



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case no J 1832/2002

J 1987/2009

In the matter between

TECHNIKON PRETORIA (NOW TUT)

Applicant

And

EP NEL N.O.

First Respondent

THE COMMISSION FOR CONCILIATION,

Second Respondent

MEDIATION AND ARBITRATION

Z GORDON-FATAGODIEN

Third Respondent

RULING: APPLICATION FOR LEAVE TO APPEAL

VAN NIEKERK J

- [1] This is an application for leave to appeal against the judgment of Ralefatane AJ, delivered on 4 November 2015. For the sake of convenience, I shall refer to the applicant in these proceedings as ‘the employee’. In her judgment, amongst other things, the learned acting judge upheld an application to review and set aside an arbitration award granted by default 17 April 2002 by Commissioner Nowosenetz, and appears to have dismissed an application for similar relief in respect of the rescission ruling made by the first respondent when on 15 April 2003, he refused to rescind the default arbitration award.
- [2] The employee seeks leave to appeal in respect of these orders. The employee does not seek leave to appeal against the court’s findings on the issue of prescription, nor against the court’s rejection of his complaint regarding an irregular proceeding.
- [3] The test to be applied is that referred to in s 17 of the Superior Courts Act, 10 of 2013. Section 17(1) provides:
- Leave to appeal may only be given where the judge or judges concerned are of the opinion that –
- (a) (i) the appeal would have a reasonable prospect of success; or
(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;
 - (b) the decision sought on appeal does not fall within the ambit of section 16 (2) (a); and
 - (c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.
- [4] The traditional formulation of the test that is applicable in an application such as the present requires the court to determine whether there is a reasonable prospect that another court may come to a different conclusion to that reached in the judgment that is sought to be taken on appeal. The use of the word “would” in

s17 (1) (a) (i) is indicative of a raising of the threshold since previously, all that was required for the applicant to demonstrate was that there was a reasonable prospect that another court might come to a different conclusion (see *Daantjie Community and others v Crocodile Valley Citrus Company (Pty) Ltd and another* (75/2008) [2015] ZALCC 7 (28 July 2015). Further, this is not a test to be applied lightly – the Labour Appeal Court has recently had occasion to observe that this court ought to be cautious when leave to appeal is granted, the review against the commissioner's refusal to grant the as should the Labour Appeal Court when petitions are granted. The statutory imperative of the expeditious resolution of labour disputes necessarily requires that appeals be limited to those matters in which there is a reasonable prospect that the factual matrix could receive a different treatment or where there is some legitimate dispute on the law (See the judgment by Davis JA in *Martin & East (Pty) Ltd v NUM* (2014) 35 ILJ 2399 (LAC), and also *Kruger v S* 2014 (1) SACR 369 (SCA) and the ruling by Steenkamp J in *Oasys Innovations (Pty) Ltd v Henning & another* (C 536/15, 6 November 2015).

- [5] It is of some significance that this matter dates back to 2000, and that the application involved no novel points of law. To the extent that an appeal will further protract the matter, this is in itself a basis on which the court ought to refuse leave to appeal.
- [6] In so far as the review against the commissioner's refusal to grant the applicant condonation for the late delivery of its rescission application, the court set out the facts and undertook an analysis before concluding that the review application ought to be granted. In essence, the court recognised (correctly) that the question was not whether the commissioner's decision was wrong, but rather whether it was unreasonable; that while the commissioner had found that there was no 'proper excuse' for the delay, he had not weighed the applicant's prospects of success and had not recognised that the delay was not particularly significant. The court concluded after consideration of these issues that the

condonation ruling stood to be granted, it being implicit in this conclusion that the court found that the commissioner's refusal of condonation was unreasonable.

- [7] In so far as the review against the commissioner's refusal to rescind the default award is concerned, the court held in essence that the commissioner had considered whether the notice of set down had been served but that he had ignored the other explanations for the applicant's non-attendance, that he ignored prior correspondence that had been transmitted to a fax number different to the one to which the notice of set down for the arbitration had been transmitted, that he failed to consider whether the applicant had given a reasonable explanation for the non-attendance and that he had failed to consider that the applicant had attended the conciliation proceedings, which created doubt that it had wilfully neglected to attend the arbitration hearing. Further, the commissioner had failed to consider the applicant's prospects of success in relation to the merits of the dismissal claim, prospects that the court considered good.
- [8] In short, the proceedings before the court involved two straightforward applications for review: a review against the refusal to grant condonation for the late delivery of an application for rescission, and a review against the refusal of the application for rescission itself. Ultimately, the court found that the distorting effect of the commissioner's failure to consider series of materially relevant facts and considerations rendered the ruling unreasonable and thus reviewable. In my view, considering the matter holistically and bearing in mind that a right to appeal exists in relation to the order made rather than the reasons given for it, the employee does not have reasonable prospect of success. For that reason, the application for leave to appeal stands to be dismissed. Finally, there is no reason why costs should not follow the result.

I make the following order:

1. The application for leave to appeal is dismissed, with costs.

ANDRÉ VAN NIEKERK
JUDGE OF THE LABOUR COURT
Chambers
2 March 2016

Labour Court