



REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR 2879/12

In the matter between

MSUKALIGWA LOCAL MUNICIPALITY

Applicant

And

SOUTH AFRICAN LOCAL GOVERNMENT

BARGAINING COUNCIL

First Respondent

NKOSINATHI MASEKO

Second Respondent

IMATU OBO GUSTAVE WALDERMAN HEINZ

Third Respondent

Heard: In Chambers

Delivered: 12 March 2015

Summary: Application for leave to appeal. Review judgment - No reasonable prospects of success – Leave to Appeal not granted

JUDGMENT: APPLICATION FOR LEAVE TO APPEAL

CHENIA AJ

Introduction

- [1] This is an application for leave to appeal against the whole of my judgment in which the Applicant's application to have the award issued by the Second Respondent, acting under the auspices of the First Respondent, under case number JR 2134/11, reviewed and set aside in accordance with the provisions of section 145 of the Labour Relations Act No 66 of 1995 (as amended) was upheld with no order as to costs.
- [2] The parties herein are referred to in the same manner as they were in the main application.

Background

- [3] The main application was heard on 9 January 2014 and upon conclusion of proceedings, judgement was reserved. After careful consideration of the issues raised in the main application, the judgement was handed down on 10 July 2014.
- [4] The review application was granted for reasons outlined in the judgement and no order as to costs was made.
- [5] Only the Applicant has made submissions in support of this application for leave to appeal. The Court deals with this application on an unopposed basis.

Grounds of Appeal

- [6] Paraphrased, the Applicant seeks leave to appeal to the Labour Appeal Court on the following grounds:
1. That the court failed to meet the requirements, as alleged and set out by the Applicant, for setting aside a commissioner's findings;

2. That the court failed to provide and consider in its decision the true definition, according to our law, of dishonesty in relation to charge 5;
3. That the court failed to provide and consider in its decision that one of the requirements for dismissal to be substantively fair is that the employer must lead evidence proving that the trust relationship has broken down as a consequence of the misconduct;
4. That one of the reasons the court gave for substantive fairness of the dismissal was based on an offence which the applicant was not charged with;
5. That I erred in stating that the reason for the Applicant's dismissal was that the Applicant failed to obtain three formal quotations from three registered suppliers;
6. That the court failed to consider and incorporate into its judgement that the dismissal was for misappropriation of monies. Similarly, the court failed to apply its mind that the use of monies did not constitute fruitless or wasteful expenditure. Both the above facts are common cause facts;
7. That the evidence presented at arbitration proceedings could not justify a finding by the court of substantive fairness and that the court failed to consider crucial evidence in the arbitration;
8. That the court failed to properly consider evidence relating to whether the work required on the bulldozer constituted 'emergency repairs' and thus misdirected itself in finding that the Second Respondent failed to take evidence in this regard into account.

9. That the Court erred in failing to take into account the fact that the Respondent's witness testified that he was not misled and that the work done was legally procured.

10. That the court misdirected itself in not finding that the Second Respondent had considered all the evidence.

Right of leave to appeal

[7] As a point of departure, all parties to a matter before this Court are entitled to make application for, and appeal the decision of the Court.¹ In the application for leave to appeal the Applicant is required to make out a substantial case on identifiable grounds as to why the decision of the Court should be set aside and indicate its probabilities of success.

[8] In *National Union of Metalworkers of SA & others v Fry's Metals (Pty) Ltd*² it was held that in order for an applicant to succeed in an application for leave to appeal, in addition to identifying the grounds upon which the appeal will be brought, it should be clearly indicated why such grounds give rise to reasonable prospects of success on appeal. Should the applicant fail to substantiate that the identified grounds of appeal indicate reasonable prospects of success in the appeal court, the application for leave to appeal should be refused. (own emphasis added)

Test for leave to appeal

[9] In determining whether leave to appeal should be granted, the Labour Court is required to consider whether there is a reasonable prospect that another court could come to a different decision than that of the court *a quo*. The court in *Karbochem Sasolburg (A*

¹ Rule 30 of the Rules For the Conduct of Proceedings in the Labour Court.

² 2005 (5) SA 433; see also *FAWU obo Mbatha & Others v Pioneer Foods (Pty) Ltd t/a Sasko Milling & Baking & Others* [2012] 4 BLLR 317 (SCA).

*Division of Sentrachem Ltd) v Kriel and Others*³ specifically made reference to this test as follows:

'I have understood that the test in deciding whether to grant leave to appeal is the traditional test. It requires a judge to ask whether there is a reasonable prospect that another court may come to a different conclusion.'

- [10] The Applicant is therefore required to show that that there is a reasonable prospect that another court could come another conclusion.

Reasonableness of the arbitration award

- [11] I refer to the Supreme Court of Appeal decision in *Herholdt v Nedbank Ltd (Congress of South African Trade Unions as amicus curiae)*⁴ which requires that, in order to succeed, an applicant in a review application needs to establish fundamental errors of fact or law on the part of the Commissioner which affect the reasonableness of his decision.

- [12] In *Nampak Corrugated Wadeville v Khoza*⁵ the Labour Appeal Court confirmed that:

"The determination of an appropriate sanction is a matter which is largely within the discretion of the employer. However, this discretion must be exercised fairly. A court should, therefore, not lightly interfere with the sanction imposed by the employer unless the employer acted unfairly in imposing the sanction. The question is not whether the court would have imposed the sanction imposed by the employer, but whether in the circumstances of the case the sanction was reasonable." (own emphasis added).

³ (1999) 20 ILJ 2889 (LC) at 2890B.

⁴ [2013] 11 BLLR 1074 (SCA)

⁵ (1999) 20 ILJ 578 (LAC).

Merits for the application for leave to appeal

- [13] The applicant raised 10 individual grounds of review. I consider the merits of the grounds for appeal in light of the above-mentioned authority.
- [14] When considering the application for leave to appeal, the *Fry's Metal's* case is of crucial importance. It states that in the grounds for leave to appeal, it should clearly be indicated why such grounds of appeal give rise to reasonable prospects of success on appeal. It is the Court's opinion that there are very few or even no submissions made as to how these grounds of appeal establish reasonable prospects of success. The Applicant has detailed certain grounds upon which it believes are strong grounds for appeal, but fails to make mention of how these grounds create reasonable prospects of success.
- [15] In terms of the test I am required to apply fact that the Applicant has failed to establish prospects of success, weighs heavily against granting the leave to appeal.
- [16] There are also substantial defects regarding certain grounds of appeal which will now be discussed.
- [17] In paragraph 1, the Applicant alleges that the Court failed to comply with the requirements for making a determination that the commissioner's findings on the facts were unreasonable. The Applicant also lists 5 grounds upon which such a determination can be made and states that is trite law that these grounds are required for such a determination.
- [18] I am of the opinion, with respect, that the Applicant has completely misdirected himself as to the actual requirements for such a determination. It is trite law, in actual fact, that the test set out in *Sidumo*, namely whether or not the commissioner's

decision was one that a reasonable decision-maker would have made, is the appropriate criteria in this regard. It is this test that is used to determine whether such a determination can be made and as such set aside the arbitration award. Reference to the *Sidumo* case is contained in paragraphs 24 – 29 of my judgement.

- [19] The Applicant provides a definition of dishonesty found in the *Nedcor* case and states that the Court erred in the judgement by not providing that such definition is trite law. The Applicant in no way explains how this constitutes an error on my part in the judgement. A lack of pronouncement that a definition is trite law cannot be a ground of appeal. I therefore find that this ground of appeal cannot succeed.
- [20] In paragraph 8 the Applicant states that it is 'simply not correct to provide that a machine must break down for repairs to constitute an emergency'. In no place in the judgement is any reference made that requires a machine to 'break down' in order to constitute an emergency. Such a statement is an inference drawn from paragraph 42 of the judgement where it was stated that the failure to report any faults on the machine influenced/had a bearing on whether there was a real emergency or not.
- [21] Similarly, in paragraph 4 the Applicant alleges that the Court erred in the finding that the dismissal was substantively fair based on non-compliance with procedure. The Applicant submits that I erred in this regard because this was not an offence that the Applicant was charged with. Again, nowhere in the judgement does it state that the reason for the dismissal of the Applicant is due to the non-compliance with this established procedure. As explicated in my judgement, this was used to establish reasonable inferences for the charge of misconduct.

The submission is therefore unfounded as this evidence was relied upon to indicate misconduct and not as a specific offence that the Applicant was charged with.

- [22] In paragraph 10 it is alleged that the Court erred in finding that the Second Respondent failed to take into account and apply his mind to evidence presented regarding the failure to report any faults on the earth moving machine. It is alleged that I erred in not finding that such evidence was clearly considered by the Second Respondent. This issue was described in paragraph 42 of the judgement. The point was that the evidence was crucial in determining whether or not the situation constituted a real emergency or not. If the Second Respondent had considered this evidence, he would not have come to the conclusion that the work done fell under emergency repairs. This ground of appeal has therefore already been adequately dealt with in the judgement and does not constitute an error.

Conclusion

- [23] In considering all the grounds of appeal alluded to in the application for leave to appeal, I am of the opinion that the Applicant has not made out its case that another court may reasonably arrive at a different decision. I am also not persuaded that there exists any alternative basis that warrants the granting of leave to appeal.
- [24] Although certain grounds in the application may bear some merit, I cannot grant leave to appeal on this basis. This is due to the fact that the Applicant has not satisfied the court of its probabilities of success in another Court. I base my judgement in this regard on the following excerpt from the Fry Metals case:

"Should the applicant fail to substantiate that the identified grounds of appeal indicate reasonable prospects of success in the

appeal court, the application for leave to appeal should be refused".

[25] On this basis, I cannot grant leave to appeal in this matter.

[26] There is no reason to make an order for costs.

[27] The following order is made:

1. The Applicant's application for leave to appeal is dismissed.
2. There is no order as to costs.

CHENIA, AJ

Acting Judge of the Labour Court

REPESANTATIVES:

FOR THE APPLICANT:

Otto Krause INC

FOR THE THIRD RESPONDENT:

Sefalafala Attorneys