DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.

19/08/2020
DATE

SIGNATURE

THE JUDICIARY · REPUBLIC OF SOUTH AFRICA ·

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case Number: JR 666/18

In the matter between:

LEWIS STORES (PTY) LTD — **Applicant** (Third Respondent *a quo*)

and

VENKATSAMY NAIDOO — **First Respondent** (Applicant *a quo*)

THE COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION — **Second Respondent** (First Respondent *a quo*)

MOHAU NTAOPANE N.O. — **Third Respondent** (Second Respondent *a quo*)

Decided in Chambers.

This Judgment was handed down electronically by circulation to the parties' legal representatives by e-mail on the 19th day of August 2020.

Summary:

JUDGEMENT – LEAVE TO APPEAL

Ramdaw, AJ

[1] This is an application for leave to appeal to the Labour Appeal Court against the entire judgement I handed down on the 20th of May 2020 and varied on the 1st of June 2020.

Test for Appeal

[2] Section 17 of the Superior Courts Act, No. 10 of 2013 regulates an application for leave to appeal from a decision of a High Court. It reads as follows:

> **'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 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.'

[3] This section also applies to applications for leave to appeal in the Labour Court per *Section 151 of the Labour Relations Act, Act 66 of 1995.*[1]

[1] *Section 151 of the Labour Relations Act, Act 66 of 1995*

[4] The Court in *Mgezeni Gasbat Nxumalo v the National Bargaining Council for the Chemical Industry (NBCCI) and Others*[2] conveniently summarised the approach to an application for leave to appeal as follows:

> '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. As the respondents observe, the use of the word "would" in Section 17(1)(a)(i) are 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*[3]. 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 (See the judgment by Davis, JA in *Martin and East (Pty) Ltd v NUM*[4] and also *Kruger v S*[5] and the ruling by Steenkamp, J in *Oasys Innovations (Pty) Ltd v Henning and Another*[6], 6 November 2015) and also Seatlholo and Others v *Chemical, Engergy, Paper, Printing, Wood and Allied Workers' Union and Others*[7].'

Grounds for Leave to Appeal

[5] It is trite that in order to be entitled to leave to appeal, an applicant in the application for leave to appeal must satisfy this Court that it has reasonable

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[2] *Mgezeni Gasbat Nxumalo v the National Bargaining Council for the Chemical Industry (NBCCI) and Others* JR1170 / 2013 unreported
[3] *Daantjie Community and Others v Crocodile Valley Citrus Company (Pty) Ltd and Another (75/2008)[2015] SALCC 7 (28 July 2015*).
[4] *Martin and East (Pty) Ltd v NUM (2014) 35 ILJ 2399 (LAC),*
[5] *Kruger v S 2014 (1) SACR 369 (SCA)*
[6] *Oasys Innovations (Pty) Ltd v Henning and Another* (C 536/15, 6 November 2015)
[7] Seatlholo and Others v *Chemical, Engergy, Paper, Printing, Wood and Allied Workers' Union and Others* (2016) 37 ILJ 1485 (LC)

prospects of success on appeal. In the matter of *S v Smith*[8] the Supreme Court of Appeal held as follows:

> "What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law that a court of appeal could reasonable arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of succeed on appeal and that those prospects are not remote but have realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success and appeal."

[6] However, 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. In *Seatlholo and Others v Chemical Engergy Paper Printing Wood and Allied Workers Union and Others*[9] this Court confirmed the fact that the test applicable in applications for leave to appeal is more stringent.

[7] The Applicant raised various grounds for appeal dealing with the substantial fairness of the First Respondent's dismissal. In fact, 6 grounds of appeal are set down with a great deal of clarity in the Applicant's heads of argument. The First Respondent opposes this application and responded to all 6 grounds for appeal in their heads of arguments. I do not intend to repeat such grounds nor the responses thereto and they form part of this Judgment as if incorporated herein. I issued a twenty-five page judgement in this matter and dealt with the issues as raised by both parties very crisply in my judgement.

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[8] 2010 (2) SACR at 576 (SCA). See also *Zweni v Minister of Law and Order* 1993(1) SA 523 (A).
[9] See: Para [4]

[8] The charges against the First Respondent were unbecoming conduct relating to the false accusation against the DGM of inciting grievances from staff against the First Respondent. Secondary of insolence and gross disrespect in that the First Respondent used vulgar words and was grossly disrespectful towards his DGM when she confronted him with regards to his performance in his annual review. The specific words used were "you talking "shit", whatsoever she is doing is nonsense. God will never forgive her and that she must look at herself in the mirror "which was totally unacceptable" conduct.

[9] I was convinced that a reasonable decision maker based on the evidence and material before him as he would have arrived at a different decision than arrived of by the Third Respondent herein. When assessing this review application, I engaged in a holistic analysis of all the evidence before me.

[10] In paragraph 34 of my Judgement I dealt with the circumstances under which the so-called insolence and gross disrespect arose.

[11] The evidence of the two witnesses who overheard the conversation between Ms L Banda and Mr Naidoo does not take the matter much further as argued by the Applicant. My findings are not reliant on their evidence and as I set aside the Third Respondent's award I am not bound by any of his findings. I made my own analysis of the evidence as presented at the arbitration.

[12] In Para 48 of my Judgement I stated that even if the Applicant herein (Third Respondent's *a quo*) version is to be accepted dismissal was too harsh as a sanction and is not justifiable.

[13] I found that the Second Respondent *a quo* misconducted himself in the conduct of the arbitration proceedings and in respect of his duties as an Arbitrator. He rendered an arbitration award which was reviewed and set aside. The court had to dispense with the matter rather than to remit the same to the First Respondent *a quo* to be heard by another commissioner than the Second Respondent *a quo*.

[14] Section 193(2)(c) of the LRA is quite clear and the onus was on the Applicant herein to demonstrate to this court that reinstatement is not reasonably possible which the Applicant failed to do. This court correctly exercised its discretion in terms of Section 162 of the LRA with regards to costs based on the facts and the merits of the matter before the Court.

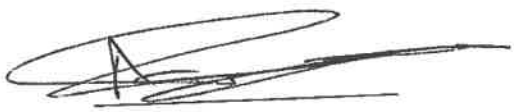
Conclusion

[15] Applying the relevant principles and considering the submissions made, I am not persuaded that the Applicant has reasonable prospects of success on appeal and that there is any reasonable prospect that another court will come to a different result.

[16] I, therefore make the following order:

Order

1. The Application for Leave to Appeal is dismissed with costs.



A Ramdaw

Acting Judge of the Labour Court of South Africa