



**THE LABOUR COURT OF SOUTH AFRICA
JOHANNESBURG**

Not Reportable

Case no: J 2767/16

NKOSINATHI KHENA

Applicant

and

PASSENGER RAIL AGENCY OF SOUTH AFRICA

Respondent

Decided: In Chambers

Delivered: 1 February 2017

Summary: Application for leave to appeal. No prospects of success on appeal. Application dismissed.

JUDGMENT-APPLICATION FOR LEAVE TO APPEAL

PRINSLOO J

- [1] This is an application for leave to appeal against certain findings and orders of this Court handed down on 6 December 2016.
- [2] The Applicant opposed the application.

The test for leave to appeal

- [3] It is trite that in order to be entitled to leave to appeal, an applicant for leave to appeal must satisfy this Court that it has reasonable prospects of success on appeal. In the matter of *S v Smith*¹ the Supreme Court of Appeal held as follows:

'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 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] However, 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. In *Seatlholo and Others v Chemical Energy Paper Printing Wood and Allied Workers Union and Others*² Van Niekerk J confirmed the fact that the test applicable in applications for leave to appeal is more stringent and held as follows:

"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. As the respondents observe, the use of the word "would" in s17(1)(a)(i) are 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, as should the Labour

¹ 2010 (1) SACR at 576 (SCA)

² (2016) 37 ILJ 1485 (LC)

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 and 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 and another* (C 536/15, 6 November 2015).

The grounds for leave to appeal

- [5] In the application for leave to appeal it appears that the Respondent seeks leave to appeal the findings made in paragraphs 34 – 38 and 41 – 47 of the judgment as well as the orders granted. The Respondent stated that there are reasonable prospects that another court will make the following findings:
1. On the facts, the Respondent complied with its contractual obligations, in particular the ambit and scope of clause 1.3 of the disciplinary code;
 2. The applicant repudiated the contract;
 3. The granting of specific performance and in particular prayer 3, improperly impedes the Respondent's contractual right to terminate the Applicant's employment on one month's notice.
- [6] The Respondent filed written submissions in which it stated that there are three substantive grounds of appeal namely that this Court erred in the interpretation issue, there was substantial compliance with the term and condition being the subject matter of the interpretation issue and specific performance was inappropriate.
- [7] I have carefully considered the submissions made by both parties in their heads of argument filed in support and in opposition of the application for leave to appeal. I do not intend repeating those submissions in this judgment.

[8] In deciding this application for leave to appeal I am guided by the *dicta* of the Supreme Court of Appeal where it held in *Dexgroup (Pty) Ltd v Trustco Group*³ that:

” The need to obtain leave to appeal is a valuable tool in ensuring that scarce judicial resources are not spent on appeals that lack merit. It should in this case have been deployed by refusing leave to appeal.”

[9] The statutory imperative of the expeditious resolution of labour disputes also 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.

[10] Considering the grounds for appeal and the submissions made by the parties, I am not convinced that the Respondent has made out a case that another court would come to a different conclusion than the one made by this Court and that it has prospects of success on appeal.

[11] It is unfortunate that the expeditious resolution of the disciplinary process and related issues is delayed.

Order:

[12] In the premises I make the following order.

The application for leave to appeal is dismissed with cost.

Connie Prinsloo

Judge of the Labour Court

³ Unreported judgment of the Supreme Court of Appeal (687/12) [2013] ZASCA 120 (20 September 2013)