

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 37/2022
[2023] NZSC 39

BETWEEN TANYA FELICITY DUNSTAN
Applicant
AND ATTORNEY-GENERAL
Respondent

Court: Glazebrook and O'Regan JJ
Counsel: Applicant in person
H T N Fong and N D White for Respondent
Judgment: 21 April 2023

JUDGMENT OF THE COURT

- A** The application for recall of this Court's judgment of 21 September 2022 (*Dunstan v Attorney-General* [2022] NZSC 111) is dismissed.
- B** The applicant must pay the respondent costs of \$1,500.
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REASONS

[1] Ms Dunstan applies for recall of this Court's decision refusing her application for leave to appeal in *Dunstan v Attorney-General* (the leave decision).¹ The leave decision concerned an application by Ms Dunstan to challenge directions given by Goddard J in the Court of Appeal.

¹ *Dunstan v Attorney-General* [2022] NZSC 111 (Glazebrook, O'Regan and Ellen France JJ) [Leave decision].

Background

[2] Ms Dunstan had filed an appeal to the Court of Appeal,² concerning a High Court decision of Jagose J striking out an application for judicial review. The High Court judgment related to a District Court direction that Ms Dunstan’s application to begin a private prosecution be rejected.³ Ms Dunstan then applied for security for costs to be dispensed with, leading to Goddard J making a direction that the respondents were not required to participate in the appeal (the participation direction).⁴

[3] Additionally, Ms Dunstan had sought to appeal a High Court decision of Powell J to the Court of Appeal.⁵ Related to this, she requested a transcript of the hearing of the Powell J decision, which Goddard J refused (the transcript refusal).⁶

[4] Ms Dunstan applied for leave to appeal to this Court against both the transcript refusal and the participation direction. On the participation direction, this Court found that the criteria for leave were not met. The appeal related only to the particular circumstances of Ms Dunstan’s case and there was no risk of a miscarriage of justice.⁷ On the transcript refusal, this Court found that it did not have jurisdiction, as this direction was part of a matter where leave to appeal had been declined by the Court of Appeal.⁸

Applicable law

[5] The general rule is that a judgment, once delivered, must stand for better or worse, subject to appeal.⁹ A decision to recall a judgment will only be made in exceptional circumstances.¹⁰ A recall application cannot be used to relitigate the

² Ms Dunstan’s appeal has since been allowed: *Dunstan v Auckland District Court* [2022] NZCA 477.

³ *Dunstan v Auckland District Court* [2022] NZHC 417 (Jagose J).

⁴ Leave decision, above n 1, at [2].

⁵ *Dunstan v Neill* [2021] NZHC 691 (Powell J).

⁶ *Dunstan v Neill* CA248/2021, 17 June 2021 (Minute No 4) (Goddard J).

⁷ Leave decision, above n 1, at [14].

⁸ At [15].

⁹ *Horowhenua County v Nash (No 2)* [1968] NZLR 632 (SC) at 633, as cited in *Craig v Williams* [2019] NZSC 60 at [10]. Exceptions to this are discussed in *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd (No 2)* [2009] NZSC 122, [2010] 1 NZLR 76 at [2]; and *Green Growth No 2 Ltd v Queen Elizabeth the Second National Trust* [2018] NZSC 115 at [20].

¹⁰ *Wong v R* [2011] NZCA 563 at [13]; and *Uhrle v R* [2020] NZSC 62, [2020] 1 NZLR 286 at [29].

reasons provided in the leave judgment.¹¹ Nor can it be a means of collateral attack on a decision.¹² Recall will be appropriate where some procedural or substantive error has occurred that would result in a miscarriage of justice.¹³

Grounds of application

[6] Ms Dunstan now seeks the recall of the judgment declining leave on the basis of:

- (a) subsequent “binding precedent” in the form of a subsequent decision of the Court of Appeal, which allowed Ms Dunstan’s appeal against Jagose J’s judgment in part;¹⁴
- (b) “obvious errors” in the leave decision’s summary of events;
- (c) new evidence: being the marriage of the solicitor for Ms Dunstan’s ex-partner to a District Court Judge;¹⁵ and
- (d) the fact that she is a lay litigant who (she argues) has been discriminated against by the High Court.

Submissions of the Attorney-General

[7] The Attorney-General submits that none of the grounds put forward by the applicant fall into the permitted categories set out in *Horowhenua*.¹⁶

[8] In relation to Goddard J’s direction, the Attorney-General submits that the subsequent decision of the Court of Appeal is not relevant to the grounds on which this Court declined leave — namely, the lack of general or public importance. Indeed, if anything, it is submitted that the proposed appeal against the direction is now moot given the appeal has been heard and judgment has been rendered. Moreover, Ms Dunstan was not disadvantaged by the direction, given she was successful on the

¹¹ *Nuku v District Court at Auckland* [2018] NZSC 39 at [2].

¹² *R v Palmer* CA334/03, 18 October 2004 at [29].

¹³ *Uhrle v R*, above n 10, at [27].

¹⁴ *Dunstan v Auckland District Court*, above n 2.

¹⁵ See *Dunstan v Gibbs* [2023] NZSC 29, n 3.

¹⁶ *Horowhenua County v Nash (No 2)*, above n 9.

substantive appeal. As for the transcript refusal, the basis for the Court's refusal of leave was jurisdictional.

Our assessment

[9] We accept the Attorney-General's submission that none of the grounds advanced would justify recall.

[10] Ms Dunstan does not identify the errors said to appear in the leave judgment's summary of events. The allegedly new evidence has no relevance to the matters addressed in the leave judgment.

[11] The "binding precedent" is a decision of the Court of Appeal allowing her appeal in respect of which the participation direction was made. It has no relevance to the question addressed in the leave judgment, namely whether leave should be given for an appeal to this Court against the participation direction.

[12] We see no evidence of discrimination but, even if it were true that Ms Dunstan had been discriminated against by the High Court (as she alleges), that also would have no relevance to the issues addressed by this Court in the leave judgment.

[13] In short, there are no proper grounds for recalling the leave judgment.

Result

[14] The application for recall of this Court's judgment of 21 September 2022 is dismissed.

[15] The applicant must pay the respondent costs of \$1,500.

Solicitors:
Crown Law Office, Wellington for Respondent