



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no JR 1309/14

In the matter between

**SAN CONTRACTING SERVICES (PTY)
LTD**

Applicant

And

FRANCIS MAAKE KGANYAGO

First Respondent

**COMMISSION FOR CONCILIATION
MEDIATION AND ARBITRATION**

Second respondent

AMCU obo LS MALUNGANI

Third Respondent

Chambers 20 February 2017

RULING: APPLICATION FOR LEAVE TO APPEAL

VAN NIEKERK J

- [1] The applicant seeks leave to appeal against the whole of the judgment delivered on 26 May 2016 when the court dismissed an application to review and set aside an arbitration award issued in favour of the third respondent. First, I must apologise to the parties for the delay in the determination of this application. My associate only became aware of this application in late January 2017. For reasons that are not apparent to me, the file had been placed in the filing room and not forwarded to my Chambers as is the norm.
- [2] 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.
- [3] 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 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).

- [4] The five grounds on which the applicant contends that the court erred in coming to the conclusion that it did are set out in the application for leave to appeal, and I do not intend to repeat them here. It is sufficient to note that in three respects, the grounds are premised on what the evidence led at the arbitration hearing established or did not establish, in other words, on fact-specific grounds. The conclusion drawn is that the factual finding made by the commissioner in relation to the existence particularly of provocation was unreasonable. From this conclusion, the applicant contends that the decision by the commissioner to reinstate the third respondent subject to a final warning rather than to have upheld his dismissal is an unreasonable decision, and that another court might find that the decision is not that of a reasonable decision maker.
- [5] In my view, what the applicant submissions overlook is the difference between an appeal and a review. The test to be applied in a matter such as the present is whether the commissioner's decision falls within a band of decisions to which reasonable decision-makers could come on the available material. The capacity of this court to intervene, particularly in relation to the appropriateness of sanction, is extremely limited. This much ought to be apparent from the judgment in the *Sidumo* case, where virtually all of the judges concerned indicated that they themselves may well have imposed a penalty of dismissal but that the

commissioner's decision to impose a lesser sanction was not so unreasonable that it warranted interference. None of the applicant's grounds for appeal persuade me that the wrong test was applied to determine the reasonableness of the outcome of the proceedings under review or that the outcome was so unreasonable that no reasonable decision maker *could* come to the decision to which the first respondent came.

[6] In my view, there is accordingly no merit in the present application and leave to appeal stands to be refused.

I make the following order:

1. The application for leave to appeal is dismissed.

ANDRÉ VAN NIEKERK
JUDGE OF THE LABOUR COURT