



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case no: JR 191/2012

In the matter between:

DEPARTMENT OF PUBLIC ENTERPRISES

Applicant

and

DR JOACHIM VERMOOTEN

First Respondent

COMMISSIONER JM MATSHEKGA N.O.

Second Respondent

THE GENERAL PUBLIC SERVICE

SECTORAL BARGAINING COUNCIL

Third Respondent

Delivered: 14 September 2015

ORDER AND REASONS IN THE APPLICATION FOR LEAVE TO APPEAL

FOURIE AJ

Order

[1] I make the following order:

- 1.1 Condonation is granted for the late filing of the application for leave to appeal.

1.2 The first respondent is granted leave to appeal to the Labour Appeal Court, against the entire *ex tempore* judgment and Order handed down on 9 July 2015.

1.3 Costs of this application are to be costs in the appeal.

Reasons for order

[2] On 9 July 2015, in an *ex tempore* judgment, I upheld a review application, set aside an arbitration award, and replaced it with an award to the effect that the first respondent was not an employee of the applicant. The effect of this award is to non-suit the first respondent from contesting the fairness of an alleged dismissal by the applicant.

[3] The first respondent seeks leave to appeal to the Labour Appeal Court against the whole of the judgment and order. The application for leave was filed some 18 days out of time, but was accompanied by an application for condonation in which the reason for the delay is set out, primarily being a change in legal representatives, a delay in obtaining the transcribed judgment, and the need to conduct investigations into whether all relevant information was placed before the review court.

[4] According to the condonation application, it appears that the full review record was not before court when the matter was argued, and the first respondent will seek to present further evidence on appeal which is relevant to the question as to whether he was an employee.

[5] Having considered the grounds put forward in the application for leave to appeal, I am satisfied that there are reasonable prospects of another court reaching a different conclusion, for the following reasons:

5.1 Further evidence may be admitted on appeal, and may prove to be decisive of the issue, and while I do not know the exact nature of this evidence, the first respondent should be given the benefit of the doubt in this regard.

5.2 The first respondent clearly feels aggrieved by the manner in which the matter was presented by his erstwhile attorneys, who apparently neglected to ensure that all relevant evidence was placed before the review court. This perception may well have merit, and it is in the interests of justice that the first respondent be given a full and fair hearing, on all relevant (and admissible) evidence. At the very least, the first respondent should be given the opportunity of seeking leave from the Labour Appeal Court to supplement the record and/or to adduce further evidence.

5.3 The question of whether the first respondent is an employee or independent contractor, does entail the application of various possible tests, which are in themselves not entirely free of controversy. As is apparent from the *ex tempore* judgment, I am of the firm view that (on the evidence as it was before me) the first respondent was not an employee. However, I accept that another court may reasonably have a different interpretation of the evidence and the applicable law on this issue.

5.4 As this issue is probably decisive of the first respondent's claim in its entirety, the effect of the Order is to deprive him of any remedy in terms of labour law. It is therefore in the interests of justice that leave to appeal be granted, particularly in circumstances where the decision under

appeal may have been reached on incomplete information
(which was not apparent at the time).

GA Fourie

Acting Judge of the Labour Court of South Africa