



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case no: JS232/09

In the matter between:

VICTOR BIGGAR

Applicant

and

CITY OF JOHANNESBURG

(EMERGENCY MANAGEMENT SERVICES)

Respondent

Heard: 18 November 2015

Delivered: 31 March 2017

JUDGMENT: APPLICATION FOR LEAVE TO APPEAL

Nkutha-Nkontwana AJ

Introduction

- [1] The respondent seeks leave to appeal against the whole judgment I handed down on 13 December 2016. In that judgment, I found that the respondent unfairly discriminated against the applicant. I accordingly ordered the

respondent to pay the applicant an amount equivalent to 12 months and the costs of suit.

- [2] The application is opposed by the applicant who in turn sought indulgence for the later filing of his written submissions. The condonation application is not opposed and I note that there is no prejudice to be suffered by the respondent as a result of the delay. I am also satisfied with the explanation furnished for the delay which I find to be detailed and reasonable. As such, I do not deem it necessary to consider the prospects of success. In these circumstances, condonation is granted.

Grounds of leave to appeal

- [3] There are several grounds of appeal to the Labour Appeal Court upon which the application is hinged and I do not intend repeating them in this judgment. The whole application is, however, encapsulated by paragraph 68 of the respondent's written submissions which states that:

“The interests of justice have not been served by the manner in which the court approached the evidence and applied the standard of proof. This raises important legal questions...”

Test applicable in an application for leave to appeal

- [4] In *National Union of Metalworkers of South Africa and Others v Columbus Stainless*,¹ Van Niekerk J contextualised the test applicable in an application of this nature and stated the following:

“[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 granted where judge or judges concerned are of the opinion that –

¹ JS 529/14, 16 May 2016, a ruling in an application for leave to appeal the court's reported judgement cited as *National Union of Metalworkers of South Africa and Others v Columbus Stainless* (JS529/14) [2016] ZALCJHB 344 (30 March 2016).

- (a)(i) the appeal would have reasonable prospect of success, or
- (ii) there is some compelling reason why the appeal should be heard, including conflicting judgements on the matter under consideration;
- (b) The decision sought on the 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 judgement 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 to demonstrate that there was a reasonable prospect that another court might come to a different conclusion (see *Daantiie 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 has an accession to observe that this court ought to be cautious when leave to appeal is granted...as should the Labour Appeal Court when petitions are granted. The statutory imperative of 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 that a is some legitimate dispute on the law (See the judgement by Davis JA in *Martin & East (Pty) Ltd v NUM* (2014) 35 ILJ 2399 9LAC, and also *Kruger v S* 2014 (1) SACR 369 (SCA) and the ruling by Steenkamp J in *Oasys Innovations (Pty) Ltd v Henninh & another* (C 536/15, 6 November 2015)."

[5] I fully concur with Van Niekerk J.

Analysis

[6] Since the incidents of discrimination complained of by the applicant took place prior to 1 August 2014, the date in which the amendments to section 11 of the Employment Equity Act (“EEA”) came into effect, the issue of the onus was determined in terms of the pre-amended Section 11 of the EEA which provides that:

“Whenever unfair discrimination is alleged in terms of this Act, the employer against whom the allegation is made must establish that it is fair.”

[7] In *IMATU v City of Cape Town*,² Murphy AJ, as was then, expansively dealt with the tenets relating to unfair discrimination on the ground of disability. He then emphatically adopted the following test as laid down in *Harksen v Lane NO*:³

“The first enquiry is whether the provision differentiates between people or categories of people. If so, does the differentiation bear a rational connection to a legitimate governmental purpose? If it does not, then there is a violation of the guarantee of equality. Even if it does bear a rational connection, it might nevertheless amount to discrimination. The second leg of the enquiry asks whether the differentiation amounts to unfair discrimination. This requires a two-staged analysis. Firstly, does the differentiation amount to “discrimination”? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there was discrimination would depend upon whether, objectively, the ground was based on attributes and characteristics which had the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner. Secondly, if the differentiation amounted to “discrimination”, did it amount to “unfair discrimination”? If it is found to have been on a specified ground, unfairness will be presumed under the Bill of Rights by virtue of the provisions of section 9(5) of the Constitution, which transfers the onus to prove unfairness to the complainant who alleges

² [2005] 11 BLLR 1084 (LC).

³ 1998 (1) (SA) 300 (CC) paras 78 - 81.

discrimination on analogous grounds. As I read section 11 of the EEA, no similar transfer of onus arises under the EEA. In other words, whether the ground is specified or not the onus remains on the respondent throughout to prove fairness once discrimination is shown." (Emphasis added)

- [8] Turning to the matter at hand, the applicant adduced sufficient evidence to back up his claim that he had indeed been a victim of racial harassment perpetrated by his white colleagues. He also managed to show that the respondent was aware of the racial abuse suffered by him and his family but failed to act decisively and reasonably to eradicate same.
- [9] The respondent, on the other hand, closed its case without leading any evidence despite the fact that it had an evidentiary duty to rebut the applicant's *prima facie* evidence of discrimination and the onus to prove the fairness of the discrimination.
- [10] I agree with the applicant's attorney's submission that since the applicant's version was unchallenged, it had to stand. The respondent has always been legally represented and as such ought to have been better advised of its burden of proof and consequences of failure to lead evidence.
- [11] Having considered all the grounds of leave to appeal, I am not persuaded that the applicant has made out a case that another court might reasonably arrive at a decision different to the one reached by this court.
- [12] In the premises, the application for leave to appeal stands to be dismissed.

Order

- [13] The application for leave to appeal is accordingly dismissed with costs.

Judge of the Labour Court of South Africa

LABOUR COURT