

SOUTH AFRICA / JUDGMENT

Motsei and Others v General Public Service Sector Bargaining Council and Others (JR 38/2020) [2022] ZALCJHB 296 (26 October 2022) [2022] ZALCJHB 296

COURT

Labour Court Johannesburg

BEFORE

Van Niekerk

CASE / FILE NUMBER

JR 38/2020

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THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR 38/2020

In the matter between:

L MOTSEI AND 54 OTHERS

Applicant

And

GENERAL PUBLIC SERVICE SECTOR

BARGAINING COUNCIL

First Respondent

E MAREE N.O.

Second Respondent

STATISTICS SOUTH AFRICA

Third Respondent

Decided in chambers: October 2022

Delivered: 26 October 2022

(This judgement was handed down electronically by circulation to the parties' representatives, by email. The date on which the judgment is delivered is deemed to be 26 October 2022.)

RULING:

APPLICATION FOR LEAVE TO APPEAL

VAN NIEKERK, J

[1] The applicant seeks leave to appeal against the whole of the judgment delivered by the court on 9 September 2022. In its judgment, the court dismissed an application to review and set aside an award issued by the second respondent in which she found that the applicants had failed to discharge the onus of establishing that they had been dismissed as contemplated by section 186 (1)(b) of the LRA.

[2] The test to be applied is that referred to in section 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 previously applicable formulation of the test (on which the respondents rely) is that in an application such as the present, the court is required 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 section 17 (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] The first ground of appeal relates to an interlocutory ruling made by the second respondent. The applicants contend that the court erred in finding that it was not open to them to seek a review of an interlocutory ruling under Rule 7A by way of a supplementary affidavit filed in terms of Rule 7A (8). As the judgment records, the application to review and set aside the award was filed on 16 January 2020, in terms of section 145. What the applicants sought to do in their supplementary affidavit was not to supplement their grounds for review, but to introduce an entirely new application for review, this time, seeking in terms of section 158 (1) (g) to set aside the arbitrator's interlocutory ruling, two years after it was issued. After the interlocutory ruling was issued, the arbitration proceeded only on the unfair dismissal claim, the only dispute ventilated in the evidence. I fail to appreciate how in these circumstances it can be said that the court erred in finding that the review of the interlocutory ruling, which related to the referral of a dispute to the bargaining council under section 198B, ought properly to have been the subject of a discrete review, and that it was not permissible for the applicants to introduce a new and different application under the guise of a supplementary affidavit. This much was held in *Bafokeng Rasimone Platinum Mine (Pty) Ltd v CCMA* (2015) 36 ILJ 3045 (LC) which the applicants have not sought to distinguish or dispute.
- [5] In so far as the applicants contend that the court erred in finding that the applicants' earnings exceeded the threshold contemplated by section 198B(2)(a) and that section 198B was thus not applicable to them, it is not disputed that in an earlier dispute regarding differential rates of pay and permanency, the parties concluded a settlement agreement that had the result that their gross salary increased to a level placing the applicants above the threshold. This much was conceded at the arbitration. In any event, it was not in dispute that for the arbitrator to have determined any dispute in terms of section 198D (in addition to the dismissal dispute) the arbitrator was required to satisfy herself that a dispute in terms of that section had in fact been referred to the bargaining council and conciliated. It is common cause that this was not done.
- [6] In relation to the merits of the arbitrator's ruling in respect of the dismissal dispute, the applicant contends that the court erred in finding that the arbitrator's decision was correct, particularly in that the fixed term contracts of the applicants had been renewed on a number of occasions, and that the applicants were performing work of a critical nature. That may be so, but the award accounts (correctly) for other factors, including Stats SA's precarious financial position, budget cuts imposed by Treasury and the consequent need to place a moratorium on recruitment and reconsider staffing requirements and the fact that the applicants were aware of their precarious position and had acknowledged in their contracts that they should have no expectation of renewal.

- [7] There is no reasonable prospect that a court of appeal would come to a different conclusion or give a different treatment to the factual matrix, nor does the factual matrix disclose any matter that warrants the attention of the appeal court.

Order

1. Leave to appeal is refused.

André van Niekerk

Judge of the Labour Court of South Africa

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Prepared on 11 October 2026 · Esheria