

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: **JR 2086/20 AND JR 2111/20**

CCMA CASE NUMBER: GATW 9858-19

In the matter between:

**NATIONAL UNION OF PUBLIC SERVICE AND Applicant
ALLIED WORKERS ("NUPSAW") obo LUTENDO
& 284 OTHER**

and

**COMMISSION FOR CONCILIATION, MEDIATION First Respondent
AND ARBITRATION**

COMMISSIONER KRUGER Second Respondent

DIS-CHEM PHARMACIES LTD Third Respondent

Decided: In Chambers

Delivered: 13 March 2024

JUDGMENT IN APPLICATION FOR LEAVE TO APPEAL

NORTON AJ

Introduction

1. On 5 January 2024 I delivered my judgment dismissing NUPSAW's review application, and thereby leaving intact the arbitrator's finding that the dismissal of 285 employees was fair. Furthermore I upheld Dis-Chem's cross review, and found

that the arbitrator's finding that the dismissal of Mr Mayengisa was unfair should be reviewed and set aside and replaced with an order that his dismissal was fair.

2. On 26 January 2024 NUPSAW sought leave to appeal to the Labour Appeal Court and sets out grounds in their application and in their written submissions filed on 8 February 2024. Dis-Chem has opposed their application for leave to appeal and filed their submissions on 20 February 2024.

3. The application has been made in terms of rule 30 of the Labour Court rules read with clause 15 of the Practice Manual.

4. I intend to summarise NUPSAW's submissions, and answer the salient points, and thereafter analyse whether or not the union has passed the legal threshold for leave to appeal.

NUPSAW's submissions and the court's response

5. The court erred by finding that the arbitrator did not misapply the parity principle¹ In particular that with respect to two employees Ms Mndebele and Ms Jaca, who had committed misconduct, but were sanctioned with a FWW. (By implication then other employees who had committed misconduct should too receive the lesser sanction, and not dismissal.)

5.1. Whilst like misconduct should be met with like sanction as a general principle; differentials are legitimate if based on individual valid factors like length of service, remorse and disciplinary records. Furthermore in circumstances in which there are many disciplinary processes before a multitude of different chairpersons, there will inevitably be different outcomes as reasonable chairpersons differ reasonably.

5.2. The arbitrator was alive to these factors, (as was Ms Schafer the company's witness) and thus found that the company did not violate the parity principle.

¹ Paragraph 1 of application for leave to appeal, and paragraph 12 of the written submissions

5.3. With respect to the two identified employees Ms Schafer testified that at the time of their disciplinary enquiries the company was not aware of further misconduct they had committed. She did not rule out the possibility of a further disciplinary enquiry to take this “new” misconduct into account.

5.4. Employees who had been dismissed may not profit from the lesser sanctioned meted out to the two employees.² That is what the union seeks to achieve with this challenge, ignoring the serious misconduct of the majority of employees which led to their dismissal.

5.5. There is no reason for the court to interfere with this finding.

6. Noting that the court found that the commissioner had misconceived the principle of common purpose, the court should have reviewed and set aside the award and remitted the matter back to the CCMA to be heard *de novo* before a different commissioner.³

6.1. I disagree, the nature of the misconduct was such that the ultimate finding of a fair dismissal could be sustained, despite the finding that the commissioner had misconceived the doctrine of common purpose.

6.2. The members who remained on the bus, had violated two court orders, and showed their support for the members who disembarked off the bus and vandalised the stores at Woodmead and Sunninghill.

6.3. There is no reason for the court to interfere with this finding.

7. The court erred by finding that Mr Mayengisa had committed misconduct warranting the sanction of dismissal.⁴

7.1. I disagree, Mr Manyengisa blocked traffic, threw bricks on the road and threatened members of the public. This constituted material misconduct justifying dismissal.

7.2. Mr Manyengisa’s actions were distinguishable from employees who gathered outside the picketing area contravening the first court order, who were sanctioned with a Final Written Warning.

² *Mphigalale v Security Sectoral Bargaining Council and Others* (2012) 33 ILJ 1464 (LC)

³ Paragraphs 9 and 10 of the Application for leave to appeal

⁴ Paragraph 20

7.3. There is no reason for the court to interfere with this finding.

8. The number of employees dismissed – over 200 – warrant the LAC's consideration.⁵

8.1. I agree that this is a material consideration, but I am not persuaded that for this reason alone the matter warrants the LAC's attention. More is required.

Legal considerations

9. When considering the standard in applications for leave to appeal, section 17(1) of the Superior Courts Act 2013 (the "Act") applies. That section reads,

"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 (a)(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration."

10. The threshold to cross for an audience with an appeal court is a high one, requiring a strong prospect that another court would come to a different decision, or that there are compelling reasons justifying the attention of that court.

11. In *Seathlolo & others v Chemical Energy Paper Printing Wood & Allied Workers Union & others*⁶ Judge Van Niekerk, discussing the test to be applied states,

"The traditional formulation of the test that is applicable ...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. ...the use of the word "would" in s 17(1)(a)(i) is indicative of a raising of the raising of the threshold since previously, all that was required for the applicant to demonstrate was that there was a reasonable prospect that another court might come to a different conclusion...Further this is not a test to be applied lightly – the Labour Appeal Court has recently had occasion to observe that this court ought to be

⁵ Paragraph 27

⁶ (2016) 37 ILJ 1485 (LC). See too *Sepheka v Du Pont Pioneer (Pty) Ltd* (2019) 40 ILJ 613 (LC)

*cautious when leave to appeal is 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..."*⁷

Analysis

12. Noting the requirement of strong prospects with respects to the facts, or a compelling reason based on the law as set out in the Act, and described more fully above, I am not persuaded that the union has made out a persuasive argument for leave to appeal. Each ground presented by the union has been addressed and discounted. The only issue of some merit is the number of employees involved. Unfortunately that is a factor, and a risk, with strike action, strike misconduct, and consequential dismissals.

13. In my view the union has not demonstrated that the LAC would come to a different conclusion on the matter, nor that there are compelling circumstances with respect to the matter, which would warrant the attention of the LAC.

14. Accordingly I make the following order:

Order

The application for leave to appeal is dismissed.

No order as to costs.

D Norton
Acting Judge of the Labour Court of South Africa

⁷ At para 3