



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no: JR1901/23

In the matter between:

PLATINUM MEDICAL

Applicant

and

MARIA JOHANNA VAN RENSBURG

First Respondent

COMMISSIONER REFILOE NOINYANE N.O.

Second Respondent

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

Third Respondent

Heard: 11 September 2024

Delivered: 20 January 2025

(This judgment was handed down electronically by circulation to the parties' representatives by email. The date of hand-down is deemed to be on 20 January 2025)

JUDGMENT

MYBURGH, AJ

Introduction

- [1] There are two unopposed applications before me. Firstly, an application to review and set aside the award issued by the second respondent (commissioner) in which she found that the applicant (company) had dismissed the first respondent (Ms Van Rensburg) and that the dismissal was substantively and procedurally unfair, and thus awarded her five months' salary as compensation. Secondly, an application to condone the late filing of the review record, and reinstate the review application.
- [2] Having perused the reinstatement application, I am satisfied a case has been made out for the relief sought. Although the review record was delivered some 55 days late, the company has provided a reasonable and satisfactory explanation for this (rooted in the fact that its CEO, Mr Chetty, fell seriously ill and that it suffered a monetary crisis) and has demonstrated good prospects of success.
- [3] This leaves the review application. The central issue relates to the commissioner's decision that Ms Van Rensburg was dismissed on 18 April 2023. As the decision is of a jurisdictional nature, this is a correctness review – meaning that, in order to succeed, the company needs to establish no more than that the decision was wrong.

Common cause facts

- [4] The company is a supplier of medical and pharmaceutical products, with (as stated above) Mr Chetty being the CEO. The company had an association with Gabler Medical and acted as its BEE partner, supplying its products in the

public sector. Gabler Medical would, in turn, supply the company's Moon Care products in the private sector. Ms De Haan and Ms Fraser worked for Gabler Medical.

- [5] Ms Van Rensburg and Ms Fraser are sisters and Ms Van Rensburg came to be employed by the company by way of her sister introducing her to Mr Chetty. They appeared to be a good match. Ms Van Rensburg had been unemployed for three years after having lost her job as a regional manager at Dischem during the Covid-19 pandemic, and Mr Chetty was looking for an additional sales representative.
- [6] The introduction culminated in Ms Van Rensburg taking up employment with the company with effect from 23 January 2023 as a sales representative. Although she was not provided with a letter of appointment, it is common cause that she was engaged at a salary of R50 000 per month, plus commission (although the details went undiscussed). Of significance is the fact that she was assigned solely to government hospitals, a sector that she had no experience in. Given that she was involved in supplying their products, Ms Van Rensburg underwent training by Gabler Medical while at the same time attempting to make an entry into the government-hospital market.
- [7] Although Ms Van Rensburg was paid her full salary for the month of February 2023, from the outset the employment relationship did not run smoothly. Ms Van Rensburg secured only one sale and a complaint was received about her from a doctor. To exacerbate matters, on 6 March 2023, government hospitals were hit by strike action that endured for some time, which meant that it was not safe for her to call on them.
- [8] This led to a meeting between Ms Van Rensburg and Mr Chetty on 9 March 2023 – in the immediate run up to which Ms Van Rensburg conveyed to Ms Fraser that she believed that she was going to be fired. The upshot of the aforesaid meeting was that Ms Van Rensburg would go on “short-time”, receive half her salary, move from public to private hospitals, and be trained by Ms Fraser.

- [9] On 10 March 2023, Ms Van Rensburg sent Mr Chetty a WhatsApp reading: “Just clarify March and April salary is half, 25k. If I make target in April I will get full salary, R50k. May salary is back to R50k.” Mr Chetty’s response was: “Depending on your sales. Provided u achieve your target sales.”
- [10] As things turned out, Ms van Rensburg only trained with Ms Fraser for one day – this in circumstances where she could not afford to travel from Johannesburg to Pretoria (where her sister lived) because she was not allowed to use her company issued petrol card.
- [11] On 25 March 2023, and after having sent Mr Chetty a WhatsApp about her salary earlier in the day, Ms Van Rensburg received payment of R15 500 (for the month of March). This appears to have been payment from 25 February to 9 March 2023, when Ms Van Rensburg was placed on so-called short-time while being trained.
- [12] On 3 April 2023, Ms Van Rensburg enquired from Mr Chetty whether she would receive a salary at the end of the month, to which Mr Chetty replied: “No. I will discuss the way forward with you. Remember u are learning to sell. I cannot pay u while u are learning.”
- [13] On 6 April 2023, Ms Van Rensburg sent Mr Chetty this WhatsApp (to which she received no response):
- “Hi Mr Chetty,
- Please can we discuss my salary. We agreed on a salary R50k per month and if I made target I get commission on top of that. Last month I was short paid and this month it seems like you don’t want to pay me at all. I cannot afford to work for free. ... I feel it’s not my fault that the government hospitals’ budgets were closed, they did stock take and that all the hospitals went on strike.”

- [14] On 11 April 2023, Ms Van Rensburg enquired from Mr Chetty what he wanted her to do that week because Ms Fraser was herself on training, to which Mr Chetty replied: “She agreed to teach u while going on her work which is not my hospitals and business.”
- [15] In the immediate run up to his next meeting with Ms Van Rensburg on 18 April 2023, Mr Chetty had a discussion with both Ms Fraser and Ms De Haan, during which he mentioned to them that he was going to meet with Ms Van Rensburg to discuss with her “moving over to private”, which entailed marketing various products to Dischem and Clicks (referred to as “wholesalers”).
- [16] At about noon on 18 April 2023, and following an exchange of WhatsApps, Mr Chetty met with Ms Van Rensburg in person at Booysens. It was at this meeting that Ms Van Rensburg was either dismissed or walked out.
- [17] Directly after the meeting, Ms Van Rensburg went to her car to fetch her petrol card and then put it on Mr Chetty’s desk. In the process, Mr Chetty said that he was sorry (because he had upset her).
- [18] At 13:36 on 18 April 2023, Ms Van Rensburg sent a WhatsApp to Mr Chetty reading: “Please can you ask Denise to send me my letter to say I have been dismissed.” Mr Chetty read the message, but never responded.
- [19] At 13:52 on the same day, Ms Van Rensburg sent Ms Fraser this WhatsApp: “Ek is nou net gefire. Daar is nie plek vir my by Platinum nie. Jy kom met experience en hy hoef jou nie train nie.”
- [20] Later that afternoon (at 16:12), Ms Fraser responded: “Gaan jy nie wholesalers doen nie.” Ms Van Rensburg did not respond to this.

Focusing on the meeting of 18 April 2023

- [21] In their evidence, Ms Van Rensburg and Mr Chetty gave conflicting versions of what transpired at this meeting.

- [22] Ms Van Rensburg's version was as follows. Mr Chetty said that he wanted her to sell sanitizers, Bio Scrub, and disposable masks into Dischem and Clicks on a commission basis, and that she could also sell invertors for Platinum Energy (a new company he had started) on a commission basis. In response, having mentioned that she had gone from public to private hospitals, and now to sanitizers, Bio Scrub, masks, and invertors on a commission basis, she asked, "what does this all mean" and "what is going on?" Mr Chetty's reply was that there was no space for her at Platinum Medical anymore. According to Ms Van Rensburg, the conversation continued thus: "So I said to him ... does this mean I am dismissed, and he said to me the bottom-line is yes, you are dismissed and your sister has got ... more experience than you."
- [23] When it was put to Ms Van Rensburg under cross-examination that it was improbable that Mr Chetty would have said to her in one breath that he wanted her to sell products to Clicks and Dischem (she being valuable to the company because of her contacts there) and in the next breath that there was no place for her in the company, Ms Van Rensburg's response was that "it was never said that I want you here, that was never said". She later repeated that she was not told "to go and do Dischem or Clicks ... I was told no space for you".
- [24] Turning to Mr Chetty's version, it was essentially as follows: he told Ms Van Rensburg that he wanted her to move over to private and market sanitary pads to Dischem, Clicks and other wholesalers on a commission basis; her response was to enquire about her working in government hospitals, to which Mr Chetty replied that she could not work both in private and government; Ms Van Rensburg then said that she needed money to pay her bills, with Mr Chetty's response being that there were other products that she could market on a commission basis in the meantime while undergoing training; Ms Van Rensburg then got up and walked out.
- [25] Asked about Ms Van Rensburg's version that she was dismissed, Mr Chetty said that she had never asked him whether she was dismissed, and had instead simply got up and walked out after he had told her that she would no longer be servicing government hospitals and was to "move to private".

[26] Mr Chetty's version of the meeting was corroborated to some extent by the evidence of Ms De Haan and Ms Fraser, who both testified for the company. Given that Mr Chetty had told them immediately before the meeting that he intended to move Ms Van Rensburg to the private wholesale market and thus had a place for her within the company, they could not understand (and did not believe) her version that she was dismissed by Mr Chetty. It is borne out by Ms Fraser's contemporaneous WhatsApp to Ms Van Rensburg on 18 April 2023.

The commissioner's award

[27] The vast majority of the commissioner's "analysis of evidence and argument" comprises of what is really a rendition of the evidence of the various witnesses. This to the extent that the commissioner's entire *ratio* on the dismissal issue is contained in this single paragraph:

"[75] Based on the contents of the WhatsApp message sent by the Applicant to Mr Chetty requesting for the dismissal letter and the 3rd witness of the Respondent [Ms Fraser] confirming that indeed the Applicant had told her that she was dismissed and the 2nd witness [Ms De Haan] testifying that she was told by Michelle [Fraser] that the Applicant told her that Mr Chetty had dismissed her (sic). It is a mystery as to why Mr Chetty did not respond to the Applicant when she requested for the dismissal letter. Mr Chetty did not follow up with the Applicant as to whether and when she was returning to work again. Mr Chetty expected the Applicant to get in touch with Ronel [De Haan] and Michelle [Fraser], who were employed by someone else, however, the Applicant had a verbal contract with the Respondent and was paid by the Respondent. The Applicant was firm and consistent in her version and during her testimony. It is undeniable proof based on the version of events and argument the Applicant submitted that on the balance of probabilities, the Applicant was indeed dismissed by the Respondent."

[28] As stated at the outset, the commissioner found further that the dismissal was both substantively and procedurally unfair, and awarded Ms Van Rensburg five months' salary (at R50 000 per month) as compensation.

Evaluation and analysis

[29] In terms of section 192(1) of the LRA, Ms Van Rensburg bore the onus of proving on a balance of probabilities that she was dismissed by Mr Chetty.

[30] Given that this court is faced with irreconcilable versions of fact about the events of the meeting of 18 April 2023, what is required is an assessment of the credibility, reliability and probabilities associated with the evidence with a view to determining the truth.¹

[31] On an analysis of the transcript, I am unable to make a distinction between the quality of the credibility and reliability of Ms Van Rensburg and Mr Chetty as witnesses.² There are aspects of both their versions that appear to lack credibility and reliability, and neither of them impressed as a witness. However, to my mind, the matter can be determined on a general evaluation of the probabilities, which involves an evaluation of the internal plausibility of each of the versions and their relative probabilities, with a view to determining which of them is more inherently probable.³

[32] As appears from the award, the commissioner found that the probabilities were in favour of Ms Van Rensburg having been dismissed, with this being based on essentially three things: firstly, Ms van Rensburg's WhatsApp to Mr Chetty on 18 April 2023; secondly, Ms van Rensburg's WhatsApp to Ms Fraser on 18 April 2023; and thirdly, Mr Chetty's failure to respond to Ms Van Rensburg's WhatsApp or follow up with her.

¹ *Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others* 2003 (1) SA 11 (SCA) para 5.

² *Stokes v Cancape (Pty) Ltd* (2023) 44 ILJ 431 (WCC) para 10.

³ *Harmony Gold Mining Co Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2018) 39 ILJ 1059 (LC) paras 13-14.

[33] Ignored by the commissioner were these facts which cast serious doubt on the veracity of Ms Van Rensburg's version that she was dismissed – rather than having walked out:

- a) Firstly, going into the meeting on 18 April 2023, the state of the employment relationship between the parties was tenuous. Since having been placed on so-called short-time on 9 March 2023 (after having worked for little more than a month), the only activity that Ms Van Rensburg undertook was to accompany Ms Fraser for a single day's training on 3 April 2023. There was accordingly no prospect of her receiving any salary in April – this after having received less than half of her salary in March. Allied to this, Ms Van Rensburg's relationship with Mr Chetty had broken down. As she put it, "the constant swearing, the constant telephone calls, literally I ended up with having a nervous breakdown. I went to see someone the day after he said to me that he is going to cut my salary."
- b) Secondly, in circumstances where Mr Chetty had discussed moving Ms Van Rensburg to private wholesale (Dischem and Clicks) with both Ms Van Haan and Ms Fraser immediately before meeting with her on 18 April 2023, it is probable that he made this offer to Ms Van Rensburg.
- c) Thirdly, why would Mr Chetty have dismissed Ms Van Rensburg when he had a place for her marketing products to, inter alia, Dischem where she had contacts? Not only did this make no sense to both Ms De Haan and Ms Fraser (who effectively corroborated Mr Chetty's version), but the best Ms Van Rensburg could do in response to this question was to contend that no such offer was made to her, which is (as I have found) improbable.
- d) Fourthly, Mr Chetty's dismissal of Ms Van Rensburg would not only have been contrary to what he had discussed with Gabler Medical, but was not – according to both Mr Chetty and Ms De Haan – something that Mr Chetty would have done without first consulting it. This on account

of both the close links between the companies and the fact that Ms Van Rensburg and Ms Fraser are sisters.

- e) Fifthly, the offer made by Mr Chetty was plainly unacceptable to Ms Van Rensburg. Her goal in joining the company was to gain experience in the government-hospital market, she had expressed herself (to Ms Fraser) as being opposed to working in the private sector, and she was not prepared to work on a commission-only basis.
- f) Sixthly, after Ms Fraser had been asked by Mr Chetty to speak to her following the meeting of 18 March 2023, Ms Van Rensburg was not at all receptive to her sister's advice that she may have misunderstood things – implicit in which was the possibility of revisiting the issue with Mr Chetty. And allied to this, Ms Van Rensburg declined an offer made after the aforesaid meeting to market products to Dischem and Clicks.
- g) Seventhly, if one compares Ms Van Rensburg's WhatsApps about her salary on 10 March 2023 and 6 April 2023, one gains the distinct impression (as mentioned by Mr Chetty in evidence) that she was attempting to set up Mr Chetty.

[34] Seen in the light of the above, there exists every possibility that Ms Van Rensburg's WhatsApps to Mr Chetty and Ms Fraser relied on by the commissioner were contrived to build a case of dismissal. Equally unreliable was the commissioner's reliance on Mr Chetty's failure to respond to Ms Van Rensburg's WhatsApp – this in circumstances where he knew that she would speak to her sister and was awaiting (and received) feedback from her.

[35] In sum, in circumstances where Ms Van Rensburg had little to lose as she was not going to be paid and was offered a job that was fundamentally unacceptable to her, and where Mr Chetty wanted to keep her, had not planned to dismiss her and would not do so without liaising with Gabler Medical, the probabilities inherent in the parties' versions favour Mr Chetty's version that he did not dismiss Ms Van Rensburg and that she, instead, walked out.

[36] Had Ms Van Rensburg pursued a claim of constructive dismissal, she would probably have succeeded on the basis that a continued employment relationship was rendered intolerable in circumstances where she was not being paid and was required to undertake a sales representative job in a different sector on a commission-only basis. But instead, she claimed to have been expressly dismissed by Mr Chetty – a version that is open to serious doubt and improbable in the light of the facts discussed above.

[37] In the result, in my view, Ms Van Rensburg failed to acquit herself of the onus of proving that she was dismissed by Mr Chetty, with the result that the commissioner's finding that she was dismissed is wrong and thus reviewable.

Order

[38] Accordingly, the following order is made:

1. The late filing of the record is condoned, and the review application is reinstated;
2. The arbitration award issued by the second respondent is reviewed and set aside, and replaced with an order that the first respondent was not dismissed by the applicant;
3. There is no order as to costs.

Myburgh, AJ

Acting Judge of the Labour Court of South Africa

Appearances

For the applicant: Adv L De Haan instructed by Mphatlalazana Attorneys