department of Education North West Province and others*² the court stated that the test is whether another court, acting reasonably, might come to a different conclusion having regard to the facts and law.

[23] In *Seatlholo and Others v Chemical Energy Paper Printing Wood and Allied Workers Union and Others*³ this Court confirmed the fact that the test applicable in applications for leave to appeal is more stringent and held as follows:

“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. As the respondents observe, the use of the word “would” in s17(1)(a)(i) are 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”

[24] I have dealt with Magula’s submissions in support of his application for leave to appeal. I am not persuaded that they are enough to grant the Magula a

² [2010] 6 BLLR 631 (LC) at para 3

³ (2016) 37 ILJ 1485 (LC) at para 3

passage to the LAC. I am furthermore not satisfied that his submissions have an impact on his prospects of success on appeal.

[25] After fully considering the contents of the arbitration award and Harmony's submissions, I conclude that there are no reasonable prospects of success in Magula's application for review. This, in addition to Magula's failure to provide a plausible explanation for the delay in prosecuting the review, is a further and compelling reason to decline this application for leave to appeal.

[26] Magula's case must therefore fail and scarce resources should not be wasted on matters which are destined to fail. On this point I am guided by the authority in Toyota SA where the Constitutional Court (per Nkabinde J) had this to say in respect of speedy resolution to labour disputes:

"Time periods in the context of labour disputes are generally essential to bring about timely resolution of the disputes. The dispute resolution dispensation of the old Labour Relations Act⁴ was uncertain, costly, inefficient and ineffective. The new Labour Relations Act⁵ (LRA) introduced a new approach to the adjudication of labour disputes. This alternative process was intended to bring about the expeditious resolution of labour disputes which, by their nature, require speedy resolution. Any delay in the resolution of labour disputes undermines the primary object of the LRA. It is detrimental not only to the workers who may be without a source of income pending the resolution of the dispute but, ultimately, also to an employer who may have to reinstate workers after many years".

[27] This Court cannot lose sight of this purpose. I do not believe that the LAC, presented with the same facts, would arrive at a different conclusion.

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

Order

1. The application for leave to appeal is dismissed;
2. There is no order as to costs.

⁴ Act 28 of 1956.

⁵ Act 66 of 1995.

PE Deale

Acting Judge of the Labour Court of South Africa

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