



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR1020/15

In the matter between:

NEHAWU OBO ISAAC NDINANNYI NETSHIVUNGULULU

Applicant

and

**GENERAL PUBLIC SERVICE SECTORAL BARGAINING
COUNCIL**

First Respondent

RALEFATANE MJ N.O

Second Respondent

STATISTICS SOUTH AFRICA

Third Respondent

Decided: In Chambers

Delivered: 10 October 2017

JUDGMENT: LEAVE TO APPEAL

SCHENSEMA, AJ

Introduction

- [1] This is an application for leave to appeal against the judgment of this Court made on 26 August 2016, in terms of which the applicant's review application was dismissed with costs.
- [2] Accompanying the application for leave to appeal is an application for condonation for its late filing. In terms of Rule 30 (2) of the Rules of this Court, if leave to appeal has not been made at the time of judgment or order, an application for leave 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. The application for leave to appeal in this case was filed on 25 April 2017.

Condonation application

- [3] The principles applicable to applications for condonation are well established¹. Thus whether the applicant has shown good cause involves a consideration of a variety of factors including the degree of lateness, the explanation therefore, the prospects of success and the importance of the case. These factors are interrelated and are not on their own individually decisive. However, where there are no prospects of success, there would be no point in granting condonation. Furthermore, 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. Ultimately, the interests of justice would determine whether the application for condonation should be granted².
- [4] In explaining the delay, the applicant in his founding affidavit averred that he only became aware of the judgment when he received the bill of costs from the third respondent's attorneys of record on 14 March 2017. The applicant has further averred that the reason why he could not receive any communication from the Court is that he had been placed on suspension in

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

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

September 2016 and his laptop and cell phone had been confiscated as a result thereof. The applicant had no access to email or fax and was therefore not able to receive any correspondence from the Court.

- [5] The applicant has further averred that due to the fact that his shop steward had tried on several occasions to communicate with the legal department of NEHAWU that further delays were caused. The applicant is of the view that his application for leave to appeal was due to be delivered on or before 30 April 2017 and his application for leave to appeal was therefore only 18 days late.
- [6] On considering the applicant's condonation application, I noted that there was no proof attached to the applicant's application, that the application had been served on the third respondent. I therefore requested that Ms Maluleke (the Judge's Secretary) make contact with the third respondent's attorneys of record to ascertain whether they had in fact received the applicant's condonation application. I was advised by Ms Maluleke that the application had not been received by the third respondent's attorneys and that the third respondent would be filing its answering affidavit. The answering affidavit was filed at Court on 13 September 2017.
- [7] In opposition to the applicant's condonation application it has been averred that the application for leave to appeal ought to have been delivered on 16 September 2016 which is 15 court days after the judgment was delivered³. The application for leave was only delivered on 25 April 2017 and was therefore approximately 151 days late. The third respondent further avers that as *dominus litis* in the review application, the applicant ought to have actively pursued his claim and would have expected the applicant to have followed up regularly with the Court as to the outcome of his matter.
- [8] It is trite that an applicant for condonation, is required to furnish a reasonable and acceptable explanation for the delay and that an applicant seeking condonation for the non-compliance with the set time frames must give a complete account for each period of delay.⁴

³ See Rule 30(2) of the Labour Court Rules.

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

- [9] In this case, it is my view that the applicant's explanation is lacking in detail and does not give a complete account of what caused the delay from 14 March 2017 to 25 April 2017. Furthermore the applicant's explanation that as a result of his suspension he was not able to receive any communication from the Court is also not reasonable. Even if I were to accept this explanation, the applicant does not explain the delay between 14 March to 25 April 2017.
- [10] Other than the applicant's failure to proffer a reasonable and/or acceptable explanation for the delay, the issue is whether he has prospects of success in respect of his application for leave to appeal. It is trite that even if the delay is not excessive no purpose would be served in granting condonation where the applicant's prospects of success are minimal.

Leave to appeal application

- [11] In considering the applicant's prospects of success, I have had regard to the grounds upon which leave to appeal is sought, which grounds I do not intend to deal with separately.
- [12] In considering whether to grant or refuse leave to appeal, I apply the well-known test of leave to appeal which is; whether there is a reasonable prospect that another Court may come to a different conclusion to that reached by this Court.⁵ The assessment whether another Court may come to a different conclusion has to be done with reference to whether the applicant has made out a case that there are prospects of succeeding on appeal. The other consideration has to do with whether the matter is of substantial importance to the parties.
- [13] As set out in my judgment, the applicant was required to reconstruct the record, which the applicant despite the correspondence received from the third respondent's attorneys of record at the time, refused to do. The applicant's entire basis of his review is reliant upon the evidence that was submitted during the arbitration proceedings and accordingly by the very nature of the applicant's review application, it was essential that the applicant provide the

⁵ See *Westing House Break and Equipment (Pty)Ltd v Bilger Engineering (Pty) Ltd* 1986 (2) SA 555 (A) where the Court reiterated the general principle that in order for an applicant for leave to appeal to succeed, the applicant must demonstrate that it has a reasonable prospect of success on appeal.

documentary record of the proceedings he wished to review. The applicant further failed to provide any explanation as to why he did not deem it necessary to reconstruct the record.

[14] In light of the above, and further having considered all material pertinent to the application before the Court, it is concluded that the applicant has not proffered a reasonable and acceptable explanation for the delay. Having considered the grounds upon which he seeks leave to appeal, I am not persuaded that there are reasonable prospects of success in the appeal.

[15] I therefore make the following order:

Order

1. The late filing of the application for leave to appeal is not condoned.
2. The application for leave to appeal is also dismissed.
3. The applicant is ordered to pay the third respondent's costs.

Hedda Schensema

Acting Judge of the Labour Court