INTHE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no: JA40/2010

In the matter between:

SAMUEL RABOTHATA & OTHERS	**Appellants**
And	
MEIBC	**First Respondent**
J M GAYLARD, NO	**Second Respondent**
INTERCABLES (PTY) LIMITED	**Third Respondent**

Heard: **05 March 2015**

Delivered: **03 June 2015**

Summary: Reinstatement of appeal – employees failing to file notice of appeal and record of appeal timeously – employees obtaining second case number two years later after obtaining first case number – employees relying on second case number and misleading the court – employees' misrepresentation detrimental to their case- employees failing to provide acceptable explanation for the excessive delay – application for reinstatement of appeal dismissed.

CORAM: Waglay JP, Landman JA, and Mngqibisa-Thusi AJA

JUDGMENT

MNGQIBISA-THUSI AJA

Introduction

[1] This is an appeal against the Judgment of the Labour Court (Molahlehi J) in terms of which, the Labour Court dismissed the appellants' application to review and set aside the decision of the second respondent. The second respondent had found that the referral by the appellants of their dispute for arbitration was defective.

[2] Before dealing with the merit of the appeal, this Court needs to deal with the appellants' application to reinstate the appeal and to condone the late filing of their notice of appeal. The third respondent opposes the application and the appeal. Hereinafter the third respondent will be referred to as the respondent.

Background

[3] Up and until 25 January 2007, the appellants were in the employ of Intercables (Pty) Limited ("Intercables"). Subsequent to disciplinary hearings, Intercables dismissed the appellants for their involvement during December 2006 in an unprotected strike. At the time when the appellants were dismissed, they were represented by National Union of Metalworkers of South Africa ("NUMSA"). NUMSA represented the appellants both during the disciplinary proceedings and in the internal appeal process. NUMSA referred an unfair dismissal dispute to the Metal Industry Bargaining Council ("MEIBC") under case number MEGA 14950. Later the United Peoples Union of South Africa ("UPUSA") also referred the same dispute under case number MEGA 15038 to MEIBC. On 13 March 2007, a day before the arbitration hearing was to be held under the auspices of the Centre for Dispute Resolution Council of the MEIBC ("CDR"), NUMSA withdrew as the appellants' representative.

[4] At the arbitration, the appellants were represented by UPUSA. Intercables raised as a point *in limine* to the fact that since the appellants were represented by NUMSA at the time the dispute arose and during the disciplinary proceedings, in terms of clause 17 of the CDR, the appellants

could not be represented by UPUSA[1]. The commissioner ("second respondent") upheld the point *in limine* and made a ruling that the appellants' referral was defective and dismissed the matter.

[5] The appellants lodged a review application in the Labour Court seeking the review and setting aside of the second respondent's decision. The Labour Court dismissed the application on the ground that the irregularity complained of was not reviewable. On 17 July 2009, the Labour Court granted the appellants leave to appeal its decision dismissing the review application.

[6] The appellants filed a notice of appeal on 02 July 2010 under case number JA 40/2010, that is, 11 months out of time.[2] Subsequent thereto, there was no progress made in the prosecution of the appeal in that the appellants did not file the record within the prescribed time limits.[3] The record was supposed to have been lodged on or before 28 September 2009. On 13 September 2011, the registrar of this Court informed the appellants' then attorneys of record, Maserumule Attorneys, that the appeal in case number JA 40/2010 was deemed to be withdrawn in terms of Rule 5 (17).[4] Five months after receipt of the letter from the registrar, in February 2012, the appellants obtained a legal opinion. The opinion dated 16 February 2012, prepared by an attorney, Mr Sandile Mabaso ("Mr Mabaso"), makes reference to the registrar's letter of 13 September 2011 and advises what the appellants are required to do to persue the appeal.

[7] The appellants appear to have done nothing for a period of 9 months after obtaining the legal opinion. On 13 November 2012, the appellants filed a second notice of appeal under a new case number, JA 60/2012, that is, after

[1] Clause 17 of the DRC provides that at arbitration a party may appear in person or be represented either by a legal practitioner or 'by a member, official or office bearer of a registered union that the party was a member of at the time the dispute arose'.
[2] In terms of Rule 5(1) of the Rules of this Court, a notice of appeal must be filed within 15 days after leave to appeal is granted.
[3] In terms of Rule 5(8), the appellant is to deliver the record within 60 days of the granting of leave to appeal.
[4] Rule 5(17) provides that in the event of the appellant failing to lodge the record within the prescribed period as set, the appellant is deemed to have withdrawn the appeal unless the appellant receives the consent of the respondent for an extension of the of time. If consent is not given, the appellant must, on notice of motion accompanied by an affidavit, apply to the Judge President in chambers for such an extension, after serving the application on the respondent.

the letter issued by the registrar indicating that the appeal under case number JA 40/2010 was deemed to have been withdrawn. On service of the notice of appeal under the new case number the respondent filed a notice of objection in which it was pointed out to the appellants that it was incompetent for them to file a second notice of appeal under a new case number.

[8] Without responding to the respondent's objection the appellants applied to have their appeal reinstated and heard by this Court. In the founding affidavit in support of the application the appellant made reference and attached the legal opinion referred to earlier.

[9] An application for reinstatement is similar to an application for condonation. The court in granting condonation, has a discretion that is to be exercised judiciously, taking into consideration all the facts before it. In doing so, it must take into account (i) the degree of lateness or non-compliance; (ii) the explanation thereof; (iii) the prospects of success; (iv) the importance of the case; (v) the respondent's interest in the finality of the matter.[5]

[10] It is apparent that the contents of the notice of appeal with case number JA 40/2010 are copied in the second notice of appeal with case number JA 60/2012. In the founding affidavit, the deponent alleges that the case number for the appeal was obtained in 2012 and the notice of appeal was filed in November 2012. This clearly referred to the new case number, 60/2012. Counsel for the appellants could not explain why the pervious case number was abandoned. It is clear that this was an attempt at misleading this Court as to the age of the appeal.

[11] The appellants have attempted to mislead this Court by obtaining a second case number two years after it had already obtained a case number for their appeal. I am of the view that based solely on this misrepresentation, this application should be dismissed.

[5] *Melane v Santam Insurance Company Limited* 1962 (4) SA 531 (A) at 532 C-F; *Dial Tech CC v Hudson and Another* (2007) 28 ILJ 1237 (LC).

[12] Dealing with the delay itself, it appears from the founding affidavit and from submissions made by counsel for the appellants that, the delay in filing the notice of appeal and the record was because several successive legal representatives were given instructions to pursue the appeal and they had not done so. According to counsel, the appellants experienced problems raising funds to pay the attorneys' fees or to pay a deposit as UPUSA appeared to have abandoned them. They added that after they had raised and paid the deposit, the relevant UPUSA representative failed to attend scheduled consultations with the lawyers, leading to the lawyers withdrawing as their legal representatives. Counsel for the appellants submitted that the appellants were lay people who have been let down by their union and lawyers and that it was not through the fault of the appellants that the appeal was not prosecuted with the necessary diligence. Counsel urged this Court to be sympathetic to the appellants' need to have their day in court. In *NUM v Council for Mineral Technology,*[6] this Court held that "courts have traditionally demonstrated their reluctance to penalise a litigant on account of the conduct of its legal representative but have emphasised that there is a limit beyond which an applicant cannot escape the results of his representatives lack of diligence or the insufficiency of the explanation tendered."[7] Even though this Court may have sympathy in the way in which the union and the appellants' legal representatives have dealt with this matter, the appellants have not given any particulars as to what they did during the time delays experienced in this matter in pursuing their legal representatives.[8]

[13] It is the respondent's contention that, taking into account the time it took the appellants to prosecute the appeal, the delay is excessive and the appellants have not given a proper and full explanation for non-compliance with the Rules of this Court. Furthermore, the respondent contends amongst other things that the application should be dismissed in view of the misrepresentation committed on behalf of the appellants when a new case number was obtained to fraudulently represent that it was a 2012 appeal when it was a 2010 appeal.

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[6] [1999] 3 BLLR 209 (LAC).
[7] At 211I-212A.
[8] See also *Allround Tooling (Pty) Ltd v NUMSA and Others* [1998] 8 BLLR 847 (LAC) at para 8.

[14] Although the appellants are asking for an indulgence from this Court, it does not appear that they have taken this Court into their confidence. The appellants have failed to come clean and explain that it was the failure of their representatives and it was the representatives who took it upon themselves to mislead the court. Such failure which amounts to a misrepresentation cannot be countenanced.

[15] Also, and with regard to the time delay, the appellants have not given an explanation with any particularity as to why significant periods lapsed during which no action was taken to prosecute the appeal. There is furthermore no explanation as to why the first notice of appeal was filed 11 months late.

[16] The record, which was due on 28 September 2009 in terms of Rule 5(8), was only filed on 27 September 2013, that is, three years after it became due. There is no acceptable explanation given as to why the record was filed more than three years late. The application for reinstating the appeal should also have been instituted as soon as the appellants became aware of the need for it. Even if one was to assume in favour of the appellants that they might not have been expected to know that the application was necessary in February 2012, Mr Mabaso did advise them of the need to so apply. The appellants have not given any explanation as to why this application was only instituted on 16 May 2014; more than two years after the appellants became aware that in order to prosecute their appeal they have to apply for its reinstatement.

[17] I am of the view that the time lapses are excessive. The appellants have displayed a total disregard of the Rules of this Court. Taking into account the purpose of the Labour Relations Act[9] for the resolution of disputes expeditiously, and the fact that the appellants have not taken this Court into their confidence by disclosing relevant information to enable this Court to decide whether condonation should be granted, I am of the view that this application should fail.

[18] In the absence of a reasonable and acceptable explanation and in view of the excessive delay in prosecuting the appeal and the taint of misrepresentation,

[9] 66 of 1995.

it is unnecessary to have regard to the prospects of success on the merits.[10] I am satisfied that the appellants have not shown sufficient cause to reinstate the appeal.

[19] The respondent has sought a punitive cost order. However, bearing in mind the fact that the appellants are probably unemployed, have been abandoned by their union and must have expended their own resources up to this stage, I am not inclined to grant a cost order against the appellants.

[20] Accordingly the following order is made:

The appeal is dismissed with no order as to costs.

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Mngqibisa-Thusi AJA

I agree

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Waglay JP

[10] In this regard see *Moila v Shai NO* (2007) 28 ILJ 1028 (LAC) at para 34; *NUM v Council for Mineral Technology* [1999] 3 BLLR 209 (LAC) at 211G-H.

I agree

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Landman JA

APPEARANCES:

FOR THE APPELLANT:	Adv Zondi
	Instructed by Mhlungu Attorneys
FOR THE THIRD RESPONDENT:	Mr Snyman of Snyman Attorneys