



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case no: JR82/2024

In the matter between:

MILTON MARWESHE AND OTHERS

Applicants

and

CITY OF TSHWANE METROPOLITAN MUNICIPALITY

First Respondent

SA LOCAL GOVERNMENT BARGAINING COUNCIL

Second Respondent

ELSABE MAREE NO

Third Respondent

Heard: Considered in Chambers

Delivered: 13 March 2025

JUDGMENT: LEAVE TO APPEAL

DANIELS J

Introduction

[1] The applicants brought an application to review and set aside the arbitration award issued by the third respondent. In the award, the third respondent ruled that the applicants had not discharged the onus of proving that they were dismissed. Having heard the application, I dismissed the review. The applicants now apply for leave to appeal.

Legal principles and analysis

[2] Section 17(1) of the Superior Courts Act No. 10 of 2013 provides that leave to appeal may only be given where the judge is of the opinion that the appeal *would* have a reasonable prospect of success or there is some other compelling reason why the appeal should be heard.

[3] Leave to appeal should not be granted unless there is a sound and rational basis to conclude that there is a reasonable prospect of success.¹

[4] In *Martin & East (Pty) Ltd v National Union of Mineworkers & others*² the court, per Davis JA stated:

“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,

¹ *MEC for Health, Eastern Cape v Mkhitha and Another* [2016] JOL 36940 (SCA) at paras 16 – 17

² (2014) 35 ILJ 2399 (LAC) at 2406

subverting a key purpose of the Act, namely the expeditious resolution of labour disputes.” (own emphasis)

[5] In the final analysis, one can say no more than that the threshold is high and leave to appeal is not merely for the asking.

Analysis of the grounds for leave to appeal

[6] The application for leave to appeal contained six grounds for leave to appeal. However, the applicants’ written submissions addresses only four of such grounds. I will deal only with those four, on the understanding that the other two have been abandoned. In any event, in my view, the other two grounds lack merit.

Ground one

6.1 The applicants allege that the court erred by finding that the mere absence of an audited report does not indicate that expenditure on the wages (of the applicants) was proper, regular or authorised. The applicants allege that it is “trite” that in this context an audited report must exist, indicating that such expenditure was irregular, and the absence of such indicates that the expenditure is regular. The applicant does not refer the court to any legislative provision to that effect, nor am I aware of any such provision. I do not accept that this ground has merit.

Ground two

6.2 The applicants allege that the court erred by finding that: (1) the employment of the applicants was not authorised by the Mayor or the municipal manager, (2) the budget for the applicants’ engagement had not been approved, and (3) their employment was not contemplated by the staff establishment. The applicants challenge this by stating that: (1) they did not employ themselves, (2) they entered into “valid” employment contracts, (3) the minutes of the Mayoral Committee were unsigned, and

(4) neither the Mayor nor the municipal manager testified. It is significant that the applicants do not, and never have, contended that their appointment was contemplated in the staff establishment. Properly so, given that this was not the applicants' case, at arbitration. Section 66(3) and (4) of the Municipal Systems Act³ is clear that the employment of any individual, not contemplated by the staff establishment, is null and void. When an employment contract is regarded as "null and void"⁴ such contract is regarded as never having been concluded. I do not accept that this ground for leave to appeal has merit.

Ground three

6.3 The applicants allege that the court erred by finding that the third respondent's finding that the applicants had not proven their dismissal was a jurisdictional ruling. In our statutory scheme, in any dismissal dispute before the CCMA or Bargaining Council, the employee bears the onus of proving the dismissal⁵ before that tribunal has jurisdiction to determine whether the dismissal was fair. It has been held, by the LAC, that for an arbitrator to be clothed with jurisdiction it must be established on facts, placed before the commissioner, objectively considered, that the employees were dismissed by the entity cited as the employer.⁶ I do not accept that this ground for leave to appeal has merit.

Ground four

6.4 The applicants allege that the court erred by finding that the employment contracts were null and void because the commissioner, and the court, were required only to determine if the dismissals were fair. This lacks reason. The commissioner was statutorily required to

³ No. 32 of 2000

⁴ *Neugarten and others v Standard Bank of SA Ltd* 1989 (1) SA 797 (A) at 808

⁵ See section 192(1) of the LRA

⁶ *James & another v Eskom Holdings SOC Ltd & others* (2017) 38 ILJ 2269 (LAC) at para 16

determine if a dismissal existed before she could determine whether the dismissal was fair.

Conclusion

[7] In the circumstances, none of the grounds for leave to appeal have merit, and the application falls to be dismissed.

RN Daniels
Judge of the Labour Court of South Africa