



REPUBLIC OF SOUTH AFRICA

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Of interest to other judges

**THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**  
**JUDGMENT**

Case no: J 2653/12

In the matter between:

**SAPU**

**Applicant**

and

**MINISTER OF SAFETY & SECURITY**

**First Respondent**

**NATIONAL COMMISSIONER OF  
SAPS**

**Second Respondent**

**Delivered: 27 November 2012**

**Summary:** Leave to appeal – applicable test.

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**RULING ON LEAVE TO APPEAL**

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STEENKAMP J

Introduction

- [1] The applicant union brought an urgent application seeking to prevent the South African Police Services (SAPS) from appointing security guards.

I dismissed the application on 18 October 2012.<sup>1</sup> The applicant seeks leave to appeal against that judgment.

The applicable test

[2] The applicant submitted that “it is trite” that the test in considering leave to appeal is –

- whether there is a reasonable prospect that another court may come to a different conclusion to that of the Labour Court (with reference to *Tsotetsi v Stallion Security (Pty) Ltd*<sup>2</sup>); and
- whether the case is of considerable importance, not only to the parties involved but also to the public at large (with reference to *GA Motor Winders (East Cape) cc & Another v CCMA & Others*<sup>3</sup>).

[3] Whilst the applicant’s counsel is correct in formulating the test as outlined in *Tsotetsi* – i.e. whether there is a reasonable prospect that another court may come to a different conclusion – I doubt that the test adopted in *GA Motor Winders* survived the judgment of the Supreme Court of Appeal in *NUMSA v Fry’s Metals (Pty) Ltd*<sup>4</sup>. The decision in *GA Motor Winders* was based on the premise that the LAC is the final court of appeal in all labour matters. But in *Fry’s Metals*, the SCA held:

“We conclude that the Constitution vests this court with power to hear appeals from the LAC in both constitutional and non-constitutional matters, and that the provisions of the LRA that confer final appellate power on the LAC must be read subject to the appellate hierarchy created by the Constitution itself. This follows from the subordination to the Constitution that the LRA itself mandates. It does not entail that any provisions of the LRA are unconstitutional any more than the recognition of the appellate jurisdiction of the CC and of this court in constitutional matters required a finding of unconstitutionality.”

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<sup>1</sup> [2012] ZALCJHB 118.

<sup>2</sup> (2009) 30 *ILJ* 2802 (LC) para [14].

<sup>3</sup> (1999) 20 *ILJ* 1802 (LC) para [3].

<sup>4</sup> (2005) 26 *ILJ* 689 (SCA); [2005] 5 *BLLR* 430 (SCA) para [16].

[4] Importantly, the court in *Fry's Metals*<sup>5</sup> went on to state:

“We therefore hold, exercising this court’s constitutional power to protect and regulate its own process, that applications for leave to appeal from the LAC must be on petition to this court, in accordance with the existing application procedure from the High Court. We hold further that applicants must show not merely that the appeal has reasonable prospects of success, but that there are special considerations why, having already had an appeal before a specialist tribunal, there should be a further appeal to this court.”

[5] Subsequent to that finding, it appears to me that the public interest element is only relevant in applications for special leave, such as appeals from the Labour Court to the Supreme Court of Appeal. That approach was recently confirmed by the SCA in *FAWU obo Mbatha & others v Pioneer Foods (Pty) Ltd t/a Sasko Milling and Baking & others*.<sup>6</sup>

#### Grounds for appeal

[6] The applicant raises three grounds for leave to appeal:

- That the court was mistaken in coming to the conclusion that there was no agreement that SAPS would not employ career security guards.
- That the appointment of security guards amounted to “restructuring” and that the collective agreement 2 of 2009 applies.
- That the court erred in finding that the duty to consult had been fulfilled.

[7] I shall deal with each of these grounds.

#### *The “agreement” of 20 June 2012*

[8] The minutes of the meeting of 20 June 2012 do not bear out the applicant’s contention that there was an agreement that the SAPS “would not employ career security guards”.

[9] At that meeting, management indicated that “guard duties should not be outsourced anymore at police buildings”. After a caucus, labour “indicated

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<sup>5</sup> *Supra* para [42].

<sup>6</sup> (2011) 32 ILJ 2918 (SCA) paras [19] – [.

that they understand and welcome the principle however the period between now and implementation is too short". Labour also expressed the opinion that "guarding should not be a member's permanent post". This clearly referred to a SAPS member, and not the recruitment of new personnel under the Public Service Act.

[10] The only "decision" reflected in the minutes is the following:

- Management will give feedback to their principles.
- Labour agreed to the principle.
- Management will start with the implementation process on 1<sup>st</sup> July 2012.
- Engagements between management and labour will continue on the matter.
- The process is jointly owned by management and labour.
- Management will in the interim develop the guidelines.

[11] There was no decision that SAPS is precluded from recruiting and appointing security guards. There is no reasonable prospect that another court could come to a different conclusion.

*Does the decision amount to restructuring?*

[12] The applicant submits that the court should have found that "restructuring" occurred, thus triggering the provisions of SSSBC agreement 2 of 2009.

[13] The applicant now argues, in its submissions for leave to appeal, that "restructuring" includes the process of moving from the "outsourcing" to the "insourcing" of security guards. In its founding affidavit, though, it stated that it was entitled to be consulted over the "recruitment" of security guards and that this amounted to restructuring. Firstly, there is no prospect that another court would find that the recruitment of new personnel amounts to "restructuring" in circumstances where no existing jobs are threatened or affected. Secondly, the unions (including the applicant) expressly accepted the principle of moving from outsourcing to "insourcing" at the meeting of 20 June 2012.

*Duty to consult fulfilled?*

- [14] The applicant accepted that, at most, SAPS had to consult it. It abandoned the argument that SAPS had to negotiate with it. The difference is significant. There was no duty on SAPS to reach agreement with the unions.
- [15] SAPS did consult with the unions, including the applicant. The parties met over a period of four months to discuss the recruitment issue. SAPS disclosed all relevant information to the unions. The applicant made proposals and SAPS considered them. The duty to consult (and not to negotiate to agreement) was fulfilled.
- [16] There is no reasonable prospect that another court will come to a different conclusion on this point.

*Balance of convenience*

- [17] The balance of convenience did not favour the applicant. It is imperative for SAPS to fill the guard positions as soon as possible. The failure to do so impacts on the South African public at large. On the other hand, no existing rights of the applicant's members are affected.

Conclusion

- [18] There is no reasonable prospect that another court will come to a different conclusion on any of the grounds raised. The applicant approached the court on an urgent basis. It is in the public interest that the matter now be brought to finality without further delay.

Order

- [19] The application for leave to appeal is dismissed with costs.

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Steenkamp J

APPEARANCES

APPLICANT:

JL Basson

Instructed by Van der Merwe Du Toit Inc,  
Pretoria.

RESPONDENTS:

T Ngcukaitobi

Instructed by the State Attorney, Pretoria.