

SOUTH AFRICA / JUDGMENT

Chauke v Pan South African Language Board and Another (J1959/2016) [2016] ZALCJHB 491 (9 November 2016) [2016] ZALCJHB 491

COURT

Labour Court Johannesburg

BEFORE

Van Niekerk

CASE / FILE NUMBER

J1959/2016

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THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

Case no: J 1959/2016

In the matter between

MIKATEKO FLOYD CHAUKE

Applicant

and

PAN SOUTH AFRICAN LANGUAGE BOARD

First Respondent

MPHO MONARENG Second

Respondent

Date of ruling: 9 November 2016 (in Chambers)

RULING: APPLICATION FOR LEAVE TO APPEAL

VAN NIEKERK J

- [1] On 13 September 2016, the court struck from the roll, with costs, an urgent application to interdict the applicant's suspension by the respondent. The applicant applies for leave to appeal only against the costs order.

[2] The test to be applied is that referred to in s 17 of the Superior Courts Act, 10 of 2013. Section 17(1) provides:

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 judgments on the matter under consideration;

(b) the decision 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 issues between the parties.

[3] The traditional formulation of the test that is applicable in an application such as the present requires the court to determine

whether there is a reasonable prospect that another court may come to a different conclusion to that reached in the judgment that is sought to be taken on appeal. The use of the word “would” in s17

(1) (a) (i) is indicative of a raising of the threshold since previously, all that was required for the applicant to demonstrate

was that there was a reasonable prospect that another court might come to a different conclusion (see *Daantjie Community and others v Crocodile Valley Citrus Company (Pty) Ltd* and another (75/2008) [2015] ZALCC 7 (28 July 2015). Further, this is not a test to be applied lightly – the Labour Appeal Court has recently had occasion to observe that this court ought to be cautious when leave to appeal is granted. The statutory imperative of the expeditious resolution of labour disputes necessarily requires that appeals be limited to those matters in which there is a reasonable prospect that the factual matrix could receive a different treatment or where there is some legitimate dispute on the law (See the judgment by Davis JA in *Martin & East (Pty) Ltd v NUM* (2014) 35 ILJ 2399 (LAC), and also *Kruger v S* 2014 (1) SACR 369 (SCA) and the ruling by Steenkamp J in *Oasys Innovations (Pty) Ltd v Henning & another* (C 536/15, 6 November 2015).

[4] In an application for leave to appeal only against an order for costs, the court must necessarily also have regard to the general

approach when considering an appeal against a costs order. The Labour Appeal Court has made clear more than once that an award of costs and the scale on which costs are awarded are matters within the discretion of the court making the order, and that an appeal court will not easily interfere with the exercise of that discretion. (See, for example, *Lawrence v Mutual and Federal* (JA 77/2014, 15 September 2016).)

[5] In the present matter, the basis on which an order for costs was made is apparent from paragraph 9 of the judgment. In the court's

view, the applicant failed to make out a proper case for urgency. In the founding affidavit, the grounds for urgency, as the court

observed, were limited to the negative effect that a suspension would have on the applicant's health, his reputation, job security advancement and fulfilment. None of these grounds, either individually or cumulatively, have been held by this court to

constitute grounds for urgency.

[6] Also relevant to the issue of urgency was the fact that the applicant had referred substantially the same dispute to the CCMA in circumstances where an arbitration hearing was imminent. At the time of the hearing, it was not in dispute that the applicant had referred an unfair labour practice claim concerning his suspension to the CCMA, and that conciliation had been unsuccessful. Whatever transpired subsequently is hardly relevant; the fact remains that as of the date of the hearing, the applicant was entitled to refer the matter to arbitration and thus had a readily available alternative remedy at his disposal.

[7] Insofar as the applicant seeks to establish in the present application that the court during the course of the proceedings made

a ruling on urgency and that it is bound by that ruling, this is simply not correct. The applicant appears to rely on propositions put by the court to counsel during the course of argument. A proposition intended to test counsel's submissions during the course of debate does not amount to a ruling.

[8] The hurdle that the applicant is required to clear, as is evident from the above authority, is that the court did not exercise its discretion judicially. Put another way, the applicant must necessarily assert and establish that the court in this instance did not exercise its discretion judicially. In my view, the applicant has failed to do so and it is unlikely that another court might come to the conclusion that the court exercised its discretion unlawfully, capriciously or irrationally.

[9] Finally, in relation to the costs of the present application, there is no reason why the court in the exercise of its discretion ought not to grant the respondent its costs in relation to its opposition to this application. The applicant ought to have been aware that applications for leave to appeal against orders for costs are rarely successful and that a proper case must be made out. The present application amounts to an application for leave to appeal against the court's ruling on urgency rather than an attack, properly mounted, against the exercise of a discretion in relation to costs. For that reason, in my view, costs ought properly to follow the result.

I make the following order:

1. The application for leave to appeal is dismissed, with costs.

ANDRÉ VAN NIEKERK

JUDGE OF THE LABOUR COURT

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Prepared on 13 October 2026 · Esheria