

IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

Case No JS 1318/09

In the matter between:

GABRIEL MABITLE

First Applicant

and

TSELISO NTSENO

Second Applicant

and

EDCON

Respondent

HEADS OF ARGUMENT

1. These Heads of Argument are occasioned by the Applicants referring this dispute to the above Honourable Court in terms of rule 6.
2. This matter has had a long and acrimonious history. The material detail relevant to this matter is set out below:
 - 1.1 The Applicants were dismissed on **24 August 2007**;
 - 1.2 The First Applicant was charged and found guilty of the following charges:

“During the month of May 2007 you unlawfully and unreasonably **withdrew your labour** with respect to the provisions of customer service in the watch and jewelry department which action resulted in collective customer complaints.

On the 24th May 2007 at Edgars, Sandton City, you failed to follow the implemented work guidelines/instructions relating to the watch department in that you failed to

assist a customer in the replacing of a watch strap and battery of a watch resulting in a lack of customer service, total disregard for the PIPP values, potentially losing the customer and also bringing the name of the company into disrepute.

On the 24th May 2007 at Edgars, Sandton City, you refused to obey a lawful and reasonable instruction from a departmental manager (Elvis Seoma) relating to the assisting of a customer in replacing a watch strap and battery to a watch, resulting in an act of gross insubordination against a superior, and a breach of the trust relationship between the employer and the employee.”

1.1 The Second Applicant was charged and found guilty of the following charges:

“During the month of May 2007 you unlawfully and unreasonably withdrew your labour with respect to the provisions of customer service in the watch and jewelry department which action resulted in collective customer complaints.

On the 23rd of May 2007 at Edgars, Sandton City, you failed to follow the implemented work guidelines/instructions relating to the watch department in that you failed to assist a customer in the replacing of a watch strap of a watch resulting in a lack of customer service, total disregard for the PIPP values, potentially losing the customer and also bringing the name of the Company into disrepute.”

1.3 They referred an unfair dismissal dispute to the CCMA on **11 September 2007 [See pg 68 – 71 of bundle A]**;

1.4 On **8 October 2007** the CCMA issued a dismissal ruling, occasioned by the Applicants’ non-attendance at the hearing of the matter **[See pg 72 of bundle A]**;

1.5 On **6 November 2007** the Applicants brought an application for rescission against the dismissal ruling **[See pg 186-192 of trial bundle]**; **[this is more than the 14 days provided for in CCMA rule 32]**

- 1.6 On 20 November 2007 the respondent entered a notice of opposition to the rescission application [**See pg 197 of trial bundle**];
- 1.7 On **3 December 2007** the CCMA issued a rescission ruling, that the dismissal ruling would not be rescinded [**See pg 73 – 77 of bundle A**];
- 1.8 On **7 March 2008** the Applicants brought a review application in the Labour Court against the rescission ruling [**outside of the 6 works provided for in section 145 of the LRA**] [**See pg 166 – 177 of trial bundle**];
- 1.9 On **25 November 2008** the parties agreed to remit the matter back to the CCMA and the Third Respondent accordingly entered a rule 17.1 notice [**See pg 273 of trial bundle**];
- 1.10 On **12 February 2009** the Labour Court issued a consent order remitting the matter back to the CCMA [**See pg 78 of bundle A**];
- 1.11 On 27 March 2009 the CCMA issued a set down for arbitration [**See pg 80 of bundle A**];
- 1.12 On 4 May 2009 the CCMA issued a second notice of set down for arbitration [**See pg 81 – 82 of bundle A**];
- 1.13 During the arbitration proceedings held on about **30 July 2009** the Applicants raised a **jurisdictional point** stating that they were actually dismissed as a result of participation in an illegal strike action and accordingly the Labour Court has jurisdiction to hear the dispute;
- 1.14 On **12 August 2009** the CCMA issued a jurisdictional ruling finding that it lacked jurisdiction and that the matter should be referred to the Labour Court [**See pg 83-85 of bundle A**];

1.15 On **4 December 2009 [4 months after the jurisdictional ruling was issued]** the Applicants filed a statement of claim in terms of rule 6 of the Labour Court rules.

2 The above facts are common cause [See pre-trial minute pg 101-106].

Preliminary points

LATE REFERRAL OF THE DISPUTE TO THE LABOUR COURT AND NOT DILIGENTLY PROSECUTING THIS MATTER

3 This dispute should not be heard by the above honourable court based on the second point in limine that will be advanced.

4 Should the dispute relate to a dismissal as a result of an unprotected strike, the dispute must be referred to the Labour Court within 90 days. **[Section 191 of the LRA]**

5 Although it is denied that the Applicants were dismissed for engaging in an unprotected strike , in the circumstances the dispute should have been referred 90 days after conciliation. It is common cause that conciliation did not take place, but a jurisdictional ruling was issued on 12 August 2009.

6 It is respectfully submitted that the dispute should have been referred to the Labour Court **90 days** from this date but that the dismissal was actually referred **some 4 months later**.

7 It is respectfully submitted that the time periods would also hold true should the Applicants allege that their dismissal was automatically unfair.

8 It is respectfully submitted that despite the proceedings that took place since the dismissal of the Applicants, coupled with the fact that they were dismissed for misconduct, that the construction of time limits above should not be relied upon. In

the event it is relied upon, the Applicants have referred this dispute to the above Honourable Court out of time and accordingly must seek condonation.

9 It is respectfully submitted that the Applicants were dismissed on 24 August 2007 and despite the ancillary proceedings, it took them more than two years to bring their statement of claim before the above Honourable Court. This is an unreasonable delay and this should weigh heavily against the Applicants.

10 The Applicant's referral to this Court must accordingly be dismissed for lack of jurisdiction.

Nature of the dispute

3. The Applicants have referred this dispute to the above Honourable court in terms of rule 6. Their referral is based on the Applicants being of the belief that charge 1, levelled against both the First and Second Applicants, **"implies that the Applicants were embarking upon an unprotected industrial action of which that was not the case"** [See pg 6 of bundle A line 11-13].

11 The charge in question reads as follows **"during the month of May 2007 you unlawfully and unreasonably withdrew your labour with respect to the provisions [sic] of customer service in the watch and jewellery department which action resulted in collective customer complaints"**[See pg 61 and 65 of bundle A].

12 The Applicants contend that the true nature of the dispute is that the Respondent unilaterally changed the terms and conditions of employment **[page 6 Bundle A, line 27 –page 7 line 17]** and that **the reason for dismissal was to compel them to accept a demand in respect of a matter of mutual interest. [section 187(1)(c)].**

- 13 However the relief sought is that the dismissal if the Applicants be found to be **unfair and that they be retrospectively reinstated. [page 7 of bundle A line 22-27.**
4. It is respectfully submitted that although the Applicant decides on how to categorise a dispute, in the circumstances the Applicants are relying on what they believe the Respondent **implied rather than the actual state of affairs.**
- 14 Even on their own version, they did not engage in a strike and were dismissed for misconduct. **[trial bundle page 173 line: 5-6 (Mabitle's affidavit) page 184-185 Ntseno line 1-2] [See pg 6 of bundle A line 11-13].**
- 15 This is an opportunistic referral to this above honourable court to convert a dismissal for misconduct into a dismissal for an illegal strike, come unilateral change to terms and conditions in an attempt to couch this dispute as an automatically unfair dismissal dispute. The immediate benefit is to attempt to solicit payment of 24 months compensation rather than 12 months.
- 16 It is respectfully submitted that this dispute should be arbitrated by the CCMA and that any delay in bringing this matter to finality rests solely with the Applicants and is of their own making.

Other relevant facts

- 17 A strike is defined as “the partial or completed concerted refusal to work, or the retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee, every reference to “**work**” in this definition includes overtime work, whether it is voluntary or compulsory” **[See section 213 of the Labour Relations Act 66 of 1995, as amended]**

- 18 Should the honourable court find that this conduct does fall within the definition of a strike then it is respectfully submitted that the Code of Good Practice: Dismissal provides that participation in a strike that does not comply with the provisions of chapter IV is misconduct [**Schedule 8 to the LRA: section 6(1)**]. It is respectfully submitted that the misconduct committed by the First and Second Applicant does not fall within the ambit of chapter IV.
5. It is further respectfully submitted that even with a great degree of latitude, and an imaginative construction, the First and Second Applicant's misconduct **does not constitute that of an illegal strike.**
6. The Respondent did not dismiss the First and Second Applicants for participation in an unprotected strike, but rather for committing misconduct.
7. The First and Second Applicants confirmed on affidavit that they were dismissed for misconduct [**See pg 173 of trial bundle para 11- 13, pg 184 of trial bundle**].
8. The First and Second Applicants have intentionally crafted their referral as a dismissal as a result of them participating in unlawful strike action, to cast dispersions on whether the Respondent has complied with the substantive and procedural requirements set out in the Code of Good Practice: Dismissal. This includes a determination of the substantive fairness of the dismissal by considering:
- 8.1 The seriousness of the contravention of the LRA;
- 8.2 The attempts made to comply with the LRA; and
- 8.3 Whether or not the strike was in response to unjustified conduct by the employer.
9. Although it is the Respondent's case that the Applicants were dismissed for misconduct and not for participation in an unlawful strike, insofar as the Court may find that the Applicants were dismissed for participation in an unlawful strike, the following is respectfully submitted:

- 9.1 The First and Second Applicants have seriously contravened the act by not having complied with any of the prescripts of chapter IV dealing with the process in which the right to strike is established;
- 9.2 They made no attempts to comply with this act and were at all relevant times represented by the union; and
- 9.3 The strike was not in response to unjustified conduct by the employer, as the Applicants at all relevant times provided the service of changing watch straps, and took an about turn in not providing these services, or refusing to provide these services to customers unreasonably.
10. The procedure set out in the Code of Good Practice: Dismissal relevant to a dismissal for industrial action requires that the employer contact a trade union official to discuss the course of action it intends to adopt, at the earliest opportunity. It further provides that the employer should issue an ultimatum in clear and unambiguous terms that should state what is required of the employees and what sanction will be imposed if they do not comply with the ultimatum. The employees should then be afforded sufficient time to reflect on the ultimatum and respond to it, either by complying with it or rejecting it. **If the employer cannot reasonably be expected to extend these steps to the employees in question, the employer may dispense with them.**
11. The bone of contention for the First and Second Applicants were that they believed that they were entitled to additional remuneration for replacing watch straps. To this end they held a meeting with the Human Resources Department and eventually escalated their concern to the Respondent's Head Office and received feedback that the changing of the watch straps formed part of their job function and as such they would not receive further compensation¹. The First and Second Applicant then

¹ See pg 55 para 6 and pg 51 para 1

called an additional meeting with the HR Department wherein they refused to perform the function in question. It is respectfully submitted that although it is the Respondent's case that the Applicants were dismissed for misconduct, the Respondent has reasonably complied with the procedural requirements set out in the Code of Good Practice sections 6(2) and that should it be alleged that the employer has fallen short with the procedural requirements set out therein, the employer cannot reasonably have been expected to extend these steps to the First and Second Applicants.

DATED at SANDTON on this the day of MAY 2012

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