

IN THE LABOUR COURT OF SOUTH AFRICA HELD IN DURBAN**Case No: D628/09****Not Reportable**

In the matter between

ETHEKWINI MUNICIPALITY**Applicant****AND****SHADRACK IVAN LABAN****Respondent****Date of Judgment : 24 January 2012**

Judgment

Cele J**Introduction**

- [1] This application has been brought in terms of section 166 of the Act¹ as an application for leave to appeal against a final *ex tempore* order dated 15 April 2010 issued by this court in terms of section 158(1)(c) of the Act, where an arbitration award dated 25 May 2009 was made an order of this court. The applicant further seeks leave to be allowed to lead evidence on appeal. The application ought to have been filed within 15 days from the date of the order but it was filed on 17 October 2011 and is therefore about 18 months late. The applicant seeks condonation for such lateness.
- [2] The respondent opposed both the application for leave to appeal and the condonation application simply on the basis that both applications are an abuse of the legal process, intended to frustrate his application for contempt of court in seeking to give effect to the terms of the arbitration award.

¹ The Labour Relations Act Number 66 of 1995.

Factual background

- [3] On 14 August 2009 the respondent filed an application to make the arbitration award an order of court in this matter. The applicant was given 10 days within which to deliver a notice of opposition and an answering affidavit, it intended to oppose the application. No opposing papers were filed and the Registrar of this court set the application down in the unopposed role for hearing on 25 February 2010. Counsel for the applicant appeared on 25 February 2010 and made representations as a result of which the matter was then postponed to the opposed role for hearing on 15 April 2010. The applicant was directed to file its answering affidavit with a condonation application within 21 days from the date of the order.
- [4] When the matter came to court on 15 April 2010 no opposing papers had been filed. According to the parties the matter was stood down for some discussions which took place and this was also in the Judge's chambers. I do not have any recollection of the fact and events and accept the say so of the parties. According to the respondent it was brought to the attention of this court that there was a review application pending against the same award sought to be made an order of court. It remained unexplained and therefore unclear why the applicant approached court on 15 April 2010 without first filing opposing papers to the section 158(1)(c) application as already directed by court. Effectively the application to make the award an order of court was not opposed on 15 April 2010. The order was finally granted by court on that day as prayed for.
- [5] In the meantime there was a pending review application in the same matter but under case number D 529/2009 filed on 10 July 2009. The record of the arbitration hearing was filed with the Registrar on 5 August 2009. The applicant's supplementary affidavit in terms of rule 7A(8) was filed on 22 October 2009. On 19 January 2010 the respondent filed his notice of opposition. On 15 April 2010 the record of the arbitration proceedings was served to the respondent's attorneys and on 29 April 2010 the respondent delivered his answering affidavit. On 28 June 2010 the applicant filed an application for condonation for the late filing of the review application and for its replying affidavit. The respondent filed its answering affidavit to oppose the condonation application on 23 July 2010 and he pointed out that the granting of the section 158(1)(c) order was a bar to the granting of the review application. The applicant persisted in seeking a review of the award. The Registrar set the review application for hearing on 7 June 2011 before Gush J who upheld the view of the respondent by striking the matter off the roll. The

applicant sought legal advice on the prospects of success of the application for leave to appeal against the section 158(1)(c) order. On 11 October 2011 the respondent initiated the contempt of court proceedings, seeking to give effect to the award in this matter. The applicant initiated the present application. It contends that it had initiated an application to stay the execution under the award and that the application was set down for a hearing on 25 September 2009. The respondent denied knowledge of that application and called on the applicant to prove the same. No further submissions were made in that regard and no papers were put up in support of that allegation. The applicant said that the application for a stay of execution was also set down for 15 April 2010. That statement was denied by the respondent. There is no indication by the applicant what became of that application. The file for this matter does not have any papers for the application to stay. Nor is there any reference given for the case number.

Grounds for leave to appeal

[6] Two grounds for leave to appeal have been outlined as being that :

1. *“The Learned Presiding Judge erred in failing to take into account the fact that the Applicant had already instituted review proceedings as at 15 April 2010;*
2. *The Learned Presiding Judge erred in granting the order in the light of the pending review proceedings under case number D520/2009.”*

[7] In its further submissions in support of this application the applicant stated the issue for consideration as being whether:-

“the learned Judge was correct in making the award an order of court whilst the review was pending; alternatively

in the event that the learned Judge was not aware of the pending review, whether the Applicant ought to be given leave to lead such evidence interlocutory to its application for leave to appeal.”

Grounds for opposition

- [8] The respondent opposed both applications on the bases that:
- The applicant was represented by the same attorneys and counsel on 15 April 2010 and on 7 June 2011 with the result that the applicant knew about the section 158(1)(c) as early as 15 April 2010;
 - There is no explanation for the delay covering the period from 15 April 2010 and the period 7 June 2011;
 - It should have been apparent as from the date of the service of the answering affidavit on 23 July 2010, in the condonation application that the applicant was required to seek leave to appeal against the order of 15 April 2010;
 - Where there is a delay in a review applicant a court may make an award its order.

Evaluation

- [9] The failure of the applicant to file an answering affidavit to the s158(1)(c) application, after being accorded an opportunity to do so has gone unexplained in this matter. Court was accordingly faced with an unopposed application and therefore no reason to refuse the granting of the order sought. This has resulted in parties speculating on what happened or could have happened on the day before the order was granted. The respondent suggested that it was brought to court's attention that there was a review application pending in the matter. The applicant is not sure of this fact. None of the parties suggested what court said about the pending review application. It does not appear that the file for the review application was brought to court on the day as would normally be the procedure in such situations. The probabilities are that court was not appraised of the existence of the review application. It in that eventuality that the applicant sought to be granted leave to lead further evidence on appeal. Even if court was not told of the pending review application on 15 April 2010, there is no denial that such an application was pending. This court has regrettably not been told by the applicant what evidence is intended to be led and its relevant.
- [10] As correctly submitted by the respondent, the application for condonation lacks an explanation for material periods of the delay, which period commences with 15 April 2010 when an order sought to appeal against was granted in the presence of the attorney and counsel of the applicant. The

period of the delay is substantial. The only explanation proffered is that the applicant was under the impression that the s158(1)(c) order was granted subject to the review application proceeding. The explanation makes no sense at all. Court could never make an award its order subject to the stated condition. The applicant has not indicated who gave it this false impression and the circumstances of it. In the absence of a credible and acceptable explanation for the delay, court does not even have to consider the merits of the matter.

[11] For what it is worth, court considers briefly the merits and notes that, depending on the circumstances of each case, an arbitration award may be made an order of court while there is a pending review application.² No case was made by the applicant that in this case such an approach ought never to have been taken. The applicant has incorrectly assumed that a pending review application is a bar to the granting of the s158(1)(c) order.

[12] Therefore the following order will issue:

1. Condonation for the late filing of the application for leave to appeal in dismissed;
2. The application for leave to appeal is dismissed;
3. The applicant is to pay costs of this application.

Cele J.

APPEARANCES:

1. **For the applicant: D J Saks instructed by Mngoma-Mlaba & Khumalo attorneys.**
2. **For the respondent: D Sridutt instructed by Maraj Attorneys.**

² See Ntshangane Speciality Metal CC [1998] 3 BLLR 305 (LC); Bezuidenhout v Johnston NO & Others (2006) 27 ILJ 2337.

LABOUR COURT