



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case No: JS 382/2018

In the matter between:

**NATIONAL EDUCATION HEALTH AND
ALLIED WORKERS UNION (NEHAWU)**

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SECOND TO SEVENTEENTH APPLICANTS

BONGANI DLADLA

CATHARINE MOLEFE

HLENGIWE BUTHELEZI

SONGEZE JIYA

GLADYS MAMATSHELE

MATHLODI MASIPA

LESIBA JIMMY MOGALE

BONGA GEORGE DLADLA

JOSEPH DIPUO

CADWELL MAKHALE

LUCKY MPOFU

LESETJA THOMAS LEDIGA

DUDU VERONICA MBULI

DORAH MALEBYE

First Applicant

Second Applicant

Third Applicant

Fourth Applicant

Fifth Applicant

Sixth Applicant

Seventh Applicant

Eighth Applicant

Ninth Applicant

Tenth Applicant

Eleventh Applicant

Twelfth Applicant

Thirteenth Applicant

Fourteenth Applicant

Fifteenth Applicant

AUDREY KITIERENG NOGE

Sixteenth Applicant

KEDIEMETSE ANNA ABRAHAMS

Seventeenth Applicant

and

METROFILE (PTY) LTD

First Respondent

INFOVAULT (PTY) LTD

Second Respondent

(Registration No: 2002/021025/07)

DISCOVERY (PTY) LTD

Third Respondent

(Registration No: 1997/013480/07)

ZAHEER CASSIM N.O.

Fourth Respondent

Decided: In chambers

Delivered: 28 May 2019

JUDGMENT: APPLICATION FOR LEAVE TO APPEAL

NIEUWOUDT, AJ

- [1] This is an opposed application for leave to appeal against the judgment of this Court that was handed down on 8 March 2019.
- [2] The application for leave to appeal raised the following issues:
 - 2.1 The Court erred in considering irrelevant facts, which created a reasonable apprehension of bias.
 - 2.2 The Court erred in finding that the explanation for the delay for the period 10 January 2018 to 11 April 2018 was woefully inadequate.
 - 2.3 The Court erred in finding that during the period 10 January 2018 to 11 April 2018, there was inactivity on the part of the applicants.
- [3] The applicants' submissions significantly added to issues that were raised in the application for leave to appeal.

- [4] The applicants submitted that it would be appropriate for the matter to be heard in open court due to the number of applicants in the matter and the issues raised by it. The Court considered this submission, but is of the view that oral argument is not justified. Accordingly, the Court deals with the matter on the basis of the written submissions.

The test for leave to appeal

- [5] In *Seathlolo and Others v Chemical Energy Paper Printing Wood and Allied Workers Union and Others*¹ this Court held as follows:

“The test to be applied in an application such as the present is that referred to in s 17 of the Superior Courts Act 10 of 2013. Section 17(1) provides:

'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.”

- [6] The Court then continued² as follows:

“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 s 17(1)(a)(i) is 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 & others v Crocodile Valley Citrus Co (Pty) Ltd & another* (75/2008) [2015] ZALCC 7 (28 July 2015)).

¹ [2016] 37 ILJ 1485 (LC) at para 2

² *ibid* at para 3.

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 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 & East (Pty) Ltd v National Union of Mineworkers & others* (2014) 35 ILJ 2399 (LAC), and also *Kruger v S* 2014 (1) SACR I 369 (SCA) and the ruling by Steenkamp J in *Oasys Innovations (Pty) Ltd v Henning & another* (C536/15 6 November 2015)."

- [7] This approach was followed in *Sepheka v Du Pont Pioneer (Pty) Ltd*³ and the Court considers it bounding on it.

The nature of the decision

- [8] The applicants do not deal with this aspect in either their application for leave to appeal or their submissions.
- [9] In *Coates Brothers Ltd v Shanker and Others*⁴ the Labour Appeal Court (LAC) dealt with an appeal against a decision by the Labour Court to grant condonation, albeit in slightly unusual circumstances. The same test would apply to the refusal of condonation. The LAC held the following⁵:

"I have referred in para [3] above to the case of *National Union of Metalworkers of SA & others v Fibre Flair CC*⁶, in which were summarized the relevant principles with regard to the interference with a discretion which is to be judicially exercised. An appellant must show, in an appeal from a decision in a lower court, that the court a quo 'acted capriciously, or acted upon a wrong principle, or in a biased manner, or for insubstantial reasons, or committed a misdirection or an irregularity, or exercised its discretion improperly or unfairly'. Mr Watt-Pringle conceded that the only basis upon which he could argue that

³ [2019] 40 ILJ 613 (LC).

⁴ [2003] 24 ILJ 2284 (LAC).

⁵ at para 5.

⁶ [2000] 21 ILJ 1079 (LAC).

the discretion of the court a quo could be interfered with was that of a misdirection. This was confined to the following: did either (i) the court a quo's error with regard to the lack of explanation by the employer for its stance on the absence of the employee's signature or (ii) the court a quo's possible error with regard to the evaluation of and weight given to the prospects of success, amount to a misdirection which would warrant interference?"

- [10] The applicants have not in either the application for leave to appeal or their submissions, directly or indirectly, contended that this Court has acted in a manner that would satisfy the test set out above. This is fatal to the application for leave to appeal and should be the end of the matter.

Allegation of Bias

- [11] The applicants contended in the application for leave to appeal, although this is not repeated in the submissions filed on their behalf, that there is a reasonable apprehension that this Court was biased.
- [12] Irrespective of the merits of the application, this contention cannot be left unanswered.
- [13] The contention is based on the fact that the Court dealt with an aspect that was not raised in the affidavits relevant to the application for leave to appeal. It is correct that the Court mentioned the fact that there was an issue about which of the applicants were included in the referral to the Commission for Conciliation, Mediation and Arbitration (CCMA). However, the Court immediately thereafter said that this aspect will not be dealt with at condonation stage. The Court perused the whole file prior to hearing the condonation application. It is this fact that caused the Court to enquire, as stated in para 21 of the judgment, whether it could have regard to material that did not form part of the condonation application. How this could lead to a reasonable apprehension of bias is totally unclear.

Costs

- [14] The first respondent submitted that the application should be dismissed with costs. However, for the same reason that costs were not awarded in the condonation application, it ought not to be awarded now.

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

Order:

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

H Nieuwoudt

Acting Judge of the Labour Court of South Africa