

THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH
JUDGMENT

Not reportable

CASE NO: PR 265/18

In the matter between:

NEHAWU obo KERR HOHO

Applicant

and

CCMA

First respondent

MZAMO MAMA N.O.

Second Respondent

SECRETARY EC LEGISLATURE

Third Respondent

Judgement: 3 September 2019

JUDGMENT

VAN NIEKERK J

- [1] This is an application for leave to appeal against a judgment delivered by this court on 9 May 2019.
- [2] The application for leave to appeal was filed in the Port Elizabeth court on 30 May 2019. For reasons that are not apparent to me, the application was forwarded to my associate in Johannesburg only on 31 July 2019. A set of the submissions made by the parties was made available to me only on the afternoon of Friday 30 August 2019. The application for leave to appeal was initially unopposed. The third respondent reinstated its opposition to the application on the advice of senior counsel.
- [3] The relevant facts are recorded in the judgment that is the subject of the present application, and there is no need to repeat them here. It is sufficient for present purposes to record that the court dismissed an application to review and set aside a decision by the second respondent (the commissioner) to the effect that the penalty of dismissal imposed on the applicant by the third respondent was fair.
- [4] The test to be applied is that referred to in s 17 of the Superior Courts Act, 10 of 2013. Section 17(1) provides:
- 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] The test in the present application, accurately stated, is not one that 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. The use of the word “would” in s17 (1) (a) (i) is indicative of a raising of the threshold since previously, all that was required for the applicant to demonstrate was that there was a reasonable prospect that another court might come to a different conclusion (see *Daantjie Community and others v Crocodile Valley Citrus Company (Pty) Ltd and another* (75/2008) [2015] ZALCC 7 (28 July 2015). 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. 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 (See the judgment by Davis JA in *Martin & East (Pty) Ltd v NUM* (2014) 35 ILJ 2399 (LAC), and also *Kruger v S* 2014 (1) SACR 369 (SCA) and the ruling by Steenkamp J in *Oasys Innovations (Pty) Ltd v Henning & another* (C 536/15, 6 November 2015).
- [6] The grounds on which leave to appeal is sought are not clearly expressed. What the applicant does is to repeat the grounds for review which formed the basis of the judgment that is the subject of the present application. The applicant appears to treat the review application as an appeal – his submissions appear to suggest that the commissioner came to a decision that was incorrect, and that he is entitled to relief on this basis. To the extent that the applicant submits that the

court failed to address a series of legal questions raised as grounds for review, there is no merit in this ground. The test to be applied in review proceedings is well-established, and was applied before the court. In summary, as the third respondent's counsel has observed, the applicant's submissions are repetitive, lack a factual and legal foundation, demonstrate a lack of understanding of the powers of a review court, and fail to confine themselves to the judgment under review. The application stands to be dismissed.

- [7] In so far as costs are concerned, the court has a broad discretion to make orders for costs according to the requirements of the law and fairness. The third respondent seeks the costs of the application, including the costs of two counsel. I am persuaded that the requirements of the law and fairness are best satisfied by an order for costs, but that these do not extend to the costs of two counsel.

I make the following order:

1. The application is dismissed, with costs.

André van Niekerk
Judge

Contact details

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