



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR1155/13

J1074/13

In the matter between:

AIR CHEFS (PTY) LTD

Applicant

and

LEHLOHONOLO FORTUNE LETLATSA

First Respondent

**COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION**

Second Respondent

MBHELE, NOMUSA N.O.

Third Respondent

Decided in chambers

Delivered on: 12 January 2016

JUDGMENT: APPLICATION FOR LEAVE TO APPEAL

TLHOTLHALEMAJE, J

Introduction:

- [1] This is an application for leave to appeal against the whole of the judgment and order granted on 5 October 2015. In the judgment, the applicant's review application was dismissed with costs, and the arbitration award which was the

subject of the review application was made an order of court in terms of section 158(1)(c) of the Labour Relations Act.

- [2] The application for leave to appeal is opposed by the first respondent. The opposition to the application and submissions in that regard were filed some five days late. The applicant does not oppose the late filing of these submissions. Having had regard to the application for condonation in this regard and the principles applicable to such applications as enunciated in *Melane v Santam Insurance Co. Ltd*¹ and other authorities, it is my view that good cause has been shown and as such, the late filing of the opposing papers should accordingly be condoned.

Grounds upon which leave to appeal is sought:

- [3] The application for leave to appeal centres around two findings in the judgment. The first is the significance of the first respondent's withdrawal of a section 24 dispute which was before the CCMA and the implications thereof and secondly, that the first respondent's dismissal in consequence to his withdrawal of the section 24 dispute before the CCMA without consulting with the applicant or its legal representatives was too harsh a sanction.
- [4] The applicant argues that the Court erred in number of respects in relation to these issues. In short it was submitted that the first respondent's withdrawal of the section 24 dispute was reckless and contrary to the mandate that he had been given by the applicant, and further that he had acted without consulting with the applicant's management or its legal representatives.
- [5] The applicant further submitted that the withdrawal of the section 24 dispute resulted in the underlying *causa* of the pending appeal before the Labour Appeal Court being removed and in effect rendering the appeal moot. The applicant argues that the Court erred in not finding that the first respondent's conduct was grossly negligent and had warranted dismissal.
- [6] The applicant's further contention in relation to the withdrawal of the section 24 dispute was that the Court erred in relation to finding that a new dispute could

¹1962 (4) SA 531 (A) at 532B-E

still be referred to the CCMA, as the crux of its complaint was that the withdrawal affected the appeal and the interdict in place pending the appeal, and it went contrary to its legal strategy.

Opposition to the application for leave to appeal:

- [7] The first respondent denied that his actions amounted to gross negligence and submitted that the possible outcomes of his actions as referred to by the applicant are only partially relevant as the matter focussed on his conduct i.e. whether he was negligent or grossly negligent. It was submitted that the alleged misconduct was not gross as he had not been apprised of the full legal strategy. He further submitted that the withdrawal of the section 24 dispute had no impact on the strike interdict which was subject to the appeal.
- [8] The first respondent also placed reliance on the omission of applicant in tendering evidence at the arbitration in relation to the alleged breakdown in the trust relationship between the parties. He had submitted that even if there was any wrongdoing on his part, progressive discipline should have been implemented and not dismissal.

The legal framework and evaluation:

- [9] The test for determining whether to grant an application for leave to appeal is whether there are reasonable prospects that another Court (on appeal) may come to a different conclusion as reached by the Court *a quo*. This test was described by Corbett CJ in *National Union of Metal Workers of South Africa v Jumbo Products CC*² in the following terms:

"In such a case the enquiry is whether there are reasonable prospects of success, i.e. whether there is a reasonable prospect that the Court of appeal may take a different view and hold the trial Judge to have been wrong (see S v Ackerman en 'n ander 1973 (1) SA 765 (A); Botes and Another v Nedbank Ltd 1983 (3) SA 27 (A), at 28 D)"

² 1996 (4) SA 735 (A) at 742B. See also *Karbochem Sasolburg (A Division of Sentrachem Ltd) v Kriel and Others* (1999) 20 ILJ 2889 (LC) at 2890B where it was held that:

"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] In seeking leave to appeal, the applicant appears to rely on the fact that in the judgment, a conclusion was reached that the first respondent had failed to consult with its management or its attorneys of record prior to and after the withdrawal of the dispute. It was further contended that the court had erred in finding that before a dismissal was merited, there had to be some consequence flowing from the misconduct, and this was a dangerous precedent to set as regard had to be taken of potential prejudice.
- [11] Having reflected on my judgment and considered the submissions made by both parties in regards to the grounds upon which leave to appeal is sought, and further having had regards to the facts of this case and the law, I am of the view that there are no reasonable prospects that another court would come to a different finding to that arrived at by the court *a quo* for the following reasons;
- [12] The applicant as already indicated does not take issue with the finding in respect of its rights in law to have re-referred the section 24 dispute to the CCMA, nor does it take issue with the legal exposition in respect of dismissals as dealt with in the judgment.
- [13] However, on the basis that a finding was made to the effect that the withdrawal of the dispute constituted an act of misconduct, the applicant nevertheless expected a dismissal to be confirmed. The applicant's submissions in this regard are without substance in that the appropriateness of a sanction of dismissal was looked at in consideration of a variety of factors which the Commissioner had had regard to. It is further incorrect to suggest that a precedent was set with a remark that before a dismissal is merited there had to be some consequence flowing from the misconduct to the exclusion of potential prejudice. This is further borne out by comments made in paragraph [27] of the judgment to the effect that the sanction of dismissal was disproportionate to any potential prejudice or inconvenience caused as a result of the withdrawal of the dispute. In the light of these comments, I fail to appreciate how it can be said that an error of law was committed.
- [14] Further in the light of the applicant's acceptance of the finding that it could have re-referred the dispute or referred a section 24 dispute afresh, no purpose will

be served with a regurgitation of the issues surrounding the significance of the withdrawal of the section 24 dispute. This is even more so in view of the fact that the applicant continuously referred to what could and/or could not have happened before the Labour Appeal Court had the dispute not been withdrawn, or what could or could not have happened had SATAWU gone or not gone on strike. As it was correctly pointed out on behalf of the first respondent, these issues are partly relevant, and in my view, pertains to the potential prejudice already alluded to and sufficiently dealt with in the judgment.

[15] On the whole, I am not satisfied that there are reasonable prospects that another court may come to a different conclusion, and this application is found to be without merit. To this end, and further having had regard to considerations of law and fairness, the application for leave to appeal ought to be dismissed with costs.

Order:

- i. The application for leave to appeal is dismissed with costs.



Tlhotlhemaje, J

Judge of the Labour Court of South Africa