

IN THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

Not Reportable

Case no: PR 45/17

In the matter between:

ODWA TAFENI

Applicant

and

COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION

First Respondent

COMMISSIONER SONJA KILLIAN

Second Respondent

EASTERN CAPE RURAL DEVELOPMENT AGENCY

Third Respondent

SHELDON RECRUITMENT AND SELECTION

Fourth Respondent

Decided: In Chambers

Delivered: 19 September 2019

JUDGMENT – APPLICATION FOR LEAVE TO APPEAL

MAHOSI. J

- [1] This is an opposed application for leave to appeal against the whole judgment of this Court handed down on 04 October 2018 in terms of which the Court dismissed the applicant's review application.
- [2] The applicant brought this application on the basis of a number of grounds. However, the challenge was mainly that the Court erred in:
- 2.1 Finding that the applicant submitted a self-defeating argument that a formally invalid renewal invalidates the initial contract.
 - 2.2 Failing to define the process which details how the mechanics of section 198B of the Labour Relations Act¹ LRA should be effected to trigger the statutory operation of an indefinite term in terms of section 198A(3)(b)(ii) and section 198B(5) of the LRA and how the issue of contract and joinder fits into the equation.
 - 2.3 Misconstruing sections 198A(5) and 198B(3) of the LRA.
 - 2.4 Assessing the degree of comparability of the applicant's tasks with those of a Senior Finance Clerk.
 - 2.5 Focussing on the reasons for renewal and not the reasons, which justify the fixing of the employment.
 - 2.6 Entertaining an argument on section 198B(3) as there is a breach of section 198B(6)(b).
- [3] In opposing this application, the respondent submitted that the amendments to section 198 of the LRA mentioned only became applicable after the applicant's matter was heard and do not apply retrospectively. The respondent further submitted that the applicant could not be reinstated to a higher position that he never occupied. In this regard, the respondent argued that the fact that the applicant applied for the position of a Senior Finance Clerk was not a guarantee

¹ Act 66 of 1995 as amended.

that such position would be made available to him and that it did not create any expectation, reasonable or otherwise.

Test for leave to appeal

[4] The traditional test in determining whether to grant an application for leave to appeal, is whether there is a reasonable prospect that another court may come to a different conclusion than that arrived at by the court *a quo*.² In terms of section 166(1) of the LRA, a party to proceedings before the Labour Court, may apply to the Labour Court for leave to appeal to the Labour Appeal Court (LAC) against any final judgment or final order of the Labour Court. Section 17 of the Superior Courts Act,³ which applies to the Labour Court, regulates instances in which the appeal may be granted. Section 17(1) provides as follows:

‘Leave to appeal may only be given where the judge or judges 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 decisions 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 issue between the parties.’

[5] Section 16(2)(a) of the Superior Courts Act provides as follows:

² See *Karbochem Sasolburg (A Division of Sentrachem Ltd) v Kriel and Others* (1999) 20 ILJ 2889 (LC) at 2890B; *Ngcobo v Tente Casters (Pty) Ltd* (2002) 23 ILJ 1442 (LC) at 1443 para 2 and *Tsotetsi v Stallion Security (Pty) Ltd* (2009) 30 ILJ 2802 (LC) at 2804 para 14.

³ Act 10 of 2013.

- ‘(i) When at the hearing of the appeal the issues are of such a nature that the decision sought will have no practical effect, the appeal may be dismissed on this ground alone.
- (ii) save under exceptional circumstances, the question whether the decision would have no practical effect or result is to be determined without reference to any consideration of costs.’

[6] In *Martin and East (Pty) Ltd v National Union of Mineworkers and Others*,⁴ the LAC made it clear that leave to appeal is not simply there for the taking, and that this Court must be cautious in granting leave to appeal and in assessing the requirement of the prospect of success. In this case, the Court stated as follows:

‘...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.

There are two sets of interests to consider. There are the interests of the parties such as appellant, namely who are entitled to have their rights vindicated, if there is a reasonable prospect that another court might come to a different conclusion. There are also the rights of employees who land up in a legal “no-man’s-land” and have to wait years for an appeal (or two) to be prosecuted.

This was a case which should have ended in the labour court. This matter should not have come to this court. It stood to be resolved on its own facts. There is no novel point of law to be determined nor did the Court *a quo* misinterpret existing law. There was no incorrect application of the facts; in particular the assessment of the factual justification for the dismissals/alternative sanctions.

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 that is different. But

⁴ (2014) 35 ILJ 2399 (LAC) at 2405-2406.

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.'

[7] In this matter, the Court is not persuaded that the applicant has made out a case for the granting of leave to appeal or that there are reasonable prospects of a successful appeal. As such, this application is without merit and stands to be dismissed.

[8] With regard to costs, the respondent prayed that the applicant should pay punitive costs for bringing a frivolous and vexatious application that is wasting both the Court's and the respondent's time. In terms of section 162 of the LRA, the Court has a wide discretion in awarding costs. The Constitutional Court reiterated in *Zungu v Premier of the Province of Kwa-Zulu Natal and Others*⁵ that in labour matters, costs orders should be made in accordance with the requirements of law and fairness. In this matter, the requirements of law and fairness dictate that there should be no order as to costs.

[9] Accordingly, the following order is made:

Order

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

D. Mahosi

Judge of the Labour Court of South Africa

⁵ (2018) 39 ILJ 523 (CC).