REPUBLIC OF SOUTH AFRICA

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THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 177/16

In the matter between:

A M MODIOKGOTLA **Applicant**

and

HEAD OF DEPARTMENT: **First Respondent**

NORTHERN CAPE PROVINCIAL GOVT: DEPT OF EDUCATION

J B MTHEMBU N.O. **Second Respondent**

ELRC **Third Respondent**

Delivered: **28 February 2018**

RULING ON LEAVE TO APPEAL

STEENKAMP J

Introduction

[1] The applicant seeks leave to appeal against my judgment of 17 October 2017.

[2] In that judgment, I dismissed the applicant's application for condonation for the late filing of a review application. Ironically, despite that, this application for leave to appeal is also late and the applicant, once again, applies for condonation. His submissions on the application for leave to appeal are also filed more than a month late. And the whole sequence of events was set in motion because the applicant's counsel, Mr Lechwano, did not abide by the agreed timeframe to file heads of argument in the initial application.

Evaluation

[3] In dealing with this application, I shall briefly restate the test in applications for leave to appeal; and against that background, deal with the application for condonation.

The test

[4] As Van Niekerk J noted in *Seatlholo and Others v Chemical, Energy, Paper, Printing, Wood and Allied Workers' Union and Others*[1] :

> "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. As the respondents observe, the use of the word 'would' in s17(1)(a)(i) are 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 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

[1] (2016) 37 *ILJ* 1485 (LC) par [3].

different treatment or where there is some legitimate dispute on the law (See the judgment by Davis JA in *Martin & East (Pty) Ltd v NUM* (2014) 35 *ILJ* 2399 (LAC), and also *Kruger v S* 2014 (1) SACR 369 (SCA) and the ruling by Steenkamp J in *Oasys Innovations (Pty) Ltd v Henning & another* (C 536/15, 6 November 2015)."

[5] It is against that background that the prospects of success in this application for condonation must be considered.

Condonation

[6] Once again, as in the judgment *a quo*, the Court must consider the well-trodden principles set out in *Melane v Santam Insurance Co Ltd.*[2]

[7] Rule 30(2) of this Court is clear. An application for leave to appeal must be delivered within 15 days of the date of judgment, except that the court may, on good cause shown, extend that period. And the Practice Manual that has been in existence since April 2013 further puts it beyond doubt that awaiting the transcript of an *ex tempore* judgment does not delay that time period. It runs from the day judgment is handed down.

[8] In this case, both the applicant and his counsel, Mr Lechwano, were in court when I handed down judgment on 17 October 2017. The prescribed time period lapsed on 7 November 2017. Yet he only delivered his application for leave to appeal on 28 December 2017, without any application for condonation. He only delivered that application on 12 January 2018, more than two months late, and only after the Department (the first respondent) had raised an objection to its late delivery. And this despite the fact that the very judgment he wishes to take on appeal considered an application for condonation and spelt out the principles and consequences. And then, rather than keeping to the further time periods set out in rule 30(3A) read with clause 15.2 of the Practice Manual, he only foiled his submissions on 20 February 2018, after the Court had directed him to do so, and not by 12 January 2018, as he should have done. I have nevertheless considered those submissions.

[2] 1962 (4) SA 531 (A).

[9] Despite having been represented by attorneys and counsel throughout, the applicant gives no explanation for the delay other than to say that he was “in despair” and that he “could never come to peace with the fate which I had been dealt”. He gives no explanation why, if he wished to seek leave to appeal, his attorneys and counsel did not advise him of the applicable timeframes, or indeed if they had done so. In short, he gives no plausible explanation for the delay.

[10] It is only “on or about” 15 November 2017, after the prescribed time periods had already lapsed, that he so much as instructed his attorneys to obtain a transcript of the judgment that had been handed down on 17 October 2017 in his presence. He received the signed judgment on 30 November 2017. And yet his counsel only drafted the application by 28 December 2017, almost a month later; and then his attorneys delivered it without applying for condonation.

[11] Apart from the excessive delay and the poor explanation therefor, the applicant has no prospects of success in the application for leave to appeal, given the test set out above. The factual matrix against which the arbitrator found against him is clear. And in deciding whether or not to grant condonation, the Court exercises a judicial discretion. There is no reasonable prospect that another court would interfere with that discretion, especially given that the applicant now concedes that his explanation for the late filing of his review application was “needlessly vague”.

Conclusion

[12] The applicant has not shown good cause for his failure to comply with rule 30(2).

[13] With regard to costs, the applicant and his legal team were well aware of the applicable time periods. They already had a judgment against them where the relevant principles relating to condonation were spelt out. Yet they delayed in bringing this application; initially did not even attempt to show good cause for their non-compliance; and only attempted to do so, unsatisfactorily, once the first respondent had raised it. The first respondent had to incur further unnecessary costs in opposing this

application. There is no reason in law or fairness why the applicant should not bear those costs.

Order

[14] The application is dismissed with costs.

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Steenkamp J

APPEARANCES

APPLICANT:	Fixane attorneys, Bloemfontein.
FIRST RESPONDENT:	Frans Petersen Instructed by Mjila & Partners, Kimberley.
SECOND AND THIRD RESPONDENTS	Solomon Holmes attorneys, Johannesburg.