REPUBLIC OF SOUTH AFRICA

Not reportable

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 106/15

In the matter between:

Jacob FESTUS **Applicant**

and

DEPARTMENT OF HEALTH (WESTERN CAPE) **First Respondent**

PHSDSBC **Second Respondent**

DENOSA **Third Respondent**

Heard: **17 September 2018**
Delivered: **18 September 2018**

RULING ON LEAVE TO APPEAL

STEENKAMP J

Introduction

[1] The applicant seeks leave to appeal my judgment of 10 March 2016. The application for leave to appeal is more than two years later. He also applies for condonation.

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Condonation

[2] I shall consider the application for condonation bearing in mind the well-known principles in *Melane v Santam Insurance Co Ltd*[1], *Queenstown Fuel Distributors*[2] and *Lentsane v HSRC.*[3]

Extent of delay

[3] Judgment was handed down on 10 March 2016. The applicant only filed this application for leave to appeal – dated 25 June 2018 – on 27 July 2018, together with the notice of motion in his application for condonation. After inquiries from the Court his attorneys sent a copy of the supporting affidavit, which was apparently signed on 10 June 2018, to the Court by email on 20 August 2018.

[4] The delay is excessive. That must be weighed up against the explanation therefor and the prospects of success.

Reasons for delay

[5] The reasons for the delay are not persuasive. The applicant has been legally represented throughout. He has been aware of the judgment since at least 14 March 2016. Yet he delayed for more than two years before applying for leave to appeal. He blames his erstwhile attorneys and his trade union, DENOSA, but as this Court has often confirmed, there is an extent beyond which an applicant cannot escape the negligence of his chosen representatives. It is only after two years that he terminated their mandate and instructed new attorneys. He also blames one "advocate Lourens" whom he consulted in Oudtshoorn. He does not explain who adv Lourens is, nor does adv Lourens provide a supporting affidavit. And he provides no explanation for lengthy periods of delay, including a period of seven months when adv Lourens was in possession of the relevant pleadings and documents until he consulted another attorney, one Bedi, with Lourens.

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[1] 1968 (4) SA 531 (A).

[2] *Queenstown Fuel Distributors cc v Labuschagne N.O.* [2000] 1 BLLR 45 (LAC).

[3] (2002) 23 *ILJ* 1433 (LC).

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[6] The applicant instructed his current attorneys in February 2018. Yet they only launched this application on 24 July 2018. He says that he "looked for" another attorney in October 2017, more than eight months before launching this application; and he includes email correspondence between him and his current attorneys from January 2018, six months before they launched this application. They do not explain their lackadaisical approach.

[7] Despite the excessive delay and poor explanation, I will nevertheless consider the prospects of success.

Prospects of success

[8] In his submissions, the applicant's counsel makes the startling submission that the Court erred in applying the test on review that it did – i.e. that the conclusion reached by the arbitrator was "not so unreasonable that no other arbitrator could have come to the same conclusion". Mr *Dyanti* goes so far as to say that "applying such a permissive interpretation" would "render the facility to review a decision of an arbitrator an almost impossible task". Yet that is the very test outlined by the SCA in *Sidumo* more than ten years ago, and cited in the judgment *a quo* [at para 20] and in the headnote. And even last week the Constitutional Court reiterated that test in *Duncanmec*[4]*:*

> ""*Sidumo* cautions against the blurring of the distinction between appeal and review and yet acknowledges that the enquiry into the reasonableness of a decision invariably involves consideration of the merits. So as to maintain the distinction between review and appeal this Court formulated the test along the lines that unreasonableness would warrant interference if the impugned decision is of the kind that could not be made by a reasonable decision-maker.
>
> This test means that the reviewing court should not evaluate the reasons provided by the arbitrator with a view to determine whether it agrees with them. That is not the role played by a court in review proceedings. Whether the court disagrees with the reasons is not material.

[4] *Duncanmec (Pty) Limited v Gaylard NO and Others* (CCT284/17) [2018] ZACC 29 (13 September 2018) pars [41] – [43].

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> The correct test is whether the award itself meets the requirement of reasonableness. An award would meet this requirement if there are reasons supporting it. The reasonableness requirement protects parties from arbitrary decisions which are not justified by rational reasons.

[9] How Mr *Dyanti* could argue that this Court should now depart from that binding authority that has been cited in hundreds of review judgments over the last ten years, simply beggars belief. It is also indicative of the applicant's lack of prospects of success.

[10] The test for leave to appeal has now been codified in s 17(1) of the Superior Courts Act.[5] That is whether the appeal would have reasonable prospects of success; or there is some other compelling reason why the appeal should be heard.

[11] This appeal would have no reasonable prospects of success. The arbitrator properly considered the evidence and the probabilities. His conclusion passes the *Sidumo* test. And there is no other compelling reason why the appeal should be heard. To argue, as Mr *Dyanti* does, that "the issues in relation to the standard that an arbitrator's adjudication of matters is subject to in South Africa is a matter of considerable importance to labour laws" is facile. This Court, the Labour Appeal Court, the SCA and the Constitutional Court have all pronounced on that standard; and it has formed the subject of at least one self-standing academic work[6] and a comprehensive section in at least one other.[7]

Conclusion

[12] The delay is excessive; the explanation therefor is poor; and so are the prospects of success in the application for condonation as well as the application for leave to appeal. The application must fail.

[13] There is no reason in law or fairness why costs should not follow the result. The applicant has forced the Department to incur unnecessary

[5] Act 10 of 2013.

[6] Myburgh & Bosch, *Reviews in the Labour Courts* (LexisNexis 2016).

[7] Cf Du Toit *et al, Labour Relations Law: A Comprehensive Guide* (6 ed LexisNexis 2015) Ch III.

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further costs in pursuing this excessively late application, especially considering its poor prospects of success.

Order

The application for condonation – and thus the application for leave to appeal – is dismissed with costs.

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Steenkamp J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT: D M Nyathi

Instructed by Nico Smit Inc, George.

FIRST RESPONDENT: V Barthus

Instructed by the State Attorney, Cape Town.

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