

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT PORT ELIZABETH

CASE NO. P123/98

In the matter between :

SUPERSTAR HERBS

Applicant

and

DIRECTOR, CCMA & OTHERS

Respondent

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JUDGEMENT

MLAMBO J :

[1] There are two applications before me. In the one application, which I will deal with first, the applicant, (“Superstar Herbs,”) seeks to review and set aside an award of the Commission for Conciliation Mediation and Arbitration (“the commission”). In the second application, Miss Madikwa (“Madikwa”), who is the third Respondent in the review application, seeks to have the award made an order of Court.

[2] The award was made by Mr Hempe, a commissioner who was appointed to arbitrate the dispute between Superstar Herbs and Madikwa. He issued his award on 9 March 1998.

[3] As already stated, I will consider the review application first. I will consider the application in terms of section 145 which empowers this Court to review arbitration awards of the commission.

[4] The facts briefly are that Madikwa was dismissed on 22 October 1997 after a disciplinary enquiry at which she was found guilty of theft of 2 money due and owing to Superstar Herbs. She apparently sold an item belonging to Superstar Herbs for half its value and pocketed the money.

[5] At the resultant arbitration, conciliation having failed, Hempe felt that Superstar Herbs had dismissed Madikwa, in a situation where it was procedurally and substantively unfair to do so. He ordered Superstar Herbs to pay Madikwa an amount of R 8 523,40 being the equivalent of 9 months' remuneration.

[6] The evidence tendered at the internal disciplinary enquiry and during the arbitration proceedings was that :

(i) Tabakula Aron, a customer of Superstar Herbs, reported that Madikwa had met him on the street and informed him that she had a money tree for sale.

(ii) Aron further reported that Madikwa had later visited his house where she had told him she was prepared to take R80,00 for the tree although it would cost R160,00 if purchased from the shop.

(iii) Aron confirmed that he paid Madikwa the R80,00 for the tree and that he had also bought medicines from her for R80,00 which was R70,00 less than their retail value.

[7] Gregory Peters of Superstar Herbs further testified during the arbitration proceedings that he visited Aron at his house, who informed him that he had made the purchases from Madikwa and tendered the outstanding R80,00 as well as the tree, apparently because it did not bring the luck it was supposed to bring. Peters confronted Madikwa with this information, who apparently responded in an aggressive manner and denied all knowledge of the transaction. Peters suspended Madikwa pending a disciplinary inquiry. She was informed on 20 October 1997 that a disciplinary enquiry would take place on 22 October 1997. She was informed of all her rights pertaining to such enquiry.

[8] The inquiry was chaired by an outsider, one Ian Taylor, who heard the evidence I have already outlined above. Ian Taylor requested Madikwa to cross-examine Peters which she declined to do save to profer a bare denial of the transaction. When Ian Taylor asked Madikwa to make a closing statement, she said that she had nothing to say. Ian Taylor, after assessing all the evidence, decided that dismissal was justified and informed Madikwa in writing of the reasons and of the procedure she could follow in terms of the Act if she was not satisfied with her dismissal.

[9] As already stated, Madikwa during the internal disciplinary enquiry as well as during the arbitration proceedings, merely denied the allegations against her. She specifically told the arbitrator that she had nothing further to say beyond such denial. She averred, however, that the procedure that had been followed during the internal disciplinary inquiry was unfair because the persons who had informed Peters of her misconduct had not given evidence at the disciplinary inquiry held prior to her dismissal.

[10] Superstar Herbs comes to this Court challenging the award on a number of grounds which are :

(1) that Hempe committed a gross irregularity in the conduct of the proceedings by conferring with Madikwa in the absence of the Superstar Herbs representative;

(2) he committed a gross irregularity in the conduct of the proceedings by attempting to resolve the dispute by conciliation without the consent of either party;

(3) he conducted himself in a manner calculated to give rise to a reasonable suspicion of bias by requesting Superstar Herbs to compensate Madikwa before the hearing was concluded;

(4) he committed a gross irregularity in the proceedings, alternatively a reviewable irregularity by preferring Madikwa's bare denial to the unchallenged evidence of Peters;

(5) he acted grossly unreasonably, alternatively unreasonably by concluding that Madikwa was entitled to compensation;

(6) that the conclusion reached by Hempe in his award was not

justifiable in relation to the reasons given for it.

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[11] In his award Hempte under the heading “Analysis of evidence and argument” simply stated the following :

“ It is common cause that no evidence was led at the employee’s disciplinary hearing. Witnesses who may have corroborated the employer’s version of what happened were not called by the employer. I therefore find that the dismissal was both procedurally and substantively unfair. I am also satisfied that there is no prospect of the parties renewing their relationship.”

[12] He then proceeded to award Madikwa three months’ compensation for the unfairness relating to procedure as well as six months in terms of section 194(2).

[13] The test that I think is applicable to the review of arbitration awards was alluded to by Professor Grogan when he argued the matter. It is a test whether the award is appropriate within the meaning of section 138(9), whether there has been a failure of justice or whether a fair hearing took place.

See STANDARD BANK OF SOUTH AFRICA LTD v CCMA & OTHERS [1998] 6 BLLR 622 (LC).

[14] As to the material placed before me, I can only rely on the affidavits filed by Superstar Herbs and the award itself. It is correct therefore, as argued by Professor Grogan that in assessing the arbitration proceedings I must accept the version put up by Superstar Herbs. This is so as Madikwa and any of the other Respondents did not file any opposing papers.

[15] Therefore the following material averments of fact must be accepted:

1. that Peters for Superstar Herbs gave the evidence I have referred to above under oath during the arbitration proceedings;
2. that insofar as Madikwa's bare denial can be deemed to be evidence, it was not made under oath;

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3. that Hempe conferred with Madikwa during the arbitration proceedings in the absence of Peters representative without his leave;
4. that after the aforesaid discussion, Hempe asked the Superstar Herbs representative whether he was prepared to pay Madikwa an amount equivalent to one month's remuneration by way of settlement.

[16] I am of the view that the second Respondent put undue weight to Madikwa's bare denial as opposed to the unchallenged evidence of Peters. I think this was a misdirection. Peters gave detailed evidence of what was reported to him and of how he confronted Madikwa. That evidence could not simply be overlooked in favour of a bare denial. Madikwa should have explained to Mr Taylor in the internal disciplinary enquiry and to Hempe on what basis she was denying and why would Peters make up such an elaborate story. The problem is further that Hempe has provided no reasons for his preference of Madikwa's denial to Peter's evidence.

[17] My view is that the transaction between Madikwa and Aron took place. I think the commissioner erred in laying emphasis on the fact that no other evidence was led to corroborate the version put up by Peters' at the disciplinary inquiry. He failed to consider and apply his mind to what was before him.

[18] Furthermore, I think Hempe erred by concluding that the dismissal

was procedurally unfair solely because witnesses who may have corroborated the employer's version of what happened were not called at the disciplinary enquiry. In any event, as was argued by Professor Grogan, the evidence given by Peters was enough to prove, on a balance of probabilities, that Madikwa was guilty of dishonesty.

[19] Hemepe does not appear to have had regard to the code of good practice found in Schedule 8 of the Labour Relations Act No 66 of 1995. It is specifically stated in that code that an internal inquiry conducted by an employer need not be formal, the employee must be given timeous

6 notice and a fair opportunity to state his or her case. When an employer has held an inquiry, the commissioner's role is to see if it was fair. The fact that no corroboration evidence was led does not necessarily make the inquiry unfair. It would be unfair if corroboration was necessary.

[20] In this case the employer led elaborate and extensive evidence of dishonest conduct by Madikwa. I can find no basis for the view that the employer concocted the whole story simply to dismiss her. I am satisfied therefore that Hemepe's award stands to be reviewed and set aside. He also ignored well established principles regarding dishonest conduct by employees. As stated in STANDARD BANK LTD v CCMA & OTHERS (supra) dishonesty breaches the trust that an employer places on an employee and in turn it destroys the employment relationship.

[21] I do not deem it wise to refer the dispute back to the commission for a fresh arbitration. I am satisfied that Madikwa was involved in dishonest conduct. In terms of section 145(4)(a) I will determine the dispute. I find that Madikwa's dismissal was for a fair reason. I do not award any costs as same were not requested nor was the application opposed. It stands to reason that the application in terms of section 158(1)(c) whereby Madikwa seeks to have the award made an order of Court, must fail. I also award no costs in that regard.

D MLAMBO

JUDGE OF THE LABOUR COURT

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DATE OF HEARING : 13 August 1998

DATE OF JUDGEMENT : 14 August 1998

FOR THE APPLICANT : Professor J. Grogan instructed
by

Chris Baker & Associates
Ref : P.Kroon