



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR 252/22

In the matter between:

SASBO, THE FINANCE UNION

FIRST APPLICANT

MMAKGOSI MORUDU

SECOND APPLICANT

And

THE STANDARD BANK OF SOUTH AFRICA LTD

RESPONDENT

In re:

THE STANDARD BANK OF SOUTH AFRICA LTD

APPLICANT

And

SASBO, THE FINANCE UNION

FIRST RESPONDENT

MMAKGOSI MORUDU

SECOND RESPONDENT

THE COMMISSION FOR CONCILIATION, MEDIATION

THIRD RESPONDENT

AND ARBITRATION

COMMISSIONER LEN DEKKER N.O

FOURTH RESPONDENT

Decided: In Chambers
Delivered: 13 January 2025

The judgement was handed down electronically by circulation to the parties' representatives by email. The date for hand-down is deemed to be 13 January 2025.

JUDGEMENT: APPLICATION FOR LEAVE TO APPEAL

MAFA-CHALI AJ

Introduction and judgement (in summary)

- [1] On 16 August 2024, I handed down a judgement in the opposed review application.
- [2] I made the following order:
- 2.1 The arbitration award of the Fourth Respondent under CCMA case number GATW11198-21 dated 1 February 2022 is reviewed and set aside.
- 2.2 The dismissal of the Second Respondent was substantively fair.
- [3] The Applicants have filed an application for leave to appeal on 6 September 2014 and I entertained it on an unopposed basis and issued the judgement on 31 October 2024, which I later rescinded on 11 November 2024, on the basis that it was erroneously made without considering the opposing submissions by the Respondent.
- [4] The Respondent filed the submissions opposing the application for leave to appeal to the Applicant on 30 September 2024, and subsequently delivered them at the Court on 01 October 2024.
- [5] I am now entertaining the application for leave to appeal afresh on an opposed basis.

Grounds for application for leave to appeal

- [6] The Applicants have made an application for leave to appeal on 6 September 2024, and subsequently filed the written submissions on 23 September 2024.
- [7] The Applicants raised 8 grounds of appeal as follows:
- 7.1 The Court erred in finding that the commissioner had failed to take into account the totality of the circumstances.
- 7.2 The Court erred in finding that the posting of the video on Morudu's WhatsApp status breached the duty of trust and confidence which Morudu owed to the Bank.
- 7.3 The Court erred in finding that there was no restriction to those employees circulating the video to outsiders and such WhatsApp circulation was in the social media domain immediately upon its circulation.
- 7.4 The Court erred in finding without evidence to the contrary, that the video was already circulated in the social media domain with the result consequence that the contraventions of the government regulations on COVID-19 were not adhered to by the Bank's employees and thereby potentially ruining the Bank's good name and reputation.
- 7.5 The Court erred in finding that the breach by Morudu of the Bank's COVID-19 protocols were serious to warrant dismissal.
- 7.6. The Court erred in finding that Morudu failed to provide information to build a prima facie case on inconsistency in disciplining employees alleged to have hosted parties in other branches of the Bank.
- 7.7 The Court erred in finding that Morudu failed to show genuine remorse.
- 7.8 The Court failed to find that the adjusted alert level 3 was in place from 16 June 2021 to 27 June 2021 and that social gatherings were indeed permitted in terms of Government Gazette No.44715 of 15 June 2021, that the reason Morudu hosted the party was to boost the morale of the employees, that Morudu's WhatsApp status containing the video was limited to a selected number of five Bank employees and lastly that the commissioner is allowed a broad spectrum in his decision-making and that the commissioner's award fell within the band of reasonableness.
- [8] The Respondent's opposing submissions are as follows:
- 8.1 The case advanced by the Applicants in its submissions appears to be a

matter of linguistics on the use of the word 'wrong' in its court's description of the commissioner's award applying the incorrect test of review. The Applicants, however appreciates and concedes that the Court employed the language of reasonableness which is the correct test. Therefore, the Applicant's complaint relates to linguistic rather than substance.

8.2 The Court had set out the accepted test to be applied and that the award of the commissioner will be set aside on review if it is unreasonable; and the award that a reasonable arbitrator could not reach on the material that was before him or her.

8.3 The usual approach when the court is faced with a review application is to consider the material before the arbitrator and in considering the reasonableness of the arbitrator's decision, the court will assess whether the arbitrator's decision is wrong in the sense of whether the arbitrator made any errors and if so whether the erroneous approach of the arbitrator has distorted the award to the extent that its result is unreasonable.

8.4 The court has followed that approach and found that the commissioner made a number of errors in his assessment of the facts and applicable law and these errors led to the conclusion which was not reasonable based on the material before the commissioner.

8.5 Details of those errors were shown by the Court with regard to his assessment of the inconsistency principle in paragraphs 29, 32 and 33 of the judgement and that the commissioner should have found that Morudu's conduct was extremely irresponsible in the context of the pandemic and that she has committed gross misconduct warranting dismissal as set out in paragraph 34 of the judgement.

8.6 The judgement has explained the shortcomings of the commissioner's approach and sets out what a reasonable commissioner ought to have found. The court reached the appropriate conclusion in the circumstances and there is no prospect that the LAC will reach a different conclusion.

8.7 This court would not be appropriately acting as a filter if it were to permit the present application for leave to appeal and would be burdening the LAC with a case which is not truly deserving of its attention.

8.8 It is incontrovertible facts that Ms Morudu promoted and organised a party during the period of the COVID restrictions, an action which was grossly irresponsible, particularly from a senior manager. The decision by the Court to review the commissioner's award is clearly correct and the application for leave to appeal should be dismissed as the Applicants have not been able to effectively challenge that conclusion,

or persuade the court that the LAC would find otherwise.

Legal considerations

[9] I have considered the application for leave to appeal and the written representations in chambers.

[10] It is trite that there is no automatic right of appeal against a judgement of the Labour Court. Section 166(1) of the Labour Relations Act¹ (LRA) provides that any party to any proceedings before the Labour Court may apply for leave to appeal to the LAC against any final judgement or final order of the Labour Court. To be entitled to leave to appeal, an applicant must satisfy this Court that there is a reasonable prospect that another Court would come to a different conclusion².

[11] The test is not whether there is a possibility that another court could come to a different conclusion. The test is whether there is a reasonable prospect that another court would come to a different conclusion.

[12] When considering the standard in applications for leave to appeal, section 17(1) of the Superior Courts Act 2013 (the “Act”) applies. That section reads:

“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 (a)(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration.”

[13] The threshold to cross for an audience with an appeal court is a high one, requiring a strong prospect that another court would come to a different decision, or that there are compelling reasons justifying the attention of that court.

[14] *In Seathlolo & others v Chemical Energy Paper Printing Wood & Allied Workers Union & others*³, Judge Van Niekerk, discussing the test to be applied states:

“The traditional formulation of the test that is applicable ...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. ...the use of the word “would” in s 17(1)(a)(i)

¹ Act 66 of 1995, as amended

² See *Woolworths Ltd v Matthews* [1999] 3 BLLR 208 (LC)

³ (2016) 37 ILJ 1485 (LC)

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...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...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...’’⁴

- [15] In deciding this application for leave to appeal, I am also guided by the dicta of the Supreme Court of Appeal where it held in *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd and Others*⁵ that:

“The need to obtain leave to appeal is a valuable tool in ensuring that scarce judicial resources are not spent on appeals that lack merit. It should in this case have been deployed by refusing leave to appeal”.

- [16] In *Smith v S*⁶, the test was summarised as follows;

“What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal”.

- [17] The Applicants submitted that the Court did not employ the correct review test, but rather came to the conclusion that the commissioner had been ‘wrong’ to make the award that he did, having regard to the evidence before him, and that such

⁵ [2013] 1 ALL SA 375 (SCA) (20 September 2013)

⁶ [2020] ZALCJHB 195 (7 May 2020)

approach is inconsistent with the jurisprudence setting a high bar for interfering with CCMA on review and limited only to those cases where the bounds of reasonableness had been breached.

- [18] It was further argued that the Court considered that the commissioner downplayed the impact of Morudu's actions, and that conclusion is inconsistent with the precedent in *Lucerne Transport v TAWUSA and Others*⁷ with regard to the Respondent having an obligation to adduce evidence to show that its name was brought into disrepute by showing a sufficient close link between the misconduct and the business and the impact of the conduct on the Respondent's business must be sufficiently serious, and as such the Court was required to ask itself if the finding that dismissal was an inappropriate sanction and harsh and was so unreasonable that it falls outside of the band of reason within which two reasonable people might reasonably disagree.
- [19] It is the Applicants' further arguments that the question before the Court in the review was whether, even if the commissioner had expressed himself upon matters beyond the questions placed before him in the arbitration, his conclusions concerning the harshness of the penalty fell beyond the band of reasonableness, having regard to the full conspectus of the evidence before him.
- [20] The Respondent on that other hand argued that the Court applied the correct review test and the Applicants have not presented sufficient grounds to persuade the court that there is a reasonable prospect of success or some compelling reason why the appeal should be heard.
- [21] Reasonable prospects of success means that the Applicants have to show that another Court, faced with the same material, could come to a different conclusion or an appeal can succeed if there is a legitimate dispute of the law.
- [22] I am not persuaded that there are good reasons for the Labour Appeal Court to consider the factual matrix of Morudu's case and to pronounce on some of the issues raised by the Applicants in how the Court erred in its findings. I find that there are no compelling reasons why leave to appeal should be granted.
- [23] Having regard to the submissions made on behalf of the Applicants in respect of the application, these do not come to meeting the threshold referred above.
- [24] In casu, applying the principles applicable to applications for leave to appeal, I am

⁷ (JR 284/2019) [2020] ZALCJHB 195 (7 May 2020)

not persuaded that there are reasonable prospects that the LAC would arrive at a different conclusion than one arrived at by this Court. The Applicant failed to make out a case for leave to appeal to be granted. The Applicants have outlined its grounds for leave to appeal on its notice and also substantiated in its subsequent submissions. I am satisfied that those issues were adequately canvassed and dealt with in my judgment, and no purpose will be served in revisiting the same.

[25] In the light of the above, and having regard to the submissions made in regard to the application for leave to appeal, the opposition thereto, and further reflection of my judgment, I am of the view that the Applicant has failed to demonstrate that there are reasonable prospects that the LAC will come to a different decision to that reached in my judgment.

[26] I am not persuaded that any appeal would have a reasonable prospect of success.

[27] Furthermore, there are no other compelling reasons why leave to appeal should

be granted.

[28] There is no reason why a cost order should be made in this application.

Order

[29] The application for leave to appeal to the Labour Appeal Court is dismissed.

[30] There is no order as to costs.

G MAFA-CHALI
Acting Judge of the Labour Court of South Africa

Representation:

For the First and Second Applicants:

B J Erasmus Pieterse Attorneys

For the Respondent:

Tabacks Attorneys Inc

LABOUR COURT