

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JS 612/20

In the matter between:

MZOLISI NJOKWENI

First Applicant

FERHANA DOCRAT

Second Applicant

GIFT NYOKA

Third Applicant

NISIPHO GUMEDE

Fourth Applicant

SALEH KADIR

Fifth Applicant

CHANNEL FRANCIS

Sixth Applicant

and

MOBILE TELEPHONE NETWORKS (PTY) LTD

Respondent

Decided: In Chambers

Delivered: 20 October 2023

JUDGMENT: LEAVE TO APPEAL

NKUTHA-NKONTWANA, J

Introduction

[1] In this application, Mobile Telephone Networks (Pty) Ltd (MTN), the respondent in the main application, seeks leave to appeal the whole judgment

and the order. In this judgment, I will, however, continue to refer to the parties as reflected in the original citation.

[2] In broad terms, the main application concerned MTN opposing the relief sought by the applicants and took two legal points. Firstly, whether the applicants are, in law, entitled to payment of their salaries for the period from 1 December 2010 until 14 December 2017, since they did not tender their services to MTN during that period. Secondly, and alternatively, whether a part of the applicants' claims has prescribed.

[3] The matter served before me on 8 June 2023 and on 21 July 2023, I gave judgment with the following order:

- '1. The legal points raised by the respondent (Mobile Telephone Networks (Pty) Ltd) are dismissed.
2. The respondent shall pay the applicants (Njokweni and 5 others) the arrear remuneration due to them in accordance with their contracts of employment for the period between 1 December 2010 to 14 December 2017.
3. The calculation of the quantum of the arrear remuneration is deferred to a hearing in due course.
4. MTN shall pay the applicants' costs.'

[4] On 11 August 2023, the respondent filed an application for leave to appeal and the applicant filed its notice to oppose such leave to appeal on 28 August 2023. This was followed by the written submissions from both the applicant and the respondent as contemplated by Rule 30 (3A) of the Labour Court Rules¹ and Clause 15.2 of the Practice Manual².

¹ GN 1665 of 1996: Rules for the Conduct of Proceedings in the Labour Court.

² Practice Manual of the Labour Court of South Africa, effective 2 April 2013.

- [5] Clause 15.2 of the Practice Manual further provides that an application for leave to appeal will be determined by a Judge in chambers unless the Judge directs otherwise. I see no reason to direct otherwise and will therefore determine the leave to appeal application in chambers.

Ground of Appeal

- [6] The respondent seeks leave to appeal against the judgment on three respective grounds, namely:

- '5.1 Finding that the applicants were not required to tender their services in order to claim their salaries pursuant to a section 197 transfer.
- 5.2 Finding that the applicants' claim for their salaries had not prescribed because their entitlement to claim their salaries had only arisen pursuant to the judgment of Lagrange J on 6 December 2017 ("Lagrange Judgment").
- 5.3 Finding that the section 197 application launched on 11 May 2011 in the Pillay case interrupted prescription in this matter.'

The test for leave to appeal

- [7] It is trite that there is no automatic right of appeal against a judgment of the Labour Court. This much is clear from section 166(1) of the Labour Relations Act³ (LRA) which provides that any party to any proceedings before the Labour Court may apply for leave to appeal to the Labour Appeal Court (LAC) against any final judgment or final order of the Labour Court. To be entitled to leave to appeal, an applicant in an application for leave to appeal must satisfy this Court that there is a reasonable prospect that another court would come to a different conclusion.⁴

³ Act 66 of 1995, as amended.

⁴ See *Woolworths Ltd v Matthews* [1999] 3 BLLR 288 (LC).

[8] It is well accepted that for leave to appeal to be granted, the applicant should in essence show appeal would have a reasonable prospect of success. In *Member of the Executive Council for Health, Eastern Cape v Mkhitha and Another*⁵, the Court described '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 why 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.'

[9] In *Seatlholo and Others v Chemical Energy Paper Printing Wood and Allied Workers Union and Others*⁶, this Court confirmed that the test applicable in applications for leave for appeal is stringent and held as follows:

'The traditional formulation of the test that is applicable in an application such as the present requires the court to determine whether there is a reasonable prospect that another court may come to a different conclusion to that reached in the judgment that is sought to be taken on appeal. As the respondents observe, the use of the word

⁵ [2016] ZASCA 176; [2016] JOL 36940 (SCA) at paras [16] – [17]. See also *Smith v S* [2011] JOL 26908 (SCA) at para [7]; *Greenwood v S* [2015] JOL 33082 (SCA) at para [4]; *Kruger v S* [2014] JOL 31809 (SCA) at para [2]; *Acting National Director of Public Prosecutions and Others v Democratic Alliance In Re: Democratic Alliance v Acting National Director of Public Prosecutions and Others* (Society for the protection of our Constitution as amicus curiae) [2016] JOL 36123 (GP).

⁶ [2016] ZALCJHB 72; (2016) 37 ILJ 1485 (LC).

“would” in s 17(1)(a)(i) is indicative of a raising of the threshold since previously, all that was required for the applicant to demonstrate was that there was a reasonable prospect that another court might come to a different conclusion (see *Daantjie Community and others v Crocodile Valley Citrus Company (Pty) Ltd & another* (75/2008) [2015] ZALCC7 (28 July 2015)). Further, this is not a test to be applied lightly – 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 the expeditious resolution of labour disputes necessarily requires that appeals be limited to those matter 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 (see the judgment by Davis JA in *Martin and East (Pty) Ltd v NUM* (2014) 35 ILJ 2399 (LAC), and also *Kruger v S 2014 (1) SACR 369 (SCA)* and the ruling by Steenkamp J in *Oasys Innovations (Pty) Ltd v Henning and another* (C536/15, 6 November 2015).⁷

[10] It is apparent from the above authorities that the test is not whether there is a possibility that another court could come to a different conclusion, the test is whether there is a reasonable prospect that another court would come to a different conclusion.

[11] In the present instance, MTN is refusing to accept the consequences of its failed legal strategy. In *Mobile Telephone Networks (Pty) Limited v Pillay and Others*⁸ (*Pillay II*), the LAC determinedly pronounced on the issues which are the subject matter of this application. Obviously, MTN is clutching at straws, hoping to get a second bite at the cherry.

⁷ Id at para [3].

⁸ [2019] ZALAC 35; (2019) 40 ILJ 2011 (LAC).

[12] It is absolutely evident from the impugned judgment that there is no reasonable prospect that the factual matrix would receive a different treatment by the LAC or that the LAC would come to a different conclusion.

Conclusion

[13] I have considered the submissions by both parties also the grounds in support for appeal and applying the applicable test, I am not convinced that the respondent has made out a case that passed the test and high threshold of a reasonable prospect that another court would come to a different conclusion.

[14] In the premises, I make the following order:

Order

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

P Nkutha-Nkontwana
Judge of the Labour Court of South Africa