THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR104/2021

In the matter between:

COUNCIL FOR MEDICAL SCHEMES	Applicant
and	
LINDELA NOBANTU NDZIBA	First Respondent
MPHATE ENIA LEHUTJO *N.O* **(ESTATE M.D. LEHUTJO)**	Second Respondent
TEBOGO THEMBEKILE MAZIYA	Third Respondent
COMMISSION FOR CONCILIATION, MEDIATION, AND ARBITRATION	Fourth Respondent
WILLIAM KOEKEMOOR *N.O.*	Fifth Respondent

Heard: Considered in Chambers

Delivered: 27 November 2024

LABOUR COURT

Summary: Application for leave to appeal. Decided in chambers. Application granted, no costs.

JUDGMENT: LEAVE TO APPEAL

DANIELS J

Introduction

[1] The applicant brought an application to review and set aside an arbitration award issued by the fifth respondent in which the commissioner found that: (1) the individual respondents were dismissed – because they had a reasonable expectation that their fixed term employment contracts would be renewed, (2) their dismissal was procedurally and substantively unfair, and (3) the applicant must pay them each twelve months' remuneration.

[2] In my judgment I found that the application, brought under section 145(2) of the LRA, should have been brought under section 158(1)(g). I struck the application from the roll for lack of jurisdiction. However, I also indicated that the fifth respondent was correct to treat the individual respondents as dismissed because did hold a reasonable expectation of renewal of their contracts.

[3] The applicant seeks leave to appeal.

Legal principles: leave to appeal

[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

LABOUR COURT

the appeal would have a reasonable prospect of success or there is some other compelling reason why the appeal should be heard.

[5] In *S v Smith*[1] the court emphasized that a reasonable prospect of success postulates a "*dispassionate decision, based on the facts and the law, that a court of appeal could reasonably arrive a conclusion different to that of the trial court*."

[6] In *MEC for Health, Eastern Cape v Mkhitha and Another*[2] the court said there: "… *must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal*.'

[7] Leave to appeal thus carries a heavy burden, and is not merely for the asking.

Grounds for leave to appeal

[8] The applicant raises a number of grounds on which its seeks leave to appeal. I intend to deal with only one. The applicant alleges that the court erred because it was entitled to deal with the review based on the factual allegations made, despite the absence of any reference to section 158(1)(g).

Analysis

[9] It is trite that an applicant is required to set out the basis upon jurisdiction is grounded. A further principle is that a court on review is limited to

[1] 2012 (1) SACR 567 (SCA)

[2] [2016] JOL 36940 (SCA) at paras 16 – 17.

LABOUR COURT

deciding the legal issues raised in the papers. However, this is subject to an exception that: "*Where a point of law is apparent on the papers, but the common approach of the parties proceeds on a wrong perception of what the law is, a court is not only entitled, but is in fact also obliged, mero motu, to raise the point of law and require the parties to deal therewith. Otherwise, the result would be a decision premised on an incorrect application of the law. That would infringe the principle of legality."*[3]

(own emphasis)

[10] It appears that, while the court may (and is in fact obliged to do so) raise the issue of jurisdiction where this is unclear, regardless of whether it has been raised in the papers, the parties must be granted an opportunity to address the issue. Any other approach is incongruent with a fair hearing. Regrettably, jurisdiction was not raised during the hearing, and the parties were not afforded an opportunity to address the issue.

[11] It is said that the mere failure to plead an issue does not preclude the court from dealing with the issue when the evidence is before the court and the real issues have been canvassed.[4] In *Robinson v Randfontein Estates GM Co Ltd* Innes CJ stated:

> "*The object of pleading is to define the issues; and parties will be kept strictly to their pleas where any departure would cause prejudice or would prevent full enquiry. But within those limits the Court has a wide discretion. For pleadings are made for the Court, not the Court for pleadings. And where a party has had every facility to place all the facts before the trial Court and the investigation into all the circumstances has been as thorough and as patient as in this instance, there is no justification for interference by an appellate tribunal, merely because the pleading of the opponent has not been as explicit as it might have been*".
>
> (Own emphasis)

LABOUR COURT

[3] *Commercial Workers Union of SA v Tao Ying Metal Industries & others* (2008) 29 ILJ 2461 (CC)

[4] *Member of the Executive Council, Department of Education, Western Cape Government v Jethro & another NNO* (2019) 40 ILJ 2318 (LAC)

[12] During the hearing, and in the judgment, the principles canvassed in abovementioned authorities were not fully explored. There is therefore a sound and rational basis to conclude that the applicant has a reasonable prospect of success, at least insofar as jurisdiction is concerned.

Conclusion

[13] In the result, the application for leave to appeal is granted. No order as to costs.

RN Daniels
Judge of the Labour Court of South Africa

LABOUR COURT