REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 2023-091028

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

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K. PHAHLAMOHLAKA 26 January 2024

In the matter between:

DARIO INVESTMENTS
t/a TEMBISA SUPERSPAR Applicant

And

MATOME JOSEPH MAKWELA First Respondent

SHADRACK SIMPHIWE MACHABAWE Second Respondent

This judgment was handed down electronically by circulation to the parties' and/or the parties' representatives by email and by being uploaded to CaseLines. The date and time for hand-down is deemed to be 10h00 on 26 January 2024

JUDGMENT
(LEAVE TO APPEAL)

PHAHLAMOHLAKA AJ:

[1] This is an application for leave to appeal against my judgment and order dated 10 October 2023. This application is brought in terms of section 17(1) (a) of the Superior Courts Act,10 of 2013 which provides that:

"(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 reason why the appeal should be heard, including conflicting judgements on the matter under consideration."*

[2] The applicant lists, among others, the following grounds of appeal:

2.1 That I failed to have proper regard to the application that served before me and specifically the contents of the founding affidavit and answering affidavit.

2.2 That in paragraph 6 of the judgement I captured the applicant 's contention that the respondents are relying on a breach of contract as well as policies of the applicant which they described as "policy procedures" and that those were not annexed to the founding affidavit and do not exist. In terms of an application brought in terms of section 77(3) of the BCEA (and whether the respondents allege a breach of contract) contractual terms sought to be vindicated must be plainly pleaded which the respondents failed to do.

2.3 Notwithstanding this factual position, according to the applicant, I proceeded to find that the applicant now allegedly admitted that it has a contractual right, but omitted to appreciate that there are also contractual obligations, whereas there is absolutely no basis for that conclusion *qua* the application that served before me.

2.4 That I appear to have accepted not an order in the current terms could be granted in the absence of the contractual bargain struck by the parties being expressly relied on (or annexed to the founding affidavit) and furthermore to issue an order in the absence of the "internal policy procedure' that the respondents relied on, which clearly does not exist.

2.5 That notwithstanding this, according to the applicant, I accepted in paragraph 12 and 13 of the judgement that the pleadings are clear in that the respondents are complaining about "the breach of a contractual obligation by the respondent". According to the applicant this alleged contractual obligation has never been pleaded, nor annexed to the papers.

2.6 In paragraph 14 of the judgement, according to the applicant, I latched onto an issue that is a non-issue, namely that the applicant mentioned in the answering affidavit that there was in any event no legal obligation between the parties to enter into a contract of employment, but that contracts of

employment are indeed entered into between the parties. The applicant contends that this was only mentioned as an aside that there is in reality no legal obligation to enter into contracts of employment as per the provisions of the Basic Conditions of Employment Act (BCEA) but respondent did not expressly deny that contracts were indeed entered into. According to the respondent the gist of the matter is that the applicants failed to rely on any contractual right and failed to identify the alleged "internal policy procedure."

2.7 In paragraph 21 of the judgement, according to the applicant, I stated that the issue for determination is "whether the respondent's act of terminating the employment contracts of the applicants is a breach and in contrast with the policy procedure of the respondent."

2.8 That I erred in finding that the respondent breached the applicants' employment contract by acting in contrast with the "policy procedure" of the respondent, whereas no such policy procedure was identified, nor relied on and in the face of the fact where such a "policy procedure" does not exist.

2.9 In paragraph 24.5 and 24.9 of the answering affidavit it was clearly averred by the respondent that it has no "internal policy" and that such an alleged policy has not been attached to the founding affidavit, nor pleaded, and the reason for that is obvious, since there is none.

2.10 That the respondent gallantly acceded that what it indeed possesses is a "list of offences with suggested sanctions". This is colloquially known in the workplace environment as a "code."

2.11 The respondent makes it clear in its answering affidavit that it does not have any policy or procedure stipulating "that the individual employees have a right to a physical hearing in any event, or any policy dealing specifically with the format of a disciplinary process, timelines, etc.

2.12 Notwithstanding this fact, according to the applicant, I erroneously held that the respondent's argument that it does not have a "policy procedure" is without merit and cannot be sustained in the face of the fact where the applicants attached an employment contract to their replying affidavit which refers to "policy and procedure."

2.13 Respondent contends that apart from the fact that I erred in not dismissing the applicants' application, they did not make out a case in the of founding affidavit, the contract of employment so annexed to the replying affidavit makes absolutely no mention of a disciplinary "policy procedure" that was in place or was incorporated into the employment contract. The applicant says it specifically pleaded that it prescribes to schedule 8 to the LRA (Code of Good

Practice: Dismissal) in disciplining its employees. The respondent contents that this is also captured in paragraph 13.1 of the contract annexed to the replying affidavit, which was erroneously ignored, alternatively misinterpreted by me.

[3] The applicant further contends that paragraph 13.1 of the contract of employment merely stipulates that "the employee will observe and obey all the rules, regulations, policies and procedures that have been or may be drawn up by the employer, or by any relevant legislation, and the employer will endeavour to ensure that the employee is made familiar with such rules, regulations, policies and procedures."

[4] According to the applicant I erred by finding as a fact that the applicant indeed failed to adhere to its "company policy", where I confuse the admission by the applicant that it has a code of offences with suggested sanctions and does not have what the respondents term a "policy procedure" in place dealing with disciplinary action.

[5] The applicant further contents that I erred in relying on the wording of one of the disciplinary allegations in paragraph 32 of my judgement, thereby attempting to justify my judgement and order by referring to the wording of the disciplinary charge with the ambit "breach of company policy and breach of trust "where the allegations pertain to the respondents' misconduct during the currency of the protected strike. That I erred by finding in paragraph 34 of my judgement that the "*events happened so fast that the respondent (Applicant) in its own answering affidavit admits that the applicants were removed from the venue where the disciplinary hearing was held because they were unruly. It appears that the Respondents (applicants) were aggrieved by the actions of the applicants (respondents) of embarking on a legal strike and instead of following its own internal policy and procedure the respondent this conclusion according to the applicant is totally out of kilter with the factual averments that served before me. According to the applicant I failed to identify what exact breaches there were of the "its own internal policy and procedure.*"

[6] The application is opposed by the respondents on the basis that there are no reasonable prospects of success.

[7] I am not intending to deal with each and every ground of appeal for the simple reason that the majority of the grounds of appeal revolve around the applicant's policy procedure which I have already found it exists. The applicant admits the existence thereof, but at the same time denies its existence.

[8] The test for leave to appeal was well articulated by the Supreme Court of Appeal in the ***MEC for Health, Eastern Cape v Makhitha and Another***[1]at para 16-17 where the following was said:

[1] [2016] ZASCA 176 (25 November 2016).

[*16*] *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.*

[17] 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 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."

[9] In this case the requirements of section 17(1) (a) of the Superior Courts Act, were not met. The applicant is denying the existence of its policy procedure which is clearly there. It is clear that the applicant is bringing this application on the basis that it has an arguable case not on the basis that there are reasonable prospects of success.

[10] In my view, none of those grounds passes the muster of section 17(1) (a) of the Superior Courts Act. In ***Rex v Baloyi***[2] the SCA held that leave to appeal should not be granted unless the applicant has a reasonable prospect of success on appeal, and that this reasonable prospect of success is not merely a fairly arguable case, or even an arguable case. See also ***MEC for Health Eastern Cape v Tina Goosen & 18 Others***.[3]

[11] In the circumstances, the application for leave to appeal must fail.

[12] Consequently, I make the following order:

The application for leave to appeal is dismissed with costs.

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K. PHAHLAMOHLAKA
Acting Judge of the High Court
Gauteng Division, Johannesburg

[2] 1949(1) SA 523 at 524.
[3] (LCC14R/2014) [2014] ZALCC 20.

Heard:	22 November 2023
Judgment:	26 January 2024

Appearances

For Applicant:	W.P. Bekker
Instructed by:	M.L. Schoeman Attorneys
For Respondent:	M. Marweshe
Instructed by:	Mabu Marweshe Attorneys