



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR 759/21

In the matter between:

MINERALS OPERATIONS EXECUTIVE (PTY) LTD

t/a MINOPEX

Applicant

and

COMMISSIONER FOR CONCILIATION

MEDIATION AND ARBITRATION

First Respondent

COMMISSIONER COMFORT MOKOBANE, N.O.

Second Respondent

JEREMIAH RAMIKOSI

Third Respondent

Decided: In Chambers

Delivered: 13 January 2025

This order was handed down electronically by circulation to the parties' legal representatives by email. The date for hand-down is deemed to be 13 January 2025.

JUDGMENT: LEAVE TO APPEAL

BECKENSTRATER, AJ

Introduction

[1] On 4 September 2024, this court handed down its judgment granting the Applicant's review application and consequently setting aside the arbitration award of the Second Respondent and remitting the matter to the CCMA for a re-hearing. The Third Respondent then applied for leave to appeal against this judgment on 14 October 2024, outside of the time limits prescribed by the rules of this court. He then delivered written submissions in support of that application on 8 November 2024, outside of the time period required by rule 67(5)¹. At the instance of the court, the Third Respondent then brought a condonation application seeking to have these 2 delays condoned. The condonation application is opposed. I will below deal with both the condonation application and the application for leave to appeal.

[2] The test for the granting of condonation is trite and need not be repeated herein².

[3] In accordance with Section 17(1)(a) of the Superior Courts Act³ leave to appeal may only be given where the appeal would have reasonable prospects of success or there is some other compelling reason why the appeal should be heard. In *Martin and East (Pty) Limited v National Union of Mine Workers and others*⁴ the Labour Appeal Court recorded the following cautionary note:

'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

¹ GN 1665 of 1996: Rules for the Conduct of Proceedings in the Labour Court, repealed with effect from July 2024.

² *Melane v Santam Insurance Company Ltd* 1962 (4) SA 531 (A); *Grootboom V National Prosecuting Authority and Another* 2014 (2) SA 68 (CC); [2013] ZACC 37.

³ Act 10 of 2013.

⁴ (2014) 35 ILJ 2399 (LAC).

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.⁵

[4] In considering this application, this Court must, however, be mindful that the grounds of review fall to be determined in accordance with the test laid down in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*⁶ and thus require a determination of whether the Commissioner's findings were reasonable, and not whether they were correct.

[5] I have considered the submissions filed by both parties in respect of the application for leave to appeal as well as the affidavits exchanged in the condonation application. For the purposes of this judgment, I do not intend repeating or expressly dealing with all the material covered therein but will simply deal with the most material issues.

Condonation Application

[6] As set out above, there was a delay in launching of the application for leave to appeal and the delivery of submissions. Neither of these delays were significant. The Third Respondent's condonation application sets out that in the first instance, upon receipt of the judgment the Third Respondent himself, "*without first obtaining any legal advice from my legal representatives*", wrote to the CCMA requesting that the matter be set down for a new arbitration in accordance with the judgment.

⁵ At 2406 B-D.

⁶ 2008 (2) BCLR 158 (CC); (2007) 28 ILJ 2405 (CC).

[7] Not surprisingly the Applicant opposed the condonation application and complained that the Third Respondent was blowing hot and cold. He had not withdrawn this request for the CCMA to enroll a fresh arbitration while at the same time, he was seeking leave to appeal. The Third Respondent's above conduct may well amount to a pre-emption of his right to appeal. A litigant is not entitled to acquiesce in a judgment and later seek to challenge that judgment.

[8] I, however, must take into account several factors. Firstly, while the Third Respondent was legally represented at all times he referred the matter to the CCMA without taking legal advice. Secondly, the principle of preemption has its basis in waiver. Waiver is not lightly presumed. Thirdly, even where the principle of preemption applies its application is not absolute.⁷ Fourthly, the Third Respondent has filed no replying affidavit and the issue of pre-emption has not been fully ventilated nor argued before me.

[9] In these circumstances and while I make no final pronouncement on the issue, I am not able to find that the Third Respondent had pre-empted his right of appeal by applying to the CCMA for a new arbitration in accordance with the judgment.

[10] The Third Respondent then further explains in his condonation application that the balance of the delays was caused by what he perceived to be the need to obtain separate legal advice on his prospects of success on appeal and thereafter reverting to his initial advocate for the purposes of drafting the application for leave to appeal. He further explains that his advocate had been ill from 15 to 24 October 2024 and faced a backlog upon his return to work.

[11] Given this explanation and my views on the Third Respondent's prospects of success set out below, I grant the condonation sought.

Leave to Appeal

⁷ *Booi v Amathole District Municipality & Others* (2022) 43 ILJ 91 (CC); [2021] ZACC 36 at paras 29-33.

[12] In summary, the Third Respondent sought leave to appeal alleging 3 errors in the judgment in relation to which another court could come to a different conclusion.

[13] The Third Respondent contended that this court failed to attach any weight to the WhatsApp communication of Saturday 13 June 2020, between the Third Respondent and the mechanic. This is not correct. The judgment pertinently noted that these WhatsApp messages provided some corroboration for the Respondent's version but were not without difficulties, particularly as the court had found the evidentiary burden was on the Third Respondent. The court cannot thus be said to have ignored those messages. This ground cannot succeed.

[14] The Third Respondent further persisted in its argument that the charges brought against the Third Respondent amounted to a splitting of charges as set out in the case of *Specialty Metals*.⁸ The facts of this matter are, to my mind, distinguishable from those of the *Specialty Metals* case. The present case has to do with an allegation that the Third Respondent had dishonestly pre-planned his unauthorized absence from work. This is different to the situation when an excuse for not being at work is rejected as a lie. This is what distinguishes premeditated misconduct from other misconduct. This ground cannot succeed.

[15] The Third Respondent argued that this court had misapplied the law applicable to reviews. The Third respondent emphasized that even if there are errors in a Commissioner's findings, the award cannot be reviewed unless the result was unreasonable on the evidence before the Commissioner. In the judgment I was expressly aware of this distinction and grappled with it, eventually concluding in paragraph 33 that, as the Third Respondent bore an evidentiary burden, he could not reasonably have been said to have discharged that burden if the evidence of Ntuli and MkhaliPhi stood.

⁸ *Specialty Metals CC v Ntshangane* [1998] 3 BLLR 305 (LC); [1998] ZALC 69.

[16] However, another court could well find that even if the Commissioner's finding was incorrect, it was not unreasonable. In other words, another court could find that it was reasonable of the Commissioner to accept that the Third Respondent's car troubles were an unforeseen event and thus that his absence from work on that Monday was not pre-planned notwithstanding his having been heard stating that he would not be at work on the Monday. It is arguable that my own sense that this is highly unlikely (and thus not probable) does not mean that it is unreasonable.

[17] In the above circumstance, I find that another court may come to another conclusion on the final weighing of the evidence in this matter and consequently leave to appeal should be granted.

[18] I thus make the following order:

Order

1. Condonation for the late noting of the application for leave to appeal and late filing of submissions is granted.
2. Leave to appeal is granted.
3. Costs are costs in the appeal.

C. Beckenstrater
Acting Judge of the Labour Court of South Africa