

SOUTH AFRICA / JUDGMENT

Boerdery v CCMA and Others (Application for Leave to Appeal) (JR2187/2020) [2025] ZALCJHB 198 (20 May 2025) [2025] ZALCJHB 198

COURT

Labour Court Johannesburg

BEFORE

Morgan

CASE / FILE NUMBER

JR2187/2020

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IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR 2187/2020

In the matter between

MINNAAR BOERDERY

Applicant

and

CCMA

1st Respondent

RAMADIMALA JACKY MATETA N.O

2nd Respondent

NUFBWSAW obo KOBELA AND 22 OTHERS

3rd Respondent

The judgment was handed down electronically and was circulated to the legal representatives of the parties.

Heard: In Chambers

Delivered: 20 May 2025

JUDGMENT: APPLICATION FOR LEAVE TO APPEAL

MORGAN AJ

INTRODUCTION

- [1] The Respondent has filed leave to appeal against the whole order and judgment (except the costs order) I delivered on 29 April 2024. In that judgment, I ordered:
1. The CCMA award is confirmed, the dismissal of the 23 (twenty-three) employees by the Applicant was procedurally and substantially unfair.
 2. This application is dismissed.
 3. There is no order as to costs.
- [2] The Applicant raises two chief grounds of review, which I will elaborate on below. The Applicant contends that this Court erred in law and in fact in that:
- a. The Court failed to deal with the grounds for review advanced by the applicant and provided no reasons for rejecting same and dismissed the application in circumstances where this Court never engaged the Applicant or its counsel on the issues, which ultimately led to the application being dismissed.
 - b. This Court reached the incorrect conclusion when it found that the Commissioner's decision was reasonable.
- [3] It is the Applicant's contention that there is a reasonable prospect of another court coming to a conclusion different from that reached by the Labour Court.
- [4] The initial application was brought in terms of section 145 of the Labour Relations Act[1] (LRA)[2]. The Applicant sought to have the award granted by the Commissioner reviewed, set aside and substituted with an order that the dismissals were both substantively and procedurally fair, alternatively, remit the matter to the CCMA to be heard de novo (afresh) before another Commissioner of the CCMA other than the First Respondent.

BACKGROUND FACTS

- [5] I reiterate the background facts of this case. The Applicant, Minnaar Boerdery, operates two farms. On 25 May 2018, the Third Respondent initiated a mutual interest dispute with the CCMA. The details are as follows:

3.1 Minnaar Boerdery received salary negotiation proposals from Mr. Tiba, a trade union official. In response, the Applicant notified the trade union that due to the upcoming Minimum Wage Act, some employees would be made redundant and likely retrenched. The trade union insisted on proceeding with salary negotiations. The Applicant then provided a list of employees at risk of retrenchment and proposed reassigning some employees within the company

3.2 The Third Respondent rejected the Applicant's proposal and referred the matter to the CCMA. They were later informed they could not refer the dispute as the employer had withdrawn it and sought assistance under section 150 of the Act.

3.3 Both parties met with a CCMA Commissioner and agreed on a bonus compromise. The trade union proposed a 9-hour shift, but the employer countered with an 8-hour weekday shift and 5 hours on Saturdays.

3.4 The trade union rejected this offer, leading to a decline in union membership and termination of their bargaining rights by the employer.

[6] As the dispute remained unresolved, the trade union referred it to the CCMA, resulting in a strike certificate on 25 June

2018. The union notified the Applicant of the strike on 22 July 2018, set to begin on 24 July 2018 at 15:30.

[7] On the strike day, the Applicant issued picketing guidelines and a lock-out notice. The strike led to barricades at major agricultural entrances, halting vehicle movement, and lasted until 31 July 2018.

[8] Disciplinary notices were issued on 13, 16, and 23 November 2018, with hearings on 19 and 26 November 2018. Members of the Third Respondent were dismissed on these dates.

[9] Subsequent arbitration proceedings were held at the CCMA offices in Tzaneen on various dates from 22 May 2019 to 23 September 2020, concluding on 22 and 27 October 2020, with the findings to follow. The arbitrator found:

- a. The dismissal of the employees is found both procedurally and substantially unfair because they were not given the opportunity to cross-examine witnesses,
- b. With reference to the Code of Good Practice[3], the employer must put allegations to the employee in a manner that they can understand.
- c. The Respondent is ordered to reinstate the Applicants back to employment (immediately after their dismissal and they must report for duty on 1 December 2020) on the same terms and conditions or terms that are no less favourable than the ones applied before their dismissal.
- d. As a result of the retrospective nature of the Applicant's reinstatement, the Respondent is ordered to pay amounts that would have been the Applicant's salaries from the date of their dismissals to the date of their reinstatement.
- e. These back payments are subject to statutory deductions.

TEST FOR APPLICATION TO LEAVE TO APPEAL

[10] Section 17(1)(a) of the Superior Courts Act 10 of 2013 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.'

[11] The Supreme Court of Appeal in *MEC for Health, Eastern Cape v Mkhitha and Another* 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 judgment in question believes the appeal has a reasonable prospect of success or there is another compelling reason for it to be heard.[4]

[12] 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. This is set out in *MEC for Health, Eastern Cape v Mkhitha and Another*. [5]

[13] Recently, the Supreme Court of Appeal in *Ramakatsa and Others v African National Congress and Another*, 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 (Pty) Ltd v Independent Advisory (Pty) Ltd* [2020] ZASCA 17; 2020 (5) SA 35 (SCA), concerning the provisions of section 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.'

[14] In a similar vein, the Supreme Court of Appeal in *Smith v S* 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.'

[15] 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 *S v Kruger*, 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."

[6] (My own emphasis).

[16] The new threshold is higher. This was affirmed by the Labour Court in *Seathlolo & Others v Chemical Energy Paper Printing Wood & Allied Workers Union & Others*.^[7] Dealing with section 17 of the Superior Courts Act, the Land Claims Court in *Mont Chevaux Trust v Tina Goosen & 18 Others* 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.’^[8]

[17] 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 *MEC for Health, Eastern Cape v Mkhitha and Another*, and *Ramakatsa and Others v African National Congress and Another*.

[18] 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.

[19] It is also important to note that labour courts have to balance the ‘expeditious resolution of a dispute 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.’^[9]

SHOULD LEAVE TO APPEAL BE GRANTED?

[20] I am guided by the wisdom of the previous courts, whose ratio I believe is correct and persuasive. I make two general points now. First, I do not believe this case involves any arguable point of law. The case hinged on applying established tests to the facts. It did not involve developing the law or creating any new tests.

Furthermore, the Court did not challenge any established tests; it simply applied existing principles to the facts and reached a conclusion. There was no legal dispute involved.

[21] It would also be a stretch to argue that this case holds general importance. For a case to be of general public importance, it must go beyond the narrow interests of the litigants and affect a significant portion of the general public. This case and its judgment do not extend beyond the specific interests of the parties involved.

Failure to consider the grounds of review

[22] The Applicant notes that although a review lies against the order and not the judgment, the Applicant contends that the court failed to deal with the grounds for review advanced by it. The Applicant cites the Constitutional Court judgment of *Eke v Parsons*, where that Court held that:

‘The starting point is to determine the manifest purpose of the order. In interpreting a judgment or order, the court’s intention is to be ascertained primarily from the language of the judgment or order in accordance with the usual well-known rules relating to the interpretation of documents. As in the case of a document, the judgment or order and the court’s reasons for giving it must be read as a whole in order to ascertain its intention.’[10]

[23] It is thus argued that this Court failed to deal with the grounds for review set out by the Applicant because the Applicant did not mention the factual and legal issues raised by it. The Applicant then relies on *Strategic Liquor Services v Mvumbi NO and Others*, which deals with cases where no written reasons were furnished:

‘It is elementary that litigants are ordinarily entitled to reasons for a judicial decision following upon a hearing, and, when a judgment is appealed, written reasons are indispensable. Failure to supply them will usually be a grave lapse of duty, a breach of litigants’ rights, and an impediment to the appeal process. In *Botes and Another v Nedbank Ltd*, Corbett JA pointed out that “a reasoned judgment may well discourage an appeal by the loser”:

“The failure to state reasons may have the opposite effect. In addition, should the matter be taken on appeal, as happened in this case, the Court of Appeal has a similar interest in knowing why the Judge who heard the matter made the order which he did.”

That the Labour Appeal Court considered the employer’s application for leave to appeal without requiring Nel AJ to supply reasons, and without in their absence furnishing its own, is most regrettable. The application before that Court gave to it the opportunity that Nel AJ let slip through his fingers, namely to give the employer reasons for its failed attempt to review the CCMA outcome.

In Mphahlele, this Court noted that there is no express constitutional provision requiring the judges to furnish reasons for their decisions (and on this basis upheld the long-standing practice of the Supreme Court of Appeal not to furnish reasons when determining applications for leave to appeal). We add that there is likewise no express statutory provision requiring judges who have given judgment *ex tempore* to furnish written reasons when later required. Nonetheless, as this Court pointed out in Mphahlele, a reasoned judgment is indispensable to the appeal process. Judges ordinarily account for their decision by giving reasons – and the rule of law requires that they should not act arbitrarily and that they be accountable. Furnishing reasons—

“explains to the parties, and to the public at large which has an interest in courts being open and transparent, why a case is decided as it is. It is a discipline which curbs arbitrary judicial decisions. Then, too, it is essential for the appeal process, enabling the losing party to take an informed decision as to whether or not to appeal or, where necessary, seek leave to appeal. It assists the appeal Court to decide whether or not the order of the lower court is correct. And finally, it provides guidance to the public in respect of similar matters.”[11] (References omitted)

- [24] The Applicant then accepts that these cases are not readily on point because they deal with cases where there were no written reasons given, whereas in this case, there were reasons. It is on this basis that I do not believe that these cases help the Applicant at all. They are wholly inapposite.
- [25] The central contention seems to be that the judgment of this court did not disclose the factual and legal basis of its findings. This, the Applicant argues, is baffling because the Respondents did not participate in the proceedings.
- [26] Accordingly, the Applicants argue that the judgment of this Court denied it the right to a fair hearing as enshrined in section 34 of the Constitution.[12] The Applicant relies on the cases of *De Beer NO v North-Central Local Council and South-Central Local Council and Others*[13] and *Rand Refinery (Pty) Ltd v Schunance NO and Others*.[14]
- [27] These cases do not assist the Applicant. There was a hearing in this case. I heard the Applicant’s oral submissions and read their written reasons. There was a fair hearing for all intents and purposes, and the authorities relied on do not indicate otherwise. For instance, the *De Beer* case reaffirms a standard and trite principle that a fair hearing lies at the heart of the rule of law. The *Rand Refinery* case deals with a situation where the court overlooked an affidavit. Here, there was no such allegation. All affidavits were considered. Without more, *Rand Refinery* is unhelpful.
- [28] The fact that the matter was unopposed does not denude this Court of the obligation to apply its mind. The fact that a case was unopposed does not mean that a court ought to rubber-stamp the order sought.

[29] I applied my mind to all the arguments raised by the Applicant, both orally and in writing. The arguments were not compelling and convincing – I said as such in the written reasons furnished in the judgment. In this head alone, the Applicant has failed to demonstrate that there are reasonable prospects that an appellate court would find differently in light of the scarce judicial

resources.

Finding of reasonableness was incorrect

[30] Under this head of appeal, the Applicant argues that this Court did not consider each ground and determine the merits of each ground. Based on this purported failure, this Court is said to have erred in finding that the Commissioner's findings and outcome were reasonable. Much of this ground stands on the same arguments as those in the first ground for review.

[31] The Applicant raises no plausible argument regarding this Court's determination that the Commissioner's findings were

reasonable. However, this assertion is unfounded, as it mirrors the arguments already addressed in the first ground for review. The Court's thorough examination of each ground collectively, rather than in isolation, does not undermine the reasonableness of the Commissioner's findings. Consequently, the applicant's claims lack merit and fail to demonstrate any substantive error in the Court's reasoning or conclusion.

Order

[32] I make the following order:

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

M. Morgan

Acting Judge of the Labour Court of South Africa

[1] Act 66 of 1995, as amended.

[2] Section 145 provides: '145. Review of arbitration awards (1) Any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award- (a) within six weeks of the date that the award was served on the applicant, unless the alleged defect involves the commission of an offence referred to in Part 1 to 4, or section 17,20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004; or (b) if the alleged defect involves an offence referred to in paragraph (a), within six weeks of the date that the applicant discovers such offence. (2) A defect referred to in subsection (1), means- (a) that the commissioner- (i) committed misconduct in relation to the duties of the commissioner as an arbitrator; (ii)

committed a gross irregularity in the conduct of the arbitration proceedings; or (iii) exceeded the commissioner's powers; or (b) that an award has been improperly obtained

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 - (a) within six weeks of the date that the award was served on the applicant, unless the alleged defect involves the commission of an offence referred to in Part 1 to 4, or section 17,20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004; or
 - (b) if the alleged defect involves an offence referred to in paragraph (a), within six weeks of the date that the applicant discovers such offence.
- (2) A defect referred to in subsection (1), means-
 - (a) that the commissioner-
 - (i) committed misconduct in relation to the duties of the commissioner as an arbitrator;
 - (ii) committed a gross irregularity in the conduct of the arbitration proceedings; or
 - (iii) exceeded the commissioner's powers; or
 - (b) that an award has been improperly obtained

[3] Labour Relations Act, No. 66 of 1995 – Schedule 8 CODE OF GOOD PRACTICE: DISMISSAL.

[4] MEC for Health, Eastern Cape v Mkhitha and Another

[2016] ZASCA 176 at para 16.

[5] Ibid at para 17.

[6] S v Kruger 2014 (1) SACR 647 (SCA) at paras 2-3.

[7] Seathlolo & Others v Chemical Energy Paper Printing Wood & Allied Workers Union & Others at para 3.

[8] Mont Chevaux Trust v Tina Goosen & 18 Others 2014 JDR 2325 (LCC) at para 6.

[9] Martin And East (Pty) Limited v National Union Mineworkers and Others

(2014) 35 ILJ 2399 (LAC)

[10] Eke v Parsons 2016

(3) SA 37 (CC) at para 29.

[11] Strategic Liquor Services v Mvumbi NO and Others 2010 (2) SA 92 (CC) at paras 14-16.

[12] Section 34 of the Constitution reads: ‘Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.’

[12] Section 34 of the Constitution reads:

‘Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.’

[13] De Beer NO v North-Central Local Council and South-Central Local Council and Others (Umhlathuzana Civic Association Intervening)

[2001] ZACC 9; 2002 (1) SA 429 (CC) at para 11.

[14] Rand Refinery Limited v Sehunane N.O. and Others 2023 (12) BCLR 1511 (CC) at para 20.

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