THE LABOUR COURT OF SOUTH AFRICA, GQEBERHA

Not Reportable

Case no: PR 223/22

In the matter between:

THE RECLAMATION GROUP	Applicant
and	
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	First Respondent
COMMISSIONER FATAAR *N.O.*	Second Respondent
STEVEN ABBOTT	Third Respondent

Heard: Considered in Chambers
Delivered: 28 November 2024

JUDGMENT: LEAVE TO APPEAL

DANIELS J

LABOUR COURT

Introduction

[1] The applicant applied to review and set aside an arbitration award (the "award") issued by the second respondent (the "commissioner"). In the award, the commissioner found that the third respondent's dismissal was substantively fair, but procedurally unfair. Second respondent awarded third respondent compensation equal to two months' wages. I dismissed the review application. The applicant seeks leave to appeal.

Condonation

[2] The application for leave to appeal, though signed on 2 September, appears to have been filed on 25 September, judging from the date on the court stamp. Rule 67(2) of the Rules of Court states that the application for leave to appeal must be *filed with the registrar responsible for appeals* within 15 days of the judgment or order. The application should have been filed *with the registrar* on or before 3 September. It is unclear whether this occurred. I will assume, without deciding, that the application was filed within the time periods provided for in Rule 67(2).

[3] The third respondent delivered its submissions on 1 October. The third respondent states that its submissions were due on 23 September and is five court days late. The third respondent has provided a detailed explanation for the delay in the filing of its submissions. The applicant does not oppose the condonation application. In the circumstances, condonation is granted.

Legal principles and analysis

[4] Section 17(1) of the Superior Courts Act No. 10 of 2013 provides that leave to appeal may only be given where the judge is of the opinion that the appeal *would* have a reasonable prospect of success or there is some other compelling reason why the appeal should be heard.

LABOUR COURT

[5] Leave to appeal should not be granted unless there is a sound and rational basis to conclude that there is a reasonable prospect of success.[1]

[6] In *Martin & East (Pty) Ltd v National Union of Mineworkers & others*[2] the court, per Davis JA stated:

> "*This was a case which should have ended in the Labour Court. This matter should not have come to this court. It stood to be resolved on its own facts. There is no novel point of law to be determined nor did the court a quo misinterpret existing law. There was no incorrect application of the facts; in particular, the assessment of the factual justification for the dismissals/alternative sanctions. I would urge labour courts in future to take great care in ensuring a balance between expeditious resolution of a dispute and the rights of the party which has lost. If there is a reasonable prospect that the factual matrix could receive a different treatment or there is a legitimate dispute on the law, that is different. But this kind of case should not reappear continuously in courts on appeal after appeal, subverting a key purpose of the Act, namely the expeditious resolution of labour disputes*." (Own emphasis)

[7] In the final analysis one can say no more than that the threshold is high and leave to appeal is not merely for the asking.

LABOUR COURT

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[1] *MEC for Health, Eastern Cape v Mkhitha and Another* [2016] JOL 36940 (SCA) at paras 16 – 17

[2] (2014) 35 ILJ 2399 (LAC) at 2406

Grounds for leave to appeal

[8] The applicant contends that the court was wrong to find that the commissioner's findings on charges 1 and 2 were reasonable.[3] The applicant submits that the commissioner's findings were unreasonable and the third respondent should have been found guilty of breaching his duty of good faith (charge 1) as well as the misappropriation of the bulldozer (charge 2).

[9] It is important to bear in mind that the commissioner found that the third respondent's dismissal was *substantively fair*. It is therefore unlikely that the commissioner's findings in relation to charge 1 or 2 will have any practical effect.

[10] The Superior Courts Act provides, in section 16(2)(a)(i) that: "*When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone*." In the circumstances, there is no basis to grant leave to appeal based on the findings in relation to charges 1 and 2.

[11] In relation to the commissioner's finding of procedural unfairness and the award of two months' compensation, the applicant contends that:

11.1 The court erred by finding that the third respondent was prejudiced by manner in which the disciplinary process was run.

11.2 The court should have found that the commissioner failed to exercise his discretion judiciously in relation to the quantum of compensation.

[3] The commissioner found third respondent not guilty of charge 1 but guilty of the alternative charge 2 - unauthorised use of the bulldozer.

LABOUR COURT

[12] The commissioner's finding that the disciplinary process was unfair rested on the following: (1) the third respondent was given a short time to prepare, (2) the third respondent had to conduct his defence from his home, on his mobile phone (while the employer presented its case from its office with an opportunity to address the chairperson and witnesses directly), and (3) the chairperson refused to read the application for a postponement, and legal representation, and failed to give it fair consideration.

[13] I found that the commissioner's finding of procedural unfairness was not unreasonable. I pointed out that third respondent had provided evidence about the prejudice he suffered. I further found that two months' compensation (where the commissioner could have awarded up to 12 months' compensation) was not unreasonable. I don't believe that my findings are wrong, or that the applicant come close to making out such a case.

[14] In my view, the applicant fails to grasp that it seeks to appeal against the outcome of a *review application*. The grounds of appeal suggest that the applicant wishes to subject the award to a higher level of scrutiny more appropriate to a court of law. The distinction between reviews and appeals must be maintained. The court on review must not ask itself whether it would have made the same decision as the commissioner, only whether the award falls within the bounds of reasonableness.[4] The award falls within the bounds of reasonableness.

LABOUR COURT

[4] *Sidumo and another v Rustenburg Platinum Mines and others* (2007) 28 ILJ 2405 (CC) at para 109

Conclusion

[15] The applicant has not made out a case for leave to appeal. The application is therefore dismissed.

RN Daniels
Judge of the Labour Court of South Africa

LABOUR COURT