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THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR2023/22

In the matter between:

CINDI ALANI SAMSON	Applicant
and	
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	First Respondent
MASHEGO MAILMELA *N.O.*	Second Respondent
REACH SUMMIT (PTY) LTD	Third Respondent

Summary: Application for leave to appeal, no merit to any of the grounds, application therefore dismissed.

JUDGMENT: LEAVE TO APPEAL

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DANIELS J

Introduction

[1] Having heard the review application, I handed down a judgment granting the order sought and ordering that the final written warning issued to the applicant by the third respondent constituted an unfair labour practice. The third respondent applies for leave to appeal. For ease of reference, in this judgment, the applicant in the review application will still be referred to as the applicant. The third respondent in the review application, the applicant in the application for leave to appeal, will still be referred to as the third respondent.

Legal principles and analysis

[2] Section 17(1) of the Superior Courts Act No. 10 of 2013 provides that leave to appeal may only be given where the judge is of the opinion that the appeal *would* have a reasonable prospect of success or there is some other compelling reason why the appeal should be heard.

[3] Leave to appeal should not be granted unless there is a sound and rational basis to conclude that there is a reasonable prospect of success.[1]

[4] In *Martin & East (Pty) Ltd v National Union of Mineworkers & others*[2] the court, per Davis JA stated:

> *"This was a case which should have ended in the Labour Court. This matter should not have come to this court. It stood to be*

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[1] *MEC for Health, Eastern Cape v Mkhitha and Another* [2016] JOL 36940 (SCA) at paras 16 – 17

[2] (2014) 35 ILJ 2399 (LAC) at 2406

resolved on its own facts. There is no novel point of law to be determined nor did the court a quo misinterpret existing law. There was no incorrect application of the facts; in particular the assessment of the factual justification for the dismissals/alternative sanctions. I would urge labour courts in future to take great care in ensuring a balance between expeditious resolution of a dispute and the rights of the party which has lost. If there is a reasonable prospect that the factual matrix could receive a different treatment or there is a legitimate dispute on the law, that is different. But this kind of case should not reappear continuously in courts on appeal after appeal, subverting a key purpose of the Act, namely the expeditious resolution of labour disputes." (own emphasis)

[5] In the final analysis, one can say no more than that the threshold is high and leave to appeal is not merely for the asking.

Analysis of the grounds for leave to appeal

Ground 1: Prior engagement before the warning was issued

[6] The third respondent contends that the court ignored evidence from its sole witness, Ms Anthea Kallis to the effect that there was "engagement" and "conversations" prior to the warning being issued. This is incorrect. Such evidence was not ignored.

[7] In para 4.14 of the judgment, the court pointed out that there was evidence of prior conversations, but those conversations related to the alleged poor work performance of the applicant. Ms Kallis had conceded as much under cross examination. The relevant parts of the record are referenced in the judgment. In the circumstances, the court held that there was no

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evidence of a *hearing*. In addition, the court took into account that Ms Kallis conceded that, irrespective of what the applicant had to say about the alleged negligence at a hearing, the warning would still have been issued.

[8] There is therefore no merit to the third respondent's contentions.

Ground 2: Finding that the applicant short staffed

[9] The third respondent contends that the court disregarded the evidence of Ms Kallis as to: (1) the vacancies that existed and how they were filled, (2) the evidence that the workload of the applicant was significantly reduced. The third respondent further contends that the court should have preferred the version of Ms Kallis over the applicant because the applicant bore the onus. These contentions are without merit.

[10] The third respondent does not appear to have considered the entire judgment, particularly para 4.7. In paragraph 4.7, with reference to the record, the court summarized the evidence of Ms Kallis concerning this issue. Ms Kallis confirmed that the applicant was allocated additional duties, aside from those for which she was engaged. Ms Kallis eventually took on some of these additional duties. This was not a reduction in her workload. Ms Kallis conceded that two individuals, who worked with the applicant, had resigned and were not replaced.

[11] In the circumstances, the court considered that there was no negligence, as required, for the misconduct for which applicant had received a warning. The court considered that the third respondent should have dealt with the matter as one relating to poor work performance.

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[12] There is no merit to this ground for leave to appeal.

Ground 3: Failure to consider that the applicant bore the onus

[13] The third respondent alleges that the court failed to consider that the applicant bore the onus. There is nothing which reflects that the onus was not taken into consideration. In para 22 of the judgment, the court records: "*On the evidence before the second respondent, regardless of whether deadlines were actually missed, no conclusion is warranted that the applicant was negligent or careless in the execution of her duties*." This means that the applicant satisfied the onus on her. There is therefore no merit to this ground for leave to appeal.

Ground 4: A reasonable decisionmaker could reach same conclusion as the second respondent

[14] The third respondent simply states that it disagrees with the conclusion of the court, without providing any substance. In the circumstances, this constitutes no ground for leave to appeal.

Ground 5: Error on substitution - poor work performance or misconduct

[15] The court did not deal with the issue as one related to incapacity, as alleged. Having decided that the award must be set aside, the court considered whether the applicant was guilty of the misconduct for which she was disciplined.

[16] The third respondent had disciplined the applicant for misconduct, on the basis of her alleged negligence, and issued a final written warning for the alleged misconduct. If the evidence failed to establish negligence, the

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applicant was not guilty of the misconduct. The court found that the evidence did not reveal negligence, given that the applicant was under resourced and her workload was extreme.

[17] There is no merit to this ground for leave to appeal.

Conclusion

[18] There is no merit to any of the grounds for leave to appeal. The application for leave to appeal is dismissed.

RN Daniels

Judge of the Labour Court of South Africa

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