



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG.

JUDGMENT

Not Reportable

Case no: J991/2015

In the matter between:

MPUMALANGA ECONOMIC GROWTH AGENCY

Applicant

and

MTHEMBU QINISO CHRISTOCENTRIC

Respondent

Decided in Chambers.

Delivered on: 14 October 2015

RULING - LEAVE TO APPEAL

TLHOTLHALEMAJE, AJ

Introduction:

- [1] The Applicant (Respondent in the urgent application) seeks leave to appeal against my judgment in terms of which I had concluded that the application was indeed urgent; that the agreement of employment between the parties was extant, and that the Applicant should abide by that agreement. The

Applicant was further ordered to pay the costs of that application. The application for leave to appeal is opposed.

- [2] The test to be applied in applications of this nature is whether there are reasonable prospects that another court might come to a different conclusion to that of the Court *quo*¹. 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.’

The grounds of appeal and evaluation:

- [3] The Respondent seeks leave to appeal on the following main grounds, *viz*;
- 3.1 That the court erred in treating the matter as urgent;
 - 3.2 That the court erred when it ordered the Applicant to abide by the terms of the agreement on an urgent basis;
 - 3.3 That the court erred in not granting the Applicant leave to file an answering affidavit as prayed for in its answering affidavit;
 - 3.4 That the court should have found that financial considerations do not establish urgency;
 - 3.5 That the court erred in not finding that the employment agreement concluded between the parties had been properly and validly rescinded.

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]

- [4] In opposing the application for leave to appeal, the Respondent submitted *inter alia* that not all judgments and orders are appealable, and that in terms of section 173 (1) (a) of the Labour Relations Act, the Labour Appeal Court has exclusive jurisdiction;

“to hear and determine all appeals against the final judgments and the final orders of the Labour Court”.

- [5] It is not my intention to deal with all the grounds upon which leave to appeal is sought in the light of the conclusions to be reached in regards to the appealability of findings on urgency. It is trite that a ruling as to urgency is procedural in nature and not appealable³. Thus a ruling as to whether a matter is urgent or not does not finally dispose of the merits of the dispute between the parties. Such an order as correctly pointed out on behalf of the Respondent is not definitive of the rights of any party nor does it dispose of a substantial portion of the relief claim. On this ground alone, it follows that the application for leave to appeal should be refused.
- [6] The issue whether the Applicant should have been granted leave to file an answering affidavit as prayed for in its answering affidavit was also dealt with in the judgment. It was correctly pointed out on behalf of the Respondent and as also stated in the judgment that in filing an affidavit challenging only the issue of urgency, the Applicant accepted the risk that a finding in the Respondent's favour on urgency would result in the merits of the matter being determined on her version only. I am further in agreement with the Respondent that by seeking an opportunity to file a comprehensive answering affidavit, the Applicant effectively sought a postponement of the matter, and this could not have been countenanced in the light of the urgency accorded to the application. Further in the light of the period granted to the Applicant to file its answering affidavit and its choice to only oppose the matter on the grounds of urgency, it is found that there is no merit on this grounds relied upon.

³ See *Ball v Bambalela Bolts (Pty) Ltd and Another* [2013] 9 BLLR 843 (LAC) at para [32] where the LAC held that;

“....In the circumstances, I need not say much on the point, save for restating that, generally, rulings on urgency, by themselves, are not appealable, because they are not final and definitive of the rights of the parties”

- [7] The issue whether financial hardship can be a basis for granting urgency was also dealt with sufficiently in the main judgment. The Applicant's contention was that the court should have aligned itself with the majority view as set out in the authorities referred to and dealt with, and should have concluded that the Respondent was not able to demonstrate that detrimental consequences arising from the decision to rescind the contract could not be addressed in due course. In this regard, it was contended that in the light of conflicting decisions to which the court lends itself, it would be in the interests of justice to have the matter finally resolved by the Labour Appeal Court.
- [7] In the light of the conclusions in regards to the appealability of the findings on urgency, it is not necessary to deal with the basis upon which that finding was made, other than to state that in *De Beer v The Minister of Safety & Security Services/ Police and Another*⁴, Coppin AJA (as he then was) in addressing the issue of financial hardship as a basis for granting urgency stated that;

".....The grounds for 'semi-urgency' which were primarily relied upon by the appellant, was that he was not receiving a salary and had no other source of income, his savings were almost exhausted and that he had ongoing financial commitments that he could not, or had difficulty in honouring. The loss of salary and benefits, with the concomitant financial hardship, are not regarded as sufficient (my emphasis) to establish urgency. In any case, any urgency that may have existed appears to have been self-created, either by the appellant or his legal representatives, by unreasonable delays and a failure to institute proceedings in the appropriate forum in time, or at all."⁵ (Authorities omitted)

- [8] It is my view that reference to '*sufficient*' in the above *dictum* cannot be read to imply that urgency would not be granted in every circumstances where reliance is placed on financial hardship. I do not understand the *dictum* to imply that financial hardship will as a rule of thumb be rejected as a basis of according a matter urgency. Furthermore, what was said in *De Beer* should be understood in line with the principles set out in *South African Informal Traders Forum and Others v City of Johannesburg and Others*; *South African*

⁴ (2013) 34 ILJ 3083 (LAC)

⁵ At para 32

*National Traders Retail Association v City of Johannesburg and Others*⁶, where the Constitutional Court held that the ability of people to earn money and support themselves and their families is an important component of the right to human dignity. Without it they faced “humiliation and degradation”⁷.

- [9] In the light of the above, and more specifically in the light of the findings made in regards to the appealability of the conclusions on the issue of urgency, there is no sound or rational basis for a conclusion to be made that there are prospects of success on appeal. I have further had regards to considerations of law and fairness, and it is concluded that costs are not warranted in this case.

Order:

- i. The application for leave to appeal against the judgment handed down on 17 June 2015 is dismissed.
- ii. There is no order as to costs.



Tlhotlhemaje, AJ

Acting Judge of the Labour Court of South Africa.

⁶ 2014 (6) BCLR 726 (CC)

⁷ At para [31]. See also at para [36] where the Constitutional Court continued to state that:

“We have already said much that shows that the application for interim relief was manifestly urgent. The City had evicted the applicants from their trading areas or stalls and refused to allow them back, even though they had been verified and re registered at the behest of the City. Although the City admittedly failed to follow the processes in the Businesses Act, it forcibly evicted the applicant traders. Its conduct spawned immediate and acute hardship that left the applicant traders destitute. It was never disputed that they were unable to feed or house themselves or their families. The situation would have only worsened if it persisted”.