



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case No: 2025 – 082814

In the matter between:

SELLO MOLAPANE MOTHOTOANA

Applicant

and

JOHANNESBURG SOCIAL HOUSING CO. (SOC) LTD First Respondent

THEODORE DHLAMINI NO

Second Respondent

THANDEKA TSHABALALA NO

Third Respondent

MUSA SHIBAMBO NO

Fourth Respondent

THULANI MDADANE NO

Fifth Respondent

TABISA POSWA NO

Sixth Respondent

ZAMIKHAYA XALISA NO

Seventh Respondent

LAWRENCE NDLOVU NO

Eighth Respondent

NTOKOZO MJIYAKO BAYIPHIWE SIMELANE NO

Ninth Respondent

JASON SOBEKWA NO

Tenth Respondent

Summary: Application for leave to appeal dismissed.

Date issued: 8 September 2025

JUDGMENT

DANIELS J

Introduction

[1] This relates to the application for leave to appeal against the judgment dated 24 June 2025. In the application, the applicant sought final relief, based on an alleged breach of his employment contract by the first respondent.

Test for leave to appeal

[2] Section 17(1) of the Superior Courts Act No. 10 of 2013 provides that leave to appeal may only be given where the court 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. In *S v Smith*¹ the court emphasized that a reasonable prospect of success postulates a “dispassionate decision, based on the facts and the law, that a court of appeal could reasonably arrive a conclusion different to that of the trial court.” In *MEC for Health, Eastern Cape v Mkhitha and Another*² the court held that there “must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal”. It is plain that an application for leave to appeal must present an objectively sound and rational basis to conclude that there are reasonable prospects of success. This is a high threshold. Accordingly, leave to appeal is not merely for the asking.

¹ 2012 (1) SACR 567 (SCA)

² [2016] JOL 36940 (SCA) at paras 16 – 17.

Grounds for leave to appeal

[3] To be perfectly honest, I find it hard to distinguish between the various grounds for leave to appeal.

[4] In the main, the applicant alleges that:

4.1 The court erred in its application of the *Plascon Evans* rule and it should have found that there was no real, genuine or bona fide dispute of fact.

4.2 The first respondent cannot be permitted to approbate and reprobate, because it made an election to discipline the applicant for misconduct and it is bound by its election.

4.3 The employment contract excluded the principle of repudiation.

4.4 There was no written agreement to second the applicant between 1 January and 31 March 2025.

4.5 The court should not have issued a cost order against it.

Analysis

[5] In para 6 of its judgment, the court held that the matter must be resolved on the following facts: (1) the applicant failed to tender his services, for a period of three months, without being excused from doing so, and (2) when given an opportunity to explain his conduct, the applicant failed to do so. In my view, there was no basis to reject these factual averments, by the first respondent, as being far-fetched or untenable.

[6] The applicant seeks to apply the principles relating to peremption to this matter. In *Mhlontlo Local Municipality & others v Ngcangula & another*³ the Supreme Court of Appeal (SCA) explained peremption in the following manner:

“The principle of peremption safeguards the integrity of the judicial process by preventing litigants from oscillating between contradictory positions, ensuring judicial consistency and fairness. It ensures finality and stability in legal proceedings, which is essential for maintaining public trust in the justice system. The underlying principle of the doctrine of peremption is that a litigant cannot take two inconsistent positions.”
(own emphasis)

[7] Peremption is about safeguarding the integrity of the judicial process. It is not about ensuring that humans and institutions behave consistently. Accordingly, if the first respondent failed to clearly or consistently articulate that applicant had repudiated his contract, this did not preclude it from accepting his repudiation.

[8] The applicant submits that his employment contract excluded the common law principle of repudiation. No basis was laid for the submission. In any event, it was not pleaded.

[9] There is no authority for the proposition that repudiation no longer forms part of our law because of section 186(1) of the LRA. In *Albany Bakeries Ltd v Van Wyk & others*⁴ the Labour Appeal Court recognized that repudiation remains part of our employment law.

[10] I do not understand the submission that there was no agreement to second the applicant between 1 January and 31 March 2025. Until the services of the applicant terminated, he remained an employee, and was required to tender his services.

³ (2024) 45 ILJ 775 (SCA) at para 13

⁴ (2005) 26 ILJ 2142 (LAC) at paras 24 – 26

[11] In relation to costs, this matter related to an alleged breach of an employment contract. As such, the dispute was not a labour matter but a civil matter governed by the BCEA. The provisions of section 162 of the LRA were inapplicable.⁵

Conclusion

[12] For the reasons set out above, the application for leave to appeal falls to be dismissed.

RN Daniels

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

Adv V Ndebele

Buthelezi Inc

For the Respondents:

Mr J Norval

ENS Africa Attorneys

⁵ *RFS Administrators (Ptd) Ltd v Samons and Others* (JS 641/17) [2022] ZALCJHB 110 (30 August 2022) - confirmed on appeal *RFS Administrator v Samons* [2024] 7 BLLR 722 (LAC)