

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO: JR2763/08

In the matter between:

CASHBUILD (PTY) LTD

Applicant

and

RAMOTSHELA, MS N.O.

1st Respondent

THE COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION

2nd Respondent

NGOBENI, BASANI

3rd Respondent

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JUDGMENT

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FRANCIS J

1. This is an unopposed application to review and set aside an arbitration award issued by the first respondent (the commissioner) under case number LP7085-07 on 22 October 2008, after he had found that the third respondent's dismissal was procedurally fair but substantively unfair. The applicant was ordered to reinstate the third respondent into the position that she held at the date of her dismissal on the same terms and conditions and to pay her back pay in an amount of R31 770.48 which is the equivalent of twelve months remuneration.
2. The third respondent is a female who was previously employed by the applicant. On 24 October 2007 she hit out at a person who had touched her breast. She was on the same day charged with:

"1. Violent behaviour - in that you were threatening to injure Mr Robert Maluleke

on 24/10/07.

2. *Assault - on 24/10/2007 you assaulted Mr Robert Maluleke with a fist on the eye and causing bodily harm to Mr Maluleke.*

3. *Intimidation and/or incitement - use violence on Mr Maluleke on 24/10/07.”*

3. The third respondent appeared at a disciplinary hearing and was found guilty of the first two charges of misconduct. She was dismissed on 2 November 2007. She after that referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (the CCMA), the second respondent. The applicant called three witnesses and the third respondent testified in her own defence.

4. The applicant's first witness was Robert Mdunwane Maluleke (Maluleke). He testified that he is employed by the respondent as a sales assistant at the Giyane branch. On 24 October 2007 he and some of his other fellow employees were attending a meeting addressed by a representative. The third respondent, who was seated on his left side, was also present at the meeting. Whilst the representative was talking, the third respondent touched his left arm. The representative made a joke and they started to laugh. As Maluleke was laughing, he found himself touching the third respondent's shoulder. She then suddenly hit him with a fist on his left eye. He jumped up and held his eye. He then went to his seniors and told them that she had hit him with a fist on his left eye. They gave him money and he went to see a doctor who treated him and returned with a doctor's letter. He said that the third respondent was telling a lie when she said that he touched her breast. She had hit him with a fist on his eye and not with the back of her hand. During cross examination he denied that

he touched her on her breast.

5. The applicant's second witness Maurise Manyiko Ndabula (Ndabula) testified that he is employed at the applicant's Giyani store as a store manager. On 24 October 2007, they had a meeting at the store. After the meeting, the employees were told to go to their workstations to help customers. He and the divisional manager went to a counter when Maluleke came to them, holding his eye. He told them that he was hit by the third respondent. They went to sit in the receiving office. The third respondent was called and was asked by the divisional manager, Michael Ngobeni, why she hit him. She denied that she hit him and said that she only hit him away with her arm. She did not explain anything further to what had happened. She did not say that she assaulted him because he had grabbed her breast. In terms of the applicant's disciplinary code, the sanction for fighting in the workplace is dismissal. During cross examination it was put to Ndabula that the third respondent told them on 24 October 2007 that Maluleke had touched her breast. He denied that she said so.
6. The applicant's third witness was Michael Dutuma Ngobeni (Ngobeni). He testified that he is employed as the applicant's divisional manager and is responsible for seven stores. On 24 October 2007, as it was customary on a Wednesday, they held a staff meeting at the Giyani store. After 08h00 whilst in the presence of Ndabula, Maluleke came to them, asking permission to consult with a doctor. He asked him why and said that he had just been assaulted by the third respondent. He had a swollen eye. He asked him what had happened. He said that he had been laughing and was excited and touched the third respondent at the back like patting her. He touched her at the

back and it was then when the third respondent retaliated and assaulted him with a fist on his eye. Ngobeni immediately called the third respondent to investigate what had happened. She said that Maluleke should be asked. Maluleke was asked and he gave the whole story that he was assaulted. He then asked him why he had pat her or touched her and he said that he was excited and was laughing. Ngobeni went to the third respondent and told her what Maluleke had said. She said that he had touched her on her back. He then asked her why she retaliated by assaulting him instead of reporting him to management. She did not give him an answer. She was then charged as their code of conduct indicate that if a person is assaulted an enquiry should be held and she was dismissed. Maluleke was taken to the doctor who confirmed that he was assaulted. During cross examination it was put to him that according to the rules of the applicant if a person commits sexual harassment, dismissal should follow and was asked why Maluleke was still working for the applicant. He said that sexual harassment was a serious offence but she did not lodge a sexual harassment complaint against Maluleke. It was put to him that she did not assault him but had pushed his hand away when he wanted to touch her breast. He said that they did investigations and she was called in to give her story. She did not tell them about the sexual harassment and Maluleke patting her on her breast and those things were never brought to their attention. They were surprised to find out in this enquiry that this is what had happened. She never complained that he had touched her breast.

7. The third respondent testified that on 24 October 2007 they attended a meeting at the workplace. After the meeting had ended, she took her chair and felt a touch on her

breast. She pushed the hand that was touching her breast away and her nail injured the person's eye. She realized that it was Maluleke. She went to the cash office to collect money for the till. She was called by Ndabula and Ngobeni to receiving. They asked her about the injury sustained by Maluleke. She explained that he had started touching her breast. Ngobeni responded by stating that they were not going to entertain her story since Maluleke was injured on his eye. They told her that according to the company policy and labour law they could not look into her matter because Maluleke was injured on his eye and she had already taken the law into her own hands. They showed her the company rules that deal with assault, intimidation and violent behaviour and the result is a dismissal. They told her that there are documents and the result of her actions is dismissal but she still had to attend a disciplinary hearing. A notice to attend a hearing was issued and Ngobeni told her that even if she could take the matter to the CCMA she would not succeed. During cross examination she denied that after the meeting had ended that there was laughing, talking and joking. She said that after the meeting they went to their departments to attend to customers. When Maluleke touched her breast, she was bending down taking the chair and threw her hands into the air. She pushed her hand with power because she did not know what was touching her breast and this was a shock for her. She pushed her hand because she was not sure what was touching her breast. This happened within a blink of an eye and it was a shock to her. Maluleke had not done this to her before.

8. The commissioner in his arbitration award summarised the evidence led before him. It is not necessary to repeat it. He said that in terms of section 192(1) of the Labour

Relations Act 66 of 1995 (the Act), the onus rests on the third respondent to establish the existence of a dismissal. For her to succeed in her claim, she must establish that she was dismissed. The applicant had admitted that it dismissed the third respondent on 2 November 2007. The commissioner found that the existence of dismissal had been established. The onus was now on the applicant to prove that the dismissal was fair in terms of section 192(2) of the Act. The applicant had to establish that the dismissal was preceded by a fair procedure and that there was in existence a valid reason to justify such dismissal. The standard of proof is on a balance of probabilities.

9. The commissioner said that the third respondent was dismissed for assaulting Maluleke, a fellow employee. She did not deny hitting Maluleke on his eye but said that she was responding to a sudden touch on her breast by him. The commissioner said that whilst the overall onus to prove the misconduct still rested with the applicant, once the third respondent admitted the act of hitting but raised a ground of justification, then the evidentiary burden shifted to her. The question then is whether she had adduced sufficient evidence to substantiate her allegations. The commissioner found that she had succeeded in establishing a plausible version that indicated that she was responding to an unacceptable prior conduct by Maluleke. Her evidence is that as she was picking up a chair, she felt a hand touching her breast. Without any much thinking about what was happening, and in response thereto, she warded off the hand that touched her breast and in the process found herself hitting Maluleke, causing injuries with her nails. In the circumstances he found that a touch on her shoulder as testified to by Maluleke, could not have been sufficient to trigger

the third respondent's conduct.

10. The commissioner said that compared with the applicant's version as testified to by Maluleke, he found the third respondent's version to be more probable. Maluleke's testimony was that he was responding to a joke by a person in the meeting, and out of excitement, whilst laughing, he found himself touching her shoulder. He had testified that she was seated on his left side. The commissioner said that he found this hard to accept that with such sitting arrangement, merely laughing, no matter how one could have been excited, could result in a person unintentionally touching her on her shoulder. The only logical conclusion is that if indeed Maluleke could have touched her on her shoulder, such conduct could have been deliberate. However, his finding is that Maluleke did not touch her on her shoulder, but on her breast, as testified to by the third respondent. He said that his rejection of Maluleke's evidence was also based on the very serious contradiction between what he testified, as compared to what he told Ngobeni. Ngobeni testified that when Maluleke explained what happened between him and the third respondent, he said that he only touched her on the back. On the other hand, Maluleke testified that he touched her on the shoulder. The commissioner said that he found this contradiction seriously tainted the applicant's version such that he found it hard to accept same as a reflection of the truth.
11. The commissioner said that having made a finding that the third respondent's conduct was a response to Maluleke's unacceptable behaviour of touching her breast, the question that still needed to be answered is whether her action amounted to a sufficient ground of justification. The commissioner found that the third respondent's

explanation should be accepted as sufficient dilution of her conduct (of hitting a fellow employee). Her testimony is that she found herself suddenly responding to the touching and her plan was merely to ward off the uninvited touching of her breast. The commissioner said that he found that given the manner in which she was touched, she had no time properly to think about how to react. Her actions were thus spontaneous and she therefore did not intend to cause any harm. Accordingly, the injury sustained by Maluleke was accidental. He found that the applicant had failed to prove that the third respondent had committed any misconduct. The applicant had failed to establish a valid and fair reason for dismissal. This inevitably rendered the dismissal as substantively unfair. The dismissal was found to be procedurally fair. He ordered her reinstatement with twelve months back pay.

12. The applicant has raised several grounds of review. It was contended that there was a material issue that the commissioner failed to consider at all, and which also rendered his award irrational, unreasonable and irregular. Defects exist in the arbitration proceedings before the commissioner, and in the proceedings before the CCMA, as contemplated by section 145 of the Act, and the award made by the commissioner is not an award that a reasonable decision maker could arrive at, in the following respects and for the following reasons:

- 12.1 He failed to comply with the provisions of the Act, pertaining to the conducting of fair and proper arbitration proceedings in terms of the Act.

- 12.2 Factual findings made by him did not correspond with the evidence and

documents properly placed before him.

- 12.3 He exceeded his powers in terms of the Act.
- 12.4 He did not properly and rationally and justifiable apply his mind to the facts or the law.
- 12.5 He failed to properly apply the provisions of the Constitution of South Africa.
- 12.6 He failed to afford the applicant a fair and proper hearing and failed to properly conduct the arbitration proceedings.
- 12.7 The award made by him is not justifiable in relation to the reasons given for such award, such award is not rational or justifiable in its merits or outcome, and is not an award that a reasonable decision maker could arrive at.
- 12.8 He failed to apply his mind properly and failed to have proper consideration of the facts and the law, in respect of the relief afforded to the third respondent in this instance, he exceeded his powers.
- 12.9 He failed to properly, justifiably and reasonably determine and assess the evidence properly before him, and the relevant provisions of law.
- 12.10 The award made by him constitutes a defect as contemplated by section 145 of

the Act, and should be reviewed and/or set aside.

13. The application stands to be dismissed on a number of basis. The first is that the applicant has not complied with the provisions of rule 5(3) of the Rules of this Court in that the original affidavits were not lodged with the registrar. This Court has often raised this with the applicant's attorneys in other matters where copies of documents are filed without complying with rule 5(3). In most of those cases the applications were postponed to allow the applicant's attorneys to file the originals and with an explanation why there was non compliance. There is simply no duty on this Court to remind practitioners that they must comply with the rules of this Court. Mr Posthuma who appeared for the applicant could furnish no explanation why rule 5(3) was not complied with.
14. Even if the applicant's non compliance of rule 5(3) were to be condoned, the application stands to be dismissed since the grounds of review are baseless. The third respondent was unrepresented when she appeared before the commissioner. On the second day of the arbitration hearing the applicant was represented by attorney Posthuma who also moved the review application. He at page 22 of the arbitration proceedings stated that he appeared for the applicant and was an Industrial Relations official of the Employer's representative organization. Posthuma did not inform the commissioner that he as an attorney. I am raising this because a legal practitioner knows that he must put his client's version to a witness. The third respondent's version was that she felt a hand touching her breast and than reacted instinctively. Her version was not challenged when she testified before the commissioner. During

his closing arguments as reflected from pages 45 and 46 of the transcript, the applicant's representative said that what probably happened is that the two (Maluleke and third respondent) did not get along very well. Posthuma said that Maluleke most probably brushed up against her as his own testimony is and that of the witnesses. He most probably pushed up against her for some reason. She overreacted and hit him and to escape the consequences of dismissal made up the story of sexual harassment which is the most horrible thing a man can do to a woman in a work place.

15. The applicant had contended that the award is not reasonable for various reasons. The first was that the third respondent did not seek reinstatement but compensation and despite this the commissioner awarded her reinstatement. This is not correct and is not borne out by the transcript of the arbitration proceedings at page 2 line 2 where the following appears:

"..... and she told me that if I were to make a finding that the dismissal was unfair the remedy that she was seeking was reinstatement and she indicate that she did not dispute procedure."

This puts to bed the applicant's contentions on this ground.

16. A further ground of review is that the commissioner did not justify why he awarded the third respondent twelve months compensation. This is not true. All that the commissioner did was to order reinstatement with twelve months back pay. It was strictly speaking not necessary for the commissioner to have said that the third

respondent was entitled to back pay since once an order for reinstatement is made, it includes back pay. The back pay was for the period that the third respondent was dismissed to the date of her reinstatement.

17. A further ground of review is that the commissioner's finding that the applicant's witnesses had contradicted themselves was not reasonable. Maluleke had testified that he had touched the third respondent on her shoulder. He reported this to his superiors. Ngobeni gave a different version about this. He said that Maluleke had a swollen eye and asked him what had happened. He said that he had been laughing and was excited and touched the third respondent at the back like patting her and she retaliated and assaulted him with a fist on his eye. He then immediately called the third respondent to investigate what had happened. She said that Maluleke should be asked. This is clearly contradictory. Posthuma in his closing address said the following at page 45 of the record of the arbitration proceedings:

“What most probably happened is that the two did not get along very well..... He most probably brushed up against her as his own testimony is and that of the witnesses..... That he most probably pushed up against her for some reason..... She overreacted and hit him And to escape the consequences of dismissal Made up the story Of sexual harassment, which is the most horrible thing a man can do to a woman in a work place.”

18. The commissioner had the benefit of observing the witnesses who appeared before him. He made a credibility finding and gave reasons why he rejected the applicant's

version and preferred that of the third respondent. It is not necessary for a commissioner to give full reasons for the orders that they make. He clearly applied his mind to the issue that he was required to determine. This is not an appeal but a review application.

19. The facts of this case are rather unique. It is not one of those cases where an employee had assaulted another employee without any good reason. The position might have been different were this to be an unprovoked assault by the third respondent on Maluleke. The third respondent had reacted immediately after her breast were touched. The injury sustained by Maluleke is consistent with having been assaulted with a fist. The third respondent's version that she brushed him away does not explain the injuries that he had sustained. Whether she hit him with a fist or swung her hand in the air does not assist the applicant at all. The fact is that she reacted swiftly after her breast was touched. Even if her breast was not touched but that he had stroked her back, her response was immediate. She repelled the unwarranted advances on her. The position might have been different had she assaulted Maluleke a few minutes or hours after the incident.
20. It was contended by the applicant's witnesses that they were surprised to hear at the arbitration hearing for the first time that Maluleke had touched the third respondent's breast. This is not true since it is clear from the disciplinary record that the third respondent had raised the issue about the touching of her breast. It is telling that the chairperson of the disciplinary hearing in finding the third respondent guilty of violent behaviour and assault said the following:

“Mrs. Ngobeni did not impress me as a sincere or even a very honest witness. The positions that she indicated on the first day of the hearing has changed conveniently on the second day. The mere fact that in South Africa today so much is made of women and child abuse and yet she had nothing to say when a man allegedly “attacked” her by touching her breast. She did not tell a soul, no one. Not even a friend. Observing her before and after the hearing, she had a very easy-going and even brash attitude towards the other staff, but she could not tell anyone that a man has “attacked” her inappropriately. Her personnel file contains a sick note after she had been treated for an “injury to the head” on 03/10/2007. On the casual enquiry I was told that it was because she was in a fight with another woman in the shop. The incident serves to enforce the image of a person who resorts to violence when she does not get what she deserves.”

This case shows again why the reasonable employer test in relation to sanction was rejected. The above quotation clearly shows the mind set of the chairperson who chaired the disciplinary hearing that is that because women and children who are abused and do not tell anyone about it, they must be telling lies. This is a lamentable state of affairs.

21. The applicant has failed to prove that the commissioner has committed any defects and that the award is reviewable. The decision reached by the commissioner is one that a reasonable decision maker could reach. The application stands to be dismissed.
22. In the circumstances I make the following order:

22.1 The application is dismissed.

22.2 There is no order as to costs.

FRANCIS J

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

FOR THE APPLICANT : A J POSTHUMA

FOR THIRD RESPONDENT : NO APPEARANCE

DATE OF HEARING : 9 MARCH 2010

DATE OF JUDGMENT : 19 MARCH 2010