



**THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

**JUDGMENT**

Not Reportable

Case no: J 1520 / 16

In the matter between:

**KPMM ROAD AND EARTHWORKS (PTY) LTD**

**Applicant**

and

**ASSOCIATION OF MINEWORKERS AND**

**CONSTRUCTION UNION**

**First Respondent**

**INDIVIDUALS SET OUT IN ANNEXURE "FA1"**

**Second to Further Respondents**

**Heard: Considered in Chambers**

**Delivered: 1 November 2017**

**Summary: Application for leave to appeal – case for leave to appeal made out  
– leave to appeal granted**

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**JUDGMENT**

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SNYMAN, AJ

Introduction

- [1] The current applicants for leave to appeal were the respondents in a contempt application brought by the applicant in the main matter (the current respondent). In this judgment, I will continue to refer to the parties as cited in the main application and in my judgment in respect of which leave to appeal is sought.
- [2] The application was argued before me on 11 November 2016 by the applicant and respondents, and in a written judgment handed down on 12 September 2017, I upheld the applicant's contempt application, and concluded that the respondents were indeed in contempt of Court.
- [3] On 4 October 2017, the respondents then filed an application for leave to appeal against my whole judgment. This application for leave to appeal was also followed by written submissions as contemplated by clause 15.2 of the Practice Manual and Rule 30(3A) of the Labour Court Rules, by both parties, as the applicant opposed the application for leave to appeal.
- [4] Further in terms of clause 15.2 of the Practice Manual, it is provided that an application for leave to appeal will be determined by a Judge in chambers, unless the Judge directs otherwise. I see no reason why the application for leave to appeal needs to be dealt with in open Court, and I shall therefore determine the respondents' leave to appeal application in chambers.

#### Leave to appeal

- [5] In deciding whether to grant leave to appeal to the Labour Appeal Court, the Labour Court must determine whether there is a reasonable prospect that another Court would come to a different conclusion to that of the Court *a quo*, or in other words the appeal would have a reasonable prospect of success.<sup>1</sup> As said in *South African Clothing and Textile Workers Union and Others v Stephead Military Headwear CC*<sup>2</sup>:

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<sup>1</sup> See Section 17(1)(a) of the Superior Courts Act 10 of 2013; *Molefe v MMARAWU and Others* [2017] ZALCJHB 337 (13 September 2017); *Mbawuli v Commission for Conciliation, Mediation and Arbitration and Others* [2017] ZALCJHB 275 (1 August 2017); *Glencore Operations South Africa (Pty) Ltd v NUM obo Maripane and Others* [2017] ZALCJHB 147 (11 May 2017).

<sup>2</sup> [2017] JOL 37932B (LC) at para 7.

‘It is trite that for an application for leave to appeal to be successful, it is required of the party seeking such leave to demonstrate that there are reasonable prospects that another court, in this instance, the Labour Appeal Court, would come to a different conclusion to that reached in the judgment that is sought to be taken on appeal. ...’

[6] In *Seathlolo and Others v Chemical Energy Paper Printing Wood and Allied Workers Union and Others*<sup>3</sup> the Court considered the above test for leave to appeal and held:

‘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. ... 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 ...’

[7] And in *Member of the Executive Council for Health, Eastern Cape v Mkhitha and Another*<sup>4</sup> the Court described ‘reasonable prospects of success’ as follows:

‘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.

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

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<sup>3</sup> (2016) 37 ILJ 1485 (LC) at para 3.

<sup>4</sup> [2016] JOL 36940 (SCA) at paras 16 – 17. Also compare *Smith v S* [2011] JOL 26908 (SCA) at para 7; *Greenwood v S* [2015] JOL 33082 (SCA) at para 4; *Kruger v S* [2014] JOL 31809 (SCA) at para 2.

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.'

- [8] I am indebted to the parties for filing detailed and informative written submissions on the issue of leave to appeal. What is pleasing is that these submissions focus on the pertinent issues on which leave to appeal sought, coupled with proper argument relating specifically to those grounds. It is not, as I have often found to be the case, just simply a rehashing of the original argument when the matter was first argued.
- [9] From the outset, I am satisfied that the respondents' application for leave to appeal raises important policy considerations which in my view deserves the attention of the Labour Appeal Court. There are, as said in *Seathlolo*, legitimate disputes on the law, and how the law should be applied in contempt proceedings relating to collective conduct in the course of strike action under the LRA. I believe that it is important for the Labour Appeal Court to consider exactly what obligations there are on trade unions and trade union officials where it comes to compliance with Court Orders. On this basis, the respondents have in my view made out a case for leave to appeal to be granted.
- [10] Further, I appreciate that this matter has factual complexity. I am satisfied that there is a reasonable prospect that another Court would conclude differently on the facts, and especially where it comes to the resolution of possible disputes of fact, and what is necessary to establish a legitimate dispute of fact, in contempt proceedings. Thus, there is a reasonable prospect that another Court may decide the factual matrix otherwise. For this reason as well, the respondents should be granted leave to appeal.
- [11] Because of the judgment of the Constitutional Court in *Matjhabeng Local Municipality v Eskom Holdings Ltd and Others; Mkhonto and Others v Compensation Solutions (Pty) Ltd*<sup>5</sup>, which was handed down after my judgment *in casu* and thus did not feature in my reasoning, it may well be appropriate for the Labour Appeal Court to reconsider the matter, having due

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<sup>5</sup> [2017] ZACC 35 (26 September 2017).

regard to this judgment. This is especially the case where it comes to the issue of penalization in the context of civil contempt proceedings.

[12] I thus conclude that the respondents, overall, have made out a proper case for leave to appeal to be granted, and there is indeed a reasonable prospect that another Court would come to a different conclusion.

Order

[13] In the premises, I make the following order:

1. The respondents' application for leave to appeal is granted.
2. The respondents are given leave to appeal to the Labour Appeal Court against the whole of my judgment handed down on 12 September 2017.
3. Costs are to be costs in the appeal.

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S Snyman

Acting Judge of the Labour Court

Appearances:

For the Applicant:

Knowles Husain Lindsay Inc Attorneys

For the Respondents:

Larry Dave Attorneys