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HIGH COURT OF ESWATINI

HELD AT MBABANE CASE NO. 501118

In the matter between:

THANDIKUNENE 1st Applicant

MAKHOSANDILE VILAKATI 2nd Applicant

DAVID MDLOVU 3rd Applicant

and

THE REGISTRAR OF THE INDUSTRIAL COURT

OF APPEAL & 2 OTHERS.

Respondents

Neutral Citation: *Thandi Kunene and 2 Others Vs The Registrar* of *the Industrial Court* of *Appeal and 2 Others (501/18) [2018} SZHC 27 (10th March 2021).*

Coram : MAPHANGA J

Dates heard : 20th February

2019 Date delivered: 10th March

2021

Summary : *Civil Procedure - Application for leave to appeal judgment* of *the Court on Review - Applicant failing test* of *establishing the existence* of *prospects* of *success - Application dismissed.*

RULING

[1] In this application, the applicant seeks leave to appeal against a judgment I handed down in an earlier application for the review and setting aside of the Industrial Court of Appeal judgment.

[2] The judgment from which this application arises was handed down by me on the 2ylh 'February 2019 and that of the Industrial Court of Appeal, the 31st October 2017.

[3] The matter has a long tail as can be appreciated from the litigation history. I do not intend to rehash the background for the reason that it is not relevant and of immediate interest. I mention only incidentally that the applicants presently have embarked on a course challenging an award made by the Industrial Court in a judgment handed down by the Hon. Justice Nkonyane on 26th January 2016 in which the applicants were substantially successful in proceedings to have their retrenchment by the Respondent declared an unfair termination. As stated they got achieved the substantial relief they sought but were dissatisfied with the award by the Industrial Court (as the Court of first instance) ; that of compensation *in lieu* of reinstatement in terms of section 16(2) of the Industrial Relations Act of 2000.

[4] The Applicant appealed the remedial aspect of the Industrial Court judgment to the Industrial Court of Appeal (ICA) which dismissed the appeal. They then sought to review the decision of the ICA before this Court; in the outcome of which the application was dismissed. It is from the judgement on review that they now seek leave to appeal to the Supreme Court of this land.

[5] The grounds of the application for leave to appeal are set out as per the Notice of Appeal as follows:

> ***"1.1 the Court a quo erred to hold that the case before it called upon the Court to enquire into the correctness of the decision of a lower Court, regarding the conclusion it had reached on the evidence before it.***

1.2 *The learned Judge did not consider the grounds of review raised in Appellant's Founding Affidavit.*

1.2.1 His Lordship merely confined himself to paragraphs 9 and 10 of the Founding Affidavit (which gave a background to the Application). The grounds of review were substantively set out from paragraph 13-28 of the Founding Affidavit.

1.3 *The Learned Judge erred to find that the appellants failed to establish an error of such a nature as to initiate the integrity of the judgment. Such serious errors which the Learned Judge should have found proven were the following:*

1.3.1 *That the Industrial Court of Appeal considered and ruled on a matter/issue that was not before it. When it held that the Appellants were responsible for having caused the lapse of 5 years thus making reinstatement impracticable.*

1.3.2 *The issue before the Industrial Court of Appeal were inter alia that:-*

1.3.2.1 *There is no specified threshold in law against which Reinstatement Order could not be made.*

1.3.2.2 *There was no compliance with Section 16(c) by the Industrial Court, i.e. to conduct an enquiry why a reinstatement order could not be issued, i.e. for Respondent to discharge the onus.*

1.3.2.3.1 In blaming the Appellants, <u>the Industrial Court of Appeal relied upon incorrect dates as regards the date when the matter first appeared before the Industrial Court</u>.

1.3.2.4 There was no cross Appeal filed by Respondent before the Industrial Court of Appeal to argue that the Appellants delayed. <u>The Industrial Court of Appeal issued an order in respect of which no relief was claimed by the Respondent."</u>

[6] I must say that in essence, these grounds are a reiteration of the bases for the review brought by the Applicant; the nature and circumstance of which are extensively canvassed in the judgment of this Court in my written reasons for that judgment on review. As a result, do not intend to repeat them in this judgment.

[7] Mr. Magagula who appeared for the Applicant on both the review and present application made oral submissions advancing the extensive statement of the arguments set out in his written submissions.

These are fairly elaborate but the recurring thematic element I discern is that the error he attributes to this Court is in determining that the review had no merit in so far as it sought to impugn the legal correctness of the Industrial Court of Appeal decision. He contends this Court misconceived the point of the review which was to assert fundamental irregularities in the conduct of the appeal proceedings specifically it is alleged the Industrial Court of Appeal made reviewable errors when it delved into factual issues and upheld the Industrial Courts adjudication on the appropriate remedy of compensation as opposed to reinstatement; and in determining in essence that the Industrial Court had properly exercised its discretion in terms of section 6(2)(c) of the Act.

[8] On the other hand Mr. Sibandze who appeared for the Respondent, in both his written and oral submissions, sought to rebut the applicants arguments on the basis that the applicants grounds of appeal as proposed fall short of the threshold test of demonstrating reasonable prospects of appeal when viewed in regard to the judgment of this Court and the germane issues in the review proceedings.

(9] The Applicants bring this application upon invocation of Section 147(1)(b) of the Constitution of eSwatini (formerly Swaziland) Act No. 1 of 2005. That Section provides:

> ***"147 (1) An appeal shall lie to the Supreme Court from a judgment decree or order of the High Court.....***
>
> **(a) .....**
>
> ***(b) With leave of the High Court, in any other cause or matter where the case was commenced in a Court lower than the High Court and where the High Court is satisfied that the case involves a substantial question of law is in the public interest.***
>
> ***(2) Where the High Court has denied leave to appeal to the Supreme Court in any cause or matter, civil or criminal, and may grant or refuse leave accordingly."***

[10] The threshold test for applications for leave to appeal is whether there are reasonable prospects that another Court may come to a different conclusion (see ***Commission for Inland Revenue v Tuck [1989} (4) SA 888 (T) at 890 B.***

(11] The constitutional provision adverts to the consideration of a substantial question of law or a matter of public interest in the exercise of the Courts discretion on applicaitions for leave to appeal. This is akin to the language adopted by Wessels CJ in ***Haine v Podlashuk & Nicolson* 1933 AD 104** to the effect that a litigant in the application must establish that the matter involves a matter of substantial importance. As to what 'substantial importance' entails, Centlivres CJ, in reference to the *Haine* test said in ***African Guarantee & Indemnity* Co. *Ltd v Van Schalkwyk & Others***[1] :

> ***"When Wessels CJ said "[l}n granting leave the predominant consideration ought to be whether the matter is of substantial importance to one or both of the parties concerned .....I do not think that***

[1] *African Guarantee & Indemnity v Van Scha/kwyk & Others* 1956 (1) SA 236 (A) at 382 in fine -329 A.

he was saying something in* abstracto *when speaking of 'substantial importance' to one or both of the parties. He must have meant that the matter must be of substantial importance to one of the parties in the proceedings in issue" (added emphasis)

[12] I have carefully examined the applicants' stated grounds of appeal, considered the submissions made and reconsidered my judgment in the context of the threshold test to be applied. In considering whether the proposed appeal would have reasonable prospects of success. It is my considered opinion that no such prospects exist.

[13] Now firstly the proposed appeal lacks the requirements dictated by the constitutional provision. It has not been shown to raise any substantial matter of law or a reasonable path to breaking new ground. Seen within the scope of the instant case, this means the substance or otherwise of the issue or question must be determined in the context of the proceedings. This however is but one of the requirements the applicants must meet. It is however linked to the other factor to be established which is satisfaction of the test of reasonable prospects of success.

[14] In ***S v Smith v S* 2012 (1) SACR 567 (SCA) 570** at para [7] Plasket AJA defines what it is that constitutes reasonable prospects of success in these words:

"What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law, that a court of appeal could reasonably arrive at the conclusion differenct to that of the trial court. In order to succeed, therefore the appellant must convince this Court on proper grounds 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 categorized as hopeless. There

must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal"

[15] I am mindful that the nature of the appeal arises in the context of a decision of this court on a matter of judicial review of the proceedings of the Industrial Court of appeal as opposed to an appeal from a court of first instance. Nonetheless the principles cited above equally apply here. The assertions that have been tendered as grounds of appeal are that this court's reasoning in rejecting and dismissing the grounds of review was erroneous and a failure in the respects cited. What they are forms part of the applicants relentless litigation seeking to impugn a remedial order made by the Industrial Court in an outcome that was substantially favourable to them. It stems from their dissatisfaction with the Industrial Court award falling short of their desirable award of reinstatement to their former employment. The last iteration of this litany of proceedings was the approach to this court to set aside the Industrial Court of Appeals dismissal of their appeal on review. It was this courts decision that the review application was meritless.

[13] The essential flaw in the applicants' quest is that what they sought under the guise of review is to appeal the decision of the Industrial Court of Appeal. That is impermissible. This remains the underlying object of even the proposed appeal to the Supreme Court. It is no more that an attempt at prolonging the process in some form of 'turnstile litigation' until they achieve the object of the courts interfering with the Industrial Courts statutory discretion in the determination of employment disputes.

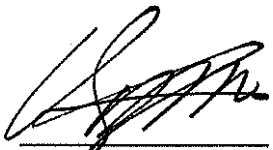
[14] It is my considered view that what would result in the grant of the sought leave is an unnecessarily prolonged litigation over a matter that only the courts in the labour division have the remit and jurisdiction to determine and resolve as specialized courts. That system of courts have determined the matter and that should be the end.

Otherwise this course the applicants seek to embark on is a road to revolving litigation through the entire court system of the Kingdom. It raises the spectre of legal proceedings without a definitive and final outcome. The appeal prospects are dim for this simple reason.

In the result the order I make is as follows:

Order:

The application is dismissed with costs.



MAPHANGA J

Appearances :

For the Applicants : Mr. K.Q. Magagula
Sithole & Magagula Attorneys

For the Respondents : Mr. M. Sibandze
Musa M. Sibandze Attorneys