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LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No.: JR1086/21

In the matter between:

**DEPARTMENT OF SPORTS, ARTS AND CULTURE
AND RECREATION**

Applicant

and

**GENERAL PUBLIC SERVICE SECTOR
BARGAINING COUNCIL**

First Respondent

LUYANDA OLOTA N.O.

Second Respondent

ANDILE KOLANISI

Third Respondent

Heard: 10 December 2024

Delivered: 21 January 2025

JUDGMENT

LUTHULI, AJ

Introduction

[1] This is an application for leave to appeal to the Labour Appeal Court against the whole of my judgment and order delivered on 30 September 2024. The application is opposed.

[2] In my judgment, I dismissed the review application as well as the cross review and found that the arbitrator's award falls within the band of reasonableness.

[3] The application is premised on the provisions of sections 16 and 17 of the Superior Courts Act¹.

[4] The parties are at *ad idem* concerning the applicable test for this application to succeed. It is submitted by the Applicant that the application has reasonable prospects of success and that there are other compelling reasons why leave to appeal should be granted.

[5] The Applicant relied on *Acting National Director of Public Prosecutions and Others v Democratic Alliance in Re: Democratic Alliance v National Director of Public Prosecutions and Others*² in its submission regarding the applicable test.

[6] There was, however, a condonation application that had to be determined for the Applicant's late filing of the leave to appeal application.

Condonation application

[7] It is trite that an application for leave to appeal must be instituted within 15 days from the date of the judgment.

[8] Judgment was delivered on 30 September 2024. The application therefore ought to have been filed by or on 21 October 2024.

¹ Act 10 of 2013.

² (19577/09) [2016] ZAGPPHC 489 (24 June 2016).

[9] On 21 October 2024, the Applicant served the application for leave to appeal on the Third Respondent at 16h12 to m[...] and duly filed same by e-mail on the same day.

[10] On 22 October 2024, the Applicant contacted the Third Respondent's attorneys of record requesting acknowledgement. The Applicant was informed that the Third Respondent's attorneys were not in receipt of the application.

[11] It is only at this stage that the Applicant realised that the e-mail used was incorrect, the correct e-mail was m[...].

[12] The application now being a day late, necessitated a condonation application.

[13] The application is unopposed.

[14] In my view, the explanation is satisfactory, and the delay is very slight. It is in the interest of justice to grant the condonation application and therefore, I hereby grant condonation for the late filing of the application for leave to appeal.

Grounds for leave to appeal

[15] My judgment is impugned on the following broad grounds:

- 15.1. That I erred in finding that the arbitrator's finding that the Third Respondent did not act in bad faith was reasonable;
- 15.2. That I erred in finding that the refusal to attend meetings and the non-compliance with instructions were not sufficiently serious and did not give rise to the destruction of the employment relationship; and
- 15.3. Other compelling reasons for granting leave to appeal

Analysis

[16] In *S v Smith*³ the Court held:

‘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] Friedman AJ in *Baphalaborwa 72 Construction & Civil Engineering CC and T& L Civil Electrical Contractors CC*⁴ recently said the following, which I wholly agree with:

‘Of course, it is human nature to cling to the correctness of one’s views. But if rational humans could not be persuaded by argument, the whole system of litigation would be pointless. It is a duty of a judge (or acting judge) when deciding whether to grant leave to appeal to have the humility to realise when his or her findings are subject to reasonable disagreement, and to approach the matter as objectively as possible. Good judges, in a sensible legal system, should easily be able to identify which points are arguable and which are not. Just as, I dare say, good people, in a sensible society, should be able to take a position while recognising the reasonableness (or unreasonableness) of the differing views of others.’

[18] I am persuaded that a different court can reach a different conclusion than the one I reached when I found that the arbitrator’s finding, that a breach of fiduciary duty takes place when a person acts in bad faith, was reasonable.

[19] There are reasonable prospects of success, in my view, on this ground. It is

³ [2011] ZASCA 15; 2012 (1) SACR 567 (SCA) at para 7.

⁴ (2018/45610) [2024] ZAGPJHC 1046 (17 October 2024) at para 3.

possible that another court could find that by signing and supporting the appointment of an unsuited candidate, the Third Respondent breached his fiduciary duties.

[20] Given the position of the Third Respondent, being a Chief Director, I am persuaded that another court could reach a conclusion that the Third Respondent's failure to attend meetings and his non-compliance with instructions destroyed the trust relationship between himself and the Applicant.

[21] It may very well be that another court could find that corrective and progressive discipline was not the appropriate sanction in these circumstances.

[22] For these reasons, the application for leave to appeal must succeed.

[23] In the premises, the following order is made:

Order

1. Condonation of the late filing of the leave to appeal is granted.
2. The application for leave to appeal is granted.
3. There is no order as to costs.

B Luthuli

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Adv. Matyolo

Instructed by: the State Attorney

For the Third Respondent: Mr Shuping of PM Shuping Attorneys