

SOUTH AFRICA / JUDGMENT

Nhlapo and Others v Member of the Executive Council (MEC) and Others (Application for Leave to Appeal) (J 1614/2022) [2023] ZALCJHB 119 (20 April 2023)

[2023] ZALCJHB 119

COURT

Labour Court Johannesburg

BEFORE

Van Niekerk

CASE / FILE NUMBER

J 1614/2022

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THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: J 1614/2022

In the matter between:

NHLAPO BAFANA NICHOLAS

First Applicant

NOMALANGA JANE MADUNA

Second Applicant

THE SCHOOL GOVERNING BODY (“SGB”)

Third Applicant

(As represented by the Chairperson)

and

MEMBER OF THE EXECUTIVE COUNCIL (“MEC”)

First Respondent

GAUTENG DEPARTMENT OF EDUCATION (“GDE”) Second Respondent

METSING BENJAMIN PEELLO

Third Respondent

Decided in Chambers

Delivered: 20 April 2023

(This judgment was handed down electronically by circulation to the parties' representatives, by email. The date on which the judgment is delivered is deemed to be 20 April 2023.)

RULING: APPLICATION FOR LEAVE TO APPEAL

VAN NIEKERK, J

[1] The applicants seek leave to appeal against the whole of the judgment delivered by this court on 23 January 2023, when the court upheld an application to review and set aside the appointment of the first applicant to the post of administrative assistant.

[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 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)).

- [4] The applicants raise five grounds for appeal. The first and second grounds are related – the first is that the court granted overbroad relief; the second is that the court lacked jurisdiction to grant the order it did. The applicant contends that having regard to the fact that the order sought was that the applicant's appointment be declared null and void, it was not open to the court to grant an order reviewing and setting aside the appointment. There is no merit in this submission. The application was brought in terms of section 158 (1)(h), which empowers this court to review any decision taken or act performed by the state in its capacity as an employer. The proper order then was to review and set aside the impugned decision – the fact that the applicant had elected to seek relief in the form of a declarator that the appointment was null and void did not preclude the court from making the order that it did. To the extent that the applicant contends that the court had no jurisdiction to declare an employment contract null and void, jurisdiction is to be determined from the papers. As I have indicated, the founding affidavit was clearly drafted on the basis that the application was one specifically in terms of section 158 (1)(h). The applicant's submission elevates from over substance, and has no merit.
- [5] The third ground for appeal is that the court erred in granting an order in the face of a clear dispute of fact. The dispute of fact referred to in paragraph 9 of the judgment is irrelevant to the issue

that was required to be determined. The court in effect found on the applicant's own version that the first applicant had been furnished with the interview questions prior to the interview and that he had not been considered as the most suitable candidate for appointment.

- [6] The fourth ground for review is that the court erred by failing to consider the guidelines in their entirety. There is no merit in this submission. The guidelines do not admit the appointment of a candidate who was both furnished with questions prior to the interview and not regarded by the interview panel as the most suitable candidate for appointment. The Public Service Act and Regulations place a premium on the rule of law and the principle of legality.
- [7] Finally, the applicants contend that even if there are no reasonable prospects of success on appeal, the court should nonetheless grant leave to appeal in the interest of justice. The interests of justice do not form a discrete basis on which leave to appeal may be sought – the interests of justice are reflected in the grounds recognized by the Superior Courts Act. To the extent that the applicant relies on his personal circumstances consequent on the order, this is not a ground for granting leave to appeal.

I make the following order:

1. Leave to appeal is refused.

André van Niekerk

Judge of the Labour Court of South Africa

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