THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 875/12
Reportable

In the matter between:

KIEVITS KROON COUNTRY ESTATE (PTY) LTD **APPELLANT**

and

JOHANNA MMOLEDI **FIRST RESPONDENT**
COMMISSIONER KHOMOTJO DANIEL MATJI **SECOND RESPONDENT**
COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION **THIRD RESPONDENT**

Neutral citation: *Kievits Kroon Country Estate v Mmoledi* (875/12) [2013] ZASCA 189 (29 November 2013)

Coram: Brand, Cachalia, Leach, Willis JJA and Zondi AJA
Heard: **11 November 2013**
Delivered: **29 November 2013**

Summary: **Unfair dismissal – whether employee's reliance on a 'calling from ancestors' justifiable reason for disobeying employer's instruction for employee to report for duty – whether traditional healer's certificate to be equated with medical certificate for purposes of sick leave.**

ORDER

On appeal from: Labour Appeal Court (Tlaletsi, Ndlovu JJA and Murphy AJA concurring sitting as court of appeal):

'The appeal is dismissed with costs, including the costs of two counsel.'

JUDGMENT

CACHALIA JA (BRAND, LEACH, WILLIS JJA AND ZONDI AJA CONCURRING):

[1] The appellant, Kievits Kroon Country Estate (Pty) Ltd, is a company that offers conference and leisure facilities to its clients. It has two hundred employees, one of whom was the respondent, Ms Johanna Mmoledi. The appellant charged her with misconduct for disobeying an instruction to report for duty and being absent from work without permission. A disciplinary inquiry found her guilty and recommended her dismissal on 15 June 2007. The appellant dismissed her the following day. She referred the dispute to the Commission for Conciliation, Mediation and Arbitration (the CCMA), which found that her absence from duty was caused by circumstances beyond her control. It accordingly held her dismissal substantially unfair and ordered her reinstatement, but without retrospective payment. Both the Labour Court and the Labour Appeal Court (the LAC) upheld that decision. The appellant now appeals to this court with its special leave.

[2] The parties see and understand the dispute dichotomously. The appellant's case is that the respondent wilfully absented herself from work after the appellant

had refused to grant her leave for an extended period to attend a training course unrelated to her work. Hers is that she had no option but to stay away from work because she had to attend a course to be trained as a traditional healer in response to a calling from her ancestors. The factual background will illuminate the dispute.

[3] The respondent commenced her employment with the appellant in March 2005, was promoted to a supervisory position as Chef de Partie, and was fourth in charge in that part of the kitchen where food is prepared for the appellant's guests. The kitchen operates a morning shift from 6h00 until 15h00, and an afternoon shift which commences at 14h00 and ends at 23h00. The employees are rotated weekly.

[4] Sometime between April and May 2007 the respondent approached the executive chef and her manager, Mr Stephen Walter, requesting that she be exempt from the afternoon shift so that she could attend a traditional healer's course. She explained that she had been seeing visions of her ancestors, the significance of which, as I understand the evidence, was that she had a calling to become a traditional healer. Mr Walter spoke to the other staff affected by her request in an effort to accommodate her. They were willing to assist, and the shift-schedule was amended so as to excuse her from working the afternoon shift. For her part she agreed to assist if the need arose.

[5] On 1 June 2007, she again approached Mr Walter to be allowed time off. This time she requested permission to take unpaid leave of absence for almost five weeks – from 6 June 2007 until 8 July 2007 – to continue with her course. Mr Walter discussed her request with the human resources manager, Ms Adri Dreyer, who told him that the respondent had used up almost all leave due to her, ie annual leave, sick leave and compassionate leave. The respondent had also received a final written warning in December 2006 for staying away from work despite an instruction prohibiting her from doing so. On that occasion she had stayed away to have her cellular phone repaired.

[6] Mr Walter was nonetheless prepared to accommodate the respondent's absence for another week, but no longer. The reason was that the appellant was very busy, short of staff and would not be able to provide a proper service to its

guests without her. She was therefore instructed to return to work on 6 June but was not willing to accede to this instruction.

[7] On this discordant note, the respondent approached Ms Dreyer to pursue the matter further. She told her that she would deliver a letter from her traditional healer to support her request for unpaid leave. Ms Dreyer informed her that this would not make any difference as Mr Walter had already decided not to accede to her request.

[8] Nevertheless the respondent returned to Ms Dreyer's office later with the 'letter' to which she had referred earlier. Ms Dreyer was not present. The respondent left an envelope with two documents on Ms Dreyer's desk. The first was a note from her traditional healer, Mrs Agnes Mamoreroa Masilo, requesting permission for the respondent to be excused from work from 4 June to 8 July 2007 to complete her traditional healer's course. The second was a certificate, also from Mrs Masilo, confirming that the respondent had been under her care since 13 January 2007, and had been diagnosed by her as having 'perminisions of ancestors'. The meaning of the phrase was not properly explained but it appears to mean the 'calling' or the 'visions' referred to earlier. The certificate went on to say that the respondent would resume work on 8 July 2007. This document is important because one of the arguments proffered by the respondent at both the disciplinary and CCMA hearings was that the certificate should have been construed as a sick note equivalent to a medical certificate from a medical practitioner.

[9] After depositing the envelope on Ms Dreyer's desk the respondent returned to the kitchen, completed her duties, and left thereafter. She was due back as instructed on 6 June. The day before that she phoned Ms Dreyer to enquire whether she had received the documents. Ms Dreyer confirmed that she had but that the respondent's application for leave of absence had not been approved. She also told the respondent that she would face disciplinary action if she did not report for duty. The respondent indicated that she would not return, and she did not.

[10] By 12 June, when the respondent had not returned to work, the appellant charged her with misconduct under the company's workplace rules. There were four charges: non-compliance with established procedures, gross insubordination, acting to the detriment of the company and being absent from work for more than three

days without permission. The main charge related to her absence from work and the remaining charges arose as a consequence of this charge. Three days later, on 15 June, a disciplinary hearing was held at the appellant's premises.

[11] It appears from the 'Disciplinary Hearing Report' that when Mr Walter explained to the respondent that he was not able to accommodate her request for more than a week she responded by saying that she was 'serious', meaning that she was seriously ill. This was a reference to her being 'disturbed in her spirits'. And as I have mentioned, the letter from her traditional healer confirmed this and requested that she be excused from work to complete her course.

[12] Nonetheless the respondent was found to have disregarded the company's policies and procedures by absconding to attend a course unrelated to her employment without her employer's permission. The chairman of the disciplinary tribunal also rejected her submission that the period of absence be construed as sick leave. In this regard he held that her reliance on the letter from her traditional healer was misplaced because it was not a letter by a medical practitioner that would provide proof of illness as required by the Basic Conditions of Employment Act 75 of 1997. She was accordingly found guilty as charged and, following a recommendation from the tribunal, dismissed. She then referred an unfair dismissal dispute to the CCMA.

[13] The CCMA hearing proceeded on 31 October 2007. An official of the trade union, SACCAWU,[1] represented the respondent. An attorney appeared for the appellant. In a nutshell, the appellant's evidence as given by Mr Walter and Ms Dreyer was that the respondent was refused unpaid leave because of the company's business requirements; and the fact that she wanted to attend a traditional healer's course had no bearing on the decision. They dealt with her request in a manner that they would have any similar request for unpaid leave. Moreover, they bent over backwards to accommodate her by agreeing to allow her a week's leave, but could not accommodate her any further. They did not understand what was meant by the reference to 'perminisions of ancestors' or that this

[1] South African Commercial and Catering Allied Workers Union.

phenomenon was related to some form of illness. Importantly, they conceded that they would have accepted a medical certificate from a registered medical practitioner as proof of illness, but could not accept as a valid reason a request for unpaid leave to attend the traditional healer's course for such a long period.

[14] For her part the respondent testified that she believed that she was sick because she saw visions of her ancestors. She was therefore required to complete certain tasks with a traditional healer so that she also could become a traditional healer. Importantly, in response to questions from the commissioner, she testified that had she not attended the course, her health would have been in danger and she may have collapsed; only her traditional healer could help her. Mrs Masilo, her traditional healer, testified that she had treated the respondent from 13 January to 8 July 2007 because she had 'perminitions', which were visions of her ancestors. She testified further, also in response to the commissioner's questions, that had the respondent not defied her employer to attend her course, something ill – including death – may have befallen her. Surprisingly, neither the respondent's nor Mrs Masilo's evidence in this regard was challenged. Their testimony on this aspect became the lynchpin for the commissioner's award.

[15] The commissioner considered that there was a cultural chasm between Mr Walter and the respondent. Because of this he was not able to understand the significance of her request to be released from duty to attend the traditional healer's course. If he had understood the request, so the commissioner reasoned, he would have regarded her condition as a disease that would have qualified her for sick leave. And because the respondent genuinely believed that her health would be in danger if she did not heed the call from her ancestors to undergo training to become a traditional healer, which Mrs Masilo confirmed, she had no option but to defy her employer's instruction to report for duty. She had thus proved, said the commissioner, that 'her absence from duty was necessitated by circumstances beyond her control'. Her dismissal was therefore substantively unfair.

[16] The Labour Court concluded that the award was well reasoned. Likewise, the LAC held that the commissioner's conclusions were supported by reasons; that the reasoning process could not be faulted; that he had been alive to the issues and that

he had properly applied his mind to the material before him. The LAC therefore dismissed the appeal but made no costs order.

[17] The appellant takes issue with the award: it contends that the commissioner undertook the wrong inquiry by asking whether the respondent was justified in failing to report for duty. The problem was compounded, it is contended, when in the absence of any expert or other evidence by the respondent on what was meant by 'perminitions', calling or visions of ancestors, the commissioner took judicial notice of the meaning of these concepts. Furthermore, complains the appellant, it cannot be expected to plan and cater for perceptions of the supernatural – visions of ancestors – in the running of its business.

[18] The real question before the commissioner, says the appellant, was whether it properly applied the principles applicable to an application for unpaid leave for purposes unrelated to the employment contract between the parties. Those principles require a consideration of the circumstances prevailing at the time when the application for leave is made, taking into account the interests of the employer and the employee. In this regard the commissioner had to consider whether or not it was fair for the employer not to grant unpaid leave to the respondent. Considered thus, submits the appellant, the following facts made the dismissal substantively fair: the employment contract made no provision for unpaid leave; the appellant accommodated her request by allowing a week's leave despite her only having made an informal request; her request for more than five weeks was unreasonable given the operational requirements of the business; and she was insolent in defying the instruction to report for duty.

[19] In summary, it is contended on behalf of the appellant that the commissioner committed a gross irregularity within the meaning of s 145(2)*(a)*(ii) of the Labour Relations Act 66 of 1995[2] by misconceiving the true nature of the inquiry: he asked

[2] Section 145(2)*(a)*(ii) reads as follows:
Review of arbitration awards
(2) A defect referred to in subsection (1), means-
(a) that the commissioner-
(i) . . .
(ii) committed a gross irregularity in the conduct of the arbitration proceedings; or
(iii) . . .

the incorrect question, ie whether the respondent was justified in not reporting for work; and he failed to appreciate the true nature of the inquiry ie, whether or not the appellant had properly applied the principles applicable to a request for unpaid leave. Had he done so, so it is submitted, he would have concluded that the dismissal was substantively fair.

[20] It must be borne in mind that a CCMA commissioner, adjudicating an unfair dismissal complaint, does not perform a review function but determines the dispute afresh. This means that the ambit of the inquiry is not confined to the record of a prior disciplinary hearing. The commissioner performs his or her function inquisitorially with little formality, but subject to the overriding requirement of fairness. Ultimately the commissioner must determine the true facts and reach a fair and equitable decision. And if the commissioner determines the dispute in accordance with a fair procedure, a review court will not interfere with the decision unless it is one that could not have been reasonably made on the available material.[3]

[21] I turn to consider the appellant's submission that the commissioner misconstrued the true nature of the inquiry.[4] It is apparent from the respondent's evidence at both the disciplinary hearing and at the CCMA that she believed that she was ill. Her employer seems to have understood that her experiences bore some cultural significance – hence Mr Walter's willingness to accommodate her on two occasions. But he did not understand this as some form of illness. The chairman of the disciplinary inquiry also did not accept that she was ill without proof from a medical practitioner: the letter from the traditional healer did not suffice.

[22] In contrast the commissioner accepted that the respondent genuinely believed that her health would be in danger had she not heeded the calling of her ancestors. And that her belief stemmed from deeply held cultural convictions, which were confirmed by Mrs Masilo, the respondent's traditional healer. Admittedly, apart from Mrs Masilo's testimony, the respondent adduced no expert evidence regarding the nature of her illness and its association with her cultural convictions.

(b) . . .
[3] *Herholdt v Nedbank* 2013 (6) SA 224 (SCA) para 25.
[4] Ibid.

[23] But that such belief systems exist and are part of the culture – the customs, ideas and social behaviour – of significant sections of this country's people is beyond dispute. The courts have acknowledged this. Recently in *Department of Correctional Services v Popcru*[5] this court had to consider the dismissal of two employees of the department for refusing to cut off their dreadlocks. They had worn them, after being refused permission to do so, to obey their ancestors' call to become traditional healers in accordance with their Xhosa culture. The evidence was that they would wear the dreadlocks temporarily and shave them off at a cleansing ceremony on a specified date. The completion of the process would signify their transition from initiates into recognised traditional healers. The department argued that dreadlocks violated its dress code, which also required short hair, and undermined its objective to engender uniformity and neatness in the dress, appearance and discipline of correctional officials. The court rejected the argument. It held that the employees' sincerely held cultural beliefs were constitutionally protected and in the absence of any evidence that the dreadlocks had any impact on their job performance or unreasonably imposed a burden on the department their dismissals were automatically unfair.

[24] Also beyond dispute is that as part of these belief systems people resort to traditional healers for their physical, spiritual and emotional well-being. The World Health Organisation (WHO) observes that up to 80 per cent of South Africans meet these needs through the use of traditional medicine, which include:

'Diverse health practices, approaches, knowledge and beliefs incorporating plant, animal and/or mineral based medicines, spiritual therapies, manual techniques and exercises applied singularly or in combination to maintain well-being, as well as to treat, diagnose or prevent illness.'[6]

[25] And the WHO Centre for Health Development defines 'African Traditional Medicine' as:

'The sum total of all knowledge and practices, whether explicable or not, used in diagnosis, prevention and elimination of physical, mental or societal imbalance, and relying exclusively

[5] *Department of Correctional Services v Popcru* 2013 (4) SA 176 SCA.
[6] Marlise Richter 'Traditional Medicines and Traditional Healers in South Africa' (2003) at 6 referring to 'Traditional Medicine Strategy' 2002-2003, World Health Organisation, WHO/EDM/TRM/2002.1, Geneva, p. 7.

practical experience and observation handed down from generation to generation, whether verbally or in writing.'[7]

[26] In contrast to the approach of conventional medicine which uses 'material causation' to understand and treat illness, traditional medicine generally looks towards the 'spiritual' origin, which includes communication with the ancestors, for this purpose.[8] Their methods of diagnosis and treatment are completely different and understandably their respective adherents would each be sceptical if not completely dismissive of the other.

[27] Our courts are familiar with and equipped to deal with disputes arising from conventional medicine, which are governed by objective standards, whereas questions regarding religious doctrine or cultural practice are not. Courts are therefore unable and not permitted to evaluate the acceptability, logic, consistency or comprehensibility of the belief. They are concerned only with the sincerity of the adherent's belief, and whether it is being invoked for an ulterior purpose. This of necessity involves an investigation of the grounds advanced to demonstrate that the belief exists.[9]

[28] Once it is accepted that the respondent experienced visions of her ancestors and used traditional healing methods because of sincerely held cultural beliefs, as the commissioner correctly found that she did, the line of questioning he pursued with her and Mrs Masilo regarding the possible consequences had she not attended the course was not only understandable, but unavoidable. In this regard it is well-established that where an employee absents herself from work without permission, and in the face of her employer's lawful and reasonable instruction, a court is entitled to grant relief to the employee if the failure to obey the order was justified or reasonable.[10] The commissioner's inquiry thus sought to determine whether the respondent was justified in failing to obey the order.

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[7] Marlise Richter 'Traditional Medicines and Traditional Healers in South Africa' (2003) at 7 referring to 'Planning for cost-effective traditional medicines in the new century' – a discussion paper, WHO Centre for Health Development. Accessible: http://www.who.or.jp/tm/research/bkg/3_definitions.html
[8] F Jolles and S Jolles. *Zulu Ritual Immunisation in Perspective in Africa* 70(2), 2000 p 238f.
[9] Cf *Christian Education SA v Minister of Education* 1999 (4) SA 1092 (SECLD) 1100-1101.
[10] M S M Brassey, E Cameron, M H Cheadle, M P Olivier *The New Labour Law* 430-431.

[29] The evidence of the respondent and Mrs Masilo revealed that the respondent had a fearful apprehension of suffering serious misfortune if she failed to respond to the call of her ancestors to attend the course; hence her refusal to report for duty. Before us it was contended that the respondent was not honest in relying on the note from the traditional healer in her claim to be ill and attempting to justify her refusal to obey the order. The difficulty with this submission, as I have mentioned earlier, is that this evidence went unchallenged. It follows that the criticism of counsel for the appellant that the commissioner misconstrued the nature of the inquiry has no merit.

[30] It is also significant that Mr Walter testified that the respondent would not have been dismissed if she had produced a certificate from a medical practitioner, instead of the traditional healer, as proof of her illness. The certificate from the traditional healer was considered 'meaningless' and was therefore rejected as proof of illness. But had he understood it to be equivalent to a medical certificate, or tried to understand its import by asking the respondent to explain its meaning, instead of summarily rejecting it, he may well have accommodated her request. Further the appellant could have explored with the respondent alternatives to her taking leave at that time, such as her attending the course when it was convenient to accommodate her request if possible.

[31] It should be mentioned that an employer is not expected to tolerate an employee's prolonged absence from work for incapacity due to ill health. And it may, if it is fair in the circumstances, exercise an election to end the employment relationship.[11] But that was not the situation in this case.

[32] There is one aspect of the commissioner's reasoning that was incorrect: he impermissibly attempted to explain the meaning of traditional healing by embarking on a biblical discourse and equating the concept with a biblical parable. Secular authorities, including courts and tribunals, should avoid attempting to resolve civil disputes by applying reasoning that involves interpreting and weighing religious doctrine.[12] This criticism notwithstanding the commissioner's conclusion that the

[11] *NUM & another v Samancor Ltd (Tubatse Ferrochrome) & others* [2011] 11 BLLR 1041 (SCA) para [12].
[12] *Christian Education SA v Minister of Education* 1999 (4) SA 1092 SECLD 1100B-D.

respondent was justified in disobeying the employer's instruction is supported by the evidence. The LAC was therefore correct to dismiss the appeal.

[33] It follows that the appeal must fail. Following the CCMA hearing, two courts told the appellant that its appeal had no merit, although no cost order was made against it. But the appellant persisted with a further appeal to this court. In these circumstances it is appropriate that costs should now follow the result.

[34] The following order is made:

The appeal is dismissed with costs, including the costs of two counsel.

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A CACHALIA

JUDGE OF APPEAL

APPEARANCES

For Appellant:	H v R Woudstra SC Instructed by: Louw Pienaar Attorneys, Pretoria Naude's Attorneys, Bloemfontein
For First Respondent:	N A Cassim SC (with him F A Boda and S Tilly) Instructed by: M S Molebaloa Inc, Pretoria Mthembu & Van Vuuren Inc, Bloemfontein