

CASES / VONNISSE

FOREWARNED IS FOREARMED, *MUTHI* IN THE WORKPLACE:

A REFLECTION ON NATIONAL SUGAR REFINING AND ALLIED INDUSTRIES UNION ON BEHALF OF MNGOMEZULU AND TONGAAT HULETT SUGAR LTD (2016) 37 ILJ 2441 (BCA)

1 Introduction

The use of traditional medicine (*muthi*) is an integral part of the African culture. In fact, there is greater acceptance of the use of traditional medicine among Africans for health care purposes (Gruca, van Andel and Balslev "Ritual uses of Palms in Traditional Medicine in Sub-Saharan Africa: A Review" 2014 10(60) *Journal of Ethnobiology and Ethnomedicine* 1–24; Boakye, Pietersen, Kotzé, Dalton and Jansen "Ethnomedicinal Use of African Pangolins by Traditional Medical Practitioners in Sierra Leone" 2014 10(76) *Journal of Ethnobiology and Ethnomedicine* 1–10; Zubane *Prospect and Scope for Traditional Medicine in the South African Education Support Services* (unpublished Masters Dissertation, submitted at the University of Zululand 2001) 64–78).

Be that as it may, there are cases where traditional medicine is used for ulterior motives, such as witchcraft, causing harm, and casting a negative spell on other people (Tanaka, Kendal, and Laland "From Traditional Medicine to Witchcraft: Why Medical Treatments are not always Efficacious" 2009 4(4) *Plos One* 1; Ashforth "*Muthi*, Medicine and Witchcraft: Regulating African Science in Post-apartheid South Africa" 2005 31(2) *Social Dynamics* 211–235). The aim of this case note is to look at the issue of dismissal arising from the use of traditional medicine and witchcraft in the workplace. This issue was examined in *National Sugar Refining and Allied Industries Union on behalf of Mngomezulu and Tongaat Hulett Sugar Ltd* (2016) 37 ILJ 2441 (BCA) (hereinafter "*National Sugar Refining*"). The note concludes with a discussion on whether the use of traditional medicine or witchcraft in the workplace constitutes a dismissable offence?

2 Facts and judgment

In *National Sugar Refining* the employee (shop steward) was dismissed by his employer on the basis of having committed serious misconduct. In

particular, it was alleged that he had used traditional medicine (*muthi*) to intimidate and harass the employer's Human Resources manager (HR manager). The employee believed that his dismissal was unfair and referred a claim for unfair dismissal to the Bargaining Council. The matter was not resolved at the conciliation and proceeded to arbitration, at which stage both parties were legally represented (*National Sugar Refining* par 8).

At the arbitration hearing the employer presented a video footage from its CCTV camera and the following persons gave evidence: HR manager, the general manager, the security manager, and two security guards. The general manager and HR manager testified about the HR manager's strained relationship with the employee and cited prior altercations and incidents (*National Sugar Refining* par 12). The general manager advised that the employee had been found guilty of assaulting, threatening and being insubordinate to a member of management, and was on a final written warning at the time of the incident (*National Sugar Refining* par 13). The proceedings that transpired at the workplace involving the employee placing *muthi* in the HR manager's vehicle were recorded through the CCTV camera.

The video footage clearly showed what transpired on the day in question (*National Sugar Refining* par 16). In fact, it was shown that the applicant was the only person in the vicinity of the HR manager's car at the time when the black substance was placed on her vehicle, a substance the HR manager submitted was *muthi* designed to threaten and intimidate her (*National Sugar Refining* par 47). The employer led the evidence of a *sangoma* who confirmed the HR manager's view that the substance was *muthi* designed to harm her. The employee was charged with misconduct based on the fact that he had placed the HR's manager safety, and health or life at risk. The charge of misconduct was founded on the fact that the employee had deliberately placed a black gummy substance on the door, and on the rear wheel of the HR Manager's car (*National Sugar Refining* par 212). In assessing whether the evidence proved the charge, the arbitrator concluded that the content of the video footage was undisputed. The arbitrator had to determine whether the employee was the one who placed *muthi* on the door handle and, if so, whether he did so with the intent to harm or intimidate the HR manager.

In light of the above facts, the employee was found guilty and dismissed. He challenged his dismissal, and the commissioner upheld the dismissal as having been fair. According to the commissioner, witchcraft has a negative influence in the lives of Black Africans, it raises intense fear and revulsion within the African community as a whole (*National Sugar Refining* par 248). Furthermore, the commissioner acknowledged that the Constitution recognises a citizen's right to participate in a cultural belief (*National Sugar Refining* par 251). According to the commissioner all aspects of African cultural beliefs, including witchcraft and the belief in supernatural forces such as the ancestors, have to be recognised and endorsed.

The commissioner further held that the act of witchcraft need not achieve its purpose in order to constitute misconduct and he accepted the employer's argument that the mere act of using *muthi* to attempt to harm or intimidate a fellow employee constituted a serious act of misconduct

(*National Sugar Refining* par 252). It was found that the placement of *muthi* was an attempt to psychologically exploit the HR manager and create fear and panic in her, for herself, her family, and her possessions (*National Sugar Refining* par 254). Consequently, this conduct amounts to serious intimidation and cannot be tolerated in the workplace. It was further held that the employee attempted to use cultural belief system in order to intimidate the HR manager. Accordingly, such action is unacceptable in any workplace and may likely break down an employer and employees' relationship of trust and cordiality that exists (*National Sugar Refining* par 256).

Furthermore, the commissioner found that the employee had indeed committed the misconduct and took into account that the employee was already on a final written warning (*National Sugar Refining* par 255). The commissioner was satisfied that the dismissal was the appropriate sanction. The commissioner held that the employee's dismissal was substantively fair (*National Sugar Refining* par 258).

3 Comment

This section provides a discussion on the following issues: The realities of using traditional medicine and witchcraft in the workplace, and the constitutional limitation on the right to practice cultural belief. The last part of this note concludes by discussing whether the use of traditional medicine or witchcraft in the workplace constitutes a dismissable offence?

3.1 *The realities associated with the use of traditional medicine*

Scholars assert that traditional remedies, utilising medicinal plant and animal products, have been used as treatments for human diseases and medical conditions for many years (Tanaka *et al* 2009 4(4) *Plos One* 1; Cocks and Moller "Use of Indigenous and Indigenised Medicines to enhance Personal Well-being: A South African Case Study" 2002 54(3) *Social Science and Medicine* 394). Despite its healing purpose, in many parts of Africa traditional medicine has been used ostensibly as part of negative ends of witchcraft (Semenya and Letsosa "Effects and Impact of Witchcraft on Sotho Reformed Churches and the Biblical View of Witchcraft" 2013 34(1) *Verbum et Ecclesia* 2–5).

By its very nature witchcraft raises varying connotations and approaches in different people (Hund "Witchcraft and Accusations of Witchcraft in South Africa: Ontological Denial and the Suppression of African Justice" 2000 xxxiii *Comparative and International Law Journal of Southern Africa* 384–389). The activity of witchcraft encompasses poisoning, the malevolent use of potions, and also the deployment of familiars (Niehaus "Witchcraft and the South African Bantustans: Evidence from Bushbuckridge" 2012 64(1) *South African Historical Journal* 47). Okeja asserts that to some, it is just not worth the trouble to subject the intellect in our age and day to the excruciating pain of exploring, let alone, thoroughly investigating such phenomena because they are just things of the pre-modern (or primitive) world (Okeja "Witchcraft and Magic in the African context" <http://www.inter-disciplinary.net/wp->

content/uploads/2010/02/okejapaper.pdfdate (accessed 2017-02-10) 1–2. The reality is that the perception people hold on witchcraft makes them fear, hate, and wish to eliminate from society those suspected or accused of it (GechikoNyabwari and NkongeKagama “The Impact of Magic and Witchcraft in the Social, Economic, Political and Spiritual Life of African Communities” 2014 1(5) *International Journal of Humanities Social Sciences and Education* 9).

GechikoNyabwari and NkongeKagama notes that in the African context good magic is accepted and esteemed, used mainly by specialists such as medicine men, diviners, and rainmakers (GechikoNyabwari and NkongeKagama 2014 1(5) *International Journal of Humanities Social Sciences and Education* 9). They assert that these practitioners use their knowledge or tap into this power for the benefit of their community. Examples of beneficial use of magic power include, *inter alia*, the treatment of diseases, counteracting misfortune, neutralising or destroying evil power or witchcraft.

It is important to note that the concept “witchcraft” means different things to different people. Differences in the perception of witchcraft are largely based on differences in context. Kombo defines witchcraft as a mystical and innate power which can be used by its possessor to harm other people (Kombo “Witchcraft: A living vice in Africa” 2003 22(1) *Africa Journal of Evangelical Theology* 73-74). It involves the use of objects, formulas, incantations, and casting of spells to harm people. Conceptually the notion witchcraft is neither archaic nor static but is highly flexible and deeply attuned to the conundrums of contemporary world (Sanders “Reconsidering witchcraft: Postcolonial Africa and analytic (un)certainties” 2003 105(2) *American Anthropological Association* 338-339). Russel considers witchcraft as “a human comedy in which the prophetic spirit can discern the essential and immutable folly of our race” (Russell *Witchcraft in the middle ages* (1972) 1-2).

In the African context, witchcraft is associated with the practice of exorcism, use of charms, potent portions, wearing of amulets, voodoo dolls, and invocation of non-physical persons or powers by means of incantations (Okeja <http://www.inter-disciplinary.net/wp-content/uploads/2010/02/okejapaper.pdfdate> 1–2). Manala defines witchcraft as the use of magic powers, especially evil ones with the purpose of harming or causing misfortune to others (Manala “Witchcraft and its impact on Black African Christians: A Lacuna in the Ministry of the Hervormde Kerk in Suidelike Afrika” 2004 60(4) *HTS* 1492).

3.2 *The right to practice cultural beliefs under the South African Constitution*

In *National Sugar Refining* the Bargaining Council confirmed that “all aspects of African cultural beliefs, including witchcraft and the belief in supernatural forces such as the ancestors, have to be recognised and endorsed” (*National Sugar Refining* par 251). The South African Constitution recognises everyone’s right to participate in a cultural life (s 30 of the Constitution, 1996). The Constitution provides that persons belonging to a

cultural, religious or linguistic community may not be denied the right to enjoy their culture, practice their religion, and use their language (s 31(1)(a) of the Constitution).

Venter notes that the Constitution employs the term “religion” generically, without any denomination or institutional connotations, and it is distinguished from the related notions of “belief” and “opinion” (Venter *Fundamental Rights in South Africa: A Brief Introduction* (2015) 36). The author acknowledges that the Constitutional mention of freedom of belief and opinion appears with reference to its observance and practice (Venter *Fundamental Rights in South Africa: A Brief Introduction* 36).

According to Bennet the concept culture, implies high intellectual or artistic endeavour. In his view “culture” may also denote a person’s entire store of knowledge and artefacts, especially the languages, systems of belief, and laws that give social groups their unique characters or [identity]. This meaning would encompass a right to customary law, for customary law is peculiarly African, in contrast with the law of a European origin” (Bennet *Human Rights and African Customary Law under the South African Constitution* (1999) 23–24). Having said this, it is important to note that all rights entrenched in the Bill of Rights are subject to the general limitations clause in section 36. For ease of reference, this section reads:

- (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom, taking into account all relevant factors, including –
 - (a) the nature of the right;
 - (b) the importance of the purpose of the limitation;
 - (c) the nature and extent of the limitation;
 - (d) the relation between the limitation and its purpose; and
 - (e) less restrictive means to achieve the purpose.
- (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

Accordingly, the South Africa Constitution envisions a state of affairs where rights enshrined in the Constitution can be limited, but sets a high standard for when such limitations would be justifiable. When dealing with alleged rights infringements, our courts apply a two-stage inquiry (De Vos “Freedom of Religion vs. Drug Traffic Control: The Rastafarian, the Law, Society and the Right to Smoke the Holy Weed” 2001 5(1) *Law, Democracy, and Development* 87–89.) First, the court is required to interpret the scope and content of the right in order to determine whether there has been an infringement of that right. If there has been no infringement the inquiry stops there. But if the court finds that the right in question has been infringed it is required to undertake a “limitations analysis”. The second stage involves the court applying the factors listed in section 36 to determine whether the limitation of that right is constitutionally justifiable. There are two general requirements that the limitation would have to meet in order to satisfy section 36, it must constitute a law of general application and must be “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom”.

In light of the above, it is submitted that the practice of using traditional medicine or witchcraft with the purpose of casting a bad spell, or harming other people in the workplace will not pass the Constitutional muster. In fact, the practice of witchcraft is expressly prohibited by law in South Africa. In terms of section 1 of the Witchcraft Suppression Act 3 of 1957 “any person who imputes to any other person the causing, by supernatural means, of any diseases in or injury or damage to any person or thing, or who names or indicates any other person as a wizard; ... employs or solicits any witchdoctor, witch-finder or any other person to name or indicate any person as a wizard; professes a knowledge of witchcraft, or the use of charms, and advises any person how to bewitch, injure or damage any person or thing, or supplies any person with any pretended means of witchcraft; on the advice of any witchdoctor, witch-finder or other person or on the ground of any pretended knowledge of witchcraft, uses or causes to be put into operation any means or process which, in accordance with such advice or his own belief, is calculated to injure or damage any person or thing ... shall be guilty of an offence ...” In a nutshell, it is clear that the practice of using *muthi* for evil, and immoral ends cannot be condoned, primarily because using *muthi* in this context is often associated with witchcraft which instills evil, fear, and hate (GechikoNyabwari and NkongeKagema 2014 1(5) *International Journal of Humanities Social Sciences and Education* 9).

It is important to note that the South African Law Reform Commission has embarked on a process of reviewing the Witchcraft Suppression Act. Mavhungu notes that it is proposed the new law should provide for the control of the practice of witchcraft and similar practices (Mavhungu *Witchcraft in Post-colonial Africa: Beliefs, Techniques and Containment Strategies* (2012) 115). According to the author the new law should make it an offence for any person who does any act which creates a reasonable suspicion that he/she is engaged in the practice of witchcraft. He acknowledges that the issue of evidence will become a challenge to the courts if witchcraft practice is to be criminalised (Mavhungu *Witchcraft in Post-colonial Africa: Beliefs, Techniques and Containment Strategies* 116).

3.3 *Dismissal arising from the use of traditional medicine in the context of witchcraft*

The use of traditional medicine in the context of witchcraft is a misconduct which is a dismissable offence in the workplace. This was clearly confirmed by the decision of the *Bargaining Council in Metal and Electrical Workers Union of SA on behalf of Sibuyi and Wireforce Steelbar (Pty) Ltd* (2011) 32 ILJ 1481 (BCA). In this case an employee was dismissed, after he was found guilty of misconduct in the form of disruption and causing production loss for the employer. The basis for the charge was that the applicant had sprinkled sand mixed with *muthi* around the base of the machine that he operated. Other employees who feared the *muthi* refused to work on the machine, fearing that they would die, and as a result production was disrupted. The respondent alleged that the employee had thereby destroyed the trust relationship with its management and with its customers. It was held that dismissal of the applicant was procedurally fair but substantively unfair.

In *Bheki Dlodla v DK Woodcraft CC* (FAJA5335) (2015), the applicant accused two employees, Nancy and Edward of stealing his phone and claimed to have been informed by a *sangoma* and threatened to cast a spell on them. The applicant was repeatedly warned to stop threatening the two employees with *muthi*. The applicant was found burning *muthi* in the spray booth on 6 May 2015 and claimed that it is in retaliation of his missing phone. The applicant was warned due to the safety risk of his conduct and was instructed to stop threatening Edward and Nancy. The applicant ignored the warnings and Edward complained to the Foreman about the applicant's conduct. Neil Lobb engaged the applicant with a view of resolving this matter, conversely, the applicant called him a racist who favours "coloured people" whilst they stole his phone. The applicant was charged because his conduct disrupted operations in the factory. Neil stated that the applicant cannot be trusted as he is stubborn and repeated the misconduct after he was warned a number of times.

The arbitrator found that the applicant had a valid final warning for burning *muthi* in the spray area. It was found that the sanction of dismissal against the applicant was appropriate as the applicant was a safety risk and disruptive despite being repeatedly warned to stop accusing Edward and Nancy of stealing his phone without proof. In this case the dismissal of the applicant was fair.

4 Conclusion

In light of the above discussion, one comes to the realisation that the use of traditional medicine in the context of witchcraft is unacceptable in the workplace. In fact, by its nature witchcraft has a number of negative effects on people (Ashforth 2005 31(2) *Social Dynamics* 8–10). It is, therefore, no surprise that employees who are found practicing witchcraft in the workplace can be charged with misconduct, or at times disturbing the health and safety of other employees in the workplace. This was confirmed by the decision of the Bargaining Council in *National Sugar Refining* case discussed above. The decision of *National Sugar Refining* case is important in the context of addressing contentious issues arising from a dismissal of an employee based on the use of traditional medicine with the view of intimidating, scaring or threatening employee's in the workplace.

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