



IN THE LABOUR COURT OF SOUTH AFRICA, GQEBERHA

Not Reportable

Case No: PR198/21

In the matter between:

INXUBA YETHEMBA MUNICIPALITY

Applicant

and

XOLELA MSWELI

First Respondent

SOUTH AFRICAN LOCAL GOVERNMENT

Second Respondent

BARGAINING COUNCIL

COMMISSIONER KELVIN KAYSTER N.O.

Third Respondent

Heard: In Chambers

Delivered: This judgment was handed down electronically by circulation to the Legal Representatives of the Applicant and the First Respondent by email, and release to SAFLII. The date and time for handing down is deemed to be 14h00 on 30 May 2025.

JUDGMENT:

APPLICATION FOR LEAVE TO APPEAL

KROON, AJ

- [1] This is an application for leave to appeal, brought by the First Respondent, against a judgment handed down on 7 April 2025. Submissions were received on behalf of the First Respondent on 16 May 2025 and the Applicant on 27 May 2025. The submissions of the Applicant were out of time but nothing turns on this as, in my view, on the First Respondent's own version, a case has not been made out for the granting of leave to appeal.
- [2] The main ground relied on in support of the application for leave to appeal is sourced in the contention that the Court considered the matter through the lens of an appellate court and not a review court. Expressed differently, the assertion is that, whilst the decision of the Arbitrator may have been wrong, it was not a decision to which no reasonable arbitrator could have come.
- [3] There is no merit in this contention for all the reasons contained in the judgment which demonstrate that, given the material errors of law and fact committed by the Arbitrator as well as his failure to apply his mind properly to the dispute before him, and, in particular, to the gravity of the misconduct committed by the First Respondent, he came to a decision to which no reasonable arbitrator could have come.
- [4] As mentioned in the judgment, the award issued was the type of award that was arguably reviewable on its face, the Arbitrator, having found that the First Respondent was guilty of serious financial misconduct, proceeding, without foundation, to determine that the sanction of dismissal was unfair. An evaluation of the record revealed that the ultimate conclusion of the Arbitrator was unsustainable, both on the facts and on the law, and that, as a result of the various gross irregularities committed by him, the Arbitrator adopted an approach to sanction which was disproportionately, if not shockingly, lenient. To borrow from the parlance of earlier jurisprudence, the determination by the Arbitrator that the First Respondent should be reinstated was one that makes you whistle.

- [5] What stands out in the submissions is a contention that the Applicant was made aware by the First Respondent of the irregular so-called "*risk appointment*". This is not accurate. I was at pains to set out in the judgment that when the Applicant presented its case, there was no contention that the Applicant was aware of the contentious appointment. Even in his evidence in chief, the First Respondent conceded that, in violation of his obligation as the accounting officer, he had not reported the irregular appointment to the Municipal Council. The failure by the First Respondent to disclose his conduct meant, *inter alia*, that he could be held to account for the unlawful appointment which was worth millions of Rands. To put it colloquially, the facts demonstrated that the First Respondent took a deliberate decision not to account for what he had done. Contrary to what is submitted in support of the application for leave to appeal and contrary to what was found by the Arbitrator, such conduct does contain an element of dishonesty (albeit in the form of an omission). This is aside from the circumstance that, irrespective of whether there was dishonesty present, the misconduct committed by the First Respondent was destructive of the employment relationship on its own terms, something which the Arbitrator would have appreciated, had he properly applied his mind.
- [6] The First Respondent also complains that the judgment has resulted in bad publicity. It was contended in the submissions that the First Respondent had, in the media, been referred to as a "*crook*". To be clear, I did not find that the Arbitrator should have found that the First Respondent guilty of corruption or theft. I also did not find that the Arbitrator should have found him guilty of having personally benefited from his misconduct. That being said, negative or unfair publicity does not, in and of itself, constitute a self-standing ground justifying an appeal where otherwise none would lie, particularly so where, as in this case, the matter concerns the narrow interests of an individual employee. If anything, if a media outlet has not acted lawfully when it comes to a publication about a judgment, then the remedy of the First Respondent lies against that media house.

- [7] A further point was raised that this was a case where the dispute should have been remitted "... *back to the functionary for re-consideration*". I find this submission unpersuasive. Leaving aside that this was not a submission made by the First Respondent when the matter was argued (it was raised for the first time in the submissions), this was not a case where the issues were not properly ventilated. In the result, the Court was in as good a position as any arbitrator would have been to determine the matter on the merits, all the more so when the gravamen of the misconduct was not seriously in dispute. When it comes to labour disputes and the ethos of the Labour Relations Act, the watchwords are economy, expedition and finality. Where no purpose will be served in further delaying the finalisation of a matter, it has become part and parcel of our jurisprudence that the Labour Court will step in to resolve it. I would add that I also have reservations as to whether it might not offend one's sense of justice to remit the issue of sanction to an arbitrator who has already made up his mind on that question.
- [8] Lastly, a point was raised that the record was incomplete and that the review application should have been dismissed on this basis. No factual basis was laid as to why it was contended that the record was incomplete. No allegation was made as to which parts of the record were missing. When the matter was argued, no party contended that the record was incomplete and the Court was not in a position to adjudicate the review application. On the contrary, both counsel contended that, on the strength of the record, their respective clients should succeed. If a party is unhappy with the content of the record then ordinarily what should occur is that an objection should be noted in the answering affidavit.¹ This did not occur and, as mentioned, there was no suggestion during argument that the record was defective or that the Court was not in a position to adjudicate on the merits of the matter.² For these

¹ Lubbe v Roop NO & Others (2012) 33 ILJ 1695 (LC) at para [7]; SACCAWU & Others v President, Industrial Tribunal & Another 2001 (2) SA 277 (SCA) at para [7].

² What did happen was that the Court, *mero motu*, initially drew the attention to the representatives that the record was incomplete in the sense that not all the hard copies of the transcript had been placed in the Court file. By way of amplification, although the full transcribed record was transmitted electronically to the Court, for reasons which were not explained the Applicant had not furnished a hard copy of the last portion. As appears from the judgment, it was the First Respondent's attorney himself (who is now responsible for the application for leave to appeal) who stepped into the breach and sorted out the record so that the Court was in a position to adjudicate the merits of the review application.

reasons, in my view, this last point borders on the disingenuous.

Order:

1. The application for leave to be appeal is dismissed.
2. There is no order as to costs.


P. N. Kroon
Acting Judge of the Labour Court of South Africa

Written submissions:

For the Applicant : Adv S Nzuzo

Instructed by : NE Mbewana Incorporated Attorneys

For the First Respondent: Mr Voyi of Voyi Incorporated Attorneys