



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable
Case No: JR170/24

In the matter between:

ESKOM HOLDINGS SOC LTD

Applicant

And

**COMMISSION FOR CONCILIATION, MEDIATION
ARBITRATOR**

First Respondent

DAN PRETORIUS N.O.

Second Respondent

ANELE GXUMISA

Third Respondent

Decided: In Chambers

Delivered: 08 July 2025

JUDGMENT

MAFA-CHALI, AJ

Introduction:

[1] On 26 February 2025, this Court handed down judgment in terms of which the arbitration award dated 25 September 2023 handed down by Commissioner Dan Pretorius, under case number GAJB9125-23 is reviewed and set aside; and the Applicant ordered to pay the Applicant an amount equivalent to six-month salary at G17 level within 14 days.

[2] The Applicant subsequently requested written reasons for the order on 13 March 2025, which reasons were furnished on 10 April 2025 by this Court.

[3] On 12 May 2025, the Applicant filed an application for leave to appeal against the whole of the judgment and orders of this Court. The Applicant also filed an application for condonation for the late filing of the application on 16 May 2025. Both applications are opposed by the Third Respondent.

[4] I will first deal with the issue of condonation.

Condonation:

The test for grant of condonation

[5] The relevant legal principles to be applied in an application for condonation are well established. The onus is on the Applicant to satisfy the court that condonation should be granted. In employment disputes there is an additional consideration which applies in determining whether the onus has been discharged, as was held in *National Union of Metalworkers of SA on behalf of Thilivali v Fry's Metals (A Division of Zimco Group) and others*¹.

‘There is, however, an additional consideration which applies in employment disputes in determining whether an applicant for condonation has discharged this onus. This is the fundamental requirement of expedition. The Constitutional Court has, as a matter of fundamental principle, confirmed that all employment law disputes must be expeditiously dealt with and any determination of the issue of good cause must always be conducted against the back drop of this fundamental principle in employment law.’

¹ (2015) 36 ILJ 232 (LC).

[6] This Court has a discretion which must be exercised judicially on a consideration of the facts of each case and it is a matter of fairness to both sides. In *Melane v Sanlam Insurance Co Ltd*² it was held that:

‘.... Among the facts usually relevant, are the degree of lateness, the explanation therefore, the prospects of success and the importance of the case. Ordinarily these facts are interrelated, they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there will be no point in granting condonation. What is needed is an objective conspectus of all the facts.’

[7] In *Toyota SA Motors (Pty) Ltd v CCMA and Others*³ the Constitutional Court emphasised that one of the fundamental purposes of the Labour Relations Act⁴ (LRA) was to establish a system for the quick adjudication of labour disputes. When it assesses the reasonableness of a delay, the court must not lose sight of this purpose.

[8] The Courts have endorsed the principle that where there is a delay with no reasonable, satisfactory and acceptable explanation, condonation may be refused without considering the prospects of success and to grant condonation where the delay is not explained, may not serve the interests of justice. The expeditious resolution of labour disputes is a fundamental consideration. As condonation for delays in all labour law litigation is not simply there for the taking, the starting point is that an applicant in an application such as the present seeks an indulgence from the court and bears the onus to show good cause.

The degree of lateness

² 1962 (4) SA 531 (A) at 532 C - F.

³ 2016) 37 ILJ 313 (CC).

⁴ Act 66 of 1995 as amended

[9] The Labour Court Rule 67(3)⁵ provides that an application for leave to appeal is to be made within 15 days of the date of the judgment against which leave to appeal is sought. If the reasons for the court's order are given on a day later than the judgement or order, the application for leave to appeal must be made 10 days after the date on which the reasons are given, except that the court may, on good cause shown, extend that period. The judgment was handed down on 26 February 2025. The reasons for judgement were given on 10 April 2025 and the 10-day period prescribed in the Rules, expired on 24 April 2025, whereas the application for leave to appeal was lodged on 12 May 2025. The application is therefore 12 days late.

[10] The degree of lateness should however not be considered in isolation.

Explanation for the delay

[11] As the Applicant seeks an indulgence from the Court, it bears the onus to satisfy the Court that condonation should be granted. The Applicant has to provide the Court with a full explanation for every period of the delay. This means that the explanation for the delay has to be compelling, convincing, comprehensive, and should cover every period of the delay.

[12] In the founding affidavit, the Applicant gave several explanations and steps followed internally since 16 April 2025 in order to secure budget to appeal the judgement up until funds were obtained, and attorneys briefed to file the application which was eventually filed so on 12 May 2025. Several internal email communications have been submitted in support of the submissions.

Prospects of Success

[13] The Applicant contended that it has reasonable prospects that the Labour Appeal Court would find that the Labour Court erred in the following respects:

⁵ GN 4775 of 3 May 2024: Rules Regulating the Conduct of the Proceedings of the Labour Court (effective 17 July 2024)

(a) The Labour Court erred in applying grounds of review which were not pleaded in the review application, in that there was no reviewable defect pleaded nor was it pleaded that the decision arrived at by the Commissioner was a decision that a reasonable decision maker would have come to, but instead the Third Respondent pleaded that the ruling made by the Commissioner is wrong and set out reasons for that, and thus this was an appeal dressed up as a review which the Labour Court should have dismissed on that basis.

(b) The Labour Court erred in finding that the failure to shortlist and interview the Third Respondent constituted an unfair labour practice, as in paragraph 9, the Court referred to the decision on promotion and in paragraph 10, the Court held that the onus was on the Third Respondent to demonstrate that failure to promote him was unfair. However, the Court failed to distinguish between the failure to shortlist/interview the Third Respondent, and the failure to appoint/promote him.

(c) The Court focussed on whether the Third Respondent met the requisite minimum qualifications to be shortlisted, and having found that he did, the Court concluded that the award was unreasonable. The Court did not make an analysis of findings regarding whether or not the Third Respondent ought to have been appointed if shortlisted or interviewed.

(d) On the issue of relief, it was submitted that the Court erred in ordering the Applicant to pay the Third Respondent 6 months' compensation within 14 days. as that was not the order he sought in his notice of motion. The only prayer was for the arbitration award to be reviewed and set aside; and even if the prayer of compensation was made, the Labour Court did not make an order substituting the award with an order of compensation.

(e) It was further submitted that the permissible orders in the event of reviewing and setting aside of the award include the remittal of the matter to the CCMA or an order substituting the arbitration award with an order of its own in terms of section 158(1)(c) of the LRA; but the Third Respondent did not pursue an application under section 158 (1)(c) of the LRA. As such the Court did not have powers to make a substantive award on its own regarding relief of 6 months' compensation without the relief being in a form of a substantive order.

(f) Furthermore, even if the Court had made a substitution order, an order of 6 months' compensation was not just and equitable and amounted to a misdirection and an error.

(g) The Court failed to inquire into and determine whether the Third Respondent had discharged the onus of demonstrating that the failure to promote/appoint him was unfair; instead it focussed on whether he ought to have been shortlisted/interviewed; and on evidence the Third Respondent did not discharge the onus of demonstrating that the failure to promote/appoint him was unfair. There was no basis for a compensation award in his favour. There was no basis to make such an order.

Prejudice

[14] It was submitted that the Applicant would suffer significant prejudice if condonation is refused as it will be saddled with a judgement which can operate as a precedent against it in future matters as the order to pay the Third Respondent is of significant sum of money, and the prejudice it stands to suffer outweighs the prejudice the Third Respondent would suffer. The Third Respondent would not be prejudiced as he will be able to oppose the appeal on the merits if leave is granted.

[15] It was submitted a proper case has been submitted by the Applicant for granting condonation of the application for leave to appeal.

[16] The Third Respondent's grounds for opposing condonation are that the Applicant as a state owned entity was served with the court order on 06 March 2025 as well as the reasons for judgement on 10 April 2025; and is therefore disingenuous to raise the budget issues as a defence for the delay since the budgets for the entity are allocated according to their mandates, objectives and operational plans. Custodians of employee and industrial relations division have budget of legal fees. It was submitted that reference to Public Finance Management Act (PFMA)⁶ without citing the relevant section prohibiting the use of the budget for legal fees cannot be accepted; but in fact it is a contravention of section 57(c) of the PFMA as it is a

⁶ Act 1 of 1999

fruitless and wasteful expenditure because condonation could have been avoided had reasonable care been exercised.

[17] The Third Respondent also argued that the Applicant knew about the Court order and should have moved funds as early as 06 April 2025 from one cost centre to another to make provision for the legal funds. The Applicant ought to have been aware of the Court's rules and consequences of intentional disregard.

[18] It was also further submitted by the Third Respondent that the Applicant decided not to oppose the review application and insisted that the Applicant did not fully understand the Court's reasons for judgement and furthermore that he was denied a fair opportunity to compete in the interview process with other candidates who were shortlisted; and the incumbent did not meet the minimum requirements; and that the Third Respondent will suffer prejudice if condonation is granted as the Applicant has financial resources and legal assistance to pursue the matter. Therefore, it would be in the interests of expeditious resolution of disputes, principle of finality and interests of justice to dismiss the condonation application. The Applicant has demonstrated disrespect and disregard of this Court's rules and abuse of funds in delaying to file the application for leave to appeal and such the delay is a consequence of their own negligence and self-created. Therefore, the condonation application must be dismissed as the Applicant has failed to make a good case for condonation to be granted.

[19] I find that the delay as mentioned above is not substantial, the reasons proffered for the delay is not so unreasonable as to amount to no reason at all and this court will accordingly exercise its discretion and grant condonation in the interests of justice.

[20] I have considered the application for leave to appeal and the written representations in chambers.

[21] The application for leave to appeal sets out various grounds of appeal as indicated above. The Third Respondent's submissions opposing leave to appeal are

also similar to those made in the affidavit opposing the condonation application. I will not burden this judgment by listing all of the grounds again in details.

Evaluation

[22] I do not intend to deal with each and every ground of appeal separately. Much of the grounds raised by the Applicant are grounds that were raised in the condonation affidavits.

The test for leave to appeal

[23] It is trite that there is no automatic right of appeal against a judgement of the Labour Court. Section 166(1) of the LRA provides that any party to any proceedings before the Labour Court may apply for leave to appeal to the Labour Appeal Court (LAC) against any final judgement or final order of the Labour Court. To be entitled to leave to appeal, an applicant must satisfy this Court that there is a reasonable prospect that another Court would come to a different conclusion⁷.

[24] The test is not whether there is a possibility that another court could come to a different conclusion. The test is whether there is a reasonable prospect that another court would come to a different conclusion.

[25] When considering the standard in applications for leave to appeal, section 17(1) of the Superior Courts Act⁸ applies. That section reads:

“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.”

[26] The threshold to cross for an audience with an appeal court is a high one, requiring a strong reasonable prospect that another court would come to a different decision, or that there are compelling reasons justifying the attention of that court.

⁷ See *Woolworths Ltd v Matthews* [1999] 3 BLLR 208 (LC)

⁸ Act 10 of 2013

[27] In *Seathlolo & others v Chemical Energy Paper Printing Wood & Allied Workers Union & others*⁹, Judge Van Niekerk, discussing the test to be applied states:

“The traditional formulation of the test that is applicable requires the court to determine whether there is a reasonable prospect that another court may come to a different conclusion to that reached in the judgment that is sought to be taken on appeal the use of the word “would” in s 17(1)(a)(i) is indicative of a raising of the threshold since previously, all that was required for the applicant to demonstrate was that there was a reasonable prospect that another court might come to a different conclusion...Further this is not a test to be applied lightly – the Labour Appeal Court has recently had occasion to observe that this court ought to be cautious when leave to appeal is granted...The statutory imperative of the expeditious resolution of labour disputes necessarily requires that appeals be limited to those matters in which that there is a reasonable prospect that the factual matrix could receive a different treatment or where there is some legitimate dispute on the law...”

[28] In deciding this application for leave to appeal, I am also guided by the dicta of the Supreme Court of Appeal where it held in *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd and Others*¹⁰ that: “The need to obtain leave to appeal is a valuable tool in ensuring that scarce judicial resources are not spent on appeals that lack merit. It should in this case have been deployed by refusing leave to appeal”.

[29] In *Smith v S*¹¹, the test was summarised as follows;

“What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote but have a realistic chance of succeeding. More is required to

⁹ (2016) 37 ILJ 1485 (LC)

¹⁰ [2013] 1 ALL SA 375 (SCA) (20 September 2013)

¹¹ [2020] ZALCJHB 195 (7 May 2020)

be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal”.

[30] The provisions of section 17 of the Superior Courts Act is the starting point in considering applications of this nature. These specifically provide that:

‘17 (1) leave to appeal may only be given where a 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.’

[31] Central to the determination of applications for leave to appeal is whether there are reasonable prospects of success in the appeal. This test as outlined in section 17(1) of the Superior Court Act differs to the traditional test as previously stated by our courts. Therefore, the provisions of section 17(1) raise the threshold of the test for leave to appeal.

[32] An applicant in an application for leave to appeal must therefore convince the court *a quo* that it has reasonable prospects of success on appeal. What the test requires is the reasonable likelihood that another court, presented with the same facts and evidence as this Court, could come to a different conclusion than the one arrived at by this Court.

[33] This Court and the LAC have in the past stressed that leave to appeal should not be lightly granted because meritless appeals delay the final resolution of disputes.

[34] Reasonable prospects of success mean that the applicant has to show that another Court, faced with the same material, could come to a different conclusion, or an appeal can succeed if there is a legitimate dispute of the law.

[35] The submissions made by the Applicant is that this Court dealt with a review ground that the Third Respondent did not plead as he had pleaded that the Commissioner was wrong and thus it is an appeal not review. The Third Respondent may have used the word 'wrong' in his review application; however the explanations the Third Respondent gave on the various grounds for review fall within the ambit of reviewable grounds based on the findings made by the Commissioner in his award, which revolves around the submissions that the Commissioner failed to properly consider the relevant evidence presented before him at the arbitration by the parties in coming to the conclusion that the Applicant did not commit unfair labour practice towards the Third Respondent.

[36] The Third Respondent in his review application submitted that the arbitrator failed to consider the evidence that he met the minimum requirements for the job compared to the incumbent, and that he possessed the required experience in the position advertised and ought to have been shortlisted. The primary grounds for review relates to the arbitrator's assessment of the evidence in the matter. These are not the grounds for appeal but rather for review. The Applicant argued that this Court erred in dealing with the issue of job requirements and did not analyse whether or not the Third Respondent ought to have been appointed if shortlisted or interviewed.

[37] The Court dealt with whether the award itself meets the requirement of reasonableness and whether it fell within a range of decisions that a reasonable decision-maker could make. The Court therefore broadly evaluated the merits of the dispute and considered whether, if the arbitrator's reasoning is found to be unreasonable, the result is, nevertheless, capable of justifications for reasons other than those given by the arbitrator and found that the result was unreasonable as it was entirely disconnected with the evidence.

[38] The Applicant also raised an issue with regard to the relief of 6 months' compensation awarded to the Third Respondent under the circumstances it was not

prayed for in the notice of motion as the Applicant only prayed for an order to review and set aside the arbitration award; and the Third Respondent did not also pray for the substitution order. However, the Third Respondent prayed for further or alternative relief the Court may deem proper.

[39] It must be pointed out that if the reviewing court comes to a conclusion that the commissioner has committed misconduct or a gross irregularity or has exceeded his powers in terms of section 145(2) of the LRA because the decision is not justifiable in terms of the reasons given, then the arbitration award is reviewable and to be set aside.

[40] The Court has wider powers to order make in the review and set aside of the award in terms of section 158 of the LRA. If the award or ruling is ultimately set aside by the Labour Court, the Labour Court may make any order that it considers appropriate in relation to the procedure to be followed in determining the dispute. The Labour Court may rule that the dispute be remitted back to the CCMA or Bargaining Council and be heard afresh before a different Commissioner, or the Labour Court may rule that it will correct the CCMA or Bargaining Council award or ruling itself as it sees fit, or substitute with the Court's own order. The Court would not necessarily be restricted to the prayers sought in the Applicant's notice of motion in the review application when making an order if the award is reviewed and set aside.

[41] It must be noted that the Applicant did not oppose the review application and has not even in the application for leave to appeal address the Court on the reasons why the review application was not opposed. The Applicant in a way is actually raising its defence to the review grounds in this appeal application. The Court determined the review application only based on the Third Respondent's unopposed and uncontested submissions and arguments together with the records of the arbitration proceedings.

[42] Having had regard to the submissions made on behalf of the Applicant in respect of this application, these do not come close to meeting the threshold referred to above.

[43] *In casu*, applying the principles applicable to applications for leave to appeal, I am not persuaded that there are reasonable prospects that the LAC would arrive at a different conclusion than the one arrived at by this Court. The Applicant failed to make out a case for leave to appeal to be granted.

[44] In light of the above, and having had regard to the submissions made in regard to the application for leave to appeal, the opposition thereto, and further upon a reflection of my judgment, I am of the view that the Applicant has failed to demonstrate that there are reasonable prospects that the LAC will come to a different decision to that reached in my judgment.

[45] I am not persuaded that any appeal would have a reasonable prospect of success. Furthermore, there are no other compelling reasons why leave to appeal should be granted.

[46] There is no reason why a cost order should be made in this application.

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

Order

1. The application for leave to appeal is dismissed.
2. There is no order as to costs.

G. Mafa-Chali

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Considered in Chambers

For the Third Respondent: Considered in Chambers