



THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Not Reportable

Case no: C257/2016

In the matter between:

DEON ARTHUR JEFTHA

Applicant

and

SA METAL GROUP (PTY) LTD

Respondent

Decided in Chambers

Dated: 17 October 2016

JUDGMENT- APPLICATION FOR LEAVE TO APPEAL

TLHOTLHALEMAJE, J

- [1] The applicant's application to make certain portions of the award issued under case number WECT17537-16 an order of court in terms of the provisions of section 158 (1) (c) of the Labour Relations Act was dismissed with costs in terms of a judgment handed down on 23 August 2016.

- [2] On 13 September 2016, the applicant launched an application for leave to appeal against that judgment, and his written submissions were filed on 27 September 2016. The respondent opposed the application.
- [3] Essentially, the applicant's contention is that the Court erred in its findings and therefore did not correctly exercise its discretion to make the severance pay award an order of court in terms of section 158 (1) (c) of the LRA.
- [4] The respondent opposed the application on the basis that first, the judgment was not final in effect and was therefore not appealable. The second ground relied upon was that there were no reasonable prospects that the Labour Appeal Court would overturn that judgment bearing in mind that the applicant sought to appeal against the exercise of a judicial discretion.
- [5] It is trite that the test to be applied in applications of this nature is whether there are reasonable prospects that another court might come to a different conclusion to that of the Court a quo¹. In *S v Smith*² Plasket AJA observed that:
- "What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law, that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote, but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal"*
- [6] To the extent that in coming to its conclusion, the court a quo had exercised its judicial discretion, the decision in this regard is not appealable merely on the basis that another court could reasonably come to a different one. The applicable test as enunciated by the LAC in *NUMSA v Fibre Flair cc t/a Kango Canopies*³ is whether or not it can be said that, in exercising its discretion, the

¹ National Union of Metal Workers of South Africa v Jumbo Products CC 1996 (4) SA 735 (A) at 742B

² 2012 (1) SACR 567 (SCA) at para [7]

³ (2000) 21 ILJ 1079 (LAC) 1081G – 1082A

court a quo did so "capriciously, or upon a wrong principle, or in a biased manner, or for insubstantial reasons, or committed a misdirection or irregularity, or failed to exercise discretion, or exercised it improperly or unfairly."

- [7] I have had regard to the grounds upon which leave to appeal is sought, and the basis upon which the application is opposed. Further having reflected on my judgment, I come to the conclusion that there is no basis upon which the Labour Appeal Court may come to a different conclusion on the matter. My conclusions in this regard are based on the following considerations;
- [8] In the judgment, it was specifically made clear that the main application was premature in the light of the dispute before the MEIBC. Secondly, it was common cause that there was a review application as launched by the respondent that was pending. It therefore follows that the applicant's contention that the current order dismissing the application to enforce the severance pay award was final, or that the order has the effect of setting aside the arbitration award is misleading, as the applicant still has a mechanism of enforcing the award once those disputes have been determined. There is no basis for a contention that any future application in terms of section 158 (1) (c) can be met with a defence of *res judicata*. In the light of these factors, I am in agreement with the respondent's contention that the order is not final in effect. Such orders as the applicant should have known or anticipated, are not appealable.
- [9] There is nothing in the grounds upon which leave to appeal to suggest that in exercising my discretion and dismissing the section 158 (1) (c) of the LRA application, I had done so capriciously, or upon a wrong principle, or in a biased manner, or for insubstantial reasons, or committed a misdirection or irregularity, or failed to exercise that discretion, or exercised it improperly or unfairly. The applicant has not proffered any grounds upon which it can be said that there are exceptional circumstances necessitating interference with my discretion. A mere allegation that the discretion was not exercised correctly cannot form a basis for leave to appeal. There are thus no reasonable prospects based on either the facts or the law that a court of appeal could reasonably arrive at a

conclusion different to that arrived at by this court. There is in essence, no sound or rational basis for that conclusion to be reached.

- [10] The respondent sought a cost order in the event that the application for leave to appeal was dismissed. I have had regard to considerations of law and fairness in awarding costs, in the same manner as I had done when such costs were awarded in the main application. The applicant had also sought leave to appeal in regards to the award of costs in the light of the dispute pertaining to notice pay having been settled subsequent to the hearing of the main application. To the extent that this aspect of the dispute was settled after the main application was heard, that on its own cannot be a sound ground for seeking leave to appeal. For the purposes of this application however I am not persuaded that there is a reason for making a further cost order.

Order:

- i. The application for leave to appeal is dismissed.
- ii. There is no order as to costs

Tlhotlhemaje, J

Judge of the Labour Court of South Africa