



THE LABOUR COURT OF SOUTH AFRICA

JOHANNESBURG

Not reportable

Case no: JS 638/2015

In the matter between:

MABUTI MALINGO

Applicant

and

BOXING SOUTH AFRICA

First Respondent

MASILO MAAKE

Second Respondent

Decided : In Chambers

Judgment: 27 July 2017

Summary: Application for leave to appeal. No prospects of success.

Application dismissed with costs.

JUDGMENT: APPLICATION FOR LEAVE TO APPEAL

PRINSLOO, J

[1] This is an application for leave to appeal against a judgment of this Court handed down on 29 November 2016 in terms of which the Court upheld the

Respondents' special pleas and dismissed the Applicant's case for lack of jurisdiction.

- [2] The application for leave to appeal was filed late and the Applicant sought condonation for the late filing thereof. The condonation application is opposed.
- [3] Although I am not satisfied that a proper case has been made out for the late filing of the application for leave to appeal, I reluctantly grant condonation and I will deal with the merits of the application for leave to appeal.
- [4] The Applicant has set out his grounds for leave to appeal and specified where this Court has erred. I have considered the grounds for appeal raised and the submissions made to support the application for leave to appeal as well as the submissions made in opposition thereof and I do not intend to repeat it in detail. I deal with the main submissions herein below.

Test for leave to appeal

- [5] It is trite that in order to be entitled to leave to appeal, an applicant in the application for leave to appeal must satisfy this Court that it has reasonable prospects of success on appeal. In the matter of *S v Smith*¹ the Supreme Court of Appeal held 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 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"

¹ 2010 (1) SACR at 576 (SCA). See also *Zweni v Minister of Law and Order* 1993(1) SA 523 (A).

- [6] However, 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. In *Seatlholo and Others v Chemical Energy Paper Printing Wood and Allied Workers Union and Others*² this Court confirmed the fact that the test applicable in applications for leave to appeal is more stringent and held as follows:

“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. 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 (See the judgment by Davis JA in *Martin and East (Pty) Ltd v NUM* (2014) 35 ILJ 2399 (LAC), and also *Kruger v S* 2014 (1) SACR 369 (SCA) and the ruling by Steenkamp J in *Oasys Innovations (Pty) Ltd v Henning and another* (C 536/15, 6 November 2015)”.

² (2016) 37 ILJ 1485 (LC)

- [7] In deciding this application for leave to appeal I am also guided by the *dicta* of the Supreme Court of Appeal where it held in *Dexgroup (Pty) Ltd v Trustco Group*³ that:

” The need to obtain leave to appeal is a valuable tool in ensuring that scarce judicial resources are not spent on appeals that lack merit. It should in this case have been deployed by refusing leave to appeal.”

Grounds for leave to appeal

- [8] Firstly, the Applicant submitted that the Court erred in finding that the Applicant did not file supplementary heads of argument.
- [9] It is common cause that the parties were afforded an opportunity to file the supplementary heads of argument by 4 November 2016, which date was extended to 11 November 2016 to accommodate Mr Memani’s request for more time. I specifically requested the parties to file the heads of argument directly with my Associate as the Court file was with me and by 11 November 2016 the Respondents complied and filed supplementary heads of argument but no supplementary heads of argument were filed by the Applicant.
- [10] In his application for leave to appeal the Applicant attached a copy of heads of argument that bears a Court stamp of 11 November 2016.
- [11] I have now considered those supplementary heads of argument filed by Mr Memani and it is evident to me that Mr Memani persisted with an argument similar to the one he presented in his argument in Court. Mr Memani persisted with the argument that a certificate of non-resolution is administrative action

³ Unreported judgment of the Supreme Court of Appeal (687/12) [2013] ZASCA 120 (20 September 2013)

which is binding until and unless it is set aside, that the certificate gave the Applicant the legal entitlement to refer his dispute to this Court, that the certificate is legally binding on all parties, including the Labour Court and that it binds this Court to preside over the matter as if the matter was correctly referred to it. There were no new submissions made on these issues in the supplementary heads of argument.

- [12] In respect of condonation, Mr Memani submitted that although the Court has the power to grant condonation, it can only do so in cases where it has jurisdiction in the first place and as this Court does not have the jurisdiction to hear the main application, it does not have the power to condone or refuse the late referral, even if the Applicant had applied for condonation.
- [13] In respect of costs Mr Memani submitted that as this Court lacks jurisdiction it has no power to order costs and for that reason no order as to costs should be made. Alternatively, Mr Memani submitted that both parties should have sought the setting aside of the incorrect certificate and as they both failed to do so, they are equally guilty and therefore each party should pay its own costs.
- [14] It is evident that the same issues that were raised in argument in Court and which I considered, were raised in the supplementary heads of argument. The supplementary heads of argument did not raise new arguments but rather highlighted Mr Memani's lack of understanding and his inability to interpret and apply the principles as set out in case law.
- [15] No case was made out in the supplementary heads of argument, to the contrary, it displayed Mr Memani's persistent lack of understanding and there is no prospect whatsoever that another Court will be persuaded to come to a different conclusion based on the arguments presented by Mr Memani in his supplementary heads of argument.
- [16] There is no merit in this ground for leave to appeal.

- [17] Secondly, the Applicant's ground for leave to appeal is that I was only seized with the question of costs and it was not competent to dismiss the matter. In his submissions Mr Memani submitted that this Court was only to determine who ought to pay the costs and it was not to determine the merits.
- [18] This ground for leave to appeal once again displays a concerning lack of understanding and it is without merit.
- [19] On 23 October 2015 the Applicant served his statement of case and on 6 November 2015 the Respondents filed a statement of defence wherein they raised two special pleas. The first special plea is that the statement of case was filed outside the 90-day period and the Applicant has not applied for condonation and the second special plea is that the Applicant failed to make out a case for an automatically unfair dismissal based on unfair discrimination. The Respondents' case was that the Applicant's dispute relates to dismissal for misconduct and that it falls under the jurisdiction of the CCMA and not this Court.
- [20] On 30 November 2015 the parties held a pre-trial conference and the pre-trial minute was filed on 12 January 2016. In the pre-trial minute the two special pleas were raised as preliminary points. The special pleas were enrolled for hearing on 26 February 2016, on which date the Court issued an order that the points *in limine* (the special pleas) were to be heard on the first day of the trial and the Registrar was directed to enroll the matter for a two-day trial.
- [21] The matter was enrolled for trial on 27 October 2016 and as per the Court order of 26 February 2016 the special pleas were to be dealt with on the first day of the trial.
- [22] On 26 October 2016 and a day before the commencement of the trial Mr Memani filed heads of argument wherein it was conceded that the CCMA arbitrator 'misclassified' the nature of the dispute and that the dispute should have been referred to the CCMA. Mr Memani sought an order from this Court

referring the dispute to the CCMA and for each party to bear its own costs. The relief so sought was opposed and this Court had to deal with the special pleas.

[23] It is wrong to understand or to submit that this Court was only to determine costs or that it decided the merits of the case. The special pleas raised by the Respondents had to be considered and were indeed considered and decided.

[24] Thirdly, the Applicant stated that Mr Memani is deprived of his Constitutionally enshrined right not to be deprived of his property when this Court ordered that he was not entitled to charge a fee for the heads of argument without giving him a hearing.

[25] I made an order that Mr Memani was not entitled to any fees in respect of the heads of argument he drafted and submitted on 26 October 2016 as the stance taken by Mr Memani was ill considered in view of judgments by this Court and the Labour Appeal Court and it did not assist the Applicant's case at all. I was of the view that the Applicant cannot be expected to pay for heads of argument that were of a poor quality, that made submissions not supported by established principles and did not advance the Applicant's case at all.

[26] In *Early Bird Farm (Pty) Ltd v Food and Allied Workers Union and others*⁴ the Labour Appeal Court held that:

“Before concluding this judgment, there is one further matter that we wish to deal with. In this appeal the respondents' attorney was required to file heads of argument succinctly setting out the points to be argued at the hearing of the appeal. A document purporting to be heads of argument was timeously filed on behalf of the respondents. However, it was of such poor quality that it can hardly be described as heads of argument. This court could not derive any assistance from that document nor was the attorney helpful to the court at the hearing of the appeal. Properly prepared heads of argument play an

⁴ (2004) 25 ILJ 2135 (LAC) para 50.

important role in the adjudication of a matter - especially in an appeal court. Useful heads of argument cannot be prepared unless the person preparing them has taken the trouble to study the record and has done such research on the legal issues raised by the matter or appeal as may be necessary. Where heads of argument are drawn without the necessary understanding of the facts or the evidence in the record and/or without doing the necessary research on the legal issues that arise in the appeal, such heads - and it is very easy to recognize this in heads of argument - are bound to be of no assistance to the court hearing the appeal. That kind of conduct on the part of a practitioner is unacceptable. A practitioner should not accept instructions or a brief in a matter if he does not have the time to do justice to a client's case. It is inexcusable for a practitioner to file heads of argument the contents of which bear no relation to the issues raised.

In this case the document purporting to be heads of argument filed by the respondents' attorney was totally unacceptable. The fault lies solely with the practitioner concerned and not with the respondents.

.....Accordingly, as a mark of its disapproval for this type of conduct, this court will make an order precluding the respondents' attorney from charging fees in connection with the heads of argument as well as for his appearance in this court".

[27] In *Minister of Safety and Security v Mashego and others*⁵ it was held that

"It's is not acceptable that practitioners should merely send up heads which are not helpful, which do not cite authorities and which suggest hurriedness of preparation. Counsel draw heads for the purpose of assisting the court. Whilst, in the end, the court does its own research, and seeks to satisfy itself that the authorities referred to actually say what counsel say they say, it goes without saying that in a case where counsel have worked hard and produced material that shows that they have researched the topic of contestation, the courts become hugely indebted to the practitioners when they have to give their reasoned judgments".

⁵ (2003) 24 ILJ 1690 (LC)

[28] *In casu* the heads of argument prepared by Mr Memani indicated that he has no understanding of the issues and has not properly researched the topics he addressed. The heads of argument were of no assistance to this Court and there is no prospect that the Labour Appeal Court would come to a different finding.

[29] Be that as it may, if the Applicant is satisfied with the heads of argument Mr Memani has filed on his behalf, he is free to pay Mr Memani for that and it is not necessary to burden the Labour Appeal Court with this issue.

[30] Fourthly, the Applicant's case is that this Court erred in not finding that the certificate of outcome is administrative action which is binding until it is set aside, that the certificate of outcome precluded the Applicant to refer his dispute to any other forum and it compelled the Respondents to participate in proceedings in the Labour Court.

[31] I have in my judgment fully dealt with the status of a certificate of outcome and the Labour Appeal Court judgment of *National Union of Metalworkers of SA and others v Driveline Technologies (Pty) Ltd*⁶ and I do not intend to repeat it here. There is no prospect that another Court would find that the certificate of outcome is administrative action which is binding until it is set aside and that the certificate of outcome precluded the Applicant from referring his dispute to any other forum. There is no merit in this ground for leave to appeal.

[32] The Applicant further made contradictory submissions. On the one hand it submitted that this Court erred in not referring the matter to the CCMA in terms of section 158(2) of the Labour Relations Act⁷ (LRA), on the other hand he submitted that the Labour Court lacked jurisdiction over the dispute and lacked the power to exercise any power connected to the dispute between the parties. These grounds for appeal show a lack of understanding and are without merit.

⁶ (2000) 21 ILJ 142 (LAC).

⁷ ACT 66 OF 1995.

[33] Finally the Applicant attacks my decision to award costs on a punitive scale.

[34] There is no merit in this ground for appeal. Costs should be considered against the provisions of section 162 of the LRA and according to the requirements of the law and fairness. The requirement of law has been interpreted to mean that the costs would follow the result and this Court has a very wide discretion in awarding costs.

[35] The Labour Appeal Court recently held in *KM Lawrence v Mutual and Federal (Pty) Ltd and Another*⁸ held with the authority of *Protea Assurance Co Ltd v Matinise*⁹; *Minister of Prisons and another v Jongilanga*¹⁰ that:

“[35] The general approach to be adopted by a court of appeal when considering an appeal against costs is trite. The award of costs and the scale thereof is a matter within the discretion of the court making the order.¹¹ The appeal court will not easily interfere with the exercise of that discretion. It can only interfere where the discretion was exercised on a wrong principle or was capriciously made.

[36] It is trite that this Court has a discretion in awarding costs. I have invited the parties to make submissions on the issue of costs and I considered those and I exercised my discretion to award costs as I did, based on the facts and merits before me.

[37] Applying the relevant principles and considering the submissions made, I am not persuaded that the Applicant has reasonable prospects of success on appeal or that there is any reasonable prospect that another court will come to a different result.

⁸ (*Lawrence v Mutual and Federal (Pty) Ltd*, Unreported case number JA 77/2014, handed down on 15 September 2016.

⁹ 1978 (1) SA 963 (A) at 976H

¹⁰ 1985 (3) SA 117 (A) at 124B

[38] This application is without merit and scarce judicial resources should not be spent on it.

Order

[39] I therefore make the following order:

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

Connie Prinsloo

Judge of the Labour Court of South Africa