THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR 1886 /16

In the matter between:

DAVID BROWN GEAR INDUSTRIES **Applicant**

And

METAL AND ENGINEERING INDUSTRIES

BARGAINING COUNCIL **First Respondent**

COMMISSIONER DAVID SMITH **Second Respondent**

NUMSA obo MABETHA, GODFREY **Third Respondent**

Considered: In Chambers

Delivered : 30 January 2019

Summary: Leave to appeal – no proper grounds made out – application for leave to appeal dismissed with costs

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JUDGMENT: LEAVE TO APPEAL

SNYMAN, AJ

Introduction:

[1] The applicant applied to review and set aside an arbitration award of the second respondent, an arbitrator of the first respondent, in terms of section 145 as read with 158(1)(g) of the Labour Relations Act ('LRA')[1]. In terms of this award, the second respondent held that the dismissal of the individual third respondent by the applicant was substantively unfair, and awarded reinstatement with retrospective effect to date of dismissal, with back pay in the sum of R367 876.80. The applicant sought to review and set aside this award.

[1] Act 66 of 1995 (as amended).

[2] In an *ex tempore* judgment handed down on 24 October 2018, I dismissed the applicant's review application.

[3] On 14 November 2018, the applicant filed an application for leave to appeal, followed by written submissions as contemplated by Rule 30(3A) of the Labour Court Rules and clause 15.2 of the Practice Manual, on 11 December 2018. The third respondent opposed the application, filing its written submissions on 13 December 2018.

[4] Clause 15.2 of the Practice Manual further provides that an application for leave to appeal will be determined by a Judge in chambers, unless the Judge directs otherwise. I see no reason to direct otherwise and will therefore determine the applicant's leave to appeal application in chambers.

The merits of the application

[5] When deciding whether to grant leave to appeal to the Labour Appeal Court, the Labour Court must determine whether there is a reasonable prospect that another Court would come to a different conclusion to that of the Court *a quo*, or in other words the appeal would have a reasonable prospect of success.[2] As said in *South African Clothing and Textile Workers Union and Others v Stephead Military Headwear CC*[3]:

> 'It is trite that for an application for leave to appeal to be successful, it is required of the party seeking such leave to demonstrate that there are reasonable prospects that another court, in this instance, the Labour Appeal Court, would come to a different conclusion to that reached in the judgment that is sought to be taken on appeal. …'

[6] In Member of the *Executive Council for Health, Eastern Cape v Mkhitha and Another*[4] the Court applied the concept of 'reasonable prospects of success' as follows:

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[2] See Section 17(1)(a) of the Superior Courts Act 10 of 2013; *Molefe v MMARAWU and Others* [2017] ZALCJHB 337 (13 September 2017); *Mbawuli v Commission for Conciliation, Meditation and Arbitration and Others* [2017] ZALCJHB 275 (1 August 2017); *Glencore Operations South Africa (Pty) Ltd v NUM obo Maripane and Others* [2017] ZALCJHB 147 (11 May 2017).

[3] [2017] JOL 37932 (LC) at para 7. See also *Seathlolo and Others v Chemical Energy Paper Printing Wood and Allied Workers Union and Others* (2016) 37 ILJ 1485 (LC) at para 3.

[4] [2016] JOL 36940 (SCA) at paras 16 – 17.

> 'Once again it is necessary to say that leave to appeal, especially to this Court, must not be granted unless there truly is a reasonable prospect of success. Section 17(1)(a) of the Superior Courts Act 10 of 2013 makes it clear that leave to appeal may only be given where the judge concerned is of the opinion that the appeal *would* have a reasonable prospect of success; or there is some other compelling reason why it should be heard.
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> An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. A mere possibility of success, an arguable case or one that is not hopeless, is not enough. There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal".

[7] Overall considered, in the context of the above principles, the applicant's application for leave to appeal is completely lacking in substance. It is virtually an identical case to that argued before me when the matter was heard. For the reasons already given in my judgment, this case never had any merit. The fact that the applicant's disagrees with my conclusions does not now give the case merit. Especially on the factual conclusions I have made, I am entirely unconvinced that the record supports any other factual conclusions other than those I have come to. In my view, the application for leave to appeal is devoid of any prospects of success.

[8] The applicant complains that I did not specifically refer, in my judgments, to the arguments advanced by the applicant's counsel in Court. The purpose of a judgment is not to record the submissions of counsel and then answer them, as the applicant appears to suggest. In deciding whether an arbitration award is reviewable, this Court is guided by the submissions from counsel, but ultimately the determination whether an award of a CCMA arbitration passes muster on the basis of being reasonable is to be decided by this Court considering the grounds of review as raised by the applicant in its founding affidavit and Rule 7A (8) notice, the record of the proceedings, and the arbitration award. This I did. The fact that I did not specifically refer to counsel's submissions' which in my view in any event did not have merit, is neither here nor there. None of these complaints of the applicant have any

substance and do not establish reasonable prospects of success as required by the test for the granting of leave to appeal.

[9] This is a case where the facts speak for themselves. The applicant has desperately tried to justify a dismissal for misconduct which was never on the cards, as it was always a work performance issue. The misconduct case has no prospect of success on appeal. There was simply no insubordination on the part of the individual third respondent, and the singular instance of insolence, which was accepted to exist, did not justify dismissal as a fair sanction. This is the kind of case that should not be permitted to continue, and I refer to the following *dictum* of Davis JA in *Martin & East (Pty) Ltd v National Union of Mineworkers and Others*[5] which I consider apposite:

> '… I indicated that the events in this case took place in 2010. 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.'

[10] I thus conclude that the applicant has shown no reasonable prospect that another Court would come to a different conclusion, and has no prospects of success on appeal. The application for leave to appeal falls to be dismissed.

[11] There was simply no basis for the applicant to have sought leave to appeal. It did so, in my view, simply because it disagreed with my judgment. It should have been clear that this matter was devoid of prospects of success where it comes to seeking leave to appeal. Exercising the wide discretion I have in terms of section 162 of the LRA, I believe that this is a case where a costs order against the applicant tis justified.

Order

[12] In the premises, I make the following order:

1. The applicant's application for leave to appeal is dismissed.

2. The applicant is ordered to pay the third respondent's costs relating to the application for leave to appeal.

[5] (2014) 35 *ILJ* 2399 (LAC) at 2405J-2406A

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S Snyman

Acting Judge of the Labour Court of South Africa