



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: **JS135/2014**
JS306/2015

In the matter between:

AVIEL TILON NADEL

Applicant

and

**JOHANNESBURG JEWISH HELPING HANDS AND
BURIAL SOCIETY**

Respondent

Heard: In Chambers

Delivered: 03 May 2017

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

MALINDI AJ

[1] The Applicant for leave to appeal (Claimant in the main action) filed an application for leave to appeal against the whole of the judgment and order of this Court delivered on 9 December 2016.

[2] The Respondent (Defendant in the main action) opposes the application. For convenience, the parties will be referred to as in the main application.

[3] The grounds upon which the application is based are set out comprehensively in the application. The gist of the application is set out in paragraphs 21 and 23 thereof which read as follows:

“21 In toto, in respect of the dismissal it is submitted that another Court acting reasonably, may find it probable that the dominant reason for the dismissal was because the applicant exercised his rights under the Labour Relations Act; and that he was discriminated against on the basis of his religious belief, political beliefs and conscience.

23. His Lordship should have found that the respondent had breached the preclusion in the Employment Equity Act precluding psychological testing and should have found that the dignity of the applicant was impugned by this testing. The applicant was at that point an employee of WOW, alternatively a candidate for employment.”

[4] I was referred to *Kroukam v SA Airlink (Pty) Limited*¹ for the proposition that the dominant reason for the dismissal of the Claimant is that he exercised his rights under the LRA.

[5] I was referred to *Stellenbosch Farmers' Winery Group Ltd v Martell et Cie*² for the approach to be adopted when applying the degree or standard of proof in civil, as opposed to criminal matters. The case applies the technique generally employed by courts in resolving factual disputes that have a bearing on the probabilities.

[6] The judgment canvasses all the issues that the Claimant raised as his causes of complaint. I am satisfied that all the factors were taken into account in the judgment.

[7] The standard of proof that the Applicant urges me is the one I should have applied is the one that was applied in respect of each aspect of the evidence that needed to be evaluated. Having done so I came to the conclusions, *inter alia*, that:

6.1 on the probabilities, it was not the dominant reason for the Claimant's dismissal that he had exercised his rights under the LRA because the Claimant had been advised in every notice of disciplinary action that he had a right to approach the CCMA should he not be satisfied with the outcome of the disciplinary

¹ 2003 (1) SA 11 (SCA) at [5]

hearing;

6.2 although Weber was a hard taskmaster and difficult, as testified to by the Respondent's other witnesses, Weber had not done anything to support the contention that the Claimant was being persecuted for utilising the labour laws to air his grievances with the Respondent;

6.3 the issue of begging does not detract from the final decision I will take because I did not make a definitive finding on the issue as it was not referred to the Labour Court. However, it would also fail as one of the building blocks to sustain a thesis that there was a concerted effort to punish the Complainant for utilising the LRA processes;

6.4 subjecting the Claimant to psychological or psychiatric testing was not for the purpose of assessing his suitability to be employed or to continue to be employed. It was to address the issues of his conduct, including the common cause issue that he had severely assaulted a Mr Greenberg, and was admittedly also tempestuous.

² (2005) 26 ILJ 2153 (LAC) at [90] and [91]

[8] I concluded that the Respondent, who bears the onus as the employer in an admitted dismissal, has discharged the required onus on a balance of probabilities.

[9] In the circumstances I am not satisfied that the Applicant has reasonable prospects of success on appeal. I therefore make the following order.

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

Malindi, AJ
Acting Judge of the Labour Court

Submissions:

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For Respondent: Mr Berry (Employer Representative)

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