



IN THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

Not Reportable

Case no: P 399/14

In the matter between

**SOUTH AFRICAN MUNICIPAL WORKERS
UNION OBO ZUKO S DYWILI**

Applicant

and

INKWANCA MUNICIPALITY

Respondent

Considered in chambers

Delivered: 22 May 2017

JUDGMENT: APPLICATION FOR LEAVE TO APPEAL

TLHOTLHALEMAJE, J:

Introduction:

- [1] On 31 January 2017, judgment was delivered in this matter wherein I had dismissed the respondent's application to rescind an order granted by default by Euijen AJ on 26 February 2016. The respondent has since filed an application for leave to appeal against the whole judgment. The applicant opposed the application. For the sake of consistency, the citation of the parties shall remain as they were in the main action. The reference to the applicant in this application is the applicant in the statement of case.

Background:

- [2] In terms of Rule 30 (2) of the Rules of this Court, an application for leave to appeal must be lodged within 15 days of the date of the judgment. The notice in respect of the application for leave to appeal was filed on 20 February 2017, and the submissions in support of the application were filed on 20 March 2017.
- [3] The provisions of clause 15.2 of the Practice Manual 2013 govern the filing of submissions in respect of the leave of appeal and provide as follows:

“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.”

- [4] In line with the above, the respondent ought to have filed its submission on or before 6 March 2017. The respondent's submissions were only filed eight (8) days outside the time limit prescribed by the Practice Manual. There is no application for condonation for the late filing of the submissions.
- [5] The applicant's submissions in opposition to the application for leave to appeal were filed on 06 April 2017. As mentioned above the applicant ought to have filed within five (5) days upon being served with the respondent's submissions. The respondent's submissions are therefore seven (7) days out of time. Again, there is no application for condonation for the late filing of the applicant's submissions. Furthermore, there was never a request made by the parties for an extension for the purposes of filing either of the submissions.
- [6] Ordinarily, the application for leave to appeal and the opposition thereto are not properly before the Court. Notwithstanding my reservations about non-compliance with the provisions of the practice manual, it is taken into account that the delays as mentioned above are not substantial, and the court will accordingly exercise its discretion and nevertheless determine the central issues.

The grounds upon which leave to appeal is sought and the submissions:

[7] The grounds relied upon by the respondent are as follows;

[7.1] This Court erred or misdirected itself in determining the rescission application only on basis of the provisions of 165(a) of the Labour Relations Act [66 of 1995], read with Rule 16A of the Rules of this Court;

[7.2] This Court erred in finding that it did not have to consider whether the applicant had shown good or sufficient cause in determining whether to grant rescission or not;

[7.3] This Court erred or misdirected itself by finding that the applicant failed to prove its case to justify rescission of the default judgment without determining the prospect of success in the main action, contrary to the Labour Appeal Court decision in *Shoprite Checkers (PTY) LTD v Commission for Conciliation Mediation and Arbitration & Others*¹;

[7.4] The Court failed to consider that the applicant had raised special defences;

[7.5] This Court misdirected itself in not finding any good cause shown by the applicant in having the rescission application granted;

[7.6] This Court erred by dismissing the rescission application without taking into account the [respondent's] right of access to courts in terms of section 34 of the Constitution. In limiting the right in question, the Court did not apply the provisions of section 36 of the Constitution.

Evaluation:

¹ (2007) 28 ILJ 2246 LAC

[8] The provisions of section 17 of the Superior Courts Act² are always a useful starting point in considering applications of this nature. These specifically provide that:

“17 (1) leave to appeal may only be given where a 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.”

[9] Central to the determination of applications for leave to appeal is whether there are reasonable prospect of success in the appeal. This test as outlined in section 17(1) of the Superior Court Act differs to the traditional test as previously stated by our courts.³ The provisions of section 17(1) raises the threshold of the test for leave to appeal.⁴

² Act 10 of 2013.

³ Minister of Safety and Security and Another v Madyibi (1034/2004) [2008] ZAEHC 180 (30 October 2008) at para 20:

“In giving consideration to the issues at hand I am enjoined by judicial authority to take due cognisance of the test which is of application in matters of this nature. Judicial authority requires of a Judge considering an application for leave to appeal reflecting dispassionately upon the decision sought to be appealed against and decide whether or not there is a reasonable prospect that the Appeal Court may come to a different conclusion. This necessarily requires of me to disabuse my mind of the fact that I was of the view when I delivered my judgment that it was supportable both on the facts of the case and the law applicable thereto”.

⁴ Seathlolo & others v Chemical Energy Paper Wood & Allied Workers Union & others (2016) 37 ILJ 1485 (LC) at para 3:

“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

- [10] The applicant correctly pointed out that this Court and the Labour Appeal Court have in the past stressed that leave to appeal should not be lightly granted because meritless appeals delay the final resolution of disputes. Having had regard to the submissions made on behalf of the respondent in respect of this application, these do not come close to meeting the threshold referred to as above.
- [11] Inasmuch as the respondent outlined its grounds for leave to appeal on its notice, it however failed to substantiate these in its subsequent submissions. The submissions, as also correctly pointed out on behalf of the applicant, at best amounts to a regurgitation of its case as in the rescission application. I am satisfied that all of these issues were adequately canvassed and dealt with in my judgment, and no purpose will be served in revisiting same.
- [12] In the light of the above, having had regard to the submissions made in regards to the application for leave to appeal, the opposition thereto, and further upon a reflection of my judgment, I am of the view that the respondent has failed to demonstrate that there are reasonable prospects that the Labour Appeal Court will come to a different decision to that reached in my judgment.
- [13] In respect of the issue of costs, it is trite that such an order may be made upon a consideration of the requirements of law and fairness. It has already been pointed out that both parties to this application failed to comply with the timeline in terms of filing the requisite submissions as contemplated in the Practice Manual. Other than this factor, I am of the view that the facts and circumstances of this case do not call for a costs order to be made.
- [14] In the premise, I make the following order:

to demonstrate was that there was a reasonable prospect that another court might come to a 3 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 & 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 & another (C 536/15, 6 November 2015).

1. The application for leave to appeal against the judgment and order of this Court delivered on 31 January 2017 is dismissed;
2. There is no order as to costs.

E Tlhotlhemaje

Judge of the Labour Court of South Africa

LABOUR COURT