THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no. J 3913 / 18

In the matter between:

MEDTRONIC AFRICA (PTY) LTD **Applicant**

And

YOLANDE VAN ROOIJEN **First Respondent**

BOSTON SCIENTIFIC SA (PTY) LTD **Second Respondent**

Heard: **Considered in Chambers**

Delivered : **25 March 2019**

Summary: **Application for leave to appeal – application for leave to appeal brought out of time – also non-compliance with Practice Manual – no proper case of good cause made out and condonation not applied for – application dismissed**

Leave to appeal – no proper grounds made out – application for leave to appeal dismissed

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JUDGMENT

SNYMAN, AJ

Introduction

[1] In this instance, the applicant had brought an urgent application to enforce a restraint of trade covenant against the first respondent. The first respondent opposed the application. After hearing argument by both parties on 7 December 2018, when the matter came before me, I granted the following order.

1. The application is heard as one urgency.

2. The first respondent is interdicted and restrained until 30 November 2019 and in the Republic of South Africa from directly or indirectly being interested in or rendering services to:

   2.1 The second respondent;

   2.2 Any person or entity which competes directly or indirectly with the business of the applicant.

3. The first respondent is interdicted and restrained from disclosing, disseminating, divulging, relaying or in any way conveying the confidential information of the applicant to any third party including the second respondent.

4. There is no order as to costs.

5. Written reasons for this order will be provided on 14 December 2018.

[2] Written reasons for my order were then indeed handed down on 14 December 2018, by way of a comprehensive written judgment. It does however appear to be common cause that even though the judgment was handed down on 14 December 2018, it was only sent to the parties by the office of the registrar on 18 December 2018. I shall accordingly accept for the purposes of the application for leave to appeal that judgment was handed down on 18 December 2018.

[3] On 11 January 2019, the first respondent filed an application for leave to appeal. In terms of Rule 30(3), if the reasons for the Court's order are given on a date later than the date of the order, the application for leave to appeal must be made within 10 (ten) days after the date on which the reasons are given. In this case therefore, the due date for the first respondent's application for leave to appeal was 4 January 2019, making the application for leave to appeal out of time.

[4] I was also not favoured with written submissions as contemplated by Rule 30(3A) of the Labour Court Rules and clause 15.2 of the Practice Manual, by the first respondent. The applicant however did file its submissions as contemplated by these provisions, opposing the application for leave to appeal. In the applicant's submissions, it is also recorded that it did not receive submissions from the first respondent.

[5] Clause 15.2 of the Practice Manual provides that an application for leave to appeal will be determined by a Judge in chambers, unless the Judge directs otherwise. I see no reason to direct otherwise and will therefore determine the first respondent's leave to appeal application in chambers.

Defective application

[6] As touched on above, and in In terms of Rule 30(3) of the Labour Court Rules, the first respondent's application for leave to appeal was due on 4 January 2019, but was only filed on 11 January 2019, and is thus 5(five) Court days out of time. This Court can however can condone the late filing of such application for leave to appeal on good cause shown, in terms of that same Rule.

[7] Good cause requires a proper application for condonation. The first respondent, because its application for leave to appeal was out of time, always needed to apply for condonation and explain the delay.[1] In *MCC Contractors (Pty) Ltd v Johnston NO and Others*[2] 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. ….
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> …. 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.'

[8] The first respondent did not apply for condonation. In the absence of any application for condonation, this Court should on this basis alone decline to entertain the first respondent's application for leave to appeal. The reason for this is that the absence of a condonation application means that good cause has not been shown and that the delay is unexplained. As a result, prospects of success also becomes an irrelevant consideration.[3] It is clear to me that the approach of the first respondent was simply that condonation was there for the asking, which is unfortunately for it a wrong approach. In *Seatlolo and others v Entertainment Logistics Service* (*a division of Gallo Africa Ltd*)[4] 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

[1] Compare *Msunduzi Municipality v Hoskins* (2017) 38 ILJ 582 (LAC) at paras 3 and 5.
[2] (2012) 33 ILJ 2096 (LC) at paras 4 – 5.
[3] 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
[4] (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.

> 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.'

[9] The situation is compounded by the first respondent's failure to comply with the Practice Manual, in that it never filed written submissions in support of its application for leave to appeal. The first respondent 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*[5]:

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

[10] In *Ralo v Transnet Port Terminals and Others*[6] the Court similarly held as follows:

> '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.'

[11] The first respondent'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, and 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 first respondent in the application for leave to appeal.

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[5] (2017) 38 ILJ 430 (LC) at para 13. See also See *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.

[6] (2015) 36 *ILJ* 2653 (LC) at para 9.

The merits of the application

[12] When 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.[7] As said in *South African Clothing and Textile Workers Union and Others v Stephead Military Headwear CC*[8]:

> '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. …'

[13] In Member of the *Executive Council for Health, Eastern Cape v Mkhitha and Another*[9] the Court applied the concept of '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.
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> 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.'

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[7] 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, Meditation 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).

[8] [2017] JOL 37932 (LC) at para 7. See also *Seathlolo and Others v Chemical Energy Paper Printing Wood and Allied Workers Union and Others* (2016) 37 ILJ 1485 (LC) at para 3.

[9] [2016] JOL 36940 (SCA) at paras 16 – 17.

[14] Overall considered, in the context of the above principles, the first respondent's application for leave to appeal is completely lacking in substance. It is virtually an identical case to that which was argued before me when the matter was originally heard. I dealt with all these arguments in detail in my judgment, and it seems the first respondent simply disagrees with my conclusions and repeats the same arguments again. It is simply not appropriate to simply argue the same case when seeking leave to appeal, and then hoping some of the argument may stick on the second occasion, and thus substantiate the granting of leave to appeal.

[15] Because I have in my judgment of 14 December 2018 comprehensively dealt with the arguments now again raised by the first respondent in her application for leave to appeal, there is simply no point to deal with the same all over again in this leave to appeal judgment. For the reasons already given in my original judgment, I remain entirely unconvinced that the first respondent's arguments have any merit, and I am satisfied that there is no reasonable prospect that another Court would come to a different decision on appeal. This is an instance where the first respondent does no more than disagree with my conclusions and findings, but such disagreement cannot serve to establish reasonable prospects of success as required by the test for leave to appeal.

[16] The above being said, I will briefly deal with some of the issues raised by the first respondent. The first respondent took issue with the fact that I simply did not follow the judgment in *Baroque Medical (Pty) Ltd v Medtronic Africa (Pty) Ltd and Another*[10] (which involved the applicant as well). But the first respondent remains unable to appreciate that *Baroque* is entirely distinguishable on the facts, and has failed to make out any case in the application for leave to appeal that another Court could reasonably come to a different conclusion in this regard. The first respondent also in effect ignores that the judgments *Medtronic (Africa) (Pty) Ltd v Kleynhans and Another*[11] and *Medtronic (Africa) (Pty) Ltd v Van Wyk and Another*[12], which also involved the applicant, are far more aligned to the case *in casu*, both in fact and on legal

[10] [2013] ZAGPJHC 383 (13 December 2013).
[11] (2016) 37 ILJ 1154 (LC).
[12] (2016) 37 ILJ 1165 (LC).

principle, and that the application of these judgments supported the applicant's case for enforcement of the restraint. I remain unconvinced that the judgment in *Baroque* bestowed any prospects of success on appeal on the first respondent.

[17] In this instance, it is the risk caused by the first respondent's employment with the second respondent that is a critical consideration. This is the kind of risk that a restraint of trade covenant is designed to mitigate. The first respondent remains unable to answer this case of risk so created, and for her to do what is in essence a detailed comparison of job descriptions cannot assist her to successfully contradict the case of the to the applicant to mitigating risk to it. I remain satisfied that there was sufficient *nexus* between the first respondent's positions at the applicant, both historic and current, and her position at the second respondent, to satisfy the risk requirement to the extent of rendering the enforcement of the restraint competent. Also on the risk issue, it is in my view now trite that the giving of undertakings not to violate the restraint is not sufficient to eliminate risk, based on the reasons fully set out in my judgment. The first respondent remains unable, in her application for leave to appeal, to contradict any of these considerations to the extent of establishing a reasonable prospects of success on appeal.

[18] The final issue I would like to address is the issue of waiver. The difficulty is that the first respondent, who had the onus to do so, has simply failed to satisfy the requirements of waiver. The reasons for my conclusion in this regard are dealt with in detail in my judgment. In her application for leave to appeal, the first respondent simply makes a bald assertion that I erred in finding that the waiver was conditional. No reasoning has been provided by the first respondent as to why another Court may reasonably decide differently in this regard.

[19] I thus conclude that the first respondent has shown no reasonable prospect that another Court would come to a different conclusion, and she has no prospects of success on appeal. The application for leave to appeal falls to be dismissed.

[20] This leaves only the issue of costs. Exercising the wide discretion I have in terms of section 162 of the LRA, I shall apply the same reasoning as set out in my original judgment, and make no order as to costs.

Order

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

1. The first respondent's application for leave to appeal is dismissed.

2. There is no order as to costs.

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S Snyman

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Fasken Attorneys

For the First Respondent: Lee & McAdam Attorneys