

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case no: J 1615 / 21

In the matter between:

LESHABANE, JOSEPH MALEKUTU

Applicant

and

MINISTER OF HUMAN SETTLEMENTS

First Respondent

**DIRECTOR GENERAL OF THE DEPARTMENT
OF HUMAN SETTLEMENTS**

Second Respondent

DEPARTMENT OF HUMAN SETTLEMENTS

Third Respondent

Decided: In Chambers

Delivered: 16 February 2024

This judgment was handed down electronically by circulation to the parties and legal representatives by email. The date and time for hand-down is deemed to be 16 February 2024

Summary: Leave to appeal – no proper grounds made out – application for leave to appeal dismissed

JUDGMENT – LEAVE TO APPEAL

SNYMAN, AJ

Introduction

[1] In this instance, the applicant in the main application brought an application starting out as an urgent application, which was struck from the roll for want of urgency, and then proceeding in the ordinary course which is how the application came before me. In the application before me, the only remaining relief sought by the applicant was an order that the applicant's fixed term contract with the third respondent be declared to be valid and binding between the parties until 31 December 2024. The applicant contended that the termination of that contract by the third respondent was unlawful, unreasonable, irrational, unjustifiable and unfair. The application was opposed by the respondents.

[2] The application came before me on 30 August 2023 for argument. After hearing argument by all parties, I reserved judgment. Written judgment in the application was then handed down on 1 December 2023, in terms of which the applicant's application was dismissed with costs.

[3] Dissatisfied with the judgment, the applicant, on 20 December 2023, filed an application for leave to appeal. The application for leave to appeal also incorporated written submissions as contemplated by Rule 30(3A) of the Labour Court Rules and clause 15.2 of the Practice Manual. The respondents did not engage in the application for leave to appeal. The time limit in terms of the Practice Manual for filing submissions has now passed, and the application is ripe for determination.

[4] Clause 15.2 of the Practice Manual further provides that an application for leave to appeal will be determined by a Judge in chambers, unless the Judge directs otherwise. I see no reason to direct otherwise and will therefore determine the applicant's leave to appeal application in chambers.

Analysis

[5] In *J & L Lining (Pty) Ltd v National Union of Metalworkers of SA and Others* (2)¹ the Court summarized the legal position that applies when a litigant seeks leave to appeal from this Court as follows:

¹ (2019) 40 ILJ 1303 (LC) at para 5.

‘Leave to appeal is not there for the asking. When deciding whether to grant leave to appeal to the Labour Appeal Court, the Labour Court must determine whether there is a reasonable prospect that another court would come to a different conclusion to that of the court a quo, or in other words, whether the appeal would have a reasonable prospect of success. This was summarised in *SA Clothing & Textile Workers Union & others v Stephead Military Headwear CC*, as follows:

‘It is trite that for an application for leave to appeal to be successful, it is required of the party seeking such leave to demonstrate that there are reasonable prospects that another court, in this instance, the Labour Appeal Court, would come to a different conclusion to that reached in the judgment that is sought to be taken on appeal.’

[6] As to the meaning of ‘*reasonable prospects of success*’, the Court in *Member of the Executive Council for Health, Eastern Cape v Mkhitha and Another*² said the following:

‘Once again it is necessary to say that leave to appeal, especially to this Court, must not be granted unless there truly is a reasonable prospect of success. Section 17(1)(a) of the Superior Courts Act 10 of 2013 makes it clear that leave to appeal may only be given where the judge concerned is of the opinion that the appeal *would* have a reasonable prospect of success; or there is some other compelling reason why it should be heard.

An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. A mere possibility of success, an arguable case or one that is not hopeless, is not enough. There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal.’

[7] Firstly, the applicant contends that I erred in deciding that the applicant’s case was not founded on a breach of contract. I deal with this issue in full in my original judgment. There can be little doubt that the applicant never advanced a case based on breach of contract, but squarely founded his case on either an unfair or unlawful termination of employment. The applicant’s founding affidavit speaks for itself, and I

² [2016] JOL 36940 (SCA) at paras 16 – 17.

am not going to repeat what I have already set out in full in my judgment. There is simply no prospects of success at all in this ground for seeking leave to appeal.

[8] The applicant also contends that I erred in finding that the Court had no jurisdiction to entertain the application. The problem with this contention is that the applicant simply does not understand the jurisdictional issues, which arise specifically based on the case he has pleaded. It is trite that jurisdiction is determined on the case as pleaded. Considering the one part of the pleaded case, this Court does not have the jurisdiction to decide a case of unlawful dismissal. The case law in this regard is well settled. And secondly, where the applicant seeks to rely on an unfair dismissal, this Court would equally have no jurisdiction if that dispute was not first referred to the CCMA and conciliated, and thereafter, depending on the nature of the dispute, referred to arbitration or adjudication. A direct approach to this Court is simply not competent. Again, the case law in this regard is settled and clear. As this was the other basis of his pleaded case, this Court had no jurisdiction to come to his assistance. The applicant accordingly has no prospects of success on appeal where it comes to this ground for seeking leave to appeal.

[9] According to the applicant, I erred in finding that the 2021 contract did not extend the 2016 contract. I do not understand how this contention can be made by the applicant. The applicant relies on a letter of 15 February 2021 in support of his contention in this regard. But what the applicant completely fails to appreciate is that this letter was superseded by a *de novo* contract of employment that replaced, *in toto*, the 2016 agreement, which contract the applicant signed on 10 June 2021. There is accordingly no substance at all in this ground for seeking leave to appeal.

[10] When the matter was originally argued before me, the applicant squarely relied directly on section 23 of the Constitution in support of his claim. As I found in my original judgment, this approach was not competent because of the principle of subsidiarity. In seeking leave to appeal, the applicant now argues that his direct reliance on the Constitution was 'in addition' to relying on section 158(1) of the LRA, and hence permissible. The proposition is ludicrous. The fact is that under subsidiarity, the applicant cannot rely on the Constitution at all. He can only rely on the LRA. There is no prospect at all that another Court would conclude otherwise.

[11] The applicant continues, in his application for leave to appeal, to assert a case based on breach of contract under section 77(3) of the BCEA, despite never having pleaded the same. I am compelled to reiterate that there was no such case made out in the pleadings, by the applicant. This case was raised for the first time in the applicant's heads of argument when the matter came before me. It is trite that such an approach is simply not permissible. One simply is not allowed to raise a case for the first time in heads of argument. The applicant has no prospects of success on appeal in this regard.

[12] In the end, and what the applicant stubbornly refuses to appreciate, despite the plethora of authorities including several Constitutional Court authorities (referred to in my original judgment) that pertinently say so, is that if one wants to rely on the LRA to substantiate a case and obtain a remedy, then one is compelled to follow the processes prescribed by the LRA. The applicant did not follow those processes, bypassed the same, and came directly to this Court. That is just not competent. These principles are so well settled that any contention by the applicant to the contrary is hopeless, and no other Court would decide otherwise.

[13] In the end, I am unpersuaded that any of my findings in this case was erroneous to the extent that it would justify interference with on appeal. Overall considered, I believe that the applicant in effect simply disagrees with the findings I had made, however such a disagreement does not make out a case for leave to appeal. Where it comes to these findings, I simply do not believe that there exists a reasonable prospect that another Court would find otherwise, and the applicant has no prospects of success on appeal in this regard.

[14] Accordingly, the applicant has thus failed to show that there exists a reasonable prospect that another Court would come to a different conclusion, and that the applicant has little prospect of success on appeal. The application for leave to appeal falls to be dismissed. I believe the following *dictum* from the judgment in *Martin & East (Pty) Ltd v National Union of Mineworkers and Others*³ to be appropriate in deciding to refuse leave to appeal, especially considering the delay that has already taken place in this case:

³ (2014) 35 ILJ 2399 (LAC) at 2405J-2406A

‘... The Labour Relations Act was designed to ensure an expeditious resolution of industrial disputes. This means that courts, particularly courts in the position of the court a quo, need to be cautious when leave to appeal is granted. ...’

[15] This only leaves the issue of costs. For the reasons I have set out in my original judgment, I would have been inclined to make a costs award against the applicant. But since the respondents have not engaged in the application for leave to appeal, I shall treat the application as unopposed and make no costs order.

[16] In the premises the following order is made:

Order

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

S. Snyman

Acting Judge of the Labour Court of South Africa