



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JS 895/16

In the matter between:

TILLY LABE

Applicant

And

LEGAL AID SOUTH AFRICA

First Respondent

BRAIN NAIR

Second Respondent

PATRICK HUNDERMARK

Third Respondent

FLAVIA ISOLA

Fourth Respondent

AYSHA ISMAIL

Fifth Respondent

**THE CURRENT BOARD MEMBERS OF
THE LEGAL AID SOUTH AFRICA**

Sixth Respondent

Considered in chambers

Delivered: 02 August 2017

RULING: LEAVE TO APPEAL

TLHOTLHALEMAJE, J.

Introduction and background:

[1] This matter came before me on 12 May 2017 for a determination of a special plea raised in regard to prescription and other points *in limine*. On 20 June 2017, I delivered a judgment wherein an order was issued in the following terms:

“ ...

- i. *The first respondent's preliminary points in respect of the citation of the second to sixth respondents is upheld, and it is declared that they are not party to these proceedings.*
- ii. *The first respondent's special plea is upheld and it is declared that the applicant's claim of an alleged automatically unfair dismissal has prescribed in accordance with the provisions of the Prescription Act.*
- iii. *The costs associated with the preliminary and special as raised by the first respondent are to be costs in the cause.*
- iv. *The parties may approach the Registrar of this Court to set the matter down for trial.”*

[2] The applicant on 27 June 2017 filed an application for leave to appeal against that judgment and order. This was followed by her written submissions in support of the application for leave to appeal in terms of Rule 30(3A)¹ of the Rules of this Court read with clause 15.2 ² of the Practice Manual 2013 on 11 July 2017.

[3] The respondents therefore had to file their opposition to the application for leave to appeal on or before 18 July 2017. They however did so on 26 July 2017. Based on correspondence between the applicant's and the respondents' attorneys of record, I am prepared to accept that the former

¹ **Sub-rule (3A) provides:** Unless the judge from whom leave to appeal is sought otherwise directs, the parties' respective submissions in respect of the application for leave to appeal must be-

(a) in writing; and

(b) delivered on or before a date fixed by the judge.

² Clause 15.2 provides: Within 10 days of the filing of the application for leave to appeal, the party seeking leave must file its submissions in terms of Rule 30(3A) and the party opposing the leave must file its submissions five days thereafter. An application for leave to appeal will be decided by the judge in Chambers on the basis of the submissions filed in terms of Rule 30 (3A), unless the judge directs that the application be heard in open court.

granted the latter an indulgence to file the opposition to the application until 26 July 2017.

Leave to appeal:

[2] The applicant in her notice of application for leave to appeal contends that the Court erred in the following respect:

[2.1] By finding that the second to sixth respondents lacked substantial interest in this matter as she had cited them in their *nomine officio* and not in their personal capacities.

[2.2] By finding that the sixth respondent lacked authority to take disciplinary measures against the second to fifth respondents in terms of the provisions of section 4 of the Legal Aid South Africa Act.³ She contends that her claim in the main was not premised on the Legal Aid South African Act but rather on section 158 of the Labour Relation Act.⁴

[2.3] By determining the merits of the claim without the benefit of the evidence to be lead at Trial.

[2.4] By accepting the version of the respondents that she might have personal issues with the second to fifth respondent for not appointing her to the position to which she had applied for.

[2.5] By failing to consider 'the evidence' in its entirety as led during the preliminary proceedings.

[2.6] By finding that she was wrong to conclude that all issues canvassed at the arbitration proceedings fall under the scope and jurisdiction of this Court.

[2.7] By considering material that was not placed before the Court, particularly in determining the issue of prescription.

³ Act 39 of 2014

⁴ Act 66 of 1995

[2.8] By not considering her prayer to amend her papers in the event that the Court did not find in her favour in respect of the citation point.

[2.9] By finding that she failed to comply with the provisions of Rule (6)(1)(b)⁵ of the Rules of this Court.

Evaluation:

[3] The respondents' submissions in opposition to the application are dealt with within the context of this evaluation. As to whether an application for leave to appeal should be granted is dependent on a variety of factors. The first is that it is trite that the applicant must demonstrate that there are reasonable prospects that the appeal would succeed.⁶ As was postulated in Supreme Court of Appeal in *S v Smith*⁷ this implies that the applicant must convince this court on proper grounds that she has prospects of succeed on appeal and that those prospects are not remote but have realistic chance of succeeding. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success an appeal⁸.

⁵ **Rule 6 Referrals**

Statement of claim

(1) A document initiating proceedings, known as a 'statement of claim', may follow the form set out in Form 2 and must—

(a) have a heading containing the following information:

...

(b) have a substantive part containing the following information:

(i) The names, description and addresses of the parties;

(ii) a clear and concise statement of the material facts, in chronological order, on which the party relies, which statement must be sufficiently particular to enable any opposing party to reply to the document;

(iii) a clear and concise statement of the legal issues that arise from the material facts, which statement must be sufficiently particular to enable any opposing party to reply to the document; and

(iv) the relief sought;

⁶ Section 17 of the Superior Courts Act 10 of 2013 provides: **Leave to appeal**

(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.

⁷ 2012 (1) SACR 567 (SCA) (15 March 2011)

⁸ At para 7

- [4] A further consideration in such applications as directed by the Labour Appeal Court is that caution must be exercised by judges of this Court when seized with applications for leave to appeal, and that they must ensure that matters that end up in the Appeal Court must be 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 law⁹.
- [5] 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 judgement and order, and hold the firm view that the issues raised by the applicant in this application and grounds upon which leave to appeal is sought were adequately dealt with in that judgment.
- [6] Other than confusing the concept of evidence and submissions as applicable in motion proceedings, it is further apparent as correctly pointed out on behalf of the respondents that the applicant has completely misread and misunderstood my judgment. This is evident from paragraph 10 of her written submission, where she contended that the Court erred in concluding that the prevailing jurisprudence on the applicability of the Prescription Act¹⁰ is the decision of the Labour Appeal Court in *Fawu obo Gaushubele & Others v Pieman Pantry (Pty) Ltd*¹¹. The applicant contends that the correct approach is to follow the decision of the Constitutional Court in *Myathaza v Johannesburg Metropolitan Bus services (SOC) t/a Metrobus & Others*¹². It is apparent that the applicant has not had proper regard to my judgment, specifically at paragraphs 36 to 43, and the reference therein made to the Constitutional Court judgment in *Maria Jane Mogaila v Coca Cola Fortune (PTY) Limited*.¹³ The Constitutional Court in *Mogaila* held the following:

Because of the parity of votes in Myathaza, in which none of the judgments secured a majority, no binding basis of decision (ratio)

⁹ See also *Khena v Passenger Rail Agency of South Africa (J2767/16)* [2017] ZALCJHB 32 (1 February 2017) at para 4; *Martin and East (Pty) Ltd v NUM (2014) 35 ILJ 2399 (LAC)*

¹⁰ Act 68 of 1969

¹¹ [2016] ZALAC 46; [2016] 12 BLLR 1175 (LAC); (2017) 38 ILJ 132 (LAC)

¹² [2016] ZACC 49; (2017) 38 ILJ 527 (CC); [2017] 3 BLLR 213 (CC); 2017 (4) BCLR 473 (CC)

¹³ [2017] 5 BLLR 439 (CC); (2017) 38 ILJ 1273 (CC); 2017 (7) BCLR 839 (CC)

emerges from the Court's decision. But, on either approach, that of Jafta J and Zondo J, or that of Froneman J, Ms Mogaila is entitled to an order declaring that the arbitration award ordering her reinstatement has not prescribed. She is entitled to secure its certification under section 143(3) of the LRA, and its enforcement under section 143(1). [My underlining]

- [7] Should the applicant have considered my judgment diligently, it would have been apparent as to the reason the decision in *Fawu obo Gaushubele & Others*¹⁴ was preferred. The current legal position is that there is no binding decision of the Constitutional Court in respect of the applicability of the Prescription Act in matters governed by the Labour Relations Act. The judgments in *Myathaza*¹⁵ are indeed of persuasive effect but adopting either of the two approaches could lead to legal uncertainty and that is not permissible. It is for that reason that I had preferred the approach in *Fawu obo Gaushubele & Others* in my judgment.
- [8] In consideration of the above factors, it is found that there is no sound or rational basis for the conclusion that there are prospects that the applicant's leave to appeal shall succeed, or that there are reasonable prospects that the Labour Appeal Court would come to a different conclusion to that reached in my judgment. Furthermore, it is my view that this application for leave to appeal was ill-considered and the requirements of law and fairness dictate that the respondents should not be burdened with its costs. Accordingly, the following order is made;

Order:

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

E. Tlhotlhemaje

Judge of the Labour Court of South Africa

¹⁴ *Supra* at para 7

¹⁵ *Supra* at para 7

LABOUR COURT