



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR 1632 / 14

In the matter between:

NEHAWU obo DLAMINI AND 5 OTHERS

Applicant

and

COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION

First Respondent

MASOTE, B T N.O. (AS ARBITRATOR)

Second Respondent

THE SOUTH AFRICAN SOCIAL SECURITY

AGENCY (SASSA)

Third Respondent

Heard: Considered in Chambers

Delivered: 28 November 2017

**Summary: Application for leave to appeal – application for leave to appeal
brought out of time – non-compliance with Practice Manual – no proper case
for condonation made out – application dismissed with costs**

Application for leave to appeal – no proper case for leave to appeal made out – application dismissed with costs

JUDGMENT

SNYMAN, AJ

Introduction

- [1] The current applicant for leave to appeal was also the applicant in a review application brought in this Court, seeking to review and set aside an arbitration award made by the second respondent in his capacity as an arbitrator of the Commission for Conciliation, Mediation and Arbitration (the first respondent).
- [2] The review application was argued before me on 16 May 2017, and in an *ex tempore* judgment handed down the same day, I dismissed the applicant's review application with costs. The applicant has subsequently attended to transcribe the *ex tempore* judgment, and once it came to hand, filed an application for leave to appeal on 24 August 2017.
- [3] Considering that I gave judgment on 16 May 2017, this application for leave to appeal is out of time. The applicant however did apply for condonation.
- [4] Clause 15 of the Practice Manual applies to applications for leave to appeal. In particular, clause 15.2 provides:
- '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. ...'
- [5] Further, written notice by my associate was given on 29 August 2017 to the applicant, drawing the applicant's attention to clause 15 of the Practice Manual and calling on the applicant to file written submissions. These written submissions were only filed on 23 November 2017.
- [6] Finally, and in terms of clause 15.2 of the Practice Manual, it is provided that an application for leave to appeal will be determined by a Judge in chambers,

unless the Judge directs otherwise. I see no reason why the application for leave to appeal needs to be dealt with in open Court, and I shall therefore determine the applicant's leave to appeal application in chambers.

Late application for leave to appeal and failure to comply with the Practice Manual

- [7] In terms of Rule 30(2) of the Labour Court Rules, an application for leave to appeal must be made and the grounds for appeal furnished, within 15 (fifteen) days of the date of the judgment or order in respect of which leave to appeal is sought. The Court however can condone the late filing of such application for leave to appeal on good cause shown.
- [8] In this instance, and as said above, judgment was given on 16 May 2017. The prescribed time period applies as from that date.¹ That means that any application for leave to appeal had to be brought on or before 6 June 2017. The application for leave to appeal was only filed on 24 August 2017, and is thus in excess of two and a half months' late. This is a substantial delay which required a very good explanation when the applicant sought condonation.² In *MCC Contractors (Pty) Ltd v Johnston NO and Others*³ the Court held:

‘... The Rules of the Labour Court (and those of the High Court) provide for time periods within which an application for leave to appeal must be brought. There are important policy considerations for requiring a party to file an application for leave to appeal within a certain time period. Where a party does not observe the rules, such a party must apply for condonation and it is for the applicant to satisfy the court that there is sufficient cause to excuse him or her from not complying with the rules.

.... In the context of labour litigation, there is however a further important consideration that should be taken into account which is that labour disputes should be resolved speedily. Any delay in bringing the application for leave to appeal should therefore be properly explained.’

¹ See *SA Police Service v Safety & Security Sectoral Bargaining Council and Others* (2015) 36 ILJ 3143 (LC) at para 7; *Food & Allied Workers Union v Foodtown Incorporated (Pty) Ltd* (2000) 21 ILJ 1782 (LC) at para 4.

² Compare *Msunduzi Municipality v Hoskins* (2017) 38 ILJ 582 (LAC) at paras 3 and 5.

³ (2012) 33 ILJ 2096 (LC) at paras 4 – 5.

[9] The explanation provided by the applicant for this substantial delay is poor, to say the least. The duty is on the applicant to ensure that an *ex tempore* judgment is immediately and timeously transcribed. There is no explanation of any kind as to what the applicants did from 16 May 2017, when the *ex tempore* judgment was handed down, and 17 July 2017, when it was finally signed by me. This period is accordingly in essence entirely unexplained.

[10] It would seem that only after the applicant received the transcribed *ex tempore* judgment, it sought assistance from counsel to settle an application for leave to appeal. This is in itself a dereliction of duty, and cannot serve as an acceptable explanation. In *SA Police Service v Safety and Security Sectoral Bargaining Council and Others*⁴ this Court warned:

‘... It is thus important that parties in the case where an *ex tempore* judgment is given, pay proper attention in court to what the judge is saying and the reasons being provided for the judgment, as the application for leave to appeal must still be filed within 15 days if any party wants to challenge the judgment. If an applicant for leave to appeal, despite paying proper attention, then realises when the written judgment later comes to hand that it omitted grounds on which it would seek leave to appeal, such applicant is free to supplement the application for leave to appeal ...’

[11] Then, and accepting the signed transcribed judgment came to hand on 18 July 2017, as contended by the applicant, there is no explanation as to why it then took, with the application already being late, until 24 August 2017 to file it. The applicant needed to explain what it actually did in this regard in that period in preparing and then filing the application for leave to appeal, in proper detail. To simply explain this entire period in an already late application as ‘obtaining advices from counsel’ and then needing to postpone one meeting with counsel because of illness to a time suitable to ‘all parties’, is completely unacceptable, and no explanation at all.

[12] In the end, virtually the entire period of delay in this matter is unexplained. That should be the end of the application for leave to appeal, and the associated condonation application, with prospects of success becoming an

⁴ (2015) 36 ILJ 3143 (LC) at para 8.

irrelevant consideration. It is trite that an unexplained delay renders prospects of success to be an irrelevant consideration.⁵ It is clear to me that the approach of the applicant was simply that condonation was there for the mere asking. This is, of course, wrong. In *Seatlolo and others v Entertainment Logistics Service (a division of Gallo Africa Ltd)*⁶ the Court held:

‘It is trite law that condonation should only be granted where the legal requirements have been met and is not a default option. It remains an indulgence granted by a court exercising its discretion whilst being cognizant of the criticism emanating from the Constitutional Court and the SCA and bearing in mind the primary objective of the expeditious resolution of disputes articulated in the Act.’

- [13] The situation is compounded by the applicant's further failure to comply with the Practice Manual, in that the applicant filed its written submissions in support of the application for leave to appeal (due by 7 September 2017), only on 23 November 2017, again more than two and a half months' late. The applicant is obliged to comply with the provisions of the Practice Manual, which is not just some or other guideline which parties can adhere to at their leisure. As said in *National Education Health and Allied Workers Union on behalf of Leduka v National Research Foundation*⁷:

‘The Practice Manual is binding on litigating parties and must be complied with. It is not just a guideline, but an actual prescript. ...’

- [14] In *Ralo v Transnet Port Terminals and Others*⁸ the Court similarly held as follows:

⁵ See *Mziya v Putco Ltd* (1999) 3 BLLR 103 (LAC) at para 9; *Moila v Shai NO and Others* (2007) 28 ILJ 1028 (LAC) at para 34; *Universal Product Network (Pty) Ltd v Mabaso and Others* (2006) 27 ILJ 991 (LAC) at para 20; *Colett v Commission for Conciliation, Mediation and Arbitration and Others* (2014) 35 ILJ 1948 (LAC) at para 38; *Mgobhozi v Naidoo NO and Others* (2006) 27 ILJ 786 (LAC) at para 34

⁶ (2011) 32 ILJ 2206 (LC) at para 27. See also *3G Mobile (Pty) Limited v Raphela NO and Others* [2014] JOL 32479 (LC) at para 33.

⁷ (2017) 38 ILJ 430 (LC) at para 13. See also *Tadyn Trading CC t/a Tadyn Consulting Services v Steiner and Others* (2014) 35 ILJ 1672 (LC) at para 11; *Butana v SA Local Government Bargaining Council and Others* [2016] JOL 36088 (LC) at paras 8-9; *Edcon (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others: In re Thulare and Others v Edcon (Pty) Ltd* (2016) 37 ILJ 434 (LC) at para 24; *3G Mobile (Pty) Ltd v Raphela NO and Others* [2014] JOL 32479 (LC) at para 36.

⁸ (2015) 36 ILJ 2653 (LC) at para 9.

'The Practice Manual contains a series of directives, which the Judge President is entitled to issue. In essence, the manual sets out what is expected of practitioners so as to meet the imperatives of respect for the court as an institution, and the expeditious resolution of labour disputes (see clause 1.3). While the manual acknowledges the need for flexibility in its application (see clause 1.2), its provisions are not cast in the form of a guideline, to be adhered to or ignored by parties at their convenience.'

- [15] Therefore, in the case of a failure to comply with the Practice Manual, a litigating party is similarly obliged to show good cause as to why the Court should nonetheless still entertain the matter, which must also be done by way of a proper condonation application.⁹ In *Samuels v Old Mutual Bank*¹⁰ the Court specifically dealt with instances of non compliance with the Practice Manual, and said:

'In essence, an application for the retrieval of a file from the archives is a form of an application for condonation for failure to comply with the court rules, time frames and directives. Showing good cause demands that the application be bona fide; that the applicant provide a reasonable explanation which covers the entire period of the default; and show that he/she has reasonable prospects of success in the main application, and lastly, that it is in the interest of justice to grant the order. It has to be noted that it is not a requirement that the applicant must deal fully with the merits of the dispute to establish reasonable prospects of success. It is sufficient to set out facts which, if established, would result in his/her success. In the end, the decision to grant or refuse condonation is a discretion to be exercised by the court hearing the application which must be judiciously exercised.'

- [16] The applicant's delay in filing written submissions is substantial, once again. The applicant needed to apply for condonation and show good cause as to why it did not comply with the clear provisions of the Practice Manual. The applicant has not done so at all. This means that there exists no explanation as to why it has taken the applicant close on three months to file written submission that ought to have been filed in 10 days. This complete lack of

⁹ See *MJRM Transport Services CC v Commission for Conciliation, Mediation and Arbitration and Others* (2017) 38 ILJ 414 (LC) at paras 12 – 14; *SA Municipal Workers Union on behalf of Mlalandle v SA Local Government Bargaining Council and Others* (2017) 38 ILJ 477 (LC) at paras 5 – 6.

¹⁰ (2017) 38 ILJ 1790 (LAC) at para 17.

explanation should attract the same consequences I have already discussed above.

- [17] The applicant's application for leave to appeal thus falls to be dismissed on the above grounds alone, irrespective of any consideration of prospects of success. However for the sake of being complete, I will nonetheless consider the merits of the application for leave to appeal, on the basis of the grounds advanced by the applicant in the application for leave to appeal, and the belated written submissions.

Leave to appeal

- [18] In deciding whether to grant leave to appeal to the Labour Appeal Court, the Labour Court must determine whether there is a reasonable prospect that another Court would come to a different conclusion to that of the Court *a quo*, or in other words the appeal would have a reasonable prospect of success.¹¹ As said in *South African Clothing and Textile Workers Union and Others v Stephead Military Headwear CC*¹²:

'It is trite that for an application for leave to appeal to be successful, it is required of the party seeking such leave to demonstrate that there are reasonable prospects that another court, in this instance, the Labour Appeal Court, would come to a different conclusion to that reached in the judgment that is sought to be taken on appeal. ...'

- [19] In *Seathlolo and Others v Chemical Energy Paper Printing Wood and Allied Workers Union and Others*¹³ the Court also considered the above test for leave to appeal and added:

'... 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

¹¹ See Section 17(1)(a) of the Superior Courts Act 10 of 2013; *Molefe v MMARAWU and Others* [2017] ZALCJHB 337 (13 September 2017); *Mbawuli v Commission for Conciliation, Mediation and Arbitration and Others* [2017] ZALCJHB 275 (1 August 2017); *Glencore Operations South Africa (Pty) Ltd v NUM obo Maripane and Others* [2017] ZALCJHB 147 (11 May 2017).

¹² [2017] JOL 37932B (LC) at para 7.

¹³ (2016) 37 ILJ 1485 (LC) at para 3.

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 ...'

[20] And in *Member of the Executive Council for Health, Eastern Cape v Mkhitha and Another*¹⁴ the Court described 'reasonable prospects of success' as follows:

'Once again it is necessary to say that leave to appeal, especially to this Court, must not be granted unless there truly is a reasonable prospect of success. Section 17(1)(a) of the Superior Courts Act 10 of 2013 makes it clear that leave to appeal may only be given where the judge concerned is of the opinion that the appeal *would* have a reasonable prospect of success; or there is some other compelling reason why it should be heard.

An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. A mere possibility of success, an arguable case or one that is not hopeless, is not enough. There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal.'

[21] The grounds of appeal set out in the application for leave to appeal are general in nature. For example, it is said that I erred by not finding that the arbitrator committed an error or that the outcome was unreasonable. No proper basis is provided for this contention. The same difficulty applies to a contention that I failed to appreciate that the applicants were not prejudiced. Without the necessary specificity, no proper determination can be made as to whether there in fact exists a realistic chance of success on appeal. No case for leave to appeal is accordingly made out where it comes to these general grounds permeating the application for leave to appeal.

[22] The applicant persists with the contention that a breach of a disciplinary code is the same as unfair conduct. As I have dealt with in detail in my judgment, a breach of the code does not automatically equate to unfairness. More is

¹⁴ [2016] JOL 36940 (SCA) at paras 16 – 17. Also compare *Smith v S* [2011] JOL 26908 (SCA) at para 7; *Greenwood v S* [2015] JOL 33082 (SCA) at para 4; *Kruger v S* [2014] JOL 31809 (SCA) at para 2.

required. The applicant has advanced no argument that could serve to convince me that it would have a reasonable prospect of success on appeal in this respect. I find it unlikely that another Court could come to a different conclusion where it comes to this principle.

[23] As to all the other issues raised in the application for leave to appeal, the applicant simply repeats the same argument presented to me when the matter was originally argued. The fact that the applicant clearly thinks I am wrong, does not mean that there is a prospect of success on appeal. I have properly dealt with all of these issues in my original judgment. With nothing new being said about this, I remain unconvinced that the applicant has a prospect of success on appeal, and that there exists any reasonable prospect that another Court could come to a different conclusion.

[24] All said, the applicant has simply made out no proper case for leave to appeal, and considering that this matter dates back to 2014, the following *dictum* from the judgment in *Martin & East (Pty) Ltd v National Union of Mineworkers and Others*¹⁵ is apposite:

‘... I indicated that the events in this case took place in 2010. The Labour Relations Act was designed to ensure an expeditious resolution of industrial disputes. This means that courts, particularly courts in the position of the court a quo, need to be cautious when leave to appeal is granted.’

[25] I thus conclude that the applicant, overall, has shown no reasonable prospect that another Court could come to a different conclusion, has no realistic prospects of success on appeal, and accordingly the leave to appeal application must fail.

[26] As to costs, it is my view that the applicant’s application for leave to appeal always had little prospect of success. The applicant has now failed twice to upset what was clearly a case without merit. I intend to follow the same approach I have adopted in my original judgment, and make a costs award against the applicant.

Order

¹⁵ (2014) 35 ILJ 2399 (LAC) at 2405J-2406A

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

1. The applicant's application for leave to appeal is dismissed with costs.

S Snyman

Acting Judge of the Labour Court

Appearances:

For the Applicant: Mdhluli Pearce and Mdzikwa Inc Attorneys

For the Third Respondent: Renqe Kunene Inc Attorneys