

SOUTH AFRICA / JUDGMENT

Recycling Consolidated Holdings (Pty) Ltd v Reddy and Others (J358/24) [2024] ZALCJHB 285 (1 August 2024) [2024] ZALCJHB 285

COURT

Labour Court Johannesburg

BEFORE

H Molotsi

CASE / FILE NUMBER

J358/24

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THE LABOUR COURT OF
SOUTH AFRICA, JOHANNESBURG

Not Reportable
case

no: J358/24

In

the matter between:

RECYLING CONSOLIDATED
HOLDINGS (PTY)
LTD
Applicant
and
BODENE
REDDY
First Respondent
WASTEPLAN
HOLDINGS (PTY) LTD
Second Respondent
WASTEPLAN
GAUTENG (PTY) LTD
Third Respondent

Heard:

17 July 2024

Delivered:

01 August 2024

JUDGMENT**APPLICATION FOR LEAVE TO APPEAL**

MOLOTSI AJ

Introduction

- [1] This is an application for leave to appeal. The first respondent sought leave to appeal against the entire Order and judgement handed down on the 30th of May 2024, save for that which deals with the issue of costs. The applicant is opposing the application for leave to appeal.
- [2] There are five grounds of appeal raised by the first respondent. The grounds of appeal are the following:
- (i) The Court's findings on the nature of the applicant's business, the first respondent's involvement herein and, in particular, the first respondent's involvement with the applicant's waste management;
 - (ii) The Court's findings in respect of the undertakings provided by the first respondent and five executives of the second and third respondents.
 - (iii) The Court's failure to consider that the applicant had decided not to enforce a restraint of trade agreement against a former manager.
 - (iv) The Court's findings in respect of the applicant's refusal to engage in mediation, save for in respect of the issue of costs; and
 - (v) The Court's failure to weigh the constitutional rights of the first respondent against the principle of pacta sunt servanda in a manner consistent with what is required by the Constitution, and a finding that the enforcement of the restraint of trade agreement was reasonable in the circumstances
- [3] The first respondent amended its application for leave to appeal and stated that it will rely on the following grounds in support of its application for leave to appeal:

The Court erred:

- (i) By overstating the interconnectedness of the applicant's waste management and collections divisions and as a result, erroneously found that the first respondent had been involved in the applicant's waste management business and thus he knew the needs and the requirements of the applicant's waste management customers;
- (ii) By not finding that the first respondent's responsibilities as set out in paragraph [44] of the Judgement only related to the applicant's collections division, and not its business in general (including its waste management division);

- (iii) By finding that the first respondent had built up customer relations with the applicant's customers and ... is able to easily induce the applicant's customers to follow him to WastePlan'
- (iv) By failing to consider the common cause fact that prices in the waste management industry are volatile and, accordingly, that all pricing information which the first respondent may have become privy to during his employment in the applicant's collections division, was likely stale.
- (v) By failing to recognize the material distinction of the 'operational issues' that the first respondent engaged in while employed in the applicant's collection division, as opposed to those he performs at WastePlan;
- (vi) By finding that it is inconceivable that that the first respondent will not be involved in trading activities at WastePlan and that contract managers ... would do their limited trading work... without the first respondent's involvement'
- (vii) By finding that the first respondent was on a gardening leave on 3 April 2024, when the first respondent was only required to confirm whether he would leave his employment with the applicant by 17h00 on 4 April 2024 after which his gardening leave period would become operational'
- (viii) By failing to appreciate the common cause fact that over 100 employees of the applicant had access to Qlikview;
- (ix) By not subjecting the duration and scope of the restraint of trade agreement to strict scrutiny as required;
- (x) By considering the reasonableness of the restraint of trade on the basis that it only operated for 12 months, in circumstances where the applicant had persisted with its enforcement of, he full period of the restraint (24 months) in its pleadings;
- (xi) By not considering whether any customers or clients of the applicant had left it, or any marketing attempts of the applicant had been thwarted by the first respondent, during his term of employment at WastePlan;
- (xii) By not considering that the proposed mediation process, which was declined by the applicant, would have eliminated any risk to the applicant's customers that may have existed;
- (xiii) By not considering the nature of the industry in which the applicant and WastePlan operate (i.e. the general trading industry) where there are common suppliers and customers;
- (xiv) By not considering the applicant's concession that the first respondent did not contribute to the overall strategy of the applicant's business, despite its erroneous impressions that he had done so;
- (xv) By enforcing the restraint of trade agreement.

- [4] The first respondent in its amended notice of application for leave to appeal introduced an additional ground of appeal, that Labour Appeal Court, as a court of similar statute to the Supreme Court of Appeal, is not bound by stare decisis to follow *Magna Alloys*, or subsequent decisions of the Supreme Court of Appeal, such as *Reddy v Siemens*, which applied *Magna Alloys*, or even its own previous decisions on this point.
- [5] The first respondent further submitted that there are reasonable prospects of success that the Labour Appeal Court may find that the fundamental right to freedom of trade and occupation, guaranteed in section 22 of the Constitution, outweighs the principle of *pacta sunt servanda* unless the applicant seeking enforcement of a restraint of trade agreement can prove that enforcement would, in the circumstances of that case, not impose an unreasonable restriction on the respondent's freedom of occupation. In other words, the Labour Appeal Court may decide to develop the common law in line with the Constitution, and reverse the onus of proof, to place it on an applicant seeking enforcement of an agreement in restraint of trade.
- [6] The applicant disputes the merits of the application for leave to appeal and that this Court was correct in its finding as to the interconnectedness of the two divisions. The first respondent's role and responsibilities at Mpact Recycling were admitted. The proprietary interests that were worthy of protection were established on the common cause facts and that this Court did not err in its findings of fact and no other court will find differently. In respect of the undertakings, the applicant stated that this Court was correct that the undertakings require the respondents 'to police each other'

Legal Principles: Application for leave to appeal

- [7] The test for leave to appeal in terms of section 17(1) of the Superior Courts Act 10 of 2013 (the Act) is a stringent test. Leave to appeal is not there for the taking.
- [8] Section 17(1) of the Act provides that:

'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)...

- [9] In *S v Notshokovu & Another*[1], the SCA held that:

'The applicant, on the other hand, faces a higher and stringent threshold in terms of the Act compared to the provisions of the repealed Supreme Court Act 59 of 1959

Section 17(1) uses the word 'only'. It provides that

‘17(1) Leave to appeal may ‘only’ be given.... Then proceed to set out the circumstances under which leave to appeal may be given. For instance in *South African Breweries (Pty) Ltd v The Commissioner of the South African Revenue Services (SARS)* (2017) 2 AGPPHC 340 (28 March 2017) para (5), the Court cited with approval the following passage from *Mont Chevaux Trust v Tim Goosen & Others*, 2014 JDR 2325 (LCC) para {6}

‘It is clear that the threshold for granting leave to appeal against a judgement of the High Court has been raised in the new Act. The former test whether leave to appeal should be granted was reasonable prospects another court might come to a different conclusion. See *Van Heerden v Cronwright & Others* 1985 (2) SA 343 (T) at 34H. The use of the word ‘would’ in the new statute indicates a measure of certainty that another court will differ from the court whose judgement is sought to be appealed against’, Accordingly, the Public Protector must be certain that another tribunal would decide the same issues that the High Court grappled with differently. Quite clearly the Legislature intended to limit the number of cases which might be taken on appeal.’

[10] In *Smith v S[2]*, the Court held that:

‘What the test for reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law, that a court of appeal could reasonably arrive at a conclusion different to that of a trial court. In order to succeed, therefore, the applicant must convince this court on proper grounds that he has prospects of success of appeal and that those prospects are not remote but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorized as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal.”

Submissions by the parties

[11] Mr. Fourie SC on behalf of the first respondent submitted that whether to enforce the restraint of trade or not is a value judgement requiring a balancing act between the principles of *pacta sunt servanda* and section 22 of the Constitution. The Labour Appeal Court (LAC) may well apply its value judgement differently from the Court a quo.

[12] It is not appropriate to determine probabilities in motion proceedings. Another Court may apply *Plascon Evans* test strictly and come to the conclusion that the first respondent’s version was not far- fetched. A number in respect of customers connections may matter especially considering the first respondent’s new role does not involve trading.

[13] In respect of interconnectedness between collections and waste management divisions, another Court may on the strict application of *Plascon Evans* test, conclude that there was limited interaction by the first respondent in respect of operations. Accordingly, the fact that the respondent is working at a different department at WastePlan is an important rider not to enforce the restraint.

[14] Another Court may take a different finding on the first respondent’s undertakings.

- [15] In respect of mediation, Mr. Fourie SC submitted that mediation is a novel issue. Novelty of the mediation is enough to grant leave to appeal. The Appeal Court may endorse this Court's finding on mediation and further consider that mediation as a factor is enough not to enforce the restraint.
- [16] Another Court may find that the risk of unwitting disclosure of the applicant's proprietary interest is too remote to justify enforcement of the restraint of trade agreement.
- [17] The onus in restraint of trade is a critical issue and remains controversial. The issue of onus has never been resolved by the Appellate Court. The LAC may want to revisit the issue of onus in restraint of trade. Conflicting judgments are a reason to grant leave to appeal. The Labour Court has followed *Magna Alloys*. *Magna Alloys* does not survive constitutional scrutiny. Section 22 of the Constitution did not exist in 1984 when *Magna Alloys* was delivered. The question is whether 40 years later, *Magna Alloys* is still good law. Mr. Fourie SC submitted that this ground of appeal constitutes a point of law which requires the attention of the Appeal Court.
- [18] Mr. Whitcutt SC on behalf of the applicant submitted that application for leave to appeal is not meant to re-argue the arguments in the Court a quo. The provisions of section 17(1) of the Act must be complied with. It is not sufficient to say, 'another Court may find differently'. The test is a measure of certainty that another Court would come to a different conclusion. Value judgment is not a test for leave to appeal.
- [19] The applicant was granted an application in terms of section 18 of the Act to execute the order of the Court a quo immediately despite the application for leave to appeal.
- [20] On the first respondent's own version, customer connections were established and furthermore, the first respondent's own version showed interconnectedness. This has nothing to do with the onus issue.
- [21] There is nothing more that the Appeal Court can say in respect of the mediation issue. Mediation cannot be the basis to grant leave to appeal.
- [22] Mr. Whitcutt SC in respect of the point of law ground for leave to appeal submitted that, the issue of onus was not an issue which this Court was asked to determine. The first respondent in its heads of arguments, did not raise the issue of onus in restraint of trade agreements as an issue that this Court had to determine.
- [23] The case before the Court a quo did not turn on onus. The onus debate is an academic debate. The Courts have held that restraint of trade agreement does not infringe section 22 of the Constitution.

Evaluation

- [24] The submissions made by the first respondent on the grounds for leave to appeal were characterized using the words 'another Court may come to a different conclusion'.

- [25] As correctly, submitted by Mr. Whitcutt SC, the fact that another Court may come to a different conclusion, is not the test for leave to appeal. Consequently, the first respondent's grounds for leave to appeal do not get out of the starting blocks and completely fails to meet the test for leave to appeal set out in section 17(1) of the Act. This should be the end of the inquiry.
- [26] In the submissions made by Mr. Fourie SC, there was no measure of certainty that another come would come to a different conclusion.
- [27] The grounds for leave to appeal and the submission in support of the leave to appeal, did not show reasonable prospects of success which postulates a dispassionate decision, based on the facts and law, that a court of appeal could reasonably arrive at a different decision. The first respondent has no reasonable prospects of success.
- [28] The exercise of a different value judgement does not constitute ground for leave to appeal. The exercise of value judgement is part of judicial work and happens everyday in our Courts. To accept that a different value judgement by another Court constitutes grounds for leave to appeal will open the flood gates and will clearly be contrary to the provisions of section 17(1) of the Act.
- [29] Other than the use of the words another Court may come to a different conclusion, the submissions and grounds for leave to appeal, constituted the re-arguing of the arguments made during the hearing of the matter on 15 May 2024. This is inappropriate. The arguments raised by the first respondent were properly dealt with in the main judgement and they will not be repeated herein.
- [30] With regards to mediation, I agree with Mr. Whitcutt SC, there is nothing that the LAC could add in respect of mediation. Mediation is not a compulsory process. Each case must be judged on its own merits.
- [31] The point of law raised as a ground for leave to appeal is not important. There is nothing new raised by this point of law. The Courts have held that restraint of trade agreements are not unconstitutional[3]. The issue of onus was not an issue that this Court was required to determine. This point is, accordingly, unmeritorious. The granting of leave to appeal on this point would amount to injudicious deployment of the scarce and already over-stretched judicial resources.
- [32] Consequently I make the following order:
1. The application for leave to appeal is dismissed with costs.

H Molotsi

Acting Judge of the Labour Court of South Africa.

Appearances: For the Applicant: Adv C Whitcutt SC with Adv C De Witt Instructed by: Dockrat Inc
Attorneys For the Respondent: Adv G Fourie SC Instructed by: Cowan- Harper- Madikizela
Attorneys

[1]

[2016] ZASCA 112 para 2 (7 September 2016)

[2] 2012 (1) SACR 567 (SCA) (15 March 2011) at para 7

[3] Knox D'Arcy Ltd and another v Shaw and another 1996 (2) SA 651(W), 660I-661A; Fidelity
Guards Holdings (pty) Ltd t/a Fidelity Guards v Pearmain 2001 (2) SA 853 (SE), 862B- F,

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