



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: J 1931 / 2013

In the matter between:

UTATU SARWHU

First Applicant

INDIVIDUALS WHOSE NAMES APPEAR ON

ANNEXURE "A" TO THE NOTICE OF MOTION

Second and Further Applicants

and

AUTOPAX PASSENGER SERVICES

(SOC) LTD

First Respondent

SOUTH AFRICAN TRANSPORT AND

ALLIED WORKERS UNION

Second Respondent

Heard: Considered in Chambers

Delivered: 11 November 2013

Summary: Application for leave to appeal – Test to be applied – reasonable

prospect of different conclusion

Leave to appeal – proper grounds made out – another Court may come to a different conclusion – application for leave to appeal granted

JUDGMENT

SNYMAN, AJ

Introduction

- [1] This concerned an urgent application brought by the applicants on 26 August 2013 in terms of which the applicants sought relief in the form of an order compelling the first respondent to pay the remuneration of the individual applicants following a lock out instituted on the first applicant's members by the respondent, which lock-out the applicants sought to be declared to be unprotected.
- [2] The application was argued on 29 August 2013, and in a judgment handed down on 17 September 2013, the applicants' application was dismissed with no order as to costs.
- [3] The applicants have now sought leave to appeal against my judgment as referred to above. The applicants filed an application for leave to appeal on 11 October 2013, and filed written submissions on 24 October 2013. The first respondent has elected not to file any further submissions and had indicated in writing that it would abide by the decision of the Court in respect of the issue of leave to appeal.

Test for leave to appeal

- [4] In deciding whether to grant leave to appeal to the Labour Appeal Court, the

Labour Court must determine whether or not there is a reasonable prospect that another Court might come to a different conclusion to that of the Court a quo.¹

- [5] As was specifically said in *Karbochem Sasolburg (A Division of Sentrachem Ltd) v Kriel and Others*.²

'I have understood that the test in deciding whether to grant leave to appeal is the traditional test. It requires a judge to ask whether there is a reasonable prospect that another court may come to a different conclusion. See *North East Cape Forests v SAAPAWU and Others* (1997) 18 ILJ 729 (LC); [1997] 6 BLLR 705 (LC) at 710A-B; *NEWU v LMK Manufacturing (Pty) Ltd and Others* [1997] 7 BLLR 901 (LC) and Landman and Van Niekerk *Practice in the Labour Courts* (Service 1) at A-41.'

- [6] The applicants thus have to show in this instance that there is a reasonable prospect of another Court coming to a different conclusion. The applicants have raised nine individual grounds on which the leave of appeal application is based, with various subcategories. Considering the conclusion I have come to, I will not address all of these individual grounds.

The merits of the application for leave to appeal

- [7] From the outset, I am compelled to state that Moshwana AJ in *Transport and Allied Workers Union of South Africa obo Members v Algoa Bus Company (Pty) Ltd*³ came to the opposite conclusion to that which I did, whilst considering very similar and related facts. I decided not to follow the judgment of Moshwana AJ on the basis that I considered it to be clearly wrong. What this however surely must demonstrate, for the purposes of an application for leave to appeal, is that this is a matter where Judges may reasonably differ. The existence of such

¹ See *National Education Health and Allied Workers Union v University of Cape Town and Others* (2003) 24 ILJ 95 (CC) at paras 25-26; *Ngcobo v Tente Casters (Pty) Ltd* (2002) 23 ILJ 1442 (LC); *Volkswagen SA (Pty) Ltd v Brand No and Others* (2001) 22 ILJ 993 (LC); *Singh and Others v Mondi Paper* (2000) 21 ILJ 966 (LC); *Glaxo Welcome SA (Pty) Ltd v Mashaba and Others* (2000) 21 ILJ 1114 (LC).

² (1999) 20 ILJ 2889 (LC) at 2890B.

³ [2013] 8 BLLR 823 (LC).

directly conflicting judgments justifies the granting of leave to appeal for the very reason that another Court may well come to a different conclusion. Most certainly, it justifies the attention of the Labour Appeal Court to resolve this conflict.

- [8] I would also grant leave to appeal for another reason. I am of the view that central to the determination of this matter is the judgment in *SA Transport and Allied Workers Union and Others v Moloto NO and Another*⁴, and how it must be interpreted and applied. In this context also, it needs to be finally determined if the principle underlying *Moloto* would equally apply to a lock-out implemented by an employer against all of its employees. This is a complex question, and a novel one. It is certainly, in my view, in the interest of the proper administration of justice and the development of employment law that this matter be placed before the Labour Appeal Court. So far, this issue has only attracted the attention of the Higher Courts in the context of strikes by employees, and not in respect of a lock-out by the employer, despite these two issues being the two sides of the same coin.
- [9] I would finally be disposed in favour of granting of leave to appeal on the very issue of what may constitute a 'demand' for the purposes strike action or a lock-out, as part of the process of collective bargaining. There appears to be conflicting judgments on this very issue as well. I have addressed this issue in detail in my judgment, but I am of the view that the certainty which can be provided by the Labour Appeal Court considering and determining this issue would equally resolve an issue where different Judges currently have different conclusions.
- [10] I thus conclude that as a whole, the applicants have shown reasonable prospects that another Court may come to a different conclusion. As to the issue of costs, these costs are to be costs in the appeal.

⁴ (2012) 33 ILJ 2549 (CC).

Order

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

1. The applicants' application for leave to appeal is granted.
2. The applicants are given leave to appeal against the whole of my judgment handed down on 17 September 2013, to the Labour Appeal Court.
3. Costs are to be costs in the appeal.

Snyman AJ

Acting Judge of the Labour Court

APPEARANCES:

For the Applicants: Fluxmans Attorneys

For the First Respondent: Maserumule Inc Attorneys

