THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no. J 3424 / 18

In the matter between:

NATIONAL EMPLOYERS' ASSOCIATION OF SOUTH AFRICA ('NEASA') **Intervening Party**

In re:

J & L LINING (PTY) LTD **Applicant**

and

NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA ('NUMSA') **First Respondent**

THE EMPLOYEES LISTED IN ANNEXURE "A" **Second Respondent**

Considered: In Chambers

Delivered: April 2019

Summary: Leave to appeal against refusal of application for leave to intervene – no reasonable prospect of another Court deciding differently – application for leave to appeal dismissed

JUDGMENT

SNYMAN, AJ

Introduction

[1] This is an application for leave to appeal brought by the National Employers' Association of South Africa ('NEASA'), the intervening party in the original proceedings between the applicant and the respondents. This application resulted from the fact that I dismissed NEASA's application for leave to intervene in the application for leave to appeal filed by the applicant against my original judgment handed down on 10 December 2018.

[2] My judgment dismissing the application to intervene by NEASA was handed down on 26 February 2019. The applicant filed an application for leave to appeal on 12 March 2019, followed by written submissions as contemplated by Rule 30 (3A) of the Labour Court Rules and clause 15.2 of the Practice Manual on 27 March 2019. The respondents have not engaged in the application for leave to appeal.

[3] Clause 15.2 of the Practice Manual further provides that an application for leave to appeal will be determined by a Judge in chambers, unless the Judge directs otherwise. I see no reason to direct otherwise and will therefore determine NEASA's leave to appeal application in chambers.

The merits of the application for leave to appeal

[4] In order to succeed with its application for leave to appeal, NEASA must convince me that that there is a reasonable prospect that another Court would come to a different conclusion to that of the Court *a quo*, or in other words, whether the appeal would have a reasonable prospect of success.[1]

[1] See: Section 17(1)(a) of the Superior Courts Act 10 of 2013; *Molefe v MMARAWU and Others* [2017] ZALCJHB 337 (13 September 2017); *Mbawuli v Commission for Conciliation, Meditation and Arbitration and Others* [2017] ZALCJHB 275 (1 August 2017); *Glencore Operations South Africa (Pty) Ltd v NUM obo Maripane and Others* [2017] ZALCJHB 147 (11 May 2017); *South African Clothing and Textile Workers Union and Others v Stephead Military Headwear CC* [2017] JOL 37932 (LC) at para 7; *Seathlolo and Others v Chemical Energy Paper Printing Wood and Allied Workers Union and Others*

[5] The concept of 'reasonable prospects of success', was described in *Member of the Executive Council for Health, Eastern Cape v Mkhitha and Another*[2] as follows:

> '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.
>
> 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.'

[6] NEASA contends that I applied the wrong test when deciding whether or not to grant leave to intervene. I remain unconvinced that this is the case. NEASA sought to distinguish the test when deciding to give leave to intervene to a litigant as enunciated in *Gory v Kolver NO and Others (Starke and others Intervening)*[3], from the test it argues should have been applied in this Court. The distinction suggested by NEASA is artificial, considering the fact that rule 22 of the Rules of this Court is virtually identical to rule 8(1) of the Constitutional Court Rules. If the Constitutional Court has ascribed a certain meaning to its rule 8(1), then surely a similar meaning must be ascribed to the virtually identically worded Labour Court Rules. I have dealt with the meaning of these provisions in my earlier judgment, and see no need to repeat what I have already said in this judgment. I simply see no reasonable prospect of another Court deciding otherwise.

[7] NEASA argued that the current proceedings do not concern the constitutionality of a statute, as was the case in *Gory*, and this distinguishes

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(2016) 37 ILJ 1485 (LC) at para 3; *Sepheka v Du Point Pioneer (Pty) Limited* [2018] JOL 40493 (LC) at para 13.

[2] [2016] JOL 36940 (SCA) at paras 16 – 17.

[3] 2007 (4) SA 97 (CC) at para 13.

that judgment from the current matter. But again this is an artificial distinction. In *Gory*, the 'substantial interest' component as the pre-requisite for an application to intervene was established by the challenge of the constitutionality of a statute. In the current matter, this is established by section 200 of the Labour Relations Act[4] (LRA). The simple point is, depending on the Court and the issue at stake, the substantial interest component may be established in different ways. However, that does not mean that the other elements of the discretion, where it comes to deciding whether to grant leave to intervene, do not apply because they still do. I thus cannot accept that the basis of distinction advanced by NEASA has any reasonable prospects of success on appeal.

[8] NEASA suggests that because of the provisions of section 200(2) of the LRA, it is entitled as of right to in effect jump into litigation whenever it wants, and this Court has no discretion to refuse it. This proposition is untenable. If that is indeed so, then why even apply for leave to intervene? The simple answer is that the Court 'may' make an order in terms of rule 22, upon application, and this in my view clearly contemplates a discretion. I am thus satisfied that the argument by NEASA i.e. the mere fact that the applicant is its member entitles it to participate in proceedings in which its member is a party, meaning that it can join proceedings at will and this Court must allow it to do so, has no substance. The entitlement to intervene is one of the elements when deciding to grant leave to intervene, it is not the only element. The discretion goes further than just that, and in particular involves a consideration of the interests of justice. In my view, this argument of NEASA has insufficient prospects of success on appeal.

[9] This only leaves the issue of the application for leave to intervene being too late, which NEASA also takes issue with. I believe NEASA misses the point. When I handed down the original judgment on the merits, NEASA, despite being always entitled to be a party to the proceedings, elected not to become a party. When considering an application for leave to appeal, it is simply too late to allow it to become a party where the merits of the case had been decided. It is thus too late to intervene in the proceedings before this Court.

[4] 66 of 1995, as amended.

[10] The point can perhaps be best illustrated by a practical example. When the applicant applied for leave to appeal, and I refuse it (as I did), what would be the point of intervening. If I granted leave to intervene, it would simply have no practical effect or consequence. NEASA would intervene in proceedings that had already been finally disposed of. There is nothing more it could say or add that would change anything. But even worse still, what if the applicant decided not to pursue the matter further after the refusal for leave to appeal? There would accordingly be no case on the merits brought by the actual *dominus litis* in the Labour Court proceedings, which is placed before the Labour Appeal Court. NEASA would then be granted leave to intervene in proceedings that have ended, and pursue a matter where it is not *dominus litis*.[5] That is why a proper exercise of the discretion to allow or not to allow leave to intervene calls for the application to be dismissed, even if it is accepted that NEASA has a substantial interest by virtue of section 200 of the LRA.

[11] NEASA relies on the pending petition for leave to appeal to the Labour Appeal Court, brought by the applicant, in support of its argument that leave to appeal should be granted. But the existence of this petition does not assist NEASA, for the simple reason that this petition has now taken the dispute on the merits of the matter between the two litigating parties beyond the realms of this Court, and into the Labour Appeal Court. I can see no reason why NEASA, once again relying on section 200 of the LRA, cannot apply to the Labour Appeal Court to intervene in these newly instituted proceedings by the applicant in that Court. It can be an intervening party to the petition for leave to appeal. After all, section 200(2) provides that it is entitled to be a party to '*any proceedings*' in terms of the LRA, which would obviously include any appeal proceedings in the Labour Appeal Court.

[12] I accept that the Labour Appeal Court Rules do not specifically provide for the kind of scenario I have set out above, and only provides for an *amicus curiae* to join the proceedings.[6] But the entitlement to allow joinder on appeal should

[5] Compare *University of Witwatersrand Law Clinic v Minister of Home Affairs & another; Jeebhai (Applicant for Joinder)* [2007] JOL 19631 (CC) at para 6.
[6] See Rule 7 of the Labour Appeal Court Rules.

resort under the inherent power of the Labour Appeal Court to do. In *Phillips and Others v the National Director of Public Prosecutions*[7] the Court held:

> '… s 173 of the Constitution preserves the inherent power of the courts to protect and regulate their own process in the interests of justice …'

[13] In specifically dealing with an application for joinder on appeal, the Court in *Occupiers of Erf 101, 102, 104 and 112 Shorts Retreat, Pietermaritzburg v Daisy Dear Investments (Pty) Ltd and Others*[8] said:

> **'**At common law our courts have an inherent power to order joinder of parties where it is necessary to do so. Ordinarily such an order is issued pursuant to an application by one of the parties, in a court of first instance, which would have been served upon the party whose joinder is sought. A court could however, even on appeal, *mero motu* raise the question of joinder to safeguard the interests of third parties and decline to hear a matter until such joinder has been effected.'

[14] I must mention that the Rules Regulating the Conduct of the Proceedings of the Supreme Court of Appeal of South Africa (Supreme Court Rules)**[9]**, the same as the Labour Appeal Court Rules, contain no specific provision relating to the joinder of parties to appeal proceedings. However, in *Standard Bank of SA Ltd v Harris NO and Others*[10], the Supreme Court of Appeal overcame this obstacle as follows:

> **'**Shortly before the hearing of the appeal, Du Toit brought an application for leave to intervene in the proceedings before this Court. … Rule of Court 11(1)(b) affords this Court a discretion to grant the relief sought. The court decided to exercise this discretion in Du Toit's favour for the following reasons: First, the application was not opposed by any party involved in the appeal. Secondly, the relief sought would not in any way prejudice any party or inconvenience the court. Thirdly, it was apparent that Du Toit's fate was bound to that of the bank and that he therefore had a substantial interest in the

[7] 2006 (1) SA 505 (CC) at para 48.
[8] [2009] 4 All SA 410 (SCA) at para 12. See also *Matjhabeng Local Municipality v Eskom Holdings Ltd and Others; Mkhonto and Others v Compensation Solutions* (Pty) Ltd 2017 (11) BCLR 1408 (CC) at para 91.
[9] GN.1523 in GG of 27 November 1998 (as amended).
[10] [2002] JOL 10188 (SCA) at para 5.

> outcome of the appeal. Consequently the application to intervene was granted.'

[15] Rule 11(1)(b) of the Supreme Court Rules reads: **'***The President or the Court may mero motu, on request or on application … (b) give such directions in matters of practice, procedure and the disposal of any appeal, application or interlocutory matter as the President or the Court may consider just and expedient*'. By comparison, Rule 12(2) of the Labour Appeal Court Rules reads: '*The Judge President, or any judge authorised by the Judge President, may give any directions that are considered just and expedient in matters of practice and procedure*'. The comparisons are in my view immediately apparent. Rule 12(2) of the Labour Appeal Court Rules thus should serve as a similar basis to enable NEASA to apply to join the appeal proceedings.

[16] It is certainly not unprecedented that a party can apply to intervene in an appeal before the Labour Appeal Court, despite not being a party to the proceedings in the Court *a quo*. This happened in *City of Johannesburg Metropolitan Municipality and Others v Independent Municipal and Allied Trade Union and Others*[11] as is apparent from the following dictum:

> 'Even though there are several appellants and respondents cited in this appeal, none of them, with the exception of the second appellant, the Ekurhuleni Metropolitan Municipality, and the first respondent, IMATU, participated in the appeal. Mogale City Local Municipality, which was not a party to the proceedings in the court a quo, applied to the Judge President for leave to intervene in this appeal and such leave was granted.'

[17] So, and what NEASA is now doing, and borrowing from what Prinsloo J said in *SA Commercial Catering and Allied Workers Union and Others v Sun City*[12], is to cry at the wrong funeral. The ship has sailed for NEASA to intervene in the proceedings before this Court. But they are entitled to try again at the Labour Appeal Court. For this reason as well, the application for leave to appeal must fail.

Conclusion

[11] (2017) 38 ILJ 2695 (LAC) at para 2.
[12] (2018) 39 ILJ 436 (LC) at para 101.

[18] I thus conclude that NEASA has shown no reasonable prospect that another Court would come to a different conclusion, and it has no prospects of success on appeal, where it comes to the issue of the dismissal of its joinder / intervention application. The application for leave to appeal in this regard thus falls to be dismissed.

[19] Where it comes to the issue of costs, and exercising the wide discretion I have in terms of section 162(1) of the LRA, I shall follow the same approach as applied in my earlier judgment in the application for leave to appeal by the applicant, and make no order as to costs. In any event, the applicant and the respondents did not engage in the application for leave to appeal by NEASA, which further makes any costs order unnecessary.

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

Order

1. The application for leave to appeal by NEASA as an intervening party is dismissed.

2. There is no order as to costs.

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S. Snyman

Acting Judge of the Labour Court of South Africa