



Of interest to other judges

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

Case No: J 1124/2017

In the matter between:

JONES BONAKELE GXOLO

Applicant

and

HARMONY GOLD MINE (PTY) LTD

Respondent

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

Respondent

Delivered: 19 April 2018

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

LAGRANGE J

Background

- [1] This is an unopposed application for leave to appeal against the judgment handed down in this matter on 27 October 2017 dismissing an application to declare disciplinary processes and all subsequent proceedings under the CCMA unlawful and *void ab initio* and ordering the applicant's retrospective reinstatement to the date of his dismissal in 2010.

- [2] The original application was also unopposed. The applicant served the application for leave to appeal on the registrar without serving a copy on the first respondent, apparently having taken the view it was unnecessary because the original application was unopposed. Subsequently, at the court's direction, it appears that the application for leave to appeal was also served on the respondent on 21 February 2018. In passing, it should be mentioned that the applicant's reliance on ***Standard Bank Appellant v Estate van Rhyn 1925 AD 266*** as a basis for originally not notifying the first respondent of the application for leave to appeal is misplaced as that case was concerned *inter alia* with peremption of a right of appeal by the losing party. In this case, the first respondent was the winning party, *albeit* by default. It is entitled to know if the applicant now seeks to overturn a result which was in its favour.

The appeal

- [3] The central ground of appeal is set out and discussed briefly below. Before dealing therewith, it must be stressed that the test for granting leave to appeal requires the court to be satisfied that there is more than simply a possibility that another court may decide the matter differently (see ***Seathlolo & others v Chemical Energy Paper Printing Wood & Allied Workers Union & others***¹).
- [4] The applicant claims the court failed to appreciate that his case concerned the invalidity of the charge sheet which set out the charges on which he was dismissed and argues that the Court ought to have realised this rendered his dismissal unlawful and void *ab initio*. He further claims that the Court erred in not equating his dismissal with that of a public servant and that the court should have realised that he did not have to establish that his dismissal was a nullity because of a fundamental breach of his employment contract, but simply that, it was an unlawful dismissal by reasoning analogous to that in the cases ***Mokopanele en Andere V Administrateur, Oranje Vrystaat, en Andere***² and ***Tlali v Mantsopa***

¹ (2016) 37 ILJ 1485 (LC) at 1486, paras [2]-[3].

² 1989 (1) SA 434 (O)

Local Municipality and Others (A78/11) [2011] ZAFSHC 195 (1 December 2011). In short the applicant contends that no distinction ought to be made between a claim of invalid dismissal involving an employee in private employment and an employee in public employment.

[5] However, in *Mokopanele's* case, which pre-dated the Labour Relations Act, 66 of 1995, it was fundamental to that judgement that the basis for arguing that the dismissal of the employees was invalid was because, in exercising the power to summarily dismiss the employees for misconduct under clause 5 (2) of the Public Service Personnel Code, the administrator had failed to afford them the *administrative law* right of *audi alterem partem* before dismissing them.³ The unlawfulness of their dismissals was squarely founded on administrative law principles. Similarly, the invalidity of the dismissal in *Tlali's* case rested on the local authority terminating a fixed term contract contrary to a regulation.⁴ The applicant has provided no legal authority why the principles of unlawful administrative action are applicable to his situation in the private sector, in the absence of any reliance on a breach of the employment contract.

[6] I am satisfied that no other court is likely to come to a different conclusion.

Order

The application for leave to appeal is dismissed with no order as to costs.

Lagrange J

**Judge of the Labour Court of South Africa
(18 April 2018 - In chambers)**

³ At 440B-F

⁴ At paras [18]-[19].