

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR 245 / 20

In the matter between:

**AMALUNGELLO WORKERS' UNION obo
MAYISELA STEVEN JABULANI & 29 OTHERS**

Applicants

and

LANCE JABULANI N.O.

First Respondent

**COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION**

Second Respondent

UNILEVER SOUTH AFRICA (PTY) LTD

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 applicants in the main application brought an application to review and set aside a jurisdictional ruling made by the first respondent in his capacity as an arbitrator of the Commission for Conciliation, Mediation and Arbitration (CCMA), the second respondent. The application was brought in terms of section 145 of the Labour Relations Act¹ (LRA). The review application was opposed by the third respondent.

[2] The review application came before me on 24 August 2023 for argument. After hearing argument by both parties, I reserved judgment. Written judgment in the review application was then handed down on 29 November 2023, in terms of which the applicants' review application was dismissed, with no order as to costs.

[3] Dissatisfied with the judgment, the applicant, on 13 December 2023, filed an application for leave to appeal. The application for leave to appeal was accompanied by written submissions as contemplated by Rule 30(3A) of the Labour Court Rules and clause 15.2 of the Practice Manual. The third respondent 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 applicants' leave to appeal application in chambers.

Analysis

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

¹ Act 66 of 1995 (as amended).

² (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*³ 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] Dealing then with the grounds raised by the applicants in seeking leave to appeal, the first ground raised is that I was not entitled to determine that the CCMA had no jurisdiction because the individual applicants were not dismissed, because all

³ [2016] JOL 36940 (SCA) at paras 16 – 17.

that was before me to decide was whether the CCMA lacked jurisdiction on the basis that the individual applicants were dismissed for operational requirements. There can be no substance in this ground raised by the applicants. The issue to be decided concerned whether the first respondent's determination that the CCMA had arbitration jurisdiction was correct. As set out in my judgment, such a jurisdictional issue to be decided by the Labour Court is a decision *de novo* of its own accord, because the CCMA cannot finally decide its own jurisdiction. It follows that the reasons given by the first respondent in his jurisdictional ruling for finding that the CCMA lacked jurisdiction is of little importance. It is always up to this Court to finally decide, on the facts, whether the CCMA had jurisdiction. One of these facts, which were actually brought forward in the arbitration, was whether the individual applicants had been dismissed in the first place. This was always a live issue where it comes to the CCMA's jurisdiction, and even though the first respondent's reasoning is not important, he actually mentioned it. The applicants accordingly have no prospects of success on appeal where it comes to this ground for seeking leave to appeal.

[8] The applicants complain that the issue of whether the individual applicants were dismissed or not was not argued before me. That is not correct. This issue arose from the developments that occurred in this matter relating to whether the individual applicants were dismissed which, at the time of the arbitration, was subject to a Court challenge that was still in its infancy. When the matter was argued, the legal challenge had been concluded, and its consequence was that the earlier arbitration award that the individual applicants had been dismissed as set aside. This accordingly left the dismissal question open before me, and this was pertinently raised by the third respondent in argument. All of this became part of the review record, and all the information contained in my judgment, I extracted from the review record. I must reiterate that as a final order and outcome, the ruling of the first respondent was that the CCMA had no jurisdiction, and the question on review is whether that decision is correct. If the evidence before me shows that the individual applicants were not dismissed, then that decision must be correct, even if it is for different reasons, and the review must fail. I can see no reasonable prospects that another Court would come to a different conclusion.

[9] The applicants then contend that in terms of the judgment of the LAC in *Amalungelo Workers Union on Behalf of Mayisela and Others v Commission for Conciliation, Mediation and Arbitration and Others*⁴, the Court found that the individual applicants had been dismissed. I specifically referred to the *Amalungelo* judgment of the LAC in my original judgment, and being familiar with it, it is simply wrong for the applicants to suggest that any finding was made by the LAC that the individual applicants had been dismissed. The reasoning of the Court referred to by the applicants in the application for leave to appeal took place in the context of determining when a dispute as contemplated by section 198B would have arisen, as this was the question the Court actually had to decide. The Court never found that the individual applicants had been dismissed, and simply upheld the judgment of the Labour Court that the CCMA did not have jurisdiction to decide the dispute because it was referred out of time with no condonation application. The ultimate consequence of this is that the decision by the CCMA arbitrator that the individual applicants were dismissed was set aside, meaning that there was no such determination in existence. It also meant that section 198B could not longer be relied upon, as any such dispute had expired.

[10] What the applicants appear incapable of understanding is that the third respondent consistently held the view that the employment of the individual applicants terminated because their fixed term contracts of employment had expired. This was the case first argued by the third respondent before the CCMA. The CCMA however decided there was a dismissal, because of the application of section 198B, and this was the decision that was successfully challenged. This means that if the individual applicants wanted to challenge their termination of employment, and as I said in my original judgment, that challenge must be based on either section 186(1)(a), or section 186(1)(b), of the LRA, as the two grounds of dismissal are mutually exclusive. *In casu*, the individual applicants squarely relied on section 186(1)(a), contending they were permanent employees that had been dismissed by notice on 31 July 2019. As said, the ultimate outcome of the judgment of the LAC meant that section 198B could not be relied on to establish permanent employment. It must follow that the third respondent's case that the individual applicants are not

⁴ (2022) 43 ILJ 600 (LAC)

permanent employees of the third respondent, and they were employed on fixed term employment contracts which expired on 31 July 2019 is still live, and concerns the jurisdiction of the CCMA. In my view, the applicants have no prospects of success at all where it comes to raising the aforesaid ground of appeal before another Court.

[11] Another argument raised by the applicants is that the third respondent conceded that a dismissal of the individual applicants on 31 July 2019 was established. But once again, this is simply not true. What was conceded was succinctly summarized by the first respondent in his award, where he said that: *'The strategy of the employer in this issue before me is quite clear: If the Labour Court finds against Commissioner Lerumo, then the employer will simply fall back on the termination of employment as being the completion of a fixed term contract. If the Labour Court finds against the employer, then the fairness of the termination of employment of the employees will be categorised, as per the evidence in the application and the bundle, as an operational requirement dismissal which, in terms of the numbers involved, falls squarely within the jurisdiction of the Labour Court.'* Simply put, what the third respondent thus said was that firstly, the individual applicants were not dismissed, and secondly, if they were dismissed, it was for operational requirements. The issue of whether the individual applicants were dismissed always remained in issue. There is no reasonable prospect that another Court would come to a different conclusion.

[12] The applicants even say that the first respondent found the individual applicants were dismissed. Again, this is not true. In simple terms, the first respondent said that if the individual applicants were dismissed, applying the earlier arbitration award which was at the time still subject to challenge in the Labour Court, that dismissal would be for operational requirements, over which the CCMA had no jurisdiction. It would seem that the applicants are desperately contriving a case to justify leave to appeal. I remain unconvinced that this ground has any hope of success on appeal.

[13] In their application for leave to appeal, the applicants now seek to rely on section 186(1)(b) of the LRA to establish the existence of their dismissal. However,

no such dispute was ever referred to the CCMA or ventilated in the CCMA. In short, the individual applicants never said they were fixed term contract employees that had a reasonable expectation that their contracts of employment would be extended. The applicants in fact said they were not fixed term contract employees, but were actually permanently employed, and by the third respondent terminating their employment purportedly as fixed term contract employees, it dismissed them. The applicant cannot raise this new argument in seeking leave to appeal, for the simple reason that no such dispute was before the CCMA at any time. There is simply no reasonable prospect that another Court would decide otherwise.

[14] Any finally, on the facts, there is little doubt that if the individual applicants were indeed dismissed, it was for operational requirements. In a nutshell, the work the individual applicants were employed for had concluded because the project they were working on ended. The third respondent thus had no more work for them. That would be why they were dismissed (if they were dismissed). If that is not operational requirements, I do not know what would be. I dealt with this in detail in my original judgment, and nothing the applicants have submitted in the application for leave to appeal convinces me that I erred in any respect, and certainly not to the extent that it would establish a reasonable prospect that another Court would come to a different conclusion.

[15] Despite concluding remarks by the applicants that the matter raises constitutional issues, there is simply no substance in this. There is no particular constitutional issue at stake in this case. It is a simple issue of jurisdiction, as determined by the unique facts of this particular case. There are also no conflicting judgments on this issue, as suggested by the applicants. None of these contentions can serve as a legitimate basis for seeking or establishing a proper case for leave to appeal.

[16] In summary, I am unpersuaded that any of my findings with regard to the jurisdiction of the CCMA in this case was erroneous to the extent that it would justify interference with on appeal. Overall considered, I believe that the applicants in effect simply disagree 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 applicants have no prospects of success on appeal in this regard.

[17] Accordingly, the applicants have thus failed to show that there exists a reasonable prospect that another Court would come to a different conclusion, and that the applicants have 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*⁵ to be appropriate in deciding to refuse leave to appeal, especially considering the delay that has already taken place in this case:

‘... 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. ...’

[18] This only leaves the issue of costs. I shall follow the same approach as I have adopted in my original judgment and similarly decide that it would be fair that no order as to costs be made in the application for leave to appeal. This is especially so, considering that the third respondent has not engaged in the application for leave to appeal.

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

Order

1. The applicants’ 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

⁵ (2014) 35 ILJ 2399 (LAC) at 2405J-2406A