THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable

CASE NO: 507/04

In the matter between :

NATIONAL UNION OF MINEWORKERS First Appellant

MOTLHOKI & OTHERS Second and Further Appellants

- and -

MAZISTA TILES (PTY) LTD Respondent

Before:	**MPATI DP, NUGENT, MLAMBO JJA, NKABINDE & MAYA AJJA**
Heard:	**4 NOVEMBER 2005**
Delivered:	**23 NOVEMBER 2005**
Summary:	**Appeal from the Labour Appeal Court – appeal noted before requirement of leave to appeal introduced – whether such leave required – whether leave to appeal to be granted.**

J U D G M E N T

NUGENT JANUGENT JA:

[1] After *Chevron Engineering (Pty) Ltd v Nkambule*[1] was decided by this court but before the decision in *National Union of Metalworkers of SA v Fry's Metals (Pty) Ltd*,[2] the appellants, who I will refer to collectively as the union, noted the present appeal against a decision of the Labour Appeal Court (Jafta AJA, Zondo JP and Mogoeng JA concurring). The judgment of that court is reported,[3] and it would be superfluous to repeat its careful and comprehensive exposition of the material facts and issues.

[2] Leave has not been granted for the present appeal – a prerequisite for an appeal to this court that was laid down in *Fry's Metals* – nor was it sought by the union before the matter was called. That raises the question whether the appeal is properly before us. The submission on behalf of the union was that leave to appeal is not required. It was submitted that the effect of the decision in *Chevron* was that an unqualified right vested in the union to prosecute its appeal at the time the appeal was noted, which could not be truncated by the requirement for leave to appeal that was introduced by *Fry's Metals.* The respondent's counsel made submissions to the contrary and asked for the appeal to be struck from the roll.

[3] In *Pharmaceutical Society of South Africa v Tshabalala-Msimang NO; New Clicks South Africa (Pty) Ltd v Minister of Health*[4] it was pointed out by

[1] 2003 (5) SA 206 (SCA).
[2] 2005 (5) SA 433 (SCA).
[3] [2005] 3 BLLR 219 (LAC).
[4] 2005 (3) SA 238 (SCA).

this court,[5] and later confirmed by the Constitutional Court,[6] that where leave to appeal is required the critical time at which it must exist is when judgment is delivered in the appeal. It follows that if we were to find that leave to appeal is required it would still be open to the union to apply for such leave (subject, perhaps, to condonation being required), and if it were to be granted, to once again bring this matter before us, though at additional cost and inconvenience for all. To avoid that undesirable state of affairs, and by agreement between both counsel, we permitted the union to apply orally from the bar for leave to appeal, conditioned upon a finding that such leave is required. In the result we are called upon to decide, first, whether leave to appeal is required, and secondly, if it is required, whether it should be granted, before we turn to the merits of the appeal. I should add that we heard full argument on the merits of the appeal in case we should find in favour of the union on the preliminary issues.

[4] In *Chevron* this court held that it has jurisdiction (conferred upon it constitutionally) to entertain an appeal from the Labour Appeal Court. That was endorsed by its later decision in *Fry's Metals.* (In *Chevron* the matter commenced in the former Industrial Court while in *Fry's Metals* it commenced in the Labour Court but that distinction was not material to the decision in each case and is not material for present purposes.) But in *Chevron* the court did not consider the further question when, and in what circumstances, this court will exercise that jurisdiction, a question that was considered in *Fry's Metals.* And in the latter case it was decided that this court will exercise its jurisdiction only

[5] Para 28.
[6] *Minister of Health v New Clicks South Africa (Pty) Ltd*, Case No. CCT 59/04, paras 61 and 62

where the proposed appeal has reasonable prospects of success and where there are also special considerations that warrant a further appeal to this court notwithstanding that there has already been an appeal to a specialist tribunal.[7] It was to ensure that cases without those characteristics were not placed on its roll that the procedural requirement of leave to appeal was introduced in the exercise of this court's powers to regulate its own procedures.

[5] At the time the union noted its appeal *Chevron* had decided only that this court has jurisdiction to entertain the proposed appeal. That decision did not entail that the union had a right to insist that this court exercise that jurisdiction. It has since been held that this court will exercise its jurisdiction only in the circumstances that I have described, which applies whenever this court is called upon to exercise that jurisdiction, including in the case that is now before us. The union had no vested right that has been truncated by that decision, nor by the procedural requisite that was introduced in *Fry's Metals*, and its first submission must fail. But the fact that the procedural requisite was introduced only after the present appeal was lodged, and that its effect might be said to have been uncertain, provides good grounds for condoning the union's non-adherence to form and receiving its application for leave to appeal orally from the bar. The second question, then, is whether leave to appeal ought to be granted.

[6] The present case raises issues that are similar in material respects to those that arose in *Fry's Metals.* Only a brief synopsis is required. The respondent wished to restructure its affairs in order that its business should remain

[7] Para 42.

competitive. Various courses that it considered adopting from time to time all affected its workforce in one way or another and had the potential to result in retrenchments. The respondent initiated consultation with the union to consider its proposals and the reasons why it was considering adopting them. For a year and more the respondent attempted to find consensus with the union in relation to one or other of its proposals but to no avail. On the contrary, the union failed altogether to come to grips with the difficulties that were advanced by the respondent, offered no alternative solutions of its own, and in the end merely insisted that things should remain unchanged. Ultimately the respondent decided to proceed unilaterally and it dismissed about 300 workers in order to do so. The union, on behalf of the workers, challenged the validity of the dismissals in the Labour Court, alleging that the dismissals were automatically unfair as envisaged by s 187(1)(c) of the Labour Relations Act 66 of 1995, and in the alternative, that the respondent had not shown that the dismissals were for a fair reason and in accordance with a fair procedure as contemplated by s 188(1).

[7] The Labour Court held that the dismissals were automatically unfair as envisaged by s 187(1), and also that they had not been shown to have been effected for a fair reason and in accordance with a fair procedure, and it ordered the reinstatement of the workers. On appeal both those findings were reversed and the Labour Court's orders were set aside.

[8] When the matter came before the Labour Appeal Court it had already given its decision in *Fry's Metals*,[8] which similarly concerned dismissals that

[8] *Fry's Metals (Pty) Ltd v National Union of Metalworkers of SA* (2003) 24 ILJ 133 (LAC); [2003] 2 BLLR 140 (LAC).

were alleged to be automatically unfair. In that case the court was called upon to construe the meaning of s 187(1)(c). It held that the section is confined to conditional dismissals and does not extend to dismissals that are irreversible. In the words of Zondo JP a dismissal falls within the terms of the section only where

'…the dismissal is effected in order to compel the employees to agree to the employer's demand which would result in the dismissal being withdrawn and the employees being retained if they accept the demand … [and not where] it is effected finally so that, in a case such as this one, the employer may replace the employees permanently with employees who are prepared to work under the terms and conditions to meet the employer's requirements.'

That construction of the section was subsequently endorsed by this court after hearing comprehensive argument.[9]

[9] Applying that construction of the section the Labour Appeal Court found in the case that is now before us that the present dismissals were indeed effected unconditionally and irreversibly and were thus not struck by s 187(1)(c).

[10] On the second issue that arose before it (whether the dismissals were effected for a fair reason and in accordance with a fair procedure) it found that the reason for the dismissals was a fair reason based on the respondent's operational requirements (as contemplated by s 188(1)(a)(ii)) and were effected in accordance with a fair procedure (as contemplated by s 188(1)(a)(ii)) in that the dismissals were preceded by consultation in which the union was given

[9] 2005 (5) SA 433 (SCA) paras 55-60.

adequate opportunity to furnish the respondent with counter-proposals in order to avoid retrenchment.[10]

[11] Both those findings, it was submitted on behalf of the union, raise questions of considerable importance, not only to the parties in the present dispute, but also to the labour relations community in general. It was submitted that the decisions that are made in concrete cases, and particularly in the case that is before us, has the effect of developing and refining the law for application in future cases, and that it is in the interests of the wider community that this court should pronounce authoritatively on those developments. We were referred in particular to what was said to be ongoing debate in the Labour Appeal Court concerning the approach to be adopted when determining in what circumstances the operational requirements of an employer will constitute a 'fair reason' for dismissal.[11]

[12] While it is true that the application of law to fact in particular cases has the inevitable effect that an evolving jurisprudence is developed that is not a reason in itself why this court should intervene to direct that evolutionary process. Most often that jurisprudential evolution will involve matters of nuance and refinement, which the Labour Appeal Court is both well-placed and statutorily charged to decide. The legislature has entrusted the development of doctrine and the responsibility for statutory interpretation in the field of labour relations primarily to the Labour Appeal Court and I do not think this court

[10] Para 70.
[11] The nature of that debate is explored in a useful article by Darcy du Toit 'Business Restructuring and Operational Requirements Dismissals: Algorax and Beyond' (2005) *ILJ* 595 in which the more important cases are collected.

ought to supplant it at every step. Even where a decision of the Labour Appeal Court involves matters of principle and doctrine that are open to debate this court ought not necessarily to intervene. *Fry's Metals* made it clear that the mere fact that there is a prospect, even a reasonable prospect, that this court might reverse a Labour Appeal Court ruling is not enough to justify the grant of special leave. There will need to be special considerations relating to important issues of constitutional or legislative construction or important questions of principle before this court will consider intervening. Still less will special leave to appeal be granted where the decision involves the construction to be placed on fact or the application of doctrine to matters of fact.

[13] In my view the findings of the Labour Appeal Court in the present case did not entail decisions on significant points of law or principle. On the question whether the dismissals were automatically unfair the principle question of law was settled in *Fry's Metals.* What remains for decision in particular cases, as it was in the case before us, is only whether a dismissal was conditional or irreversible. That is an essentially fact-bound enquiry, albeit that it might at times require nuances of meaning to be considered, which does not ordinarily warrant a further appeal to this court. And generally the question whether the reason for dismissal was 'a fair reason' based on the operational requirements of the employer, and effected in accordance with a fair procedure, will similarly entail essentially fact-bound value-judgments (albeit that they might be constitutionally based).[12] Those enquiries, as they were conducted in the present

[12] See Froneman DJP in *SA Chemical Workers' Union v Afrox Ltd* (1999) 20 ILJ 1718 (LAC).

case, do not seem to me to have given rise to broad questions of policy or principle constituting special considerations that warrant a further appeal to this court and on those grounds alone I would dismiss the application for leave to appeal. I might only add that I also see no reason to disagree with the conclusions that were reached by the court below and I would have dismissed the application on those grounds as well.

[14] The application for leave to appeal is dismissed, and the appeal is struck from the roll, with costs in both cases, including the costs of two counsel.

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R.W. NUGENT
JUDGE OF APPEAL

MPATI DP)
MLAMBO JA)
NKABINDE AJA) CONCUR
MAYA AJA)