



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JS1043/16

In the matter between:

MASSMART HOLDINGS LIMITED

Applicant

and

JACQUES THERON

Respondent

Considered: In chambers

Delivered: 06 June 2018

JUDGMENT: APPLICATION FOR LEAVE TO APPEAL

Nkutha-Nkontwana J,

Introduction

- [1] This is an application for leave to appeal by the respondent (Mr Theron) against the whole judgment and order handed down by this Court on 11 January 2018. In the judgment, I found that Mr Theron was directly involved in the recruitment of Mr Pillay to join his current employer, African Bank, in breach of the contractual undertaking and therefore liable for damages suffered by the applicant in recruiting Mr Pillay's replacement.

- [2] The application for leave to appeal is vigorously opposed by Massmart Holdings Limited. The parties are referred to as they are in the judgment for expediency.

Grounds of appeal

- [3] Mr Theron's leave to appeal is catholic, with unrestrained nit-picking grounds of appeal which I deem unnecessary to restate in this judgement. However, it is clear from his submissions that the core of his impugn is that I erred in finding that he was directly involved in recruiting Mr Pillay to join African Bank in breach of his contractual undertaking.
- [4] As mentioned in the judgment, there are two issues that arise in respect of a claim for damages consequent to a breach of contract and are succinctly stated in *KwaZulu-Natal Tourism Authority and Others v Wasa*.¹ Firstly, the applicant must prove that it had suffered damages as a consequence of the breach of the undertaking by the respondent and that there is a link between the damages it suffered and the breach; and, secondly, that the quantum of damages it actually suffered.
- [5] On the facts, I am satisfied that Mr Theron breached his undertaking for the reasons as mentioned in the judgment. At the risk of repeating myself, I must emphasise that Mr Theron conceded that he was not aware of his contractual undertaking throughout the process of recruiting Mr Pillay. This concession was fatal to his defence in the light of the undisputed evidence that he had suggested Mr Pillay's name to African Bank, attended to relevant recruitment paperwork and facilitated the increased offer of employment that was ultimately accepted by Mr Pillay. Clearly, he was directly involved in enticing Mr Pillay to join African Bank.
- [6] It is also common cause that Mr Theron was Mr Pillay's mentor and his successor in title. In fact, Mr Pillay had been appointed to replace Mr Theron as part of the succession plan when he was headhunted by African Bank. It was Massmart's uncontested evidence that it had no option but to recruit Mr Pillay's replacement from external candidates and thereby incurring

¹ [2016] ZALAC 35; [2016] 11 BLLR 1135 (LAC); (2016) 37 ILJ 2581 (LAC) at para 32.

recruitment costs as a result of Mr Theron's breach. It is not disputed that the current incumbent who replaced Mr Pillay was recruited through a placement agency at a cost of the quantum claimed by Massmart in damages.

Test for leave to appeal

[7] The test this Court has to apply when considering leave to appeal is set out in section 17(1) of the Superior Courts Act² as follows:

'Leave to appeal may only be given where the 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.'

[8] In the present application, I have considered the various grounds of appeal, as well as the written submissions in support thereof. I am persuaded that Mr Theron failed to make out a case that another Court may reasonably arrive at a decision different to the one reached by this Court.³ Put otherwise, there are no reasonable prospects that another Court may well find merit in the contentions advanced by Mr Theron.

[9] Furthermore, it is clear that the threshold to grant leave to appeal in matters of this nature has been raised by the provisions of Section 17(1)(a)(ii) of the Superior Courts Act. In addition to showing that there is a reasonable prospect of success on appeal, an applicant must show that there is some other

² Act 10 of 2013.

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

compelling reason which merit an appeal such as conflicting judgements or a substantial point of law, among others.⁴ None of these have been put forward in this application. The leave to appeal should, therefore, be refused.

[10] As a rule of practice, costs do not follow the result in matters before this Court. However, this is a typical case where Mr Theron should pay the costs. I have taken into account the undesirable manner in which Mr Theron has set out the grounds of appeal, which is wide ranging and ill-conceived.

[11] In the circumstances, I make the following order:

Order

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

P. Nkutha-Nkontwana

Judge of the Labour Court of South Africa

⁴ *Investec Bank Limited v Karel & Another* [2016] ZAGPJHC 171 at para 14; and *Notshokovu v S* [2016] ZASCA 112 at para 2.