REPUBLIC OF SOUTH AFRICA

Not reportable

THE LABOUR COURT OF SOUTH AFRICA, JOHANNEBURG

JUDGMENT

Case no: JR 761/14

In the matter between:

NEHAWU obo VUYO PEACH	Applicant
and	
DEPARTMENT OF AGRICULTURE: FREE STATE	First respondent
Mzondi MOLAPO N.O.	Second respondent
GPSSBC	Third respondent

Delivered: 8 March 2017

RULING ON LEAVE TO APPEAL

STEENKAMP J

Introduction

[1] The applicant, NEHAWU, acts on behalf of its member, Mr Vuyo Peach. It seeks leave to appeal against this Court's judgment of 13 December 2013.

[2] In the judgment, an arbitration award of the second respondent was reviewed and set aside. The underlying dispute was remitted to the Bargaining Council (the third respondent) for a fresh arbitration. There was no costs order. Yet the union seeks leave to appeal the judgment, arguing that the award should not have been reviewed, despite its attorneys' own submission that the merits could not be decided on a limping record.

[3] The application for leave to appeal was filed late. The applicant applied for condonation a month after it had belatedly filed the notice of application for leave to appeal. I shall deal with that aspect first. If the application for condonation fails, it follows that the application for leave to appeal fails.

Condonation

[4] I shall consider the application for condonation in the light of the well-known principles in *Melane v Santam Insurance Co Ltd.*[1]

Degree of lateness

[5] Judgment was handed down on 13 December 2016. The applicant's candidate attorney was in court to note judgment. The *dies* to note an application for leave to appeal in terms of rule 30(1) expired on 5 January 2017 (and not, as Mr Marshall, the union's national legal coordinator submits in his founding affidavit, on 6 February 2017). It was only delivered on 19 January 2017, and the application for condonation a month later, on 19 February 2017. The application for leave to appeal is thus filed two weeks, or ten court days, outside of the 15 day period prescribed by the rules.

Reason for delay

[6] The reason for delay is, firstly, the attorneys' negligence. Despite their own candidate attorney having been in court to note judgment, the attorneys blithely shut down the next day without doing anything more about it until they re-opened almost a month later, on 9 January 2017.

[1] 1962 (4) SA 531 (A) 532 C-F.

[7] In the interim, despite having been informed of the judgment, the union didn't take any further steps either. Mr Marshall says that he "was only able to have a telephone discussion with the member regarding this matter on Monday, 9 January 2017" without explaining why.

[8] Marshall then contacted the union's attorneys on 10 January 2017 only. Peach only consulted the attorneys three days later, on 13 January. The union instructed its attorneys to apply for leave to appeal on the same day; yet they took another six days to do so. The only explanation is that Mr Thaanyane was otherwise engaged.

[9] The explanation is a poor one. As long ago as 1965 the Appellate Division held in *Saloojee*:[2]

> "There is a limit beyond which a litigant cannot escape the result of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the rules of this Court. Considerations *ad misericordiam* should not be allowed to become an invitation to laxity…"

[10] And, in a well-known judgment involving the very same trade union[3], Lagrange J held:

> "The deponent mentions that the union has over 230 000 members and 72 branches falling under the various provincial offices of the union. The thrust of the explanation is that a large multi-layer organization cannot easily comply with the time-limits in the LRA. However, if one looks at the detail of the explanation the real delay occurred at head office, and possibly at the initial stage before it was referred to the regional office. When the application was received there was more than enough time to make the referral timeously and the explanation of what occurred during this time is not satisfactory. ...
>
> The LRA has been in existence for more than 15 years, and the time-limits governing referrals have not changed in that time. It is reasonable to expect that trade unions ought to be well aware of the need to act timeously in the interests of their members and to adapt their internal procedures to

[2] *Saloojee and another NNO v Minister of Community Development* 1965 (2) SA 135 (A) at 141.

[3] *National Education Health & Allied Workers Union & others v Vanderbijlpark Society for the Aged* (2011) 32 *ILJ* 1959 (LC) par [8] – [9].

> accommodate those time-limits, not vice versa. The scale of an organisation cannot serve as a justification for delays. On the contrary, it is reasonable to expect that larger organizations, be they trade unions or businesses, ought to be able to see to it that they are organized to deal with disputes of this nature in a systematic manner to ensure that they do not fall foul of the time-limits in the LRA. Where handling such disputes is a core function of the organization, this should go without saying."

[11] The same considerations apply in this case. The poor explanation, coupled with a relatively short delay, should then be considered against the union's prospects of success in the application for leave to appeal.

Prospects of success

[12] What must be considered, is whether the union has good prospects of showing that another court will come to a different conclusion on the review application.

[13] I think not. The court *a quo* was guided by the Constitutional Court's judgment in *Baloyi*[4] in deciding to remit the dispute to the Bargaining Council. And Mr *Thaanyane* himself submitted that the record was defective.

[14] There are no reasonable prospects that another court will decide differently in deciding how to deal with the matter, given the defective record.

Conclusion

[15] There are no prospects of success in the application for leave to appeal. It follows that the application for condonation cannot succeed.

[16] The union and its members have a full opportunity to have the dispute properly decided at a fresh arbitration. Instead, they have incurred further costs in bringing an unsuccessful application for condonation and for leave to appeal. Those costs were unnecessary. In law and fairness, the Department should be compensated.

[4] *Baloyi v MEC for Health and Social Development, Limpopo* (2016) 37 *ILJ* 549 (CC).

Order

The application for condonation – and thus the application for leave to appeal - is dismissed with costs, including the costs of two counsel.

_____

Anton Steenkamp

Judge of the Labour Court of South Africa

APPEARANCES

Applicant:	N Thaanyane (attorney).
First Respondent:	P L Mokoena SC (with him T Molokomme)
Instructed by	the State Attorney (Bloemfontein).