

REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Case no: D938/08 & D795/09

In the matter between:

D938/08

MBEKENI W SITHOLE

First Applicant

JACOB BERT KHANYE

Second Applicant

BHEKI C MMOLA

Third Applicant

THULASIZWE SIMON NGWENYA

Fourth Applicant

and

NI-DA TRANSPORT (PTY) LTD

Respondent

D795/09

MBONISENI ANDRIES FAKUDE

First Applicant

EPHRAIM NDABAYAKHE CHONCO

Second Applicant

THEMBA ZWANE

Third Applicant

And 98 others

(as per the attached

list)

And

NI-DA TRANSPORT (PTY)LTD

Respondent

JUDGMENT: APPLICATION LEAVE TO APPEAL

GUSH J

- [1] In this judgment I shall refer to the applicant in the application for leave to appeal as the applicant and the respondents in this application as the respondents. I make this clear for reasons that are dealt with below regarding the applicant's grounds of appeal and particularly because the applicant in the application for leave to appeal refers to itself as "the applicant".
- [2] The applicant in these matters as filed an application for leave to appeal against my judgement handed down on 24 July 2013, in which judgement I make the following order:
- a. The dismissals by the [applicant] of the [respondents] in case numbers D938 and 795/09 were both substantively and procedurally unfair;
 - b. The [applicant] is ordered to reinstate the [respondents] in both matters retrospectively to the date upon which they were dismissed;
 - c. The back pay due to the [respondents] is to be calculated in accordance with the minimum wages as determined by the Bargaining Council for the Road Freight Industry from time to time during the period from the dismissal to the date on which they are to report for duty;
 - d. The [respondents] are to report for duty within 14 days of the date of this judgment;

e. The [applicant] is ordered to pay the applicants costs in both case numbers D938 and 795/09.¹

[3] On 8 August 2030 the applicant's attorneys filed a Notice of Application for Leave to Appeal against the judgement in this matter.

[4] On receipt of the applicant's application for leave to appeal the Court's Registrar in Durban wrote to the applicant's attorneys on 12 August 2013 drawing their attention to section 15 of the 2013 Practice Manual of the Labour Court pointing out that it had come into operation on 2 April 2013. In addition the registrar attached to her letter a copy of paragraph 15 of the Practice Manual.

[5] Paragraph 15 of the Practice Manual provides:

15. APPLICATIONS FOR LEAVE TO APPEAL

15.1 A copy of any application for leave to appeal filed in terms of Rule 30 must also be served on the secretary to the judge from whom leave to appeal is sought. If the judge's secretary is not available, it may be served on the secretary of any other judge in the seat where the matter was heard.

15.2 Within 10 days of the filing of the application for leave to appeal, the party seeking leave must file its submissions in terms of Rule 30(3A) and the party opposing the leave must file its submissions five days thereafter. An application for leave to appeal will be decided by the judge in Chambers on the basis of the submissions filed in terms of Rule 30 (3A), unless the judge directs that the application be heard in open court.

15.3 An application for leave to appeal must be filed with the registrar in charge of appeals.

[6] Despite this the applicant has filed no further submissions.

[7] Understandably in the circumstances the respondents too have made no submissions.

¹ Judgment paragraph 55

- [8] The time limit within which to file submissions having elapsed I have considered the applicants application for leave to appeal on the grounds are set out in the notice.
- [9] The applicant bases its averment that another court could reasonably come to a different conclusion on the following four grounds of appeal:
- a. The finding of the court in the inherent probabilities of the case was unduly favourable to the **applicants** in that there were equally probable reasons for the **applicants** failure to attend the disciplinary enquiry and make the necessary representations in the **respondents** defence the charges raised by the **applicant**; (sic)
 - b. The court should have held that the **respondent** bear the overall onus of proving the fairness of the dismissals; (sic)
 - c. The court erred in finding that the **applicant** led no evidence regarding the sanction of dismissal, when evidence was led on various aggravating factors taken into consideration before the **applicant** decided to dismiss the **respondents**; (sic)
 - d. The court further erred in finding that the **applicant** not only failed to adduce any evidence that established that it followed a fair procedure but also failed to prove misconduct on the part of the **respondents**. (sic)² (my emphasis)
- [10] It would appear as if the respondent has used the terms “respondent” and “applicants” randomly and interchangeably.
- [11] I have carefully and, insofar as I am able to understand the applicant’s grounds of appeal even taking into account the applicants apparent confusion, considered the respondents grounds of appeal as set out in the Notice of Application for Leave to Appeal. It appears clear that they all arise from or are based on the respondent’s specific ground of appeal that “the Court should have held that the respondent bear the overall onus of proving the unfairness of the dismissals.”

² Notice of Application for Leave to Appeal; pages 2 and 3

[12] What exactly the respondent intends by this ground of appeal is unclear. The only explanation is that the respondent is seemingly ignorant of the provisions of section 192 of the Labour Relations Act. If so this ground is even more startling bearing in mind that in the pre-trial minute the applicant specifically not only agreed that it bore the onus of proving the fairness of the dismissals but agreed to begin.

[13] It was at all times common cause that the applicants had been dismissed.

[14] The judgement clearly deals with the onus in dismissal disputes.³ Section 192 provides:

Onus in dismissal disputes

(1) In any proceedings concerning any dismissal, the employee must establish the existence of the dismissal.

(2) If the existence of the dismissal is established, the employer must prove that the dismissal is fair.⁴

[15] Insofar as the other three grounds of appeal are concerned, even if they do not arise from the second ground of appeal deal with them as follows:

a. First Ground: It is unclear as to what bearing the fact that the respondents did not attend the disciplinary enquiry has on the onus the applicant bore to prove the dismissals were fair;

b. Third Ground: The applicant did not lead any evidence on what factors were taken into account before dismissing the respondents;

c. Fourth Ground: The applicant did not lead evidence to establish misconduct on the part of the individual respondents.

[16] I am not persuaded that there is a reasonable possibility of another court coming to a different decision in this matter and I accordingly make the following order:

³ See paragraph 43 of the judgment

⁴ Section 192 Labour Relations Act 66 of 1995

- a. The respondent application for leave to appeal in respect of Case Numbers D938/08 & D795/09 is dismissed;
- b. There is no order as to costs.

D H Gush

Judge

LABOUR COURT