IN THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

Not Reportable

Case no: PR 141/17

In the matter between:

JD GROUP (PTY) LTD (A DIVISION OF PEPKOR

t/a JOSHUA DOORE **Applicant**

and

PLAATJIES, S *N.O* **First Respondent**

SACCAWU OBO INGRID COETZEE **Second Respondent**

Decided: In Chambers

Delivered: 31 May 2019

JUDGMENT - LEAVE TO APPEAL

MAHOSI. J

[1] This is an application for leave to appeal against the whole judgment of this Court handed down on 03 April 2019 in terms of which the Court dismissed the applicant's review application. The application is opposed by the second respondent.

[2] The applicant brought this application on the basis that the Court erred in fact and in law in dismissing its review application in that it failed to properly appreciate and apply the applicable review test and to deal with the applicant's case. It is the applicant's case that the arbitrator ignored material evidence, made credibility findings totally out of kilter with evidence as it appeared on the record, in particular the evidence of the second respondent. The applicant's further ground of appeal was that the Court erred in failing to deal with the probabilities as raised in the applicant's review application and the ground that reinstatement was not appropriate by virtue of the application of section 193(2)(b) of the Labour Relations Act[1] (LRA).

[3] It was the applicant's submission that the Court deprived it of a fair and proper determination of the case and further that, had the Court properly considered the evidence as a whole, the only conclusion that the Court could have reached is that the arbitrator's outcome is entirely unreasonable.

[4] In opposing the application, the second respondent submitted that the application for leave to appeal is without merits and falls to be dismissed with costs in that the award is above reproach even when measured by the yardstick of reasonableness. Further that there was no reason for the arbitrator to deny the second respondent her primary remedy of reinstatement after finding that she had not committed misconduct for which she has been dismissed.

[5] The traditional test in determining whether to grant an application for leave to appeal is whether there is a reasonable prospect that another court may come to a different conclusion.[2] In terms of section 166(1) of the LRA, a party to proceedings before the Labour Court, may apply to the Labour Court for leave to appeal to the Labour Appeal Court (LAC) against any final judgment or final order of the Labour Court. Section 17 of the Superior Court Act,[3] which applies to the

[1] Act 66 of 1995 as amended.
[2] See *Karbochem Sasolburg (A Division of Sentrachem Ltd) v Kriel and Others* (1999) 20 ILJ 2889 (LC) at 2890B; *Ngcobo v Tente Casters (Pty) Ltd* (2002) 23 ILJ 1442 (LC) at 1443 para 2 and *Tsotetsi v Stallion Security (Pty) Ltd* (2009) 30 ILJ 2802 (LC) at 2804 para 14.
[3] Act 10 of 2013.

Labour Court, regulates instances in which the appeal may be granted. Section 17(1) provides as follows:

> 'Leave to appeal may only be given where the judge or judges are of the opinion that–
>
> (a)
>
> (i) the appeal would have a reasonable prospect of success; or
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> (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;
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> (b) the decisions sought on appeal does not fall within the ambit of section 16(2)(a); and
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> (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 issue between the parties.'

[6] Section 16(2)(a) of the Superior Court Act provides as follows:

> '(i) When at the hearing of the appeal the issues are of such a nature that the decision sought will have no practical effect, the appeal may be dismissed on this ground alone.
>
> (ii) save under exceptional circumstances, the question whether the decision would have no practical effect or result is to be determined without reference to any consideration of costs.'

[7] In *Martin and East (Pty) Ltd v National Union of Mineworkers and Others,*[4] the LAC made it clear that leave to appeal is not simply there for the taking, and that this Court must be cautious in granting leave to appeal and in assessing the requirement of the prospect of success. In this case, the Court stated as follows:

[4] (2014) 35 ILJ 2399 (LAC) at 2405-2406.

'…The Labour Relations Act was designed to ensure an expeditious resolution of industrial disputes. This means that courts, particularly courts in the position of the court *a quo,* need to be cautious when leave to appeal is granted, as should this Court when petitions are granted.

There are two sets of interests to consider. There are the interests of the parties such as appellant, namely who are entitled to have their rights vindicated, if there is a reasonable prospect that another court might come to a different conclusion. There are also the rights of employees who land up in a legal "no-man's-land" and have to wait years for an appeal (or two) to be prosecuted.

This was a case which should have ended in the labour court. This matter should not have come to this court. It stood to be resolved on its own facts. There is no novel point of law to be determined nor did the Court *a quo* misinterpret existing law. There was no incorrect application of the facts; in particular the assessment of the factual justification for the dismissals/alternative sanctions.

I would urge labour courts in future to take great care in ensuring a balance between expeditious resolution of a dispute and the rights of the party which has lost. If there is a reasonable prospect that the factual matrix could receive a different treatment or there is a legitimate dispute on the law that is different. But this kind of case should not reappear continuously in courts on appeal after appeal, subverting a key purpose of the Act, namely the expeditious resolution of labour disputes.'

[8] Having had regard to the applicant's submissions, I am not persuaded that there are reasonable prospects of a successful appeal. As such, I am of the view that this application is without merit and must be dismissed.

[9] With regard to costs, taking into account the requirements of law and fairness, I am of the view that this is a matter in which there should be no order as to costs.

[10] Accordingly, I make the following order:

Order

1. The application for leave to appeal is dismissed.

2. There is no order as to costs.

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D. Mahosi

Judge of the Labour Court of South Africa