**IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

Not Reportable

Case No: JR 2769/16

In the matter between:

**CITY OF TSHWANE METROPOLITAN MUNICIPALITY** **Applicant**

and

**IMATU OBO MEMBERS** **Respondent**

**Considered: 22 August 2019**

**Delivered: 15 November 2019**

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**JUDGMENT**

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**MABASO, AJ**

Introduction

[1] The challenge that I am faced with herein is that the Judge who used his discretion in making a variation ruling an order of court and issued subsequent directives sadly passed away before he could finalise this matter. Before this Court is an application for leave to appeal against an order of the late Steenkamp J, a condonation application for the application for leave to appeal as it was delivered beyond the prescribed time and the Respondent's application to dismiss the leave to appeal. Parties are hereinafter referred to as cited.

Condonation application for the late delivery of the application for leave to appeal

[2] The Respondent had approached this Court to make a variation ruling an order of Court in terms of section 158(1)(c) of the Labour Relations Act[1] (LRA). The Applicant opposed the application and on 03 May 2018 Steenkamp J delivered an *ex tempore* judgement. The notice for leave to appeal was delivered 5 days outside the 15 day period as required by the Rules of the Labour Court (the Rules). Therefore, the condonation application was necessary, and the Respondent delivered it in September 2018. The delay is not inordinate, therefore, based on this ground alone the condonation application for the late delivery of the notice for leave to appeal is granted.

Written submissions for leave to appeal

[3] This Court has its own Rules (and Practice Manual) which when applied it must be in line with the interest of justice, and the application of same may sometime differ in case by case based on the circumstances and facts of each case.

[4] The Constitutional Court regarding the application of Rules in Superior Courts, unlike Magistrates Court, held as follows in *PFE International Inc (BVI) and Others v Industrial Development Corporation of South Africa Ltd*[2]:

> "Since the rules are made for courts to facilitate the adjudication of cases, the superior courts enjoy the power to regulate their processes, taking into account the interests of justice. It is this power that makes every superior court the master of its own process. It enables a superior court to lay down a process to be followed in particular cases, even if that process deviates from what its rules prescribe. Consistent with that power, this Court may in the interests of justice depart from its own rules."

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[1] No. 66 of 1995, as amended.
[2] 2013 (1) SA 1 (CC).

[5] In terms of the Practice Manual, the Applicant was required to deliver written submissions within ten days after the application for leave to appeal had been delivered[3], as the process of transcription of an *ex tempore* judgement does not interrupt this period, and once written submission are filed the application for leave to appeal will have to be decided by the Judge in chambers.[4]

[6] Upon this file being allocated to me by the Judge President, I noticed that one of the directives that were issued by the late Steenkamp J, dated 18 February 2019, he had directed that:

> " …the Applicant must obtain and file a transcript of the *ex tempore* judgment, once the transcript is received, the matter will be set down for hearing."

[7] I further noticed that the applicant had not delivered the written submissions as required by clause 15.1 of the Practice Manual, and in June 2019 the respondent had launched an application to dismiss the leave to appeal. I then directed the parties to file respective written submissions by no later than 15 August 2019. It appears that the applicant did not receive this directive on time but proceeded to deliver its written submissions on 29 August 2019.

[8] Generally, applications for leave to appeal in this court are decided in Chambers and parties are expected to deliver wrtitten submissions, however, at times the Judge may use his/her discretion . This is provided for in Rule 30 (3A) of the Rules which specifically provide that:

> "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."

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[3] Clause 15.2 read with Rule 30 (3A).
[4] Clause 15.1 of the Practice Manual.

[9] This discretion is given to the judge in line with what CC has re-emphasised in the *PFE International dictum* above. Some of the circumstances that might lead to the judge to order a party not to deliver written submissions are when a party is illiterate and/or whatever reason that such Judge might deem valid to excuse such party.

[10] As things stand, I do not know the reasons why Steenkamp J made the directive mentioned in paragraph 6 above, as to whether or not he was excusing the applicant from filing written submissions, as per Rule 30(3A) or that maybe he intentionally deviated from the Practice Manual as the law allowed him to do so by *"lay down a process to be followed in particular cases, even if that process deviates from what [the Rules/Practice Manual] prescribe"*. I say this because it is common cause that the applicant by 18 February 2019 had not delivered the written submissions despite Steenkamp J's directive dated 31 January 2019 advising the applicant that,

> "…your attention is drawn to paragraph 14.5 of the Practice Manual, read with rule 30(3A) respectively. As thing stands, the court can only be able to entertain your application after you have complied with the above paragraph as stipulated in the Labour Court Practice Manual."

[11] It is, therefore, concluded that despite the Practice Manual directing parties in the leave to appeal to deliver written submissions within a specified period, this court could exercise its discretion as to how to handle a matter. I conclude that there was no need for the applicant to bring a condonation application as it might happen that Steenkamp J excused them from doing so in terms of Rule 30(3A) of the Rules.

Application for dismissal of the leave to appeal

[12] The respondent avers that the leave to appeal should be dismissed, as they are of the view that the applicant delayed the prosecution of the leave to appeal. Further, they submit that the reason for the application is that the application for leave to appeal was delivered on 1 June 2018 without a

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condonation application, the condonation application only being filed on 15 September 2018, three months after the application for leave to appeal had been delivered.

[13] The respondent further states that the *ex tempore* judgement was delivered in May 2018, and that "*the full judgement was signed by the Learned Judge on the 02nd August 2018*". The respondent transmitted a notice of intention to dismiss the application for leave to appeal to the applicant's attorneys who did not respond. They also have attached the letter which reiterates the directive of 31 January 2019 by Steenkamp J, among other things, advising that the matter was to be entertained once the applicant complies with paragraph 14.5 of the Practice Manual. Based on the conclusion reached in paragraphs 4 to 11 above, I conclude that the application to dismiss has to be struck off the roll.

<u>Leave to appeal</u>

[14] In November 2014, the respondents referred an unfair labour practice dispute to the Bargaining Council, which was concluded in May 2016 by way of an arbitration award. The respondent brought an application to vary the same arbitration award. The applicant did not oppose this variation application. Neither did the applicant bring an application to review and set aside this variation ruling. The respondent approached this Court in terms of section 158(1)(c) of the LRA to make the variation ruling an order of court. The applicant in opposing that application *inter alia* addressed a letter to the respondent's union advising that "*[it] will abide [by] the ruling of the arbitrator*". This application served before Steenkamp J who then proceeded to make the ruling an order of court, and reaching this decision he *inter alia* held that *"[the ruling] stands and [the applicant ] has not taken it on review*", and quoted the submissions by the applicant's representative that "*the arbitration award has been complied with".*

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[15] The test to grant an application for leave to appeal is that:

> "(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that –
> (a) (i) the appeal would have a reasonable prospect of success; or
> (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;
> (b) the decision sought on appeal does not fall within the ambit of section 16 (2) (a); and
> (c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties".

And the LAC in *PLSMIDTH Buffalo (Pty) Ltd v Hlakola*[5] held that,

> "In the circumstances, I am of the view that the Labour Court was entitled to make the award an order of court. In making an award an order of court, the Labour Court exercised a discretion. It is trite that an appeal court will interfere with a discretion of a court a quo only if it was exercised improperly or unreasonably. For an appeal court to interfere with a discretionary power of a court below, an appellant must show that the court a quo acted capriciously, or acted upon a wrong principle, or in a biased manner, or for insubstantial reasons, or committed a misdirection or an irregularity, or exercised its discretion improperly or unfairly.In considering whether a court a quo had improperly exercised its discretion, the appeal court is not entitled to interfere on the basis that in its opinion it would have come to a different conclusion because this would be substituting its discretion for that of the court a quo.[6]

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[5] [2019] 4 BLLR 363 (LAC), paras 16.
[6] Footnotes omitted.

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[16] In addition to this test, the Labour Appeal Court (LAC) in *Martin and East (Pty) Ltd v NUM and Others*[7] sent this warning to the Labour Court about leave to appeal applications:

> "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."[8]

[17] I must also add that this Court does not grant leave to appeal for the purposes of the LAC to interpret the law for the parties. I have carefully considered the grounds for leave to appeal as submitted by the applicant, and my view is that there it is no prospect that another court might come to a different conclusion than the one that was reached by the late Steenkamp J who exercised his discretion in making the variation ruling an order of Court.

[18] Further, the facts that Steenkamp J relied on as summarised above are not disputed by the applicant. Considering the grounds for leave to appeal, the Respondent wants the LAC to interpret and/or clarify the terms of the variation ruling which is not the task of the LAC. Granting the leave to appeal will be against *Martin's* principle because in making the variation ruling an order of Court, it is not the end of the matter as there is still a possibility of an enforcement process which might be engaged in, such as a contempt application.

[19] I must also indicate that the applicant on 15 October 2018 delivered what it termed a " Supplementary notice of application for leave to appeal". I have perused this notice and clearly the applicant was introducing totally new grounds of leave to appeal. The applicant should have brought a condonation

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[7] (2014) 35 ILJ 2399 (LAC).

[8] Ibid at p. 2406 at paras D – E.

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application in respect of this second notice. Therefore, this court cannot consider this new grounds.

[20] Wherefore, the following order is made:

Order:

1. The condonation for the late delivery of the notice of leave to appeal is granted.
2. The application to dismiss the notice of leave to appeal is struck off from the roll.
3. The supplementary notice of application for leave to appeal is struck off from the roll.
4. The application for leave to appeal is dismissed.
5. No order as to costs.

S. Mabaso

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Adv R Mogagabe SC (with Adv K Bokaba)

Instructed by : Malebye Mdiaung Attorneys

For the Respondent: Adv JL Basson

Instructed by : Tim Du Toit Attorneys.

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