

IN THE LABOUR COURT OF SOUTH AFRICA HELD IN DURBAN**CASE NO: D85/07****Heard and Delivered: 23 April 2010****Edited: 7 June 2010**

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NOT REPORTABLE**M B MABUZA**

APPLICANT

And

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CCMA

FIRST RESPONDENT

COMMISSIONER MARY ERLANK

SECOND RESPONDENT

METCASH TRADING AFRICA (PTY) (LTD)

THIRD RESPONDENT

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JUDGMENT

PILLAY D, J

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This is an application to review and set aside the award of the second respondent Commissioner. The applicant employee challenged his dismissal on procedural and substantive grounds. The procedural grounds were that he had not been given sufficient opportunity to prepare for his case, and that he was not allowed to have representation at the disciplinary inquiry.

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The evidence shows that the inquiry was set down for the 14 August 2006. On that occasion it was postponed to the 21 August 2006, The record shows that the chairperson of the disciplinary inquiry gave him an opportunity to look at the documents in order to prepare himself for the hearing. He indicated that he was ready to proceed. In those circumstances he cannot now complain that he did not have a sufficient opportunity to prepare for the arbitration.

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As regards representation, he wanted to be represented by a trade union official because he is a manager. The employer was not prepared to adjourn the proceedings to enable a trade union official to become available to attend the proceedings. In any event he had no automatic right to

representation by a trade union official. His right was to be represented by another employee or a shop steward. On that ground too the arbitrator found that there was no procedural unfairness. The arbitrator concluded that it was the employee's responsibility to ensure that his representative was available
5 on the date of the disciplinary hearing and that he had enough opportunity to secure such attendance.

As regards the substantive fairness of his dismissal, the employee was charged as follows:

- 10 “(1) Gross misconduct- of company rules and regulations in that you failed to request permission to conduct a business [Prima Liquors]
- (2) Dishonesty - in that you did not inform the company that you were conducting a similar business to what you are managing at Metro
15 [Liquor Warehouse] Manguzi, thus causing a conflict of interest.
- (3) Misrepresentation - in that you requested permission from P Sharman to have the
20 3 August 2006 off to take your child to a doctor, whilst in the meantime you were going to Durban as part of your business venture.
- (4) Misappropriation - in that you put to use property belonging to the company for your own benefit.”

25 The questions that arise from the evidence are firstly, whether the employee conducted a liquor business. His evidence was that his spouse, Thokozile Mabuza, worked as the manageress for Mr Rama Moonsamy who was the proprietor of Prima Liquor Store. Moonsamy was evicted from the premises where he ran this business as a result of not paying the rental.
30 Mabuza took over the premises from which she ran a clothing retail business. The employee denied that he owned, managed or conducted a bottle store business.

The second question is whether Mabuza conducted a business. At the arbitration she testified that she managed the liquor business for

Moonsamy. She also testified that she bought the licences from Boxers another bottle store for R3 000. She also bought the Prima Liquor Store licence. The Prima Liquor Store licence was transferred to her in November 2005. She sold clothes between June 2004 and June 2005. From June 5 2005 she managed Prima Liquor Store and owned the licence for Prima from November 2006. The employee was dismissed on the 1 September 2005. The Boxer licence was issued on the 1 October 2005 in her favour.

The employer's witnesses testified that the operational manager confronted the employee on two occasions at the beginning of 2005 with 10 information that the employee was running or owning a liquor store business. On both occasions the employee denied this. The operational manager and the regional loss control manager testified that the workplace rule prohibited the employee and any relative from conducting business in conflict with the employer without the employer's permission. The employee denied any 15 knowledge of this rule. He denied having received copies of the policy which the operational manager said had been handed to all managers at a monthly meeting and emailed to each of them subsequently.

Whether the employee saw the documentation is immaterial, for it is a rule of the common law that employees shall not conduct their affairs in 20 conflict with those of the employer. More telling of the employee is the manner in which his representative cross-examined the employer's witnesses. Significantly, he did not put the employee's version to any of the witnesses. Such version as he did put did not come even close to the employee's testimony when he did testify. The representative suggested to 25 the employer's witnesses that the employee's spouse might have been employed at a hotel or a tavern. The operational manager pointed out that whether it was a tavern or a bottle store it was still a business that would have been in conflict with the employer's business; for that the employee had to get permission.

30 The employee's financial records show that he paid the rental for the Prima Liquor Store premises. He also used the company's email and telephone facilities for Prima Liquor Store. Whether the email facility was in a neighbouring business or in his office is immaterial; it was the employer's facility that he used for the Prima Liquor Store business. The entire dispute

might not have arose at all if the employee had simply made a clean breast of his involvement in the business before he got involved in it.

In all the circumstances the Court finds that the award is unassailable. The arbitrator's findings of fact squares with the evidence led at
5 the arbitration. The application for review must be dismissed on the merits. It also follows that the condonation application fails. The order I grant is the following:

The applications for condonation and review are dismissed with costs.

Pillay D

Judge