



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR 1282/10

In the matter between:

ANDILE AARON MASEKO

Applicant

and

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION
BHEKINHLANHLA STANLEY MTHETHWA N.O.
SASOL INFRACHEM (PTY) LTD**

First Respondent

Second Respondent

Third Respondent

Heard: In chambers

Delivered: 08 March 2017

Summary: Application for leave to appeal decision on rule 11 application. Test for granting leave to appeal restated. Application failed as the standard for declaring a litigant vexatious is demanding and an order to that effect is not easily made.

RULING ON LEAVE TO APPEAL

EVERETT, AJ

Introduction

[1] This is an application for leave to appeal part of an order delivered on 6 May 2016. The application appears to be made timeously but it was brought to my attention several months later. The parts of the order in which appeal is noted are:

- “2. The Rule 11 application, in the context of this application, is dismissed.
3. There is no order as to costs.”

Background

- [2] The third respondent had applied in terms of rule 11 of the Rules of this Court to have the respondent declared a vexatious litigant, alternatively an order preventing Mr Andile Aaron Maseko (Mr Maseko) from proceeding with litigation against the company until a costs order granted against him has been secured or paid.
- [3] The rule 11 application arises within an application for review of a condonation ruling, launched by Mr Maseko, of a condonation ruling issued by Mr Bhekinhlanhla Mthethwa a panelist of the National Bargaining Council for the Chemical Industry.
- [4] The basis for the application for leave to appeal is essentially that:
- 4.1 I failed, so it is claimed, to take into account the history of the litigation between the parties in dismissing the rule 11 application and construed it narrowly in the context of the review application when it was much broader; and

4.2 I failed to consider and pronounce on the alternative claim that the applicant be ordered to pay all outstanding legal fees before continuing with litigation or, alternatively, provide security for costs in the amount of R181 661.00.

[7] It is not necessary to summarise the history of the litigation between the parties which is captured in the written judgment. The essence of my decision was that the rule 11 application to declare Mr Maseko a vexatious litigator had to fail because, in order to succeed, all the litigation he had instituted would have had to be without merit and I had not found the application for review of the condonation ruling to be without merit.

[8] The following is an extract of my judgment at paras 17 to 19:

"Rule 11 application"

[17] The parties addressed me on the Rule 11 application. For it to succeed, the current review application and numerous others in the history of the litigation between the two parties would need to be found to be vexatious. Two cases at the Labour Court and a series of appeals or petitions - even to the highest court in the land - is not, on the face of it, vexatious and the test to declare a person a vexatious litigant is much more demanding.

[18] It is impossible for the court to make a finding that Mr Maseko is a vexatious litigant at this stage given that the application for review of the condonation is not dismissed because it lacks merit. On the contrary, the prospects of success in the review application seem reasonably strong since there is case law requiring a commissioner or bargaining counsel panelist to hear an application for condonation and not merely determine condonation on the basis of written submissions. Furthermore, the Labour Court judgment, per Judge Basson, could be read as giving Mr Maseko hope that, if he claimed discrimination or an automatically unfair dismissal, he might ultimately succeed in challenging his

dismissal. It was not the same dispute that had been decided originally and his efforts to frame a new cause of action were not unreasonable or vexatious.

- [19] The rule 11 application cannot be granted in the context of this review application as the review application is not, on the face of it, without merit. I should add, though, that this is not to say that a similar application might not be successful at some stage in the future.”

The test for granting leave to appeal

- [9] The test to be applied in an application for leave to appeal is that referred to in section 17 of the Superior Courts Act.¹ Section 17(1)(a) provides that leave to appeal “*may only be given where the judge or judges concerned are of the opinion that the appeal would have a reasonable prospect of success*” or there is some other compelling reason why the appeal should be heard. In this case, there is no issue of conflicting judgments and the question is essentially whether another judge may have come to a different conclusion.
- [10] The Labour Appeal Court has recently noted that this Court ought to be cautious in granting leave to appeal. This is in line with a key purpose of the Labour Relations Act which is to promote expeditious resolution of labour disputes. Accordingly appeals should 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.²
- [11] Applying the test of whether another judge may have come to a different conclusion, I am of the view that this application must fail. My primary reason for this view is that the standard for declaring a litigant vexatious is demanding and an order to that effect is not easily made. The alternative claim that the applicant be

¹ Act 10 of 2013.

² See the judgment by Davis JA in *Martin & East (Pty) Ltd v NUM* (2014) 35 ILJ 2399 (LAC) at 2406; and also *Oasys Innovations (Pty) Ltd t/a GL Event Oasys v Henning & Another* [2015] ZALCCT 65 at para 8-9.

ordered to pay all outstanding legal fees before continuing with litigation or, alternatively, provide security for costs in the amount of R181 661.00., if granted, would be overly harsh given that the applicant in the main matter is a dismissed individual without the means to provide security and, in essence, an order to this effect would deny him the right to challenge the refusal to grant condonation for late referral of the automatically unfair dismissal dispute. The consequence is that he would be denied the opportunity to challenge the dismissal itself.

Order

[12] I therefore rule as follows:

1. The application for leave to appeal is dismissed.
2. There is no order as to costs.

Winnie Everett

Acting Judge of the Labour Court of South Africa