

**IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT CAPE TOWN**

Case no: C 835/10

In the matter between:

NKOSINATHI ELVIS MPELO

Applicant

and

CCMA

First respondent

Commissioner C HENNEY

Second respondent

KELLY INDUSTRIAL

Third respondent

RULING ON LEAVE TO APPEAL

STEENKAMP J:

INTRODUCTION

[1] This is an application for leave to appeal against my *ex tempore* judgement of 24 May 2011. In that judgement, I dismissed the application for review with no order as to costs.

[2] In terms of a directive of this court issued in terms of rule 30(3A)(b), the applicant was to deliver his submissions by 24 June 2011. He only did so on 27 June 2011. He applied for condonation on 11 July 2011. Since the applicant is unrepresented, I deem it in the interests of justice to grant condonation for the late filing of his submissions. The third respondent filed its submissions on 27 June 2011.

- [3] In deciding whether to grant leave to appeal, I need to consider whether there is a reasonable prospect that another court could come to a different conclusion.
- [4] In my judgement, I found that the Commissioner properly applied his mind to the evidence before him, and in considering the fairness of the applicant's dismissal, the Commissioner took into account relevant case law and the totality of circumstances in the evidence before him. His finding that the applicant's dismissal was fair, was one that a reasonable decision maker could reach.
- [5] Although the applicant's submissions are by no means clear, he appears to rely on alleged judicial bias or misconduct, without establishing any reasonable grounds for doing so.
- [6] The applicant raises six grounds of review. Firstly, he alleges:
- "By placing undue reliance that the applicant had accused the arbitrator of asking him misleading questions. The applicant furnish [sic] the honourable Mr Justice Steenkamp with clarity during the court proceedings that, the leading questions mentioned in the heads of argument were asked by the third respondent (which is the company) to its three witnesses during the arbitration process under the auspices of the CCMA, on the 19 August 2010."
- [7] I cannot find any substance to this allegation. In his heads of argument, the applicant said:
- "It's very questionable how the second respondent reached his findings this court because nowhere in the statements of the third respondent's witnesses did they substantiate also court the charges of misconduct, except for the leading questions posed by the third respondent. In order for the honourable court to have a clear understanding of the proceedings it would be advisable for the court to listen to the audio recordings made by the second respondent and revisited document D of the indexed records."
- [8] In his oral argument, I explained to the applicant that a full transcript of the arbitration proceedings was before me and that I have read through it. I challenged him to point me to the leading questions that he complained of. He could not do so. There is no substance to this ground of appeal.
- [9] The second ground of appeal is:

"By not considering the fact that the referrals contained in the applicant's head [sic] of argument reveals how the arbitrator misinterpreted and improperly obtained the facts and material evidence of this applicant. The applicant subsequently showed the Honourable Mr Justice Steenkamp paragraph 10 and 11 during this explanation that the version of the case was an injury on duty. And the referrals contained in the above mentioned paragraphs demonstrate reasonably that."

[10] This ground is also without substance. I made it clear in my judgement that the employee testified at the arbitration that the reason he went to the manager's office on 17 June 2010, was because he had sustained an injury on duty. But that does not detract from the fact that he acted in a disorderly fashion, and in an insubordinate manner towards the manager.

[11] The third ground of appeal is:

"By refusing to accept the applicant's explanation that the leading questions were asked by the third respondent, and not his description of the whole circumstances of the entire case. Although the applicant requested from Mr Justice Steenkamp to go through the documents in order to find the question raised by the Honourable Mr Justice Steenkamp, and as the applicant could not find that statement but Mr Stringer insisted that I should answer that question was irrelevant to my statements contained in my record and reliable documents."

[12] The applicant's complaint appears to be that he could not find a document. This appears to relate to an occasion when I questioned him about his allegation that the arbitrator had asked leading questions. He could not refer me to any instance in the record whether this was the case. There is no substance to this ground of appeal.

[13] The fourth ground of appeal is:

"By ignoring biased decision taken by the arbitrator for considering only what was said by the third party."

[14] As I pointed out in my judgement, this is simply not true. The arbitrator summarised the applicant's evidence in his award and applied his mind to it.

[15] The fifth ground of appeal is:

"By holding the court proceedings privately and they were confusing as the learned judge did not open the as normally done by a court of law whereby participants in the proceedings do so under oath but instead he asked the irrelevant questions to the applicant party that he should point out him,

whereupon the records does it state that the arbitrator asked the applicant misleading questions."

[16] This allegation borders on contempt. The Labour Court is a court of record¹ and its proceedings are open to the public. The applicant is lying when he alleges that the court proceedings were held privately.

[17] The final ground of appeal is:

"By not listening to the applicant's explanation that in his conscience he was expecting that the court proceedings will deal his heads of argument paragraph by paragraph and use referrals that are mentioned to enable the court to observe where and how the arbitrator was biased towards applicant and improperly obtained facts and evidence of the applicant, for example paragraph 16 of the heads of argument last not even considered although it had a strong bone of contention."

[18] I accept that, because the applicant is not represented, he may not understand how oral argument is conducted in court. The aim is not to read through each paragraph of a party's heads of argument. The parties can accept that the judge had already read through the heads of argument. It is against that background that the issues are discussed with the litigants. With regard to paragraph 16 of the applicant's heads of argument in the review application, that refers to a clear typographical error and not an indication of bias on the part of the arbitrator.

[19] There is no reasonable prospect that another court could come to a different conclusion on appeal.

[20] The only reason in law or equity that I will not order the applicant to pay the third respondent's costs. In this application is because he has unrepresented, and possibly indigent.

[21] The application for leave to appeal is dismissed. There is no order as to costs.

¹ LRA s 151(3)

STEENKAMP J

Date of judgment: 5 August 2011

For the applicant: In person

For the third respondent: AJ Hamilton, Hamilton attorneys