IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, MTHATHA)

CASE NO: 3208/2024

In the matter between:

OR TAMBO DISTRICT MUNICIPALITY **1st Applicant**

THE MUNICIPAL MANAGER: OR TAMBO DISTRICT MUNICIPALITY **2nd Applicant**

And

PHENDULE MBEWU **Respondent**

JUDGMENT ON

APPLICATION FOR LEAVE TO APPEAL

ZONO AJ:

Introduction

[1] This is an application for leave to appeal the whole judgment delivered on 22nd August 2024. The Municipality is the applicant

herein. This application was lodged on 27th August 2024 at the instance of the Municipality, a party against whom the main Judgment was granted. After the enrolment of the application for hearing on 30th September 2024, an application for postponement was made and granted due to circumstances beyond the control of applicant's Counsel who was unable to be in court on that day. The parties agreed that the costs of that day be in the cause. The matter was ultimately enrolled for hearing on 14th February 2025. The application was duly argued on that day.

[2] Stripped of wordiness, the applicant seeks to appeal the judgment on the grounds that are summarised hereinafter as follows:

[3] The court erred in ordering the applicant to pay respondent's salary for the entire month of July 2024 when it was common cause that he tendered his services only for few days of that month. The court should have applied no work no pay principle as the respondent would only be entitled to salary from 17th July 2024 and not the whole month.

[4] The applicant understood the order granted in paragraph 65.3 of the judgment to be an order reserving office number F-02. It criticizes the judgment for reserving a particular office for the respondent and to allow the respondent access to that office in perpetuity. The gravamen of this ground is that the respondent is not entitled, as a right, to a particular office or even a right to work. An employer is entitled to tell an employee that employee's services are not required.

[5] The applicant criticizes the judgment for finding that *Ouderkraal* principle applies to arbitration awards. The applicant contends that the judgment overlooked the provisions of section 158(1)(c) of LRA which effectively provide that an arbitration award can be enforced only when it is made an order of court. The applicant understood the main application to be enforcing an arbitration award. The applicant contends that the judgment fails to consider that a party may elect to ignore an administrative decision if it believes that it is unlawful and reactively challenge same in defence when the party is criminally prosecuted or sued in civil proceedings.

[6] The applicant contends that the judgment is erroneous because it failed to evaluate whether the administrative act relied upon by the respondent was invalid.

[7] The applicant does not accept that the main application sought to enforce the terms of employment agreement. The applicant contends that the contract of employment was sourced in a ruling issued by an arbitrator in terms of the LRA, and the judgment overlooked that. The arbitration award, as the font of the proceedings and the contract, is a nullity for want of jurisdiction. The labour court has exclusive jurisdiction over issues arising out of LRA, including enforcement of arbitration awards. The applicant contends that the arbitration award as a font of contractual claim was a nullity and incurably bad and was accordingly unenforceable without a need to set it aside.

[8] The applicant contends that the arbitration award was ordering the restoration of respondent's contract of employment and the judgment failed to appreciate that respondent's contract was never restored and therefore there was never compliance with the arbitration award. The applicant therefore concludes that the only way for the employee to get back into the employ of the Municipality is to enforce the arbitration award/ ruling which gave him the right to return to his employer.

[9] The applicant criticizes the judgment for determining that the matter was urgent when according to the applicant the respondent waited for a period of almost two years before approaching court.

[10] The applicant assails the judgment for a punitive cost order granted against it.

Legal Principle

[11] An application for leave to appeal is governed by Section 17(1) of the Superior Court Act which provides as follows:

> *"(1) 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."*

[12] In Smith[1]Plasket AJA (as he then was) held that:

> *"7. What the test of 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 the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on 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 categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal."*[2]

[13] These sentiments were shared by Schippers AJA in *Mkhitha*[3] where the following was said:

> *"17. An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. A mere possibility of success, an arguable case or one that is not hopeless, is not enough. There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal."*

Discussion

[14] I have dealt in my judgment with almost all the issues that are raised in the notice of application for leave to appeal. I still stand by my reasons set out in the judgment. Some of the grounds were neither raised in the papers nor argued in the court a *quo* as issues for determination. I shall deal only with those issues that are relevant for determination of this matter.

[15] Moving from the premise that the main application sought to enforce a ruling or an award made by the arbitrator in the bargaining Council,

[1] ***Smith v S*** 2012 (1) SACR 567 (SCA) Para 7.
[2] ***S v Mabena & Another*** 2007 (1) SACR 482 (SCA) Para 22.
[3] ***MEC for Health, Eastern Cape v Mkhitha and another*** (1225) [2016] ZASCA176 (25 November 2016) Para 17.

the applicant contended that such a ruling or award is unenforceable for the arbitrator failed to determine the issue of unfair dismissal that was before him. The arbitrator, so the argument went, decided a matter that was not placed before him by the parties. This issue was argued at length in the first instance.

[16] At the hearing of the application for leave to appeal the point slightly shifted and focused on the nullity of the ruling or arbitrators award, which point was not sharply or pertinently raised in the answering affidavit serving before the court of first instance. The issue about nullity of the arbitration award or ruling was not agued in the first instance.

[17] When the debate in the application for leave to appeal ensued about the existence of the contract of employment and enforceability of its terms, applicant's argument developed into saying, if the arbitration award, which sought to revive respondent's contract of employment is a nullity, so is the contract. No contractual terms may be enforceable if the font of the contract is a nullity. It is not pertinently pleaded in the applicant's papers that the contract of employment between the parties was a nullity for its font is. I was informed on behalf of the applicant that the arbitrator exceeded its jurisdiction when it failed to decide a matter that was placed before it by the parties. It was concluded that an order or award granted without jurisdiction is a nullity.

[18] Whilst the importance of pleadings was accepted by the applicant, I was advised that the point about the nullity of the award, resulting in the nullity of the contract of employment it sought to revive, is a point of law, which necessarily does not have to be pertinently raised in the papers.

[19] During the hearing of the application for leave to appeal, the debate narrowed itself down to the nullity of the arbitration award which could not produce consequences of a valid contract.

[20] The respondent approached the court of first instance for enforcement of the terms of contract of employment. The contract aforesaid was allegedly revived after respondent's dismissal from employment by the arbitration award penned by Malusi Mbuli on 20th August 2022. There is a direct bearing between the arbitration award and the contract of employment that was intended to be revived by the same award. The existence and validity of contract of employment depends on the legal or substantive existence of the arbitration award.[4]

[21] Being mindful of the fact that an arbitral award can be challenged and set aside in review proceedings[5], applicant contends that a nullity, if it is found to exist produces nothing. Nothing can come into existence as a result of a nullity. If the appeal court finds that the arbitration award

[4] ***Ouderkraal Estates (Pty) Ltd v City of Cape Town and others*** 2004 (3) ALL SA 1 (SCA); 2004 (6) SA 222 (SCA) Para 20, 31 and 32.
[5] ***Cusa v Tao Ying Metal Industries and Others*** 2009 (2) SA 204 (CC); 2009 (1) BCLR (CC); 2009 (1) BCLR (1)(CC) Para 66.

is a nullity, as a corollary the contract of employment sought to be revived by the award is a nullity.

[22] I am therefore satisfied that there are prospects of success on appeal and another court might come to a different conclusion to the one the court of first instance arrived at.

Order

[23] In the result I grant the following order:

23.1 Leave to appeal is hereby granted to the full court of the Eastern Cape Division, Mthatha.

23.2 Costs of this application are costs in the appeal.

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A.S. Zono

ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

For the Applicants	:	**ADV KROON SC**
Instructed by	:	**NOSINDWA ATTORNEYS** 23 Delville Road Mthatha Tel: 047 531 4429

For the Respondent	:	**ADV MAPEKULA**
Instructed by	:	**M NZIMA ATTORNEYS** No 47 Cumberland Road Mthatha Cell No: 072 130 4772 TEL: 047 1109 120 E-mail : brnzima@gmail.com Ref : Mr Nzima

Date heard	**:**	**14 February 2025**
Date Delivered:	**:**	**13 March 2025**