



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR 456/15

In the matter between:

LEBOGO JESSINA MALATJI

Applicant

and

BOKONI PLATINUM MINE

First Respondent

**THE COMMISSION FOR CONCILIATION
MEDIATION AND ARBITRATION**

Second Respondent

M C LEBEA N.O.

Third Respondent

Decided: In Chambers

Delivered: 28 June 2018

JUDGMENT-APPLICATION FOR LEAVE TO APPEAL

PRINSLOO. J

Introduction

- [1] This matter came before me on 14 March 2018 and on 23 March 2018 I granted condonation for the late filing of the application for review but dismissed the review application.

- [2] It is against this judgment that the applicant seeks leave to appeal. The First Respondent opposes the application.

Condonation

- [3] The application for leave to appeal is about six (6) days late. The Applicant has filed an application for condonation for the late filing of the application for leave to appeal. The delay is minimal and the explanation proffered is satisfactory and I therefore grant condonation.

The test for leave to appeal

- [4] It is trite that an applicant in an application for leave to appeal must convince the court *a quo* that it has reasonable prospects of success on appeal. What the test requires is the reasonable likelihood that another court, presented with the same facts and evidence as this Court, could come to a different conclusion than the one arrived at by this Court.
- [5] In *Seatlholo and Others v Chemical Energy Paper Printing Wood and Allied Workers Union and Others*¹ this Court confirmed that the test applicable in applications for leave to appeal is stringent and held as follows:
- [6] “The traditional formulation of the test that is applicable in an application such as the present 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. As the respondents observe, the use of the word “would” in s17(1)(a)(i) are 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 and others v Crocodile Valley Citrus Company (Pty) Ltd and 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

¹ (2016) 37 ILJ 1485 (LC)

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 and East (Pty) Ltd v NUM* (2014) 35 ILJ 2399 (LAC), and also *Kruger v S* 2014 (1) SACR 369 (SCA) and the ruling by Steenkamp J in *Oasys Innovations (Pty) Ltd v Henning and another* (C 536/15, 6 November 2015)".

- [7] Appeals should be limited to matters where there is a reasonable prospect that the factual matrix could receive a different treatment or where there is some legitimate dispute on the law.

Grounds for leave to appeal

- [8] Both parties have filed submissions in respect of the application for leave to appeal. I have considered the the grounds for appeal as well as the submissions made in in opposition thereof and I do not intend to repeat those *verbatim* herein.
- [9] The Applicant has raised various grounds for leave to appeal and having considered them, I am not persuaded that any of them has merit. I will refer to a few of the main grounds to illustrate that the application for leave to appeal is without merit.
- [10] The crux of the applicant's complaint as set out in the grounds for leave to appeal is essentially as follows:
- [11] Firstly, the applicant contends that this Court rejected and erred in not attaching value to the founding affidavit on the basis that it was deposed to by the applicant's attorney. Furthermore, the Court erred in finding that the applicant did not depose to a confirmatory affidavit confirming the contents of his attorneys' founding affidavit. This attack on the judgment is illogical, as is demonstrated by the following passages from the judgment:

'[52] The Applicant filed an application for review and the founding affidavit in the review application was not deposed to by the Applicant, but was deposed to by Mr Makinta, his attorney of record. The affidavit is deposed to on the strength that Mr Makinta is authorised by the

Applicant to bring the application and that all the facts stated in the affidavit are based on Mr Makinta's instructions.

[53] Mr Makinta has no personal knowledge of the facts he deposed to and it is doubtful that he can depose to an affidavit stating facts under oath on the strength of instructions. The authority to act on behalf of a client is not the same as having *locus standi* to depose to a founding affidavit wherein facts within the personal knowledge of the deponent are to be placed before Court.

[54] In my view the Applicant should have deposed to the founding affidavit in the review application and little value can be attached to what Mr Makinta stated under oath. It is not explained why the Applicant did not depose to the founding affidavit himself, nor did he depose to a confirmatory affidavit. The Applicant deposed to a supplementary affidavit wherein he seeks to confirm the contents of the affidavit deposed to by Mr Makinta.

[55] The affidavits filed in this application are problematic in that the founding affidavit is deposed to by a deponent with no personal knowledge of the facts and the supplementary affidavit appears to be a hybrid between a confirmatory and founding affidavit in that the deponent confirms what was said in the founding affidavit and then dealt with the facts and the background in no way proper for a supplementary affidavit, but rather akin to a founding affidavit.

[56] Be that as it may, the obvious issues with the affidavits in this application were surprisingly not raised by Bokoni. ‘

[12] The clear reading of the above passages demonstrate that they are merely *obiter dictum* and the issues identified in respect of the applicant's affidavit, had no bearing on the decision of the Court or the outcome of the applicant's case. It is evident from the judgment that all the grounds for review raised by the applicant had indeed been considered, notwithstanding the defective founding affidavit and there is no merit in the applicant's allegation that his founding affidavit was rejected and that no value was attached to it.

[13] The applicant further submits that the dispute and the judgment raise important questions of fact and law which, together with the record, if

presented before the Labour Appeal Court (LAC), would lead to a finding that the arbitration award is unreasonable. There is no merit in this ground.

[14] In *Westing House Break and Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd*² the court stated that an appeal should be allowed where the matter is of great importance or where the matter is of public importance or where the court is of the view that the decision might affect other questions. This matter involves a review and setting aside of the arbitration award. The principles governing reviews are trite, the Court has had the benefit of the pleadings as well as the record. No novel point arises from the facts of this matter. There is no reason why the LAC should be burdened with a meritless appeal.

[15] *In casu*, applying the principles applicable to applications for leave to appeal, I am not persuaded that there are reasonable prospects that the LAC would arrive at a different conclusion than the one arrived at by this Court. The applicant failed to make out a case for leave to appeal to be granted.

[16] In the result I make the following order:

Order

1. Condonation for the late filing of the application for leave to appeal is granted.
2. The application for leave to appeal is dismissed;
3. There is no order as to costs.

Connie Prinsloo

Judge of the Labour Court

² 1986 (2) SA 555 (A)