REPUBLIC OF SOUTH AFRICA

Not reportable
Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 540/2008

In the matter between:

FAWU	**First applicant**
VERONICA CLAASSEN	**Second applicant**
BERONICE SETHLOW	**Third applicant**
APAHEA PHATLANYANE	**Fourth applicant**
ROSY TSHENYEGO	**Fifth applicant**

and

CAPE HOSPITALITY SERVICES (PTY) LTD t/a SAVOY HOTEL	**Respondent**

Delivered: **9 December 2014**

RULING ON LEAVE TO APPEAL

STEENKAMP J

Introduction

[1] The respondent, Savoy Hotel, seeks leave to appeal against my judgment of 24 February 2014. It delivered the application for leave to appeal some six months late. It seeks condonation. Mr *Spamer*, who has appeared for the Hotel throughout, also failed to deliver his submissions within the time period prescribed in clause 15.2 of the Practice Directive that has been in force since 2 April 2013. Nevertheless, given that answering and replying affidavits had been filed in the application for leave to appeal and the application for condonation, I directed the Hotel to deliver its submissions by 31 October 2014 and the Union (the first applicant) to do so by 14 November 2014. Although they did so, the file was only returned to me on 27 November 2014.

The judgment

[2] The judgment dealt with an application in terms of s 158(1)(c) of the Labour Relations Act[1] to make an arbitration award an order of court. The Court granted the application, pointing out that it had the discretion only to grant it or to decline it, and not to interfere with the award by limiting the backpay included in an order of retrospective reinstatement.

Condonation

[3] The application for leave to appeal was due by 17 March 2014. It was only delivered on 11 September 2014, almost six months late. I shall deal with the application for condonation in the light of the well-known principles in *Melane v Santam Insurance Co Ltd.*[2]

Extent of delay

[4] As I have noted, the application is almost six months late. This is clearly an excessive delay. In order to succeed with its application for condonation, the Hotel would have to show persuasive reasons for the

[1] Act 66 of 1995 (the LRA).

[2] 1962 (4) SA 531 (A).

delay and excellent prospects of success in the application for leave to appeal.

Reasons for delay

[5] The Hotel's sole director, Robert Johan Williams, admits that his attorney, Mr Spamer, gave him a copy of the judgment on 24 February 2014.

[6] Williams acknowledges that the award that was made an order of court unequivocally stated that the employees had to be reinstated. Yet he says that in his "opinion and interpretation" – apparently on the advice of his attorney – that did not mean that it was retrospective in the sense that the employees were entitled to backpay. He says that he was advised – apparently by Mr Spamer – "that there was legal authority that when a court or arbitrator decides to grant reinstatement, it also needs to make a decision as to whether reinstatement should be retrospective and the period of retrospectivity". He formed the opinion that he did not have to pay the employees retrospectively to the date of dismissal.

[7] This "opinion and interpretation" of the meaning of reinstatement by Messrs Williams and Spamer is surprising. In the judgment it is clearly stated (at paragraph 14) that reinstatement "also implies their right to backpay, apart from the period of 8 February to 9 June 2008". And the judgment spells out (in paragraph 17) that the Court did not have the discretion to limit backpay – it could only make the arbitration award an order of court or decline to do so. And the order included an order of reinstatement, i.e. putting the employees back into the position in which they would have been, had they not been dismissed.

[8] Despite this clear exposition of the trite legal position in the judgment, the Hotel refused to give effect to the judgment by paying the employees retrospectively. (The employees reported for work in compliance with the court order on 1 April 2014). That forced the union to bring a contempt of court order. It was heard on 29 August 2014. At that hearing, the Court again explained the legal position to Mr Spamer, i.e. that the employees were reinstated and thus entitled to retrospective backpay. Still his client did not comply. It was only on the return date of the contempt application,

on 11 September 2014 and without any prior notice, that the Hotel delivered its application for leave to appeal.

[9] The reason for the delay, for the most part, appears to be the Hotel's refusal – aided by legal advice – to accept the clear legal position with regard to reinstatement. And even when the Court again explained that position to Mr Spamer at the hearing on 29 August, the Hotel did nothing further until it was faced with a final contempt order on 11 September.

[10] The explanation is a poor one. It flies in the face of the clear language of the judgment and the trite legal position. The Hotel was legally represented by the same attorney throughout. It offers no other explanation for its failure to timeously bring an application for leave to appeal, given that it disagreed with the judgment from the time it was handed down. And insofar as it seeks to blame its attorney for his legal advice, there is a measure beyond which it cannot escape its attorney's lack of diligence[3], especially since the attorney appears to have taken issue with the judgment since the time it was handed down in February.

Prospects of success: grounds for leave to appeal

[11] The extreme lateness of the application, coupled with the poor explanation therefor, needs to be weighed up with the prospects of success.

[12] There is no prospect that another court will come to a different conclusion. The law is clear. The Court does not have a discretion to limit backpay when it makes an arbitration award an order of court – its only discretion, as reiterated in the judgment, is whether to make the award an order of court or not.[4]

[13] The authorities on which Mr *Spamer* relies in his submissions for the contrary argument do not support him at all. Those authorities deal with the trite proposition that, when clothed with original authority in an unfair dismissal case, an arbitrator or this Court does have the discretion whether or not to order reinstatement or re-employment in terms of section

[3] *Saloojee v Minister of Community Development* 1965 AllSA 521 (A); *Silplat v CCMA & others* [2011] 8 BLLR 798 (LC).

[44] *SA Post Office v CWU* [2013] 12 BLLR 1203 (LAC) paras 21-22.

193(2) of the LRA, and whether or not to limit the period of backpay. But the Court does not have the authority to change the terms of an arbitration award when it is called upon to make that award an order of court in terms of s 158(1)(c) of the Act.

[14] The meaning of “reinstatement”, insofar as it need be stated again, was made abundantly clear by the Constitutional Court more than five years ago in *Equity Aviation Services (Pty) Ltd v CCMA*[5] and reiterated by the LAC in *Gijima AST v Hopley*[6]:

> "It is not necessary for this court to define what reinstatement means. We are bound by the definition ascribed to the term by the Constitutional Court in the *Equity Aviation* matter that:
>
> '[36] The ordinary meaning of the word 'reinstate' is to put the employee back into the same job or position he or she occupied before the dismissal, on the same terms and conditions. Reinstatement is the primary statutory remedy in unfair dismissal disputes. It is aimed at placing an employee in the position he or she would have been but for the unfair dismissal. It safeguards workers' employment by restoring the employment contract. Differently put, if employees are reinstated they resume employment on the same terms and conditions that prevailed at the time of their dismissal. "

[15] The Hotel has no prospects of success in its application for leave to appeal. Another court will not place a meaning on ‘reinstatement’ that is contrary to the authority of the highest court in the land. And as far as the decision to grant the application in terms of s 158(1)(c) is concerned, the court *a quo* had a discretion to grant it or to decline it. That discretion was exercised judicially and not arbitrarily or capriciously. There is no reasonable prospect that another court will interfere with the exercise of the discretion.

[5] 2009 (1) SA 390 (CC); [2008] 12 BLLR 1129 (CC) para [39]. See also *Billiton Aluminium SA Ltd V Khanyile & ors* [2010] 5 BLLR 422 (CC).

[6] (2014) 35 *ILJ* 2115 (LAC) para [47].

Conclusion

[16] The application for leave to appeal is almost six months late. The explanation for this excessive delay is unsatisfactory. The prospects of success are poor. The employees are being prejudiced by the Hotel's refusal to abide by the court order.

[17] In all these circumstances, the application for condonation must be refused. I did not order costs in the judgment *a quo*. The employees have now had to incur further costs occasioned by the Hotel refusing to comply with the court order and belatedly launching this application without any prospects of success. The Hotel should, in law and fairness, bear the costs of this application.

Order

The application for condonation – and thus the application for leave to appeal – is dismissed with costs.

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Steenkamp J

APPEARANCES

APPLICANTS (FAWU and others):	MJ Ponoane (attorney).
RESPONDENT (Savoy Hotel):	J S Spamer of Spamer Triebel attorneys.