THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR729/16

In the matter between:

ASSOCIATION OF MINEWORKERS AND CONSTRUCTION UNION **First Applicant**

B C MASHOLOGO **Second Applicant**

and

THE METAL AND ENGINEERING BARGAINING COUNCIL **First Respondent**

D MASENYE N. O **Second Respondent**

MURRAY AND ROBERTS POWER AND ENERGY **Third Respondent**

Considered: In chambers

Delivered: 7 June 2019

JUDGMENT: APPLICATION FOR LEAVE TO APPEAL

NKUTHA-NKONTWANA. J

[1] In this application, the applicants seek leave to appeal against the whole judgment delivered by the Court on 13 December 2018 wherein it was found that the arbitration award by the second respondent was reasonable and unassailable; and consequently dismissed the review application with costs. The application is vehemently opposed by third respondent.

[2] Both parties have filed written submissions and I have considered both submissions in determining the application for leave to appeal.

[3] There are several grounds of leave to appeal upon which the application is hinged and I do not intend repeating them in this judgment. Seemingly, the applicants' main impugn is that I erred in finding that the award was reasonable and therefore unassailable. Instead, I ought to have found that, on an overall conspectus of the evidence, the second respondent was not guilty of participating in an unprotected strike and that the he demonstrated an intention to return to work but there were no bus services provided for by the third respondent to employees from 10 to 17 April 2015, so the submission went.

[4] In this regard I deem it appropriate to refer to the relevant paragraphs in the impugned judgment which adequately dealt with the above submissions:

> '[24] To my mind, if indeed Mr Mashologo was not involved in the unprotected strike and did not report for duty simply because there was no transport, he ought to have been the first one to avail himself to the resumed bus services and attended the induction.
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> [25] It will be an arduous burden to expect employers faced with an unprotected strike to deal with minute details of each employee who did not report for duty. It is incumbent upon an individual employee to dissociate him/herself from the striking employees and communicate that decision to the employer in no uncertain terms. In the present case, the arbitrator correctly found that Mr Mashologo failed to demonstrate an intention to return to work.'

[5] The impugned judgment is detailed and extensive and so is the arbitration award. In essence, the applicants sought an appeal on the facts clothed in the garb of review based on the unreasonableness of the arbitration award. Tritely, the irregularities or errors in relation to the facts or issues do not necessarily produce an unreasonable outcome or provide a compelling indication that the arbitrator misconceived the inquiry.[1] The applicants are clearly seeking a third bite of the cherry in the Labour Appeal Court (LAC).

[1] See: *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (2007) 28 ILJ 2405 (CC)*; Herholdt v Nedbank Ltd (Congress of South African Trade Unions as amicus curia) [2013] 11 BLLR 1074 (SCA); Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation Mediation and Arbitration and Others* [2013] ZALAC 28; [2014] 1 BLLR 20 (LAC); (2014)

[6] It is accepted that the applicable test in an application for leave to appeal requires the court to determine whether there is a reasonable prospect that another court would come to a different conclusion to that reached in the judgment that is sought to be taken on appeal. In *Martin and East (Pty) Limited v National Union Mineworkers and Others*[2] (per Davis JA), the LAC has, however, cautioned this Court that the test should not be applied unconscientiously in light of the statutory imperative of expeditious resolution of labour disputes. It was stated:

> '…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, as should this Court when petitions are granted.
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> …
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> I would urge labour courts in future to take great care in ensuring a balance between expeditious resolution of a dispute and the rights of the party which has lost. If there is a reasonable prospect that the factual matrix could receive a different treatment or there is a legitimate dispute on the law, which is different. But this kind of case should not reappear continuously in courts on appeal after appeal, subverting a key purpose of the Act, namely the expeditious resolution of labour disputes.' (Emphasis added)

[7] Having considered all the grounds of leave to appeal, I am not persuaded that there is a reasonable prospect that the factual matrix in this case might receive a different treatment on appeal. Put differently, the applicants have failed to make out a case that another court would reasonably arrive at a decision different to the one reached by this Court. As such, the leave to appeal should be refused.

[8] On the issue of costs, even though costs do not follow the result in this Court, this application is patently unmeritorious. The first applicant is pursuing a claim of the second applicant, an individual employee, that arose within a context of a

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35 ILJ 943 (LAC) at paras 14 to 16 and *Department of Education v Mofokeng Head of the Department of Education v Mofokeng* [2015] 1 BLLR 50 (LAC).
[2] (2014) 35 ILJ 2399 (LAC).

strike related disciplinary action and sanction of a final written warning concerning a number of its members and members of the other trade unions in the employ of the third respondent. The collective bargaining relationship between the parties cannot, therefore, assist the first applicant.

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

Order:

1. The application for leave to appeal is dismissed with costs.

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P. Nkutha-Nkontwana

Judge of the Labour Court of South Africa