



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case No JR 1973/10

Case No JR 293/07

Case No JR 919/00

In the matter between:

MASHALE PAULUS MALAPANE

Applicant

And

NATIONAL BARGAINING COUNCIL FOR

First Respondent

THE ROAD FREIGHT INDUSTRY

COMMISSIONER LORAINÉ JOHNSTON

Second Respondent

TWIN TRUCKING (PTY) LTD

Third Respondent

Decided: 27 October 2014

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

SEEDAT AJ

[1] This is an application for leave to appeal by both the applicant and the third respondent against my judgment of 24 July 2014 in terms of which

- I dismissed the applicant's application to re-enrol case J3919/00 which was struck off the roll on 15 October 2003
- I dismissed the applicant's application to consolidate case JS 293/07
- I reviewed and set aside the award of the second respondent and sent it back to the first respondent to be heard by another commissioner on the aspect of sanction alone

[2] It would be convenient to refer to the parties in this application as they were cited in the review application.¹

Case No J3919/00

[3] The grounds of appeal ranged from the personal conduct of the court, the failure to accept, on a balance of probabilities, that the applicant had not received the application of set down and that the court should have found that the applicant was unfairly dismissed.

[4] Effectively, the court found that the applicant did not give a satisfactory explanation as to why he could not be present in court on 15 October 2003 and also why it had taken him almost nine years to make the application to re-enrol the matter.

[5] Firstly, the applicant's assertion that I interrogated him about his failure to have legal representation and that I kept interrupting him has little, if anything, to do with the merits of the appeal.

[6] As stated in the judgment, the Constitutional Court in *Mohlomi v Minister of Defence*² decried inordinate delay in finalising of disputes. The sentiments of Bosielo AJ sitting in the Constitutional Court in *Grootboom v National Prosecuting Authority & another*³ are of the same effect.

¹ The application for leave to appeal was decided in chambers in terms of rule 30(3A) and clause 15 of the Consolidated Practice Directive of 2013.

² 1997 (1) SA 124 (CC) para 11

³ (2014) 35 ILJ 121 (CC); see *eThekweni Municipality v Ingonyama Trust* 2013 (5) BCLR 497 (CC)

- [7] I do not intend to traverse all the reasons which I gave in my judgment for refusing the application to re-enrol this matter. If the applicant was not wilful in his failure to attend court on 15 October 2003, he certainly was grossly negligent.⁴ As I said in my judgment it is not enough for a defaulting party to aver simply that he did not receive the notice of set down.⁵
- [8] I am satisfied that I had considered all the relevant factors in exercising a judicial discretion⁶ not to re-enrol the matter. There is no need to consider the prospects of success in the main cause.⁷
- [9] Accordingly, there is no reasonable prospect of the Labour Appeal Court concluding that the court a quo had exercised its discretion improperly or unreasonably.
- [10] For these reasons, the application is refused.

Case No JS 293/07

- [11] Again, the applicant's papers are clouded in a welter of confusion and it is not clear whether the applicant seeks leave to appeal my ruling to refuse to consolidate this case with the primary case JA 1973/10 or he seeks leave to appeal the decision of Nel AJ.
- [12] If the application is apropos the consolidation of this case with the primary case, then again all relevant factors were considered in exercising my discretion and it is unlikely that the court on appeal will find that this discretion was improperly or unreasonably exercised.
- [13] It must be emphasised that the judgment of Nel AJ was final and even if I were to have permitted the consolidation, I could not have varied that order.

⁴ *Saraiva Construction (Pty) Ltd v Zululand Electrical & Engineering Wholesalers (Pty) Ltd* 1975 (1) SA 612 (D)

⁵ *Caravan & Pleasure Resort v SA Health Care Trade Union obo Bronkhorst & another* (2008) 29 ILJ 1008 (LC)

⁶ *Foster v Stewart Scott Inc* (1997) 18 ILJ 367 (LAC)

⁷ *National Union of Metalworkers of SA on behalf of Nkuna & others v Wilson Drills-Bore (Pty) Ltd t/a A & G Electrical* (2007) 28 ILJ 2030 (LC)

[14] In the event that the application for leave to appeal is against the judgment of Nel AJ, the applicant is hopelessly out of time and no application for condonation was made.

[15] This application for leave to appeal too, is refused.

Case No JR 1973/10

[16] Effectively, the third respondent bases its leave to appeal on the ground that I had erred by referring to judgments overruled by *Lifecare Special Health Services (Pty) Ltd t/a Ekuhlengeni Care Centre v Commission for Conciliation, Mediation & Arbitration*.⁸

[17] While *Lifecare* did restate the law with regards to the filing of the record of the arbitrating tribunal, it certainly did not render judgments which preceded it completely nugatory.

[18] I simply extracted general principles that have not been invalidated by *Lifecare* and remain sound as statements of law. Thus, my citation of *ASA Metals (Pty) Ltd (Dilokong Chrome) v Commission for Conciliation, Mediation & Arbitration*⁹ was only to emphasise the principle that in deciding whether an award is reasonable, all the material before the commissioner and not just the reasons, must be considered. This principle is not in conflict with *Lifecare*.

[19] Similarly, my reliance on *Doornpoort Kwik Spar CC v Odendaal & others* (2008) 29 ILJ 1019 (LC) was simply to support my view that I cannot rely on the 'scribbled notes of the commissioner'.

[20] The cases of *Shoprite Checkers (Pty) Ltd v Commission for Conciliation Mediation & Arbitration* (2002) 23 ILJ 943 (LC) and *Ram Hand-to-Hand Couriers v National Bargaining Council for the Road Freight Industry* (Case No

⁸ (2003) 24 ILJ 937 (LAC) (*Lifecare*)

⁹ (2013) 34 ILJ 350 (LC) at para 17

C174/2007) were used in reference to my statement that sometimes 'courts have been robust in determining the matter on the available information'.¹⁰

[21] The other grounds relied on by the applicant were that the parties have been involved in litigation for more than ten years and that the applicant had 'insulted everybody'.

[22] These are factors extraneous to the review application and I remain of the view that the second respondent committed a reviewable irregularity in not stating the factors that had influenced her decision to grant compensation.

[23] There is no reason in my view why another court would come to a different decision.

[24] The application for leave to appeal is dismissed.

Order

1. The application for leave to appeal by the applicant under case number J3919/00 and case number JS 293/07 are both refused.
2. The application for leave to appeal by the third respondent under case number 1973/10 is refused.
3. There are no orders as to costs.

SEEDAT AJ

Acting Judge of the Labour Court

¹⁰ Para 30 of the judgment