



Not reportable

**THE LABOUR COURT OF SOUTH AFRICA,
HELD AT JOHANNESBURG**

Case No: JR 1693/16

In the matter between:

PIETER BREED

Applicant

and

LASER CLEANING AFRICA

First Respondent

Handed down on 3 October 2017

JUDGEMENT ON APPLICATION FOR LEAVE TO APPEAL

LAGRANGE J

Introduction

- [1] In April this year the applicant has filed an “urgent notice of application for appeal” against my judgment in the above matter handed down on 24 March 2017 in which I dismissed his application to review and set aside an arbitration award in which the arbitrator found that the applicant’s dismissal was procedurally and substantively fair. In his notice he wished to appeal to “... a full bench of the Labour Court ..., alternatively to the Supreme Court of appeal or a Higher Court...” against the judgement. That

application was opposed by the respondent on the basis that the applicant appeared to mistakenly believe that he has a direct right of appeal in terms of Rule 9 of the Labour Court Rules, which applies only to direct appeals provided for in the Labour Relations Act, 66 of 1995. He should have followed the application for leave to appeal procedure in Rule 30 of the Labour Court Rules. The respondent immediately advised him that his application was defective because he was trying to appeal against my judgement without obtaining my leave to do so and called on him to withdraw the application, which he did not. Later, the applicant corresponded with my secretary and advised that his application should be held in abeyance as he had already launched an 'urgent Appeal and petition' in the Labour Appeal Court which was not subject to the 'leave for appeal process in the Labour Court'.

- [2] For the sake of clarity, because the applicant had not applied for leave to appeal from the Labour Court, but had then purportedly withdrawn in pending the outcome of the application he had initiated in the Labour Appeal Court, I made a declaratory order on 4 May 2017 that there was no application for leave to appeal pending in terms of Rule 30 of the Labour Court Rules. I did not make an adverse cost order at that stage because I felt it would be appropriate for the LAC to address that issue in relation to the application which the applicant was persisting with before it.
- [3] On 23 August 2017, the applicant brought a new application in this court, this time for leave to appeal rather than a direct appeal. It is opposed by the first respondent. In this notice of application he incorporated the grounds of appeal that were contained in his previous urgent direct appeal and adds one additional ground.
- [4] Applications for leave to appeal are governed by the provisions of Rule 30 of the Labour Court Rules. Rule 30 (1) and (2) state:
- “(1) An application or to appeal to the Labour Appeal Court may be made by way of a statement of the grounds leave, at the time of the judgement or order.
- (2) If leave to appeal has not been made at the time of judgement or order, an application for the must be made and the grounds furnished

within 15 days of the date of the judgement or order against which leave to sort, except that the court may, on good cause shown, extend that period.”

The applicant makes no apology, nor offers any explanation why he has only filed this application nearly 5 months late. Consequently, he has not shown good cause why the court should entertain the late application, and I am strongly inclined simply to dismiss it for want of compliance with the requirement of obtaining condonation for such a late application. However, the respondent did not raise any objection to the late filing of the application and accordingly, I will consider his application for leave to appeal notwithstanding the egregious delay which appears to have been caused by the applicant’s initial unwillingness to follow the Court rules and procedures.

Principles

[5] In terms of section 17 (1) (h) (i) of the Superior Courts Act, 10 of 2013, aside from other circumstances which are not applicable in this case, leave to appeal may only be granted if a judge is of the opinion that the appeal would have “a reasonable prospect of success”. That does not mean that merely because another court might come to a different conclusion leave to appeal should be granted. The court must also consider if such a result is not merely a theoretical possibility but there is some likelihood that this would be the case.

[6] In *Seathlolo & others v Chemical Energy Paper Printing Wood & Allied Workers Union & others*¹ this court summarised the approach to be adopted to applications for leave to appeal under s 17:

“As the respondents observe, the use of the word 'would' in s 17(1)(a)(i) is 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 & others v Crocodile Valley Citrus Co (Pty) Ltd & 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

¹ (2016) 37 ILJ 1485 (LC)

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 & East (Pty) Ltd v National Union of Mineworkers & others* (2014) 35 ILJ 2399 (LAC), and also *Kruger v S* 2014 (1) SACR 1 369 (SCA) and the ruling by Steenkamp J in *Oasys Innovations (Pty) Ltd v Henning & another* (C536/15 6 November 2015)).²

Grounds of appeal

[7] In my judgment, I concluded with the following summation of the applicant's review application:

"[28] Even on a very indulgent assessment of the applicant's grounds of review, he has not met the threshold set by the LAC in showing any failures in the arbitrator's reasoning he complains of which would have necessarily altered the outcome if they had not been made. As mentioned, if the 'grounds of review' as set out by the applicant had been prepared by a legal professional, they would probably have been rejected out of hand as not settling out recognised grounds of review."

[8] In his application for leave to appeal, in which he incorporated the grounds of appeal set out in his initial direct appeal, he mainly reiterates or expands on the grounds of review which were considered in the original judgement, or raises new issues which should have been part of the Grounds of review in his initial review application. In so far as he reiterates arguments already addressed in my judgement, I do not intend to revisit those issues and I am satisfied that another court would not decide those differently. The grounds of appeal which relates to issues arising from the judgement itself and the proceedings are addressed below.

² At 1485, para [3]

Reference to the applicant as a 'layperson'

[9] In my judgement, I made the following introductory remark at paragraph [9]

“[9] I appreciate that the applicant is a layperson. His grounds of review are formulated more like grounds of appeal and are somewhat inchoate even as grounds of appeal. As such, his application stands to be dismissed on this basis alone. However, I have considered the applicant's complaints about the arbitrator as if they were grounds of review relating to the reasonableness of the award, making generous allowance for this severe defect in the pleadings.”

The applicant, places his own religious interpretation on the use of the term 'layperson' and construed this as a term indicating bias on my part. He goes on to suggest that his lack of proficiency in the procedure to be followed was used against him in my judgement. Nothing could be further from the truth. Any reasonable person reading the passage above would realise that the court was making an allowance in the applicant's favour by treating his grounds of appeal as if they were raised as grounds of review. There is no merit in this ground.

Permitting the respondent to make submissions without being granted leave to file an opposing affidavit.

[10] The review application had been enrolled on the unopposed role and the respondent was refused leave to file an opposing affidavit, having belatedly filed a notice of opposition. The applicant had objected to the late filing of the first respondent's answering affidavit and the first respondent claimed that it was preparing a condonation application and requested a postponement of the review hearing so that it could file it. Understandably, the applicant strongly objected to any postponement been granted and after considering submissions from both parties as well as a submission from Ms Lancaster, an attorney, who volunteered to assist the applicant *pro bono* on the postponement issue, I dismissed the postponement application and accordingly in the absence of the answering affidavit's late filing being condoned, the contents of the affidavit did not form part of the pleadings in the review application. The

first respondent was compelled to make its submissions based on the record and the applicant's affidavits.

- [11] The applicant now objects to the court having entertained those oral representations by the respondent and contends that the court relied on those representations. Firstly, it is normal practice in this court and the high court that provided a respondent party has given notice of its opposition to an application, even if it not permitted to file an opposing affidavit, the respondent may still make submissions in argument on the applicant's own papers, if it elects not to apply for a postponement of the application or, as in this case, the application for postponement was dismissed. Secondly, the applicant made no objection, as he now does, to the respondent's representative appearing in the hearing. The matter was comprehensively argued by the applicant and he replied in detail to the respondent's submissions. Consequently, I am satisfied that there is no merit in this ground of appeal.
- [12] A large number of the applicant's grounds of appeal consist of claims that the court decided that the Commissioner findings were 'correct'. The judgement concerned the reasonableness of the Commissioner's findings and not their correctness. That is why it is possible that two commissioners hearing the same evidence might reasonably differ in the findings they make. The submissions of the applicant in this regard unfortunately reflect that he has still failed to appreciate that the review proceedings were not appeal proceedings and that the court does not consider.
- [13] The remaining grounds of appeal essentially really revisit the applicant's contention that he was entitled to an investigation complying with the rules of natural justice prior to the convening of the disciplinary enquiry and that the disciplinary enquiry convened by the employer did not meet the requisite standards of natural justice or procedural fairness. I can add no more than was said in the judgement about the applicant's misconceptions of law on these issues and I am satisfied that it is extremely unlikely that another court would come to a different view on those issues.
- [14] One other issue raised the applicant's original "urgent notice of application for appeal" was at paragraph 8 of that notice. The applicant suggests that

the court erred in finding that the employer successfully imposed a vehicle policy on him. In fact paragraph [24] of the judgement makes it clear that in deciding the matter I did not assume that the applicant had agreed to the new policy adopted by the employer. Similarly, the judgment made no finding that the commissioner was reasonable in not finding that the applicant had reserved all his rights before the disciplinary enquiry as alleged in paragraph 35. Similarly, at paragraph 33, the applicant claims the court erroneously found that he had 'simply reimbursed' the employer. The reference can only be to paragraph [26] of the judgment where I commented on the applicant's own perception that reimbursement of the employer for damaged property was an adequate remedy, even if the damage had been caused recklessly. Other examples of the applicant misconstruing the plain meaning of the judgement may be cited but these serve to illustrate that much of the applicant's criticism is not based on an accurate reading of the judgment.

- [15] I am satisfied that the applicant has not advanced grounds that would lead me to believe that there is a probability that another court might reach a different conclusion.
- [16] On the question of costs, the court cannot ignore that the applicant only belatedly followed the correct procedure in lodging this application for leave to appeal despite being alerted to the correct approach in April this year by the respondent and by my ruling. He chose to ignore these and pursue a direct application for leave to appeal to the LAC, or alternatively to petition the LAC. His legal meanderings have put the respondent to considerable inconvenience, and it is appropriate that the respondent should not have to bear the costs of opposing this appeal which was out of time in any event.

Order

In light of the above,

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

Lagrange J
Judge of the Labour Court of South Africa

LABOUR COURT