

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NUMBER: JR686/2006

In the matter between:

MTN SERVICE PROVIDER (PTY) LTD

Applicant

and

MATJI, KD N.O

First Respondent

CCMA, JOHANNESBURG

Second Respondent

MZOBE, MOIPONE MONICA

Third Respondent

JUDGEMENT

NGALWANA AJ

Introduction

[1] This is a review application for the setting aside of the first respondent's decision sitting as arbitrator under the second respondent's auspices.

[2] On 13 February 2006 the first respondent made an award in which

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he found that the third respondent's dismissal by the applicant on 6 June 2005 on grounds of incapacity was substantively and procedurally unfair. The applicant was ordered to re-employ the third respondent with effect from 1 March 2006.

- [3] The applicant now seeks the review and setting aside of that award and substitution therefor with an order declaring that the dismissal was fair. In the alternative, the applicant seeks an order referring the matter back to the first respondent for *de novo* determination before a different arbitrator. There is also a prayer for condonation for late filing of the application and one for costs in the event of opposition to this application. No grounds for condonation are advanced in the founding affidavit. Nevertheless, the third respondent does not seem too perturbed by this as he has not baulked at the request. Thus the matter was heard as opposed.

Factual background

- [4] The third respondent was employed by the applicant on 4 April 2002 as an administration clerk (She says she started on 1 April 2001. The applicant has filed no replying papers to set the record straight. Nevertheless, nothing turns on this for purposes of this

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judgment). She was dismissed on 6 June 2005 following an incapacity hearing. The facts leading to her dismissal are briefly these.

[5] In a 36 month cycle she was absent from work for a total period of 202 days. On 15 December 2004 the applicant addressed a letter to her advising that as she had exhausted her sick leave her continued absence would be treated as unpaid leave; that she would not be paid for the month of December 2004; that the last time the applicant had heard from her (through her doctor) was on 30 November 2004; and that her continuous absence from work would be investigated. The third respondent claims never to have received the letter

[6] Nothing was heard about her until 17 March 2005 when a medical certificate of that date indicated that she had been “unfit for work” from 29 November 2004 until 1 April 2005 as a result of a “major depressive disorder”. As treatment, the certificate listed counselling, hospitalisation, occupational therapy and psychiatric medication.

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[7] When the third respondent reported for duty on 4 April 2005 she was greeted with a notice of suspension pending an investigation into her capability to render the service for which she had been employed. In the meanwhile, the applicant instructed Alexander Forbes to investigate the third respondent's utilisation of sick leave. Alexander Forbes found that there were "*some legitimate incidences of sick leave interspersed with what appeared to be abuse of sick leave*". It then recommended that the applicant grant her "*extended sick leave for 76.2% of the days taken for which sick notes were submitted.*" On her medical condition, Alexander Forbes concluded that she had "*received treatment for all the medical conditions she [had] presented with and that it does not have any impact o[n] her functional ability.*" It then went on to say (just in case she was inclined to lodge a disability claim) she would not have been eligible for disability benefits.

[8] The applicant had also obtained a report from the third respondent's specialist psychiatrist who reported that "*she is fit to continue with her work in a new environment, away from the current stressful pressure*" and recommended that she be transferred to another environment.

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- [9] On 29 April 2005 an incapacity hearing was held. It is not clear from the record what form the hearing took. On 6 May 2005 the third respondent was given notice of termination on grounds of incapacity effective from 6 June 2005.
- [10] On 21 September 2005, conciliation having failed, she referred an unfair dismissal dispute to the second respondent in terms of section 191(5)(a) of the Act.

The applicant's case

- [11] The essence of the applicant's case is that the first respondent misconceived the nature of the issue he had to determine in that in formulating the issue to be determined he limited the nature and scope of the enquiry by omitting the words "*due to habitual (or persistent) absenteeism caused by ill-health*". The second issue raised is that his finding that the applicant had "*unilaterally and arbitrarily decided on what is best for or not best for the third respondent*" had no factual or legal basis because the applicant's witnesses merely testified that they *considered* (presumably as opposed to "decided on") alternative positions but found none that

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were less stressful for the third respondent. The third issue is that the first respondent's finding that the applicant overlooked new facts (in the form of the psychiatrist's report and that of Alexander Forbes) indicates that he failed to apply his mind to the evidence adduced. The applicant also submitted that the first respondent's rejection of the applicant's version as regards the non-existence of less stressful positions to which the third respondent could be transferred flies in the face of the applicant's witnesses' uncontroverted evidence.

The third respondent's case

- [12] The third respondent maintained that the first respondent's decision is justifiable because the applicant failed to consider the findings of the psychiatric report and those of the Alexander Forbes report. She submitted that she was not involved in the consideration of whether or not there existed alternative positions for her in the company. She said she was never given an opportunity to prove that following her treatment she was "*ready to continue with [her] services*". She said all that happened was that she was given a letter of suspension and then called to an incapacity hearing where she was "*charged [with] being incapable of rendering [her] services*".

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The court's finding

- [13] Section 145 of the Act on which the applicant relies for this review application requires the applicant to prove one of four grounds of review. These are misconduct on the arbitrator's part in relation to his duties as an arbitrator; gross irregularity in the conduct of arbitration proceedings; *ultra vires* conduct by the arbitrator in the exercise of his powers and an improper obtaining of the award. On a *conspectus* of all the cases, however, it seems to me the permissible grounds of review are wider than those set out in section 145 of the Act and can perhaps be reduced to this: for the applicant to succeed the decision must be shown to be irrational (in the sense that it does not accord with the reasoning on which it is premised or the reasoning is so flawed as to elicit a sense of incredulity) and unjustifiable in relation to the reasons given for it (*Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Kapp NO* (2002) 23 ILJ 863 (LAC) at paragraph [19]; *Shoprite Checkers (Pty) Ltd v Ramdaw NO and Others* (2001) 22 ILJ 1603 (LAC) at paragraph [26]; *Carephone (Pty) Ltd v Marcus NO and Others* (1998) 19 ILJ 1425 (LAC) at paragraph [37]; *Pharmaceutical Manufacturers' Association of SA and Others: In re Ex Parte*

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Application of the President of the RSA and Others 2000 (3) BCLR 241 (CC)). It is not the reviewing court's task to consider whether or not the decision is correct in law as that would be an appeal (*Minister of Justice and Another v Bosch NO and Others* (2006) 27 ILJ 166 (LC) at paragraph [29]).

- [14] On this test, I am satisfied that the second respondent's award is not susceptible to review and setting aside. None of the witnesses who testified for the applicant at the arbitration hearing could show that the third respondent had been given an opportunity to prove that she was capable of performing her tasks following her treatment. It appears from all the evidence that the applicant's decision to dismiss her was based not so much on her incapacity as her long and persistent periods of absence from work due to ill-health. That is why the applicant insisted that the enquiry before the first respondent should have been formulated broader than it was to make reference to the "habitual" and "persistent absenteeism" of the third respondent. That is not the test. The test is whether the third respondent was at the time of dismissal capable of rendering her services to the applicant. She was never given a chance to prove that she was. I am thus satisfied that the first

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respondent asked and answered the correct question.

[15] As regards the second issue, there was no evidence before the first respondent that the third respondent had any say in the applicant's "consideration" of alternative positions of a less stressful hue. Whether or not such positions indeed existed is a separate enquiry.

[16] I am unable to fault the first respondent on his finding that the applicant ignored the findings of the psychiatrist and Alexander Forbes report because in the final analysis it (the applicant) never sought to establish whether the third respondent was indeed capable of performing her functions following her treatment. When she reported for duty she was not given a chance to prove that she could perform but was simply served with a notice of suspension and subsequently called to an incapacity hearing where she was charged with the very incapacity she was not permitted to disprove.

[17] In the result, I am satisfied that the first respondent's decision is rational and justifiable in relation to the reasons given for it. The application is dismissed with costs.

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Ngalwana AJ

For the applicant: Mr W Hutchinson
Instructed by: Lebea and Associates

For the 3rd respondent: Mr GN Moshwana
Instructed by: Mohlaba Moshwana Incorporated

Date of hearing: 06 June 2007

Date of judgment: 12 June 2007