

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA,



MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO: HC-MD-LAB-APP-AAA-2019/00072

In the matter between:

**THOMAS HAMUTETA**

**APPLICANT**

and

**MINISTER OF HOME AFFAIRS AND IMMIGRATION**

**1<sup>ST</sup> RESPONDENT**

**CHAIRPERSON OF THE PUBLIC SERVICE**

**COMMISSION OF THE REPUBLIC OF NAMIBIA**

**2<sup>ND</sup> RESPONDENT**

**PRIME MINISTER OF THE REPUBLIC OF NAMIBIA**

**3<sup>RD</sup> RESPONDENT**

**Neutral Citation:** *Hamuteta v Minister of Home Affairs and Immigration* (HC-MD-LAB-APP-AAA-2019/00072) [2021] NALCMD 29 (17 June 2021)

**CORAM:** SIBEYA J

**Heard:** 24 May 2021

**Delivered:** 08 June 2021

**Reasons:** 17 June 2021

**Flynote:** Labour Law – Application for leave to appeal – Applicable principles restated – Whether Court erred in finding that misconduct committed involved dishonesty – Whether negligence is dismissable in this matter – Applicant required to establish reasonable prospects of success in the appeal – Prospects of success not established – Application for leave dismissed.

**Summary:** The court was faced with an application for leave to appeal launched against the judgment of this court where the applicant's appeal was dismissed. The applicant contend that this court misdirected itself when it allegedly found that he was guilty of dishonesty and thus justifying the dismissal when he was not charged with dishonesty.

*Held* – The established legal principle applicable to an application for leave to appeal is whether there are reasonable prospects of success on appeal in that another court may come to a different conclusion.

*Held* – There is no finding by the court that the verdict of negligence delivered by the arbitrator was replaced with dishonesty on appeal. The court only remarked that a consideration of the evidence reveals dishonesty, which does not substitute the negligence verdict.

*Held* – The court has to consider the circumstances surrounding the commission of the misconduct which justifiably destroys the employment relationship between the employer and the employee and warranting dismissal. Application has no reasonable prospects of success.

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### **ORDER**

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1. The application for leave to appeal to the Supreme Court is dismissed.
2. There is no order as to costs.
3. The matter is regarded finalised and removed from the roll.

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### **JUDGMENT**

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**SIBEYA J:**

## Introduction

[1] This is an application for leave to appeal against the judgment of this court where the applicant's appeal was dismissed. The reasons for the decision were delivered on 01 February 2021. The application for leave to appeal was filed on 03 March 2021.

[2] The applicant is Mr Thomas Hamuteta, formerly employed in the Ministry of Home Affairs and Immigration ("the Ministry") before his dismissal. The first respondent is the Minister of Home Affairs and Immigration, the minister responsible for the Ministry. The second respondent is the Chairperson of the Public Service Commission. The third respondent is the Prime Minister of the Republic of Namibia.

[3] Disguntled by the decision of the Labour Court on appeal, the applicant applied for leave to appeal to the Supreme Court.

## The grounds

[4] The applicant raised several grounds of appeal but during the hearing of the application for leave, his grounds were limited to one. In essence the applicant contend that this court misdirected itself when it found that he was guilty of dishonesty and therefore, his dismissal was justifiable.

[5] The respondents oppose the application on the basis that the court did not replace the finding of the arbitrator that the applicant was negligent with the verdict of dishonesty.

## The law and the merits

[6] The established legal principle applicable to an application for leave to appeal is whether there are reasonable prospects of success that another court may come to a different conclusion. In *S v Smith*,<sup>1</sup> a judgment of the Supreme Court of South

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<sup>1</sup> *S v Smith* 2012 (1) SACR 567 (SCA) para [7]. See also: *S v Nowaseb* 2007 (2) NR 640 (HC); *S v Teek* (1 3/2005) [2017] NAHCMD 35 (15 February 2017).

Africa, the court discussed the test for an application for leave to appeal and stated as follows:

'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 a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and 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 categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal.'

[7] The court must therefore ask itself whether the application for leave establishes reasonable prospects of success on appeal. In such process, the appellate Judge must disabuse his mind of the conviction that the appeal deserved to be dismissed. Where reasonable prospects of success on appeal exist, then the court should not be hesitant to grant the applicant leave to appeal.

[8] It is in consideration of the above legal principles and disabusing my mind of the conviction that the appeal stood to be dismissed, that I proceed to determine the merits of the application.

[9] Both Mr. Marcus and Mr Coetzee appeared for the applicant and the respondents respectively during the hearing of the appeal and the application for leave to appeal.

[10] The singular ground argued is that this court found that the applicant was guilty of dishonesty and that raises reasonable prospects of success to the extent that the Supreme Court may find it to be a vitiating error, so the applicant argued. Mr Marcus submitted that the arbitrator found that the applicant committed a very careless and unreasonable mistake and that such finding cannot be equated with dishonesty. He submitted that the finding of negligence by the arbitrator attracts a sanction of a written warning to a first offender. He concluded his submissions that dishonesty was not established at arbitration.

[11] Mr Coetzee submitted contrariwise and argued that nowhere in the judgment did the court find the applicant guilty of dishonesty. Mr Coetzee further submitted that the conduct of the applicant was bad so as to destroy the trust forming the basis of the employment relationship and thus warranting dismissal.

[12] The applicant was, at the time of his dismissal, employed as a Chief Control Officer in the procurement department of the Ministry. He was responsible for procurement, amongst other duties. At the disciplinary hearing, he was found guilty of negligence after completing and facilitating the process of the general expense whereby a cheque of N\$1 013.90 for the Ministry was printed, and sent to the City of Windhoek for payment of his personal municipal account. He was dismissed on the basis of fraud.

[13] Discontented with his dismissal, the applicant referred his matter to the Office of the Labour Commissioner. The arbitrator heard further evidence and delivered an award where she criticised the dismissal on the basis of fraud and labelled it as incompetent in view of the fact that the applicant was not charged with fraud. The arbitrator however concluded that in the premises of the evidence led, it was reasonable and justifiable to dismiss the applicant.

[14] From the evidence led at arbitration, it is apparent that:

- a) before completing the general expense for payment to be made by the Ministry, a person must examine the invoice to be paid and the applicant, a Chief Control Officer in the procurement department, was obliged to verify the correctness of the payee and the amount of due for payment;
- b) the invoice from the City of Windhoek for the amount of N\$1 013.90 was issued to the applicant for his personal municipal services rendered to him;
- c) the applicant had subordinates who could assist him to complete the general expense;

d) that on 14 October 2009, the applicant completed and processed a general expense resulting in a cheque of the Ministry for the amount of N\$1 013.90 issued in favour of the City of Windhoek, for his benefit after obtaining the particulars of the account from his personal municipal account;

e) after completing the general expense and processing same, the applicant ensured that the cheque was issued and sent to the City of Windhoek for payment of his personal municipal services while knowing that he was not allowed to pay his personal invoice with the State account or funds of the Ministry and that this would constitute misconduct.

f) the applicant's claim that he completed the general expense out of mistake due to work pressure lacks merit as there was no urgency to pay the municipal services and he was not alone in the office.

[15] The above evidence demonstrates that the applicant completed the general expense for the Ministry in order to pay for his personal municipal account.

[16] It is on the basis of the above evidence on record that this court remarked that the arbitrator cannot be faulted for concluding that the actions of the applicant were very unreasonable and careless and that dismissal was fair. This court affirmed the guilty verdict of negligence passed by the arbitrator together with the sanction of dismissal.<sup>2</sup> The court went on to remark that the aforesaid actions of the applicant shows dishonesty towards the employer. The conduct of the applicant, as submitted by Mr Coetzee, destroyed the employment relationship.

[17] There is no finding by the court that the negligence verdict passed by the arbitrator was replaced with dishonesty by the court. What appears from the record is that the court remarked that the evidence reveals dishonesty, which does not amount to a substitute of the negligence verdict with that of dishonesty.

[18] The court can however not turn a blind eye to the circumstances surrounding the commission of the misconduct which justifiably in the present matter destroys the

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<sup>2</sup> *Hamuteta v Minister of Home Affairs and Immigration* (HC-MD-LAB-APP-AAA-2019-00072) Para 74.

employment relationship between the employer and the employee. On all the facts of the matter inclusive of the surrounding circumstances of the misconduct, this court is of the view that the actions of the applicant are so grievous that dismissal is warranted.

[19] In view of the foregoing, I find that there are no reasonable prospects brought forward for leave to be granted.

#### Order

[20] In the result, it is ordered that:

- 1.The application for leave to appeal to the Supreme Court is dismissed.
- 2.There is no order as to costs.
- 3.The matter is regarded finalised and removed from the roll.

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O S SIBEYA  
JUDGE

APPEARANCES:

APPLICANT:

N Marcus  
Nixon Marcus Public Law Office

RESPONDENTS:

E Coetsee  
Tjitemisa & Associates