THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: J 2453/16

In the matter between:

TIMSON TSHILILO	**First Applicant**
NOMVUALA HADI	**Second Applicant**
THEBEITSHILE MOKOTO	**Third Applicant**
NKETHENI MUTHAVHI	**Fourth Applicant**
VUKILE MLUNGWANA	**Fifth Applicant**
NONCEBA MBILINI	**Sixth Applicant**
VUYANI SINGONZO	**Seventh Applicant**
PAUL TLHABANE	**Eighth Applicant**
MEISI SIKALEDI	**Ninth Applicant**

and

CITY OF JOHANNESBURG AND OTHERS	**Respondents**

Heard: **Considered in Chambers**

Delivered: **8 March 2017**

Summary: Leave to appeal – no proper grounds made out – application for leave to appeal dismissed

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JUDGMENT

SNYMAN, AJ

Introduction

[1] This matter concerned an application initially brought by the current cited respondent, the City of Johannesburg, against several respondents, which included the current applicants for leave to appeal. At the heart of the case was a dispute between two factions within SAMWU, one of the respondents, as to who was the legitimately elected officials and office bearers of SAMWU. Following a proposal I had made, all parties agreed that the two factions would each argue their respective cases as to why the members of each of these factions should be considered to be the legitimately elected and appointed current office bearers of SAMWU. Such argument was then presented.

[2] In a written judgment handed down on 14 December 2016, I found in favour of what I called the 'Molalenyane faction' in the judgment, and against the "Tshililo faction', the latter being all the current applicants for leave to appeal.

On 21 December 2016, the applicants filed an application for leave to appeal, followed by written submissions in the application for leave to appeal on 23 January 2017. The respondents did not engage in the leave to appeal application and to date of considering of this application in March 2017, have filed no written submissions.

[3] Further, Clause 15.2 of the Practice Manual provides that an application for leave to appeal will be determined by a Judge in chambers, unless the Judge directs otherwise. I see no reason to direct otherwise and will therefore determine the applicant's leave to appeal application in chambers.

Non compliance with the Practice Manual

[4] In terms of clause 15.2 of the Practice manual, the applicant in a leave to appeal application, had to file the required written submissions within 10 days. The leave to appeal application was filed on 21 December 2016, but the applicants' written submissions were only filed on 23 January 2017. Considering that the written submissions had to have been filed by 9 January 2017, the written submissions are thus some two weeks' late. There is no application for condonation for such late filing. The applicants have thus not complied with the Practice Manual.

[5] In *Ralo v Transnet Port Terminals and Others*[1] the Court said

> '…. The Practice Manual contains a series of directives, which the Judge President is entitled to issue. In essence, the manual sets out what is expected of practitioners so as to meet the imperatives of respect for the court as an institution, and the expeditious resolution of labour disputes (see clause 1.3). While the manual acknowledges the need for flexibility in its application (see clause 1.2), its provisions are not cast in the form of a guideline, to be adhered to or ignored by parties at their convenience.'

[6] The failure to file written submissions in the leave to appeal application in time, without applying for condonation for such late filing, could result in dismissing the application for leave to appeal on this basis alone. But for the sake of completeness, I will nonetheless consider the merits of the applicants' application for leave to appeal.

<u>The merits of the application</u>

[7] In deciding whether to grant leave to appeal to the Labour Appeal Court, the Labour Court must determine whether there is a reasonable prospect that another Court may come to a different conclusion to that of the Court *a quo*.[2] In *Seathlolo and Others v Chemical Energy Paper Printing Wood and Allied*

[1] (2015) 36 ILJ 2653 (LC) at para 9. See also *Tadyn Trading CC t/a Tadyn Consulting Services v Steiner and Others* (2014) 35 ILJ 1672 (LC) at para 11.
[2] See *Karbochem Sasolburg (A Division of Sentrachem Ltd) v Kriel and Others* (1999) 20 ILJ 2889 (LC) at 2890D. See also *National Education Health and Allied Workers Union v University of Cape Town and Others* (2003) 24 ILJ 95 (CC)*; Ngcobo v Tente Casters (Pty) Ltd* (2002) 23 ILJ 1442 (LC) ; *Volkswagen SA (Pty) Ltd v Brand NO and Others* (2001) 22 ILJ 993 (LC); *Singh and Others v Mondi Paper* (2000) 21 ILJ 966 (LC); *Glaxo Welcome SA (Pty) Ltd v Mashaba and Others* (2000) 21 ILJ 1114 (LC).

Workers Union and Others[3] the Court recently considered the above test for leave to appeal and held:

> 'The traditional formulation of the test that is applicable in an application such as the present 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. … 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, as should the Labour Appeal Court when petitions are granted. The statutory imperative of the expeditious resolution of labour disputes necessarily requires that appeals be limited to those matters in which there is a reasonable prospect that the factual matrix could receive a different treatment or where there is some legitimate dispute on the law …'

[8] From the outset, I must say that I find the applicants' criticism in the written argument filed, of being deprived of an opportunity to further address the merits of their case, astounding. As I have recorded in my judgment, there were a number of options given to the parties on how to have this matter resolved. After some debate and consideration, all the parties indicated that they were happy to argue the merits of the matter on the basis of the affidavits as it stood before me. To now cry foul because of a lack of further opportunity to answer is simply unacceptable.

[9] I decided this matter principally on the basis of what turned out to be irrefutable evidence, and in particular the evidence relating to the outcome of the prior legal proceedings brought by the current applicants for leave to appeal. In the end, much of what actually happed was not in dispute. Each of the factions, in short, actually did what they said they did as recorded in the affidavits. The simple question was which conduct was legitimate, and which was not. I remain convinced that there can be no doubt that the applicants' conduct was not legitimate, and I do not consider that there is any reasonable prospect of another court coming to a different conclusion.

[10] The applicants, in the application for leave to appeal, have to some extent changed tack. When arguing this matter before me, they contended that their

[3] (2016) 37 ILJ 1485 (LC) at para 3.

actions were legitimate and those of the other faction were not. Now it is argued that the actions by both factions are not legitimate. To change approach at this late stage, and after judgment has been handed down, is not palatable. The applicants must stand or fall by the approach they adopted when this matter was originally argued. It was an all or nothing approach by each faction, and the applicants came up second. They must live with that decision. But in any event, the applicants have advanced no compelling reasons as to how another court could reasonably decide otherwise where it comes to my findings that the actions of the Molalenyane faction were indeed legitimate. The applicants have not made out a proper case for leave to appeal in this regard.

[11] In this matter, there are no complex principles of law. It was in principle a determination of fact. In the end, and considering the sets of affidavits by both factions, fully supported by comprehensive annexures, made it clear to me that there were no material factual disputes that needed to be resolved. The documents speak for themselves. In particular, there can be no legitimate answers by the applicants to the various Court orders forming part of the pleadings. I do not believe that there is any reasonable prospect that another Court may decide that preferring the conduct of the Molalenyane faction is incorrect.

[12] There is one remaining consideration. As I have said in my original judgment, this is not a situation that should be permitted to linger. Whilst the issue of who is the legitimate office bearers of SAMWU remains open, the City of Johannesburg and the members of SAMWU are being prejudiced. A leave to appeal application with little merit must not serve to further compound these problems, especially in the interest of expedition. The following *dictum* from the judgment in *Martin & East (Pty) Ltd v National Union of Mineworkers and Others*[4] is apposite:

> '… The Labour Relations Act was designed to ensure an expeditious resolution of industrial disputes. This means that courts, particularly courts in the position of the court a quo, need to be cautious when leave to appeal is granted.'

[4] (2014) 35 *ILJ* 2399 (LAC) at 2405J-2406A

[13] I thus conclude that the applicants have shown no reasonable prospect that another Court may come to a different conclusion. This considered, as coupled with the non compliance with the Practice Manual, convinces me that the application for leave to appeal falls to be dismissed.

[14] Because the respondents did not engage in the leave to appeal application, I shall make no order as to costs.

Order

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

1. The applicants' application for leave to appeal is dismissed.

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S Snyman

Acting Judge of the Labour Court

Appearances:

For the Applicants: M C Mudau Attorneys

For the Respondents: Moodie and Robertson Attorneys; and

Maenetja Attorneys