



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: J 1818/17

In the matter between:

**SOUTH AFRICAN MARITIME SAFETY
AUTHORITY (SAMSA)**

Applicant

and

MURORO DZIRUNI

Respondent

Decided: In Chambers

Delivered: 3 July 2018

JUDGMENT: LEAVE TO APPEAL

TLHOTLHALEMAJE, J

[1] The respondent, Mr Muroro Dziruni approached this Court on urgent basis seeking to have a settlement agreement entered into between himself and those representing the applicant, the South African Maritime Safety Authority (SAMSA) made an order of court in terms of the provisions of section 158(1)(c) of the Labour Relations Act (LRA).¹

[2] SAMSA had opposed the application, contending that persons who signed the settlement agreement on its behalf lacked the necessary legal authority to do

¹ Act 66 of 1995, as amended.

so, and that the agreement was therefore *ultra vires*. Furthermore, it contended that the settlement was subject to a review application pending before the Labour Court.

- [3] The Court heard the matter as one of urgency, and judgment was delivered on 31 August 2017, in terms of which the settlement agreement was made an order of court. SAMSA was also ordered to pay the costs of that application.
- [4] On 13 October 2017, the respondent instituted contempt proceedings against the Chief Operations Officer of SAMSA for failing to comply with the settlement agreement which was made an order of court. On 30 October 2017, the Sheriff of the Court attended to the business premises of SAMSA to attach movable goods in satisfaction of the judgment.
- [5] On 31 October 2017, SAMSA filed an application to stay the writ of execution pending the finalisation of the appeal process. That application was heard on 7 November 2017. On 15 December 2017, this Court (per Lagrange J) handed down judgment and issued an order in the following terms:

“...

- [2] The writ of execution issued out of the Labour Court on 16 October 2017 under case number J1818/17, which was attached as Annexure “JC1” to the founding affidavit and all steps taken thereunder, are stayed pending the determination in respect of the late filing of the application for leave to appeal against the judgment of the court in this matter handed down on 31 August 2017...”
- [6] On 19 October 2017, SAMSA filed an application for leave to appeal against the whole of the judgment and the order. In terms of Rule 30(3A)² read with paragraph 15.2³ of the Practice Manual of the Labour Court (2013), the

² (3A) Unless the judge from whom leave to appeal is sought otherwise directs, the parties' respective submissions in respect of the application for leave to appeal must be-
 (a) in writing; and
 (b) delivered on or before a date fixed by the judge.

³ 15.2 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. An application for leave to appeal will be decided by the judge in Chambers on the basis of the submissions filed in terms of Rule 30 (3A), unless the judge directs that the application be heard in open court.

applicant in an application for leave to appeal must file written submissions within 10 days from the date of the delivery of the application. On 28 November 2018, the respondent in the absence of SAMSA's written submissions filed their written submissions in opposition of the application for leave to appeal.

[7] As the application for leave to appeal was filed out of time, on 24 November 2017, SAMA filed an application for condonation for its late filing. The explanation for the late filing of the application for leave to appeal is summarised as follows:

7.1. SAMSA was not made aware of the fact that the judgment was scheduled to be handed down on 31 August 2017. It is common practice that the Registrar of the Judge concerned would notify the parties of the date of the delivery of the judgment, but this did not take place. On 1 September 2017, the respondent's attorneys of record informed SAMSA that the judgment had been handed down.

7.2. At that time, the attorney dealing with the matter had taken leave of absence. The email only came to the attention of the attorney concerned on 14 September 2017. On 18 September 2017, an employee of SAMSA's attorneys of record attended to the Labour Court with the intention of uplifting the judgment. The employee was however informed by the Labour Court official that the file could not be located. The employee returned to the Labour Court on several occasions to try and locate the file but was unsuccessful each time. The file was eventually found on 6 October 2017. The employee is said to have been told by the Registrar of this Court that the difficulty in locating the file in the filing room is attributed to the fact that the respondent had taken steps to execute the court order. SAMSA deemed it necessary to obtain the judgment from the Court so that it could verify its authenticity.

7.3. SAMSA contends that the period in which an application for leave to appeal had to be filed ought to be calculated from 6 October 2017, the

date in which the judgment was uplifted from the court file. The application for leave to appeal ought to have been filed on or before 27 October 2017. Taking into account that the application was filed on 19 October 2017, it was filed within the time limits. The respondent's attorneys of record wrote to SAMSA expressing the view that the application was filed late. SAMSA however does not share the same view and deny that the application was filed late. SAMSA nonetheless filed the condonation application as a caution and conditionally in the event that this Court holds that condonation is necessary. In that eventuality the application was filed late because:

- 7.3.1. The Court did not inform SAMSA of the date of handing down the judgment.
- 7.3.2. On 1 September 2017, after SAMSA was informed by the respondent that judgment was handed down, SAMSA was nonetheless compelled to determine the authenticity of the judgment.
- 7.3.3. The court file was not available in order to enable SAMSA to authenticate the judgment, whilst the respondent had already commenced with the execution of the judgment.

7.4. SAMSA contends that the late filing was not as a result of gross and reckless disregards of the time frames laid down by the Rules. Furthermore, it was submitted that the delay was not excessive and even if the delay is calculated from 1 September 2017, the application would be 18 days late.

[8] The application for condonation is opposed by the respondent on the grounds that:

- 8.1. It was not correct that SAMSA were not informed of the date of handing down of judgment, as a notice in that regard was addressed to both parties. Moreover, SAMSA was advised by the respondent's

attorneys on record on 1 September 2017, that judgment was indeed handed down on 31 August 2017.

- 8.2. A copy of the judgment was emailed to SAMSA's attorneys of record on 1 September 2017. It was therefore unnecessary for SAMSA to approach the Registrar of this Court to request a copy of the judgment. SAMSA's claims therefore amounted to nothing but a lie to cover up its negligence and recklessness.
- 8.3. SAMSA did not exhaust all means to obtain a copy of the judgment notwithstanding that it was served with a copy of the judgment immediately after it had been handed down.
- 8.4. The respondent denies that the application was filed within the time limits provided for in terms of the Rules. In terms of Rule 30(2) of the Rules of this Court, an application for leave to appeal must be filed within 15 days from the date of the judgment.
- 8.5. SAMSA was notified by the secretary to the Judge of the date of judgment on 30 August 2017.

Evaluation

- [9] In terms of Rule 30(2)⁴ read with Rule 12⁵ of the Rules of this Court, the period for the filing of the application for leave to appeal may be extended on good cause shown by the applicant. In determining whether good cause has been shown, the court will take into account relevant factors such as the extent of the delay, the explanation for the delay, prospects of success (on

⁴ Rule 30: **Application for leave to appeal to the Labour Appeal Court**

...
(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.

⁵ Rule 12: **Extension of time limits and condonation**

(1)

The court may extend or abridge any period prescribed by these rules on application, and on good cause shown, unless the court is precluded from doing so by an Act.

...

appeal), and in the whole it must be determined whether it is in the interest of justice to grant condonation⁶.

- [10] In this case, judgment in the main application was delivered on 31 August 2017. Notices in that regard as apparent from the court's file were sent to both parties' attorneys of record on 31 August 2017. A bare denial therefore that the applicant was not informed of the delivery of judgment cannot be sustainable.
- [11] Even if there is any semblance of merit in the applicant's denials, the respondent had in opposing the condonation, pointed out that a copy of the judgment was also forwarded to the applicant's attorneys of record on the same date it was delivered. In the absence of any other contention, I have no reason to doubt that at least as of 31 August 2017, the applicant was aware of the judgment. The contention therefore that an attempt was made to uplift the judgment at some point thereafter to ascertain the status of the matter is indeed a lame excuse, particularly since on the applicant's own version, it was again advised by the respondent's attorneys of record on 1 September 2017 that judgment had been handed down.
- [12] The excuse that an attorney dealing with the matter at the time was on leave is equally lame, and it is of no consequence as to when he had become aware of the judgment upon his return, as in any event, he ought to have been aware of it at least before he went on leave. It is equally not an acceptable excuse that the applicant only became aware of the judgment on 6 October 2017 upon the upliftment of the court file on that date.

⁶See *Melane v Santam Insurance Co. Ltd* 1962 (4) SA 531 (A) at 532B-E, where it was held that;

'In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success and the importance of the case. Ordinarily these facts are interrelated, they are not individually decisive, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation may help to compensate prospects which are not strong. Or the importance of the issue and strong prospects may tend to compensate for a long delay. And the Respondent's interests in finality must not be overlooked'

- [13] I further fail to appreciate or to understand the logic behind the applicant's reasoning that it needed to verify the authenticity of the judgment it had been advised of by the respondent's attorneys of record, as it is far-fetched to suspect that attorneys, who are officers of this court would fraudulently produce a court judgment. A phone call to the respondent's attorneys or to the Court would have sufficed if the applicant was for whatever reason still in doubt about the authenticity of the judgment in question.
- [14] In line with the above conclusions, I have no reason to doubt that the applicant was duly notified of the date on which judgment was delivered. Even if no appearance was made in court to note the judgment, a copy in that regard was forwarded to the applicant's attorneys of record and no further steps were taken.
- [15] The application for leave to appeal was launched on 19 October 2017 and was therefore some four weeks out of time. The explanation proffered by the applicant for the delay is not only inadequate but as correctly pointed out on behalf of the respondent, based on attempts to cover up tardiness in attending to this matter. As it was also noted by La Grange J in his judgment in respect of a further application by the applicant to stay the writ of execution, the application for leave to appeal was only filed once the respondent had attached the applicant's assets, and in that judgment, note was also taken of the general dilatory conduct of the applicant, inclusive of a failure to attend to several correspondences from the applicant's attorneys of record subsequent to delivery of the main judgment.
- [16] Inasmuch as the explanation for the delay is found to be inadequate and/or unacceptable, ordinarily, that would have been the end of the matter. However, for the sake of completeness, and to the extent that the applicant contended that it had prospects of success, 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.

[17] In considering the above test, the Supreme Court of Appeal in *S v Smith*⁷ 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 reasonably 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 success 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 on appeal'

[18] I have had regard to the applicant's submissions in respect of the application for leave to appeal and the respondent's opposition thereto. I have also reflected on my judgment, and I am satisfied that the grounds upon which leave to appeal is sought and the arguments in that regard have been dealt with at length, and no purpose would be served in repeating same. On the whole, and even upon a consideration of the interests of justice, I am satisfied that there is no sound, or rational basis for a conclusion there are prospects that the Labour Appeal Court may come to a different conclusion on the merits. In the circumstances, I am satisfied that the applicant has failed to show good cause why its tardiness in attending to the leave to appeal ought to be condoned. Consequently, the application for leave to appeal ought to be dismissed.

[19] Further having had regard to the requirements of law and fairness, I see no reason why the applicant should not be burdened with the costs of this application.

[20] Accordingly, the following order is made;

Order:

1. The application for condonation for the late filing of the application for leave to appeal is dismissed;

⁷ 2010 (1) SACR at 576 (SCA)

2. The application for leave to appeal is dismissed;
3. The applicant is ordered to pay the costs of this application.

E. Tlhotlhemaje

Judge of the Labour Court of South Africa