



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JS 791/14

In the matter between:

**SOUTH AFRICAN CLOTHING AND TEXTILE
WORKERS' UNION**

First Applicant

MAGGIE MALALA

Second Applicant

LESEGO RACHEL NKHUMANE

Third Applicant

and

STEPHEAD MILITARY HEADWEAR CC

Respondent

Considered in chambers.

Delivered: 23 May 2017

RULING: APPLICATION FOR LEAVE TO APPEAL

TLHOTLHALEMAJE J

Introduction

- [1] Following upon trial proceedings, judgment in this matter was delivered on 20 March 2017, in terms of which the dismissal of the second and third applicant was found to have been procedurally and substantively unfair. The respondent was consequently ordered to reinstate the second and third

applicant in its employ, with retrospective effect from the date of their dismissal.

[2] The respondent has since filed an application for leave to appeal against that judgment and order. The applicants opposed the application.

[3] The material facts of this case that gave rise to the current application are recorded in the main judgment, and no purpose will be served in burdening this judgment with a repetition thereof. In its application, the respondent contends that this Court erred and/or misdirected itself in several respects, inclusive of that:

- i. It held that the respondent was not permitted to justify the dismissal of the two employees concerned on a basis other than upon which it purported to rely when it dismissed them. In so holding the Court departed from the principle expressly endorsed by the Labour Appeal Court to which it was bound;
- ii. It evaluated the fairness of the dismissal of the employees by the respondent with reference to the criteria applicable to dismissals for operational reasons rather than those applicable to dismissal for poor performance or lack of competence.
- iii. It held that the respondent had not proven that the employees were poor performers and had not been given sufficient warning or counselling. This finding, made in the context of the respondent having taken performance into account as a selection criterion for an operational dismissal, was not supported by evidence which was replete with incidents, articulated in the judgment, showing that the employees were not rendering competent service as pattern makers.
- iv. The Court failed to determine the real issue before it. Put differently, this Court did not decide the true reason for the second and third respondent's dismissal.

[4] The respondent nevertheless accepted that it did not prove a valid reason for dismissal for operational requirements. It further accepted that the procedure followed in dismissing the second and third applicant did not conform to

procedural fairness contemplated in the Labour Relations Act¹ in respect of retrenchments. It however contended that the Court ought to have determined the real reason for the dismissal, and that the failure to do so rendered the judgment appealable. In this regard, reliance was placed on the decision of the Labour Appeal Court in *Fidelity Cash Management*,² where it was held:

“It is an elementary principle of not only our labour law in this country but also of labour law in many other countries that the fairness or otherwise of the dismissal of an employee must be determined on the basis of the reasons for dismissal which the employer gave at the time of the dismissal. The exception to this general rule is where at the time of the dismissal the employer gave a particular reason as the reason for dismissal in order to hide the true reason such as union membership. In such a case the court or tribunal dealing with the matter can decide the fairness or validity of the dismissal not on the basis of the reason that the employer gave for the dismissal but on the basis of the true reason for dismissal.” [Emphasis added.]

- [5] As I understand the respondent's contentions and its interpretation of the above *dictum*, in circumstances where a court is confronted with a dispute where the employer changed the initial reasons for a dismissal as advanced at the time of the dismissal, the court is then obliged to evaluate the fairness of the dismissal on the reason provided subsequent the dismissal. That obligation is maintained even if the true reason unveiled in the pleadings after the conciliation process.
- [6] The respondent further submitted that the distinctions provided for in the LRA on how specific types of dismissals must be resolved and the specific procedures applicable was immaterial for the current dispute. It contended that the fact that the LRA prescribed certain procedures in cases of misconduct, or poor work performance, or in respect of a no-fault dismissal is immaterial, as this Court is empowered in terms of the provisions of section

¹ 66 of 1995, as amended, (LRA). See section 189 thereof.

² *Fidelity Cash Management Services v CCMA & Others* (2008) 29 ILJ 964 LAC; [2008] 3 BLLR 197 (LAC) at para 32.

158(2)(b) of the LRA to adjudicate such dismissal and the court may grant relief as if it were the arbitrator or commissioner.³

[7] It is trite that for an application for leave to appeal to be successful, it is required of the party seeking such leave to demonstrate that there are reasonable prospects that another court, in this instance, the Labour Appeal Court, would come to a different conclusion to that reached in the judgment that is sought to be taken on appeal.⁴ As to what this test entails was addressed by the Supreme Court of Appeal in *S v Smith*⁵ as follows:

“What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper

³ *Wardlaw v Supreme Moulding (Pty) Limited* [2007] ZALAC 2; [2007] 6 BLLR 487 (LAC) at para 24 it was held:

In the light of the above it seems to us that the employee's allegation of the reason for dismissal as contemplated in sec 191(5) is only important for the purpose of determining where the dispute should be referred after conciliation but the forum to which it is referred at that stage is not necessarily the forum that has jurisdiction to finally resolve the dispute on the merits. That may depend on whether it does not later appear that the reason for dismissal is another one other than the one alleged by the employee and is one that dictates that another forum has jurisdiction to resolve the dispute on the merits. Once a dispute has been referred to, for example, the Labour Court, the Labour Court provisionally assumes jurisdiction. That assumption of jurisdiction is conditional upon it not later becoming “apparent” to the Court within the contemplation of sec 158(2) of the Act that the reason for the employee's dismissal is one that falls within sec 191(5)(a) of the Act. We say it is provisional or conditional because if it later becomes “apparent” that the dispute is one that ought to have been referred to arbitration, the Court will decline jurisdiction and have the dispute referred to arbitration.

⁴ See Superior Courts Act 10 of 2013: Section 17(1) thereof provides:

- “(1) 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.”

⁵ 2012 (1) SACR 567 (SCA) at para 7.

grounds that he has prospects of success on appeal and that those prospects are not remote but have realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal.”

- [8] The Labour Court in *Seathlolo & others v Chemical Energy Paper Wood & Allied Workers Union & others*⁶ in reference to section 17(1) recently held that:

“ . . . As the respondents observe, the use of the word “would” in s17(1)(a)(i) are 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, 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

- [9] The applicants’ main contention was that there was no reasonable prospect that another Court would reach a different conclusion in that *inter alia*, they (applicants), had pleaded in their main claim that the respondent dismissed them for operational reasons, and that despite pleading to the contrary, the respondent’s witness confirmed that the individual applicants were dismissed for operational reasons, but had nevertheless applied performance as selection criteria. It was submitted further on the applicant’s behalf that having chosen operational requirements as its reason to dismiss, the respondent was bound by that decision, and to prove that the dismissal was both procedurally and substantively fair.

⁶ (2016) 37 ILJ 1485 (LC).

⁷ Id at para 3.

[10] In considering the application before the Court, it is taken into account that that the Labour Appeal Court has directed that caution must be exercised by judges of this Court when seized with applications for leave to appeal. There is a further requirement that judges of this Court must ensure that the matters that are sent to the Labour Appeal Court are limited to those in which there is a reasonable prospect that the facts could be treated differently and/or where there is some legitimate dispute on the law.⁸

[11] I have carefully considered the grounds upon which leave to appeal is sought, and the submissions made by both parties in support of and in opposition to the application. I have further reflected upon my judgment and hold the firm view that the issues raised by the respondent in this application and grounds upon which leave to appeal is sought were adequately dealt with in that judgment. To this end, I am of the view that there exist no sound or rational basis for the conclusion that there are reasonable prospects that the Labour Appeal Court would on the facts or the law, come to a different conclusion.

[12] In the light of the above conclusions, it is further my view that this application was ill-conceived, and the requirements of law and fairness therefore dictate that the individual applicants should not be burdened with costs of this application.

Order

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

1. The application for leave to appeal is dismissed with costs

E Tlhotlhemaje
Judge of the Labour Court of South Africa

⁸ See also *Khena v Passenger Rail Agency of South Africa* (J2767/16) [2017] ZALCJHB 32 at para 4; *Martin and East (Pty) Ltd v NUM* (2014) 35 ILJ 2399 (LAC) at 2406.

LABOUR COURT