IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT DURBAN
CASE NO: D917/2004

In the matter between:

N J MADLALA

Applicant

and

NAMPACK SACKS (PTY) LTD First Respondent

W PAUL N.O. Second Respondent

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION Third Respondent

JUDGMENT

FRANCIS J

1. This is an application to condone the late filing of the applicant's review application which application was opposed by the first respondent.

2. The applicant was a shop steward and was previously employed by the respondent in a junior managerial position. On 9 December 2003 he arrived approximately half an hour late to represent an employee, Themba Ngubane (Ngubane) at a disciplinary enquiry which was scheduled to start at 7h30. Ngubane had previously arranged to be represented by another shop steward at the hearing and had arrived at the hearing with that shop steward. Before his arrival at the disciplinary hearing on 9 December 2003, and at approximately 7h35, the applicant spoke to a human resources representative,

Futhi Buthelezi (Buthelezi) about the venue. When the applicant arrived at the hearing, he did not address the chairperson of the disciplinary enquiry, David Puttick (Puttick) or apologised for his late arrival, but spoke to other employees present at the hearing.

3. Puttick asked why Ngubane and his representative were late for the hearing and after a brief exchange about the venue for the hearing, Puttick expressed his dissatisfaction with the fact that Ngubane and his representative were late and that they had not apologised for being late. The applicant responded by saying words to the following effect:

"Lokhu okushoyo kukhombisa ngokusobalala ukuthi unbandlulula ngokwebala - what you are saying shows very clearly that you are a racist".

4. The interpreter, Innocent Nzimande (Nzimande) declined to translate what the applicant had said. He told the applicant that he spoke very good English and that he could tell Puttick what he had said in Zulu, in English himself. The applicant insisted that Nzimande translate what he had said in Zulu to Puttick. Nzimande then translated his statement into English. Puttick requested the applicant to repeat his statement, to which the applicant replied:

"Muchazele Nzimande ukuthi loko akwenzayo ngikubuka kuwukubandlulula ngokwebala - explain to him Nzimande that what he is saying make me view him as a racist."

5. The applicant insisted that Puttick be removed as chairman for the reasons set out above. Puttick then recused himself and left the hearing. Nzimande and the applicant remained behind. Nzimande then asked the applicant why he had said that. Nzimande told the applicant that if he had a problem with Puttick, he should have taken him aside and addressed him privately. The applicant replied that what he had said needed to be said in public.

6. The applicant was subsequently charged with having used abusive and/or derogatory language. He pleaded not guilty. He gave various explanations for his conduct including:

6.1 He had been mistranslated;

6.2 The way that Puttick had looked at him reminded him of the time when Afrikaners were bullying him and oppressing him on the farm as a child;

6.3 The manner in which Puttick had spoken to him was viewed by him as racist conduct.

The applicant contended that there was a difference between calling someone a racist and saying that a person's conduct caused the applicant to view him as a racist.

7. Puttick occupies a senior managerial position at the first respondent. He said that an

unfounded allegation of racism on his part would have a devastating effect on him in his capacity as a manager and on the first respondent's industrial relations generally. The applicant at no stage expressed remorse for his conduct, nor did he retract his statement notwithstanding his claim that he had been mistranslated. The first respondent's disciplinary code states that the use of abusive and/or derogatory and/or offensive language or signs would ordinarily result in a final written warning for the first offence and a dismissal for the second offence. It provides further that "this list is not exhaustive as to the categories and nature of offences and only serves as a guide. The disciplinary action prescribed by the code may be deviated from where justified by the particular circumstances of the case. Accordingly such action may be more severe than the prescribed guideline where aggravating circumstances exist, or less severe where mitigating circumstances exist."

8. The applicant was found guilty and was dismissed. He appealed against his dismissal which appeal hearing was held on 23 December 2003. His appeal was dismissed. He then referred a dispute to the third respondent (the CCMA) for conciliation and arbitration. In an award dated 29 June 2004 the second respondent (the commissioner) found that the applicant's dismissal was substantively fair and that the sanction of dismissal was not outside the codes of conduct and recommendations of sanction.

9. The applicant was aggrieved with the award and brought a review application with a condonation application. Both applications were opposed by the first respondent. The applicant has raised several grounds of review. I do not deem it necessary to

repeat those grounds of review.

10. At the commencement of the proceedings I raised with both parties whether there was a need for the applicant to have applied for condonation. The applicant had contended that he was not served with a copy of the award and that he had uplifted the award from the CCMA towards the end of July 2004. The review application was filed on 10 December 2004.

11. Section 138(7)(b) of the Labour Relations Act 66 of 1995 (the Act) requires that the Commission must serve a copy of the award on each party to the dispute or the person who represented a party in the arbitration proceedings. An application for review brought in terms of section 145(1)(a) of the Act may be brought within six weeks of the date that the award was served on the applicant.

12. It is clear from the provisions of section 138(7)(b) read with section 145(1)(a) of the Act that the six-week period starts running from the date when the award was served on the applicant. Where there is no such service, the six-week period does not commence running.

13. Mr Meneses who appeared for the first respondent contended that the human resources Manager who was the deponent to the answering affidavit was advised that the award was transmitted to CEPPWAWU by telefax no later than 22 July 2004 and in support of this contention annexed “NB2" which is a copy of a transmission report from the CCMA. NB2 is the first page of the arbitration award. It records that the award was transmitted to Fax no 031 3065404 on 17 December 2004. It is also recorded on the same document that it was transmitted to the destination address given as 450 8510 on 22 July at 10:50. The fax number used is 031 3065404. It is apparent from the first page of the arbitration award that the fax number that it was

sent to does not belong to the applicant. It is not clear whose fax number this is. It is also unclear who had advised the human resources manager that the award was faxed to CEPPWAWU. There is no confirmatory affidavit as such.

14. There is no proof before this Court that the Commission has complied with the provisions of section 138(7)(b) of the Act. It was therefore not necessary for the applicant to have applied for condonation. Even if it could be argued that when the applicant uplifted a copy of the award by the CCMA that it amounts to service, the application for condonation should be granted.

15. Four requirements must be satisfied in an application for condonation. The first is the degree of lateness, the second is the explanation for the lateness, the third is prospects of success and the fourth requirement is the importance of the case.

16. The review application was filed three months late. It is a lengthy delay. The explanation given for the delay is explained in paragraphs 9 to 13 of the applicant's founding affidavit. The award was received in late July 2004. The union's bureaucracy, staff shortages and the legal officer's work pressure contributed towards the delay. The applicant was in no way to be blamed for it. The first respondent's response to this explanation is that it has no knowledge of it and accordingly denied same. The explanation for the delay was not seriously challenged or contradicted by the first respondent. I am satisfied that the applicant has given an adequate explanation for the delay.

17. This brings me to the issue of prospects of success. I am mindful of the fact that the review court will still have to deal with the merits of the review application. The review court must decide whether the commissioner's award was rational or not. The commissioner has dealt with why he found that the applicant's dismissal was substantively fair in nine lines. He has failed to provide reasons for the conclusions that he arrived at. The first respondent's code prescribes that for a first offence the penalty should be a final written warning and for a second offence it should be a dismissal. I have great doubt whether the applicant should have been found guilty in the first place for having accused the Puttick of being racist especially where he believed that he was racist. To accuse somebody of being racist is different from uttering racist statements. To accuse a person of being racist is not always a misconduct. It depends on the facts of each case. Truth could be used as a defence. The commissioner has not dealt with this at all.

18. It appears from the facts of this case that both the chairperson of the disciplinary enquiry and the commissioner confused the issue with some well-known racist terms used by racist people. This is not one such case. All that the applicant did in this case was to inform Puttick what his conduct led him to conclude. This was said in the context of a disciplinary hearing where the applicant appeared as a representative of an employee. He had arrived late and did not tender an apology to Puttick. Puttick was as could be expected upset or irritated. It would appear that some words were exchanged which prompted the applicant to say what he said. This was said in Zulu which was translated after much reluctance by the interpreter. There appears to have been mitigating factors which in terms of the first respondent's code should have been

taken into account and a lesser penalty as prescribed in the code should have been imposed. The commissioner did not consider this and found that there were aggravating circumstances. All that this Court must decide at this stage is whether there are prospects of success. The applicant has clearly shown that there are some prospects of success in this matter.

19. This case is of importance to both parties. It raises a number of issues with which the review Court should deal. The first is that where a person who is on the receiving end of racism truly believes that the other person is racist, is he or she allowed to tell that person that his conduct makes him to believe that he is racist? Does the person who does so open himself to misconduct where he truly believes that the person is racist? Should the employer than rush of and charge the person with misconduct without investigating the matter properly? Should Puttick's conduct not have been investigated? Should evidence not be led to prove that the person against whom the remarks were made is or is not racist? What should the employer's response be?

20. I am therefore satisfied that the applicant has made out a proper case for condonation.

21. There is no reason why costs should not follow the result.

22. In the circumstances I make the following order:

22.1 There is no need for the applicant to apply for condonation.

22.2 In the alternative to paragraph 22.1 the application for condonation is granted.

22.3 The first respondent is to pay the costs of the application.

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FRANCIS J

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

FOR THE APPLICANT	:	T E SEERY INSTRUCTED BY SHANTA REDDY ATTORNEYS
FOR FIRST RESPONDENT	:	R J MENESES OF SHEPSTONE WYLIE ATTORNEYS
DATE OF HEARING	:	20 NOVEMBER 2006
DATE OF JUDGMENT	:	24 NOVEMBER 2006