



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no: J 1795/17

SOUTH AFRICAN AIRWAYS TECHNICAL SOC LIMITED

Applicant

and

**NATIONAL UNION OF MINEWORKERS OF
SOUTH AFRICA**

First Respondent

MEMBERS LISTED IN ANNEXURE "A"

Second to further Respondents

Decided: In Chambers

Delivered: 19 October 2017

JUDGMENT-APPLICATION FOR LEAVE TO APPEAL

PRINSLOO. J

Introduction

- [1] On 2 August 2017 the First Respondent (NUMSA) issued a strike notice wherein the Applicant was notified that strike action in the form of a go slow would commence on 4 August 2017 and that the strike was in respect of the following demands: that fair disciplinary action be taken against Nontsasa Memela, Princess Tshabalala, Chaile Makaleng, Kevin Sampsons and Musa Zwane for alleged misconduct related to breach of company policies and that

the said managers be suspended while investigations would be pending against them.

- [2] The Applicant subsequently approached this Court and in the urgent application that was enrolled for hearing on 4 August 2017 the Applicant sought an order *inter alia*, declaring the strike action by the Respondents, which was due to commence on 4 August 2017, non-compliant with the provisions of section 64(1) of the Labour Relations Act¹ (the Act) and for the said strike action to be interdicted and restrained.
- [3] The Applicant explained that NUMSA referred a mutual interest dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) on 23 August 2016. NUMSA's demand was that implicated executives be disciplined due to their failure to comply with the Applicant's recruitment policy. After conciliation failed, the CCMA issued a certificate on 27 September 2016. No strike action followed and the parties engaged in dialogue.
- [4] The Applicant submitted that NUMSA appeared satisfied with the feedback it received and no further action was taken to enforce their demands.
- [5] Following a newspaper article with respect to fraudulent transactions at the Applicant and the South African Airways SOC Limited, NUMSA demanded that three executives be suspended pending investigations. NUMSA's demands were responded to on 19 June 2017 on the basis that the investigation process into allegations of misconduct were still pending and due process will take its course once there is *prima facie* evidence of wrongdoing. In this communique NUMSA was urged to provide information to the Applicant's Board to assist with the independent investigation to ensure that the matter was resolved expeditiously.
- [6] NUMSA was not satisfied with the Applicant's response and on 18 July 2017 it referred a mutual interest dispute to the CCMA. NUMSA's demands included the fair suspension and fair disciplinary hearings for allegations of misconduct

¹ Act 66 of 1995 as amended.

for specified managers and for an independent chairperson to chair the said hearings.

- [7] The dispute was scheduled for conciliation on 18 August 2017.
- [8] NUMSA placed reliance on the certificate it obtained from the CCMA in September 2016 and its case was that industrial action based on the 2016 certificate was only put on hold to allow discussions between the parties.
- [9] The Applicant on the other hand submitted that the demands made in the strike notice are similar to those forming the subject matter of the dispute that was referred in July 2017, which dispute was not yet conciliated.
- [10] On 3 August 2017 the Applicant's attorneys addressed a letter to NUMSA wherein it was recorded that the intended strike action was in contravention of section 64 of the Act as a new mutual interest dispute was referred and the dispute was not conciliated, nor has the 30- day period elapsed since the referral of the dispute.
- [11] In its answering affidavit, NUMSA submitted that the application was based on the allegation that the go slow strike action scheduled to commence on 4 August 2017 related to the demands in the second referral of July 2017. NUMSA's case is that the strike relates to the demands referred to conciliation in 2016 and for which a certificate was issued. NUMSA submitted that the Applicant was looking for any reason to frustrate their right to strike.
- [12] In paragraph 5 of the answering affidavit NUMSA explained what their demands were.
- [13] When the matter was called in Court, Mr Mosam for the Applicant requested that the matter stand down as he was trying to get instructions and he placed on record that there was a possibility that the parties could agree to an order.
- [14] Mr Mosam subsequently indicated that he was unable to get an instruction at that point and the parties thereafter endeavoured to reach a settlement but

could not agree on the terms of the agreement and the matter proceeded to Court.

- [15] The reality of this matter was this: if I were to agree with the Applicant that the strike could not proceed before the second referral was either conciliated or 30 days have elapsed from 18 July 2017, the strike action would be interdicted but the relief would be of a very limited duration as the dispute would have been conciliated by 18 August 2017, where after the Respondents would be entitled to proceed with strike action. If, on the other hand, I were to agree with the Respondents, this application had to fail and they could embark on a strike action. Neither of these options seemed to be in the long term interest of any of the parties. This is more so where Mr Mosam agreed that the Respondents' issue was a matter of mutual interest and the Applicant's basis for seeking the interdict was purely a procedural one and if NUMSA attended the conciliation on 18 August 2017, a certificate would be issued and they would give 48 hours' notice and exercise their right to strike thereafter.
- [16] I raised the question with Mr Mosam whether there was not a better way to deal with the matter to ensure a longer term solution to avoid a situation where the Applicant's operations would be affected and the parties be back in Court in the near future.
- [17] Mr Mosam referred to a memorandum issued by the Applicant in terms of which it was evident that the employer's view was that insofar as employees have committed misconduct, it will follow a fair procedure in terms of the Act. Mr Mosam submitted that they could not agree on what the process should be but specifically submitted that it was well within the purview of the Court to decide such as the Court has a wide enough discretion, looking at the papers, to make an order the Court deemed just and equitable under the circumstances.
- [18] I specifically canvassed with Mr Mosam what was contained in paragraph 5 of the Respondents' opposing affidavit and invited him to make submissions on the Respondents' proposal that the alleged misconduct be investigated. On this aspect Mr Mosam submitted that the Applicant's position was that there

are three investigations being conducted at the moment, which are independent investigations done by independent bodies namely Open Waters, Ernst & Young and Edward Nathan Sonnenbergs Inc. (ENS).

- [19] Mr Mosam submitted that in the event that allegations of misconduct come to the fore, the employer is duty bound to take the necessary disciplinary action in accordance with the principles of fairness and the provisions of the Act, which may include the suspension of the employees.
- [20] I raised the same question whether there was not a better way to deal with the matter to ensure a longer term solution with Mr Daniels for the Respondents.
- [21] Mr Daniels submitted that in terms of section 158(1)(a)(iii) of the Act this Court has the power to grant an order directing the performance of any act which will remedy a wrong and give effect to the primary objectives of the Act, one of which is the effective resolution of labour disputes. Mr Daniels argued that this Court has the power to fashion an order that resolves the dispute between the parties.
- [22] In respect of the submissions made by Mr Mosam, Mr Daniels submitted that insofar as there are current independent investigations done, the Respondents accept that those investigations would suffice for the purpose of NUMSA's demand but insofar as the investigations do not cover the scope of NUMSA's disputes, the scope of the investigations should be extended to include those individuals. Mr Daniels submitted that the Respondents would be satisfied if due process is followed in respect of any disciplinary hearing and if an independent chairperson is appointed to chair those processes.
- [23] Mr Daniels submitted that an order dealing with the said issues would resolve the present strike action and the issues arising from the strike notice and the Respondents were prepared to withdraw the strike notice and would call off the strike action.
- [24] In reply, Mr Mosam submitted that he does not have instructions on the appointment of an independent chairperson as that remains the employer's

prerogative. Mr Mosam specifically agreed with the submissions made by Mr Daniels that this is a Court of equity and that I have a wide discretion in terms of how to fashion an order in this regard.

[25] It was evident from the submissions made that the parties were not opposed to an order been made to address the issues and to resolve the matter.

[26] After the issues were canvassed and arguments presented, this Court handed down the following order:

- “1. The investigations currently conducted by Open Waters, Ernest & Young and Edward Nathan Sonnenburgs Inc are to include an investigation into the conduct of Mr Musa Zwane, Mr Chaile Makaleng, Ms Nontsasa Memela and Ms. Princess Tshabalala in respect of the alleged breach of company policies;
2. The First Respondent should be afforded an opportunity to make representations to the investigators as named in paragraph 1;
3. In the event that the investigations report findings of misconduct; the Applicant must take appropriate action;
4. The appropriate action to be taken by the Applicant must be compliant with the provisions of the Labour Relations Act 66 of 1995;
5. The Applicant should appoint an independent advocate, who is acceptable to the parties, to chair any suspension or disciplinary hearing that may follow as appropriate action being taken by the Applicant after the completion of the investigations;
6. Should the parties be unable to agree on an independent advocate as chairperson, they may approach the chairperson of the Johannesburg Bar;
7. The First Respondent must withdraw the strike notice with immediate effect;
8. The First and Second to further Respondents must call off the strike action with immediate effect and they may not continue with any form of industrial action in respect of this dispute”.

- [27] Surprisingly the Applicant filed an application for leave to appeal against the orders made in paragraphs 1 – 6 of the order that was issued on 4 August 2017. The only orders the Applicant does not seek to appeal are the ones ordering NUMSA to withdraw the strike notice and to call off the strike action.
- [28] NUMSA agreed to an order that the strike action be called off on the premise that the issues would be investigated and where necessary, that disciplinary action be taken.
- [29] Effectively the Applicant seeks to deprive the Respondents of their right to strike, while the underlying dispute would remain unresolved if leave to appeal is granted.
- [30] The basis upon which leave to appeal is sought is that I had no jurisdiction to make the orders as set out in paragraphs 1 – 6 of the order, alternatively to the extent that the Court had jurisdiction to issue the order under section 158(1)(a)(iii) of the Act, I misdirected myself, alternatively erred in fact and in law for a number of reasons.
- [31] The application for leave to appeal is opposed.
- [32] Both parties have filed submissions in respect of the leave to appeal. I have considered the grounds for appeal as well as the submissions made in support and in opposition thereof and I do not intend to repeat those herein.

The test for leave to appeal

- [33] 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.

[34] Appeals should be limited to matters where there is a reasonable prospect that the factual matrix could receive a different treatment or where there is some legitimate dispute on the law.

[35] 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 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)”.

[36] It is evident that the threshold had been raised and that the test is not be applied lightly.

[37] 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:

² (2016) 37 ILJ 1485 (LC).

” 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

- [38] I have read and considered the Applicant’s grounds for leave to appeal and submissions made in support thereof as well as the Respondent’s submissions filed in opposition thereof. 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 interfere with the order issued by this Court, taking into consideration the arguments that were presented in Court.
- [39] I have already indicated that 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 all without merit. To illustrate that the application for leave to appeal is without merit, I will deal with some grounds for leave to appeal in detail.
- [40] The Applicant’s main ground for leave to appeal is that I had no jurisdiction to issue the orders I made in paragraphs 1-6 of the order.
- [41] This ground for leave to appeal is shockingly opportunistic in view of the submissions made in open Court by the Applicant’s own counsel. Mr Mosam specifically submitted that although the parties could not agree on the process, it was well within the purview of the Court to decide such as the Court has a wide enough discretion, looking at the papers, to make an order the Court deemed just and equitable under the circumstances. In reply Mr Mosam specifically agreed with the submissions made by Mr Daniels and agreed that

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

this is a Court of equity and that I have a wide discretion in terms of how to fashion an order in this regard.

- [42] In the Respondents' submissions filed in opposition of the application for leave to appeal it is submitted that at no point did the Applicant's counsel argue that the Court has no jurisdiction to make the order the parties alluded to or that section 158(1)(a)(iii) of the Act was not sufficiently broad to make the order the Court made. In fact, the parties were in agreement that the Court had the jurisdiction and power to make the order that was handed down.
- [43] In view of the submissions made in Court, I find this ground for leave to appeal opportunistic and without merit. I attach to this judgment a copy of the transcribed proceedings of 4 August 2017.
- [44] I fail to understand how a litigant, through its instructed legal representative, can agree to issues in an open Court and make submissions in support thereof and then in the same breath approach the Court with an application for leave to appeal the same issues that were agreed or not disputed in Court.
- [45] In the alternative the Applicant's case is that I misdirected myself, alternatively erred in fact and in law for a number of reasons. I have considered the reasons put forward and I do not intend to deal with each aspect as there is no merit in any of them, but to illustrate that it is without merit, I deal with some of the aspects.
- [46] It is the Applicant's case that there was no factual foundation for the orders or evidence justifying the orders. Furthermore, the Applicant was not afforded an opportunity to plead facts or consider its position and its right to *audi alteram partem* was breached.
- [47] It is evident from the transcribed record that Mr Mosam was afforded an opportunity to take an instruction and to indicate whether the Applicant wanted to file a replying affidavit in answer to the Respondents' opposing affidavit. The Applicant elected not to file a replying affidavit but to proceed on the papers as they were before Court. The parties also took time to discuss the possibility of

reaching an agreement to settle the dispute. In Court Mr Mosam was invited to make submissions on all the aspects the parties knew this Court would consider in making an order.

- [48] In his argument Mr Mosam referred to a communique issued by the Applicant and he submitted that the Applicant, on its own version, was of the view that insofar as employees have committed misconduct, it will follow a fair procedure in terms of the Act.
- [49] Mr Mosam was invited to make submissions on the Respondents' proposal that the alleged misconduct be investigated and he submitted that the Applicant's position was that there are three investigations being conducted at the moment, which are independent investigations done by independent bodies namely Open Waters, Ernst & Young and Edward Nathan Sonnenburg Inc. (ENS).
- [50] Mr Mosam submitted that in the event that allegations of misconduct come to the fore, the employer is duty bound to take the necessary disciplinary action in accordance with the principles of fairness and the provisions of the Act, which may include the suspension of the employees.
- [51] In view of the opportunity afforded to the Applicant's counsel to make submissions and the Applicant's own version that the issues be investigated, that NUMSA was invited to bring information on the issues and that insofar as employees have committed misconduct, it is duty bound to take the necessary disciplinary action in accordance with the provisions of the Act, it is astonishing that the Applicant alleges that there was no factual foundation for the orders made and that its right to be heard was breached.
- [52] The orders this Court issued were informed by the submissions made in Court and no party's right to be heard was infringed in the process.
- [53] There are no reasonable prospects that the Labour Appeal Court would arrive at a different conclusion or that it would interfere with the order issued by this

Court and scarce judicial resources should not be spent on an appeal that lacks merit.

[54] The Respondents submitted that in view of what transpired in Court and the grounds for leave to appeal as raised by the Applicant, this application constitutes an abuse of process and they seek the dismissal of the application with costs on an attorney and client scale. However, no specific submissions were made as to why the cost order should be granted on a punitive scale.

[55] This Court has a discretion in making a cost order, considering the requirements of law and fairness.

[56] In my view this application is opportunistic and brought with the sole purpose to avoid the obvious and unavoidable and to frustrate the Respondents.

[57] I can see no reason to deviate from the general rule that the cost should follow the result.

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

Order

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

Connie Prinsloo

Judge of the Labour Court