

SOUTH AFRICA / JUDGMENT

Sebloane v Commission For Conciliation, Mediation And Arbitration (CCMA) and Others (JR 300/2022) [2022] ZALCJHB 154 (5 October 2022)

[2022] ZALCJHB 154

COURT

Labour Court Johannesburg

BEFORE

Van Niekerk

CASE / FILE NUMBER

JR 300/2022

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THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case No: JR 300/2022

In the matter between:

MONTWE SIBUSISO SEBLOANE Applicant

and

COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION (CCMA) First

Respondent

DESMOND LYNCH N.O. Second Respondent

ESKOM SOC LIMITED Third

Respondent

Delivered: 05 October 2022

(In view of the measures implemented as a result of the Covid 19 pandemic, this judgement was handed down electronically by circulation to the parties' representatives, by email. The date on which the judgment is delivered is deemed to be 05 October 2022.)

RULING:**APPLICATION FOR LEAVE TO APPEAL**

VAN NIEKERK, J

- [1] The applicant seeks leave to appeal against a judgment delivered by this court on 10 June 2022. When an application to review and set aside an award issued by the second respondent was dismissed. In its judgment, the court refused to condone the late referral of the review application, made some seven months after the ruling sought to be reviewed, itself a refusal to condone the later referral of the applicant's unfair dismissal dispute to the CCMA, a referral made 496 days late.
- [2] The test to be applied is established by section 17 (1) of the Superior Courts Act, 2013. The court must determine whether the appeal would have a reasonable prospect of success, or whether there is some other compelling reason why the appeal should be heard. In *Seatlholo and others v Chemical Energy Paper Printing Wood and Allied Workers Union and others* (2016) 37 ILJ 1485, the court said the following:
- ... the use of the word "would" in s17 (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 (see *Daantjie Community and others v Crocodile Valley Citrus Company (Pty) Ltd and another* (75/2008)
- [2015] ZALCC 7 (28 July 2015). Further, this is not a test to be applied lightly – the Labour Appeal Court has 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 there is a reasonable prospect that the factual matrix could receive a different treatment or where there is some legitimate dispute on the law.
- [3] More precisely stated, the court must determine whether there is a reasonable prospect that the factual matrix would receive a different treatment or where there is some legitimate dispute on the law (see *Martin & East (Pty) Ltd v NUM* (2014) 35 ILJ 2399 (LAC); *Acting National Director of Public Prosecutions & Others v Democratic Alliance In re: Democratic Alliance v Acting Director of Public Prosecutions & Others* [2016] JOL 36123 (GP); *Mothuloe Inc. Attorneys v The Law Society of the Northern Provinces & Another* [2017] ZASCA 17 (22 March 2017), where the raising of the bar in applications for leave to appeal has been affirmed). In this court, there is an additional consideration. In the *Martin & East* judgment, Davis JA urged labour courts to take care to ensure a balance between expeditious dispute resolution and the rights of the party seeking leave to appeal.
- [4] In its judgment, the court noted that the second respondent had been called on to exercise a discretion, which he did, applying the correct principles. The court noted further that in the circumstances, a review court is not likely to interfere, in the absence of an arbitrary or

capricious decision to the extent that the applicant sought to lay the blame for his noncompliance at the feet of his union representative, the court found that the applicant had failed to explain what steps he took to cause his representative to pursue this matter with any degree of diligence, nor could the applicant provide any cogent explanation as to why he sought to hold the Department of Labour responsible for his failure to refer his dispute to the CCMA timeously. To the extent that the applicant now claims that he contacted his union representative 'on numerous times', this is not an averment that finds expression in the founding affidavit in the review application. In any event, it is well-established that a party may not rely on the negligence of a representative as the reason for failing to adhere to any relevant time period, unless there is a satisfactory explanation that none of the ineptitude or relentlessness of the representative is to be imputed to the applicant. This is not one of those cases. The applicant did not provide the court with any facts that would warrant his absolution of responsibility for his representative's conduct. To the extent that the applicant now seeks to raise a breach of constitutional rights, none of these averments were raised in the review application and the court had no obligation to have regard to this issue. Similarly, the averment that the third respondent was in violation of the POPI Act is a new matter raised only in the present application. Finally, to the extent that the applicant submits that he was a victim of bias, this ground of appeal is unsubstantiated and contemptuous of the court. It is nothing less than a gratuitous accusation of bias, without any reasonable factual basis to support that allegation.

- [5] For order for the above reasons, the applicant has failed to meet the threshold for the granting of leave to appeal and the application thus stands to be dismissed.
- [6] In relation to costs, the court has a product description in terms of section 162 of the LRA to make orders for costs according to the requirements of the law and fairness. That formulation has the consequence that costs do not ordinarily follow the result but as the Constitutional Court has pointed out, this principle does not mean that cost can never be granted. What is required is for the court to exercise judicial discretion and to give reasons for its order in relation to costs and in particular, to account for any departure from the ordinary rule, always having regard to the requirements of the law and fairness. In the present instance, the present application is an abuse of the court process. The applicant has impermissibly introduced new facts and issues into the application, that where never the subject of his review application. The present application has unduly and unnecessarily extended the litigation between the parties which was already unjustifiably prolonged, largely on account of the applicant's excessive delays. The third respondent is reliant on taxpayer resources and in the widely known to be in severe financial constraints within the organization, and has had to meet the costs of opposing the application. Considerations of fairness do not permit that the applicant should enjoy free reign to hold the third respondent [and indeed the court] ransom to frivolous and vexatious litigation. The constitutional protection for parties and labor disputes against costs was not intended to create a risk-free litigation, entitling parties to abuse others and the process of this court with impunity. The LRA sought to establish a dispute resolution structure offering parties to

labor disputes a speedy and cost-effective mechanism to resolve their disputes, and to afford access to justice to aggrieved employees. However, these goals are compromised by matters such as the present when applicants persist endlessly in meritless litigation at the expense of deserving cases. For these reasons, in my view, the requirements of the law and fairness are best met by an order that the applicant pay the costs of the application.

Order

1. The application is dismissed, with costs.

André van Niekerk

Judge of the Labour Court of South Africa

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