REPUBLIC OF SOUTH AFRICA

Not reportable
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THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 867/13

In the matter between:

HENDRIK HANEKOM	Applicant
and	
CCMA	First Respondent
COMMISSIONER F A CRAFFORD	Second Respondent
APPLETHWAITE FARM (PTY) LTD	Third Respondent

Delivered: 1 August 2016

RULING ON LEAVE TO APPEAL

STEENKAMP J

Introduction

[1] The applicant, Mr Hendrik Hanekom,[1] seeks leave to appeal against my judgment of 12 November 2014. I ruled that Mr Hanekom's chosen representative on the day, the South African Fisheries and General Workers' Union did not have *locus standi* to represent him; and that his application to re-enrol a matter that his trade union and the nominal applicant in the dispute, HOCAFAWU, had previously withdrawn, was dismissed. I made no order as to costs.

Background facts

[2] The applicant -- cited as "HOCAFAWU on behalf of Hendrik Hanekom" -- by way of a notice dated 6 August 2014, sought permission to re-open and re-enrol the matter under case number C867/2013 (i.e. the case number under which this application for leave to appeal was filed).

[3] The Applicant did not file an affidavit with his notice. The facts relevant to the application for re-enrolment are thus to be sought in the affidavit deposed to by Mr Herman Conradie ("Conradie"), the attorney acting for the Third Respondent (Applethwaite Farm) in that application and what is set out in the papers filed in respect of this matter.

[4] Hanekom referred an unfair dismissal dispute to the CCMA (the First Respondent). That dispute was set down to be arbitrated on 25 September 2013. The proceedings were presided over by the Second Respondent, Commissioner F A Crafford. At that stage, Hanekom was represented by Mr Daniel Olyn, a representative from the South African Parastatal and Tertiary Institutions Union ("SAPTU").

[5] In the course of the proceedings the Commissioner obtained consent from the parties to attempt to conciliate the dispute. The result was the conclusion of an agreement in full and final settlement of the dispute referred to the CCMA. Hanekom signed the agreement himself, despite being represented by a trade union. Part of the settlement involved Applethwaite Farm (the third respondent) paying a sum of money to Mr

[1] Mr Hanekom has chosen to cite only himself as the applicant in this application, although the citation in the court *a quo* was "HOCAFAWU obo Hendrik Hanekom".

Hanekom. It paid the agreed sum on 30 October 2013 and there is no indication that Hanekom has repaid it.

[6] On 8 November 2013 the Applicant, at that stage represented by HOCAFAWU, delivered an application to review the settlement agreement. The Third Respondent, Applethwaite Farm, filed delivered an Answering Affidavit. Its attorney, Conradie, also contacted Hanekom on 26 November 2013 for details of his representative at HOCAFAWU. Hanekom gave him the cell number of a Mr Rhode. Following some communication from Conradie in December 2013 Rhode indicated telephonically that the application to review the settlement agreement would be withdrawn and, on 9 January 2014, delivered[2] a notice of withdrawal in the following terms:

> "The Applicant in the matter withdraws his application to the Honourable Court unconditionally. The Applicant was not forced or intimidated to withdraw the matter, but do it out of his free will and after consultation with legal counsel."

[7] On 6 August 2014 Hanekom applied to re-open and re-enrol the matter under case number C687/2013. The matter was enrolled on 12 November 2014. At that hearing I ruled that the trade union purporting to represent Hanekom on the day of the hearing (the South African Fishermen and General Workers' Union) had no *locus standi* to represent him and dismissed the application to re-enrol with no order as to costs.

[8] On 21 November 2014 Hanekom – citing only himself as applicant -- served a document entitled "Leave to Appeal" on Third Respondent. The document was not served on the Third Respondent's attorneys of record and was not filed with the Court until 25 June 2015. However, on 25 November 2014 the Third Respondent filed a notice of opposition in response to the document served by the Applicant.

[9] On 6 July 2015 the Registrar issued a directive reminding the parties to comply with the provisions of paragraph 15 of the Practice Manual of the Labour Court. On 28 August 2015 the Registrar issued a further directive

[2] It seems that the notice was served on the Farm's attorneys on that day, although it was only foiled at court on 8 April 2014.

that in order to process the application for leave to appeal, the applicant had to obtain the transcription of the *ex tempore* judgment of 12 November 2014. She directed Hanekom to ensure that the transcription was filed by 4 September 2015 or the file would be archived. The Applicant failed to comply with that directive and, by way of a further directive of 15 September 2015, the file was archived.

[10] By way of an application on 26 November 2015 Hanekom apparently sought to substitute himself as the applicant party in the proceedings by providing changes in contact details. Nowhere in the application was there any mention of, or a request for, substitution. Be that as it may, he also sought an indulgence in the form of a further opportunity to file the transcription. He was granted two weeks from 15 February 2016 to file the transcription. He was then granted a further indulgence via a directive from the Registrar of 16 March 2016 to file the transcription by 1 April 2016. He failed to do so, instead filing the transcription with the court on 18 April 2016.

Evaluation

Late filing of application for leave to appeal

[11] An application for leave to appeal must be made within15 days from the date of the order against which an appeal is sought.[3] In this case the Applicant served the document entitled “Leave to Appeal” on Third Respondent on 21 November 2014. That document was not filed with this Court until June 2015, well outside of the 15-day period.

[12] The Applicant has not applied for condonation for his failure to comply with the Labour Court Rules. The Court has no jurisdiction to hear the application and it should be dismissed on that basis alone.

Late filing of submissions in support of application for leave to appeal

[3] Rule 30(2) of the Rules for the Conduct of Proceedings in the Labour Court

[13] Even if the late filing of the application on 25 June 2015 were to be condoned, the Applicant's submissions in support of the application were filed late and he has not sought condonation. Paragraph 15 of the Practice Manual of the Labour Court requires applicants to file their submissions in support of an application for leave to appeal within 10 days of filing the application. The Applicant in this case filed his submissions on 17 August 2015, some 38 days outside of the period permitted.

Late filing of the transcription of the ex tempore *judgment*

[14] The transcription of the *ex tempore* judgment was filed on 18 April 2016, some 11 court days after it was supposed to have been filed as directed by the Registrar after the Court had granted the applicant a number of extensions.

The merits of the application for leave to appeal

[15] In any event, there is no reasonable prospect that another court will come to a different conclusion on the merits.

[16] The application for leave to appeal is based on the following grounds:

16.1 The Court denied Hanekom representation from a registered trade union;

16.2 The Court denied an official from a registered trade union the opportunity to represent him;

16.3 The Applicant was given short notice of the Labour Court proceedings on 12 November 2014;

16.4 The Court refused to postpone the matter in order for the Applicant to seek alternative representation when he requested an opportunity to do so;

16.5 The Applicant did not have sufficient time to prepare for the hearing given that his application for legal aid was denied on 5 November 2014;

16.6 The trade union that represented Hanekom, HOCAFAWU, does not exist in the Western Cape, something of which the Third Respondent is aware.

[17] The Applicant has not appealed against the Court's decision to dismiss his application to re-enrol his review. If that is so, this application is moot given that the dismissal of the application to re-enrol stands regardless of whatever becomes of the Court's other decisions.

[18] In any event, none of the points raised above relate to appealable issues. Before turning to the particular points raised by the Applicant it is useful to briefly set out the relevant legal principles.[4]

[19] In terms of s173(1)(a) of the LRA the Labour Appeal Court can determine appeals against the final judgments and final orders of this Court.

[20] Courts have often grappled with deciding which decisions are appealable and which (usually referred to as rulings) are not. It can generally be accepted that a (final) judgment or order is one that[5]:

20.1 is final in effect and not subject to alteration by the court of first instance;

20.2 is definitive of the rights of the parties in the sense that it grants definitive and distinct relief to either of the parties.[6]; and

20.3 has the effect of disposing of at least a substantial portion of the relief claimed in the proceedings.

[4] I am indebted to Mr *Bosch*, for Applethwaite Farm, for his summary of the applicable legal principles.

[5] See *Sacca (Pty) Ltd v Thipe & another* (1999) 20 *ILJ* 2845 (LAC) at 2848.

[6] See *Publications Control Board v Central News Agency Ltd* 1977 (1) SA 717 (A) at 745A and *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue and Another* [1992] 4 All SA 62 (AD) at 64.

[21] With this in mind I consider the points raised in the application for leave to appeal. At the outset it should be noted that the application for leave to appeal does not indicate what is being appealed against i.e. whether it is the whole of the judgment or certain orders made by the Court.

[22] The points referred to at paragraphs 16.3, 16.5 and 16.6 above are allegations that might have supported an application for postponement. They are not judgments or orders of the Court and therefore need not be considered as part of this application.

[23] The points in 16.1 and 16.2 are two sides of the same coin, i.e. whether the court ought to have allowed Hanekom the opportunity to be represented by the South African Fishermen and General Workers' Union, despite the fact that HOCAFAWU is cited as the applicant, acting on behalf of Hanekom.

[24] It would thus appear that the Applicant seeks leave to appeal the decisions refusing him to be represented by the South African Fishermen and General Workers' Union and refusing to postpone the matter ("the decisions").

[25] Those decisions are not appealable. Firstly, they were not definitive of the rights of the parties. Secondly, they did not have the effect of disposing of any of the relief claimed by the Applicant, let alone a substantial portion of it.

[26] Even if those decisions were appealable, there are no merits to the application for leave to appeal them. These decisions fall within the discretion of the Court. An appeal court may therefore not determine whether they were correct. Rather, it is restricted to deciding whether the court *a quo* "acted capriciously, or acted upon a wrong principle, or in a biased manner, or for insubstantial reasons, or committed a misdirection or an irregularity, or exercised its discretion improperly or unfairly."[7]

[7] *Coates Brothers Ltd v Shanker & others* [2003] 12 BLLR 1189 (LAC) at para 5 and *National Union of Metalworkers of SA & others v Fibre Flair CC t/a Kango Canopies* (2000) 21 *ILJ* 1079 (LAC) at 1081A-1082A. With respect to

[27] The Applicant, in his submissions, does not allege that the Court failed to meet this test. Rather, the submissions suggest that the Court decided incorrectly.

[28] In any event, there is nothing, taking into account the evidence before the Court and the submissions by the parties, to suggest that the Court acted in the manner set out in paragraph 28 above. There are no reasonable prospects that an appeal court would set aside the decisions on an application of that test.

[29] And even if the test to be applied to the decisions were wider, i.e. whether there are reasonable prospects of another court coming to a different conclusion, there is no basis for leave to appeal.

[30] As far as the decision on representation is concerned:

30.1 In his submissions in this application the Applicant confirms that the review application was brought by Mr Rhode of HOCAFAWU on his behalf;[8]

30.2 When Conradie contacted the Applicant on 26 November 2013 for details of his representative at HOCAFAWU he was supplied with the cell number of Mr Rhode;

30.3 HOCAFAWU was designated as the Applicant's representative in the notice of motion for the re-enrolment of the application for review and the address indicated there is the same as that on the notice of motion for the initial (withdrawn) review application;

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postponements being a discretionary matter and the application of the test formulated here see *Madnitsky v Rosenberg* [1949] 2 All SA 391 (A).
[1949] 2 All SA 391 (A) at 397-398 and *Momentum Life Assurers Ltd v Thirion* [2002] 2 All SA 62 (C) at 67.

[8] Paragraph 15 of the Applicant's Submissions.

30.4 Neither the Applicant nor HOCAFAWU gave any indication that HOCAFAWU's mandate was terminated and it remained the Applicant's representative in these proceedings until that occurred;

30.5 The Applicant failed to provide any evidence that he was a member of the South African Fishermen and General Workers' Union or that the area and industry in which he worked falls within its registered scope;

30.6 No attempt was made to place the South African Fishermen and General Workers' Union on record as the Applicant's representative. Rather, the 'notice of appointment of union official on record' filed on 11 November 2014 purported to substitute a Mr Titus as the Applicant's representative in his personal capacity as opposed to designating the trade union as the Applicant's representative. Mr Titus, union official or not, had no standing to represent Hanekom in his personal capacity;

30.7 Hanekom was not denied the right to be represented. However, his representatives should have taken proper steps to place themselves on record as such, they ought to have satisfied the Court that they were entitled to represent him and should have known that they might be required to do so.

[31] As far as the refusal to postpone is concerned:

31.1 The Applicant did not, in court, raise any concerns regarding a lack of time to prepare for the hearing or relating to alleged short notice. The Court could thus not have regard to those in deciding not to postpone the hearing;[9]

31.2 The Applicant did not prepare an application for postponement with an affidavit setting out the basis for such. Annexure B to the

[9] It is worth noting that the annexure attached to the application for leave to appeal does not show any discrepancy between the time that the Third Respondent had to prepare and that allowed to the Applicant. On 4 November 2014 both received confirmation that the hearing would proceed on 12 November 2014.

application for leave to appeal is not evidence that is properly before the Court;

31.3 The Labour Relations Act is predicated on expeditious dispute resolution and the Labour Court must where possible avoid unnecessary delays;

31.4 There was a delay of some 8 months between the date of the withdrawal and the application to re-enrol;

31.5 The Applicant's failure to have proper representation in court was as a result of the inadequate assistance he received from his chosen representatives. For the reasons given above they failed to take the necessary steps to ensure that Hanekom was properly represented. If they were not permitted to assist him they should have referred him to someone who could;

31.6 The application to re-enrol had very limited, if any, prospects of success: amongst other things, Hanekom's designated representative, by whose decisions he was bound, withdrew the review application. That application was, in any event, without merit. The Applicant's version was improbable and was directly contradicted by the Third Respondent's evidence;

31.7 The application to re-enrol (and the application to review) amounts to an abuse of the court process. The Applicant accepted the payment made by the Third Respondent in terms of the settlement agreement and gave no indication that he would repay it. Yet he persisted in pursuing a review application which would have the effect of setting aside the agreement in terms of which he received the money. He cannot simultaneously approbate and reprobate;

31.8 No purpose would have been served by further delay to allow the Applicant to secure alternative representation.

<u>Conclusion</u>

[32] The application for leave to appeal must fail.

Costs

[33] I did not order costs *a quo.* In exercising the discretion not to order costs, I took into account that Hanekom is a farmworker and that he may have been badly advised. The latter consideration is no longer valid. He chose to pursue this application – that also did not have any merit – after taking further advice from an attorney. He would have been advised of the risks of incurring a costs order against him in this application, although he was not ordered to pay the costs in his earlier unsuccessful application. That has resulted in Applethwaite Farm having to incur further legal costs, including the costs of counsel. In law and fairness it should not have to bear those further costs.

Order

The application for leave to appeal is dismissed with costs.

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Anton Steenkamp
Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	B Guy (attorney).
THIRD RESPONDENT:	C S Bosch Instructed by Fairbridges Wertheim Becker.