

SOUTH AFRICA / JUDGMENT

Ngcobo v Commission for Conciliation, Mediation & Arbitration and Others (JR 1693/2019) [2022] ZALCJHB 48 (14 March 2022)

[2022] ZALCJHB 48

COURT

Labour Court Johannesburg

BEFORE

Van Niekerk

CASE / FILE NUMBER

JR 1693/2019

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THE

LABOUR COURT OF SOUTH AFRICA

(HELD

AT JOHANNESBURG)

Not

reportable

CASE

NO: JR 1693/2019

In

the matter between:

PRIMROSE

SIZI NGCOBO

Applicant

and

COMMISSION

FOR CONCLINATION, MEDIATION AND

ARBITRATION

First Respondent

COMMISSIONER

J MPHAPHULI N.O

Second Respondent

SUN

INTERNATIONAL MANAGEMENT LIMITED

Third Respondent

Date

of judgment: 14 March 2022

JUDGMENT

VAN NIEKERK J

- [1] The applicant seeks leave to appeal against the head of the judgement delivered by this court on 25 January 2022. In its judgement, the court dismissed an application to review and set aside an arbitration award issued by the second respondent, on the basis that the second respondent had not committed any reviewable irregularity in the conduct of the proceedings under review and that the decision to which he came fell within a range of decisions to which a reasonable decision-maker could come on the available evidence.
- [2] The test to be applied is set out in s 17 of the Superior Courts Act. In broad terms, leave to appeal should be granted only when the appeal would have a reasonable prospect of success, or where there is some other compelling reason why the appeal should be heard. The bar is set high – in *The Mont Chevaux Trust v Tina Goosen & 18 others* 2014 JDR 2325 (LCC) Bertelsman J pointed out in paragraph 6 that:

It is clear that the threshold for granting leave to appeal against a judgment of the High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion, see *Van Heerden v Cornwright & Others* 1985 2 SA 342 (t) at 343H. The use of the word ‘would’ in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against.

- [3] Put another way, there must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal – the mere possibility of success, or an arguable case or one that is not hopeless, is not enough (see *MEC for Health Eastern Cape v Mkhitha and another* (1221/2015 [2016] ZASCA 176 (25 November 2016), at paragraphs 16 and 17).
- [4] The applicant submits that the court erred in finding that the second respondent had not committed a reviewable irregularity by concluding that the third respondent had not inconsistently applied discipline by dismissing the applicant but not Mr Sooklall, a food and beverage manager employed on the same level as the applicant, who had allowed the guest, Mr Palais, to run up a food and beverage account of similar value to the accommodation account that the applicant had failed to detect. Secondly, the applicant submits that the court erred in finding that the second respondent had not committed a reviewable irregularity by finding that the sanction of dismissal was too harsh.
- [5] Both these submissions were raised during the course of argument in the review application, and reasons for rejecting those submissions appear in the judgment. The evidence discloses that Mr Sooklall resigned from the third respondent’s employ before disciplinary action could be instituted against him, and there is thus no basis on which a comparison can be drawn between him and the applicant. In respect of other employees, to the extent that the applicant persists in this application with its submission regarding

alleged inconsistent conduct on the part of the third respondent, as the court observed, other employees, including the general manager and the finance manager at the time, were disciplined. The fact remains that the comparators identified by the applicant held different positions and had different levels of involvement in the relevant managerial processes. Put another way, they were differently circumstanced and it was not unreasonable for the second respondent to conclude that it was not unfair for the third respondent to have imposed a penalty short of dismissal on them. In any event, as the LAC has remarked more than once, the element of consistency is but one factor that must be taken into account to determine the fairness of a dismissal, and the fact that another employee committed a similar transgression in the past and was not dismissed does not mean that serious acts of misconduct should go unsanctioned.

- [6] In regard to sanction, the court observed that the relevant legal principles afford a broad discretion on commissioners in relation to the determination of an appropriate sanction and that this court may intervene only in limited circumstances. While the applicant admitted guilt and while the personal circumstances of nothing short of tragic, the fact remains that she failed to perform her duties in circumstances where the third respondent suffered a loss of some R2 million, which may in part at least, have been avoided had the applicant not failed to neglect duties in the gross manner in which she did. The second respondent took into account all relevant factors and circumstances, applied the correct test and came to a decision

that cannot be described as so unreasonable so as to meet the threshold for intervention.

- [7] In short, the applicant has failed to establish that she has a reasonable prospect of success or that there is some other compelling reason why she should be granted leave to appeal. The application thus stands to be dismissed.

I make the following order:

1. Leave to appeal is refused.
2. There is no order as to costs.

André van Niekerk

Judge of the Labour Court of South Africa

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