

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
RULING ON APPLICATION FOR LEAVE TO APPEAL

Case No: HC-MD-LAB-APP-AAA-2021/00068

In the matter between:

HILARIUS MANU IIPINGE

APPLICANT

and

INDONGO AUTO (PTY) LTD t/a INDONGO TOYOTA

1ST RESPONDENT

LIWELA SASELE NO

2ND RESPONDENT

Neutral Citation: *Iipinge v Indongo Auto (Pty) Ltd t/a Indongo Toyota* (HC- MD-LAB-APP-AAA-2021/00068) [2023] NALCMD 38 (24 August 2023).

CORAM: MASUKU J

Date Heard: 28 July 2023

Date Delivered: 24 August 2023

Flynote: Labour Law – Civil Procedure – Application for leave to appeal – Considerations taken into account in granting or refusing the said application – Grounds of appeal – Their nature and purpose and what they must contain.

Summary: This is an application for leave to appeal a judgment of the Labour Court. In that judgment, this court set aside an arbitral award issued by the arbitrator, finding that the applicant's dismissal was unfair. The arbitrator reinstated the applicant in his employment with the first respondent. The applicant, dissatisfied with the decision of the court, applied for leave to appeal to the Supreme Court.

Held: That in applications for leave to appeal, the applicant must satisfy this court that there is a reasonable probability that the Supreme Court may come to a different decision from that of this court.

Held that: In doing so, the court must disabuse its mind of the fact that it has no reasonable doubt regarding the correctness of its judgment. What the court must ask itself is whether on the grounds of appeal raised by the applicant, there is a reasonable prospect that the Supreme Court might come to a different conclusion.

Held further that: The applicant in the instant case failed to present grounds of appeal that meet the standard. What he did was to merely record conclusions of law, in the absence of detailed bases for the conclusion.

Held: That the purpose of grounds of appeal is to apprise all interested parties and the court as fully as possible of what the applicant contends are the issues in contention. In addition, grounds of appeal are designed to give the respondent an opportunity of abandoning the judgment and to inform the respondent of the case it has to meet. If grounds of appeal are widely couched, they are bad because they fail to specify clearly and in unambiguous terms exactly what case the respondent is called upon to meet.

Held that: The applicant did not cross-appeal against a finding by the arbitrator to the effect that he was properly found guilty of one count of dishonesty. That being the case, that finding, on its own leaves the court with no other finding than that there are no reasonable prospects that the Supreme Court may come to a different conclusion than this court.

Held further that: The Supreme Court's decision in *Desert Fruit v Smith* (SA 43/2021) [2023] NASC (28 July 2023), has recently ruled that an application for leave to appeal is not necessary in matters of appeal or review which have served before this court. This is because when this court presides over those matters, it does not sit in an appellate capacity but as a court of first instance in line with s 18(2) of the High Court Act, 16 of 1991. As such, an application for leave to appeal was not necessary in the instant case.

The application for leave to appeal is struck from the roll.

ORDER

1. The applicant's application for leave to appeal is struck from the roll.
 2. There is no order as to costs.
 3. The matter is removed from the roll and is regarded as finalised.
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RULING

MASUKU J:

Introduction

[1] On 27 April 2023, I delivered judgment in a labour appeal instituted by the first respondent in which it challenged the propriety of a labour award issued by the arbitrator, Mr Liwela Sasele, in the applicant's favour. The applicant, Mr Hilarius lipinge, being the unsuccessful party in the labour appeal, is aggrieved by the outcome of the labour appeal. He has, to that end, instituted an application for leave to appeal, which is the subject of this ruling.

The parties

[2] The applicant for leave, is Mr Hilarius lipinge. The first respondent is Indongo Auto (Pty) Ltd t/a Indongo Toyota. The second respondent, Mr Liwela Sasele, is the arbitrator, whose decision was set aside on appeal. He has no interest in this matter and has been cited for formal purposes only.

[3] It is plain that the main protagonists in this matter are the applicant, Mr lipinge and the first respondent, Indongo Toyota. For that reason, I will refer to Mr lipinge, as 'the applicant' and to Indongo Toyota, as 'the respondent.' Where it is necessary to refer to Mr Sasele, I will refer to him as 'the arbitrator'. Where reference is made to all the litigants in this matter, they shall be collectively referred to as 'the parties'.

Background

[4] Considering that this matter serves before court for leave to appeal, it is unnecessary to delve deeply into the background. I will merely mention the salient issues that inform the present application. They can be summarised as follows: The applicant had been employed by the respondent as a sales consultant in its dealership. Following a disciplinary process, in which the respondent was charged with three counts of dishonesty, he was dismissed by the respondent, having been found guilty of all three.

[5] Aggrieved by the dismissal, the applicant lodged a labour dispute with the office of the Labour Commissioner. The arbitrator, after the matter failed to settle at conciliation, presided over the arbitration and found for the applicant. He held that the applicant's dismissal could not stand and ordered that he be compensated and reinstated to his previous position.

[6] The respondent was in turn dissatisfied with the arbitral award reinstating the applicant and appealed the award to this court. The appeal culminated in the judgment referred to in the opening paragraph of this ruling. The long and short of it, is that the applicant, dissatisfied by the judgment of the Labour Court, seeks leave from this court to appeal the judgment to the Supreme Court. It is the sustainability of that application for leave to appeal that is at the heart of this judgment.

The applicant's approach

[7] In moving this application, the applicant filed a notice of application for leave to appeal. It was accompanied by an affidavit deposed to by the applicant. It called on the respondent, if it opposes the application, to file a notice to oppose and answering affidavits. This the respondent did so. In the terse founding affidavit, the applicant contends that this court erred in reaching the conclusion that it did. He proceeded to allege eight grounds of appeal, some of which may not be properly regarded as grounds of appeal at all. For completeness' sake, it is necessary that I cite the said grounds of appeal verbatim.

[8] At para 5 of the founding affidavit, the applicant contends that the following are the grounds of appeal:

'5.1 That His Honourable Justice Masuku erred in law by upholding the appeal against the arbitration award.

5.2 That His Honourable Justice Masuku erred in law by failing to give any consideration, alternatively sufficient consideration to the fact that Mr. Heita testified during the Applicant's disciplinary hearing and confirmed the Applicant's version of events, which version was taken into account by the 2nd Respondent when making his award during the arbitration.

5.3 That His Honourable Justice Masuku erred in law by holding that the second and third counts of dishonesty were proven despite there being an unchallenged version by Mr Heita, who is the owner of the add-ons apparently unlawfully booked out.

5.4 That His Honourable Justice Masuku erred in law by setting aside the arbitration award.

5.5 That His Honourable Justice Masuku erred in law by holding that the award was wrong because the evidence presented in the arbitration proceedings does not support the conclusion reached by the arbitrator despite the overwhelming evidence to the contrary.

5.6 That His Honourable Justice Masuku erred in law by holding that the arbitrator failed to correctly consider and apply the rules of evidence.

5.7 That His Honourable Justice Masuku erred in law by holding that the order of reinstatement by the arbitrator was unreasonable and that no reasonable arbitrator would have made such an order.

5.8 That His Honourable Justice Masuku erred in law by giving no consideration, alternatively, little consideration to the fact that the respondent bears the onus to prove that the dismissal was fair.

That His Honourable Justice Masuku erred in law by giving no consideration, alternatively little consideration to the presumption of unfair dismissal and the duty of the respondent to rebut same.'

[9] The reason why I have quoted liberally from the applicant's affidavit, will become apparent as this ruling progresses.

The respondent's contentions

[10] It is important to mention that the respondent filed an answering affidavit contesting the propriety of the court granting the application. In this connection, it should be pointed out that the applicant did not file a replying affidavit. This has the effect that the allegations by the respondent should, all things being equal, stand. No heads of argument were filed on the applicant's behalf and this is not a criticism as the court did not order the parties to file heads of argument. The respondent did file its heads of argument and they have been extremely helpful to the court.

[11] In the answering affidavit, the respondent takes the point that the applicant has not properly set out grounds of appeal. It contends that what has been quoted above from the applicant's affidavit, are nothing but conclusions of law by the applicant without any factual basis being laid for the contention that the court erred in the respects mentioned. As far as

the respondent is concerned, there are no proper grounds of appeal that can persuade this court to decide in the application in the applicant's favour.

[12] The respondent further points out that when proper regard is had to the applicable test in applications for leave to appeal, the applicant's case falls flat on its face. This is because from what is alleged to be grounds of appeal filed by the applicant, the respondent and the court are made no wiser as to why leave should be granted.

[13] The respondent further points out that the applicant was found by the arbitrator to have been guilty of dishonesty and that this finding was not appealed against and it thus stands. The effect of this finding, argues the respondent, is that he accepts that he was guilty of dishonesty and as such, there can be no prospect, reasonable, or otherwise that a different court might find for him.

[14] Furthermore, the respondent points out that the findings by this court cannot be assailed and that the applicant has failed to show that another court, faced with the same facts, may come to a different conclusion. The respondent pointed out that the findings made by this court regarding the credibility of the applicant as a witness, cannot be faulted and which is a criticism of how the arbitrator dealt with the evidence on disputed issues. The long and short of the respondent's case was that this application should be dismissed.

The applicable test for applications for leave to appeal

[15] The applicable test has been stated to be that the court against whose judgment the appeal is proposed, must decide whether there is a reasonable possibility that the Supreme Court, in this case, may come to a different conclusion from the one reached by this court.

[16] In *Minister of Finance v Hollard Insurance Company of Namibia Ltd*,¹ the Supreme Court dealt with the applicable test in the following terms:

'The test for granting leave to appeal is whether there is a reasonable possibility (not a probability) that the Supreme Court may come to a different conclusion. The question in the present case therefore is whether there are reasonable prospects that the Supreme Court might come to the conclusion that the order for stay is competent.'

¹ *Minister of Finance v Hollard Insurance Company of Namibia Ltd* Case No: P8/2018 [2019] NASC 28 May 2019, para 109.

[17] Transposed to the instant case, the question that this court is called upon to answer is the following: has the applicant persuaded this court that there is a reasonable possibility that the Supreme Court might come to a different conclusion on whether it was proper for the respondent's appeal to succeed? Put differently, the question is whether there are reasonable prospects that the Supreme Court may find that the upholding of the respondent's appeal by this court, was incorrect.

[18] It is now opportune that consideration is given to the prime question whether there is a reasonable possibility that the Supreme Court may come to a different conclusion. In doing so, I will be mindful of the remarks expressed by this court in *Shilongo v Vector Logistics (Pty) Ltd*,² where the following appears:

'An application for leave to appeal should not be granted if it appears to the Judge that there is no reasonable prospect of success. And it has been said that in the exercise of his or her power, the trial Judge (or in the present case, the appellate Judge) must disabuse his or her mind of the fact that he or she has no reasonable doubt as to the guilt of the accused. The Judge must ask himself or herself whether, on the grounds of appeal raised by the applicant, there is a reasonable prospect of success on appeal: in other words, whether there is a reasonable prospect that the court of appeal may take a different view . . . But, it must be remembered "the mere possibility that another Court might come to a different conclusion is not sufficient to justify the grant of leave to appeal"'.

[19] Armed with the guidance quoted above, I now proceed to make a decision in the instant case as to whether the applicant has met the threshold required.

Determination

[20] What is plain, from the cases quoted above, especially *Shilongo*, is that the grounds of appeal play a pivotal role in assisting the court to come to a proper decision on whether reasonable prospects of success exist in any case for the court to grant leave as prayed. I am in full agreement with the criticisms laid by Mr Quickfall on the grounds of appeal filed on the applicant's behalf in this matter. They are recorded above.

[21] What grounds of appeal should do, is to inform the court fully, of the bases upon which it is alleged or argued that the Supreme Court may come to a different conclusion than this court. In this connection, the manner in which this court is alleged to have erred must be manifest from the grounds of appeal. So critical are these grounds that they should be

²*Shilongo v Vector Logistics (Pty) Ltd* (27 of 2012) [2014] NALCMD 33 (7 August 2014), para 4.

detailed in such a way that the trial court can, merely from reading them be able, in some cases, without more, to decide whether the application has merit.

[22] In drafting the grounds of appeal, the applicant must be careful not to draw conclusions of law and then argue that those conclusions are the bases upon which another court may come to a different conclusion. When regard is had to the applicant's grounds of appeal as recorded in his founding affidavit, it becomes clear that the applicant does not detail the particular respects in which the court is alleged to have erred. Wide and generalised allegations, devoid of the necessary detail will not do in such cases. Maudlin sympathy for the applicant's case by the court does not suffice either.

[23] As a result, and proper regard had to the grounds of appeal advanced by the applicant, the court is not placed in a situation where it can come to a conclusion that the Supreme Court might hold differently from this court. For example, it is alleged in the grounds of appeal that, 'His Honourable Justice Masuku erred in law by upholding the appeal against the arbitration award.' Elsewhere, it is stated 'That His Honourable Justice Masuku erred in law by setting aside the arbitration award'. The question that immediately springs to mind, is how? No answers are provided in the instant case and remain nagging in a reader's enquiring mind.

[24] It bears repeating that grounds of appeal must be just that and not conclusions of law. In *S v Gey van Pittius and Another*,³ the following was stated:

'In my opinion these are not grounds of appeal at all but are conclusions drawn by the draftsman of the notice of appeal without setting out the grounds therefor. Such grounds do not inform either the State, the magistrate or this Court the grounds on which the judgment is attacked . . . The purpose of grounds of appeal as required by the Rules is to apprise all interested parties as fully as possible of what is in issue and to bind the parties to those issues.'

[25] Further reference can helpfully be made to the case of *Songono v Minister of Law and Order*.⁴ It was recorded in that case that grounds of appeal are designed 'to give the respondent an opportunity of abandoning the judgment, to inform the respondent of the case he has to meet and to notify the court of the points raised. Accordingly . . . grounds of appeal are bad if they are so widely expressed that it leaves the appellant free to canvass every finding of fact or every rule of law made by the court, a quo, or if they specify the finding of

³ *S v Gey van Pittius and Another* 1990 NR 35 (HC) at 36 E-H.

⁴ *Songono v Minister of Law and Order* 1996 (4) SA 384 (E) and Petrus T. Damaseb, *The Supreme Court of Namibia Law and Practice*, Juta & Co, 1st ed, 2021, p103.

fact or rulings of law appealed against so vaguely as to be of no value either to the court or to the respondent, or if they, in general, fail to specify clearly and in unambiguous terms exactly what case the respondent must be prepared to meet.'

[26] In *Songono*, the court held the view that where grounds of appeal are not clearly stated in the application for leave to appeal, the said grounds are fatally defective and must be dismissed. I agree and am of the considered view that when proper regard is had to the applicant's grounds of appeal articulated above, they seem to violate the prescripts mentioned above and at every turn.

[27] For starters, they are framed in such a wide and broad manner as to afford the applicant an open sesame to canvass any and every conceivable attack on the judgment under the sun, which is not the intention that should attach to proper grounds of appeal. Specificity and directness, as well as precision are the hallmarks of proper grounds of appeal. This is so as to leave the respondent and the court under no illusion or fumes of confusion, as to the exact nature, import and precinct of the argument sought to be advanced in support of the proposed appeal.

[28] With these remarks in mind, with which I fully associate myself, and the commentary thereon recorded above, I am of the considered opinion that the applicant's proposed grounds of appeal are defective. As such, the applicant's case does not move even one inch from the starting blocks. There is, accordingly, no useful information placed before this court upon which the exercise of deciding whether there is a reasonable prospect that the Supreme Court might come to a different conclusion can be properly made. On this basis alone, I am of the considered opinion that this application should fail.

[29] Another issue that hangs like an Albatross around the applicant's proverbial neck, is a finding by the arbitrator that the applicant was properly found guilty by the disciplinary committee on the first count of dishonesty. This is a finding that the applicant did not challenge. There was, accordingly no cross-appeal on it before this court. It thus stands as a huge stumbling block in the applicant's way on any argument advanced that there can be said to prospects that the Supreme Court might find differently from this court.

[30] On its own, and standing as one finding that the applicant accepts, it immediately suggests that the upholding of the applicant's dismissal, by this court is unimpeachable. This is because there is plenty of authority for the proposition that even one act of dishonesty, whenever proved, is not to be taken lightly. This is so for the reason that dishonesty,

whatever its nature and character, tends to destroy or rupture irretrievably the employment relationship in which honesty and integrity are the foundational pillars.

[31] In *Model Pick 'n Pay Family Supermarket v Mwaala*,⁵ it was stated that 'Dismissal is no doubt an extreme sanction, but the Courts have not been shy to condone dismissal even for a single or trivial act of theft or dishonesty. . . The serious light in which this Court holds dishonesty and theft is apparent from two Namibian decisions referred to by counsel: . . .'

[32] If any further authority on this proposition is required, one need not go further than to quote from the lapidary remarks that fell from the lips of Sibeya J in *Telecom Namibia v Mandjolo*.⁶ In his usual eloquence and witty turn of phrase, the learned Judge expressed himself as follows on the issue of dishonesty and its deleterious impact on the employment relationship and pact:

'Dishonesty has the capacity to break a relationship, and an employment relationship is built on honesty and trust. Employees and employers are expected to act honestly towards each other in order to advance their relationship. Dishonesty is hardly tolerated as it has a sharp edge capable of cutting through the bone of an employment agreement and break it to pieces.'

[33] There is no ground of appeal advanced by the applicant, with the necessary material that deals with the effect of a finding of dishonesty. In this connection, the finding of the court that the disciplinary code was not cast in stone, as the law of the Medes and the Persians, has not been specifically challenged in the applicant's grounds of appeal. It thus stands and suggests that there is no reasonable prospect that the Supreme Court might arrive at a different conclusion on this aspect.

[34] Having regard to all the foregoing discussions, I find it unnecessary to deal with any further matters that the respondent raised. It is useful, however, to observe that this application has been approached by the applicant with an apparent lack of enthusiasm. The impression that I gained as I read the applicant's papers and listened to the argument, was that the applicant was merely going through the motions. In such instances, the court is confined to the material the applicant places before it to decide whether a proper case for the granting of the application for leave has been made. In this instant matter, no proper case has been so made. There can, for that reason, be no other proper or condign conclusion than for this court to dismiss the application.

The twist in the tail

⁵ *Model Pick 'n Pay Family Supermarket v Mwaala* 2003 NR 175 (LC), p 181J-182B.

⁶ *Telecom Namibia v Mandjolo* (HC-MD-LAB-APP-AAA-2022/00076) NALCMD 20 (12 May 2023), para 76.

[35] After this ruling had been drafted and was ready for delivery, a new development came to my attention. It came to light that the Supreme Court, on 28 July 2023, the very day this matter was heard, issued judgment in *Desert Fruit (Pty) Ltd v Smith and Others*.⁷ This judgment appears to fundamentally alter the terrain in so far as applications for leave to appeal in respect of appeals and reviews from this court are concerned. The judgment, in my view impacted the conclusion that I have reached above.

[36] I accordingly invited the parties to make further submissions regarding the question whether parties are required, in the light of the *Desert Fruit* judgment, to file an application for leave to appeal to this court. I have considered the further argument presented by the parties and for which I am grateful.

[37] In my considered view, there are two paragraphs in *Desert Fruit*, which are dispositive of the question. Smuts JA, writing for the majority of the court stated the following at para [44] of the judgment:

‘It would follow that appeals from arbitration tribunals established under the Act would likewise not amount to the Labour Court sitting as a court of appeal for the purpose of s 18(2)(b) of the High Court Act. A decision reached by the Labour Court in those circumstances would be as a court of first instance and not one on appeal for the purpose of s 18(2), even though this Court had previously accepted the position to be to the contrary but without the point ever being argued and determined.’

[38] At para [46], the Supreme Court proceeded to make the following finding:

‘It follows that s 18(2) is not applicable to proceedings where the Labour Court determines an application for review from an arbitration tribunal established under the Act. The Labour Court sat as a court of first instance and leave to appeal is thus not required under s 18(2) of the High Court Act.’ (Emphasis added).

[39] What is plain from the two paragraphs quoted above is that whether leave to appeal from a judgment of this court is necessary, depends on the capacity in which this court sat. If it sat an appellate court, leave to appeal to the Supreme Court is necessary. Where, however, it sits as a court of first instance, leave is not required and this is governed by the provisions of s 18(2) of the High Court Act.

⁷ *Desert Fruit (Pty) Ltd v Smith* Case (SA 34/2021) [2023] NASC (28 July 2023).

[40] The Supreme Court, relying on the South African judgment of *NCR*,⁸ reasoned that tribunals set up under the Labour Act, are not courts, strictly speaking and they are also not part of the judicial system.⁹ This accordingly renders this court, when it sits in those matters, a court of first instance. For that reason, leave to appeal a judgment of this court to the Supreme Court, is not required in terms of s 18(2) of the High Court Act.

[41] It is worth noting that the *Desert Fruit* case involved a review and in respect of which the question of whether leave was required loomed large. That finding, as seen elsewhere above, includes matters, which served before this court on appeal. The sum total of the *Desert Fruit* judgment, as I understand it, is that proceedings before this court, whether appeals or reviews, emanate from tribunals which are not courts for purposes of the High Court Act. Further, they are also not part of the judiciary. As such, this court, in those matters, sits as a court of first instance and not as a court of appeal. For that reason, leave to appeal to the Supreme Court, in respect of appeals and reviews which serve before this court emanating from the Office of the Labour Commissioner, is not required in terms of s 18(2) of the High Court Act.

Conclusion

[42] In view of the discussion above, it becomes clear that in terms of the old dispensation, the applicant had dismally failed to make out a case for an order for leave to appeal to be granted. The ground has however fundamentally shifted with the advent of *Desert Fruit*. The correct decision to return, in the circumstances, and under the new interpretational regime, is that the applicant was not required to seek leave, considering that this court, in dealing with the appeal, sat as a court of first instance. As such leave to appeal was not necessary.

[43] I accordingly come to the conclusion, which I consider inexorable in the circumstances, namely, that the applicant did not have to file an application for leave to appeal. In the premises, there is only one possible fate that can meet the application, namely, the application is struck from the roll.

Order

⁸ *National Credit Regulator v Lewis Stores (Pty) Ltd* 2020 (2) SA 390 (SCA).

⁹ *Ibid* para [38].

[44] After due consideration of the papers filed and the argument advanced in this matter, the proper order to issue, regard had to the conclusion drawn immediately is above, is the following:

1. The applicant's application for leave to appeal is struck from the roll.
2. There is no order as to costs.
3. The matter is removed from the roll and is regarded as finalised.

T.S. Masuku
Judge

APPEARANCES:

APPLICANT: M Ikanga
Of M Ikanga & Associates Inc., Windhoek

RESPONDENT: D Quickfall
Instructed by: Köpplinger-Boltman Legal Practitioners, Windhoek