



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: 2025-002049

In the matter between:

STEVE TSHWETE LOCAL MUNICIPALITY

Applicant

and

KHAZAMULA SAMUEL MIYAMBU

First Respondent

JOEY DE BRUIN

Second Respondent

RAZIA GOOLAM

Third Respondent

BUSISIWE NONHLANHLA MASHININI

Fourth Respondent

Heard: In Chambers

Delivered: 03 March 2025

(This judgment was handed down electronically by emailing a copy to the parties. The 03rd of March 2025 is deemed to be the date of delivery of this judgment).

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

SEEDAT AJ

[1] This is an application for leave to appeal against the whole judgment of 5 February 2025 in terms of which the court heard the applicants' application on an urgent basis and ordered the Municipality to pay their outstanding salaries from July 2024 to December 2024 and to continue to do so pending the determination of Part B to the Notice of Motion which application will be instituted within 30 days of the order.¹

[2] As provided in Rule 67(6) of the Rules of the Labour Court this application for leave to appeal was decided in chambers.

[3] The Municipality seems to insinuate tardiness on my part by saying that it had written to the secretary of the Court requesting written reasons for the order granted on 30 January 2025 and the reasons were only provided six days later, on 5 February 2025.

[4] I was apprised of the request for written reasons for the order late on 31 January 2025. The judgment was finalised on 3 February 2025 when it was forwarded to the court. I cannot explain why the judgment was published only on 5 February 2025.

Grounds of appeal

The application for leave to appeal

[5] Denuded of its verbiage the Municipality contends that I committed material errors of law and fact, in particular-

5.1 in dealing with the matter on an urgent basis

¹ The citation of the parties in the respective papers are not aligned and so to avoid confusion, I will refer to the applicant in the application for leave to appeal as the Municipality and the other parties as the respondents.

- 5.2 finding that the Municipality was obstinate in not disclosing the status of the respondents with regards to their past service
- 5.3 ignoring other contracts of employment that were offered to the respondents
- 5.4 ordering immediate payment of their past salaries
- 5.5 varying my original order

[6] It then contends that another court would come to a different conclusion on:

- 6.1 urgency
- 6.2 whether the Municipality breached the provisions of section 197 of the Labour Relations Act (LRA)²
- 6.3 whether the Municipality was obliged to pay the arrear salaries

The written submissions for leave to appeal

[7] While the applicant has set out the grounds of appeal in detail in its application for leave, in its written submissions it has gathered these under three headings:

- 7.1 the variation of the judgment
- 7.2 transfer of contracts of employment in terms of section 197(2) of the LRA
- 7.3 the claim for outstanding salaries

It would, therefore, be most convenient to arrange my judgment under these heads. Urgency, while listed as a ground of appeal, was curiously not argued. I will, of course, consider it.

Urgency

[8] I relied on the decisions of this court and expounded fully on the reasons for condoning the non-compliance with the forms and service contemplated in the rules of this court and that the matter is heard as one of urgency in terms of rule 38 of the Rules of the Labour Court.

² Act 66 of 1995

[9] In addition to these authorities, is the judgment of Van Niekerk J in *Harley v Bacarac Trading 39 (Pty) Ltd*³ who was of the view that it is not established law that financial hardship and loss of income can never be grounds of urgency:

'If an applicant is able to demonstrate detrimental consequences that may not be capable of being addressed in due course and if an applicant is able to demonstrate that he or she will suffer undue hardship if the court were to refuse to come to his or her assistance on an urgent basis, I fail to appreciate why this court should not be entitled to exercise a discretion and grant relief in appropriate circumstances.'

[10] The court in *Van Wyk v Khewija Engineering Contractors*⁴ confirmed that financial exigencies may warrant the hearing of a matter as one of urgency.

[11] In this matter, the respondents had sufficiently pleaded those exceptional circumstances which warranted this court to hear the matter as one of urgency. They were physically present on the applicant's premises for six months tendering their services and attempting to resolve issues with senior executive management.

[12] As a result the respondents have suffered and continue to suffer extreme economic hardship to approach this court on the basis of urgency.

Transfer in terms of section 197 of the LRA

[13] The Municipality challenges my interpretation of section 197. More especially it contends that I erred in my finding that it gave the respondents new contracts of employment that were to commence on 1 January 2025 and I failed to consider the fact that in January 2024 the Mpumalanga Department: Community Safety, Security and Liaison had given the respondents employment contracts that were to commence on 1 July 2024.

³ (2009) 30 ILJ 2085 (LC)

⁴ (J859/2022) [2022] ZALCJHB 238 (23 August 2022)

[14] This argument is spurious because regardless of whether the respondents were given contracts of employment that were to commence on 1 July 2024 or 1 January 2025, the provisions of section 197 of the LRA⁵ are unequivocal that the new employer should be '*automatically substituted in the place of the new employer in respect of all contracts of employment in existence immediately before the date of transfer*' without interrupting '*an employee's continuity of employment*'.⁶

[15] The contracts of employment for the respondents attached to the answering affidavit has the following preamble:

'WHEREAS the Employer desires to obtain the benefit of the services of the Employee, and the Employee desires to render such services on the terms and conditions set forth;

This preamble has the trappings of a new contract of employment and cannot be construed as the continuance of an existing employment relationship.

[16] Furthermore, paragraph 3 of that contract of employment states:

'This Agreement shall commence on the 01 January 2025 (hereinafter referred to as the effective date), or such other date as may be agreed upon between the parties in writing.'

There is no reference to previous service and the employment contract firmly establishes that it would commence on 1 January 2025. To reaffirm this factual certainty, the contract of employment makes the 1 January 2025 as the 'effective date'.

[17] The Municipality is in clear breach of the provisions of section 197.

Payment of outstanding salaries

[18] I held that the respondents had tendered their services and the applicant gave them access to its premises and therefore in terms of section 32(3) of the Basic Conditions of Employment Act⁷ they were entitled to their salaries.

⁵ Section 197(2)(a)

⁶ Section 197(2)(d)

⁷ 75 of 1997

[19] To argue that the Municipality does not have a budget to pay the salaries of the respondent is misleading because it is raised for the first time in this application. In its answering affidavit in the main application, the applicant avers that it 'has no legal obligation to pay the Applicants (sic) salaries from 1 July 2024 to December 2024 in that the Applicants ceased to be employees of the First Respondent on 30 June 2024'.⁸

[20] The Municipality cites the unreported decision of *Zeal Health Innovations (Pty) Ltd v Minister of Defence and Military Veterans and another*⁹ to bolster its argument that I could not order immediate payment of the outstanding salaries of the respondents because it had no budget.

[21] In this case Zeal Health was awarded a tender that exceeded the Department's available budget for the payment of healthcare services. The court held that the acting director-general did not have the power to commit the department to a liability for which money had not been appropriated. As a result, the contract was invalid and set aside. It is interesting that the court preserved Zeal Health's right to pursue payment for services it provided to the department in terms of the contract due to it being an 'innocent party'.¹⁰

[22] To say that because of the SCA's findings in *Zeal Health* that any payment of salaries in this matter would be irregular and unlawful is extravagantly vacuous. The respondents in this case are innocent parties too and are entitled to the payment of their salaries for which they had tendered their services until at least early January 2025. In this period, they were physically present on the premises of the Municipality and were not told to vacate their offices and return the keys. The senior executive knew of their presence and engaged with them right up to the end of December 2024.

Variation

⁸ The municipality's answering affidavit in the main application at para 52

⁹ (967/2023) ZASCA 183 (27 December 2024) at para

¹⁰ *Zeal Health* (ibid) at para 24

[23] Section 165(b) of the LRA permits a court acting on its own accord to vary an order in which there is an obvious error. This provision is repeated in Rule 46(1)(a)(ii) of the Rules of the Labour Court.

[24] Relying on these provisions, I varied prayers 2, 3 and 4 of my order that were made erroneously. It is alleged that I had incorrectly applied the provisions of section 165(b). It is not said in which respects was my reliance on section 165(b) incorrect.

[25] The appeal court as long ago as 1926 iterated that the 'Court can, however, declare and interpret its own order or sentence ... so long as the sense and substance are in no way affected by such a correction'.¹¹ This was confirmed in *Firestone South Africa (Pty) Ltd v Genticuro AG*¹² where Trollip JA said that the court may clarify its judgment or order 'provided that it does not thereby alter the sense or substance of the judgment or order'.¹³

[26] In *S v Wells*¹⁴ the appeal court explained:

'The more enlightened approach, however, permits a judicial officer to change, amend or supplement his pronounced judgment, provided that the sense or substance of his judgment is not affected thereby.'

[27] The Municipality relies on the constitutional court decision in *Minister of Correctional Services and another v Van Vuren and another In re Van Vuren v Minister of Correctional Services and others*¹⁵ to support its view that I was *functus officio* and I had no authority to correct, alter or supplement my judgment. However, just before the dicta quoted by the Municipality, the court did say:

'A court may clarify its order or judgment to give effect to its true intention which is to be ascertained from the language used without altering the sense

¹¹ *West Rand Estates Ltd v New Zealand Insurance Co Ltd* 1926 AD 173 at pages 186-187; *Estate Garlick v Commissioner for Inland Revenue* 1934 AD 499

¹² 1977 (4) SA 298 (A) at page 307

¹³ *Day and Night Investigations v Ngoasheng* [2000] 4 BLLR 898 at 400F; *First National Bank v Jurgens and others* 1993 (1) SA 245 (W) at 246-247; *Seattle v Protea Assurance Co Ltd* 1984 (2) SA 538 (C) at 541C

¹⁴ 1990 (1) SA 816 (A) at 820C-F

¹⁵ [2011] (10) BCLR 1051 (CC) at para 8

and substance of the judgment if, on its proper interpretation the meaning remains unclear.’¹⁶

[28] Prinsloo J in *Govender v Gauteng Provincial Government: Department of Roads and Transport*¹⁷ while affirming that once a judgment has been granted, the judge becomes *functus officio*, there are certain exceptions ‘*such as section 165(b) and rule 16A(a)(ii). The purpose of section 165(b) and rule 16A(a)(ii) is to expeditiously correct an obvious error; ambiguity or omission ...*’

[29] From a reading of the three prayers in the first order it was not clearly apparent what the respondents sought from the Municipality.

[30] The variation did not in any way replace the judgment or alter the sense and substance of the judgment which was the payment of the respondents’ salaries both past and future.

[31] The excision of the three prayers in the original order gave effect to the true intention of the court and did not, in any way, impact on the sense and substance of the judgment.

The application for leave to appeal

[32] The application for leave to appeal has its basis in section 17(1)(a) of the Superior Court Act.¹⁸

[33] The test in considering an application for leave to appeal was described in *Mont Chevaux Trust v Tina Goosen and 18 others*¹⁹ as follows:

‘It is clear that the threshold for granting leave to appeal against a judgment of the High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion ...the use of the word “would” in the new

¹⁶ *Minister of Correctional Services* (ibid) at para 8

¹⁷ [2023] JOL 61944 (LC) at para 14

¹⁸ Act 20 of 2013

¹⁹ 2014 JDR 2325 (LCC) at para 6

statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against.'

[34] This was reaffirmed by the SCA in *S v Smith*.²⁰

'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 than to establish 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 on appeal.'

[35] Davis JA sitting in the Labour Appeal Court in *Martin & East (Pty) Ltd v National Union of Mineworkers & others* cautioned reprovably:²¹

'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.'

[36] The Municipality states that its application is founded on a reasonable prospect of success.

[37] Van Niekerk J in *Seathlolo and others v Chemical Energy Paper Printing Wood and Allied Workers Union and others*²²

'... the Labour Appeal Court has recently had occasion to observe that this court ought to be cautious when leave to appeal is granted, as should the Labour Appeal Court when petitions are granted. The statutory imperative of

²⁰ 2012 (1) SACR 567 (SCA) at para 7

²¹ (2014) 35 ILJ 2399 (LAC) at page 2406D

²² (2016) 37 ILJ 1485 (LC) at para 3; *Kruger v National Director of Public Prosecutions* 2019 (6) BCLR 703 (CC)

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.’²³

[38] In *Member of the Executive Council for Health, Eastern Cape v Mkhitha and another*²⁴ the court applied the concept of ‘reasonable prospects of success’ as follows:

‘Once again it is necessary to say that leave to appeal, especially to this court, must not be granted unless there truly is a reasonable prospect of success. Section 17(1)(a) of the Superior Courts Act makes it clear that leave to appeal may only be given where the judge concerned is of the opinion that the appeal would have a reasonable prospect of success; or there is some other compelling reason why it should be heard.

An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. A mere possibility of success, an arguable case or one that is not hopeless, is not enough. There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal.’²⁵

[39] There is no sound, rational basis to conclude that there is a reasonable prospect, in the sense of a measure of certainty, of another court coming to a different conclusion.

Order

1. The application for leave to appeal the judgment of 5 February 2025 is refused.
2. There is no order as to costs.

S Seedat

Acting Judge of the Labour Court of South Africa

²³ See too, *Sepheka v Du Pont Pioneer (Pty) Ltd* (2019) 40 ILJ 613 (LC)

²⁴ [2016] JOL 36940 (SCA) at paras 16-17

²⁵ *SA Clothing & Textile Workers Union & others v Stephead Military Headwear CC* (JS791/14) [2017] ZALCJHB 184 (23 May 2017)