

IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT BRAAMFONTEIN

Not reportable
CASE NO. JR 978/09

In the matter between:

DIS-CHEM PHARMACIES (PTY) LTD

APPLICANT

and

RAMASHELA MEISIE

FIRST RESPONDENT

NTSOANE D N.O

SECOND RESPONDENT

COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION

THIRD RESPONDENT

DATE OF HEARING: 6 SEPTEMBER 2011

DATE OF JUDGEMENT: 20 SEPTEMBER 2011

JUDGEMENT

This is an application:

1. for condonation for the late filing of the review application in terms of section 145 of the Labour Relations Act 66 of 1995;

to review and set aside an arbitration award dated 28 October 2008 issued by Commissioner D Ntsoane (the commissioner) under the auspices of the Commission for Conciliation, Mediation and Arbitration under case number GATW 7899-08;

2. to substitute the award with an award that the dismissal was substantively fair

and

for costs.

Background facts

The First Respondent (the employee) was employed by the Applicant until her dismissal on 23 November 2007.

She was charged with:

1. gross insubordination in that on 16 November 2007 she repeatedly refused to follow an instruction to do her duties;
2. gross unacceptable behaviour in that poor customer service was given on 5 November 2007;
3. not following company procedures.

An internal hearing was held and the employee was dismissed.

The employee referred an unfair dismissal dispute to the CCMA where she challenged the procedural and substantive fairness of the dismissal.

The commissioner found the dismissal to be substantively unfair but procedurally fair.

The employee was reinstated to the position she held prior to the dismissal with effect from 5 November 2008. The commissioner further directed that the

employee must be paid her earnings, on or before 15 November 2008, from the date of dismissal (2 November 2007) to 20 October 2008 calculated in the amount of R 33 561.00. There was no order in respect of costs.

CONDONATION:

The delay

The application for review is four months and three weeks late.

REASONS FOR THE DELAY

The award was served on the Applicant on 5 November 2008. The review application was due on or before 19 December 2008. It was delivered on 8 May 2009.

The Applicant applied, within the time limits, for a rescission of the award mistakenly believing that it could apply for a rescission as the commissioner had not dealt with the late referral of the dispute to the CCMA.

A rescission ruling dated 23 December 2008 was issued dismissing the application for rescission and directing the applicant to review the award.

The employee on 3 February 2009 applied for a variation of the above ruling as she mistakenly believed that the matter was to be re-heard. The rescission ruling did not state this but correctly recorded that the matter ought to be reviewed. Inexplicably the CCMA varied the ruling and recorded that the rescission

application is dismissed and the award is upheld.

The variation ruling was received by the applicant on 24 February 2009.

The applications for rescission and variation cover the period from November 2008 to 24 February 2009. The applicant thereafter sought legal advice and the application for review was lodged. The application for review is dated 20 April 2009 but was filed at Court on 8 May 2009. The period from 25 February 2009 to 7 May 2009 is not explained. This constitutes approximately two months and two weeks of the four month and three week delay.

The applicant submitted that the *dies* only runs from the date of receipt of the variation ruling. I disagree. The variation ruling confirms the award and does not vary it. The *dies* therefore runs from the date the award was received by the applicant.

Prospects of success

The applicant submitted that it had excellent prospects of success. The applicant attacks the reasonableness of the award and submits that the award is not an award that a reasonable decision maker would have made.

For the reasons contained below I am in agreement with the applicant.

I will not repeat the analysis of the review grounds save to state that the

application for review has excellent prospects of success.

Prejudice

By virtue of my view on the review application the applicant will suffer prejudice should the condonation not be granted. It goes without saying that the employee will suffer prejudice should the review application be granted. However the standard for review applications has been satisfied by the applicant and as a result the award stands to be set aside.

Importance of the matter

This matter is of significant importance as it deals with repeated instructions to an employee to perform her duties and to her approach to customers of the applicant in the retail sector. The matter also deals with the employee's disregard of and disrespect to employees in positions of authority over her. I am satisfied that it is in the public interest that the application for review be heard.

Whilst the explanation for the delay is lacking in some parts I find that the explanation in respect of the applications for rescission and variation and the applicant's seeking legal advice all to be acceptable. This together with the applicant's prospects of success and the importance of the matter has led me to conclude that the application for condonation should be granted.

The review application

Point in limine

The employee's representative submitted that the applicant ought to have

referred in its supplementary affidavit to the record in support of its grounds for review. The representative further submitted that the failure to do so renders the application dismissable.

Rule 7A (2)(c) of the Annotated Rules of the Labour Court provides that the application for review must be supported by affidavit which sets out the factual and legal grounds upon which the applicant relies to have the decision corrected or set aside.

I am satisfied that the grounds of review as recorded in the applicant's founding and supplementary affidavits comply with the above rule. The record of the proceedings read with the applicant's affidavits make out a case for review and allow the employee to respond thereto. The employee in her answering affidavit does not record that she has any difficulty in understanding the grounds of review for a lack of reference to the record and she therefore cannot respond to them. Indeed she does respond to the various grounds of review in her opposing affidavit.

The *point in limine* is dismissed.

The grounds of review are that the commissioner:

1. failed to apply his mind to the evidence before him when he found that the employee had eventually obeyed the instruction to perform her duties and to stop reading a book. He consequently erred in finding that she was not guilty of gross

insubordination;

erred in finding that the employee was not guilty of unacceptable behaviour when she had an altercation with a customer;

erred in reinstating the employee to the date of her dismissal without having regard to the fact that the employee referral of the dispute was 273 days late;
erred in not finding in favour of the applicant;

2. misconstrued the inherent probabilities of the matter and made findings without a rational objective basis;

3. failed to apply his mind to all the documentary and oral evidence of the applicant and ignored and misapplied his mind to all the relevant facts to the extent that it is inappropriate and unreasonable.

Summary and analysis of the evidence before the commissioner

No evidence was led by the applicant in the arbitration hearing in respect of charge three. The commissioner correctly found that it was not necessary to deal with this charge.

Gross insubordination

The applicant's evidence was that the employee refused to follow three instructions to do a "face up" on 16 November 2007.

A face up is the aligning of the merchandise to the front edge of the shelf on which they stand.

The employee was reading a book whilst sitting down when the instructions were given to her by her superior, the branch manager, Ms Ramadhin (Ramadhin).

The instructions were given at different times and the employee was allowed an opportunity to comply therewith before the instruction was repeated. There was a thirty to forty-five minute delay between the first two instructions. She continued to read her book and did not follow the instruction at all. This was recorded on video.

The employee was previously counselled and warned. She received a final written warning for sleeping on duty and for gross misconduct for threatening management and staff.

The employee did not dispute the video footage of her reading a book on the day in question.

She testified that she was ill on the day and could not follow the instruction. This was disputed by Ramadhin. Ramadhin testified that if she was ill as alleged Ramadhin would have either given her medication or arranged for to be collected by her family – as was done in the past. The employee did not inform her that she was sick and therefore could not follow the instruction.

The employee further handed in a pamphlet as evidence of the book she was reading. The pamphlet was no more than three pages. Ramadhin disputed that the employee read the three-page pamphlet. She confirmed that the employee was reading a book, which was thicker than the pamphlet handed in.

The employee also testified that Ramadhin had a grudge against her for not watching another employee as allegedly instructed by Ramadhin. This too was disputed by Ramadhin.

Although not recorded in the award, it is clear that the commissioner found that the employee was not ill as she alleged and accepted that she was reading a book when instructed to do her duties. He found that she eventually followed the instruction and she was therefore not guilty of gross insubordination. The commissioner concluded that the employee ought to have been charged with being tardy instead of gross insubordination.

From the record there is no evidence that the employee did eventually follow the instruction. Ramadhin was asked what was the employee's response to her instructions. Her response was:

"She just looked at me, the second time her response was there's enough people so I again said to her Meisie please wake up and finish your facing up and your tidying. She woke up from the little thing she was sitting on she stood against the shelving with the book in her hand

and just looked at me, didn't move didn't do facing up didn't do cleaning up of her workstation, nothing and then she waited for 6 o' clock and she walked out."

The employee did not dispute the above evidence.

It is trite that an employee is subordinate to the will of the employer. An employee is obliged to follow lawful instructions of the employer. [See Smit v Workmens Compensation Commission 1979 (1) SA 51 (A)].

The instructions in this matter were lawful and reasonable. There was no need for the instruction to be repeated by Ramadhin. The employee did not follow the instruction. The employee was grossly insubordinate. A refusal to obey an employer's instruction may justify summary dismissal if the instruction was lawful and reasonable and the refusal is serious enough to warrant dismissal [See National Trading Co v Hiazo (1994) 15 ILJ 1304 (LAC)].

Further it was the undisputed evidence of the applicant that the employee was previously warned and counselled for not following instructions. The employee also received a final written warning on 24 August 2007 for insubordination.

The finding that the employee eventually obeyed the instruction is not supported by the evidence and is not a decision that a reasonable commissioner would have reached.

Gross unacceptable behaviour

On 5 November 2007 the employee had an altercation with a customer which was witnessed by the floor supervisor, Ishmael Matuwe (Matuwe). He testified that he heard screaming and observed the employee having a fight with a customer. He went to the employee to calm her down and advise her not to argue with the customer. She said to him “Suka wena”. He was embarrassed as other people were around and insulted by this response. He walked away.

He also testified that this was not the first time that the employee had been disrespectful to colleagues.

Ramadhin also testified that the employee had an altercation with the customer. The employee’s defence to this charge was that the customer was not allowed access to the schedule four drugs and she was correct in preventing the customer from having access thereto. This was denied by Matuwe, who testified that customers were allowed to help themselves to the drugs on the shelves.

The second leg of her defence was that the employer took a very long time to charge her and dismiss her. I am of the view that there was a reasonable period of time between the incident and the hearing. This defence has no merit.

The commissioner found a discrepancy between the Ramadhin’s evidence (that the employee had an altercation with the customer) and Matuwe’s evidence (that the employee fought with the customer) on the one hand and the charge the employee faced on the other. He concludes the employee was charged with poor

customer service and that this is not fighting with the customer. He found the charge to be improperly formulated and that the employee was not guilty of poor customer service.

There is no rational explanation for the above finding. It cannot be argued by any stretch of the imagination that having a fight with a customer does not amount to poor customer service.

Customer service is intrinsic to the survival of a retail business. It follows that employees in the retail sector are by the nature of their jobs obliged to ensure that the customers to the employer's business are looked after and provided with good, if not excellent, customer service. Not to do so results in customers being lost, the business failing and job loss. It is therefore imperative that employees treat customers with respect and dignity. This much was confirmed by Matuwe when he testified that he wished to speak to the customer in question and apologise on the employee's behalf, as he did not want to lose the customer.

The employee's threat to Matuwe, who was superior to her, shows a distinct disregard for authority in the workplace, of his efforts to calm the situation and of the rule that the "customer is king".

The evidence before the commissioner in respect of the second charge could only support a finding of guilt.

The employee had a previous final written warning issued in August 2007 for her

bad attitude to colleagues and customers. Whilst she challenged the validity of the warning at the arbitration hearing, no challenge to the warning was made at the time it was issued. It therefore remained valid.

The employee did not express remorse during the arbitration hearing. Her conduct that led to the charges and her conduct during the arbitration hearing do not support a continued employment relationship. Rather the opposite – her conduct was so dismal so as to be a hindrance to the growth and success of the employer's business.

A reasonable commissioner would have found that the employee was guilty of the charges and that the sanction of dismissal is appropriate.

Procedure

The commissioner correctly found that there was no proof of procedural irregularities preceding the dismissal.

I therefore make the following Order:

1. The application for condonation for the late filing of the review application is granted;
2. The award under case number GATW 7899-08 is reviewed and set aside;
3. The award is substituted with an award as follows:

“The dismissal of the employee is procedurally and substantively fair”;

4. There is no costs order.

Reddy AJ

Appearances:

1. For the applicant: Mr Nel instructed by Lindeque and Van Heerden Attorneys
2. For the First Respondent: Mr Mabaso of Mabaso Attorneys