REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Not reportable

Of interest to other Judges

Case no: C 596/2013

In the matter between:

CHRISTIAAN PHILANDER	**First Applicant**
JACOBUS BURGER	**Second Applicant**
ADAM LOUW	**Third Applicant**
COMMERCIAL, STEVEDORING, AGRICULTURAL AND ALLIED WORKERS UNION ("CSAAWU")	**Fourth Applicant**

and

LA MAISON	**Respondent**

Delivered: 17 April 2015

Summary: Application for condonation in application for leave to appeal.

RULING ON CONDONATION

STEENKAMP J

Introduction

[1] The fourth applicant, CSAAWU, seeks leave to appeal against the costs order only of my judgment handed down on 29 July 2014. The application for leave to appeal is seven months late. It also seeks condonation.

[2] This application for condonation and for leave to appeal against the order of costs only bears a marked resemblance to that involving the same union in *CSAAWU v Steytler Boerdery* (C 592/13). In that case, the union's application for leave to appeal was eight months late. I refused condonation, with costs, on 25 March 2015. The union's reasons for the excessive delay in bringing this application are almost *verbatim* the same as in *Steytler*. Yet it persists with this application.

[3] The fourth 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 three of its members who were dismissed by the respondent, La Maison, for participation in an unprotected strike and further misconduct.

[4] In the judgment *a quo* it was found that the dismissals were fair. The union does not take issue with that finding.

[5] The union seeks leave to appeal only against the costs order. In deciding to award costs, I took into account the following factors

> "Die applikante, wel wetende dat hul optrede, in Philander se woorde, "van dag een af" onbeskermd was, het roekeloos voortgegaan met hul wangedrag. Hulle is hierin gesteun deur hul vakbond, CSAAWU. Selfs nadat hulle uiteindelik teruggekeer het werk toe, het die werkers weer weggebly sonder enige rede. Hulle het 'n redelike opdrag van die werkgewer geweier. Hul optrede was deurgaans roekeloos en uitdagend. Die werkers het, as gevolg van hul wangedrag, hul werk verloor. Hulle sal waarskynlik ook hul gratis verblyf moet prysgee. Daarvoor kan hulle net hulself en hul vakbond blameer. Dis onwaarskynlik dat die werkers in staat sal wees om boonop die respondent se koste te betaal. Die vakbond, aan die ander kant, het sy lede se werksekerheid en verblyf in gevaar gestel en hul ledegeld gebruik om voort te gaan met hierdie hofaansoek ten spyte daarvan dat hulle geen kanse op sukses gehad het nie. Die assistent-hoofsekretaris, Swart, het nie na sy lede se belange omgesien nie. Die vakbond moet, gesamentlik en afsonderlik met die ander applikante, die werkgewer se koste betaal. Beide kante is deur 'n advokaat verteenwoordig. Die regskoste sal die koste van 'n advokaat insluit.."

[6] I will deal with the merits of the application for leave to appeal the costs order only under the heading of prospects of success in the condonation application.

Condonation

[7] 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

[8] The judgment was handed down on 29 July 2014. The union's then legal representatives were at court to note judgment. So were members of the union's leadership. In terms of rule 30(2) of this Court, the union had to deliver its notice of application for leave to appeal 15 court days later. It only did so on 18 March 2015. It is seven months late. It is obviously an excessive delay.

[9] The excessive delay of seven 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

[10] Mr Swart says under oath that "the judgment was transmitted to CSAAWU by Brink" of its then legal representatives, Brink & Thomas attorneys, on 14 August 2014. He does not explain why his attorneys would wait for more than two weeks before doing so; neither did he mention that representatives of the union were in court when judgment was handed down. It was left to the respondent's representatives to point that out in the answering affidavit. Swart then says that, "as a result", the application for leave is out of time; but even if the union's attorneys only sent it the judgment two weeks after it had been handed down, that does not explain a seven month delay. The statement is a *non sequitur.*

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

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

[11] Shortly thereafter, messrs Swart, Christiaans (the general secretary) end their attorneys consulted counsel, Adv Roseline Nyman. Counsel advised them that the matter was correctly decided. So did other legal advisors.

[12] 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".

[13] Mr Swart says that, five months later, in December 2014, the union embarked on a fundraising campaign. Mr Swart did not take the Court into his confidence with regard to the outcome of the fundraising efforts. Again, it fell upon the respondent to place evidence before the court that the union raised 100% of its "target amount" of R115 000 in the "first phase" of its funding campaign to pay its legal costs, with two more phases to follow. He also did not tell the Court that he and Mr Christiaans had already visited Sweden in September 2014 in support of its fundraising campaign.

[14] Five months after the judgment had been handed down, Messrs Swart and Christiaans met with the union's current attorneys, SERI. Brink & Thomas had not withdrawn as the union's attorneys of record. On 17 December 2014 the union "instructed them [SERI] 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".

[15] 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. 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 two and a half months, until 18 March 2015, to deliver the application for leave to appeal.

[16] Swart now says that they had to have the judgment translated. That is despite the fact that the union expressly requested the judgment to be drafted in Afrikaans, the home language of the applicants, and despite the

fact that both he and Mr Christiaans are Afrikaans speaking. In any event, it would take any competent translator no more than two or three hours to translate the 17-page judgment. He also says that they had to give the attorneys "instructions on the precise scope of the appeal", despite the fact that they had, months ago, accepted that the judgment was correct on the merits, and that SERI had already advised them to restrict the "scope of the appeal" to the costs order only. Swart also says that they had to "ascertain the personal circumstances of the first to third applicants"; he does not explain how that may be relevant on appeal.

[17] The explanation for the delay 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

[18] The union seeks leave to appeal against a costs order only. As this Court set out in *Masuku v Score Supermarket (Pty) Ltd*[3], 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.

[19] As the learned authors in *Erasmus*[4] point out with reference to the High Court generally, the principles in *Tsosane v Minister of Prisons*[5] continue to apply in that court. Briefly stated, these are:

19.1 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.

[3] (2013) 34 *ILJ* 147 (LC) paras 10-12.

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

[5] 1982 (3) SA 1075 (C) 1076E-1077B.

19.2 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.

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

19.4 The amount of costs should not be insubstantial.

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

[20] 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.

[21] The Labour Relations Act[6] 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 –
>
> (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
>
> (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".

[22] 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.

[23] 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

[6] Act 66 of 1995.

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.

[24] The court *in casu* exercised its discretion in the paragraph quote earlier in this ruling. It took into account the reckless conduct of the applicants; the fact that the union endangered it members' livelihood by sanctioning and supporting their misconduct; and the absence of any prospects of success in their referral to this court. That is not an improper or capricious exercise of the discretion. Contrary to the union's submissions in this application, the applicants' conduct in the unprotected strike giving rise to their dismissal is a relevant factor. For example, where striking workers engaged in violent conduct, Van Niekerk J held in *Tsogo Sun Casinos*[7]:

> "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*[8], 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 <u>in the negotiation process</u> led to justifiable unhappiness and frustration on the part of Ergo".[9]

[26] The union now says that it cannot afford to pay costs. But it placed no evidence in that regard before the court *a quo*.

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

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

[9] My emphasis.

[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.

Conclusion

[28] The delay of seven months in bringing this application is excessive. The explanation therefor is a poor one. And the union does not have prospects of success in the application for leave to appeal. It follows that the application for condonation must fail.

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

29.1 The union has been advised by a number of "legal specialists", including senior counsel, that it had no prospects of success on appeal. What is more, less than a month ago, in *Steytler*, the same union, represented by the same attorneys, was unsuccessful in a very similar application proffering the same reasons for its excessive delay. Yet it persists with this application, knowing full well that it runs the risk of another adverse costs order, given the precedent in *Steytler*.

The respondent has had to incur further costs, nine months after the matter had been disposed of, to deal with a dead issue. It has led to 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:	B Schiff of Bagraims attorneys.