

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case No: JR 2738/13

In the matter between:

**TRANSPORT AND ALLIED WORKERS'
UNION OF SOUTH AFRICA OBO
SYDWELL EDMUND MAPHOSA**

Applicant

And

**SOUTH AFRICAN ROAD PASSENGER
BARGAINING COUNCIL**

First Respondent

KHUTSO MPAI N.O.

Second Respondent

GREAT NORTH TRANSPORT (PTY) LTD

Third Respondent

Considered: In chambers

Delivered: 17 May 2019

LEAVE TO APPEAL - JUDGMENT

THOMPSON, AJ

Introduction.

[1] This is an application for leave to appeal in terms of section 166(1) of the Labour Relations Act. The application for leave to appeal is against the whole judgement of the court dated 21 November 2017, in terms of which the Applicant's application for condonation was refused and the Applicant's review application was dismissed.

[2] The application for leave to appeal is unopposed.

[3] Grounds for Appeal

The grounds for appeal relied upon by the Respondent are as follows:

1. The learned Judge erred by having failed to have found that the application for condonation was brought within a reasonable time.
2. The learned Judge erred by having found that the explanation for the delay in having the condonation application was unconvincing given the fact that the trade union ought to have understood the time limits and acted sooner.
3. The learned Judge erred by having failed to have applied the following principles: [35] ... The explanation based on lack of funds has to be evaluated within the context of the facts and the circumstances of a given case. See: *Goashubelwe & others v Pie Man's Pantry (Pty) Ltd* (2009) 30 ILJ 347 (LC) at paragraph 35 on page 355.
4. The learned Judge erred by failing to find that in the absence of a causal link between the Applicant and the disappearance of the diesel, reinstatement of the Applicant is not warranted.

5. The learned Judge erred by failing to find that the arbitrator's decision not to reinstate the Applicant was not obviously wrong when the arbitrator could not find any causal link between the Applicant and the disappearance of the diesel.
6. The learned Judge erred by stating that practical considerations are to be applied by the arbitrator when the arbitration award do not state what practical considerations were considered or if practical considerations were indeed considered.
7. The learned Judge erred by failing to hold that in determining whether or not an unfairly dismissed should be reinstated, as in the case of the Applicant, the overriding consideration in the enquiry should be a notion of fairness between the parties.
8. The learned Judge erred by finding that the employment relationship between the Applicant and the third Respondent has irretrievably broken down when there is no causal link between the Applicant and the disappearance of the diesel.
9. The learned Judge erred by having refused the application of condonation.
10. The learned Judge erred by refusing to order the reinstatement of the Applicant.

[4] The test for leave to appeal

- 4.1 The provisions of Section 17 of the Superior Courts Act is always a useful starting point when considering applications of this nature. Central to the determination of an application for leave to appeal is whether there are reasonable prospects of success on appeal. The test that is outlined in Section 17(1) of the Superior Courts Act differs to the traditional test as previously stated by our courts. Section 17(1) raises the threshold of the test for leave to appeal.

- 4.2 The Labour Appeal Court has in the past stressed that leave to appeal should not be lightly granted because meritless appeals delay the final resolution of disputes.
- 4.3 The Applicant relies on the ground that the court erred by having failed to have found that the application for condonation was brought within a reasonable time. I cannot accept that a purported omission by the court to make a finding that the application for condonation was brought within a reasonable time should be significant. It is common cause that the condonation was brought at the time of filing a replying affidavit.
- 4.4 The second ground of appeal relates to the finding that the explanation for the delay was unconvincing. The degree of lateness was 6 months. The delay is substantial and requires a reasonable explanation. The Applicant avers that the delay was caused by his representatives. I considered the degree of lateness together with the explanation of lateness and the prospects of success. In considering those factors, I drew the conclusion that the Applicant had failed to satisfy the court that condonation should be granted.
- 4.5 The further ground for leave to appeal is the averment that the absence of a causal link between the Applicant and the disappearance of the diesel, reinstatement of the Applicant was not warranted. In reaching the conclusion not to interfere with the arbitrator's decision to order compensation instead of reinstatement, is not based on the absence of a causal link. The absence of the causal link provided the basis for the finding that the dismissal was unfair.
- 4.6 The Applicant avers that the failure to find that the arbitrator's decision not to reinstate the Applicant was not wrong when the arbitrator could not find any causal link between the Applicant and the disappearance of the diesel. The decision by the arbitrator to award compensation instead of reinstatement was based on his conclusion that the

employment relationship had irreparably broken down and that it would not be practical to reinstate the Applicant.

4.7 The Applicant's further ground that the practical considerations applied by the arbitrator were not stated. The arbitrator accepts the Respondent's argument that the trust relationship was irretrievably broken down. The arbitrator correctly considers section 193(2)(b). Reinstatement would not be applied in circumstances surrounding the dismissals where a continued employment relationship would be intolerable. I chose not to interfere with the arbitrator's conclusion.

4.8 In as much as the Applicant outlined its grounds for leave to appeal in its submissions, it at best amounts to regurgitation of its case at the review application. I am satisfied that all of these issues were adequately canvassed and considered in the main judgement and no purpose will be served in revisiting same. I am also of the view that there are no reasonable prospects of success on appeal.

4.9 In the light of the above, and having had regard to the submissions made and further on reflection of the main judgement, I am of the view that the Applicant has failed to demonstrate that there are reasonable prospects that the Labour Appeal Court will come to a different decision to that reached in the main judgement.

4.10 In respect of the issue of costs, it is trite that such an order be made upon consideration of the requirements of law and fairness. I am of the view that the facts and circumstances of this case do not call for a cost order to be made.

[5] In the circumstances, the following order is made:

1. The application for leave to appeal against the whole judgement and the

order of this court delivered on 7 December 2017 is dismissed,

2. There is no order to costs.

Thompson AJ

Acting Judge of the Labour Court of South Africa

LABOUR COURT