



Not reportable

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

Case no: JS 831/13

In the matter between:

**FOOD AND ALLIED WORKERS'
UNION**

First Applicant

NYANGULA, J & 138 OTHERS

**Second and further
Applicants**

and

LA VISAGIE & SEUN

Respondent

Delivered: 24 January 2018

JUDGMENT ON LEAVE TO APPEAL

LAGRANGE J

- [1] 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.

- [2] In *Seathlolo & others v Chemical Energy Paper Printing Wood & Allied Workers Union & others* 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 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 I 369 (SCA)* and the ruling by Steenkamp J in *Oasys Innovations (Pty) Ltd v Henning & another* (C536/15 6 November 2015).”

- [3] In this matter the employer (‘Visagie’) has applied for leave to appeal against the judgement handed down on 10 August 2017 in which I found that the dismissal of the individual applicants for embarking on unprotected strike action was substantively unfair because dismissal was too harsh a sanction in the circumstances. There had been

unprotected strike action over the implementation of a controversial exemption from a wage determination. That strike was effectively resolved and strikers returned to work, but went out on strike again when certain individuals were prevented from reporting to work on account of being suspended pending disciplinary action for strike misconduct. Workers who went on strike in protest against this were dismissed after disciplinary enquiries. The circumstances I considered in deciding that the dismissals were substantively unfair are set out in paragraphs [90] to [100] of the judgement.

- [4] In the grounds of appeal, Visagie argues that the sole reasons for finding the dismissals to be substantively unfair was that no further warning was issued before taking steps to dismiss the workers when they went on strike again over the disciplinary action and this was the reason for their dismissal.
- [5] Firstly, Visagie contends that this was not a case where it was necessary to issue a further ultimatum and alludes to the LAC decision in ***Mndebele & others v Xstrata SA (Pty) Ltd t/a Xstrata Alloys (Rustenburg Plant)***¹, in which the court upheld the substantive fairness of a dismissal of strikers who had not been issued with an ultimatum as such but who had been told that they were participating in an unprotected industrial action and they would be disciplined. That authority is not on all fours with the facts of this case where the strike action arising from the disgruntlement over the wage exemption had been resolved and workers had returned to work and then went out on strike action when certain workers were suspended pending disciplinary action. In this instance, the conduct of the workers had to be evaluated against the fact that they had ended their strike over the wage exemption and were clearly returning to work.
- [6] Secondly, the two factors isolated by Visagie as the basis for the court's finding of a substantively unfair dismissal were not the only factors taken into account in arriving at that conclusion. Inter-alia, other factors were that:

¹ (2016) 37 ILJ 2610 (LAC)

- 6.1 No indication was given by management that workers who would be disciplined for other misconduct during the strike would be prevented from returning to work: all that had been conveyed was that disciplinary action would be taken against such employees.
- 6.2 There was no attempt to communicate with the union or shop stewards before proceeding with dismissal enquiries as a result of the new strike. The ultimatum issued which brought the first strike to an end had been heeded and complied with.
- 6.3 In so far as Visagie saw the strike as a mere continuation of the initial strike, it bore considerable responsibility for the initial strike occurring.
- 6.4 Visagie failed to establish that its selective re-employment process after the dismissals was fair or objective.
- [7] Taking account of all of the above, I am not persuaded that there is a reasonable possibility that another court would come to a different conclusion.

Order

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

Lagrange J

Judge of the Labour Court of South Africa