



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR116/2022

In the matter between:

ESKOM HOLDINGS SOC LIMITED

Applicant

and

**THE COMMISSION FOR CONCILIATION
MEDIATION AND ARBITRATION**

First Respondent

ELIAS MOKUNGWE N.O

Second Respondent

**NATION UNION OF MINEWORKERS
OBO TSHEPO THOLE**

Third Respondent

Decided in Chambers.

Delivered: This judgment is handed down electronically by circulation to the parties' legal representatives by email and publication on the Labour Court's website. The date for hand-down is deemed to be 02 December 2024.

JUDGMENT: APPLICATION FOR LEAVE TO APPEAL

PHAKEDI, AJ

Introduction

[1] This is an application for leave to appeal against the judgment granted by this Court on 20 August 2024 which reads as follows:

1. *The application for condonation is granted.*
2. *The review application is dismissed.*
3. *The arbitration award issued by the second respondent under case number GAJB15624-21 is made an order of court.*
4. *There is no order as to costs.*

[2] The Applicant raised two issues in its application for leave to appeal and contends that the Court erred in agreeing with the Commissioner's finding that Eskom subjected Mr Thole to unfair labour practice by refusing to pay him an allowance in circumstances where there is no alternative Eskom accommodation as envisaged in clause 9.6.2 of the Conditions of Service policy. The Second issue is that the court made the arbitration award an order of court in the absence of a substantive application for such an order to be made.

[3] The Third Respondent filed its opposing submissions outside the prescribed timeframes accompanied by a condonation application. The condonation application is not opposed. The Third Respondent made submissions resisting the granting of the leave to appeal but did not deal with the Applicant's contention that the Court erred in making the award an order of court in the absence of a substantive application.

APPLICABLE TEST FOR LEAVE TO APPEAL

[4] The application is governed by section 17(1) of the Superior Courts Act 10 of 2013 which provides:

"17 Leave to appeal

(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."*

[5] In *MEC for Health, Eastern Cape v Mkhitha and Another*¹ the Supreme Court of Appeal said the following (reference to other authorities omitted):

"[16] Once again it is necessary to say that leave to appeal, especially to this court, must not be granted unless there truly is a reasonable prospect of success. Section 17(1)(a) of the Superior Courts Act 10 of 2013 makes it clear that leave to appeal may only be given where the judge concerned is of the opinion that the appeal would have a reasonable prospect of success; or there is some other compelling reason why it should be heard.

[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

¹ (1221/2015) [2016] ZASCA 175

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."

[6] I will then proceed to deal with the two grounds for leave to appeal raised by the Applicant hereunder:

PROVISIONS OF CLAUSE 9.6 OF ESKOM CONDITIONS OF SERVICE

[7] The Applicant submits that the Court erred in reading clause 9.6.1 and 9.6.2 of the Conditions of Service separately instead of reading them together. Furthermore, the Court failed to appreciate that clause 9.6.1 is not a reimbursement option but a precondition that ought to have been met before the reimbursement options could be triggered. The Fixed Daily Subsistence Allowance (FDA) is regulated under clause 9.6 of the Conditions of Service and reads as follows:

'9.6 Fixed Daily Subsistence Allowances

9.6.1 The following options are available for an employee who is absent from the base for at least one night. The employee and the manager shall agree prior to the business trip on one of the following available options:

A. Reimbursement for the cost of actual expenditure with regard to accommodation and meals on submission of receipts / vouchers plus R121.50 per day tax free (incidental costs only),

OR

B. Reimbursement for the cost of actual expenditure with regard to accommodation on submission of receipts / vouchers plus R392.90 per day tax free (meals and incidental costs),

OR

9.6.2 The all-inclusive allowance of R635.00 per day shall only be paid where Eskom accommodation with catering facilities are not available. The employee must keep the receipt/ vouchers for SARS assessment purposes. This amount will not be subject to Pay As You Earn (PAYE) and must be justified on assessment. The amount not justified will be fully taxable.

9.6.3 The above allowances shall be paid through the payroll.

[8] The Applicant's assertions that clause 9.6.2 is one of the reimbursement options available under clause 9.6.1 for out-of-base expenses incurred by qualifying employees is baseless and without merit. Clause 9.6.2 is available to employees where Eskom accommodation with catering facilities are not available. Furthermore, the Commissioner found the Eskom committed unfair labour practice by refusing to pay Mr Thole an FDA allowance in terms of clause 9.6.2 and this finding was based on the evidence presented by both parties and the admission by the Applicant that Mr Thole claimed in terms of clause 9.6.2 of the Conditions of service.

[9] The application before me was a review application and not an appeal. I do not believe that another court will agree with the Applicant's argument that the provisions of clause 9.6.2 of the FDA are applicable subject to 9.6.1. The two clauses clearly provides for an employee to be paid an allowance on condition that he meets either the criteria in clause 9.6.1 or 9.6.2. Leave to appeal on this ground is therefore refused.

MAKING AN ARBITRATION AWARD AN ORDER OF COURT

[8] The Labour Court is enjoined with wide powers in terms of the provisions of section 158(1)(c) of the Labour Relations Act² which provides that the Labour Court may make any arbitration award or any settlement agreement an order of the Court.

² Act 66 of 1995 as amended

[9] In paragraph 3 of the order, I dismissed the review application and made an arbitration award an order of court in circumstances where there was no substantive application for such an order to be made. I am mindful that, although I have wide discretionary powers to make such an order in terms of section 158(1)(c) of the LRA, such a discretion cannot be exercised in a vacuum and there ought to have been an application for an arbitration award to be made an order of court.

[10] As mentioned above, the test in considering leave to appeal is whether or not there is a reasonable prospect that another Court may come to a different conclusion to that of the Labour Court. In the present instance, I am of the view that there are reasonable prospects that the Labour Appeal Court is likely to arrive at a different conclusion to the one reached by myself in respect of paragraph 3 of the judgment and order dated 20th August 2024 whereby I granted an order making a settlement agreement an order of court in the absence of an application for such an order.

ORDER

[11] In the premises, the following order is made:

1. The late filing of the Third Respondent's opposing submissions to the leave to appeal is condoned.
2. Leave to appeal is granted against paragraph 3 of the judgment and order dated 20th August 2024.
3. There is no order as to costs.

GC Phakedi
Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Adv KT Mokhatla
Instructed by: Tasneem Moosa Incorporated

For the Respondent: Adv K Ramarumo
Instructed by: Mashabela Attorneys Incorporated