



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: J1009/13

In the matter between:

SEOKA DAVID KEKANA

Applicant

and

AMALGAMATED BEVERAGES INDUSTRIES

(ABI), A DIVISION OF THE SOUTH AFRICAN

BEVERAGES LTD

First Respondent

CINDY MULLER

Second and further

(named in annexure "A" hereto)

Respondents

Decided: In Chambers

Delivered: 11 August 2017

JUDGMENT-APPLICATION FOR LEAVE TO APPEAL

PRINSLOO J.

Introduction

[1] This Court made an order on 02 December 2016 *inter alia* dismissing the

Applicant's claim and further ordering that Mr Sebola, counsel for the Applicant, is not entitled to charge a fee for the heads of argument he drafted and that any fee he received for such heads of argument, should be refunded to the Applicant.

- [2] The Applicant subsequently requested reasons for the order, which were delivered on 05 June 2017. Having received the reasons, the Applicant launched this application for leave to appeal.
- [3] The application is opposed by the Respondent and it has filed submissions in support of its opposition. The Applicant has not filed submissions in support of his application for leave to appeal as provided for in Rule 30(3A). Be that as it may, I have considered what is stated in the Applicant's application for leave to appeal.

The test for leave to appeal.

- [4] It is trite that an applicant in an application for leave to appeal must convince the court *a quo* that it has reasonable prospects of success on appeal. What the test requires is the reasonable likelihood that another court, presented with the same facts and evidence as this Court, could come to a different conclusion than the one arrived at by this Court.
- [5] Appeals should be limited to matters where there is a reasonable prospect that the factual matrix could receive a different treatment of where there is some legitimate dispute on the law.
- [6] 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 reasonable 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

¹ 2010 (1) SACR at 576 (SCA)

there are prospects of success an appeal'

- [7] In *Seatlholo and Others v Chemical Energy Paper Printing Wood and Allied Workers Union and Others*² this Court confirmed 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)".

- [8] 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."

² (2016) 37 ILJ 1485 (LC)

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

Grounds for leave to appeal

[9] I have read the Applicant's grounds for leave to appeal and having considered those and applying the aforesaid principles applicable to applications such as this one, I am not persuaded that there are reasonable prospects that the Labour Appeal Court would arrive at a different conclusion than that arrived at by this Court. I do not intend to repeat or address all the grounds for appeal raised by the Applicant, but I have considered all of the grounds and in my view they are without merit. To illustrate that the application for leave to appeal is without merit, I will deal with what appears to be the main ground for leave to appeal. The Applicant submits that this Court erred in refusing to rescind the order of Rabkin-Naicker J, by stating *inter alia* that;

- 9.1. that Rabkin-Naicker J was not competent to review the arbitration award because a 'new party' FAWU was introduced in the proceedings despite it not being a judgment creditor. FAWU was only a representative of the Applicants at arbitration;
- 9.2. Rabkin-Naicker J failed to consider that the Respondent only cited FAWU and not the Applicant personally;
- 9.3. The review application was dismissed in the absence of FAWU and in the absence of proof that the Applicant was aware of the review;
- 9.4. This Court erred in failing to accept Mr Sebola's argument that upon certification of the arbitration award, the award is deemed to be an order of the Labour Court and that it follows that the Labour Court was not competent to review and set aside its own orders.

[10] There is no merit in these submissions, I have already dealt in detail with these issues in my judgment and there is no need to repeat what is stated therein for purposes of this judgment. It is unfortunate that the Applicant persists with these submissions as grounds for leave to appeal. Grounds for leave to appeal and submissions are meant to persuade me that there are reasonable prospects that another court could arrive at a different decision and are not meant to be a repetition of submissions made in the main hearing. I am not persuaded that there is a case made out for leave to appeal to be granted.

[11] I am not persuaded that there are reasonable prospects that the Labour Appeal Court would arrive at a different conclusion than that arrived at by this Court

[12] This application for leave to appeal is misconceived and it is unfortunate that the Applicant failed to take note of the issues raised in the reasons I provided for the order I have issued.

[13] In the result I make the following order:

Order

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

Connie Prinsloo

Judge of the Labour Court