

**IN THE LABOUR COURT OF SOUTH AFRICA
AT JOHANNESBURG**

Case Number: J963/97

In the matter between

Masondo Louisa Smangele

Applicant

and

Bhamjee, Bhana, Nkosi Close Corporation

First Respondent

t/a Baragwanath Pharmacy

F. Bhamjee Close Corporation

Second Respondent

t/a Eldomet Pharmacy

JUDGMENT

POOE AJ

The Parties

[1] The Applicant is Louisa Smangele Masondo.

[2] The Respondent was initially cited as Bhamjee: Faizel t/a Eldomed & Baragwanath Pharmacies. An amendment was introduced during the course of the hearing, following which the two Respondents were cited as Bhamjee, Bhana, Nkosi Close Corporation t/a Baragwanath Pharmacy – First

Respondent and F Bhamjee Close Corporation t/a Eldomed Pharmacy – Second Respondent. The two Respondents are hereafter referred to as Baragwanath and Eldomed respectively.

[3] The Respondents are retail pharmacy stores trading from Soweto and Eldorado Park respectively. Mr Faizel Bhamjee (“Bhamjee”) represented the Respondents at all material times.

The Dispute and Relief sought

[4] The dispute arises from the Applicant’s dismissal during December 1996. The Applicant contends that the termination of her employment was unfair in that it was not for a fair reason and was not effected in accordance with a fair procedure. To the extent that her dismissal is alleged to have been for operational reasons, the Applicant contends that provisions of Section 189 of the Labour Relations Act, 66 of 1995 (“the Act”) were not complied with in that her dismissal was not preceded by consultation.

[5] The Applicant seeks compensation, severance pay and costs from the Respondents jointly and severally.

[6] The Respondents contend that the Applicant’s dismissal was for a fair reason relating to operational requirements and was effected in accordance with fair procedure, and seek an order dismissing the application, and granting costs against the Applicant. The reason advanced for the dismissal of the Applicant is that Baragwanath Pharmacy stopped trading during December 1996.

Onus in Dismissal Cases

[7] In terms of section 192 of the Act, an employee must establish the existence of a dismissal, whereafter the employer must prove that that dismissal is fair.

The Evidence by the Respondent

Yunus Bismilla

[8] He gave evidence to the effect that he is a bookkeeper practicing for his own account. He is the accounting officer for all but one of the businesses in which Faizel Bhamjee has an interest. These businesses in which Bhamjee has an interest are the following:

Bhamjee, Bhana, Nkosi Close Corporation t/a Baragwanath Pharmacy
(hereafter “Baragwanath”)

F. Bhamjee Close Corporation t/a Eldomed Pharmacy (hereafter “Eldomed”)

Madhi, Ebrahim, Bhamjee Close Corporation t/a Freeway Pharmacy;

Bhamjee and Nkosi Close Corporation t/a Eldomed II Pharmacy

Bhamjee’s Pharmacy

[9] Bismilla renders accounting and administrative services to the businesses. Part of these services is the processing of wages of all the employees and preparing balance sheets.

[10] During 1994 or 1995 he helped register Bhamjee, Bhana, Nkosi Close Corporation trading as Baragwanath Pharmacy. At the stage when the closed corporation was formed and registered, the business had not yet started operating.

[11] When processing wages, he makes all the necessary deductions from the gross amount, prepares cheques and pay slips for Faizel Bhamjee to sign and thereafter hands them over to the employees. The wage slips reflect the name of the employer, name of the employee, gross earnings, deductions, and nett earnings. These details were, however, not always reflected on the pay slips. Of the 36 pay slips shown to him belonging to the Applicant, only one had the Employer's name on it.

[12] The Applicant was employed at Eldomed until September 1995. She then took up employment at Baragwanath where she worked until November 1996. The members of the Close Corporation would jointly decide on who to employ, although Bhamjee ran the general administration of the Close Corporations. Bhamjee is the Public Officer for both Eldomed and Baragwanath. When the Applicant took up a position at Baragwanath she went onto the books of, and was paid by, the new employer. She was issued with a new blue (UIF) card (Page 7 of Bundle "I"). The UIF card at Page 8 of the same bundle was handed to the Applicant when she went on maternity leave in October 1996.

[13] Partners in Baragwanath are not always at the pharmacy, but visit there from time to time and hold meetings at the premises. Initially, when the pharmacy was opened, the visits were more frequent. The Applicant knows the partners in the business.

[14] The Applicant was the front shop manageress at Baragwanath.

[15] Dr. Bhana was a member of the closed corporation, but was more like a silent partner in that he was not very active in the business.

[16] Baragwanath stopped trading in the first week of December 1996.

The Close Corporation itself is still in existence, but dormant. The balance sheets for the Close Corporation have not been drawn up, but it was in overdraft when it stopped trading. There was a meeting with staff at the time of the closure of Baragwanath, but as he was not present he cannot say what was discussed at that meeting. He was informed of the closure of Baragwanath either early in December 1996 or January 1997, when he returned from vacation. At that stage he was informed that two of the three employees from Baragwanath, Gladys and the pharmacist, were now employed at Eldomed, and he put them on the records of Eldomed

[17] He got involved in the dismissal dispute when a letter was received from the CCMA and he was asked to represent the employer. He attended the first formal meeting at the CCMA and a meeting with the Applicant, her Union representative and Mr. Bhamjee. At the latter meeting the discussion was about the unfair dismissal. Although he was the Labour Advisor to the Close Corporation he was not very familiar with the provisions of the Act.

[18] The package that was offered at the time of the closure of the business was one week's remuneration for each year of service, as severance pay, notice and leave pay. He does not have the actual figures. A cheque for the amount offered was never drawn because the unfair dismissal dispute ensued. To date, no payment has been effected.

Faizel Bhamjee

[19] He testified that the Applicant commenced working for Eldomed during April 1993, as a shop cleaner. She never had a written contract of employment. She worked until 30 November 1994 when she went on maternity leave. When she went on leave she was given her UIF contributor's card to enable her to apply for UIF benefits. She was also advanced a loan.

[20] For reasons unknown to him, the Applicant did not return to work on 1 March 1995 as she was supposed to, but only on 1 April 1995 without offering any plausible explanation for her absence.

[21] Upon her return from maternity leave, the Applicant worked at Eldomed from 1 April 1995 until 30 September 1995 when Baragwanath was about to be opened.

[22] At the time Baragwanath was about to be opened, a meeting of the staff at Eldomed was called. The purpose of the meeting was to inform staff of, and invite them to move to, the new pharmacy. He approached the Eldomed staff because there was a need for trained staff. He preferred to have his more senior staff move across to Baragwanath but they declined and so he asked Applicant. He informed the staff that the benefits from the old pharmacy would be terminated, but that there would be better benefits at the new pharmacy.

[23] The Applicant took up the offer to move because the new pharmacy was closer to her home in Soweto, and the move amounted to a promotion, although her salary was not increased until May or June of 1996. Two members of staff declined to move for personal reasons.

[24] The Applicant duly relocated to Baragwanath, where she worked until the end of October 1996 when she went on maternity leave. Applicant was not due any benefits on termination of her employment with Eldomed. In fact, she owed the Close Corporation R1200.00, an amount advanced to her in December 1994. There was also a mutual agreement that there was no need to pay notice pay to the Applicant.

[25] On or about 29 November 1996 the members of the close corporation decided to close Baragwanath for operational reasons. Staff and creditors

were informed of the closure. Staff were informed that they would be paid severance, notice and leave pay and that they would be re-employed at the other pharmacies if they so wished and there was a position available. The Applicant was not present at the meeting which was held with the staff, and no contact was made with her to discuss the matter.

[26] During January 1997 the Applicant presented herself at Eldomed pharmacy. This was not a formal meeting. Applicant was never invited to a formal meeting to discuss her retrenchment as Bhamjee had no mandate from the Close Corporation to invite Applicant to such a meeting.

[27] She was given a letter (Page 3 of Bundle "K"). The letter is to the effect that Baragwanath was unable to continue as a retail pharmacy, that the Applicant's services were being terminated with full benefits and that an alternate position would be found for her if she desired one. There was a position available at that time at Eldomed pharmacy, as a shop assistant, at the same pay that the Applicant had been receiving prior to her taking maternity leave. Applicant was informed at this stage that the Close Corporation was unable to pay her immediately because of a lack of funds. No other notification was given to Applicant. If she had been at the meeting held at the beginning of December 1996 she would have been told that Baragwanath was closing, that her employment was terminated, but that an alternative position would be found for her should she so desire.

[28] He did not have an address for the Applicant, although he did have one for her sister, through whom communication usually passed. He did not consider it necessary to deliver the letter dated 18/12/96 to the Applicant's sister as she usually came through to pick things up for the Applicant. He did not consider it necessary to have a separate meeting with Applicant regarding her dismissal.

[29] The operational requirements that led to the closure of the pharmacy were that the pharmacy was operating on overdraft and could not pay its expenses such as rental and other creditors.

Firoza Abbajee

[30] She gave evidence to the effect that she worked at Bhamjee's pharmacy from February 1987 to December 1989. From 10 July 1995 to date she has been working at Eldomed as a front shop assistant. Eldomed is a close corporation owned by Faizel Bhamjee. She has always known who her employer was because she was told this by Mr. Bhamjee. Also, her cheques were signed by Bhamjee and had the name "Eldomed" written on them, as did her wage packet. There are other pharmacies in which Faizel Bhamjee was a partner, including Baragwanath. There was a working relationship between Baragwanath and Eldomed.

[31] Bhamjee told her and the other staff when the new pharmacy (Baragwanath) was about to be opened. This happened at a meeting which took place sometime in September 1995. Present at the meeting were herself, Gladys, the Applicant and the two cashiers. An invitation was extended to the staff to move to the new pharmacy. She declined because she considered working in Soweto unsafe. One other employee, Frances, declined because of a previous hijacking incident involving one of her relatives.

[32] She knew that the move involved moving to a new business and a new job.

[33] She was aware of the closure of Baragwanath because she was

informed about it by Bhamjee. She recalls that two staff members from Baragwanath came to work at Eldomed in December 1996.

[34] The witness met the Applicant in July 1995 when she began working at Eldomed. The Applicant was happy while working at Eldomed. She saw no undue pressure being exerted on the Applicant to move to Baragwanath. The Applicant knew she was moving to a new pharmacy.

[35] Staff movement between pharmacies did occur, but the staff were still employed by Bhamjee. Generally, this movement took place after staff meetings called by Bhamjee in which he would ask staff members to volunteer to fill in. These requests took place at the weekly meetings, generally called to discuss general shop management, promotions, merchandising etc. The relief work would be for between 2-3 days and 2-3 weeks. This need arose when employees went on leave.

Evidence by the Applicant

[36] The Applicant gave evidence that she started working at Eldomed in April 1993. She was employed as a saleslady serving customers and also helped to keep the store clean. Her earnings were R200,00 per month.

[37] Faizel Bhamjee had a number of pharmacies. She was not aware that these pharmacies were close corporations. She does not know the difference between a close corporation and a company and a sole proprietorship.

[38] While still at Eldomed she went on maternity leave. Although she gave forms to Bhamjee to sign in order for her to claim UIF benefits he did not sign them. Instead he said that he would pay to the Applicant, and did pay, two amounts of R600,00 each in December 1994 and January 1995. She went on maternity leave on 20 December 1994.

[39] The Applicant later went to work at Baragwanath. She was told by Bhamjee that he was opening a branch in Soweto and as she was a good worker he wanted her to move to Soweto and be his right hand there. There was no staff meeting at which this was discussed. Applicant denied that it was discussed at one of the regular weekly meetings. She and another employee, Gladys, were called in and told that they were to go to work at Baragwanath, as no other person was prepared to work there. She was not told that she was joining a new employer, nor was she told that she was being promoted. If she had been told that she was moving to a new employer she would have wanted to know why she was being transferred. She denied that she had wanted to go to Baragwanath because it was closer to her home. In fact, she lived with her husband and children in Lenasia. She accepted the move because it was important to her to have a job.

[40] The Applicant has been on leave only once since she started working. Thereafter she has been refused leave because she was told it was too busy. Although she was promised payment in lieu of leave, she has never been paid.

[41] Prior to moving to Baragwanath, she moved to the pharmacy in Lenasia for two to three months in 1996. She was told to move back to Eldomed because the Lenasia store was not busy. The procedure was the same as when she was told to move to Baragwanath. The staff did rotate between the different pharmacies.

[42] She was the first one to move to Baragwanath. Gladys joined her later after she had complained that the workload was too much for her. Gladys also went back to work at Eldomed for a short period. She was never introduced to Bhana or Nkosi at Baragwanath.

[43] In December 1996, she went on maternity leave, and returned on 30 January 1997 to see Bhamjee at Eldomed, to get her UIF forms, which he had not signed. Bhamjee informed her that Baragwanath was closed. He did not offer her other employment, nor any money. Because of this she decided to go to the CCMA.

[44] There was a meeting at the CCMA and another between the parties but no settlement materialised.

[45] She testified that she had never received the letter dated 18 December 1996 that Bhamjee claimed to have given her at their meeting on 30 January 1997.

The Issues to be decided

[46] The issues which the Court has been asked to decide are:

who the Applicant's employer was;

whether the Applicant was dismissed for a fair reason relating to operational requirements;

whether the Applicant's dismissal was effected in accordance with the provisions of Section 189 of the Act and if not whether such non-compliance renders the dismissal procedurally unfair;

what compensation, if any, is to be awarded to the Applicant if her dismissal is found to have been unfair, and which party is to pay the costs.

Analysis of the evidence

[47] A detailed analysis of the evidence is not necessary given the substantial volume of facts which are common cause between the parties. To the extent that it becomes necessary, I will in the course of deliberating my judgment give an analysis of the evidence.

Substantive fairness

[48] It is common cause that Applicant was dismissed on 18 December 1996 following the closure of Baragwanath Pharmacy. The evidence by Bhamjee was to the effect that this pharmacy had to be closed down as it was operating on overdraft and could not pay its expenses such as rental and creditors.

[49] An employer who dismisses an employee for operational reasons arising from economic necessity should make a full and proper disclosure to the Court of the financial position which prevailed at the time of the dismissal. It is not sufficient for an employer in these circumstances merely to allege economic necessity.

[50] No evidence was led in this matter regarding the financial position of the pharmacy at the time when the decision was taken to close it and to retrench the employees. The evidence on the reasons that led to the closure of the pharmacy is sketchy in the extreme and falls far short of the degree of disclosure which is required in these circumstances. The evidence is insufficient to support a finding that the Applicant's dismissal was for a valid reason relating to the operational needs of the pharmacy. The onus rests on the employer to satisfy the Court on this aspect. This onus has not been discharged in the present case. I find accordingly that the Applicant's dismissal was unfair in that it was not for a valid reason relating to operational requirements.

Procedural fairness

[51] At the time when the decision to dismiss her was taken, the Applicant was away on maternity leave. A letter informing her of her dismissal was prepared in December 1996 but was never sent to her. Although she could be contacted through her sister who worked in the same complex where Eldomed is situated, no attempt was made to contact her. She was only notified of her dismissal in January 1997 when she went to enquire from Mr. Bhamjee about her UIF documents. It is clear from the evidence, which is largely common cause, that no consultation took place with the Applicant prior to the decision to dismiss her. Even when she presented herself at Eldomed in January 1997, there was not attempt to consult with her. She was presented with the pre-determined fact of her dismissal. It follows therefore that there was no consultation with the Applicant as required by Section 189 of the Act. This failure to comply with Section 189 renders the dismissal procedurally unfair.

Relief

Compensation

[52] I now turn to consider the question of compensation. The Court has a discretion in terms of Section 193 of the Act to either reinstate, re-employ or award compensation if it finds that the dismissal of any employee was unfair. The Applicant has indicated that she wish does not to be reinstated or re-employed. I am of the view that this is a case in which the Court should award compensation. The degree of unfairness in this case was extreme and calls for compensation. I am obliged when determining compensation to have regard to the provisions of Section 194 of the Act. I have found that the dismissal was not effected in accordance with the

provisions of Section 189 of the Act and that such non-compliance renders the dismissal procedurally unfair. If I were to award compensation in terms of Section 194(1), I would award compensation in the amount of R16 800,00. This amount is the equivalent of the amount the Applicant would have earned in the period between the date of her dismissal and the last day of this hearing. This is a period of 21 months. The amount is calculated at the Applicant's rate of remuneration as at the date of her dismissal which is R800,00 per month.

[53] I have, however, also found the dismissal to be unfair on the basis that it has not been shown to have been for a valid reason relating to operational requirements. I am accordingly awarding compensation in terms of Section 194(2). I am limited in terms of this subsection to award compensation for an amount not less than the amount due in terms of 194(1) but not more than 12 months. The compensation I award is accordingly 12 months' remuneration at the rate of remuneration applicable at the time of the dismissal, namely R800,00 per month, a total of R9600,00.

Severance Pay

[54] The Applicant was not paid the amount due her as severance pay. She is entitled to severance pay in the amount of R185,00. This amount represents one week's remuneration for each year of service and is arrived at as follows :

$$\frac{\text{R800,00}}{4.33} \times 1$$

[55] Mr Bhamjee argued that the Applicant was offered and declined alternative employment at Eldomed. A candidate for retrenchment who

unreasonably declines alternative employment is, in terms of Section 196(3) of the Act, not entitled to severance pay.

[56] The issue of alternative employment offered to the Applicant is alluded to in the letter of 18 December 1996 addressed to the Applicant in the following terms :

Furthermore, management has found alternative employment for other staff members and if you should so desire alternative employment will be found for you.

[57] There is also reference in the minutes of Bhamjee, Bhana and Nkosi held on 29 November 1996 to the effect that attempts should be made to find alternative employment for staff.

[58] The evidence on behalf of the Respondent was that the other two employees affected by the closure of Baragwanath were offered and did accept alternative employment at Eldomed. While this may be correct, it is not altogether clear precisely what alternative employment was offered to the Applicant.

[59] I cannot conclude on the basis of the documents referred to and the evidence that an offer of alternative employment was indeed made to the Applicant. The passage in the letter of 18 December 1996 referred to above does not support Mr Bhamjee's contention in this regard. There is no clear indication in this letter of what position was offered to the Applicant. This letter merely evidences an intention to find alternative employment for the Applicant. An offer of this nature should, in any event, have been made within the context of the consultation process required by Section 189. This offer, if it was made, came after a decision to dismiss the Applicant had already been taken. This offer was also, on the Respondent's own version, never communicated to the Applicant until January 1997.

[60] I am satisfied that the Applicant has not rendered herself disentitled to severance pay.

Who was the employer?

[61] What remains to be determined is the question of who the employer was, and accordingly who should be ordered to pay the amounts due to the Applicant.

[62] Central to the question of who the employer was, is whether the Applicant's employment with Eldomed Pharmacy was terminated at the time when she moved to Baragwanath Pharmacy. Mr Bhamjee testified that when the Applicant took up employment at Baragwanath, her employment with Eldomed was terminated. Great reliance was placed on the two UIF cards, one issued by Eldomed and the other by Baragwanath. She was, according to Bhamjee paid out of the accounts of Baragwanath from that time onwards. The Applicant knew who she was employed by at any given time because the employer's name appeared on the pay packets. The cheques also reflected who the employer was. At the time when she moved to Baragwanath, the Applicant was told that she was moving to a new employer. She accepted the move because it involved a promotion and it meant that she would be closer to her home in Soweto. The offer was communicated to the Applicant at a meeting of all staff at Eldomed.

[63] The Applicant testified on the other hand that she started working for Faizel Bhamjee at Eldomed in 1993. During the course of her employment at Eldomed, she was on one occasion sent to work at one of the other pharmacies in Lenasia. She spent a period of between two to three months at the Lenasia Pharmacy and was then sent back to Eldomed as the Lenasia Pharmacy was not busy. Staff did rotate between the different pharmacies.

The Applicant denied that she was told that she was taking up new employment and stated that had she been told that this was the case, she would have queried it. She and a co-worker were told by Bhamjee that they were to go and work at Baragwanath as no other staff member was prepared to do so.

[64] It would seem from the evidence that it was not uncommon for employees to be moved from one pharmacy to the other from time to time. This is according to the evidence of the Applicant which was confirmed by Ms Abbajee and Mr Bhamjee. Such moves were always initiated by Mr Bhamjee and never involved change of employers as they were clearly meant to be of temporary duration only. On one occasion, the Applicant went to perform duty at another pharmacy for a period of between two to three months.

[65] The circumstances of the Applicant's move from Eldomed to Baragwanath as explained to the Court seem, however, to have been different. It would seem from the evidence that this move was intended to be of a more permanent nature than what had been the norm on previous occasions. It is noteworthy that at the time of her dismissal the Applicant had been working at Baragwanath for a period of one year. There is no suggestion that in this period she moved between the two pharmacies. The Applicant's evidence as to what was communicated to her at the time when she was asked to move to Baragwanath was not satisfactory. It is not the Applicant's evidence that she was told in specific terms that when she went to Baragwanath she would still be in the employ of Eldomed. It is in any event more than unlikely that such communication would be made. An arrangement of this nature would in my view not make sense at all. If I was to find that the Applicant was employed by both Baragwanath and Eldomed, I would necessarily also have to find that she was employed by the pharmacy in Lenasia where at a time she went to perform duties.

[66] The Applicant is, in essence, asking me to “lift the corporate veil “. There is a long line of decisions in which the Courts have upheld the power to lift the veil of corporate identify where fraudulent use is made thereof. See **Lategan & Another NNO v Boyes & Another** 1980 (4) SA 191 (T). The Courts will, however, not readily pierce the corporate veil. In **Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd and others** 1993 (2) SA 784 (C), the Court refused to pierce the corporate veil because although the transaction in question was “improper”, it did not result in “unconscionable injustice”. The Appellate Division has also held that improper conduct may justify piercing of the corporate veil. Similarly, the Industrial Court of the past has been prepared to pierce the corporate veil where there was a presence of “improper conduct” on the part of the employer. (See **SA Allied Workers Union & Others v Contract Installations (Pty) Ltd & Another** (1988) 9 ILJ 112 (IC); **SA Allied Workers Union v ToiletPak Manufacturers (Pty) Ltd** (1988) 9 ILJ 295 (IC); **Paper, Printing, Wood & Allied Workers Union v Kaycraft (Pty) Ltd & Another** (1989) 10 ILJ 272 (IC) and **Paper, Printing, Wood & Allied Workers Union v Lane NO & Another** (1993) 14 ILJ 1366 (IC))

[67] There is no suggestion in the present case of any “improper conduct” in the sense suggested in the authorities mentioned. There was neither evidence nor any submissions made to that effect. Mr Modise argued that I should lift the corporate veil because Bhamjee was a common denominator in all the businesses and took an active part in the running of the business more than any other members. This, however, does not in the light of the authorities I have cited above, constitute a proper basis for lifting the corporate veil. Improper conduct on the part of the employer would have to be shown.

[68] Mr Modise also argued at length that I should find that the Applicant’s

move to Baragwanath during September 1995 was not effected in accordance with the provisions of Section 197 of the Act. The short answer to this is that this Section was not in operation at the time when the Applicant moved to Baragwanath. The Act had not yet come into operation. Even if this Section was in operation, I do not believe that it offers any assistance to the Applicant as the situation with which we are faced at the moment is not one which involves a transfer of business and is thus not covered by the section.

[69] I have not been persuaded by the Applicant that there are grounds for me to brush aside the corporate veil and to hold both Respondents liable for the relief due to her. I have to find on the facts before me that the Applicant was employed by Baragwanath and that it is to Baragwanath that she should look for relief.

[70] I accordingly order the First Respondent (Bhamjee, Bhana, Nkosi CC t/ a Baragwanath Pharmacy) to pay to the Applicant:

- (i) Compensation in the sum of R9 600,00;
- (ii) Severance pay in the sum of R185,00;
- (iii) The costs of this matter other than the costs resulting from the amendment introduced by the Applicant;
- (iv) The amounts mentioned in (i) and (ii) above are to be paid within 14 days of the date on which this judgment is delivered.

M Pooe AJ

DATE OF HEARING: 12 August 1998

DATE OF JUDGMENT: 13 October 1998

For the Applicant: Mlambo & Modise Attorneys

For the Respondents: Mr F.Bhamjee