
SOUTH AFRICA / JUDGMENT

Mbekela and Another v Phahlane and Another (J2525/15) [2016] ZALCJHB 157 (22 April 2016)

[2016] ZALCJHB 157

COURT

Labour Court Johannesburg

BEFORE

Molahlehi

CASE / FILE NUMBER

J2525/15

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THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: J2525/15

In the matter between:

CRISTABLE NOBELE MBEKELA

First Applicant

SOLOMON MOTSWADISE MAKGALE

Second Applicant

And

JOHANNES KGOMOTSO PHAHLANE

First Respondent

MINISTER OF POLICE

Second Respondent

Considered in chambers: 22 April 2016

JUDGMENT:

LEAVE TO APPEAL

MOLAHLEHI J

Introduction

[1] This is an application for leave to appeal against the judgment of this Court made on 5 January 2016, in terms of which the applicant's

application for an urgent interdict relating to their suspension by the first respondent was dismissed with costs.

[2] The applicants being unhappy with that decision have now filed the application for leave to appeal.

[3] The background facts to the case are set out in that judgement and thus need no repeat in this judgment. The applicants in that application sought an order declaring as invalid and unlawful their suspension by the respondents. They also sought to have the suspensions uplifted.

[4] In this application for leave to appeal the applicants contend that the court erred in failing to find that the facts and the circumstances

as set out in their founding affidavit revealed that at the time of taking the decision to suspend them the first respondent had no reasonable belief that any offence had been committed by the applicants to justify the suspension.

[5] The applicants further contend that, having found that the guidelines set out in Regulation 5 of the Act may be applied by the employer, the court ought to have found that the first respondent was remiss in not applying all the guidelines.

[6] The other ground upon which the applicants challenge the decision of the court is that once it found that the matter was not urgent it ought not to have made a dismissal order but rather should have struck the matter from the roll. This attack on the judgment is based on the decision of the Supreme Court of Appeal (SCA) in *SARS v Hawkers Air Services (Pty) Ltd*[1]. In that case the SCA on appeal held that it was inappropriate for the High Court to dismiss a matter on the basis of lack of urgency. According to the SCA the appropriate order where the applicant has failed to show urgency in an application is not to dismiss the matter but to make an order striking the matter from the roll.

[7] In my view the SCA in formulating the approach to be adopted when dealing with urgent application did not formulate a fixed rule that take away the inherent powers of the Court to control its processes. The Court could for instance in a urgent application, where all the relevant papers have been filed and the material issues in dispute fully canvased, call on the parties to show cause why the matter should not be considered on the basis of a final

determination. The parties could also agree that despite the prayers in their papers, the matter should, as was the case in the present matter, be determined otherwise. In dealing with the approach to adopt if the applicant has failed to show urgency Cameroon JA in Hawkers Air Services, had the following to say:

“[9] . . . Urgency is a reason that may justify deviation from the times and forms the rules prescribe. It relates to form, not

substance, and is not a prerequisite to a claim for substantive relief. Where an application is brought on the basis of urgency, the rules of court permit a court (or a judge in chambers) to dispense with the forms and service usually required, and to dispose of it ‘as to it seems meet’ (Rule 6(12)(a)). This in effect permits an urgent applicant, subject to the court’s control, to forge its own rules (which must ‘as far as practicable be in accordance with’ the rules). Where the application lacks the requisite element or degree of urgency, the court can for that reason decline to exercise its powers under Rule 6(12)(a). The matter is then not properly on the court’s roll, and it declines to hear it. The appropriate order is generally to strike the application from the roll. This enables the applicant to set the matter down again, on proper notice and compliance.

[8] It is important to note that in arriving at the decision as it did the SCA was strongly influenced by the peculiar facts of the case. The key aspect which the court emphasised in its judgement was that after a long argument that lasted for two days the court a quo permitted the parties to postpone the matter for a period of six months.

[9] In commenting on Hawker Aviation, Jones J in *Vena and Another v Vena and Others*, [2] had the following to say:

“[7] I have two comments. First, I do not understand this judgment (referring to Hawker Aviation) place any restriction on the discretion of a trial court to dismiss a claim as a mark of its displeasure at an abuse of the process of the court, whether it is an abuse of the procedure of urgency or any other procedure. The issue of abuse of the process of the court was not raised or considered by the Supreme Court of Appeal. The judgment may, therefore, not be applicable in this case.”

[10] The learned Judge further in dismissing the matter explained that he did not give judgment for the respondent and thus the effect of the dismissal was equivalent to an order for absolution from the instances. In other words the applicant was entitled to re-enroll the matter. It seems to me what the Court was saying was that, the fact that the Court makes an order dismissing an urgent application

without making a positive finding in favour of the respondent does not mean that the merits of the matter has been determined.

[11] The Labour Appeal Court, in *PT Operational Services (Pty) Ltd v RAWU obo Ngwetsana* (the LAC), [3] adopted a similar approach to that in *Hawker Aviation* and *Vena*. In this respect the LAC per Mmusi JA held:

“Although I agree that the appropriate order in a matter where urgency has not been shown should be striking the matter from the roll, it seems to me that even where the word “dismissed” is used it does not necessarily mean that the dismissal amounts to a final order. One will still have to enquire, where there is doubt, whether the matter was dismissed on the merits or not. If not, then it so not final. A finding that a matter is not urgent does not mean that there are no merits in the applicant’s case. Even if a matter is dismissed for lack of urgency it can and should be re-enrolled. To reason otherwise would be to allow form to triumph over substance.”

[12] In MEC of the Department of Education, Eastern Cape v Gqebe the LAC found that it was undesirable to grant a final order where the same has not specifically been prayed for.

[13] The present matter is different to the above matters in that at the beginning of the hearing the applicants’ counsel requested that the matter be considered on the basis of a final determination as the record will reveal. The respondents never indicated any opposition to the submission made by the applicant’s counsel and thus the assumption was that the matter was to be determined on the basis of consensus between the parties. In light of this and the fact that all the relevant papers and the oral submissions made relating to a final ordered there was, in my view, no reason to determine the matter any other way. In this respect counsel for the applicant at the very beginning of the hearing said the following in relation to this point:

“...The first is that we proceed on the basis of a final interdict, and therefore the evaluation would be done on that basis.”

[14] For the above reasons, I am of the view that, the contention of the applicants that the court erred in dismissing rather than striking

the matter from the roll bears no merit when regard is had to the circumstances that lead the Court making the order as it did. I do not intend overburdening this judgment with the details of the other grounds of leave to appeal which appears in the applicants’

application. It should however be noted that in arriving at the conclusion made at the end of this judgment the same have been taken into account.

[15] In considering whether to grant or refuse leave to appeal I apply the well-known test of leave to appeal which is; whether there is a reasonable prospect that another Court may come to a different conclusion to that reached by this Court. The assessment whether another Court may come to a different conclusion has to be done with reference to whether the applicant has made out a case that there are prospects of succeeding on appeal. The other consideration has to do with whether the matter is of substantial importance to the parties.

[16] I have not been persuaded that there are reasonable prospects that the Labour Appeal Court in this matter is likely, when considering the facts as were presented before me, to come to a different conclusion than the one I reached.

[17] I accordingly find that the applicants' application for leave to appeal stand to fail and accordingly make the following order:

1. The applicants' application for leave to appeal to the Labour Appeal Court is refused.
2. There is no order as to costs.

E Molahlehi

Judge of the Labour Court Johannesburg

[1] 2006

(4) SA 292 (SCA).

[2] 2010

(2) SA 248 (ECP).

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Prepared on 13 October 2026 · Esheria