



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JR18/21

In the matter between:

**CITY OF JOHANNESBURG
METROPOLITAN MUNICIPALITY**

Applicant

and

AMOS MTHIMUNYE N.O.

First Respondent

**SOUTH AFRICAN LOCAL GOVERNMENT
BARGAINING COUNCIL**

Second Respondent

PREGALNATHAN NAIDOO

Third Respondent

Heard: In Chambers

Delivered: 28 August 2025

JUDGMENT: APPLICATION FOR LEAVE TO APPEAL

MOLOTSI, AJ

Introduction

[1] This is an application for leave to appeal against the entire judgment handed down on 17 July 2024. In the judgment, this Court held that it does not have jurisdiction to adjudicate the review application as the application for review was referred late. The applicant launched the application for leave to appeal around August 2024. This Court was not aware that the applicant launched the application for leave to appeal until the office of the Honourable Judge President of this Court forwarded a letter dated 12 May 2025 to me.

[2] The letter was from the third respondent's attorneys of record. The letter was forwarded to me on 22 July 2025. This Court only became aware of the application for leave to appeal on 22 July 2025.

[3] In the letter, the attorneys of record of the third respondent stated that they have not received the judgment on the application for leave to appeal. Given the delay occasioned by the above, this Court gave an undertaking to deliver the judgment before the end of August 2025. The Court file was delivered to my chambers during July 2025. This Court profusely apologize to both parties for the delay in delivering the judgment.

Grounds for leave to appeal

[4] The applicant submitted the following grounds for leave to appeal:

4.1. The third respondent raised a point *in limine* in the answering affidavit alleging the late filing of the review application.

4.2. At the commencement of the hearing of the review application, the third respondent's representative on his behalf abandoned the point *in limine*.

4.3. The learned Acting Judge erred in applying his mind to the consequences of the aforesaid abandonment.

4.4. Had he so applied his mind, the learned Acting Judge would have concluded that by the abandonment of the point *in limine*, there ceased to be a justiciable dispute between the parties on this point.

4.5. There no longer existing a *lis* between the parties in respect to the aforesaid, the learned Acting Judge erred in considering the point *in limine* and premising his judgment against the applicant on that point.

4.6. In the alternative to 1.5, the learned Acting Judge erred by ignoring the abandonment of the point *in limine* without affording the applicant an opportunity to address him on that point.

4.7. The learned Judge erred in finding that compliance or otherwise with the periods set out in section 145 of the Labour Relations Act¹ (LRA), is determinative of the jurisdiction of this Honourable Court to hear the matter. The learned Acting Judge failed to consider the distinction between the regularity of proceedings and the existence of jurisdiction.

4.8. In these premises, the learned Acting Judge erred in finding that he lacked jurisdiction to determine the review application.

[5] The application for leave to appeal is opposed by the third respondent, Pregalnathan Naidoo.

Legal principles: Application for leave to appeal

[6] The test for leave to appeal is laid down in section 17(1) of the Superior Courts Act². Section 17(1) of the Act provides that:

‘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) ...’

[7] The test for leave to appeal is a stringent test. In *MEC for Health, Eastern Cape v Mkhitha and Another*³, the Supreme Court of Appeal held that:

‘An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. A mere possibility of success, an arguable case or one that is not hopeless, is not enough.

¹ Act 66 of 1995, as amended.

² Act 10 of 2013.

³ [2016] ZASCA 176; [2016] JOL 36940 (SCA) at para 17.

There must a sound, rational basis to conclude that there is a reasonable prospect of success on appeal.’

[8] Did the applicant provide sound and rational basis to conclude that there is a reasonable prospect of success on appeal. In order to answer this question, one must look at the grounds for leave to appeal. The main thrust of the leave to appeal is that the third respondent through its representative abandoned the point *in limine* that the review application was filed late and that this Court erred in applying its mind to the consequences of the aforesaid abandonment.

[9] The applicant attached the transcribe record of the review proceedings and it’s clear that the third respondent’s representative abandoned the point *in limine*. Does the fact that the third respondent abandoned the point *in limine* confer jurisdiction to this Court under the circumstances wherein the review application is late? The answer is a resounding no. The jurisdiction of this Court is not determined by the parties abandoning their points *in limine*.

[10] The Labour Court is a creature of statute and its jurisdiction is determined by the statute, namely the LRA. In this instance, it is the statute and not the parties which confer jurisdiction to this Court. Section 145(1) of the LRA requires the applicant to apply to the Labour Court to review the arbitration award within six weeks of the date that the award was served on the applicant. The parties cannot agree on their own to confer jurisdiction to the Court when the provisions of the LRA have not been complied with. In *Gcaba v Minister of Safety and Security and Others*⁴, the Constitutional Court held that:

‘The specific term “jurisdiction”, which has resulted in some controversy, has been defined as the “power or competence of a Court to hear and determine an issue between parties.’

[11] The third respondent correctly referred to the judgment of the Labour Appeal Court in *South African Transport and Allied Workers’ Union and another v Tokiso*

⁴ 2010 (1) SA 238 (CC); 2010 (1) BCLR 35 (CC) at para 74.

*Dispute Settlement and others*⁵. In terms of the *stare decisis* principle, which is a fundamental principle of the rule of law and which creates legal certainty, I am bound to follow the LAC judgment. It is trite that when non-compliance relates to a statutory provision, i.e. as set out in an Act, then failure to comply with those provisions goes to jurisdiction.

[12] In the respondent's submissions, a point is made that it is for the parties to set out and define the nature and scope of the dispute they want the court to adjudicate upon. Jurisdiction is not akin to a pre-trial conference minute. No agreement of the parties can confer jurisdiction on the Court when the Court *ipso facto* has no jurisdiction. It is trite that a judgment granted by a court without jurisdiction is considered a nullity. It appears that this is what the applicant expected this Court to do when the point *in limine* was abandoned by the third respondent, i.e. to issue a judgment which would be considered a nullity. This Court, with respect, was not prepared to do that.

[13] The ground for leave to appeal that this Court erred by ignoring the abandonment of the point *in limine* without affording the applicant an opportunity to address the Court on the point *in limine* has no merit. The point *in limine* was raised in the third respondent's answering affidavit. The applicant was therefore aware of the point *in limine*. The applicant failed to file a replying affidavit. The applicant was legally represented during the review proceedings. When the third respondent abandoned the point *in limine*, the applicant's legal representative ought to have known that the abandonment of that point *in limine* did not miraculously give the Court jurisdiction. It is not the duty of the Court to give legal advice to legal representatives.

[14] Based on the above, there is no sound and rational basis to grant leave to appeal. The respondent has no reasonable prospects of success on appeal. There is no legitimate point of law which requires the intervention of the appeal Court. There is no factual matrix which requires a different treatment by the appeal Court. It is trite that this Court has no jurisdiction to adjudicate a review application which is late.

⁵ [2015] 8 BLLR 818 (LAC); [2015] ZALAC 12.

[15] In the result, the following order is made:

Order

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

H Molotsi
Acting Judge of the Labour Court of South Africa