

SOUTH AFRICA / JUDGMENT

SAMWU obo Makibinyane and Others v SA Local Government Bargaining Council and Others

(JR1043/18) [2021] ZALCJHB 15 (8 February 2021)

[2021] ZALCJHB 15

COURT

Labour Court Johannesburg

BEFORE

T Deane

CASE / FILE NUMBER

JR1043/18

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IN THE LABOUR COURT OF
SOUTH AFRICA, JOHANNESBURG
Not Reportable
Case no: JR1043/18

In the matter between:	SAMWU obo MP MAKIBINYANE & OTHERS Applicant and SA LOCAL GOVERNMENT BARGAINING COUNCIL First Respondent SURIA VAN WYK Second Respondent NALA LOCAL MUNICIPALITY Third Respondent
Heard:	In Chambers
Delivered:	08 February 2021

JUDGMENT**– APPLICATION FOR LEAVE TO APPEAL**

DEANE AJ

- [1] The Applicant and the Third Respondent filed written submissions in support and opposition of the application for leave to appeal. The Applicant served and filed its application for leave to appeal dated 01 September and court stamped 02 September 2020. The Applicant filed its Submission for Leave to Appeal dated 16th of September 2020 and court stamped filed on 18 September 2020.
- [2] The application for leave to appeal is opposed.
- [3] Judgment was handed down on 11 August 2020. The Application for Leave to Appeal is filed timeously but the Third Respondent filed its representations late and applied for condonation for the late service and filing of its opposing submissions.
- [4] On record is the Third Respondent's Submissions Opposing Leave to Appeal dated 9 December 2020; proof of Service is attached and dated 11 December 2020.
- [5] In looking at the delay for the Third Respondent's Submissions Opposing Leave to Appeal, a period of almost two months delay, I have had recourse to their submissions in the Affidavit in support of the condonation application dated 9 December 2020.
- [6] The Applicant opposes the condonation application on the grounds stated in the Applicant's Response and specifically that the "Third Respondent failed to give a reasonable response for the delay".[1]
- [7] The delay as mentioned above is not substantial, the reasons proffered for the delay is not so unreasonable as to amount to no reason at all and this court will accordingly exercise its discretion and grant condonation in the interests of justice.
- [8] I have considered the application for leave to appeal and the written representations in chambers.

Applicant's grounds of appeal

- [9] The application for leave to appeal sets out the various grounds of appeal and can be found in detail in the Application for Leave to Appeal and the Applicant's Submissions for Leave to Appeal. I will not burden this judgment by listing all of the grounds in details suffice to summarise as follows:
 - 1.1 The Court erred in failing to find that the instruction constituted an unlawful instruction.
 - 1.2 The Court failed to appreciate the Applicant's employees' right to silence and the privilege against self-incrimination.

1.3 The Court erred in failing to consider and apply the authority of National Union of Metalworkers of South Africa (NUMSA) obo Nganezi and others v Dunlop Mixing and Technical Services (Pty) Ltd and others.[2]

1.4 That “ if the judgment stands, it would have a substantial effect on the jurisprudence of the concept of “derivative misconduct”, where employees are aware of misconduct and the employees refuse their co-operation.”

1.5 “The Court erred in finding that the Applicant employees had a fiduciary duty towards the Third Respondent.

1.6 The Court failed to appreciate that the Third Respondent presented no evidence that it had a reasonable bias for assuming that the employees had actual knowledge of the principle wrongdoing.

1.7 The Court erred in not finding that the Third Respondent should have afforded the Applicant employees their right to a fair hearing and that it could only have been expected from the Applicant employees to respond to the allegations of misconduct once the Third Respondent actually proved the misconduct.

1.8 The Court erred in not appreciating the fact that the Third Respondent provided no evidence that the principal misconduct was in fact committed.

1.9 Court erroneously imposes a duty on an employee to establish his or her innocence.

1.10 Court failed to appreciate the uncontested evidence that the Applicant employees tendered to respond to any charges of misconduct during a disciplinary hearing. Court erred insofar as it was found that the Applicant employees were in fact guilty of gross insubordination” and the finding was reasonable.

1.11 “Court erred by not finding that the Second Respondent’s award is unreasonable in that she, after having found the Applicant employee guilty of gross insubordination, failed to determine the appropriateness of the sanction of dismissal.

1.12 Court should have found the sanction of dismissal was not appropriate in the circumstances”

1.13 And that “there are reasonable prospects of another court coming to a conclusion different to that reached by the above Honourable Court”.

Evaluation

[10] I do not intend to deal with each and every ground of appeal separately.

[11] Much of the grounds raised by the Applicant are grounds that were raised in the hearing of the matter which matters were addressed in the reasons for the judgment.

[12] Regarding the ground of appeal specifically related to the failure to consider National Union of Metalworkers of South Africa (NUMSA) obo Nganezi and others v Dunlop Mixing and Technical Services (Pty) Ltd and others (Dunlop) and the issue of derivative misconduct, it is submitted that the facts and circumstances of this case differ from the facts and circumstances in the Dunlop case. In this case, the questions that the employees were asked to respond to and the repeated requests to submit a comprehensive written report on

financial discrepancies, sought to elicit responses around reasons relating to login times of the employees themselves, of cash handling and depositing procedures, user codes and security of passwords, login details etc. The employees chose NOT to answer the questions in its entirety or to submit a written report.

[13] I agree with the Third Respondent's arguments that what is clear is that the employer had requested that the employees answer a questionnaire to assist with the investigation against them. The Applicant employees were not requested to incriminate other employees nor to incriminate themselves. The Dunlop case in this instance, therefore has no bearing.

[14] Regarding the ground of appeal relating to an employee's right against self-incrimination and the right to silence, from a holistic reading of the pleadings and transcript, it was clear that the employees were sanctioned for their refusal to follow a lawful instruction from their employer and that the refusal to obey was considered deliberate, continuous and gross. They were not sanctioned for their silence. The judgment in the review application deals in length with the extent of the failure, by the employees, to comply with the lawful instruction and will therefore not be traversed again herein.

The test for leave to appeal

[15] The provisions of section 17 of the Superior Courts Act[3] is the starting point in considering applications of this nature. These specifically provide that:

'17

(1) leave to appeal may only be given where a 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.'

- [16] Central to the determination of applications for leave to appeal is whether there are reasonable prospects of success in the appeal. This test as outlined in section 17(1) of the Superior Court Act differs to the traditional test as previously stated by our courts.[4] The provisions of section 17(1) raise the threshold of the test for leave to appeal.
- [17] An applicant in an application for leave to appeal must therefore convince the court a quo that it has reasonable prospects of success on appeal. What the test requires is the reasonable likelihood that another court, presented with the same facts and evidence as this Court, could come to a different conclusion than the one arrived at by this Court.[5]
- [18] In *Seatlholo & others v Chemical Energy Paper Printing Wood and Allied Workers Union & others*,^[6] 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 s17(1)(a)(i) are 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...’

- [19] This Court and the Labour Appeal Court (LAC) have in the past stressed that leave to appeal should not be lightly granted because meritless appeals delay the final resolution of disputes.
- [20] Reasonable prospects of success means that the applicant has to show that another Court, faced with the same material, could come to a different conclusion, or an appeal can succeed if there is a legitimate dispute of the law.
- [21] Having had regard to the submissions made on behalf of the Applicant in respect of this application, these do not come close to meeting the threshold referred to above.
- [22] In casu, applying the principles applicable to applications for leave to appeal, I am not persuaded that there are reasonable prospects that the LAC would arrive at a different conclusion than the one arrived at by this Court. The Applicant failed to make out a case for leave to appeal to be granted.

[23] Inasmuch as the Applicant outlined its grounds for leave to appeal on its notice and proceeded to give some substantiations in its subsequent submissions, many of the submissions at best amount to a regurgitation of its case as in the review application. I am satisfied that those issues were adequately canvassed and dealt with in my judgment, and no purpose will be served in revisiting same.

[24] In light of the above, and having had regard to the submissions made in regard to the application for leave to appeal, the opposition thereto, and further upon a reflection of my judgment, I am of the view that the Applicant has failed to demonstrate that there are reasonable prospects that the LAC will come to a different decision to that reached in my judgment.

[25] I am not persuaded that any appeal would have a reasonable prospect of success.

[26] Furthermore, there are no other compelling reasons why leave to appeal should be granted.

[27] There is no reason why a cost order should be made in this application.

[28] In the premise, I make the following order:

Order

[29] The application for leave to appeal is dismissed.

[30] There is no order as to costs.

T Deane

Acting Judge of the Labour Court

Appearances

For the Applicant:

Considered in Chambers

For the Third Respondent: Considered in Chambers

[1] Pg 1 of the Applicants Response to the Third Respondent's Condonation Application and Reply to Submissions Opposing Leave to Appeal.

[2] (2018) 6 SA 240 (LAC); (2019) 5 SA 354 (CC).

[3] 2 Act 10 of 2013.

[4] Minister of Safety and Security and another v Madyibi (1034/2004)

[2008] ZAECHC 180 (30 October 2008)

[5] Seathlolo & others v Chemical Energy Paper Wood & Allied Workers Union & others

(2016) 37 ILJ 1485 (LC)

[6] (2016) 37 ILJ 1485 (LC).

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Prepared on 9 October 2026 · Esheria