



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR 375/12

In the matter between:

EZEKIEL MASHABA

Applicant

and

TELKOM SOUTH AFRICA

Respondent

Decided: In chambers

Delivered: 18 May 2018

JUDGMENT: APPLICATION FOR LEAVE TO APPEAL

NKUTHA-NKONTWANA. J

Introduction

- [1] This is an application for leave to appeal brought by the respondent (applicant in this application) against the whole judgment and order handed down by this Court on 11 January 2018. In the judgment, I found that the dismissal of the applicant (respondent in this application) was substantively unfair and ordered the respondent to reinstate the applicant and to further pay the applicant

compensation equivalent to 10 months' salary as well as costs of suit. The applicant is opposing the application. The parties are cited as they are referred to in the judgment for expediency.

- [2] The application for leave to appeal was served and filed on 1 February 2018. The applicant served and filed its notice of intention to oppose together with its response to the leave to appeal on 15 and 19 March 2018 respectively. Rule 30(3A) read with Clause 15.2 of the Practice Manual of this Court provides that:

'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.'

- [3] In terms of the above provisions, the *dies* for filing submissions expired on 15 February 2018. On 12 April 2018, almost two months after the respondent's submissions were due, the respondent's attorneys of record addressed a letter to my secretary Ms Malungani recording *inter alia*, that they were urgently awaiting a directive from this Court on how to proceed with the filing of submissions.
- [4] Despite Clause 15.2 being so explicit and the expectation that legal practitioners, like the respondent's attorneys of record, who appear in this Court on regular basis ought to be aware of, a directive was swiftly issued drawing the attention of respondent's attorneys of record to Clause 15.2 as per their request. Almost a month has passed and the respondent's attorneys of record have not filed their submissions yet.
- [5] I therefore proceed to decide this application without the benefit of the respondent's submissions. I do so in accordance with one of the objects of the

Labour Relations Act (the LRA)¹ which is to ensure expeditious resolution of industrial disputes. Therefore, parties cannot litigate at their leisure.²

Merits

- [6] The application is pegged on several grounds of appeal and I do not intend repeating them in this judgment. Save to state that the respondent's impugn is essentially my finding that the dismissal of the applicant was automatically unfair in terms of section 187(1)(d) of the Labour Relations Act (LRA).³
- [7] It is trite that the applicable test in an application for leave to appeal 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. However, the Labour Appeal Court (LAC) has cautioned this Court that the test ought not be applied unconscientiously in light of the statutory imperative of expeditious resolution of labour disputes. In *Martin and East (Pty) Limited v National Union Mineworkers and Others*,⁴ per Davis JA, LAC commented as follows:

‘...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.

¹ 66 of 1995 as amended.

² *Philippus Johannes Lodewyk Olivier v The Gemeenskaplike Kerk and Others* (Case no: JS 487/15 Unreported) at para 12. See also *Martin and East (Pty) Limited v National Union Mineworkers and Others* [2013] ZALAC 35; (2014) 35 ILJ 2399 (LAC).

³ Act 66 of 1995 as amended.

⁴ [2013] ZALAC 35; (2014) 35 ILJ 2399 (LAC) page 16 lines 12 - 25 and page 17 lines 1 – 18; See also *National Union of Metalworkers of South Africa and Others v Columbus Stainless* [2016] ZALCJHB 344 at paras 2-3.

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 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. (Emphasis added)

- [8] Turing to the facts in the present matter, it is common cause that the applicant was the Communication Workers Union's (CWU) shop steward when he disseminated the dossier containing allegations of corruption that had been levelled against various individuals within the respondent, including senior managers. By that time, CWU had already took ownership of the dossier and endorsed its contents. The applicant disseminated it only to CWU and Congress of South Africa Trade Unions (COSATU) officials as a CWU document whether instructed or not. This evidence was never challenged.
- [9] It is clear in my mind that, 'but for' exercising his union activities and distributing the dossier, the applicant would not have been dismissed. Hence, his dismissal is automatically unfair in terms of section 187(1)(d) of the LRA.
- [10] Having considered all the grounds of leave to appeal, I am persuaded that the respondent has failed to make out a case that another Court might reasonably arrive at a decision different to the one reached by this Court. The application for leave to appeal should, therefore, be refused.
- [11] In deciding on the issue of costs, I have taken into account the fact that respondent flagrantly failed to adhere to the Rules and Practice Manual of this Court. This application is nothing but a ruse against expeditious finalisation of

this matter and such must be discouraged. Even though, as a rule of practice, costs do not follow the result in matters before this Court, this is a typical case where the respondent should be ordered to pay the costs.

[12] The following order is made:

Order

1. The respondent's application for leave to appeal against the judgment handed down on 11 January 2018 is dismissed.
2. The respondent to pay the costs of this application.

P. Nkutha-Nkontwana
Judge of the Labour Court of South Africa