

SOUTH AFRICA / JUDGMENT

Nelson Mandela Bay Municipality v SAMWU obo Bukula and Others (Application for Leave to Appeal) (PR174/2023) [2025] ZALCJHB 189 (6 May 2025)

[2025] ZALCJHB 189

COURT

Labour Court Johannesburg

BEFORE

Prinsloo

CASE / FILE NUMBER

PR 174/2023

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THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: PR 174/2023

In the matter between:

NELSON MANDELA BAY MUNICIPALITY

Applicant

and

SAMWU obo MVULENI BUKULA

First Respondent

SHARON MALGAS N.O

Second Respondent

SOUTH AFRICAN LOCAL GOVERNMENT

BARGAINING COUNCIL

Third Respondent

Decided: In chambers

Judgment:

06 May 2025

This judgment was handed down electronically by circulation to the parties' representatives by email. The date for hand-down is deemed to be on 30 April 2025.

JUDGMENT:

APPLICATION FOR LEAVE TO APPEAL

PRINSLOO, J

Introduction

- [1] The First Respondent applied for leave to appeal against the whole judgment and order, delivered on 6 March 2025.
- [2] The First Respondent (Mr Bukula) raised numerous grounds for leave to appeal and filed submissions in support of his grounds for appeal.
- [3] I have considered the grounds for appeal as well as the submissions made in support and in opposition thereof. Both parties filed comprehensive submissions, which I have taken time to peruse and consider, and I do not intend to repeat those herein.

The test for leave to appeal

- [4] It is trite that there is no automatic right of appeal against a judgment of the Labour Court. This much is clear from section 166(1) of the Labour Relations Act[1] (LRA) which provides that any party to any proceedings before the Labour Court may apply for leave to appeal to the Labour Appeal Court (LAC) against any final judgment or final order of the Labour Court. To be entitled to leave to appeal, an applicant in an application for leave to appeal must satisfy this Court that there is a reasonable prospect that another court would come to a different conclusion.[2]
- [5] The test is not whether there is a possibility that another court could come to a different conclusion; the test is whether there is a reasonable prospect that another court would come to a different conclusion.
- [6] It is further trite that an applicant in an application for leave to appeal must convince the court a quo that it has reasonable prospects of success on appeal. Appeals should be limited to matters where there is a reasonable prospect that the factual matrix could receive a different treatment or where there is some legitimate dispute on the law.
- [7] In *Seatlholo and others v Chemical Energy Paper Printing Wood and Allied Workers Union and others*[3], this Court confirmed that the test applicable in applications for leave to appeal is stringent and held as follows:

‘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. As the respondents observe, the use of the word “would” in s 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, as should the Labour Appeal Court when petitions are 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 and 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 and another* (C 536/15, 6 November 2015).’

[8] In deciding this application for leave to appeal, I am also guided by the dicta of the Supreme Court of Appeal (SCA), where it held in *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd and Others*[4] that:

‘...The need to obtain leave to appeal is a valuable tool in ensuring that scarce judicial resources are not spent on appeals that lack merit. It should in this case have been deployed by refusing leave to appeal.’

This application

[9] I have considered the submissions made in support and opposition of the grounds for appeal and, applying the applicable test, I am not convinced that Mr Bukula has made out a case for leave to appeal to be granted. I will refer to the two main aspects to illustrate why leave to appeal should not be granted – being the existence of a final order and that of prospects of success.

[10] First, to illustrate that there is no prospect of success, I will refer to Mr Bukula’s complaint regarding this Court’s findings on the question of the authority to act. In the submissions filed, it was submitted inter alia that ‘the court exceeded the acceptable boundary of what is legally acceptable when it reasoned that the volume of 13 lever arch file in an indication that the proper authority has been obtained, we submit this is a clear misdirection given the enormous implication of this conclusion, in the context of the evidentiary requirements of our law’.

[11] The submission made by Mr Bukula’s legal representatives is indicative of an inability to understand the judgment and the

applicable legal principles. This Court has set out the reasons why Mr Bukula's challenge to the authority to act was without merit in paragraphs 52 to 59 of the judgment, which had nothing to do with the volume of the application. The volume of the application was considered in view of the judgment by the SCA[5] wherein it was held that it was inconceivable that an application of magnitude could have been launched without the knowledge of an applicant. The SCA confirmed that the magnitude of an application is indeed a factor to be taken into account when considering whether litigation is authorised.

- [12] There is no prospect that the LAC would find this Court's consideration of a factor which the SCA confirmed is a factor to be considered, to be a misdirection or to constitute the exceeding of an acceptable boundary.
- [13] Second and more fatal to this application is the question of whether there is a final judgment which is appealable. Mr Bukula did not file an opposing affidavit in the review application, and as a result, his version or opposition was not before this Court. In the application for leave to appeal and the submissions filed in support thereof, Ms Olowookorun made submissions on the merits of the review application and argued that this Court 'should not have come to the conclusion that the bargaining council lacked jurisdiction' and lengthy submissions were made on the application of the TASK collective agreement and how it should have been interpreted.
- [14] The reality is that Mr Bukula did not oppose the review application – this was a choice made by his trade union and legal representative and the issues now raised on the merits of the review application, were as a result of the decision not to file any opposing papers, not raised before this Court when the review application was considered.
- [15] Mr Bukula did not oppose the review application when he should have done so, and it is not open for him to canvass submissions on appeal on the merits of a case where he had not participated in the litigation. He has no right to seek leave to appeal in these circumstances. He chose not to oppose these proceedings at the relevant time, and he cannot now elect to do so and ask the Court for leave to go to the LAC when it turns out that his choice not to oppose the matter in Labour Court has had adverse consequences for him.
- [16] The SCA, in dealing with a similar application, has held:
- 'What also strikes one as odd is that submissions on behalf of Mr Pitelli should be made for the first time in this court, when they could have been made to the court below before it made its orders, but were deliberately withheld. This is not a court of first instance. It seems to me that it would be most unfortunate for a court of first instance to find its orders reversed only because the litigant chose not to tell that court why the orders should not be made, and thought it better to make these submissions to a court of appeal only after that had occurred.'[6]
- [17] According to section 166(1) of the LRA, only final judgments and final orders are appealable:

‘Any party to any proceedings before the Labour Court may apply to the Labour Court for leave to appeal to the Labour Appeal Court against any final judgment or final order of the Labour Court.’

[18] It has been accepted that a default judgment of the Court a quo is not appealable – it is not final in effect in that the default judgment of the Court a quo is theoretically capable of being revisited in the form of an application for rescission of judgment.

[19] In the words of Nugent JA in *Pitelli v Everton Gardens Projects CC*:

‘[27] An order is not final, for the purposes of an appeal, merely because it takes effect unless it is set aside. It is final when the proceedings of the court of first instance are complete and that court is not capable of revisiting the order. That leads one ineluctably to the conclusion that an order that is taken in the absence of a party is ordinarily not appealable (perhaps there might be cases in which it is appealable but for the moment I cannot think of one). It is not appealable because such an order is capable of being rescinded by the court that granted it and it is thus not final in its effect. ...

[31] An order made by default is by its nature not final in its effect because it is capable of being revisited, albeit that condonation might be required for the delay...’[7]

[20] The possibility that Mr Bukula might have difficulty succeeding with any application for rescission is beside the point. This question too was considered by Nugent JA:

‘I am mindful of the considerable hurdle that would need to be overcome by a litigant who seeks to have an order rescinded when he or she deliberately allowed it to be taken by default, bearing in mind that in order to succeed the litigant will need to provide a “reasonable and convincing explanation” for the default. But the appealability of the order is dependent upon whether it is capable of being revisited and not upon whether such an application will succeed. And if a litigant deliberately chooses to permit an order to go by default then he or she can hardly complain if a court refuses to allow the matter to be re-opened. A litigant cannot expect to blow hot and cold depending upon which is most advantageous at the time.’[8]

Costs

[21] The last issue to be decided is the issue of costs.

[22] Insofar as costs are concerned, this Court has a broad discretion in terms of section 162 of the LRA to make orders for costs according to the requirements of the law and fairness.

[23] The requirement of law has been interpreted to mean that the costs would follow the result. In considering fairness, the conduct of the parties should be taken into account, and mala fides, unreasonableness, and frivolousness are factors justifying the imposition of a costs order.

- [24] In *Zungu v Premier of the Province of KwaZulu-Natal and Others*[9], the Constitutional Court confirmed that the rule that costs follow the result does not apply in labour matters. The Court should seek to strike a fair balance between unduly discouraging parties from approaching the Labour Court to have their disputes dealt with and, on the other hand allowing those parties to bring to this Court (or oppose) cases that should not have been brought to Court (or opposed) in the first place.
- [25] This is a matter where this Court has to strike a balance.
- [26] Mr Kroon, for the Applicant, submitted that several parts of the submissions made by Mr Bukula are irrational and incomprehensible and that a cost order is warranted. He argued that the author of the submissions recklessly bandies about words such as ‘gross irregularity’ and ‘overreach’ to describe the conduct of this Court and submitted that the Court breached the *audi alteram partem* rule, which are serious allegations.
- [27] Mr Kroon submitted that it was left in the discretion of this Court as to whether Mr Bukula or his legal representative should be liable for the costs.
- [28] Ms Olowookorun submitted that the cost of the application should be costs in the appeal.
- [29] In my view, this application for leave to appeal is an abuse of process. It is yet another display of Mr Bukula’s legal representatives’ lack of understanding of the applicable legal principles and the conduct expected of legal practitioners practicing in this Court.
- [30] In my view, this is a case where a cost order is warranted. This is more so as Mr Bukula sought legal assistance from his lawyers. He did not approach this Court as an unrepresented layperson, but he was assisted by lawyers. Mr Bukula was not responsible for the drafting of the papers or the formulation of the grounds for leave to appeal — those are legal aspects left to his lawyers to attend to.
- [31] In *South African Liquor Traders' Association and Others v Chairperson, Gauteng Liquor Board and Others*[10], the Constitutional Court ordered costs *de bonis propriis* on a scale as between attorney and client and held that:
- ‘An order of costs *de bonis propriis* is made against attorneys where a court is satisfied that there has been negligence in a serious degree which warrants an order of costs being made as a mark of the court's displeasure. An attorney is an officer of the court and owes a court an appropriate level of professionalism and courtesy.’
- [32] In *casu*, it is evident that Mr Bukula’s attorneys filed an application for leave to appeal without any reflection as to the provisions of the LRA, the applicable authorities and the possible prospects of success. One could reasonably accept that a practising advocate or attorney assisting a paying client should at least consider the aforesaid when an application for leave to appeal is filed and other parties are dragged to Court. In this instance, there was no regard for any of the aforesaid.

- [33] The way in which the application for leave to appeal was drafted and pursued is not merely an error of judgment. Mr Bukula's legal representatives acted in a manner that constitutes a departure from their office by pursuing litigation in circumstances where no case had been made out, considering the applicable authorities, and thereby burdening this Court, with limited resources and a substantial backlog. This Court's displeasure should be known to the legal representatives.
- [34] This is an exceptional case where Mr Bukula's legal representatives acted in a reprehensible manner, not only towards their client, but also towards this Court, with no regard to their duty as officers of the Court, and which would justify an order for costs de bonis propriis.
- [35] I already alluded to the fact that the Applicant is entitled to costs. Neither the ratepayers of the Municipality nor Mr Bukula should be burdened with costs, but Bukky Olowookorun Attorneys Inc. should be ordered to pay the Applicant's costs de bonis propriis. I am guided by the principles set out by the Courts in making such an order, mindful that it is awarded only in exceptional cases.
- [36] Bukky Olowookorun Attorneys Inc. are afforded seven days within which to make submissions as to why a cost order de bonis propriis should not be confirmed. If no submissions are received within the prescribed time, the cost order will have final effect.
- [37] In the premises, I make the following order:

Order

1. The application for leave to appeal is dismissed;
2. The Applicant's costs are to be paid de bonis propriis by Bukky Olowookorun Attorneys Inc., on the scale as between attorney and client;
3. The order for costs in paragraph 2 supra is provisional and Bukky Olowookorun Attorneys Inc. are afforded seven days to make written submissions as to why the order should not be confirmed, failing which the cost order will be final.

Connie Prinsloo

Judge of the Labour Court of South Africa

- [1] Act 66 of 1995, as amended.
- [2] See: Woolworths Ltd v Matthews [1999] 3 BLLR 288 (LC).
- [3] (2016) 37 ILJ 1485 (LC) at para 3.
- [4] 2013
- (6) SA 520 (SCA) at para 24.

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- [5] Unlawful Occupiers of the School Site v City of Johannesburg [2005] 2 All SA 108 (SCA) at para 16.
- [6] Pitelli v Everton Gardens Projects CC [2010] 4 All SA 357 (SCA) at para 24.
- [7] Ibid at paras 27 and 31.
- [8] Ibid at para 34.
- [9]
- (2018) 39 ILJ 523 (CC) at para 24.
- [10] 2009 (1) SA 565 (CC) at para 54.
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