



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: J269/2017

In the matter between:

MUSAWENKOSI THEMBANI NCANANA

First Applicant

NATIONAL UNION OF METALWORKERS

OF SOUTH AFRICA

Second Applicant

and

DUAL PRODUCTS INTERNATIONAL (SA) CC

t/a DUAL PRODUCTS

First Respondent

GERRY VAN RENSBURG

Second Respondent

STEPHEN VAN RENSBURG

Third Respondent

JACO PETRUS KOEN

Fourth Respondent

Decided: In Chambers

Date: 3 November 2017

JUDGMENT

PRINSLOO, J

- [1] On 11 August 2017 I made an order *inter alia*, ordering the First and Second Applicants (Applicants) to pay the Fourth Respondent's (Koen) costs, the one paying the other to be absolved. On 24 August 2017 I gave reasons for my order.
- [2] The Applicants filed an application for leave to appeal my judgment and Koen opposes the application. Both parties have filed written submissions in respect of the leave to appeal, which I have considered in deciding this application.
- [3] The main ground for leave to appeal raised by the Applicants is that this Court erred in fact and in law by finding that the Applicants failed to make out a case for contempt against Koen and ordering costs in favour of Koen.

No case for contempt

- [4] The Applicants' case is that this Court erred in finding that they failed to make out a case for contempt against Koen. As already pointed out, I have given my reasons for such order and in my judgment, I dealt with the reasons why Koen, a workshop manager, should not have been brought before this Court, on contempt proceedings. I do not intend repeating my judgment herein, suffice to mention that Koen in his affidavit explained that he was never served with the arbitration award nor was he aware of the dispute between the parties until his encounters with the First Applicant (Ncanana) when he arrived at the workshop to hand in court documents. He explains that he scanned the documents and sent them to the owners of the corporation. He did not read the contents of the documents. It is important at this moment to mention that Ncanana worked at the Boksburg factory whereas Koen is situated at the Benoni factory. To this Koen explains that he was not

privity to the dispute, nor was he involved in the disciplinary proceedings against Ncanana.

- [5] I have to emphasize that the Applicants did not file an affidavit in reply to deny or rebut Koen's version.
- [6] The Applicants rely on the dictum in *Pheko and Others v Ekurhuleni Municipality (No.2)*¹ where the Court held:

'[47] When a court order is disobeyed, not only the person named or party to the suit but all those who, with the knowledge of the order, aid and abet the disobedience or wilfully are party to the disobedience are liable. The reason for extending the ambit of contempt proceedings in this manner is to prevent any attempt to defeat and obstruct the due process of justice and safeguard its administration. Differently put, the purpose is to ensure that no one may, with impunity, wilfully get in the way of, or otherwise interfere with, the due course of justice or bring the administration of justice into disrepute'.

- [7] I am bound by the *Pheko* judgment and I agree with this dictum. It is however unfortunate that the Applicants decided to cherry pick this paragraph and read it in isolation. In the process they fail to acknowledge the standard of proof required to pin the offence of contempt on Koen. To enlighten the Applicants and to put the dictum *supra* in context, paragraph 50 of the judgment should be considered where the Constitutional Court held as follows:²

'The standards of proof are those set out in *Fakie*: a balance of probabilities in respect of civil remedies and a reasonable doubt in respect of a committal order. While the existence of the order and non-compliance have been established, the requisite of service has not. It follows that without one of the requisites being established, no

¹ (2015) 6 BCLR 711 (CC); 2015 (5) SA 600 (CC).

² *Pheko supra* at para 50.

inference of wilfulness and *mala fides* can be drawn'. (own emphasis).

- [8] On Ncanana's own version, he served a copy of the arbitration award to Mr Stephen Van Rensburg (Van Rensburg), who in turn ordered him to leave the premises.³ Also when it became clear that the arbitration award was not complied with, his attorneys addressed a letter to the corporation advising that contempt proceedings would be instituted against Van Rensburg. Koen explained the extent of his involvement in this matter and what can be deduced from his explanation is that his involvement was limited to that of a messenger; receiving and delivering the court documents to the relevant authorities. No version has been presented by the Applicants, to gainsay Koen's version. For Koen to have told Ncanana to come back on another day, and eventually handing him the letter of 31 January, is not conduct falling within the category of wilful or *mala fide* disobedience as set out in *Phoko*. Without repeating myself, there was nothing before this Court to prove any wilful or *mala fide* disobedience on the part of Koen. Furthermore, there is no suggestion that Koen was served with the arbitration award. On the contrary, Van Rensburg was. To expand further, even if Koen could comply with the arbitration award, there is no evidence that he had the power to do so. From Koen's undisputed explanation, he is himself an employee of the corporation and nowhere is there any averment made to support a finding that Koen could reinstate Ncanana or that he was in any position to do so.

The issue of costs

- [9] The gravamen of the Applicant's complaint is that the Court erred in ordering both Applicants to pay the Koen's costs of defending the contempt application.

³ Para 11 of the Applicants supporting affidavit.

[10] The Power of this Court to order costs is derived from Section 162 of the Labour Relations Act⁴ (LRA) which provides that this Court may make an order for payment of costs according to the requirements of the law and fairness. The court is required to take into account *inter alia*, the conduct of the parties in proceeding with or defending the matter before the court.

[11] In *Inviticus Holdings (Pty) Ltd (formerly Meridian Investment Holdings (Pty) Ltd) and Others v Advtech Limited and Others*⁵ the court quoted authority of *Harms* op cit C1.33 and s 21A of the Supreme Court Act as follows:

‘It is well established that leave to appeal in respect of an order for costs only is not lightly granted unless a matter of principle is involved and the amount of costs is not insubstantial’

[12] The Labour Appeal Court held in *KM Lawrence v Mutual & Federal (Pty) Ltd and Another*⁶ held with the authority of *Protea Assurance Co Ltd v Matinise*⁷; *Minister of Prisons and another v Jongilanga*⁸ 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.⁹ 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.

[13] Leave to appeal should not be lightly granted where the grounds for appeal relate to the exercising of the Court's discretion. The Applicants

⁴ Act 66 of 1995 as amended.

⁵ [2009] JOL 24145 (GSJ).

⁶ *Lawrence v Mutual & Federal (Pty) Ltd*, Unreported case number JA 77/2014, handed down on 15 September 2016.

⁷ 1978 (1) SA 963 (A) at 976H.

⁸ 1985 (3) SA 117 (A) at 124B.

made no averments or submissions that the discretion was exercised on a wrong principle or that it was capriciously made.

Test for leave to appeal

- [13] The test in granting leave to appeal is well established. It is trite that an applicant in an application for leave to appeal must demonstrate to 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.

The test for leave to appeal has become more stringent and this Court solidified this test in *Seatlholo and Others v Chemical Energy Paper Printing Wood and Allied Workers Union and Others*¹⁰ where it held:

'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

¹⁰ (2016) 37 ILJ 1485 (LC).

could receive a different treatment or where there is some legitimate dispute on the law’.

[14] Applying the relevant principles and considering the submissions made, I am not persuaded that the Applicants have reasonable prospects of success on appeal. This application is without merit and scarce judicial resources should not be spent on it.

[15] In the premises, I make the following order:

Order

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

Connie Prinsloo

Judge of the Labour Court