

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO: JR1856/08

In the matter between:

KIEVITS KROON COUNTRY ESTATE (PTY) LTD

Applicant

and

COMMISSION FOR CONCILIATION, MEDIATION  
AND ARBITRATION

First  
Respondent

COMMISSIONER KHOMOTJO DANIEL MATJI

Second  
Respondent

JOHANNA MMOLEDI

Third  
Respondent

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JUDGMENT

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FRANCIS J

*Introduction*

1. This is an application to review and set aside an arbitration award issued by the second respondent (the commissioner) after he had found that the third respondent's dismissal by the applicant was substantively unfair and ordered her reinstatement.
2. The application was opposed by the third respondent.

*The background facts*

3. The third respondent was employed by the applicant on 21 June 1999. She was promoted to the rank of *chef de partie* with effect from 1 March 2005. She sought permission from the applicant to be granted a month's unpaid leave from 6 June to 8 July 2007 to attend a

ritual ceremony for her sangoma training. She submitted a certificate issued by her traditional healer and other supporting documents but her request was turned down. The applicant refused to grant her the request and she went on leave without permission. She was charged with the following acts of misconduct by the applicant:

*“Rule 24 Non compliance with established procedure and/or managerial instructions, being detrimental to the company;*

*Rule 38 Absent without a valid reason for 3 days or more;*

*Rule 47 Gross insubordination/challenge of employer’s authority/not submissive to supervisors or management authority;*

*Rule 48 Willfully does, allows or causes to be done anything detrimental to the company, its discipline and efficiency.”*

4. The third respondent appeared at a disciplinary hearing on 15 June 2007. She was found guilty and was dismissed after she was absent from work for more than three days without leave or permission from the applicant. Her union declared a dispute on her behalf and referred it to the first respondent, the Commission for Conciliation, Mediation and Arbitration (the CCMA), for conciliation and arbitration

#### *The arbitration proceedings*

5. The applicant called two witnesses at the arbitration hearing. The first witness was Stephen Walter. He testified that he is the executive chef and was the third respondent’s direct supervisor. She occupied the position of chef *de partie*. The applicant is a multi million rand organisation dealing mostly with conferences and leisure and operates seven days a week. The kitchen opens at six in the morning until midnight. There are three

kitchens on the estate. The main kitchen can accommodate up to 220 guests. There is a banquet hall with a separate kitchen which can accommodate up to 360 guests. There is also a bistro kitchen which can accommodate 30 guests in the restaurant. The applicant also provides braais for clients in the evenings. It has employed a sous chef and a junior sous chef. There are four chef departees working directly under the junior sous chef. The third respondent was a chef departees. There are also two demi-chefs and six commi-chefs. Below them there are nine kitchen stewards and two storemen. There is also a hot kitchen, pastry kitchen and a cold kitchen. The third respondent worked in the cold kitchen as a chef *de partie*. The morning shift was from 6h00 until 15h00. The evening shift ran from 14h00 until 23h00. The employees were being rotated on a weekly basis.

6. Walter testified that the third respondent approached him and stated that she was attending a traditional healer's course. She requested to work morning shifts only to attend the course in the afternoon. As the request would affect other chefs in the kitchen, he called a meeting with all the relevant parties and asked them if they had any objection if she was allowed to work morning shifts only. They all agreed that they would not have a problem. The third respondent agreed that if the need arose, she would still assist during the night shifts. Everything went smoothly until the third respondent approached him again during May and requested to be granted one month's unpaid leave. She did not give him any supporting documents earlier. He saw the document which is a certificate dated 31 May 2007 from the North West Dingaka Association for the first time on 1 June 2007.

It reads as follows:

*"This serves to certify that Johannah Mmoledi was seen by me on 13-01-07 and was diagnosed to have a PERMINISIONS OF ANCESTORS.*

*She under my treatment from 13-01 to 8th July 2007. She will be ready to assume work on 8th 07-2007.*

*Preparation of graduation ceremony of Johannah Maite Mmoledi*

*Dear Sir,*

*I hereby inform you of the graduation of the abovemention patient. I am asking you to please give her days from the 4th of June to the 8th of July 2007 to complete her initiation school final ceremony to become a traditional healer.*

*Yours faithfully*

*Agnes Mahamba Masilo Banda”.*

7. Walter testified that the aforesaid documents were dropped on the human resources manager's desk by the third respondent. He did not understand what the diagnosis meant but she told him that she would become a sangoma because she had the visions of the ancestors. When she approached him for the second time, she said that she wanted unpaid leave for a month. He could not agree to her request as they were already short staffed. It was during a very busy period. He spoke to the human resources manager and because the third respondent did not have enough leave, offered her one week unpaid leave. She did not accept one week and left on 1 June 2007 after her shift.
  
8. Walter testified that he received a call from the human resources department stating that the third respondent had left some documents on her desk. She was supposed to work on 2 June 2007 but did not. She was thereafter supposed to return on 6 June 2007 but did not return. Her last work on duty was 1 June 2007. The third respondent was charged with misconduct. The charges were of a serious nature which warranted the sanction of

dismissal. He maintained that he would act in a similar fashion if another employee was to approach him for leave to do a karate course. He denied that he is a racist and does not have respect for African traditions and customs.

9. During cross examination Walter said that the third respondent would not have been dismissed if she had submitted a medical certificate. He would have accepted the medical certificate if it was issued by a registered medical practitioner. He agreed that sangomas and traditional healers constitute a vital part of the cultural life of Africans but did not agree that attending a traditional ritual was a valid reason for being absent from duty. He did not agree that a certificate issued by the North West Dingaka Association was a valid medical certificate. There was nothing in the document which suggested that she was ill. He understood the meaning of the word “calling” only to a certain degree.
  
10. The applicant’s second witness was Adri Dreyer. She testified that she is the human resources manager for the entire human resources function of the applicant. She was involved in the disciplinary hearing of the third respondent. She was not granted permission to take unpaid leave for one month to complete her traditional rituals. The letter was left on her desk on 1 June 2007. She called the head chef and told him that the third respondent had left some documents on her desk. Even before she had left the documents on her desk, she had a consultation with her concerning her request for unpaid leave. She repeated that it was not possible to give her permission to leave for a month because it was a very busy time for the business. They decided to offer her one week unpaid leave but she said it would not be enough. She also told her that a letter from a

sangoma would not make any difference. The third respondent called her on her cell phone on the morning of 6 June 2007 and asked if she had received the documents. She told her that she did but the position did not change. She told her to report for duty failing which she would be subjected to a disciplinary hearing. The certificate received from the traditional healer did not state that she was unfit for work. It was decided after a period of absence to charge her with misconduct. She did not know what the word “permissions” meant. In terms of the applicant’s policy, when an employee is absent from work without leave or valid reason, disciplinary action will be taken. The only leave acceptable to the applicant is annual leave, family responsibility and sick leave. She had requested to be granted unpaid leave. She did not qualify for sick leave. All the employees go through a one day induction course when they are appointed. The third respondent went through such a course and had signed for it. The charges laid against her were of a serious nature and are dismissable offences. She was not denied the right to participate in her beliefs, thoughts, religion or culture. The applicant does not allow religious leave because it does not want to discriminate against other employees. According to her knowledge of medical certificates, it must have the registered number of the practitioners and must further state that the employee was unfit for work. The applicant did not grant her a month’s leave for absence because it could not afford to dispense with the services of the third respondent for such a long period. It did not have any intention to violate her rights. The third respondent had called Walter a racist who did not have respect for African traditions. She had no knowledge whether becoming a sangoma was a calling or an individual’s choice.

11. Dreyer said under cross examination that the applicant’s disciplinary code did not make

provision for employees to attend traditional functions. She admitted that Walter told her that the third respondent had a problem of seeing visions. She did not follow up with her or anybody about the issue of visions. However, she did not believe that seeing visions were a sickness. In terms of the applicant's rules, employees desiring leave for absence whether paid or unpaid should apply for authorization to their managers stating the reasons thereof. Non-compliance with established procedures and/or managerial instructions constituted serious misconduct. The applicant has a grievous procedure. The third respondent did not invoke the procedure to address her grievance if she were not satisfied with her manager's decisions.

12. The third respondent testified that she was employed by the applicant on 21 June 1999. She started to have visions in October 2006. She went to a traditional healer for treatment of her condition. It was a condition which any medical practitioner who was trained according to western medical science would not be able to treat. It was understood and could only be treated by traditional healers. She denied that she called the head chef a racist. She explained that when the head chef asked for a sanction of dismissal, she replied that he would ask for a dismissal because he had no respect for African traditions. She submitted a medical certificate to the human resources department when she reported for work. She called Dreyer to confirm if she had received the documents which she had left on her desk. She asked for unpaid leave but it was declined. She had in the past submitted sick notes for absence from duty but was not subjected to any disciplinary hearing. She regarded herself as sick because she saw visions and to her it was like the ancestors calling her. She saw the visions but no other person could see what she was seeing. If she had ignored the ancestors calling and continued to work, she would

have collapsed and no other person would have been able to help her.

13. It was put to the third respondent during cross examination that she had deliberately flouted her conditions of employment and that she had taken leave when she did not have any leave days to her credit and had been given a final written warning in December 2006 for the same offence. She agreed that the traditional healer's course that she had attended was not relevant to the applicant's business. The documents written by the traditional healer did not mention anything about sickness in the conventional sense. There was no difference between a medical practitioner and a traditional healer. It was further put to her that the documents from the traditional healer were useless and did not serve the purpose of a medical certificate and that the applicant was under no obligation to take cognisance of those documents. She said that she regarded her condition as an illness because she saw visions and to her it was like a calling. If she had not heeded the call to attend the ritual ceremony she could have collapsed and no one would have been able to help her. The attendance of the ritual ceremony was necessary for her health.
14. Agnes Mamoreroa Masilo testified on behalf of the third respondent. She testified that she is a traditional healer who treated the third respondent when she approached her with the problem concerning visions. She gave her a traditional healer's certificate. She joined the North West Dingaka Association in 1987. She explained that the word "perminitions" mean that a person has visions with the ancestors. She treated her from 13 January 2007 until she graduated on 8 July 2007. During cross examination she said that the applicant was very ill when she came to her for treatment in January 2007. She could have died or suffered from some serious and mysterious accident or misfortune if she could have



ignored the ancestors and continued to work as instructed by the applicant.

*The arbitration award*

15. The commissioner in an award dated 16 June 2008 summarised the issues and evidence led before him. It is not necessary to repeat this. The commissioner said that the third respondent was charged with misconduct for contravention of the applicant's workplace rules. He said that although it would appear that she had contravened various rules, all the charges stemmed from the fact that she was absent from duty for more than three days without leave or permission. It was common cause that she was absent from duty from 6 June 2007 until she was dismissed on 15 June 2007. She had requested to be granted leave without pay for one month to complete a traditional initiation ceremony that would qualify her as a traditional healer. Her request was not granted. She nevertheless went ahead to attend her sangoma course although her application for unpaid leave was not approved. She had submitted supporting documents from her traditional healer to confirm that she had to attend the initiation ceremony. She called the human resources manager on the morning of 6 June 2007 to find out if she had received the documents which she had left on her desk. The human resources manager told her that she had received the documents but that the position remained the same. She was warned that if she did not come to work, she would be charged with misconduct. Dreyer testified about the applicant's disciplinary code. It was not placed in dispute that such rules existed. It was also not placed in dispute that the third respondent had contravened the rules. She had worked for many years for the applicant and was aware of the existence of the rules or could reasonably have been expected to be aware of the rules. She was told that her

unauthorised absence would have unpleasant consequences. She stated that it was imperative for her life to attend the initiation ceremony. She started her treatment from 13 January 2007. She had explained her problem to her manager and special arrangements were made to accommodate her unique circumstances. Walter stated that he called a meeting with the other supervisors and they unanimously agreed that she could be allowed to work morning shifts only and attend her treatment sessions in the afternoon. She did not submit any medical certificate to Walter but her request was granted that she could only work morning shifts only. However, when the third respondent came for the second time to request unpaid leave for one month, Walter refused. According to his evidence, he made a purely business decision when he refused to approve the third respondent's request. Both Walter and Dreyer stated that they would not have denied her leave or dismissed her if she had produced a medical certificate from a registered medical practitioner.

16. The commissioner said that it appeared clear from the applicant's two witnesses that they did not regard the third respondent's condition as a disease that would have qualified her for sick leave. Walter stated in his evidence that he would have done the same thing if an employee had requested unpaid leave to do a karate course. Masilo testified that the third respondent was very ill when she came to her for treatment. She stated further that she would have died or suffered a serious misfortune if she had ignored her ancestor's calling. The third respondent testified that should she have ignored her ancestor's calling and continued to work, she would have collapsed and no one would have been able to help her.

17. The commissioner said that employees have a fundamental duty to render service and their employers have a commensurate right to expect them to do so. A basic element of this duty is that employees are expected to be at their workplaces during working hours, unless they have an adequate reason to be absent. According to *John Grogan, Dismissal, Discrimination & Unfair Labour Practices: Juta & Co Ltd* (2005) p.239, an explanation for an absence would be adequate if employees could prove that the absence was beyond their control. He also referred to *Ndlovu v Supercare Cleaning (Pty) Ltd* (1995) 4 LCD 338 (IC). He said that it was clear that the parties had conflicting and competing interests.
- Another issue which appeared clearly from the evidence was that there was a lack of empathy and understanding of cultural diversity in the applicant's workplace. Walter stated that he acted in the best interest of the applicant when he declined to grant her request for unpaid leave. They were short staffed as some employees had already taken leave. It was a busy period of the year and the business could hardly afford to dispense with the services of the third respondent under those circumstances. Walter had conceded that she would not have been dismissed, if she had brought a medical certificate issued by a registered medical practitioner. The commissioner said that it appeared from his evidence that if the third respondent was indeed ill in the conventional sense, he would have approved her request for leave. He seemed to have laboured under an erroneous but honest impression that she had a choice whether to undergo training as a sangoma. This conclusion was drawn from Walter's evidence when he stated that he would have done the same thing if another employee had come to him to request leave for karate training. According to the third respondent's evidence, her illness was more of a spiritual nature than the conventional illnesses that ordinary people are mostly accustomed to. She stated that she saw visions which no other person could see. She had to be treated for those

visions as it was not normal for a person to see visions which not other person could see. It was under those circumstances that she went to a traditional healer who diagnosed her with 'permissions from the ancestors'. Although the word 'permissions' does not exist in the English vocabulary, the traditional healer attempted to explain what she meant by that expression.

18. The commissioner said that the issue was not whether the third respondent had a valid medical certificate for her absence. Pienaar in his arguments and during cross examination emphasised the fact that the documents issued by the traditional healer were useless and that the applicant was under no obligation to take cognisance thereof. The commissioner said that was really not the issue and it was not placed in dispute. The issue was whether there was any justifiable reason for the third respondent to disregard the applicant's instructions. The third respondent had to prove and convince him that her absence from duty was necessitated by circumstances beyond her control to be absolved from blame. It was not possible to determine what went on in the third respondent's mind when she decided to disregard her employer's instruction or when she decided to take leave of absence although she was fully aware that it was not approved. The commissioner said that there is a great deal of mystery about the phenomenon of a "calling". However, it was the third respondent's case that her health would have been in danger if she had not heeded the call from her ancestors. The commissioner said that an extract from the Holy scriptures could shed some light on what a calling entails and its effect on the lives of those who were called. He said that in the Old Testament there is a story about prophet Jonah who was called by God and sent to Nineveh. Jonah decided to disregard the calling

of God and sailed in a boat to Tarshish. A severe storm hit the ocean and the boat sank. Jonah confessed to the captain of the ship about what he did and he was thrown in the ocean to save the lives of innocent passengers. All the Christians and people subscribing to the Christian faith and religion believe that God calls his servants to the ministry and that those who fail to heed His call will suffer the same fate as Jonah did. The commissioner said that what was good for the gander must be good for the goose also. The third respondent believed that she was called by the ancestors to become a sangoma. Evidence was led that she should have died if she had continued to work and disregarded her calling. It appears to him that the third respondent had decided to follow the sangoma course to save her life. She must have genuinely believed that if she did not do so, she would die or suffer a serious misfortune.

19. The commissioner said that an average person values his or her life as more important than anything else and would do anything to save his or her life. The third respondent was faced with two evils and she chose the lesser evil. She found herself in a situation of necessity where the only recourse was to break the employer's rule to save her life. Necessity knows no law. It was only those people who are endowed with extraordinary qualities of courage, bravery and endurance who would risk their lives or sacrifice for others. The third respondent may be an average person who did not possess those supernatural qualities. The commissioner said that the third respondent was justified to choose a course that would save her life. In the normal course of events and according to human experience, any person would have acted like she did to save her life. A person lives once only and he could hardly imagine any person taking a chance that would cause his life. Life ranks higher in the scale of legal values than property and other things. The

life of the third respondent was more important than the interests that the applicant sought to safeguard and protect when it declined to grant the third respondent leave. The applicant would not have suffered irreparable harm arising from her absence.

20. The commissioner said that the inescapable conclusion which he arrived at, was that the third respondent's absence from duty was due to circumstances beyond her control. She was justified to disregard the applicant's instructions and attend the sangoma course. The applicant's instructions and refusal to grant her unpaid leave was unreasonable as the consequences thereof would have been to place her life at risk. Rather than risk the wrath of the ancestors, she decided to act against the applicant's wishes. The procedure followed by the applicant was fair. The commissioner concluded that the third respondent's dismissal was substantively unfair and she was entitled to the relief sought. Reinstatement as sought by the applicant was in his view a just and equitable remedy. The applicant was ordered to reinstate her with immediate effect on the same terms and conditions of employment which existed before her dismissal without any retrospective payment.

*The grounds of review*

21. The applicant has raised the following grounds of review:
- 21.1 By making the findings of both fact and of law that are so grossly out of touch with the evidence presented to him, the commissioner not only exceeded his powers but also failed to apply his mind to the matter he was called upon to consider and adjudicate.
- 21.2 The commissioner's findings that evidence was led which are conclusive of the

fact that the third respondent would have died if she had continued to perform her duties and disregarded the calling to follow a sangoma course; the third respondent found herself in a situation of necessity where the only recourse was to break her employer's rules to save her life; that the applicant's refusal to grant her more than a month's unpaid leave to attend a sangoma course was unreasonable, fly headlong in the face of the facts that were either common cause or undisputed in evidence; applicable legislation and case law to which the commissioner was expressly referred to; recognised the principles of the law of contract and of labour law.

- 21.3 The commissioner, moreover, fabricated evidence and came to findings on such fabricated evidence which were wholly not supported by law.
- 21.4 The award is not justifiable in relation to the reasons given for it.
- 21.5 No rational link existed between the evidence before the commissioner and the factual conclusions that were crucial to the award.
- 21.6 He had been so grossly careless as to have committed misconduct.
- 21.7 A gross irregularity had been committed, more particularly in the commissioner putting himself in a position where he separated himself from the true facts of the matter and erred in his application of the law.
- 21.8 The absence of a rational connection entailed that he exceeded his powers.

*Analysis of the evidence and arguments raised*

- 22. This case sadly shows what happens when cultures clash in the workplace. On the one hand we have an applicant that was concerned about making money at all costs and on the other hand an employee who had visions and had believed that her ancestors were calling

her to become a sangoma. The applicant does not regard a calling to be an ancestor as an illness. The third respondent believes that if she did not heed the calling to become a sangoma, she would become ill.

23. The third respondent started working for the applicant in 1999. In 2007 she started getting visions to become a sangoma. She consulted a sangoma who told her that she had to appease her ancestors by becoming a sangoma. She approached the applicant in February 2007 and informed them about her visions. She was allowed to work morning shifts to attend the training course to become a sangoma in the afternoons. In May 2007 she requested to be given a month's unpaid leave to complete her sangoma training course to qualify as a sangoma. The applicant was prepared to give her a week's unpaid leave. This was not enough for the third respondent and she decided to attend the training course despite the applicant's refusal to grant her unpaid leave. Before she went on unpaid leave, she handed a traditional healer's certificate dated 31 May 2007 stating that the third respondent had "premonitions". The applicant refused to accept the said certificate and contended that she was not sick. It demanded a doctor's certificate indicating that she was ill and if she presented such a certificate, it would not have dismissed her from employment.
24. The commissioner correctly found that the charges stem from the fact that the third respondent was absent from duty for more than three days without leave or permission. The other charges that she was charged with are therefore not material and are in any event an unfair splitting of charges. The third respondent worked for the applicant for 18 years when she was dismissed. At first blush it would appear that the several charges that



she was faced with were fair. On a proper analysis of it, they were unfair. She should have been charged with being absent without permission for more than 3 days.

25. The traditional healer has used the term “permissions”. According to the Shorter Oxford English Dictionary - sixth edition the word premonition has its origin from the French word ‘premonition’ or late Latin word ‘praemonition’ or from late ‘praemonit’. It is defined as ‘the action or warning in advance; an advance notification or warning, a presentiment of something bad’. A ‘premonitor is defined as a person who or thing which gives a forewarning; a premonitory sign or token. A preminotory is defined as ‘conveying premonition; that warns or notifies in advance’. It would appear that the word ‘perminition’ used by the traditional healer is similar to the word ‘premonition’.
  
26. The third respondent was not sick. The provisions of the Basic Conditions of Employment Act dealing with sick certificates do not apply. She did not apply for sick leave but had applied for unpaid leave to complete her training course to become a sangoma. The ultimate question that needs to be decided is whether the third respondent’s absence from work was justifiable. It is trite that in assessing the fairness of a dismissal for absenteeism the following factors are normally considered relevant: the reason for the employee’s absence, the duration of the absence, the employee’s work record, and the employer’s treatment of this offence in the past. The onus rests on the employee to tender a reasonable explanation for his or her absence. The commissioner found that the third respondent had breached the applicant’s rule but found that she was justified to do so.

27. It is common cause that the applicant knew that the third respondent was attending a course to become a sangoma. It had assisted her in the past to attend the said course. Arrangements were made with her to work morning shifts and to attend the course in the afternoons. This was from February 2007 to May 2007. The applicant was approached at the end of May 2007 for permission to take one month's unpaid leave to complete the training course. The applicant refused although the third respondent had produced a traditional healer certificate that was treated with contempt by the applicant. The applicant knew what the reasons were for the third respondent's absence. The duration of absence was going to be for a month. She had been working for the applicant for eight years. The explanation tendered for her absence was to attend a sangoma course to appease her ancestors. This is not one of those cases where an employer did not know about the whereabouts of the employee. It was prepared to give her a week off as unpaid leave. The commissioner found that the explanation that she tendered was reasonable. This court cannot second guess the commissioner's findings.
28. This Court is sitting as a review court and not as an appeal court. The test in review applications is whether the decision arrived at by the commissioner is one that no other reasonable decision maker would not have arrived at. The applicant has relied on grounds of review that are no longer part of our law. The commissioner found that the applicant has in the past accommodated the third respondent by allowing her to work shifts to attend the sangoma course. She had sought permission to take a month's unpaid leave. The applicant was prepared to grant her one week unpaid leave. The third respondent believed that she had to attend the course and did so. It was contended on behalf of the applicant that the commissioner had fabricated evidence. There is no

evidence before this court that there was such fabrication. All that the commissioner said was that the third respondent was faced with a difficult choice. It was either that she heeded the calling of her ancestors or obeyed the rules of the applicant and thereafter face the wrath of her ancestors. She had decided to obey the calling of her ancestors and to face the wrath of her employer.

29. The commissioner has in a well reasoned award dealt with why he believed that the dismissal was harsh and why reinstatement was appropriate. The applicant's grounds of review are baseless. I am satisfied that the award made by the commissioner is one that a reasonable decision maker would have made. As such the application stands to be dismissed. I do not believe that this is a matter where costs should follow the result.

30. In the circumstances I make the following order:

30.1 The application is dismissed.

31.2 There is no order as to costs.

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FRANCIS J

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

FOR THE APPLICANT : ATTORNEY J L PIENAAR

FOR THIRD RESPONDENT : N LEKALA - UNION OFFICIAL

DATE OF HEARING : 2 JUNE 2010

DATE OF JUDGMENT : 1 OCTOBER 2010