



IN THE LABOUR COURT OF SOUTH AFRICA, GQEBERHA

Not Reportable
Case No: PR 191/21

In the matter between:

TASWU obo MAZWI

Applicant

and

BOTHA DU PLESSIS N.O.

First Respondent

**SOUTH AFRICAN ROAD PASSENGER
BARGAINING COUNCIL**

Second Respondent

ALGOA BUS COMPANY (PTY) LTD

Third Respondent

Decided: In Chambers

Delivered: This judgment was handed down electronically by circulation to the applicant's legal representative and the respondent's by email, publication on the Labour Court website and release to SAFLII. The date and time for handing-down is deemed to be 11h00 on 12 April 2023.

JUDGMENT: LEAVE TO APPEAL

NZUZO, AJ

Introduction

[1] This is an application seeking leave to appeal against the whole judgment handed down by this Court on 11 August 2022. The application is duly opposed by the applicant who is the responding party in the application for leave to appeal.

The grounds for seeking leave to appeal

[2] Attack on the judgment of this Court is directed on the correctness of this Court's approach concerning the fairness of the sanction imposed. The third respondent further argues that there is compelling reasons for the granting of leave to appeal. I will deal with these grounds further below.

The test for leave to appeal

[3] It is by now settled that the Labour Court is a court of law and equity.¹ Consequently, section 17 of the Superior Courts Act (SCA) also applies to applications for leave to appeal in this Court. The said section 17 provides:

“17. Leave to appeal.

(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that—

- (a) (i) the appeal would have a reasonable prospect of success; or
- (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;
- (b) the decision sought on appeal does not fall within the ambit of section 16 (2) (a); and
- (c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.”

¹ See: section 151 of the Labour Relations Act, Act 66 of 1995.

- [4] A long-established test that is applicable in an application such as the present requires the court to determine whether there is a reasonable prospect that another court may come to a different conclusion to that reached in the judgment that is sought to be taken on appeal.² Although some of the cases referred to in this paragraph are criminal cases, it has been held that the test is the same in civil cases as well.³
- [5] This test is not to be applied lightly – the Labour Appeal Court had occasion to observe that this court ought to be cautious when leave to appeal is granted, as should the Labour Appeal Court when petitions are granted. The statutory imperative of the expeditious resolution of labour disputes necessarily requires that appeals be limited to those matters in which there is a reasonable prospect that the factual matrix could receive a different treatment or where there is some legitimate dispute on the law.⁴
- [6] In *Smith v S*⁵, the test was summarised as follows:

"What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal."

- [7] In giving consideration to the application, this court is therefore enjoined by judicial authority to take cognizance of the test which is of application in a matter

² See *Daantjie Community and Others v Crocodile Valley Citrus Company (Pty) Ltd and Another* [2015] JOL 33500 (CC); *R v Baloi* 1949 (1) SA 523 (A) at 524; *R v Nxumalo* 1939 AD 580 at 582; *R v Ngubane and Others* 1945 AD 185 at 187; *R v Sikosana* 1980 (4) SA 559 (A) at 562.

³ *Botes and Another v Nedbank Limited* 1983 (3) SA 27 AD at 28C.

⁴ *Martin and East (Pty) Ltd v NUM* (2014) 35 ILJ 2399 (LAC).

⁵ 2012 (1) SACR 567 (SCA) at para 7.

of this nature. This necessarily entails that this Court should consider the application objectively and to the extent that human nature allows not to be influenced by the fact that the same court reached the conclusion that it did in the main application. Judicial authority enjoins the Court to reflect dispassionately upon its decision and decide whether there is a reasonable prospect that the Appeal Court may disagree with its decision.

Evaluation

- [8] I shall deal firstly with the “*correctness of the Court’s approach*” argument. In opposing the review application, the third respondent argued that the employee was found guilty of committing a serious act of misconduct which warranted dismissal. The basis for making the contention that the penalty of dismissal was warranted was, as I understand the third respondent’s argument, the seriousness of the misconduct for which she was found guilty.
- [9] From my reading of the grounds for seeking leave to appeal along with the submissions made on behalf of the third respondent, the ground upon which leave to appeal is sought essentially constitutes a rehashing of the issue that was raised in the review application and it has been dealt with by this court in the impugned judgment.
- [10] I am unpersuaded that errors, as have been raised by the third respondent, exist to enable me to form the opinion that an appeal would have a reasonable prospect of success. In my view, the third respondent enjoys no prospects of success on appeal. I am fortified in this view by a well-established principle that a substantively fair dismissal is one which establishes that there was a transgression, the *nature* as well as the effect or *impact* of which was such as to make the sanction of dismissal appropriate.⁶

⁶ *Edcon Ltd v Pillemer NO* [2010] 1 BLLR 1 (SCA). See also *Phalaborwa Mining Co Ltd v Cheetham and Others* [2008] 6 BLLR 553 (LAC) para 26.5 where the Court found no fault in the arbitration award that concluded that the dismissal was substantively fair on the basis of *inter alia* the fact that the employee acted dishonest and the employer’s evidence that the trust relationship had broken down irretrievably. In *Cox v CCMA and Others* (2001) 22 ILJ 137 (LC) where the Court held that where it had been shown that the employee was dishonest and that the trust relationship had broken down dismissal is warranted. In *Miyambo v CCMA and others* [2010] 10 BLLR 1017 (LAC) at para 17 the Labour Appeal

[11] But there is an alternate ground on which leave to appeal can be granted, namely if I am of the opinion that there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration. The third respondent argues that there is such a compelling reason for the hearing of the matter on appeal. On this point, the third respondent argues that there are conflicting judgments on the issue and that does serve as the compelling reason for the hearing of the appeal.

[12] I agree with the submissions that even where I form the opinion that an appeal would not have a reasonable prospect of success, it is still incumbent upon me to consider whether leave to appeal should nevertheless be granted because there is some other compelling reason. This is so as the Supreme Court of Appeal has made this clear in *Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd*⁷ that:

“In order to be granted leave to appeal in terms of s 17(1)(a)(i) and s 17(1)(a)(ii) of the Superior Courts Act an applicant for leave must satisfy the court that the appeal would have a reasonable prospect of success or that there is some other compelling reason why the appeal should be heard. If the court is unpersuaded of the prospects of success, it must still enquire into whether there is a compelling reason to entertain the appeal.”

[13] A compelling reason has been held to include “*an important question of law or a discreet issue of public importance that will have an effect on future disputes*” but that “*here too, the merits remain vitally important and are often decisive.*”⁸ Nonetheless, it is clear that an important question of law or discreet issue of public importance may but not necessarily constitute a compelling reason.

[14] It is so that a new basis that could be raised on appeal which was not raised and addressed by the lower court may, at least in certain circumstances,

Court reiterated that “*our Courts place a high premium on honesty in the workplace.*” See also: *Hulet Aluminium (Pty) Ltd v Bargaining Council for the Metal Industry and Others* [2008] 3 BLLR 241 at para 42.

⁷ 2020 (5) SA 35 (SCA) at para 2.

⁸ *Caratco* (Ibid) at para 2.

constitute a compelling reason.⁹ In the present instance, there is no suggestion that some or other issue that was not raised before me would be advanced and argued on appeal. The third respondent intends arguing the appeal on the same grounds that it placed before me but seeking to persuade the appeal court to come to a different conclusion.

[15] I have carefully considered whether there is some other compelling reason why an appeal should be heard while being conscious of not succumbing to hubris that my judgment is unassailable on appeal, *albeit* that a higher threshold is now required for leave to appeal to be granted on the merits. I am not satisfied that the third respondent has met the required test, both in respect of reasonable prospects of success and in demonstrating compelling reasons. Besides a mere lip service as to the requirement of a compelling reason – conflicting judgment, the third respondent has not come anywhere near establishing this ground. I have not been informed of other judgments that conflict with my finding nor have the cases¹⁰ referred to in the third respondent's submission shown to have been in conflict with my conclusion *hoc casu*.

[16] In both cases referred to above, the arbitrator examined the appropriateness of dismissal as a sanction. The employee in Phalaborwa was found to have acted dishonestly and the employer led evidence that the trust relationship had broken down irretrievably. Significantly, the afore-going distinguish the circumstances leading to the employee's dismissal *hoc casu* where no act of dishonesty, which I have already found in the impugned judgment to be antithetical to employment, was committed and no evidence showing either that the relationship has broken down or that the only sanction prescribed for this kind of misconduct, in the disciplinary policy, was dismissal. It follows therefore that the leave to appeal application must fail.

[17] In the premise, the following order is made:

⁹ See: *Minister of Justice and Constitutional Development and others v South African Litigation Centre and others* 2016 (3) SA 317 (SCA).

¹⁰ See: *Phalaborwa Mining Co Ltd v Cheetham and Others* [2008] 6 BLLR 553 (LAC) and *Samancor Chrome Ltd (Tubatse Ferrochrome) v Metal and Engineering Industries Bargaining Council and others* (2011) 32 ILJ 1057 (LAC).

Order:

1. The application for leave to appeal is dismissed.
2. There is no order as to costs.



S. Nzuzo

Acting Judge of the Labour Court of South Africa

LABOUR COURT

Appearances:

For the Applicant: Charlie Higgs of Higgs Attorneys Inc

For the Respondent: Adv. le Roux

Instructed by: Joubert Galpin Searle

LABOUR COURT