



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR2068/11

In the matter between:

JOSEPH MAMOLIKI

Applicant

and

GENERAL PUBLIC SERVICE SECTORAL

BARGAINING COUNCIL

First Respondent

PANELIST P M NGAKO, N.O.

Second Respondent

DEPARTMENT OF CORRECTIONAL SERVICES

Third Respondent

JB MULLER

Forth Respondent

Decided: In Chambers

Delivered: 05 October 2018

Summary: Application for leave to appeal; no reasonable prospect that the appeal would succeed; Application dismissed with no order as to costs.

JUDGMENT: LEAVE TO APPEAL

VOYI AJ,

Introduction

- [1] The applicant seeks leave to appeal against the judgment of this Court dismissing his application to review and set aside an arbitration award that was issued by the second respondent.
- [2] The application for leave to appeal is not opposed by any of the respondents

Grounds for seeking leave to appeal

- [3] In his application for leave to appeal, the applicant advances six grounds upon which he contends this Court erred. The grounds for seeking leave to appeal are articulated as follows:

- “1. While the learned Judge correctly finds that the Arbitrator committed an error of law in finding that he (the Arbitrator) was unable to grant the relief sought by the Applicant on the basis that what the Applicant thought (sic) was out of his realm, it fell within the prerogative of the National Commissioner, the learned Judge erred in fact in determining that the materiality of the error was insufficient to vitiate the award of the Arbitrator;
2. while the learned Judge correctly found that the Arbitrator had the discretionary power to order the promotion of the Applicant, the learned Judge committed an error in fact and law when he went on to state that there was nothing before the learned Judge to indicate that granting the promotion of the Applicant will have been a forgone conclusion had the Arbitrator correctly understood such power vested in him;
3. The learned Judge, with respect, committed a material error in law by applying a test of whether the granting of a promotion would have been a foregone conclusion had the Arbitrator correctly understood his powers;
4. The learned Judge committed, with respect, an error in fact and in law by placing reliance on a six-year time frame that have passed where

this was not an issue before the learned Judge and without considering any other factors related to an appropriate remedy;

5. The learned Judge committed an error in both fact and in law by finding that the compensation granted was substantial and adequately served as *solatium* for the violation to the employee's right fair (sic) labour practice;
6. The learned Judge erred in both fact in law (sic) in finding that the error committed by the Arbitrator was not material, or that it did not affect the outcome."

[4] In essence, the applicant takes issue with this Court's finding that the error of law committed by the second respondent was not material and could not have affected the outcome arrived at.

Evaluation

- [5] The provisions of s 17(1) of the Superior Courts Act¹ lay down the test to be applied in an application for leave to appeal. In particular, s 17(1)(a)(i) stipulates that I may only grant leave to appeal if I am of the opinion that the intended appeal "...*would have a reasonable prospect of success*";
- [6] Observing from the deliberate use of the modal verb "would" in s 17(1)(a)(i), it is by now trite that the threshold has been set higher for applications of the present nature.²
- [7] In his application for leave to appeal, the applicant maintains that "...*another Court might have come to a different conclusion*:". In his written submissions in support of the application, the applicant makes specific reference to the decision of the Supreme Court of Appeal in *S v Smith*³. There is also an allusion to s 17(1) of the Superior Courts Act.

¹ Act 10 of 2013.

² *Seathlolo and Others v Chemical Energy Paper Wood and Allied Workers Union and Others* (2016) 37 ILJ 1485 (LC) at para 3.

³ 2012 (1) SACR 567 (SCA).

- [8] Having thoroughly considered the application for leave to appeal and the submissions in support thereof, I am not persuaded that the desired appeal would have a reasonable prospect of success.
- [9] The mere commission of an error of law by the second respondent did not, in and of itself, result in misconduct as contemplated by s 145(2)(a)(i) of the Labour Relations Act.⁴ The key issue was the materiality of the error of law committed.
- [10] Whether or not an error of law is material depends on its effect to the outcome of the decision. The relief that was sought by the applicant before the second respondent was not the only remedy that could be granted in an instance where an employer had committed an unfair labour practice relating to promotion.
- [11] Under s 193(4) of the LRA, the second respondent was permitted to determine the unfair labour practice dispute lodged by the applicant on terms that he deemed reasonable, including ordering reinstatement, re-employment or compensation.
- [12] In the end, the second respondent granted the applicant maximum compensation for the unfair labour practice committed by the third respondent.
- [13] Not only did the second respondent award maximum compensation, he went on to set aside the appointment of the fourth respondent.
- [14] In his application for review, the application asked this Court to substitute the second respondent's award with an order in the following terms:

- '2.1. The third respondent committed an unfair labour practice relating to promotion against the applicant;

⁴ Act 66 of 1995 as amended ("the LRA").

- 2.2. The appointment of the fourth respondent to the position of DD: Head of Correctional Centre: Leeuwkop Medium B Management Area is hereby set aside;
- 2.3. The third respondent is ordered to promote and or appoint the applicant to the position of DD; Head of Correctional Centre: Leeuwkop Medium B Management Area;
- 2.4. The third respondent, Department of Correctional Services is ordered to compensate the applicant, Joseph Mamoliki in the amount of R201, 804.00 (two hundred and one thousand eight hundred and four rand)...'

[15] As can be seen from the above, the applicant was seeking from this Court an order directing the third respondent to appoint him as well as an order for payment of compensation.

[16] I am of the view that the relief that the applicant was entitled to was either the appointment he sought or compensation. It could not have been both. The applicant could not have been appointed and also paid compensation at the same time. In this regard, I take the position that the reasoning of the Constitutional Court in *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*⁵, with reference to s 193(1) of the LRA, equally applies to the provisions of s 193(4).

[17] Ultimately, the applicant was awarded full compensation for the unfair labour practice committed by the third respondent.

[18] With the remedy granted to the applicant by the second respondent, I could not see how the error committed by the latter may have affected the outcome of his decision.

[19] It was for this reason that I came to the conclusion that in as much as the second respondent may have erred in law, the error so committed was not material.

⁵ (2008) 29 ILJ 2507 (CC) at para 41 and 42.

Conclusion

[20] For all the above reasons, I remain unpersuaded that the desired appeal would have a reasonable prospect of success. In my considered opinion, no such prospect exists in this matter.

[21] The application for leave to appeal was not opposed. Accordingly, no order for costs is necessary.

[22] I therefore make the following order:

Order

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

NP Voyi

Acting Judge of the Labour Court of South Africa