IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR 2768/17

In the matter between:

OSHO STEEL (PTY) LTD **Applicant**

and

EVA NGOBENI *N. O* **First Respondent**

COMMISSION FOR CONCILIATION MEDIATION

AND ARBITRATION **Second Respondent**

MAHOMED RAFIQ QUERESHI **Third Respondent**

In Chambers: 12 November 2019

JUDGMENT: APPLICATION FOR LEAVE TO APPEAL

TLHOTLHALEMAJE, J

[1] On 27 August 2019, this Court delivered a judgment and an order in terms of which the applicant's application to review and set aside the arbitration award issued by the first respondent acting under the auspices of the Commission for Conciliation Mediation and Arbitration (CCMA) was dismissed with costs. The first respondent had concluded that the third respondent had been constructively dismissed by the applicant as contemplated in the provisions of section 186(1)(e) of the Labour Relations Act.[1]

[1] Act 66 of 1995 (as amended)

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[2] The review application was dismissed on account of the applicant's failure to comply with the Rules of this Court in respect of the prosecution of reviews under Rule 7A of the Rules of this Court.

[3] Having launched the review application, the applicant had served and filed a record of arbitration proceedings which was not made available by the CCMA in terms of the provisions of Rule 7A(2) and (3) of the Rules of this Court. The transcribed record was from the applicant's own private recording of the arbitration proceedings, which it had thereafter served and filed even before the CCMA had an opportunity to dispatch the records to the Registrar of this Court in terms of rule 7A(3) read with subrule (2).

[4] The third respondent had raised its objection against this conduct in correspondence dated 15 January 2018 and further in his answering affidavit filed on 2 February 2018. Despite his protest in respect with the non-compliance with the Rules of this Court, the applicant erstwhile attorneys of record nevertheless addressed correspondence to the Registrar of this Court insisting that the review application remained unopposed and further that the same was ripe for hearing.

[5] The Registrar on 8 March 2019, enrolled the review application to be heard on 22 August 2019. On 6 June 2018, the third respondent filed his heads of argument contending that the review application was irregular in view of the record having not been filed and served in accordance with the provisions of the Rules of this Court.

[6] As mentioned above, the Court on 27 August 2019 delivered judgment upholding the third respondent's points on the non-compliance with the patent provisions of Rule 7A of the Rules of this Court, and dismissed the applicant's review application with costs.

[7] The applicant has since filed an application for leave to appeal. In its grounds of appeal, the applicant contends that the Court erred in considering the review application in circumstances where the review application had lapsed or deemed to be withdrawn in terms of directive 11.2.3 of the Practice Manual.

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This argument was raised in the notice of the application for leave to appeal for the time.

[8] The principles applicable to applications for leave to appeal are well-established. These principles have been codified in terms of the provisions of section 17(1) of the Superior Courts Act[2] which stipulates that leave to appeal may be granted if there are reasonable prospects that the appeal would succeed or there are some other compelling reasons why the appeal should be granted.

[9] In general, a point not raised in the pleadings before the Court *a quo* may not be raised on appeal unless the court grants leave to amend those pleadings.[3] Aligned to that principle is that a point in the appeal may only be raised if it is covered by the pleadings which served before the court *a quo* and the evidence thereto, and further that the consideration of the point would not culminate into unfairness towards the other party.[4]

[10] As mentioned above, the applicant relies on the provisions of directive 11.2.3 of the Practice Manual for the proposition that the Court ought to have struck-off the review application and provided it with an opportunity to remedy the defective record and a further opportunity to file an application to revive the review .

[11] It is common cause that the applicant was placed on terms by the third respondent well before an answering affidavit was filed, that the review application was irregular for want of compliance *inter alia* with the provisions

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[2] Act 10 of 2013

[3] See *Commissioner for Inland Revenue v Lazarus Estate* 1958 (1) SA 311 (A) 320G-H: where the Court held:

> …In Commissioner for Inland revenue v Estate Crewe and Another, 1943 A.D at p. 682, is in point. In relation to a new argument sought to be raised on appeal for the first time the learned Chief Justice said,
> "This contention, however, raised an entirely new case; it was not a contention put forward in the special case nor was it considered in the trial Court, and it cannot now be considered, and I express no opinion on it." The present proceedings were as I have indicated substantially by agreed by the parties. The case quoted by counsel for the Commissioner, which state the general principles on which points of law will be entertained on appeal, are less directly applicable than is the passage from Crewe's case. The Commissioner's proposal to rely on sec. 3(3)(a) would amount to setting up a wholly new case and this is sufficient to lead to the conclusion that the new point must be disregarded.

[4] See *Alexkor Ltd and Another v Richtersveld Community and Others*) [2003] ZACC 18; 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC) (14 October 2003) at para 44

of Rule 7A(2) & (3) in respect of the filing of the record. Moreover, the third respondent took issue with the integrity and quality of the record.

[12] Instead of heeding the call to rectify the defects, the applicant's posture throughout was that the review application was properly before the Court, and had insisted that it be heard on an unopposed basis. This was despite the third respondent's protestations in the answering affidavit and further in the heads of argument.

[13] Again, the applicant did little, if anything to address those concerns in the replying affidavit. In the hearing of the review application, the applicant persisted with its posture. Nowhere in the pleadings and/or its' submissions did the applicant seek to rely on the provisions of directive 11.2.3 of the Practice Manual as a safety net against the dismissal of the review on account of the abovementioned defects.

[14] The applicant insisted on having its day in Court notwithstanding the defective nature of its review application. It got its wish, and cannot now cry foul. The application for leave to appeal as correctly submitted on behalf of the third respondent, is disingenuous opportunistic and ill-conceived. The applicant says nothing to demonstrate that the point relied on in terms of provisions of directive 11.2.3 was raised in the review application or that the pleadings in one way or another sought to address that issue.

[15] In the light of these factors, there is nothing in the submissions made in support of the leave to appeal to demonstrate that the applicant has reasonable prospects that the Labour Appeal Court would look at the matter differently and come to a different conclusion.

[16] In respect of costs, the least said about the applicant legal strategy the better. It must however be said that the application for leave to appeal was ill-advised, ill-conceived and was indeed frivolous and vexatious. On that basis, I find no reason in law and fairness why the applicant should not pay the costs of this application taking into account its conduct in persisting with this application.

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[17] Accordingly, the following order is made;

Order:

1. The application for leave to appeal is dismissed.

2. The applicant is ordered to pay the costs of this application.

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E. Tlhotlhalemaje

Judge of the Labour Court of South Africa

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