IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JS 108/18

In the matter between:

THE COMISSIONER OF SOUTH AFRICAN REVENUE SERVICES	Applicant

and

HOPE GLORIA KEITOKILE MASHILO	1st Respondent
TSHEBELETSO ZIPPORAH SEREMANE	2nd Respondent

Heard: On paper

Delivered: 21 October 2022

JUDGMENT:

APPLICATION FOR LEAVE TO APPEAL

LABOUR COURT

SETHENE AJ

Introduction

[1] At times it would be apt for a judge, when saddled with an application whose prospects of success amount to nought, to hand down a one paged judgment cartooned with satire. After all, law must have a sense of humour and judgments may be peppered with some judicial humour, as aptly articulated by Justice Albie Sachs[1].

[2] Startling and comical about this application for leave to appeal instituted by the Commissioner of South African Revenue Services (SARS) is that there appears to be obvious realisation that it is an elementary duty of litigants and legal representatives to always disclose adverse facts[2] and/or authorities[3] to court disfavouring their cases.

[3] In my judgment that is sought to be appealed, I expressed that in SARS's Heads of Argument, Bain was written with white ink. In this application for leave to appeal, Bain features prominently. Bain's feature in this application denotes that it was a facile excuse for SARS not to mention Bain's role during Mr Moyane's "restructuring" in its previous Heads of Argument. Bain featured in the testimonies of Ms Mashilo and Ms Seremane. For instance, SARS did not dispute that Bain returned all the fees related to its role in the "restructuring".

LABOUR COURT

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[1] Laugh It Off promotions CC v South African Breweries International (Finance) BV t/a Sabmark International and Another 2006 (1) SA 144 (CC); 2005 (8) BCLR 743 (CC)

[2] Spaulding v Zimmermann 263 Minn 346 n.W.2nd 704 (1962); R Cramton & L Knowles "Professional Secrecy and its Exceptions: Spaulding V Zimmerman Revisited" (1998) 83 Minnesota Law Review 63.

[3] Ulde v Minister of Home Affairs and Another 2008 (6) SA 483 (W) at para 36ff. The High Court decision was endorsed by the Supreme Court of Appeal in Ulde v Minister of Home Affairs and Another 2009 (4) SA 522; 2009 (8) BCLR 840 (SCA)at para 13. (see also the Jeebhai v Minister of Home Affairs 2009 (5) SA 54 (SCA)

Test for leave to appeal [Superior Courts Act 2013 ("the Act")]

[4] When determining whether leave to appeal may be granted, the provisions of s 17 of the Act are applicable. Section 17(1)(a) of the Act provides as follows:

> "(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 reasons 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] Previously, the test applied in an application for leave to appeal was whether there were reasonable prospects that another court may come to a different conclusion[4]. Leave to appeal is now only granted in the circumstances set out above and this is gleaned from the word '*only'* used

[4] Commissioner of Inland Revenue v Tuck 1989 (4) SA 888 (T) at 890B

LABOUR COURT

in the relevant section 17 (1). Bertelsmann J in ***The Mont Chevaux Trust v Tina Goosen & 18 Others***[5] at para 6 stated the follow:

"It is clear that the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion, see Van Heerden v Cronwright & Others 1985 (2) SA 342 (T) at 343H. The use of the word "would" in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against." (underlining mine)

[6] In ***S v Smith***[6] at para 7 Plaskett JA held that the test is now more stringent in that:

"In order to succeed, therefore, the appellant must convince this Court on proper grounds that he has prospects of success on appeal and that those prospects are not remote but have a 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 on appeal." (underlining mine)

[7] An appellant faces a higher and more stringent threshold, in terms of the Act compared to the provisions of the repealed Supreme Court Act 59 of 1959[7].

LABOUR COURT

[5] 2014 JDR 2325 (LCC)

[6] 2012 (1) SACR 567 (SCA)

[7] See ***Van Wyk v S, Galela v S*** 2015 (1) SACR 584 (SCA) at para [14].

[8] Moreover, the SCA unanimously held in ***Mothuloe Incorporated Attorneys v the Law Society of the Northern Provinces & Another***[8]

"It is important to mention my dissatisfaction with the court a quo's granting of leave to appeal to this court. The test is simply whether there are any reasonable prospects of success in an appeal. It is not whether a litigant has an arguable case or a mere possibility of success."

[9] The SCA court has in the past bemoaned the regularity with which leave is granted to it in respect of matters not deserving its attention. (See Shoprite Checkers (Pty) Ltd v Bumpers Schwarmas CC & Others 2003 (5) SA 354 (SCA), para 23.)

Grounds for leave to appeal

[10] There are various grounds for appeal advanced by SARS and many of them are intertwined. For ease of reference, I will address them collectively. The first ground for appeal as contended by SARS is that there is no causal link between the dismissal of Ms Mashilo and Ms Seremane and reports of Nugent and Zondo Commissions. Further, the disclosure of Ms Mashilo did not disclose the details of Bain's unlawful appointment at SARS.

[11] Nugent and Zondo Commissions were primarily established in terms of the s 84(1)(f) of the Constitution of the Republic, 1996 ("the Constitution") to investigate various irregularities, corruption and malfeasance that occurred within the organs of state. Nugent Commission was solely investigating the irregularities that occurred within SARS during Mr Moyane's tenure as its Commissioner. The uncontested evidence before this court is that Bain played a key role in Mr Moyane's "restructuring" of

[8] (213/16) [2017] ZASCA 17 (22 March 2017).

LABOUR COURT

SARS. SARS on its own tendered no evidence before this court that Bain was lawfully appointed. SARS tendered no evidence in this court that it rejected Nugent Commission's findings and recommendations. In fact SARS, admitted that it implemented the recommendations of Nugent Commission. Further, it was Ms Mashilo who testified that Bain was appointed unlawfully at SARS. SARS never challenged Ms Mashilo's evidence under cross-examination, let alone calling a witness to disprove Ms Mashilo's evidence. This ground for appeal stands to fail.

[12] The second ground is premised on admissibility of Justice Nugent and Deputy Chief Justice Zondo (as he then was) reports. SARS contends that these reports are hearsay evidence and this court ought to have excluded them.

[13] SARS fails to recognise that Justice Nugent and DCJ Zondo's reports are relevant to this dispute and the interests of justice warranted that they be admitted as evidence in the opinion of this court as per s 3 of the Law of Evidence Amendment Act 45 of 1988.

[14] The opinion of a court to admit hearsay evidence is judicially exercised as the irrelevant hearsay evidence ought to be wholly excluded. SARS does not offer any credible submissions in respect of the irrelevance of the reports in issue in this dispute.

[15] In ***Minister of Police v M***[9], this court allowed the hearsay evidence to be admitted in the interests of justice. This court described the evidence in that case as the hearsay evidence of a special type warranting admission in the interests of justice. In that case, a member the South African Police Services was internally charged for allegedly raping his daughter. The chairperson of the internal hearing found him guilty and

[9] 2017 38 ILJ 402 (LC)

LABOUR COURT

recommended his dismissal. Aggrieved by the decision to dismiss him, he approached the bargaining council. The daughter refused to testify at the bargaining council as she did not want to relive the traumatic ordeal of testifying again. Minister of Police applied to the Commissioner for the record of the internal hearing to be admitted as evidence in the interests of justice. The Commissioner refused that application and found that it is hearsay evidence and ought to be excluded. Aggrieved by the decision of the Commissioner, the Minister of Police approached this court for relief. This court correctly found that the hearsay evidence ought to have been admitted in the interests of justice and remitted the matter back to the bargaining council to be dealt with by a different Commissioner.

[16] The Labour Appeal Court[10] had occasions to deal with the admission of hearsay evidence and it recognised the rationale for the legislature to have conferred powers to court to admit hearsay evidence in the interests of justice. Zondo AJP (as he then was) held at para 28:

"Furthermore it must be taken into account that, since the legislature intended hearsay evidence to be admitted in the courts of law if to do so would be in the interests of justice, it is highly unlikely that the legislature would demand a higher test before hearsay evidence can be admitted by an administrative tribunal like the Industrial Court than the test to be applied by courts of law in the admission of hearsay evidence."

[17] The exposition by Zondo AJP is apt for all courts. The civil courts found the encrypted-fax,[11] salvaged from the dustbin as admissible in the interests of justice. In this regard, the reports of Justice Nugent and DCJ

[10] Southern Sun Hotels (Pty) Ltd v SA Commercial Catering & Allied Workers Union and Another [2000] 21 ILJ 1315 (LAC); Sisonke Partnership t/a International Healthcare Distributors v National Bargaining Council for chemical Industry and Others (JA 51\10) [2013] ZALAC 16 (July 2013); Matsekoleng v Shoprite Checkers [2013] 2 BLLR 130 (LAC)

[11] S v Shaik and Others 2007 (1) SACR 142 (D); S V Shaik 2007 (1) 240 (SCA)

LABOUR COURT

Zondo are most relevant to this dispute in respect of the "restructuring" during the tenure of Mr Moyane with Bain as "service provider".

[18] In dealing with the admission of hearsay evidence in the interests of justice, Cameron JA (as he then was) held as follows in ***S v Ndhlovu and Others***[12]:

"Where the interests of justice require the admission of hearsay, the resultant strengthening of the opposing case cannot count as prejudice for statutory purposes, since in weighing the interests of justice the court must already have concluded that the reliability of the evidence is such that its admission is necessary and justified. If these requisites are fulfilled, the very fact that hearsay justifiably strengthens the proponent's case warrants its admission, since its omission would run counter to the interests of justice."

[19] SARS has advanced no credible submissions for this court to reconsider its stance in respect of the admission of reports from Commissions referred to earlier. This ground for appeal fails.

[20] The third ground for appeal is that both Domain Specialists positions were offered to Ms Mashilo and Ms Seremane and had they accepted the said position, retrenchments would have been avoided. SARS knows well that Domain Specialist positions were supernumerary positions and not substantive at all as they were not in any of SARS's approved structure. SARS called no witness with requisite knowledge of what Domain Specialists positions entailed. Neither SARS called any witness to whom Domain Specialists reported to testify if the said positions were meaningful nor where in any approved SARS's structure. Uncontested evidence of Mr Phokane remains. He testified that he accepted the position of Domain Specialist. He had no one to report to. He was paid

[12] 2002 (2) SACR 325 (SCA) at para 50

LABOUR COURT

bonus for doing nothing. SARS left Mr Phokane's evidence unchallenged under cross-examination and yet it hopes the appeal court would see things differently. None of SARS's witnesses could assist as all of them had no Domain Specialist reporting to them. Of interest in this application, SARS is silent about the uncontested evidence of Mr Phokane.

[21] In respect of the purported redundancy of the positions of Ms Mashilo and Ms Seremane, SARS contends that this court ought to have found that their positions were redundant. If SARS were to accept that its "restructuring" during Mr Moyane's tenure was marred with irregularities and illegalities, it would find that the findings and recommendations of Justice Nugent are instructive. One of the recommendations made to SARS was for its new Commissioner to recruit back to SARS employees who left SARS due to the "restructuring" under Mr Moyane's watch advised by Bain. Both Ms Mashilo and Ms Seremane left SARS solely for that "restructuring". Attempts by SARS to recruit them failed.

[22] According to SARS, reinstatement of Ms Mashilo and Ms Seremane as ordered by the court was incompetent. This contention has no merits. SARS cannot advance any submission contrary to what is set out in ***Oosthuizen v Telkom SA***[13] by the LAC.

[23] The fourth ground for appeal advanced by SARS is that the court ought not to have granted costs order as this assails the principles of *stare decisis*. In the main, SARS placed its reliance on two authorities by the apex court; namely, ***Long***[14] and ***Zungu***[15]. This contention is misplaced. Nothing in ***Long*** or ***Zungu*** connotes that the powers of this court in

[13] [2007] 11 BLLR 1013 (LAC)

[14] Long v South African Breweries (Pty) Ltd and Others (2019) 40 ILJ 965 (CC); 2019 (5) BCLR 609 (CC); [2019] 6 BLLR 515 (CC)

[15] Zungu v Premier of KwaZulu-Natal and Others (2018) 39 ILJ 523 (CC); [2018] 4 BLLR 323 (CC); 2018 (6) BCLR 686 (CC)

LABOUR COURT

terms of s 162 of the LRA have been rendered nugatory or declared unconstitutional. In my judgment, I justified why SARS has to be mulcted with punitive costs in terms of s 162 of the LRA. Nothing in my judgment suggests that I opted for the general rule applicable in civil courts: costs follow the results.

Conclusion

[24] SARS has tendered no compelling grounds for application for leave appeal to be granted. SARS has failed the test for leave to appeal as set out in the Act. Therefore, SARS's application for leave to appeal is as stated in my judgment, *"a legal tact to defend the indefensible."*

[25] In the result the following order is made:

Order

1. The application for leave to appeal is dismissed with costs.

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SMANGA SETHENE

Acting Judge of the Labour Court of South Africa

LABOUR COURT

Appearances:

For the Applicant:	Adv F Boda SC (with him Adv X Mofokeng)
Instructed by:	Majang Inc Attorneys, Johannesburg
For the Respondents:	Adv C Britz
Instructed by:	Narain Attorney, Johannesburg

(This judgment was handed down electronically by circulation to the parties' legal representatives, by email, publication on the Labour Court's website and released to SAFLII. The date on which the judgment is delivered is deemed to be 21 October 2022)

LABOUR COURT