



**IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

Not Reportable

Case No. JR710/2019

In the matter between:

**LEVY MALATSE MOKONE**

**Applicant**

and

**EDUCATION LABOUR RELATIONS COUNCIL**

**First Respondent**

**COMMISSIONER R DE WET N.O**

**Second Respondent**

**GAUTENG DEPARTMENT OF EDUCATION**

**Third Respondent**

**Decided: In Chambers**

**Delivered: 17 July 2023**

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**JUDGMENT: APPLICATION FOR LEAVE TO APPEAL**

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**GOVENDER, AJ**

**Introduction**

- [1] The Applicant applied for leave to appeal on 20 April 2023. I will address the form of the application below, but in substance, the Applicant takes issue with what he conceives as a misdirection of the law and the overlooking of evidence that should have guided the Court differently.

[2] Other than this generic description of why the Applicant believes that the Court erred and made a finding that cannot be left unchallenged, there is no actual engagement on what the grounds of review are, nor what the alleged evidence which was overlooked is.

[3] I now turn to address the test on leave to appeal.

#### Test on leave to appeal

[4] Section 17 of the Superior Courts Act<sup>1</sup> regulates when leave to appeal may be granted. Section 17(1) provides as follows:

‘(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that –

- (a)(i) the appeal would have a reasonable prospect of success; or
- (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;
- (b) the decision sought on appeal does not fall within the ambit of section 16 (2) (a); and
- (c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.’

[5] When deciding whether to grant leave to the Labour Appeal Court, the Labour Court must determine whether there is a reasonable prospect that another Court *would* come to a different conclusion than that of the Court *a quo*, or in other words, whether the appeal would have a reasonable prospect of success<sup>2</sup>.

<sup>1</sup> Act 10 of 2013.

<sup>2</sup> See Section 17(1)(a) of the Superior Courts Act; *Molefe v MMARAWU and Others* [2017] ZALCJHB 337 (13 September 2017); *Mbawuli v Commission for Conciliation, Mediation and Arbitration and Others* [2017] ZALCJHB 275 (1 August 2017); *Glencore Operations South Africa (Pty) Ltd v NUM obo Maripane and Others* [2017] ZALCJHB 147 (11 May 2017).

- [6] In *South African Clothing and Textile Workers Union and Others V Stephead Military Headwear CC*,<sup>3</sup> the Court held as follows:

‘It is trite that for an application for leave to appeal to be successful, it is required of the party seeking such leave to demonstrate that there are reasonable prospects that another court, in this instance, the Labour Appeal Court, would come to a different conclusion to that reached in the judgment that is sought to be taken on appeal...’

- [7] In *Member of the Executive Council for Health, Eastern Cape v Mkhitha and Another*,<sup>4</sup> the Court applied the concept of “*reasonable prospects of success*” as follows:

[16] 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 10 of 2013 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 it should be heard.

[17] 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.’ (Emphasis added)

- [8] In *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd and Others*<sup>5</sup>, the Court held that:

‘...The need to obtain leave to appeal is a valuable tool in ensuring that scarce judicial resources are not spent on appeals that lack merit. It should in this case have been deployed by refusing leave to appeal.’

<sup>3</sup> [2017] JOL 37932 (LC) at para 7. See also *Seathlolo and Others v Chemical Energy Paper Printing Wood and Allied Workers Union and Others* (2016) 37 ILJ 1485 (LC) at para 3.

<sup>4</sup> [2016] JOL 36940 (SCA) at paras 16 – 17.

<sup>5</sup> 2013 (6) SA 520 (SCA) at para 24

This application

- [9] Rule 30 of the above Honourable Courts Rules<sup>6</sup> regulates an application for leave to appeal to the Labour Appeal Court.
- [10] Rule 30(1) provides that an application for leave to appeal may be made, by way of a statement of the grounds for leave, at the time of the judgment or order.
- [11] Rule 30(2) provides that if leave to appeal has not been made at the time of the judgment or order, an application for leave to appeal must be made, and the grounds for appeal must be furnished within 15 days of the date of the judgment or order against which leave to appeal is sought, except that the Court may, on good cause shown, extend that period.
- [12] It is accepted practice for an application for leave to appeal to be done by way of a notice setting out the grounds upon which leave to appeal is sought.
- [13] That the Applicant has brought his application for leave to appeal on notice, with a supporting affidavit, does not contravene Rule 30 and is permissible.
- [14] Judgment was handed down on 5 April 2023, and the application for leave to appeal, which was brought on 20 April 2023, does fall within the 15-day period required by Rule 30(2).
- [15] The application for leave to appeal was unopposed. Neither party filed submissions in terms of Rule 30(3)(A), read with clause 15.2 of the Labour Court Practice Manual<sup>7</sup>.
- [16] The application for leave to appeal falls short on substance. The Applicant has failed to distil any substantive grounds which would justify leave to appeal and has simply referred to a misdirection of the law and the overlooking of material evidence, by way of concessions allegedly made by the Third Respondent's witnesses, generically.

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<sup>6</sup> GN 1665 of 1996: Rules for the conduct of proceedings in the Labour Court.

<sup>7</sup> Practice Manual of the Labour Court of South Africa, effective 2 April 2013.

- [17] The Applicant's review application is some *three and a half years late* and was initially brought without a condonation application. The Applicant, then in contravention of a court order, filed his condonation application late, despite the golden opportunity to do so. The Applicant's explanation for the delay is wanting in material respects and does not account for every period of the excessive delay, which is required whenever condonation is sought. Without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial.
- [18] Despite this, the Court considered the prospects of success and found that the serious allegations of pupils being assaulted by the Applicant were not disturbed during cross-examination. The Commissioner was alive to his duties by grappling with conflicting versions and the credibility of witnesses, which is evident from the arbitration award.
- [19] Ultimately, the arbitration award is one that a reasonable decision-maker could reach, having regard to the body of evidence placed before her, thereby necessitating the dismissal of the condonation and review applications without costs.
- [20] There is no basis for this Court to conclude that another Court would reach a different conclusion.
- [21] In the premises, I make the following order:

Order

1. The application for leave to appeal is dismissed with no order as to costs.

T. Govender

Acting Judge of the Labour Court of South Africa