

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: J 1569/18

In the matter between:

GEORGE MCDONALD

Applicant

and

TRSS 24 HOUR REACTION (PTY) LTD

First Respondent

MATHEW MCDONALD

Second Respondent

Decided: In Chambers

Delivered: 22 February 2018

JUDGMENT-APPLICATION FOR LEAVE TO APPEAL

PRINSLOO, J.

Introduction

[1] On 10 April 2018, the Applicant, as an intervening party, filed an application seeking *inter alia*, that he be granted leave to join the proceedings under case

numbers J 1569/17 and J 305/18 as a party. The Respondents were afforded 10 days from date of service of the application to file an answering affidavit.

- [2] The opposing affidavit had to be filed by 24 April 2018. The First Respondent (the Respondent) notified the Applicant on 26 April 2018 of its intention to oppose the application and on 4 May 2018 the Respondent filed an opposing affidavit. The opposing papers were filed outside the 10-day period and are six Court days late.
- [3] On 9 May 2018, the Applicant filed a replying affidavit and in the said affidavit issue was taken with the fact that the opposing affidavit was filed out of time and it was stated that the Applicant 'accordingly refuses to accept the First Respondent's answering affidavit.'
- [4] On 24 May 2018, the Applicant filed an application in terms of the provisions of Rule 11 of the Labour Court Rules, seeking an order that the Respondent's opposing affidavit be set aside and / or strike out the answering affidavit in terms of clause 11.4.2 of the Practice Manual for the Labour Court¹.
- [5] The Applicant's case was that clause 11.4.2 of the Practice Manual provides that where an opposing affidavit was filed outside the time period set out in the Rules, without filing a condonation application, the Applicant may bring an application to have such an answering affidavit set aside or be struck out. As the Respondent did not file a condonation application wherein it seeks condonation for the late filing of the answering affidavit, the answering affidavit had to be set aside.
- [6] On 3 August 2018, the Respondent filed an application for condonation for the late filing of its answering affidavit, wherein it was explained that the answering affidavit was filed six days outside the time limits prescribed in the Rules. The Respondent explained that it had been compelled to defend a number of applications settled by the Applicant on behalf of his son, the Second

¹ April 2013.

Respondent. When the answering affidavit was filed out of time and the Applicant objected thereto, the Respondent decided that the legal costs associated with the said application would be unnecessarily inflated by filing a comprehensive application for condonation. It was the Respondent's intention to oppose the joinder application merely on the basis of legal submissions and it would not place reliance on the answering affidavit when opposing the joinder application.

[7] However, matters were complicated with the Applicant's application to strike out and a condonation application was filed.

[8] The Respondent made it clear that the condonation application was filed to enable the Applicant to enrol the joinder application as it seems that he is of the view that he is not entitled to enrol the joinder application without the Respondent having either served and filed an application for condonation or the opposing affidavit being struck out.

[9] The Applicant opposed the condonation application.

[10] On 16 October 2018, the matter came before me and I granted the following order:

- '1. The First Respondent is granted condonation for the late filing of its answering affidavit in the Applicant's joinder application;
2. The Applicant's application to strike out the First Respondent's answering affidavit is dismissed;
3. There is no order as to costs'.

- [11] I have considered the papers before me. A delay of six days in filing an opposing affidavit is minimal, more so where the Applicant was unable to show that he had suffered any prejudice because the opposing affidavit was filed six days out of time. I have further considered the fact that the Respondent has good prospects of success in opposing the joinder application and considering the minimal degree of lateness, the explanation, the prospects of success and the absence of prejudice, I exercised my discretion and I granted condonation for the late filing of the Respondent's opposing affidavit.
- [12] Having granted condonation for the late filing of the opposing affidavit, it followed that the application to strike out or set aside the opposing affidavit, had to fail.
- [13] In his affidavit opposing condonation, the Applicant referred to this Court's duty to expedite matters. I am very alive to the need to expedite matters and to ensure that they are dealt with as speedily and expeditiously as possible. In granting condonation, the intention was that the joinder application would be enrolled for hearing so that the parties could move forward in this litigation.
- [14] I have alluded to the fact that this Court has limited resources and many litigants who queue for a Court date and to bring this application and cause the Respondent to file an application for condonation for a six-day delay and to take up a day in Court for this, was unnecessary and is contributing to an avoidable delay in this application.
- [15] On 30 October 2018, the Applicant filed an application for leave to appeal wherein he raised numerous grounds for appeal. On 28 January 2019, the Applicant filed supplementary submissions wherein he raised grounds for leave to appeal that were not included in the original application for leave to appeal. The Applicant was entitled to make submissions in regard to the original leave to appeal that he had filed on 30 October 2018, within the period allowed to file an application for leave to appeal. The Applicant is not entitled to raise new and different grounds for appeal, far outside the prescribed

period, without an application for condonation for the late submission of new grounds for leave to appeal. The Applicant strikes me as a person who follows the Rules to the tee and who expects others to do so as well. He should be aware of the fact that there is a prescribed period within which an application for leave to appeal is to be filed and that new grounds cannot be filed almost three months later, without any application for condonation.

- [16] The application for leave to appeal is opposed on the basis that the order that was granted is of an interlocutory nature and therefore not appealable.

The test for leave to appeal

- [17] It is trite that an applicant in an application for leave to appeal must convince the court *a quo* that it has reasonable prospects of success on appeal. What the test requires is the reasonable likelihood that another court, presented with the same facts and evidence as this Court, could come to a different conclusion than the one arrived at by this Court.

- [18] The test for leave to appeal has become more stringent and this Court solidified this test *Seatholo and Others v Chemical Energy Paper Printing Wood and Allied Workers Union and Others*² where it held:

‘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 (see *Daantjie Community and others v Crocodile Valley Citrus Company (Pty) Ltd and another* (75/2008) [2015] ZALCC 7 (28

² (2016) 37 ILJ 1485 (LC) at para 3.

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.”

[19] Appeals should be limited to matters where 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] In deciding this application for leave to appeal I am also guided by the *dicta* of the Supreme Court of Appeal where it held in *Dexgroup (Pty) Ltd v Trustco Group*³ that:

‘ The need to obtain leave to appeal is a valuable tool in ensuring that scarce judicial resources are not spent on appeals that lack merit. It should in this case have been deployed by refusing leave to appeal.’

Grounds for leave to appeal

[21] I have considered the grounds for leave to appeal as well as the submissions made in opposition thereof and I do not intend to repeat those *verbatim* herein.

³ Unreported judgment of the Supreme Court of Appeal (687/12) [2013] ZASCA 120 (20 September 2013)

[22] I have considered the Applicant's grounds for leave to appeal and having considered those and applying the aforesaid principles applicable to applications for leave to appeal, I am not persuaded that there are reasonable prospects that the Labour Appeal Court would arrive at a different conclusion than the one arrived at by this Court.

[23] I am not persuaded that the Applicant has made out a case for leave to appeal to be granted. This application is without merit and scarce judicial resources should not be spent on it and the Labour Appeal Court should not be burdened with an appeal that lacks merit.

[13] In the result I make the following order:

Order

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

Connie Prinsloo

Judge of the Labour Court