

SOUTH AFRICA / JUDGMENT

Feni v Pan South African Language Board (JS 629/2016) [2023] ZALCJHB 145 (15 May 2023)

[2023] ZALCJHB 145

COURT

Labour Court Johannesburg

BEFORE

Van Niekerk

CASE / FILE NUMBER

JS 629/2016

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Source record**IN THE LABOUR COURT OF
SOUTH AFRICA, JOHANNESBURG****Not Reportable****Case No: JS
629/2016**

In the matter between:

ZIXOLISILE
FENI
Applicant
and
PAN
SOUTH AFRICAN LANGUAGE BOARD
Respondent

Heard:

12 May 2023

Delivered:

15 May 2023
(This judgment was
handed down electronically by circulation to the parties' legal
representatives, by email, publication
on the Labour Court's
website and released to SAFLI. The date on which the judgment is
delivered is deemed to be 15 May 2023.)

JUDGMENT

VAN NIEKERK, J

[1] The present dispute arises from an ex tempore judgment delivered by this court (per Moshoana J) on 17 November 2017 in a matter where the excipient (the applicant in the present

application) had successfully excepted to a statement of claim filed by the respondent. The order, as per the transcription of the judgment, reads as follows:

1. The exception is upheld.
2. The applicant is afforded an opportunity to amend the statement of case within 14 days of this order.
3. Should the applicant fail to do so within 14 days, his claim will be dismissed.

4 The applicant is to pay the costs of this application.

[2] The respondent applied for leave to appeal against the judgment on 18 January 2018, the application was dismissed, with costs.

[3] The respondent then sought to petition the Labour Appeal Court for leave to appeal. The petition was delivered on 21 March 2018, outside of the prescribed time limit. Attached to the petition was a founding affidavit in which condonation was sought for the late filing of the petition, which in terms of the applicable Rule, ought to have been filed by 18 February 2018.

[4] On 14 May 2018, the LAC dismissed the petition with no order as to costs. The court stated:

- (a) This court does not give reasons for its order refusing a petition for leave to appeal. This is in line with international practice and does not offend any constitutional principle.
- (b) The refusal of the petition for leave to appeal signifies that this court is of the view that the intended appeal has no reasonable prospects of success and that there is no compelling reason why it shouldn't be heard. This court therefore, in general terms, concurs in the reasoning of the judgment of the Labour Court.

[5] The matter ultimately came before the court in circumstances where condonation for the late filing of the pre-trial minute was sought. In that proceeding, the issue of the claim having been dismissed consequent on the order granted on 17 November 2017 was raised. The parties were directed to file heads of argument on the point.

- [6] The respondent submits, in essence, that in the absence of any amendment to the statement of claim prior to the expiry of the 14-day period fixed by the terms of the order, the applicant's claim was considered to have been dismissed. Put another way, the respondent submits that the applicant's claim has been dismissed by operation of the court order.
- [7] In my view, what the submission overlooks is that in terms of section 18 of the Superior Courts Act, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, unless otherwise ordered, is suspended pending the decision of the application or appeal. The operation of the order granted on 17 November 2017 was thus suspended pending the outcome of the application for leave to appeal. Similarly, the filing of the petition, dated 1 February 2018 but filed only on 19 March 2018, had the effect of suspending the operation of the pending outcome of the petition, particularly given the fact that condonation for the late filing of the petition was sought. The refusal of the petition on 14 May 2018 had the consequence that the operation of the order was no longer suspended it is not in dispute that on 23 May 2018, within 14 days of the date on which the petition was refused, the applicant filed an amended statement of claim.
- [8] In so far as counsel submitted that it is not clear from the terms of the LAC's order that condonation for the late filing of the petition was in fact granted, paragraph (b) of the order reflects that the court was of the view that the intended appeal had no prospects of success and that there was no other compelling reason why it should be heard. Further, the order reflects that in general terms, the court concurs in the reasoning of the judgment of the labour court. This formulation suggests that the court entertained the merits of the petition, notwithstanding the fact that it was filed out of time and that the court accepted the reasons advanced by the applicant for the late filing.
- [9] In summary, in the circumstances, I find that the applicant filed an amended statement of claim within the 14 days contemplated by the order granted on 17 November 2017, that time limit becoming operative from the date of which the applicant's petition was refused. The respondent's point in limine to the effect that the applicant's claim was dismissed by operation of law is thus dismissed.
- [10] Finally, the court has a broad discretion in terms of section 162 of the LRA to make orders for costs according to the requirements of the law and fairness. Those requirements are best served by each party bearing its own costs.

I make the following order:

1. The point in limine is dismissed.

André van Niekerk

Judge of the Labour Court of South Africa

Appearances:

For the applicant: Adv ZD Kela Instructed by: Makhafola & Verster Inc For the respondent: Adv Z Ngwenya Instructed by: Bowman Gilfillan Inc

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