



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case no: JR 730/16

In the matter between:

**THE ASSOCIATION OF MINEWORKERS
AND CONSTRUCTION UNION**

First Applicant

**THE MEMBERS OF AMCU REFLECTED ON
ANNEXURE 'A'
Applicants**

Second to Further

and

**THE COMMISSION FOR CONCILIATION
MEDIATION AND ARBITRATION**

First Respondent

COMMISSIONER KGOMOTSO LEKWAKWE N.O

Second Respondent

GLOBAL CLEANING SERVICES (PTY) LTD

Third Respondent

EKM TRADING (PTY) LTD

Fourth Respondent

TMMS TRADING CC

Fifth Respondent

ELUTSANE ENTERPRISE (PTY) LTD

Sixth Respondent

MAHUBE A GAUTA 78 HOLDINGS (PTY) LTD

Seventh Respondent

KWEZI INVESTMENTS (PTY) LTD

Eighth Respondent

SIZISA UKHANYO TRADINGS 498 CC

Ninth Respondent

Heard: In chambers

Delivered: 18 May 2018

JUDGMENT: APPLICATION FOR LEAVE TO APPEAL

NKUTHA-NKONTWANA. J

Introduction

- [1] In this application, the applicants seek leave to appeal against the whole judgment and order handed down by this Court on 25 January 2018 wherein I dismissed their application to review and set aside the second respondent's condonation ruling dated 3 March 2016 under case number GAJB165-16. The application is opposed by the third respondent.
- [2] The applicants filed their written submissions outside the proscribed period in terms Rule 30(3A) of this Court's Rules read together with Item 15 of this Court's Practice Manual.

Condonation application

- [3] The application for leave to appeal was served and filed on 15 February 2018.¹ The applicants' written submissions were only filed on 27 March 2018, three weeks late. The explanation given by the applicants is that the parties had been involved in settlement discussions prior and after the launching of the application for leave to appeal. As a result, there was an understanding that the application for leave to appeal would be suspended pending the outcome of the settlement discussion.
- [4] However, it is clear from the correspondence between the parties' attorneys of record that the applicants proposed the settlement discussions on 1 March 2018, the due date for filing their written submissions. Although the third respondent was not opposed to the proposed settlement discussions, it was adamant that the applicants should still file their written submissions and request the Court's permission to suspend the leave to appeal pending the outcome of the settlement discussions.

¹ The original copy was filed 16 March 2018.

- [5] In fact, the third respondent dispelled every misunderstanding that might have existed at that time with regard to the applicants' written submissions in its letter dated 2 March 2018 referred to in the third respondent's letter dated 16 March 2018. The third respondent was also amenable to allow the applicants to file the written submissions by 9 March 2018 and undertook not to oppose the application for condonation. Notably, the third respondent sternly warned the applicants not to use the settlement discussions as reason for non-compliance with the prerequisites as that would not be true.
- [6] The applicants failed to file the written submission on 9 March 2018, notwithstanding. On 16 March 2016, the third respondent filed its written submissions in opposition. The first issue raised therein is the applicants' failure to file their written submissions in support of the leave to appeal. The third respondent's prayer is that the application be dismissed with punitive costs on this ground alone.
- [7] The applicants were seemingly surprised by the turn of events because they had been expecting a counter offer from the respondent, so they argued. On the other hand, Ms Bosch, the applicants' attorney and the deponent to their founding affidavit in support of the condonation application, asserts that she was not available to deal with the matter between 19 and 23 March 2018 because she was involved in a trial in this Court.
- [8] It is evident that the applicants did not heed the call by the third respondent to file their written submissions even though the settlement discussions were being undertaken and that, in so doing, not to use the settlement discussions as the reason for delay. To go ahead and shamelessly use the settlement discussion as the excuse for the delay is obviously disingenuous.
- [9] Ms Bosch's unavailability could not have absolved the applicants from adhering to the Rules and Practice Manual of this Court. The city of Johannesburg is not short of attorneys and advocates, as such the applicants could have found her replacement with ease. The applicants chose their attorneys and must stand or fall by their advice or laxity. In *SA Post Office Ltd v Commission for*

Conciliation, Mediation and Arbitration and Others,² the Labour Appeal Court (LAC) endorsed its earlier decisions where it was held that 'an applicant seeking condonation cannot rely on the negligence of its legal representatives as a reason for not complying with the prescribed time periods'.

- [10] The reasons proffered for the delay in filing the applicant's written submissions are clearly irrational and unacceptable. On this ground alone, the application stands to be dismissed. However, I deem it proper to consider the merits for finality.

Merits

- [11] Interestingly, in the judgment I upheld the second respondent's ruling dismissing the applicant's application for condonation. The referral to the first respondent (CCMA) was late by almost five months and the reason proffered by the applicants was that they had a mistaken belief that the applicant employees would be employed by the third respondent's successor service providers who had successfully tendered for cleaning services at AngloGold. The alleged mistaken belief was held despite the fact that the applicants' unsuccessfully participated in the tender process to replace their employer, the third respondent. Also, they had referral of a severance pay dispute to the CCMA immediately after the applicant employees were served with notices of termination.
- [12] Given the extent of the delay and irrational explanation, I was disinclined to interfere with the second respondent's ruling dismissing the condonation application. Clearly, the applicants have a tendency of not complying with the prescribed time periods.
- [13] It is trite that the applicable test in an application for leave to appeal 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. However, the LAC has cautioned this Court that

² [2011] ZALAC 16; [2012] 1 BLLR 30 (LAC); (2011) 32 ILJ 2442 (LAC) at para 21, see also *Superb Meat Supplies CC v Maritz* (2004) 25 ILJ 96 (LAC) at 100I-101A.

the test ought not be applied unconscientiously in light of the statutory imperative of expeditious resolution of labour disputes. In *Martin and East (Pty) Limited v National Union Mineworkers and Others*,³ per Davis JA, LAC commented as follows:

‘...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, as should this Court when petitions are granted.

There are two sets of interests to consider. There are the interests of the parties such as appellant, namely who are entitled to have their rights vindicated, if there is a reasonable prospect that another court might come to a different conclusion. There are also the rights of employees who land up in a legal “no-man’s-land” and have to wait years for an appeal (or two) to be prosecuted.

This was a case which should have ended in the labour court. This matter should not have come to this court. It stood to be resolved on its own facts. There is no novel point of law to be determined nor did the Court *a quo* misinterpret existing law. There was no incorrect application of the facts; in particular, the assessment of the factual justification for the dismissals/alternative sanctions.

I would urge labour courts in future to take great care in ensuring a balance between expeditious resolution of a dispute and the rights of the party which has lost. If there is a reasonable prospect that the factual matrix could receive a different treatment or there is a legitimate dispute on the law, that is different. But this kind of case should not reappear continuously in courts on appeal after appeal, subverting a key purpose of the Act, namely the expeditious resolution of labour disputes.’ (Emphasis added)

[14] Having considered all the grounds of leave to appeal, I am persuaded that the applicants failed to make out a case that another Court might reasonably arrive

³ [2013] ZALAC 35; (2014) 35 ILJ 2399 (LAC) page 16 lines 12 - 25 and page 17 lines 1 – 18; See also *National Union of Metalworkers of South Africa and Others v Columbus Stainless* [2016] ZALCJHB 344 at paras 2-3.

at a decision different to the one reached by this Court. The leave to appeal should, therefore, be refused.

[15] As a rule of practice, costs do not follow the result in matters before this Court. However, this is a typical case where the applicants should pay the costs. I have taken into account the applicants' flagrant failure to adhere to the prescribed time period, notwithstanding the third respondent's stern warning. Regardless, I do not think that the cost order should be punitive.

[16] In the result, the following order is made:

Order

1. The applicants' application for leave to appeal against the judgment handed down on 25 January 2018 is dismissed.
2. The applicants are to pay the third respondent's costs.

P. Nkutha-Nkontwana

Judge of the Labour Court of South Africa