REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Reportable

Of interest to other Judges

Case no: C592/2013

In the matter between:

DANIEL SAMBO	**First Applicant**
JACQUES JAFTHA	**Second Applicant**
ANDRIES AMBROSE	**Third Applicant**
DAWID JOOSTE	**Fourth Applicant**
SALMON SWARTS	**Fifth Applicant**
DANIEL JONAS	**Sixth Applicant**
LINDA AFRIKA	**Seventh Applicant**
ADEAN BRUINTJIES	**Eighth Applicant**
ESMERELDA GROOTBOOM	**Ninth Applicant**
DONOVAN GROOTBOOM	**Tenth Applicant**
CHRISTIAN PAULSEN	**Eleventh Applicant**
COMMERCIAL, STEVEDORING, AGRICULTURAL AND ALLIED WORKERS UNION ("CSAAWU")	**Twelfth Applicant**

and

STEYTLER BOERDERY	**Respondent**

Delivered: 25 March 2015

Summary: Application for condonation in application for leave to appeal. Principles of appeals against costs orders and doctrine of peremption considered.

RULING ON LEAVE TO APPEAL

STEENKAMP J

Introduction

[1] The twelfth applicant, CSAAWU, seeks leave to appeal against the costs order only of my judgment handed down on 4 June 2014. The application for leave to appeal is eight months late. It also seeks condonation.

[2] The twelfth applicant is the Commercial, Stevedoring, Agricultural and Allied Workers' Union (CSAAWU). Its activities are focused on the agricultural sector, rather than stevedoring or other commercial activities. It represents eleven of its members who were dismissed by the respondent, Steytler Boerdery. After this Court had dismissed its referral for lack of jurisdiction, the union re-referred an unfair dismissal dispute to the CCMA. Conciliation was successful. Steytler Boerdery reinstated all of the workers bar one (who had found other employment) without backpay, by agreement and by way of settlement.

[3] The union seeks leave to appeal only against the following order:

> "The applicants are ordered to pay the respondent's costs, including the costs of counsel, jointly and severally, the one paying, the other to be absolved."

[4] I will deal with the merits of that application under the heading of prospects of success in the condonation application.

Condonation

[5] In considering the application for condonation, I have regard to the principles set out in *Melane v Santam Insurance Ltd*[1] and *NUM v Council for Mineral Technology*[2].

Extent of delay

[6] The judgment was handed down on 3 June 2014 (and not, as the union's assistant general secretary, Karel Swart, says under oath in his founding affidavit in the application for condonation, on 29 July 2014).[3] I should add that Mr Swart was present in court when the judgment was handed down on 3 June 2014 in open court. So were the union's then legal representatives. In terms of rule 30(2) of this Court, the union had to deliver its notice of application for leave to appeal by 25 June 2014 (15 court days later). It only did so on 24 February 2015. It is eight months late. It is obviously an excessive delay.

[7] The excessive delay of eight months, compared to the prescribed time period of 15 days, must be assessed together with the reasons therefor and the prospects of success in the application for leave to appeal.

Reasons for delay

[8] The union, represented by Brink & Thomas attorneys, initially delivered an application for leave to appeal on 17 June 2014. Shortly thereafter, they consulted counsel, Adv Roselyn Nyman. Counsel advised them, quite properly, that:

> "(i) the Labour Court's ruling was correct; and
>
> (ii) CSAAWU runs the risk of incurring further costs on appeal".

[1] 1962 (3) SA 531 (A).

[2] [1999] 3 BLLR 209 (LAC).

[3] Mr Swart belatedly filed a replying affidavit on 18 March 2015, after both parties had filed their submissions in terms of rule 30(3A) and this Court's Practice Manual, in which he says that that was a "typing error".

[9] Given that wise counsel, the union instructed its attorneys to withdraw the application for leave to appeal. They did so on 1 July 2014.

[10] On 29 July 2014, this Court gave judgment against CSAAWU in an entirely unrelated matter.[4] Again, Ms Nyman – who represented the union in that litigation -- advised the union that it was correctly decided. Mr Swart says that the union "did not seek further advice beyond what it had already received as, firstly, the universal and undisputed opinion of legal specialists was that the cases were correctly decided, and secondly, we were afraid to incur further costs from our own counsel".

[11] This sound advice was subsequently confirmed by one Ronald Wesso of Surplus People Project. Mr Swart does not say when and in what capacity Mr Wesso gave this advice. Nevertheless, the union and its coalition partners were *ad idem* that "the possibility of appeal had finally been ruled out".

[12] Six months after the judgment and five months after having withdrawn its application for leave to appeal, in December 2014, the union started a fundraising campaign to pay for the legal costs awarded against it. According to Mr Swart:

> "As news of the costs orders and fundraising campaign began spreading, SERI raised the possibility of an appeal against the costs order granted against CSAAWU."

[13] SERI is the Socio-Economic Rights Institute, a donor-funded institution that now represents the applicants. It does not require payment from its clients. Mr Swart does not explain how SERI came to raise the possibility of an appeal; he does not say who approached whom and when, other than to say that "there was a general reluctance about approaching … SERI for advice" as CSAAWU was mistaken as to its role. Nevertheless, the union's two senior officials, Messrs Swart and Christians, met two attorneys from SERI on 17 December 2014. The union "instructed them on the matter and provided them with all of the documents in our possession. These included the judgments, statements of case in both applications, costs orders and some correspondence from Brink".

[4] *Philander & others v La Maison* (2014) 35 *ILJ* 3222 (LC).

[14] Despite this, Swart says, SERI could not "finalise" the application for leave to appeal "without a complete court file and without an advocate settling the papers". Why this was necessary, he doesn't explain. He also did not explain in his founding affidavit why they couldn't simply uplift the court file; in his replying affidavit, filed belatedly after both parties had filed their submissions, he says that the union's attorneys instructed correspondents to do that but that the court was closed. He says that he attaches email correspondence between SERI and the correspondents, but does not do so. Be that as it may, the union only obtained a copy of the files from its erstwhile attorneys one and a half months later, on 30 January 2015. And SERI's attorney only collected it from the union's offices four days later, on 4 February 2015. And then they took another 20 days, until 24 February 2015, to deliver the application for leave to appeal.

[15] The explanation is a poor one. I will nevertheless consider the union's prospects of success in the application for leave to appeal the costs order *a quo.*

Prospects of success / merits of application for leave to appeal

[16] The union seeks leave to appeal against a costs order only. Apart from that, it has withdrawn its earlier application for leave to appeal against the judgment, including the costs order. The doctrine of peremption therefore has to be considered.

Appealing costs order

[17] As this Court set out in *Masuku v Score Supermarket (Pty) Ltd*[5], a decision to award costs (or not) is not readily susceptible to appeal. It is only if the court committed a misdirection in the exercise of its discretion that leave to appeal would be granted. The prospective appellant would have to show that the court *a quo* acted capriciously, or upon a wrong principle, or in a biased manner, or for unsubstantial reasons, or committed a misdirection or irregularity, or failed to exercise its discretion, or exercised its discretion improperly or unfairly.

[5] (2013) 34 *ILJ* 147 (LC) paras 10-12.

[18] As the learned authors in *Erasmus*[6] point out with reference to the High Court generally, the principles in *Tsosane v Minister of Prisons*[7] continue to apply in that court. Briefly stated, these are:

18.1 Such leave is not lightly given – first because costs are a matter of judicial discretion; and secondly, because it is desirable that finality should be reached where the merits of a matter have been determined.

18.2 The court will not ordinarily grant leave to appeal in respect of what has become a dead issue merely for the purpose of determining the appropriate order as to costs.

18.3 Leave will more readily be granted where a matter of principle is involved.

18.4 The amount of costs should not be insubstantial.

18.5 The applicant for leave to appeal should have reasonable prospects of success on appeal.

[19] In this case, the union has accepted the advice of various legal experts that the judgment of the court *a quo* is correct. It is a dead issue on the merits. There is no issue of principle involved that has not been definitively pronounced upon by the court *a quo*. And the union has no prospects of success on appeal, given the discretionary nature of the decision on costs.

[20] The Labour Relations Act[8] codifies the principles applicable to costs orders in this Court in s 162. It reads:

> '(1) The Labour Court may make an order for the payment of costs according to the requirements of law and fairness.
>
> (2) When deciding whether or not to order the payment of costs, the Labour Court may take into account –
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> (a) whether the matter referred to the Court ought to have been referred to arbitration in terms of this Act and, if so, the extra costs incurred in referring the matter to the Court; and

[6] Erasmus, *Superior Court Practice* (ed D E van Loggerenberg) A1-50 (service 41, 2013).

[7] 1982 (3) SA 1075 (C) 1076E-1077B.

[8] Act 66 of 1995.

(b) the conduct of the parties –

(i) in proceeding with or defending the matter before the Court; and

(ii) during any proceedings before the Court".

[21] It must be noted that, in terms of s 162(1), the Court *may* order costs – in other words, exercise a discretion whether or not to order costs – according to the requirements of both law and fairness.

[22] The reference to the requirement of law has generally been held to refer to the common law principle that costs follow the result. That is the general requirement of law in High Court proceedings. But this Court sets itself apart in that the LRA allows it to take into account, also, the requirements of fairness.

[23] The court *in casu* exercised its discretion by noting:

> "This Court has a discretion, in law and fairness, to award costs. The applicants persisted with their referral when the point *in limine* was raised by the respondent, albeit belatedly. Their counsel conceded, quite properly, that her clients were dismissed, not on 8 January (as stated in their referral) but on 21 January. Yet they persisted. This intransigent attitude is also clear from the refusal of the workers and the union to stop the unprotected strike. The employer gave them numerous opportunities to return to work. They refused. There is no reason in law or fairness why the employer should not be entitled to its costs. The workers may be indigent. The union is not. Should the workers be unable to pay, the union – that has been actively involved and representing the applicants throughout – should do so."

[24] That is not an improper or capricious exercise of the discretion. The Court took into account the union's decision to persist with the litigation despite the fact that its counsel conceded that this Court had no jurisdiction to hear it. That is in accordance with the explicit provision of s 162(2)(a). And their conduct in the unprotected strike leading to the stillborn referral is also relevant. For example, where striking workers engaged in violent conduct, Van Niekerk J held in *Tsogo Sun Casinos*[9]:

[9] *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of SA Workers Union* (2012) 33 *ILJ* 998 (LC) para 14.

> "This court must necessarily express its displeasure in the strongest possible terms against the misconduct that the individual respondents do not deny having committed, and against unions that refuse or fail to take all reasonable steps to prevent its occurrence. Had the applicant not specifically confined the relief sought to an order for costs on the ordinary scale, I would have no hesitation in granting an order for costs as between attorney and own client".

[25] Van Niekerk J then ordered costs against the employees and the union, jointly and severally. And in the *locus classicus* of *NUM v ERGO*[10], decided under the old LRA but still relevant, as Mr *Wilson* submits in his argument, one of the factors taken into account by the then Appellate Division was that:

> "NUM's conduct in the negotiation process led to justifiable unhappiness and frustration on the part of Ergo".[11]

[26] The union's conduct in persisting with the litigation is also apparent from paragraph [17] of the judgment *a quo*:

> "They [the workers] could not possibly have laboured under the impression that there had been dismissed. They were represented and advised by CSAAWU throughout. Ms *Isaacs* conceded that the union conveyed to its members that they had not been dismissed on 8 January. Yet the union did not withdraw the referral of 8 January alleging an unfair dismissal on that date; neither did it refer a fresh dispute to the CCMA after the actual dismissal on 21 January."

[27] There is no prospect that another court will interfere with the discretion properly and judicially exercised by this Court in deciding to grant costs as it did, having considered the provisions of s 162 of the LRA. The union has no prospects of success in its application for leave to appeal.

[10] *National Union of Mineworkers v East Rand Gold and Uranium Co Ltd* 1992 (1) (SA) 700 (A) 793 A-F.

[11] My emphasis.

Peremption

[28] The union withdrew its initial application for leave to appeal, including leave to appeal the costs order, on 1 July 2014. Eight months later, it seeks to revive the application, despite having acted on the "universal and undisputed opinion of legal specialists" that they had no prospects of success.

[29] The union accepts that, ordinarily, if a party files and then withdraws an application for leave to appeal, its right to appeal is perempted, because it has clearly and unequivocally conducted itself in a manner that is inconsistent with the intention to appeal.[12] But Mr *Wilson*, for the union, argued with reference to *SANDU*[13] that the doctrine of peremption does not deny a party the right to appeal if it would not be in the interests of justice to do so.

[30] But SANDU dealt with an appeal against an interdict in circumstances where the SCA held that the interdict should never have been granted. It is far removed from an attempt to appeal against a costs order only in circumstances where the applicants had previously abandoned the application for leave to appeal and they accept that the underlying judgment on the merits is unassailable. In this case, it is not in the interests of justice to depart from the general rule, that is:[14]

> "The general rule that a litigant who has deliberately abandoned a right to appeal will not be permitted to revive it is but one aspect of a broader policy that there must at some time be finality in litigation in the interests both of the parties and of the proper administration of justice."

[31] For that reason also, the union has no prospects of success in the application for leave to appeal.

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[12] *Lyn & Main Inc v Mitha NO* 2006 (5) SA 380 (N) para 10; *Dabner v SA Railways & Harbours* 1920 AD 583 at 594; *Fick v Walter & anor* 2005 (1) SA 475 (C).

[13] *Minister of Defence v South African Defence Force Union* [2012] ZASCA 110 (30 August 2012).

[14] *SANDU (supra)* para 23.

Conclusion

[32] For all these reasons, the union has no prospects of success in the application for leave to appeal. It follows that the application for condonation must fail.

[33] With regard to the costs of this application, the Court has considered the following:

33.1 The union has been advised by a number of “legal specialists”, including senior counsel, that it had no prospects of success on appeal. Yet it persists.

33.2 The respondent has had to incur further costs, eight months after the matter had been disposed of (and after the workers had been reinstated by way of a conciliated agreement), to deal with a dead issue.

33.3 The union has blown hot and cold in first withdrawing its initial application for leave to appeal, then reinstating it eight months later. It has led to entirely unnecessary and wasted time and costs for the respondent.

Order

The application for condonation for the late filing of the application for leave to appeal is dismissed with costs.

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Steenkamp J

Appearances

For the Applicants:	Stuart Wilson
Instructed by:	SERI Law Clinic
For the Respondent:	Bagraims attorneys.