

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JS927/16

In the matter between:

UNATHI VIWE MBEKELA

Applicant

and

AIRVANTAGE (PTY) LIMITED

Respondent

Decided: In chambers

Delivered: 18 April 2019

JUDGEMENT: APPLICATION FOR LEAVE TO APPEAL

NKUTHA-NKONTWANA. J

Introduction

- [1] In this application, the respondent seeks leave to appeal against the whole *ex tempore* judgment and order handed down by this Court on 15 March 2018 wherein I postponed the matter *sine die* and ordered the respondent to pay the applicant's costs on the attorney client scale. For expediency, the parties are referred to as cited in the main judgment.

Condonation

- [2] The notice of application for leave to appeal was filed on 17 April 2018. The *dies* for filing submissions expired on 10 April 2018 as per Clause 15.2 of the Practice Manual of this Court. In essence, the application for leave to appeal is 7 days late. The degree of lateness is therefore not excessive and the explanation is reasonable. The applicant will not suffer any prejudice if the condonation for late filing of the leave to appeal is granted.

Leave to appeal

- [3] The respondent's main ground of appeal is that I erred in not allowing it to move an application for condonation from the bar at the commencement of the trial.
- [4] The respondent is clearly oblivious to the undertaking it made during the pre-trial conference that was held on 6 February 2016. Sub-paragraph 7.1 of the pre-trial minute states that:

'The first point *in limine* to be dealt with prior to trial will be condonation of late delivery of the statement of response. The Applicant indicated that the Respondent's application will not be opposed'. [Emphasis added]

[5] On 15 March 2018, two years later, the respondent had not applied for condonation for the late filing of its statement of response. Clearly at that point the matter was unopposed and the trial could have proceeded on default basis. Nonetheless, the applicant was amenable to postponement, with punitive costs, in order to allow the respondent an opportunity to attend to condonation.

[6] The respondent on the other hand sought to move an application for condonation from the bar. The applicant vehemently opposed the application to move condonation from the bar, correctly so. In this instance, there was no explanation whatsoever placed before Court under oath as to why the statement of response was filed late. The respondent could have, at the very least, handed up its condonation application papers in Court. In essence, condonation application is an interlocutory application and must be brought in accordance with Rule 11 of the Rules of this Court.

[7] In *Numsa and Others v Hillside Aluminium*¹ it was held that:

'Additionally, there should be an acceptable explanation tendered in respect of each period of delay. Condonation is not there simply for asking. Applications for condonation are not a mere formality. The onus rests on the applicant to satisfy the court of the existence of good cause and this requires a full, acceptable and ultimately reasonable explanation.'

¹ [2005] 6 BLLR 601 (LC) at para 12.

- [8] 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 by the court *a quo*. However, the Labour Appeal Court (LAC) has cautioned this Court that 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*, 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)

[9] Having considered all the submissions from both parties, I am not persuaded that there is a reasonable prospect that the factual matrix in this case might receive a different treatment at the appeal. Put differently, the applicant has failed to make out a case that another Court might reasonably arrive at a decision different to the one reached by this Court. The application for leave to appeal should, therefore, be refused.

[10] Turning to the issue of costs, the applicant is an individual litigant who had to incur legal costs opposing this unmeritorious application. Even though it is trite that in this Court costs do not follow the result, I am convinced that this case presents an exception.

[11] In the circumstances, I make the following order:

Order

1. The application for leave to appeal is dismissed with costs.

P. Nkutha-Nkontwana

Judge of the Labour Court of South Africa