

SOUTH AFRICA / JUDGMENT

Association of Mineworkers and Construction Union and Another v Edge Line Engineering (Pty) Ltd (Application for Leave to Appeal) (JS808/19) [2024] ZALCJHB 326 (30 August 2024)

[2024] ZALCJHB 326

COURT

Labour Court Johannesburg

BEFORE

L M Morgan

CASE / FILE NUMBER

JS808/19

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THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JS808/19

In the matter between:

ASSOCIATION OF MINEWORKERS AND CONSTRUCTION UNION First Applicant AMCU
MEMBERS AS PER ANNEXURE “X” Second to Further Applicants and EDGE LINE ENGINEERING
(PTY) LTD Respondent

Decided: In chambers

Delivered: 30 August 2024

Summary: Application for leave to appeal judgment and orders of a single Judge.

JUDGMENT IN APPLICATION FOR LEAVE TO APPEAL

MORGAN, AJ

Introduction

- [1] Edge Line Engineering (Pty) Ltd, the Respondent, has applied for leave to appeal against the judgment and paragraphs 1, 2 and 3 of the order of that judgment, which was delivered on 16 July 2024.

[2] The matter in which leave to appeal to the Labour Appeal Court is sought concerned the dismissal for operational reasons of the Second to Further Applicants, who are members of the Association of Mineworkers and Construction Union (AMCU) and former employees of the Respondent. This matter was brought in terms of section 191(5)(b)(ii) of the Labour Relations Act (LRA).[1]

[3] The Court made the following order:

“1. The condonation of the late filing of the Applicant’s statement of case is granted.

2. The dismissal of the Second to Further Applicants by way of retrenchment is substantively unfair.
3. The Respondent is ordered to reinstate those listed under annexure “X” from the date of dismissal, inclusive of back-pay.
4. There is no order as to costs.”

[4] It is this order that the Respondent seeks leave to appeal. The Applicant contends that this Court erred in law and in fact in that:

4.1 The Court erred by embarking on an enquiry into alleged discrimination against the AMCU members despite not being clothed with jurisdiction as envisaged in section 187 of the LRA;

4.2 The above Court erred by finding that the Applicants' retrenchments were substantively unfair in that it committed the following errors of fact and law:

4.2.1 This Court committed a factual error by finding that the retrenchments may have been a façade to target AMCU members;

4.2.2 The Court erred by finding that the closure and outsourcing of the Powder Coating Department does not constitute a valid rationale for retrenchment or that the subsequent engagement of subcontractors calls into question the authenticity of the Respondent's operational needs;

4.2.3 The Court made a factual error by finding that the Respondent secured two new business contracts subsequent to the retrenchment process, which calls into question the authenticity of the Respondent's operational needs;

4.2.4 The Court erred by failing to distinguish an enquiry into the rationale for retrenchment at the time of the retrenchment and an enquiry into the alleged new business contracts, the availability of new positions and whether the new positions were offered to the Applicants.

4.2.5 The Court erred by finding that the argument of financial distress was contradicted by the Respondent’s actions post retrenchment by finding that the Respondent acquired new contracts and that the Powder Coating Department continued operating.

4.3 The Court erred by finding that the Respondent did not adequately consider alternatives and that in finding that the Respondent failed to address the non-essential expenditures to avoid retrenchments.

4.4 The Court erred by finding that the appropriate relief is reinstatement.

- [5] The Respondent believes that there are reasonable prospects of success that a different court would find differently. Accordingly, it prays for the application of leave to appeal to be granted and a cost order to be made.
- [6] The Applicants oppose the application for leave to appeal. They argue that: (i) there is no point of law raised by the Respondent; (ii) there is no misapplication of the law to the facts; and (iii) the Court did not misinterpret the existing law.

Test for application to leave to appeal

[7] Section 17(1)(a) of the Superior Courts Act[2] sets out the test for leave to appeal:

'17.

(1) Leave to appeal may only be given where the judge or judges concerned 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 judgment on the matter under consideration.'

[8] The Supreme Court of Appeal (SCA) in *MEC for Health, Eastern Cape v Mkhitha and Another*[3] stated that leave to appeal should only be granted if there is a genuine reasonable prospect of success. Section 17(1)(a) of the Superior Courts Act stipulates that leave to appeal may be given only if the Judge in question believes the appeal has a reasonable prospect of success or there is another compelling reason for it to be heard.[4]

[9] An applicant requesting leave to appeal must convincingly show the Court, with valid reasons, that there is a reasonable likelihood or a realistic chance of success on appeal. It is not enough to merely indicate a possibility of success, present a debatable case, or demonstrate that the case is not without hope. There must be a solid and logical foundation to determine that there is a reasonable

prospect of success on appeal.[5]

[10] Recently, the SCA in *Ramakatsa and Others v African National Congress and Another*[6], considering the import of section 17(1)(a) of the Superior Courts Act, articulated that:

‘Turning the focus to the relevant provisions of the Superior Courts Act, leave to appeal may only be granted where the judges concerned are of the opinion that the appeal would have a reasonable prospect of success or there are compelling reasons which exist why the appeal should be heard such as the interests of justice. This Court in *Caratco*, concerning the provisions of s 17(1)(a)(ii) of the Superior Courts Act pointed out that if the court is unpersuaded that there are prospects of success, it must still enquire into whether there is a compelling reason to entertain the appeal. Compelling reason would, of course, include an important question of law or a discreet issue of public importance that will have an effect on future disputes. However, this Court correctly added that ‘but here too the merits remain vitally important and are often decisive’. I am mindful of the decisions at high court level debating whether the use of the word ‘would’ as opposed to ‘could’

possibly means that the threshold for granting the appeal has been raised. If a reasonable prospect of success is established, leave to appeal should be granted. Similarly, if there are some other compelling reasons why the appeal should be heard, leave to appeal should be granted. The test of reasonable prospects of success postulates 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 other words, the appellants in this matter need to convince this Court on proper grounds that they have prospects of success on appeal. Those prospects of success must not be remote, but there must exist a reasonable chance of succeeding. A sound rational basis for the conclusion that there are prospects of success must be shown to exist.’

[11] In a similar vein, the Supreme Court of Appeal in *Smith v S*[7] held, in relation to what constitutes “reasonable prospects of success” in terms of section 17(1)(a)(i) of the Superior Courts Act, 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.’

[12] Section 17 demands that a court would arrive at a different conclusion. It is not about the mere possibility that a court may arrive at a different conclusion but that it would. It is a higher threshold. The Supreme Court of Appeal has said as such. In *Kruger v S*[8], the Supreme Court of Appeal articulated the significance of the word ‘would’ and the normative weight it brings. The Court there said:

“Before dealing with the merits of the appeal, it is necessary at the outset to deal with the test applied by the high court in granting leave to appeal to this court. Despite dismissing the appellant’s appeal, the high court concluded that it was ‘possible’

that another court might arrive at a different conclusion and that leave to appeal should not be 'lightly refused' where the person concerned is facing a lengthy sentence of imprisonment. This is an incorrect test. What has to be considered in deciding whether leave to appeal should be granted is whether there is a reasonable prospect of success. And in that regard more is required than the mere 'possibility' that another court might arrive at a different conclusion, no matter how severe the sentence that the applicant is facing.

...

The time of this court is valuable and should be used to hear appeals that are truly deserving of its attention. It is in the interests of the administration of justice that the test set out above should be scrupulously followed." (My own emphasis).

[13] The new threshold is higher. This was affirmed by the Labour Court in *Seathlolo and Others v Chemical Energy Paper Printing Wood and Allied Workers Union and Others*.^[9] Dealing with section 17 of the Superior Courts Act, the Land Claims Court in *Mont Chevaux Trust v Tina Goosen and 18 Others*^[10] remarked:

'It is clear that the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion, see *Van Heerden v Cronwright & Others* 1985 (2) SA 342 (T) at 343H. The use of the word "would" in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against. This new standard is applied by Section 37 (4) (b) of the Restitution of Land Rights Act 22 of 1994 to this court's duty to consider the prospects of an intended appeal.'

[14] In any event, here is a summary of this. The legal threshold for granting leave to appeal is stringent, ensuring that only cases with a solid and realistic prospect of success proceed to higher courts. Section 17(1)(a) of the Superior Courts Act requires a thorough and dispassionate evaluation of the facts and law to determine whether an appellate court would reasonably arrive at a different conclusion. This standard was reaffirmed in key judgments by the Supreme Court of Appeal, including *Mkhitha* and *Ramakatsa*.

[15] The requirement for a "reasonable prospect of success" is more than a mere possibility or arguable case; it demands a sound, rational basis indicating that the appeal is truly deserving of judicial consideration. Misinterpretations suggesting a lower threshold have been corrected by the courts, emphasizing the necessity for a concrete and compelling case for appeal. This rigorous approach serves to uphold the integrity and efficiency of the judicial process, ensuring that appellate courts focus on matters with substantial merit and potential for a different outcome.

[16] It is also important to note that Labour Courts have to balance the 'expeditious resolution of a dispute and the rights of the party which [had] lost'. Davis JA reasoned:

'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.'[11]

Should leave to appeal be granted?

- [17] In considering the arguments before me, I am guided by the reasoning of previous judgments, which I find both correct and persuasive. First, this case does not present any arguable point of law. The core issue involved the straightforward application of established legal principles to the facts at hand, without challenging or developing any new legal tests. There was no real legal debate involved.
- [18] Second, it would be an overreach to suggest that this case holds broader public importance. For a case to meet that standard, it must transcend the parties' specific interests and have a significant impact on the public. Here, the judgment remains confined to the particular circumstances and parties involved, with no broader societal relevance.
- [19] In considering the application for leave to appeal, engaging rigorously with the legal standards governing such applications, particularly under section 17(1)(a) of the Superior Courts Act is essential. The threshold for leave to appeal is intentionally stringent, reflecting the principle that appeals should be reserved for cases with a genuine, substantial prospect of success. The test is not whether another court might come to a different conclusion but whether it would do so based on the evidence and legal principles. As repeatedly emphasised by the Supreme Court of Appeal, the use of the word "would" instead of "could" in section 17(1)(a) signifies a heightened threshold that demands more than the mere possibility of success or an arguable point of law.
- [20] The Applicant has failed to demonstrate that the appeal has reasonable prospects of success or that there is any compelling reason why it should be heard. The Respondent's grounds for leave to appeal are fundamentally flawed and do not meet the required legal threshold. The issues in dispute were primarily factual, and the court's findings were firmly grounded in a thorough analysis of the evidence presented during the trial.
- [21] The central issue before the court was whether the retrenchment of the affected employees was substantively fair. The Respondent asserted that the retrenchments were necessitated by operational requirements, citing financial distress and the need to close the powder coating department. However, the court carefully scrutinised this rationale and found it to be unconvincing. The powder coating department continued to operate after the retrenchments, and the respondent quickly engaged subcontractors to perform the work previously carried out by the dismissed employees. This contradicted the Respondent's claim that the retrenchments were driven by genuine operational needs.

- [22] Furthermore, the consultation process was marred by significant procedural flaws. The Respondent's failure to meaningfully engage with AMCU, particularly regarding alternatives to retrenchment, further undermined the fairness of the process. The Respondent rejected reasonable proposals out of hand, indicating that the decision to retrench was predetermined and not based on a genuine exploration of alternatives. As the Court concluded, the retrenchment process appeared to be a façade aimed at targeting union members rather than a legitimate response to operational requirements.
- [23] In assessing the merits of the application for leave to appeal, it is crucial to consider whether the issues raised are of sufficient legal or public importance to warrant further consideration by an appellate court. For a case to meet this criterion, it must transcend the narrow interests of the litigants and have broader implications for the public or the development of the law. This is clearly not the case here. The issues are confined to the specific factual matrix and circumstances surrounding this particular retrenchment, with no broader societal relevance or potential impact on future cases. The application does not raise any novel legal questions or engage in the development of new legal principles; it is simply an appeal against factual findings.
- [24] Courts are not merely concerned with whether a different conclusion is possible but must be persuaded that such a conclusion is reasonably probable. The Supreme Court of Appeal in *Mkhitha and Ramakatsa* emphasised that the threshold for leave to appeal is high and should not be lightly met. The appeal must have a realistic prospect of success, grounded in solid, compelling reasons rather than speculative or debatable points.
- [25] The Respondent's attempt to introduce new defences during the trial, such as the outsourcing of work, is procedurally impermissible and further weakens its prospects of success. The principle that parties are bound by their pleadings is a cornerstone of our legal system, ensuring fairness and preventing ambush tactics during litigation. The respondent's failure to adequately plead this defence meant that it was not before the court for determination, and any reliance on it at this stage is misplaced. The respondent's shifting positions and inconsistent explanations only serve to highlight the lack of credibility in its case.
- [26] It is also essential to consider the broader context of labour law and the expeditious resolution of disputes. The LRA was designed to ensure that labour disputes are resolved quickly and fairly, minimising the disruption to both employers and employees. Prolonging this dispute through an unwarranted appeal would subvert this objective and further prejudice the affected employees, who have already endured significant hardship due to their unfair dismissal. The SCA in *Martin And East (Pty) Limited v National Union Mineworkers and Others*[12] cautioned against allowing fact-driven cases lacking in broader legal significance to be dragged through the appeal process, thereby

delaying justice and undermining the purpose of the LRA.

[27] The application for leave to appeal is without merit and should be dismissed. The respondent has failed to demonstrate any reasonable prospect of success on appeal or to provide any compelling reason why the appeal should be heard. The Court's factual findings were well-reasoned, based on credible evidence, and by the applicable legal principles. The case does not raise any novel legal issues or matters of public importance that would justify the attention of an appellate court. Granting leave to appeal in this instance would only serve to delay the resolution of this matter, contrary to the interests of justice. The application should, therefore, be dismissed with costs, ensuring that the respondent bears the consequences of pursuing a meritless appeal.

Order

1. Leave to appeal is refused.
2. There is no order as to costs.

L M Morgan

Acting Judge of the Labour Court of South Africa

[1] Act 66 of 1995, as amended. Section 191(5)(b)(ii) provides: '(5) If a council or a commissioner has certified that the dispute remains unresolved, or if 30 days have expired since the council or the Commission received the referral and the dispute remains unresolved – ...

(b) the employee may refer the dispute to the Labour Court for adjudication if the employee has alleged that the reason for dismissal is – ... (ii) based on the employer's operational requirements.'

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(b) the employee may refer the dispute to the Labour Court for adjudication if the employee has alleged that the reason for dismissal is – ...

(ii) based on the employer's operational requirements.'

[2] 10 of 2013

[3] (1221/2015) [2016] ZASCA 176 (25 November 2016).

[4] Mkhitha (Ibid) at para 16.

[5] See: Mkhitha (Id fn 3) at para 17.

[6] (724/2019) [2021] ZASCA 31 (31 March 2021) at para 10.

[7] 2012 (1) SACR 567 (SCA) at para 7.

[8] 2014 (1) SACR 647 (SCA) at paras 2 and 3.

[9]

(2016) 37 ILJ 1485 (LC) at para 3.

[10] 2014 JDR 2325 (LCC) (LCC14R/2014) [2014] ZALCC 20 (3 November 2014) at para 6.

[11] Martin And East (Pty) Limited v National Union Mineworkers and Others (2014) 35 ILJ 2399 (LAC).

[12]

(2014) 35 ILJ 2399 (LAC).

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