

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: J102/24

In the matter between:

MATRIC LUPHONDO

Applicant

and

RG PIETERSE NO

First Respondent

NATIONAL PROSECUTING AUTHORITY

Second Respondent

Heard: Considered in Chambers

Delivered: This judgment was handed down electronically by emailing a copy to the parties. 10 April 2024 is deemed to be the date of delivery of this judgment).

Summary: Order issued on 9 February 2024 and reasons followed on 19 February. Application for leave to appeal lodged. Application for leave to appeal refused with costs.

JUDGMENT: APPLICATION FOR LEAVE TO APPEAL

DANIELS J

Introduction

- [1] On 9 February 2024, I heard this application as one of urgency. Later that same day, I handed down an order, dismissing the application. In the absence of reasons for the order, an application for leave to appeal was filed on 12 February. Reasons for the order was issued on 19 February 2024. On 4 March 2024, the applicant filed an affidavit setting out its grounds for leave to appeal. The third respondent filed opposing submissions on 15 March 2024. The applicant filed a replying affidavit on 5 April 2024. These processes do not strictly accord with the Rules of this Court or the Practice Manual. Nevertheless, taking the approach of substance over form, I will consider and determine the matter.
- [2] Having read the papers filed by the applicant, I note that the grounds for leave to appeal, apart from spewing forth broad legal contentions leaves little of substance to engage with. The application for leave to appeal is largely a repetition of the erroneous submissions made in the application itself.

The Main Application

- [3] The urgent application rested principally on three grounds:
- 3.1 The arbitration hearing, conducted in terms of section 188A of the Labour Relations Act No. 66 of 1995 as amended (the “LRA”) would proceed on 12, 13 and 14 of February 2024 in the absence of the applicant’s legal representatives, thus demonstrating the second respondent’s bias. The interdict was refused on 9 February. It is unclear what occurred on 12, 13 and 14 February, but those dates have since passed. The issue of representation at the arbitration can therefore no longer be in issue.
- 3.2 The third respondent cannot lawfully and fairly discipline the applicant, because of his position as an acting director of the NPA, in the absence of Ministerial authorisation. This court found that the applicant is not in the same position as other senior public servants

in the NPA, and Ministerial authorisation is not required for disciplinary action to fairly proceed. The applicant contends this finding is wrong but sets out no basis for this.

- 3.3 The applicant's rights under the SMS Handbook, and the Bargaining Council Rules are being violated and the arbitration cannot fairly proceed. The court found that these contentions had no merit. The applicant has been provided with the charges, documents, and the broad nature of the evidence against him. The applicant's desire for a pre-arbitration minute lies within the discretion of the arbitrator. These allegations create no exceptional circumstances justifying this court's intervention in incomplete disciplinary proceedings.

Test for leave to appeal.

- [4] In *J & L Lining (Pty) Ltd v National Union of Metalworkers of SA and Others* (2)¹ this Court summarized the legal position when seeking leave to appeal as follows:

'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

¹ (2019) 40 ILJ 1303 (LC) at para 5.

judgment that is sought to be taken on appeal.” (Own emphasis)

- [5] 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.’

Grounds for the application for leave to appeal.

- [6] Below I attempt to distil and deal with the grounds for the application for leave to appeal which, as previously explained, are not the model of clarity.

6.1 The applicant contends that this court usurped the powers of the court of review by embroiling itself in the merits on review.

- 6.1.1 It was necessary for this court to assess whether there is a reasonable prospect of success in the main application – the

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

review application. Accordingly, the court was required to peek into the merits.

- 6.1.2 To assess the merits, it was necessary, at least on a provisional basis, to interpret the NPA Act and consider whether acting directors may only be disciplined by the Minister, as the applicant alleged. This court considered the legislation and rendered its views. However, those views do not prevent the review court from finally determining the issue.
- 6.1.3 This court specifically pointed out, in para 27 of the reasons for the order, that the applicant's rights are not finally determined. In the circumstances, there can be no question that this court has usurped the powers of the court of review.
- 6.1.4 In any event, I note that the applicant fails to understand the proper context of *Masethla v President of the Republic of South Africa and Another*.³ There, the Constitutional Court held that the President had an implied power to dismiss the head of the NPA. The power was an executive one, capable of review only on the grounds of legality and rationality. Importantly, the court held that the power to dismiss the head of Intelligence Services Agency need not only be sought in national legislation but may also be sourced from the Public Servants Act⁴ (the "PSA"). In this matter, as the third respondent points out, section 16B(4) of the PSA gives this power to the head of department – the National Director. In relation to *acting directors* of the NPA, the power to institute disciplinary action lies in the hands of the head of department (the National Director).

³ 2008 (1) SA 566 (CC)

⁴ Proclamation 103 of 1994, as amended.

6.2 The applicant contends that this court incorrectly found that the complaint of bias against the third respondent was unsubstantiated.

6.2.1 The applicant presented no evidence establishing any reasonable foundation for the allegation of bias.

6.2.2 The applicant relied on the fact that the third respondent ruled against him on the numerous technical points he raised. This did establish a reasonable foundation for bias.

6.3 The applicant contends that this court failed to appreciate the “multiple fundamental matters of law and fact” that were clarified by the Labour Appeal Court in *Booyesen v Minister of Safety*.⁵

6.3.1 It is unclear what the applicant is referring to.

6.3.2 This submission is frivolous and takes the application no further.

6.4 The applicant contends that this court incorrectly referred to the applicant as a “senior public servant”.

6.4.1 The applicant sets out no basis as to why he is not a public servant. The applicant does not explain why this is relevant.

6.4.2 The applicant’s submission contradicts the express wording in the NPA Act.

6.4.3 In any event, more importantly, the summary is not part of the judgment. This contention too is frivolous.

6.5 The applicant submits that this court wrongly refused to follow the authority of *Tshavhunga v National Director of Public Prosecutions*

⁵ [2011] 1 BLLR 83 (LAC)

and Others⁶ where the High Court held that only the Minister can take a decision to terminate the services of a *deputy director* of the NPA.

6.5.1 First, the submission fails to take into consideration that the deputy director position is a permanent post, while that of an acting director is not.

6.5.2 Secondly, the applicant does not explain why another court would likely find that the reasoning in paras 29 – 37 of the judgment is flawed.

Costs

[7] The application for leave to appeal is fundamentally flawed, and frivolous. In fairness, and law, it is appropriate to order costs.

Order

[8] In the result, there is no sound rational basis to conclude that an appeal would have a reasonable prospect of success. The application for leave to appeal is therefore dismissed, with costs.

R Daniels
Judge of the Labour Court of South Africa

⁶ (TPD 42117/06 dated 19 March 2008)