

SOUTH AFRICA / JUDGMENT

Mmela Financial Services (Pty) Ltd v Mbelengwa NO and Others (JR2214/13) [2016] ZALCJHB 229 (17 May 2016) [2016] ZALCJHB 229

COURT

Labour Court Johannesburg

BEFORE

Snider

CASE / FILE NUMBER

JR2214/13

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IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT BRAAMFONTEIN)

CASE No.: JR 2214/13

DATE: 17 MAY 2016

In the matter between:

MMELA FINANCIAL SERVICES (PTY) LTD.....Applicant

And

MBELENGWA, NORMAN N.O

(Cited in his capacity as Commissioner of the CCMA).....First Respondent

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION.....Second Respondent

MOSELETSANE, ZINTLE.....Third Respondent

Date of ruling: 17 May 2016 (In chambers)

RULING: APPLICATION FOR LEAVE TO APPEAL

SNIDER AJ

[1] An application for leave to appeal has been made against a portion of my judgment and the whole order in the above matter dated.

- [2] The application for leave to appeal is not opposed. I am in possession of a notice of appointment as attorneys of record and letter from the current attorneys of the third respondent, dated 21 and 22 January 2016 respectively. The letter states, inter alia, that - “Our instructions are therefore not to oppose the leave to appeal and that we should await the outcome.”
- [3] The application for leave to appeal centres on my consideration of certain findings made by the Commissioner in this matter. In this judgment I refer to the parties as they were referred to in my original judgment.
- [4] At the heart of this matter is a statutory requirement that in order to be employed by the applicant the employee must pass certain regulatory exams.
- [5] It is further common cause that the employee wrote these examinations on a number of occasions and as at the final date required by the Financial Services Board (“the FSB”) for her to have passed those examinations; she had not yet done so.
- [6] The penultimate occasion on which the employee wrote the exams was 30 March 2013 when, according to the FSB requirement, she should have passed the exam before 31 March 2013.
- [7] Another employee, one Ngwenya, wrote the examination on the same day, 30 March 2013.
- [8] The employee received her results from the sitting of 30 March on 7 April 2013 and again she had failed.
- [9] She was then issued with a notice to attend an incapacity hearing which was to take place on 12 April 2013. The employee was dismissed on that same day.
- [10] Ngwenya passed the examination she sat for on 31 March 2013 and her employment with the applicant continued on that basis.
- [11] At her incapacity hearing the employee advised the applicant that she had re-enrolled to write the examination on 18 April 2013 and pleaded for her suspension to be extended due to the fact that she had already registered for the examination. She passed the examination and she duly informed the applicant. The applicant refused to reinstate her and advised her that she had to apply for her previous position.[1]
- [12] The central factual ground on which my judgment was based was that the employee and Ngwenya were both allowed an opportunity, after the end of the FSB deadline, to pass the examination.
- [13] The mere fact that the FSB deadline had expired is accordingly not a relevant factor. The only relevant factor is whether the Commissioner came to a reasonable conclusion, in terms of the relevant jurisprudence, that is to say a decision that falls in a band of decisions to which a reasonable decision maker could come on the available material.[2]

[14] The application for leave to appeal is based very much on what I would categorise as an appeal basis, whereas, as set out above, this is not the approach taken by this Court in review applications. The fact of the matter is that the applicant had already transgressed the FSB deadline and the Commissioner was faced with a situation where the employee had already registered for a further sitting and had pleaded with the applicant for an opportunity, one which could only be regarded as a final opportunity, to sit and pass the exam.

15] The only distinction between her and Ngwenya was this would represent an additional opportunity for the employee. The manner in which the applicant might have dealt with the process taking place aside the FSB deadline, although I may have commented thereon, is really neither here nor there.

[16] If this matter was adjudicated on absolute “right / wrong” terms the outcome may have been different. However such an adjudication would fly in the face of nearly 20 years of jurisprudence on this topic emanating from this Honourable Court.

[17] I am of the view that although there certainly are legitimate arguments that the applicant’s dismissal ought to have been regarded as fair, again this is simply not the test.

[18] In conclusion I repeat paragraph 27 of my judgment -

“This is an illustrative insistence of why the cases speak of a band of decisions to which reasonable decision maker could come. Some arbitrators may have found the dismissal fair, focusing on the many opportunities that the employee had to sit and pass the RE, the fact that she appears to have squandered those opportunities and the inconvenience caused to the applicant. Emphasis may also be placed on the applicant possibly being entitled to say ‘this far and no further’”.

However, I am of the view that the Commissioner’s decision falls within the band of decisions to which a reasonable decisions maker could come.

[19] This remains my position in this matter. I do not believe that there is a reasonable prospect of another Court coming to a different

conclusion.

[20] It does not appear that the third respondent incurred any costs herein.

[21] Accordingly I make the following order –

21.1The application for leave to appeal is dismissed.

21.2There is no order as to costs.

SNIDER, A J

Acting Judge of the Labour Court

[1] Index, pleadings Commissioner’s award page 25 second paragraph

[2] As per Goldfields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation, Arbitration and Others (2014) 35 ILJ 943 (LAC) at para [14]

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Prepared on 13 October 2026 · Esheria