

SOUTH AFRICA / JUDGMENT

Hotelicca obo Molete and Others v van der Merwe NO and Others (JR 1853/17) [2020] ZALCJHB 157 (18 August 2020)

[2020] ZALCJHB 157

COURT

Labour Court Johannesburg

BEFORE

van Niekerk

CASE / FILE NUMBER

JR 1853/17

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The

Labour Court of South Africa

(Held at Johannesburg)

(Judgment)

Not

Reportable

CASE NO: JR 1853/17

In

the matter between:

HOTELICCA
obo ABRAM MOLETE AND 22 OTHERS
Applicant
and
MINETTE
VAN DER MERWE N.O.
First
Respondent
COMMISSION
FOR CONCILIATION
MEDIATION
& ARBITRATION
Second
Respondent
PREMIER
FOODS (PTY) LTD
Third Respondent
Date
enrolled: 30 July 2020 (in Chambers)
Date

of judgment: 18 August 2020. Judgment distributed by email at 16:00

JUDGMENT

VAN NIEKERK J

- [1] The applicant seeks to review and set aside an arbitration award issued by the first respondent (the commissioner). In her award, the commissioner dismissed a claim of unfair dismissal referred by the applicants.
- [2] The material facts are not in dispute. The applicants were all employed by the third respondent. They were dismissed after having been found guilty on three charges – the first being that they failed to report for work on 6 April 2017, the second that on the same date, they disrupted the third respondent's operations, and the third being gross insubordination in that they refused to obey their manager's instructions to stay at work on 6 April 2017.
- [3] The award under review summarises the evidence of the third respondent's witnesses and that of two of the individual applicants who testified at the hearing. In respect of the first charge, the commissioner found that the applicants were not guilty of the charge as it was common cause that the applicants had indeed reported for duty albeit late. In regard to the second charge (that of disrupting the third respondent's operations) the commissioner found that the charge had been proved on a balance of probabilities. The commissioner rejected the applicant's version that the entire shift had been granted permission to go home on the basis that this was simply not probable, given that the financial loss occasioned was some R 2.7 million. Further, the applicants did not dispute evidence that some employees in the packing department had finished their shift, and contradictions were identified in the evidence proffered on behalf of the applicants. In regard to the third charge, that of gross insubordination, the arbitrator found that the misconduct alleged had been proved on a balance of probabilities. The arbitrator had regard to the evidence by the manager of the packing department, Albertus Marx, who had given evidence of the events that led to him giving an instruction that the applicants had to start up the production lines. The commissioner rejected the applicant's denial that the instruction was ever given. The commissioner went on to find that the applicants had committed acts of serious misconduct and that dismissal was an appropriate sanction in respect of the two charges on which the applicants were found guilty.
- [4] The present application was filed outside of the six-week time limit prescribed by the LRA. The applicant has applied for condonation. The award under review was issued on 11 August 2017. The present application was filed on 13 October 2017. The explanation for the delay after some 14 days is one that is concerned with internal union procedures to obtain approval for the filing of the application. The applicants made submission to the union's head office within the prescribed time period, but authorisation was slow in forthcoming.

When the applicants instructed their erstwhile attorneys of record, the review was already late. The delay was not excessive, and the explanation for the delay is reasonable, even if it lacks

detail. In essence, the applicants contend that the general secretary of the union was ‘constantly not in his office’. This is a broad statement to make and no confirmatory affidavit from the general secretary has been attached to the application for condonation. Be that as it may, it seems to me that the outcome of the application for condonation is dependent on the applicant’s prospects of success. That must necessarily involve an assessment of the merits of the review application.

- [5] The starting point is the threshold for review. This court may intervene by way of review if and only if the applicant establishes that the decision to which the arbitrator came was so unreasonable that no reasonable decision-maker could come to it. As the courts have often observed, this presents a considerable hurdle to an applicant in a review application. The principle serves to reinforce the distinction between an appeal and a review, and recognises that decision-makers, all acting reasonably, may reach different conclusions on the same facts.
- [6] The applicant’s grounds for review are based primarily on the commissioner’s assessment of the evidence. The grounds of this nature require a review court to be particularly cautious not to treat the matter as an appeal. The common cause facts before the commissioner were that on 6 April 2017, the date of the incident that gave rise to the applicant’s dismissal, it was raining. The applicants had arrived late for work on account of the rainy conditions. The applicants attempted to pass a photograph of one of their number whose residence was flooding as being the situation at all of their homes. The employee concerned was given permission to leave early but none of the other applicants were able to produce

proof of similar conditions at their homes. The applicants simply left work without authority and were subsequently disciplined and dismissed. The evidence discloses that other employees, who did not leave work, resided in the same areas as the applicants. In effect, the commissioner found that the applicants had taken advantage of an unfortunate situation and piggybacked on the misfortune of a single employee who had been excused to attend to flood damage to his home. In so far as the applicants had submitted that they were granted permission to leave, the arbitrator had regard to the conflicting evidence in this regard and for the reasons that she recorded, preferred the version proffered by the third respondent’s witness Sewe.

- [7] In short, the arbitrator appreciated the nature of the enquiry that she was required to undertake, she had regard to the evidence before her, she applied the correct test to evaluate the evidence, and she came to a conclusion that is reasonable. In the circumstances, I fail to appreciate how it can be said that the applicants’ prospects

of success are ‘excellent’ as they suggest – it appears to me that their prospects of success are minimal, if they exist at all.

- [8] For these reasons, in my view, condonation for the late filing of the review application stands to be refused.
- [9] Finally, in relation to costs, although the third respondent sought an order for costs, this court is ordinarily reluctant to make orders for costs in matters that involve employers and unions engaged in a collective bargaining relationship. Despite the fact that the present application was misguided, there is no reason to depart from that convention and for the purposes of s 162 of the LRA, the requirements of the law and fairness are best served by each party bearing its own

costs. In any event, the third respondent was represented by an employer organisation and thus incurred no legal costs.

I make the following order:

1. The application is dismissed.

André van Niekerk

Judge of the Labour Court of South Africa

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Prepared on 14 October 2026 · Esheria