

**IN THE LABOUR COURT OF SOUTH AFRICA**

(Held at Johannesburg)

Case No. J243/98

In the matter between:

**MS KATE MODISE**

Applicant

and

**KING VALET CC**

Respondent

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**J U D G M E N T**

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Date of Hearing : 29

April 1998

Date of Judgment : 29 April 1998

On behalf of Applicant

Mr B Mashego

Instructed by: The National Union of Metalworkers

of South Africa

On behalf of Respondent:

Mr Nortjè in person

**REVELAS, J:**

[1] In this matter I give judgment as follows: The applicant, Ms Kate Modise, represented by the National Union of Metal Workers of South Africa, applied to court to have an agreement of settlement reached between herself and the respondent be made an order of court. This settlement agreement is dated 11 December 1997 and has the following particular terms :

"Now therefore the parties have agreed to settle the matter on an amicable basis on the terms set out hereunder:

1. The respondent will re-instate the applicant on the same terms and conditions prior to the date of the dispute.
2. The applicant will re-commence employment on 12 January 1998 at the usual working time." (my underlining)

[2] It is common cause that the applicant did not come to work on 12 January 1998. Her version is that she reported for work on 13 January 1998. Mr Nortjè, of the respondent, stated in his affidavit that he saw her for the first time on 19 January 1998 at 16:40 (after working hours). He states further that when she reported for work at his office, he informed her, that on 14 January he had employed someone else.

[3] Mr Nortjè contended that he never dismissed the applicant and that she was present when he informed three of his employees that he could not give them work for a full week, but that they

would work for three days a week. According to Mr Nortjè the applicant was upset and left and reported the matter to the union of which she is a member and who represented her in this application. The other two employees remained with him. This evidence was corroborated by one of these employees in her testimony.

[4] There was therefore two disputes of fact before me, namely:

(1) whether the applicant was really dismissed, which is not particularly relevant to this application; and (2) whether she reported for work on the 13th or 19th January 1998. Whichever date I find to be the date when the applicant reported for work, the most important fact is that the applicant did not return to work on the day on which she was required to work. She was therefore in breach of the settlement agreement reached between the union and the respondent. In my view she cannot hold the respondent to an agreement which she breached herself. I have to take the Mr Nortjè's position into account as well. He wanted to settle the matter and consequently reinstated the applicant. A term of the agreement was that she should commence employment on the day after the agreement was signed.

[5] The two witnesses who gave evidence, were not of assistance to the respondent's case really. They could not say whether the

applicant was present, at work on the 13th or the 19th of January 1998. The applicant, who also testified, said that she went to work on the 13th January 1998. She did not make eye-contact with anyone during her evidence and appeared evasive. When Mr Nortjè put to her that she came to his office on 19 January 1998 with her shopping bags, her bald denial did not strike me as convincing. I didn't believe her. The other two witnesses were also evasive and seemed afraid. I could not rely much on their evidence. Essentially, I therefore have to decide the matter on the papers before me. During cross-examination of the applicant, the respondent's Mr Nortje made the point that he would definitely have employed the applicant if she had arrived on the 13th January 1998 because he only employed the new employee on the 14th. On the evidence before me this contention is very probable. Even if I do accept that the applicant arrived at work, on the 13th of January 1998, that is still not on the day stipulated in the agreement. She was required to commence work on 12 January 1998. She failed to report for duty on that day. Neither she nor the Union phoned Mr Nortjè to inform him of any delay or give an explanation for her absence. The Union signed the agreement on the applicant's behalf on 11 January 1998, but only notified her, according to her testimony, on the evening of 12 January 1998. Even if the Union was at fault in this regard, the respondent cannot be penalized for the Union's negligence. Therefore the applicant was in breach of the

agreement, and not the respondent.

(6) In the circumstances the application is dismissed with no order as to costs.

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JUDGE E REVELAS