



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR 745 / 16

In the matter between:

SOUTH AFRICAN BROADCASTING

CORPORATION (SOC) LTD

Applicant

and

COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION

First Respondent

ELEANOR HAMBIDGE N.O. (AS ARBITRATOR)

Second Respondent

SEAN BURKE AND 8 OTHERS

Third and Further Respondents

Heard: Considered in Chambers

Delivered: 19 April 2017

**Summary: Leave to appeal – no proper grounds made out – application for
leave to appeal dismissed**

JUDGMENT

SNYMAN, AJ

Introduction

- [1] This matter concerned an application by the applicant to review and aside an arbitration award of the second respondent in her capacity as commissioner of the CCMA (the first respondent), in terms of which award the first respondent found that the third and further respondents were employees of the applicant. The underlying cause giving rise to the matter was an unfair labour practice dispute referred by the third and further respondents to the CCMA.
- [2] In a written judgment handed down on 8 March 2017, I upheld the applicant's review application, reviewed and set aside the award of the second respondent, and substituted the award with a determination that the third to further respondents were not employees of the applicant, and consequently the CCMA had no jurisdiction to entertain this matter.
- [3] On 27 March 2017, the third to further respondents filed an application for leave to appeal, together with written submissions as contemplated by Rule 30(3A) of the Labour Court Rules and clause 15.2 of the Practice Manual. The application for leave to appeal was opposed by the applicant, who also filed its written submissions 5 April 2017. The application for leave to appeal is accordingly ripe for determination.
- [4] Clause 15.2 of the Practice Manual further provides that an application for leave to appeal will be determined by a Judge in chambers, unless the Judge directs otherwise. I see no reason to direct otherwise and will therefore determine the third to further respondents' leave to appeal application in chambers.

The merits of the application

- [5] In deciding whether to grant leave to appeal to the Labour Appeal Court, the Labour Court must determine whether there is a reasonable prospect that

another Court may come to a different conclusion to that of the Court *a quo*.¹ In *Karbochem Sasolburg (A Division of Sentrachem Ltd) v Kriel and Others*² the Court held:

‘I have understood that the test in deciding whether to grant leave to appeal is the traditional test. It requires a judge to ask whether there is a reasonable prospect that another court may come to a different conclusion. See *North East Cape Forests v SAAPAWU and others* (1997) 18 ILJ 729 (LC); [1997] 6 BLLR 705 (LC) at 710A-B; *NEWU v LMK Manufacturing (Pty) Ltd and Others* [1997] 7 BLLR 901 (LC) and Landman and Van Niekerk *Practice in the Labour Courts* (Service 1) at A-41.’

- [6] In *Seathlolo and Others v Chemical Energy Paper Printing Wood and Allied Workers Union and Others*³ the Court recently again considered the above test for leave to appeal and held:

‘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. ... 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 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 ...’

- [7] The third and further respondents contend that my findings relating to the fact that the contracts they have signed must also be considered, is in error and at odds with existing Labour Appeal Court authority. This is simply not the case. As I have illustrated in my judgment, which reasons I will not repeat again, the prevailing authority is in fact consistent in saying that the content of what has

¹ See *National Education Health and Allied Workers Union v University of Cape Town and Others* (2003) 24 ILJ 95 (CC); *Ngcobo v Tente Casters (Pty) Ltd* (2002) 23 ILJ 1442 (LC); *Volkswagen SA (Pty) Ltd v Brand NO and Others* (2001) 22 ILJ 993 (LC); *Singh and Others v Mondi Paper* (2000) 21 ILJ 966 (LC); *Glaxo Welcome SA (Pty) Ltd v Mashaba and Others* (2000) 21 ILJ 1114 (LC).

² (1999) 20 ILJ 2889 (LC) at 2890D.

³ (2016) 37 ILJ 1485 (LC) at para 3.

been agreed the between parties should not just simply be ignored. A very recent example of the Labour Appeal Court saying this can be found in *Enforce Security Group v Mwelase and Others*⁴. Also, and considering that employment was always in dispute, and the underlying dispute was one of an unfair labour practice, it must surely be trite that the third to further respondents had the onus to prove they were in fact employees, especially in the face of the clear terms of the contracts they concluded. I simply can see no reasonable prospect that another Court could come to a different conclusion in this respect.

- [8] The third to further respondents take issue with the manner in which I considered the cumulative effect of the evidence relating to control and supervision of the third to further respondents, by the applicant. I dealt with this evidence in some detail in my judgment, and in my view, the evidence speaks for itself. Considering what is contained in the application for leave to appeal, it is my view that the third to further respondents are seeking leave to appeal simply because they disagree with my conclusions on the facts in this regard. To disagree with my conclusions however cannot make out a case for leave to appeal. I remain entirely unconvinced that there exists a reasonable prospect that another Court may decide different where it comes to the evidence relating to control and supervision.
- [9] Having reviewed and set aside the award of the second respondent, there was no need to decide the review application under case number JR 650 / 16, which fell to be dismissed. There is simply no basis on which this conclusion can substantiate an application for leave to appeal.
- [10] The third to further respondents contend that because I stated in paragraph 69 of my judgment that both the parties had an arguable case, this indicates a reasonable prospect of a different decision by another Court. The reliance by the third to further respondents on this paragraph in my judgment was entirely misplaced. I made this reference in the context of deciding the issue of costs. To exercise my discretion to make no order as to costs because I believe a party had something legitimate to argue about, does not mean that I consider

⁴ [2017] ZALAC 9 (25 January 2017) at para 24.

that another Court could decide otherwise. I do not believe that this argument can sustain any application for leave to appeal.

[11] Finally, the third to further respondents believe that I did not place sufficient emphasis on the fact that their contracts prohibited them from working for direct competitors, such as E-TV. However, what the third to further respondents simply do not appreciate it is that even a legitimate independent contracting relationship could have a prohibition from rendering the same service to a direct competitor. This being said, even the authorities relied on by the third to further respondents in support of their argument indicate that the proper consideration is whether the third respondents were permitted and in a position to take on outside work. I dealt with this in some detail in my judgment as well. The simple answer is that they were. There is no reasonable prospect of another Court deciding otherwise.

[12] I thus conclude that the third to further respondents have shown no reasonable prospect that another Court may come to a different conclusion. The application for leave to appeal falls to be dismissed.

[13] In line with the approach followed in my original judgment, I shall make no order as to costs.

Order

[14] In the premises, I make the following order:

1. The third to further respondents' application for leave to appeal is dismissed.

S Snyman

Acting Judge of the Labour Court

Appearances:

For the Applicant: Maserumule Attorneys

For the Third to Further Respondents: Erasmus Scheepers Attorneys

LABOUR COURT