



IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable

Case no: C 1034/15

In the matter between:

SHAUNA PATRICIA PAMPLIN

Applicant

and

WESTERN CAPE EDUCATION DEPARTMENT

First Respondent

EDUCATION LABOUR RELATIONS COUNCIL.

Second Respondent

GAIL McEWAN N.O

Third Respondent

HILTON PALANYANDI

Fourth Respondent

Delivered: 20 September 2018

RULING – APPLICATION FOR LEAVE TO APPEAL

TLHOTLHALEMAJE, J:

- [1] Judgment was delivered on 9 May 2015 in terms of which the award of the third respondent (Commissioner) dated 13 October 2015 was reviewed and set aside, resulting in the matter being remitted back to the second respondent (ELRC). In the arbitration award, it was found that the applicant (Pamplin) had failed to discharged her onus it terms of the requirements of section 186(2) of the Labour Relations Act (LRA).¹

¹ Act 66 of 1995 (as amended)

- [2] The first respondent on 28 May 2018 filed an application for leave to appeal against this Court's judgment and order. The application for leave to appeal together with the submissions filed on 11 June 2018 only came to my attention on 18 September 2019. The application as at the writing of this ruling remained unopposed.
- [3] The facts leading to the dispute are sufficiently summarised in the Commissioner's award and the judgment of this Court. The contents of the judgment also speak for themselves and no purpose would be served by repeating same. The first respondent seeks leave to appeal on a variety of grounds, including that;
- 3.1 The conclusion by the Court (that there existed a positive duty on both the Commissioner and the first respondent to source the evidence of the HOD and further that the drawing of an adverse inference by Commissioner against the applicant for not sourcing the evidence of the HOD was unwarranted and thus amounted to a reviewable irregularity) is in contrast with the trite principle on review of arbitration awards.
 - 3.2 The Court impermissibly resolved the matter by assessing the rationality of the Commissioner's arbitration award thereby adopting a *process review* as opposed to the accepted standard of assessing the totality of the evidence and considering whether the outcome was reasonable in the circumstances.
 - 3.3 There is no evidences from the record of the arbitration proceedings that the Commissioner made an adverse inference against the applicant [for not calling the HOD as a witness] and further that the Court in its judgment did not identify those adverse inferences reached by the Commissioner which justified the setting aside of the arbitration award.
 - 3.4 The Court's conclusion that the Commissioner's failure to subpoena the HOD and/or the failure to caution the applicant of the consequences of the failure to subpoena the HOD constituted a

reviewable irregularity is not supported by this Court's previous jurisprudence which holds that commissioners are barred from calling witnesses to assist a party to discharge its burden of proof.

3.5 The approach adopted by this Court in the first respondent's view has the potential of creating perception of bias in favour of the employee to the detriment of the employer.

3.6 The approach of this Court that a Commissioner is permitted [in terms of the provisions of section 138(1) read with section 142(2) of the LRA] to direct the proceedings is a misinterpretation of the decision in *Land Bank v Nowosenetz N.O & Others*.²

[4] The principles applicable in a determination of applications for leave to appeal are trite as further codified in the provisions of section 17(1)(a)(i) and (ii) of the Superior Courts Act³. In essence, an application for leave to appeal will succeed where there are reasonable prospects of success on appeal or where there are other compelling reasons why the appeal must be constituted, including but not limited to conflicting judgments on the subject issue.

[5] The test for reasonable prospect of success was explained in *S v Smith*⁴ as follows:

'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 succeed on appeal and that those prospects are not remote but have 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 an appeal'.

² (2013) 34 ILJ 2608 (LC)

³ Act 10 of 2013

⁴ 2012 (1) SACR 567 (SCA) (15 March 2011) at para 7

[6] Having reflected on my judgment, and also having had regard to the grounds and the submissions relied upon in seeking leave to appeal, I have come to the conclusion that based on established legal principles, a case of reasonable prospects of success on appeal has not been made out.

[7] In the premises, the following order is made;

Order:

1. The application for leave to appeal the judgment and order of this court delivered on 9 May 2018 is dismissed.

E Tlhotlhemaje

Judge of the Labour Court of South Africa