



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR1564/15 and JR1460/15

In the matter between:

KENOSI MODISENYANE

Applicant

and

TRANSNET BARGAINING COUNCIL

First Respondent

E. PATEL AND K. KLEINOT N.O

Second Respondents

TRANSNET FREIGHT RAIL

Third Respondent

Decided: in Chambers

Delivered: 8 February 2018

JUDGMENT - LEAVE TO APPEAL

MAHOSI. J

- [1] This is an opposed application for leave to appeal against the judgment of this Court in terms of which the Applicant's application to review and set aside the first condonation ruling issued by commissioner Karin Kleinot, dated 28 July 2015 under case number GAJB 28587/14 and the second condonation ruling

issued by commissioner Ebrahim Patel (the second Respondents/commissioners) dated 30 July 2015 under case number TFR(GR)/12861 were dismissed.

- [2] In determining whether to grant an application for leave to appeal, the traditional test is whether there is a reasonable prospect that another court may come to a different conclusion than that arrived at by this Court.¹ In terms of section 166(1) of the Labour Relations Act,² a party to proceedings before the Labour Court, may apply to the Labour Court for leave to appeal to the Labour Appeal Court (LAC) against any final judgment or final order of the Labour Court. Section 17 of the Superior Court Act,³ which applies to the Labour Court, regulates instances in which the appeal may be granted. Section 17(1) provides as follows:

‘Leave to appeal may only be given where the judge or judges 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 decisions 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 issue between the parties.’

- [3] Section 16(2)(a) of the Superior Court Act provides as follows:

¹ See *Karbochem Sasolburg (A Division of Sentrachem Ltd) v Kriel and Others* (1999) 20 ILJ 2889 (LC) at 2890B; *Ngcobo v Tente Casters (Pty) Ltd* (2002) 23 ILJ 1442 (LC) at 1443 para 2 and *Tsotetsi v Stallion Security (Pty) Ltd* (2009) 30 ILJ 2802 (LC) at 2804 para 14.

² Act 66 of 1995 as amended.

³ Act 10 of 2013.

- '(i) When at the hearing of the appeal the issues are of such a nature that the decision sought will have no practical effect, the appeal may be dismissed on this ground alone.
- (ii) save under exceptional circumstances, the question whether the decision would have no practical effect or result is to be determined without reference to any consideration of costs.'

[4] In *Martin and East (Pty) Ltd v National Union of Mineworkers and Others*,⁴ the LAC made it clear that leave to appeal is not simply for the taking, and that this Court must be cautious in granting leave to appeal and in assessing the requirement of the prospect of success. In this case, the court stated as follows:

'Before I conclude there is a further comment I wish to make. I indicated that the events in this case took place in 2010. The Labour Relations Act was designed to ensure an expeditious resolution of industrial disputes. This means that courts, particularly courts in the position of the court *a quo*, need to be cautious when leave to appeal is granted, as should this Court when petitions are granted.

There are two sets of interests to consider. There are the interests of the parties such as appellant, namely who are entitled to have their rights vindicated, if there is a reasonable prospect that another court might come to a different conclusion. There are also the rights of employees who land up in a legal "no-man's-land" and have to wait years for an appeal (or two) to be prosecuted.

This was a case which should have ended in the labour court. This matter should not have come to this court. It stood to be resolved on its own facts. There is no novel point of law to be determined nor did the Court *a quo* misinterpret existing law. There was no incorrect application of the facts; in particular the assessment of the factual justification for the dismissals/alternative sanctions.

I would urge labour courts in future to take great care in ensuring a balance between expeditious resolution of a dispute and the rights of the party which has lost. If there is a reasonable prospect that the factual matrix could receive

⁴ (2014) 35 ILJ 2399 (LAC).

a different treatment or there is a legitimate dispute on the law, that is different. But this kind of case should not reappear continuously in courts on appeal after appeal, subverting a key purpose of the Act, namely the expeditious resolution of labour disputes.’⁵

[5] In this case, the applicant raised the following grounds of review:

- ‘5.1. The judge disregarded the points raised by the applicant regarding both commissioners who decided on two different cases, both not accredited to be commissioners.
- 5.2. The points that were disregarded in the harassment case were that the condonation that was not granted by commissioner Kleinout was not even compiled by her.
- 5.3. The other point was that the second commissioner Patelia, who presided over the dismissal case was not accredited to be a commissioner as his current portfolio is one of a minister and an attorney. In short, commissioner Patelia holds three portfolios.
- 5.4. The conclusion that was reached by both commissioners, who literally dismissed both cases without considering all factors raised by the applicant and the evidence has led to an existing and evolving catastrophe within the entire justice department, the Labour Court and other institutions.’

[6] Having had regard to the applicant’s submissions, I am not persuaded that there are reasonable prospects of a successful appeal. As such, I am of the view that this application is without merit and that it must be dismissed.

[7] Accordingly, I make the following order:

Order

1. The application for leave to appeal is dismissed.
2. There is no order as to costs.

⁵ At 2405-2406.

D. Mahosi

Judge of the Labour Court of South Africa

LABOUR COURT