



Not Reportable

Case NO: JS 33/13

In the matter between:

KATISHI JOB MAILE

Applicant

and

DEPARTMENT OF CORRECTIONAL SERVICES

Respondent

Decided: In Chambers

Delivered: 6 March 2018

JUDGMENT: LEAVE TO APPEAL

TLHOTLHALEMAJE, J

- [1] The applicant brought a claim in terms of the provisions of section 77(3) of the Basic Conditions of Employment Act, to seek payment of his outstanding salary for the period July 2004 to 17 January 2013. The non-payment of the salary was attributed to the fact that he was criminally charged, convicted and incarcerated.
- [2] Flowing from the criminal process, the respondent decided to prefer charges of misconduct against the applicant. An internal disciplinary hearing was scheduled and convened in the applicant's absence. He was subsequently found guilty on two charges levelled against him and had his services terminated.

- [3] Aggrieved by the dismissal, the applicant launched an appeal with the respondent's appeals forum. The issue before this Court was whether the applicant remained an employee whilst incarcerated, and whether he was entitled to receive his remuneration notwithstanding his conviction and dismissal pending the finalisation of his appeal.
- [4] Following upon trial proceedings on 22 March 2017, this Court handed down judgment on 24 March 2017 in terms of which the applicant's claim was dismissed without an order of costs. He has since filed an application for leave to appeal to the Labour Appeal Court against the whole of the judgment and the order.
- [5] The applicant filed the notice of application for leave to appeal on 19 May 2017. Rule 30 of the Rules of this Court¹ require a Notice of application for leave to appeal to be filed and served within 15 days from the date of the judgment and/ or order. The applicant in this case ought to have filed and served his notice of application on or before 13 April 2017. He only did so some 22 days outside the timeframes stipulated in the Rules.
- [6] At paragraph 4 of the Notice, the applicant had indicated his intention to bring an application for condonation for the late filing of this application. This however was not to be so. In the absence of an application for condonation or good cause shown as contemplated in Rule 30 (2), ordinarily, the application for leave to appeal ought to be dismissed.
- [7] Furthermore, in terms of clause 15 of the Court's Practice Manual, it is incumbent upon the applicant in an application for leave to appeal to file his written submissions within 10 days from the date of the filing of the notice of application. Again, the applicant in this case was found wanting, as he had

¹ **30 Application for leave to appeal to the Labour Appeal Court**

- 1) An application for leave to appeal to the Labour Appeal Court may be made, by way of a statement of the grounds for leave, at the time of the judgment or order.
- 2) 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.

only done so on 14 December 2017, approximately seven months late. Again, there is no explanation proffered by the applicant for the lateness.

[8] The respondent in its written submissions in opposition to the application for leave to appeal does not take issue with late lodging of the application for leave to appeal. That may be because it too filed its written submission on 19 January 2018, approximately 18 days outside the time periods stipulated in clause 15.2 of the Practice Manual. This omission is however of no moment, as the court still need to satisfy itself that the application is properly before it. Taking into account the non-compliance with the timeframes provided for in the Rules and the Practice Manual, the applicant's application ought to be dismissed on that basis alone.

[9] For the sake of completeness however, and in the light of the merits of the application, it is further my view that the application still ought to be dismissed. It is trite that the test in determining whether leave to appeal should be granted is whether there is a reasonable prospect that another court (in this case, the Labour Appeal Court), may come to a different conclusion to that reached by the Court whose judgment is sought to be taken on appeal. In considering this test, the Supreme Court of Appeal in *S v Smith*² held that:

'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 reasonable 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 succeed on appeal and that those prospects are not remote but have 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 an appeal'

[10] I have had regard to the submissions made by the applicant and those made in opposition to the application. Having reflected on my judgment and the

² 2010 (1) SACR at 576 (SCA)

basis upon which leave to appeal is sought, I am of the view that there is no sound, rational basis for a conclusion to be reached that there are reasonable prospects that the applicant would be successful on appeal. All the submissions and complaints raised are matters that were adequately addressed in my judgment and no purposes would be served in revisiting them in this judgment. In the circumstances, the application ought to be dismissed.

[11] In respect of costs, and taking into account a variety of factors, including the non-compliance with the Court's Rules and Practice Manual by both parties, I am of the view that the requirements of law and fairness dictate that no order as to costs should be made.

Order:

[12] Accordingly, the following order is made;

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

E. Tlhotlhemaje

Judge of the Labour Court of South Africa