



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG.

JUDGMENT

Not Reportable

Case no: JS 1133/10

VIVIAN HAGIOS

Applicant

and

HR SOLUTIONS FOR TOMORROW (PTY) LTD

Respondent

Decided in Chambers.

Delivered on: 14 September 2015

RULING - LEAVE TO APPEAL

TLHOTLHALEMAJE, AJ

Introduction:

[1] The applicant's claim before the court pertained to an alleged constructive dismissal which she had contended was automatically unfair as contemplated in section 187 (1) (f) of the Labour Relations Act (the LRA). She had further claimed that the intolerability of the employment relationship was predominately caused by unfair discrimination based on an arbitrary ground.

[2] The Applicant's claim was dismissed following a trial in terms of a judgment handed down on 17 March 2015. The Applicant has since filed an application

for leave to appeal against the whole of that judgment. The Respondent opposed this application.

The legal framework:

- [3] When considering an application for leave to appeal, the issue is whether there are reasonable prospects that another court, in this case the Labour Appeal Court may take a different view on the matter¹. In *S v Smith*² Plasket AJA observed that:

‘What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law, that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote, but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal.’

- [4] When considering applications of this nature, the Labour Court should be mindful of the cautionary note sounded by Davis JA in *Martin and East (Pty) Ltd v NUMSA & others*³ where he stated that:

“Before I conclude there is a further comment I wish to make. I indicated that the events in this case took place in 2010. The Labour Relations Act was designed to ensure an expeditious resolution of industrial disputes. This means that courts, particularly courts in the position of the court *a quo*, need to be cautious when leave to appeal is granted, as should this Court when petitions are granted. There are two sets of interests to consider. There are the interests of the parties such as appellant, namely who are entitled to have their rights vindicated, if there is a reasonable prospect that another court might come to a different conclusion. There are also the rights of employees who land up in a legal “no-man’s-land” and have to wait years for an appeal

¹ *National Union of Metal Workers of South Africa v Jumbo Products CC* 1996 (4) SA 735 (A) at 742B

² 2012 (1) SACR 567 (SCA) at para [7]

³ (2014) 35 ILJ 2399 (LAC)

(or two) to be prosecuted. This was a case which should have ended in the labour court. This matter should not have come to this court. It stood to be resolved on its own facts. There is no novel point of law to be determined nor did the Court a *quo* misinterpret existing law. There was no incorrect application of the facts; in particular the assessment of the factual justification for the dismissals/alternative sanctions. I would urge labour courts in future to take great care in ensuring a balance between expeditious resolution of a dispute and the rights of the party which has lost. If there is a reasonable prospect that the factual matrix could receive a different treatment or there is a legitimate dispute on the law, that is different. But this kind of case should not reappear continuously in courts on appeal after appeal, subverting a key purpose of the Act, namely the expeditious resolution of labour disputes.”

- [5] Bearing the above caution in mind, the Labour Court is also reminded by the words echoed in *Minister of Safety and Security and Another v Madyibi*⁴ that;

“In giving consideration to the issues at hand I am enjoined by judicial authority to take due cognisance of the test which is of application in matters of this nature. Judicial authority requires of a Judge considering an application for leave to appeal to reflect dispassionately upon the decision sought to be appealed against and decide whether or not there is a reasonable prospect that the Appeal Court may come to a different conclusion. This necessarily requires of me to disabuse my mind of the fact that I was of the view when I delivered my judgment that it was supportable both on the facts of the case and the law applicable thereto”.

The grounds of appeal:

- [6] As already indicated, the Applicant’s claim was based on an alleged constructive dismissal, which dismissal she had also alleged was automatically unfair as contemplated in section 187 (1) (f) of the LRA. Notwithstanding the fact that the Applicant is in agreement with the manner with which the essential dispute was captured by the court, she holds the view that the court erred in finding that it had the necessary jurisdiction to adjudicate the constructive dismissal dispute in circumstances where the Commission for Conciliation, Mediation and Arbitration has exclusive

⁴ (1034/2004) [2008] ZAECHC 180 (30 October 2008) at para 20

jurisdiction over that dispute in terms of the provisions of section 191 (5) (a) (ii) of the LRA.

- [7] In seeking leave to appeal, it was submitted that a constructive dismissal, even if in part precipitated by discriminatory acts of the employer, remains a constructive dismissal, and to this end, the court erred as it did not have jurisdiction to adjudicate the dispute of constructive dismissal, as it was bound to exercise its discretion in terms of section 158 (2) (a) & (b) of the LRA. Furthermore, to the extent that it would be determined that the court did have jurisdiction, it was submitted that the judgment was not justified by the evidence before it.

Evaluation:

- [8] In terms of the parties' pre-trial minutes⁵, they had recorded the issues to be determined by the Court as being;
- a) Whether the Applicant resigned, or whether she was constructively dismissed?
 - b) Whether or not the Applicant was subjected to unfair discrimination by the Respondent?
 - c) Whether the dismissal of the Applicant was substantively fair?
 - d) Whether the dismissal of the Applicant was procedurally fair?
 - e) Whether or not the dismissal (if any) of the Applicant was automatically unfair?
- [9] In regards to 'Resolution of Preliminary Points', the parties in the same pre-trial minutes recorded that no preliminary points were raised. As correctly pointed out by the Respondent in its opposition to the application for leave to appeal, the onus was placed on the Applicant to establish that she was dismissed and that the dismissal was for a reason that rendered it automatically unfair as contemplated in section 187 (1) (f) of the LRA.
- [10] It was common cause that the Applicant had initially referred a dispute to the CCMA on 10 August 2010 and a certificate of outcome was issued on 8

⁵ Pages 43 of Index to Pleadings

September 2010. She had nevertheless made an election to file this claim on the basis that her alleged constructive dismissal was automatically unfair on account of being allegedly discriminated against. In the light of the dispute that the parties had agreed should be determined as recorded in their signed pre-trial minutes, it is indeed strange that the Applicant would contend that the court lacked jurisdiction to determine those issues.

- [11] I further have difficulties in comprehending the basis that leave to appeal is sought in circumstances where the court was required to first establish whether there was a constructive dismissal, which the Applicant claimed was automatically unfair. To the extent that the Applicant had pleaded her case in that manner, I failed to appreciate how it can be said that the court erred in determining the issues that were placed before it, and how it was expected of it to determine the issue of automatically unfair dismissal without first establishing whether there was a dismissal as the provisions of section 192 of the LRA require.
- [12] An enquiry in terms of section 187 (1) (f) of the LRA is preceded by an enquiry in terms of section 192 of the LRA where constructive dismissal is alleged. In the heads of argument, it was submitted on behalf of the Applicant that she had shown that she was constructively dismissed and that the dismissal was automatically unfair because of the intolerability complained of was based on unfair discrimination based on arbitrary grounds. It is inexplicable how that finding could have been made without embarking on the nature of the enquiry as described above.
- [13] The court had jurisdiction to adjudicate automatically unfair dismissal disputes where that dismissal was alleged to have been based on an alleged constructive dismissal. The court's jurisdiction is founded on the provisions of section 191 (5) (a) (ii) and 191 (5) (b) (i) of the LRA. In the light of these conclusions, it is not even necessary to deal with other grounds upon which leave to appeal is sought in the light of these not having been substantiated as correctly pointed out on behalf of the Respondent.

[14] It therefore follows from the above that based on the facts and the law, there are no reasonable prospects that the Labour Appeal Court may come to a different finding to that arrived at by this court. The application for leave to appeal in my view was ill-considered, and considerations of law and fairness dictate that it should be dismissed with costs.

Order:

- i. The application for leave to appeal against the judgment handed down on 17 March 2015 is dismissed with costs.



Tlhotlhamajie, AJ

Acting Judge of the Labour Court of South Africa.