

IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

Not Reportable

Case no: D 1355/18

In the matter between:

SANDILE NGUBO

Applicant

and

EDUCATION LABOUR RELATIONS COUNCIL

First Respondent

COMMISSIONER SABHER AHMED JAZBHAY

Second Respondent

MEC: DEPARTMENT OF EDUCATION –

KWA-ZULU NATAL

Third 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 Honourable Court handed down on 21 June 2019 in terms of which the Court dismissed the review application with no order as to costs.

[2] The applicant brought this application on the grounds that the Court erred in making the following findings:

- 2.1 There was no evidence from the transcript of the proceedings or the award which indicated that the arbitrator conducted himself in a manner that is biased. According to the applicant, this bias is evident from the arbitrator's refusal to conduct an inspection *in loco* and his refusal to accept the drawing of the classroom layout. Furthermore, he submits that the transcript shows questions from the arbitrator that are intimidating towards him and his representative and this speaks to the bias that he alleges.
- 2.2 The cautionary/single witness rule is not applicable. In this regard, the applicant submits that the Court ought to have found that the arbitrator's failure to apply caution to the evidence of a single witness of the complainant amounted to a gross error.
- 2.3 There is no merit in the argument that the arbitrator was fixated on the seriousness of the allegations throughout the proceedings.
- 2.4 The arbitrator recorded that he considered all the evidence, which would include the evidence of Miss Ntanjana. The applicant submits that Ntanjana's evidence was not considered as there are no arbitrator's notes under Ntanjana's evidence.
- [3] Coupled with the aforementioned, the applicant contends that the Court failed to make findings that the decision of the arbitrator is implausible and unreasonable or address or make a ruling on the Procedural Fairness Review Ground under the South African Council for Educators Act¹. He therefore seeks an order referring the matter back to the third respondent for a hearing *de novo* which order should include specific instructions that an inspection *in loco* be held and that evidence of the classroom layout be dealt with.
- [4] In opposing this application, the respondent submitted that there was sufficient evidence tendered during the arbitration for the arbitrator to apply his mind and make a finding. The respondent denies that the applicant was denied an

¹ Act 31 of 2000.

inspection in loco or that a layout of the classroom would have resulted in the arbitrator rendering a different award.

- [5] On the cautionary rule, the respondent submitted that judicial officers need not apply caution to the evidence of a complainant in sexual offense cases and that the complainant was a reliable witness. The respondent further submitted that the arbitrator considered and summarised the evidence of Ntanjana in his award and as such, it could not be expected of the arbitrator to give a detailed analysis of her evidence as her evidence was not material to the charges against the applicant.
- [6] Furthermore, it is the respondent's submission that the Procedural Fairness Review Ground under the South African Council for Educators Act is not applicable to the charges levelled against the applicant, as they did not relate to a breach of professional ethics for educators. Lastly the respondent submits that there are no prospects that another court will set aside the decision of this Court as the arbitrator considered the evidence that was tendered and carefully analysed it, which resulted in a reasonable arbitration award.
- [7] 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.² In terms of section 166(1) of the Labour Relations Act (LRA),³ 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 Court Act,⁴ 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—

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 66 of 1995 as amended.

⁴ Act 10 of 2013.

- (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

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

- '(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.'

[9] In *Martin and East (Pty) Ltd v National Union of Mineworkers and Others*,⁵ 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 by 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

⁵ (2014) 35 ILJ 2399 (LAC) at 2405-2406.

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 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.’

[10] 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 must be dismissed.

[11] With regard to costs, taking into account the requirements of law and equity, I am of the view that this is a matter in which there should be no order as to costs.

[12] Accordingly, I make the following order:

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

LABOUR COURT