THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Not reportable

Case no P 143/13

In the matter between

PUMLA ELIZABETH VAZI Applicant

And

MEC FOR HEALTH EASTERN CAPE
First Respondent

HEAD OF DEPT. FOR EASTERN CAPE Second Respondent
DEPT OF HEALTH

PUBLIC HEALTH AND SOCIAL

DEVELOPMENT SECTORAL BARGAINING COUNCIL Third Respondent

MANGISI MRWEBI *N.O* Fourth respondent

Date delivered: 7 September 2017

RULING: APPLICATION FOR LEAVE TO APPEAL

VAN NIEKERK J

[1] This is an application for leave to appeal against the whole of the court's judgment delivered on 6 October 2016, when the court dismissed with costs an application to review and set aside an arbitration award issued by the fourth respondent. In the award, the fourth respondent had upheld the applicant's dismissal. The court held that the outcome of the proceedings under review fell within a band of decisions to which a reasonable decision-maker could come on the available material.

[2] The test to be applied is that referred to in s 17 of the Superior Courts Act, 10 of 2013. Section 17(1) provides:

> 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.

[2] The application for leave to appeal was filed late. The explanation proffered by the applicant's attorney relates to the delay in his receiving a copy of the judgment, which was delivered in Johannesburg. The explanation is acceptable, and the late filing of the application is condoned.

[3] The test in the present application, accurately stated, is not one that 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. The use of the word "would" in s17 (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 and another* (75/2008) [2015] ZALCC 7 (28 July 2015). Further, this is not a test to be applied lightly – the Labour Appeal Court has had occasion to observe that this court ought to be cautious when leave to appeal is granted. The statutory imperative of the expeditious resolution of labour disputes necessarily requires that appeals be limited to those matters 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 & 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 & another* (C 536/15, 6 November 2015).

[4] The grounds on which leave to appeal is sought are in essence those proffered in support of the review application. The fact that the arbitrator failed to deal with the issue of delay does not in itself render the award reviewable – there was an explanation for the delay, one which the arbitrator clearly elected to accept. This court's right to intervene is limited by the reasonableness threshold that is to be applied; even if the court would have decided the issue differently, that is not a

sufficient basis for review. Similarly, the decision to admit the evidence of Sutcliffe (in the form of the opinions expressed by him in relation to the documents that were introduced through him) does not in itself render the award reviewable. Arbitrators are afforded a wide latitude by the Act as to conduct proceedings with the minimum of formality. It warrants repeating that despite her being legally represented in the arbitration hearing, there was no objection to the introduction of the forensic report or to Sutton's evidence. In any event, as observed in paragraph 19 of the judgment, the Labour Appeal Court has upheld findings of dismissal made on the basis of a forensic report, introduced into evidence by the investigator.

[5] The arbitrator appreciated the nature of the enquiry and applied the correct test. The review test condones a failure to take into account material facts and a flawed assessment of the evidence, provided of course that on a totality of all of the evidence, the outcome of the proceedings under review falls within a band of decisions to which a reasonable decision maker could come. This necessarily entails an examination of the record of the arbitration proceedings and an assessment of the reasonableness of the outcome. What the applicant sought to do in the review (and pursues in the present application) is to raise and canvass issues that ought more properly to have been raised in the arbitration hearing. It is not open to a party to argue a case on review that ought more properly to have been argued before the arbitrator. The applicant made a number of decisions in regard to the conduct of the arbitration hearing – their consequences cannot be undone by way of review. I am not persuaded that any appeal would have a reasonable prospect of success. The application for leave to appeal stands to be dismissed.

I make the following order:

1. Leave to appeal is refused, with costs.

Andre van Niekerk

Judge