IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

Not Reportable

Case no: D 989/15

In the matter between:

DEPARTMENT OF HEALTH
FOR THE PROVINCE OF KWAZULU-NATAL **Applicant**

and

HOSPERSA obo R PERUMAL **First Respondent**

PUBLIC HEALTH AND SOCIAL DEVELOPMENT

SECTORAL BARGAINING COUNCIL **Second Respondent**

A DORASAMY *N.O* **Third Respondent**

Decided: In Chambers

Delivered: 27 March 2019

JUDGMENT- LEAVE TO APPEAL

MAHOSI, J

[1] This is an unopposed application for leave to appeal against the whole judgment of this Honourable Court handed down on 28 December 2018 in terms of which the Court held as follows:

> '1. The arbitration award is reviewed and set aside and substituted with the following order:
>
> 1.1 The dismissal of the employee (Mr Perumal) was substantively fair.
>
> 2. Each party is to pay its own costs.'

[2] Parties are cited as they were in the review application.

[3] The applicant brought this application on the basis that the Court erred in applying the test for review to the facts that served before the Court in that there are discrepancies between the factual findings of the Court and the evidence that served before the third respondent. In this regard, the applicant's submission is that the Court's finding that the question of how the employee gained possession of the drugs was of no consequence is a misdirection on law. The applicant's

further submission is that the Court erred in substituting the third respondent's finding because theft was not the basis of the misconduct against the employee.

[4] 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 than that of the court *a quo*.[1] In terms of section 166(1) of the Labour Relations Act (LRA),[2] 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 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
>
> (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;
>
> (b) the decisions 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 issue between the parties.'

[1] 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.
[2] Act 66 of 1995 as amended.
[3] Act 10 of 2013.

[5] 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.'

[6] 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:

> '…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.

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

> 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.'

[7] Having had regard to the submissions, I am not persuaded that the applicant has made out a case for the granting of the leave to appeal or that it has showed good cause, or that there are reasonable prospects of a successful appeal or that there are some other compelling reasons why the appeal should be heard. As such, I am of the view that this application is without merit and must be dismissed.

[8] 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