

SOUTH AFRICA / JUDGMENT

Moropene v Competition Commission of South Africa and Others (J 479/20) [2022] ZALCJHB 303 (2 November 2022) [2022] ZALCJHB 303

COURT

Labour Court Johannesburg

BEFORE

D Mahosi

CASE / FILE NUMBER

J 479/20

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IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: J 479/20

In the matter between:

NGOAKO MOROPENE

Applicant

and

THE COMPETITION COMMISSION OF SOUTH AFRICA First Respondent

TEMBINKOSI BONAKELE

Second Respondent

MAKGALE MOHLALA

Third Respondent

Delivered: This judgment was handed down electronically by circulation to the parties' representatives through email. The date for hand-down is deemed to be 02 November 2022.

JUDGMENT - APPLICATION FOR LEAVE TO APPEAL

MAHOSI, J

Introduction

- [1] The applicant brought an application for leave to appeal against the order of this Court handed down on 27 July 2022 in terms of which the Court dismissed the applicant's application with no order as to costs.
- [2] The respondents opposed the application and further filed a conditional application for leave to cross-appeal against the findings that the matter had not been settled, in the event of the applicant being granted leave to appeal.

Submissions

- [3] The applicant submitted that the basis on which he brought this application was that the Court erred in:

3.1 Dismissing the application on the basis of the finding that the respondents were correct in dismissing him without first conducting a disciplinary enquiry in terms of clause 6 of the first respondent's Disciplinary Policy and Procedure.

3.2 Relying on the interpretation of the wording "may", that it was the first respondent's prerogative whether or not to conduct the disciplinary inquiry prior to dismissing him.

3.3 Failing to find that, in terms of clause 6 of the first respondent's Disciplinary Policy and Procedure, the first respondent must appoint a representative who as far as possible should be the manager of the applicant to initiate the enquiry where there is a serious misconduct.

3.4 Ignoring clause 2.4 of the first respondent's Disciplinary Policy and Procedure which states that a disciplinary code is necessary for the efficient delivery of service and the fair treatment of employees and ensures that the employees are timeously informed of allegations of misconduct made against them, have a fair hearing in a formal and informal setting, receive written reasons for a decision taken; and have the right to appeal against any decision.

3.5 Failing to find that he was entitled to be given a chance to be heard in a fair hearing in a formal or informal setting prior to being dismissed, to be given reasons for the decision taken in that hearing in order to determine whether to exercise his right to appeal such a decision in terms of clause 2.4 of the first respondent's Disciplinary Policy and Procedure.

3.6 Failing to consider the fact that in the absence of such a fair hearing, he was put in an invidious position as he could not have been able to appeal the decision taken without a fair hearing and would not been able to properly ventilate all the issues and evidence to justify why he should not be dismissed and further to cross-examine any possible witness brought by the first respondent.

3.7 Finding that the settlement agreement only resolved the dispute referred to the Commission for Conciliation, Mediation and Arbitration (CCMA) not all claims emanating from the termination of the contract of employment.

3.8 Failing to take into account that his common law and constitutional rights were violated by the first respondent by summarily and unlawfully dismissing him without any reason and also without conducting a disciplinary inquiry prior to dismissing him, resulting in a breach of contract of employment between the parties.

3.9 Failing to take into account the fact that the first respondent's internal disciplinary policy does not supersede the provisions of the Constitution of the Republic of South Africa, 1996, (the Constitution) more importantly section 23(1) and section 34.

3.10 Failing to determine whether or not there was indeed a breach of contract of employment between him and the first respondent arising from the allegations of misrepresentation pertaining to his alleged violation of clause 15 of the contract of employment.

3.11 Failing to take into account that his criminal record was disclosed to the first respondent in 2005 and expunged on 9 June 2011, which was the period before he was appointed as Senior Legal Counsel.

3.12 Failing to understand the real dispute between the parties which is whether or not there was a breach of contract arising from the unlawful termination of the contract of employment by the first respondent or the breach of contract arising from the alleged misrepresentation by him pertaining to clause 15 of the contract of employment and the first respondent's failure to conduct a disciplinary inquiry prior to dismissing the applicant.

3.13 Disposing of the application based on the interpretation of clause 6 of the first respondent's Disciplinary Policy and Procedure and not dealing with the aspect of the breach of contract.

3.14 Finding that the First Respondent has the right to exercise discretion whether or not to conduct a disciplinary inquiry prior to dismissing the Applicant.

[4] The applicant further submitted that there are reasonable prospects that another court will find that the provisions of the disciplinary code and procedure, particularly clause 2.4 and 6, require the first respondent to conduct a disciplinary inquiry where there is a serious misconduct and that there is a well established principle of specific

performance or payment of compensation or damages where the first respondent is found to have breached the terms of the contract of employment and the provisions of its own applicable policies as set out in clause 20.2 of the contract of employment.

[5] Furthermore, it was the applicant submission that the interest of justice permits that he be allowed to approach the Labour Appeal Court to seek a legal remedy in terms of section 38 of the Constitution.

[6] The respondents opposed the application on the basis that an appeal would not have a reasonable prospect of success and that there was no other compelling reason why the appeal should be heard.

- [7] In their conditional application for leave to cross-appeal, the respondents submitted that the Court erred in failing to find that the matter had been settled as the settlement agreement concluded by the parties was in respect of all claims arising out of the termination of the applicant's employment.
- [8] The respondents further submitted that the Court erred in interpreting the intentions of the parties by having regard to the applicant's letter sent after the parties' intentions had been clarified and the matter had been finally settled.
- [9] The applicant submitted that the respondents failed to make out a case for conditional application for leave to cross-appeal to be granted in the event the applicant's leave to appeal is granted in that the Court correctly found that only the claim for unfair dismissal before the CCMA was settled with the exclusion of the claim for unlawful dismissal. It was for this reason that he prayed for the Respondents' conditional application for leave to cross-appeal to be dismissed.

Applicable law and analysis

- [10] 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.[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.'

- [11] 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.'

[12] 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 by 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.

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.’

[13] In the current matter, I am not persuaded that there are reasonable prospects of a successful appeal. As such, I am of the view that this application is without merit and must be dismissed.

Costs

[14] With regard to costs, taking into account the requirements of law and equity, I am of the view that this is a matter in which there should be no order as to costs.

[15] Accordingly, the following order is made:

Order

1. The application for leave to appeal is dismissed.
2. There is no order as to costs.

D. Mahosi

Judge of the Labour Court of South Africa

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