

**IN THE LABOUR COURT OF SOUTH AFRICA**

**HELD IN JOHANNESBURG**

**REPORTABLE**

**CASE NO: JR36/04**

In the matter between:

**COLIN CLINTON ERASMUS**

**APPLICANT**

AND

**COMMISSION FOR CONCILIATION,**

**MEDIATION AND ARBITRATION**

**1<sup>ST</sup> RESPONDENT**

**TERRY MOODLEY N.O.**

**2<sup>ND</sup> RESPONDENT**

**TELKOM SA LIMITED**

**3<sup>RD</sup> RESPONDENT**

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**JUDGMENT**

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**MOLAHLEHI J**

**Introduction**

[1] This matter concerns an application to review and set aside the arbitration award issued by the Second Respondent (the Commissioner) under case number GA6575/03 dated 14<sup>th</sup> October 2003. In terms of the arbitration award the Commissioner found the dismissal of the Applicant to have been both procedurally and substantively fair.

[2] On the 8<sup>th</sup> August 2008, this Court made an order dismissing the review application of the Applicant. The reasons for that order as requested by the Applicant are set out below.

## **Background facts**

- [3] The Applicant in this matter was dismissed from the employ of the Third Respondent for “*misconduct: uncommunicated and unauthorised absence*” for the period between 29<sup>th</sup> November 2002 to 17<sup>th</sup> January 2003.
- [4] Prior to the dismissal which is the subject matter of this review, the Applicant had been dismissed for a similar offence of absence without authorisation but was subsequently withdrawn and substituted with a suspension. In that instance the Applicant was charged for being absent from the 29<sup>th</sup> November 2002 to the 17<sup>th</sup> January 2003. He was found guilty and dismissed on the 17<sup>th</sup> January 2003. Subsequent to the dismissal the Applicant lodged an appeal against the dismissal. The in house conciliation which was convened to deal with the appeal reversed the decision to dismiss and ordered that the Applicant be reinstated with 10 (ten) days suspension. Certain conditions were attached to the suspension.
- [5] The Third Respondent’s case was that the dismissal of the Applicant was procedurally fair because it was chaired by the independent chairperson who at the commencement of the hearing explained to the Applicant his rights. It is further the version of the Third Respondent that the Applicant who had lost his status as a shop steward, decided to represent himself during the disciplinary hearing.

- [6] The first witness of the Third Respondent Mr Struwig (Struwig), the HR consultant of the Third Respondent testified that the Third Respondent had a rule in terms of which an employee could be dismissed if found guilty of unauthorised and uncommunicated absence for more than 5 (five) days. The Applicant was according to him absent from work from the 29<sup>th</sup> November 2002 to the 17<sup>th</sup> January 2003. Struwig further testified that at that stage the Applicant was on a final written warning for a similar offence.
- [7] The Operating Manager of the Respondent, Ms L Brand (Brand) who was also the supervisor of the Applicant testified that the Applicant was aware of the rule relating to absenteeism in terms of which absence without authority was regarded as a serious offence. The Applicant was also aware that any employee who happened to be absent was in terms of this rule obliged to communicate that absence to his or her supervisor. Brand also testified about the final written warning which had allegedly being issued to the Applicant for unauthorised absence from work which was issued to him to during 2002.
- [8] The Applicant was during 2002 charged and found guilty of absence without authorisation. He was charged for being absent without authorisation for the period from 13<sup>th</sup> and 14<sup>th</sup> June 2002 and 3<sup>rd</sup> July 2002 to 1<sup>st</sup> August 2002. The charges led to the dismissal of the Applicant. However, the sanction of dismissal was reversed during the in house conciliation. The outcome of the in house conciliation is recorded as follows:

*“ALTERNATIVE TO DISMISSAL-TEN DAYS [NINE MONTHS] SUSPENSION.*

*CONDITIONS: DERECOGNITION AS SHOP STEWARD-13MONTHS*

*MONTHLY PROGRESS REPOSRTS-DOCTOR ...REINSTATED FROM 12/09/2002.”*

- [9] The Applicant did not deny his absence during the 29<sup>th</sup> November 2002 to the 17<sup>th</sup> January 2003. However, he contended that his wife did phone the Respondent to communicate the reasons for his absence but was treated rudely by one of the Third Respondent’s managers. He testified that he did not personally communicate the reason for his absence because of his depression.

#### **Grounds for review and arbitration award**

- [10] The Applicant complained that he was unable to secure a union representative to assist him in his disciplinary enquiry because his union membership had lapsed due to the non payment of his union fees by the Third Respondent.
- [11] The other complaint by the Applicant is that he was denied postponement to consult with his legal representatives. In the heads of arguments the Applicant contend that the Commissioner committed a gross irregularity in this regard and failed to find out why the benefits of the Applicant were not paid by the Third Respondent. Mr Sikhakhane for the Applicant raised several other points in the heads of argument which he refers to as grounds for review, some of them were not raised in the founding affidavit.

[12] The Commissioner in his brief analysis of the evidence and submissions by the parties found that the Third Respondent had discharged the onus of proving that the dismissal was procedurally fair. In this regard the Applicant was by agreement with the Communication Workers Union deregistered as a shop steward at the in house conciliation hearing. In this regard the Commissioner rejected the contention of the Applicant that he was denied an opportunity to be represented and that if he so wish to be represented he could have asked for the matter to be postponed to afford him the opportunity to secure attendance of his representatives.

[13] The dismissal of the Applicant was also found to be substantively fair in that the Applicant was aware of the rule relating to absenteeism and also that *“he had broken the rule whilst on a final written warning.”* The Commissioner also found that what aggravated the situation for the Applicant was the length of his absence from work.

### **Evaluation of the award**

[14] The strongest point made by the Applicant in his application is that the Commissioner found that he was given a final written warning when the in house conciliation reversed the first dismissal. There seems to be merit in the Applicant’s contention that he was not given a final written warning. The recordal of the in house conciliation says nothing about the final written warning. It does not seem to make sense to me to imply that the final written warning was issued from reading the conclusion of the in house conciliation and

the collective agreement. It should be remembered in this regard that the Applicant did call for the copy of the written warning which was never produced.

[15] It is therefore clear that the Commissioner committed a mistake of fact when he said that the Applicant had been issued with a final written warning. This mistake seems to have arisen from the testimony of one of the witnesses of the Third Respondent.

[16] The question that then arises is whether this is a mistake so fundamental as to amount to an irregularity. Admittedly a mistake of fact would in general lead to an irregularity. The question in determining whether the award should be interfered with as a result of a mistake of fact is whether the mistake is grossly irregular to an extent that it has resulted in the Applicant being denied a fair hearing. Put differently the inquiry in assessing the impact of the mistake of fact on the award is whether the Commissioner failed to fully and fairly consider the issues that were before him or her as a result of the mistake.

[17] In my view the mistake of fact which the Commissioner in the present made was not fundamental to amount to gross irregularity. The important fact in this regard is that the other factors which support the conclusion of the Commissioner is that it is not disputed that the Applicant was previously guilty of the same offence. In reversing the first dismissal the in house conciliation did find the Applicant guilty of the offence and imposed a 10 (ten) days suspension including certain conditions that the Applicant had to comply with. This in my

view indicates that even the in house conciliation regarded that offence as being serious.

[18] The Applicant failed to comply with the condition which was imposed at the in house conciliation. He failed to submit the reports of his psychologists. The excuse that he was unable to pay for his psychologists is unacceptable. He conceded having failed to attend the employee's assistant programme which was made available to him by the Third Respondent. The Applicant has also not produced any medical certificate indicating that he was unable to attend work due to ill-health/depression. In this respect the Applicant confirmed during cross-examination that he elected to consult a psychologist of his choice as opposed to utilising the services of a psychologist offered by the Third Respondent. Had the Applicant attended at the psychologist offered by the Third Respondent the issue of affordability of payment for the treatment would not have arisen because the expenses would have been borne by the Third Respondent.

[19] The case of the Applicant is further aggravated by the fact that he failed to communicate his absence to the Third Respondent despite having been specifically given cell phone numbers of both Ms Brenda and Ms Madiba. These are the two people he was supposed to contact whenever he was away from work. The version of the Applicant that he had requested his wife to phone Brenda does not in my view assist his case. On his own version communication by his wife to the Third Respondent was frustrated by the alleged negative attitude of Brenda. If this version is to be believed the question is having being

aware of this problem why did the Applicant not contact the Third Respondent himself. His version that he was unable to phone the Third Respondent because of his depression is unsustainable in my view. He has not produced any medical certificate indicating that through out that period of his absence he was so depressed that he could not on any of those days have been able to communicate with the Third Respondent.

[20] In the light of the above my view is that the conclusion reached by the Commissioner taking into account both the facts and the circumstances of this case, cannot be said to be one which a reasonable decision-maker as envisaged in *Sidumo and Another v Rustenburg Platinum Mines Limited and Others* (2007) 28 ILJ 2405 (CC) could not reach. The facts and the circumstances of this case indicate very clearly that the sanction of dismissal was an appropriate sanction even in the absence of a final written warning. As indicated earlier the record of the Applicant showed that he was previously found guilty of the same offence and the sanction imposed indicates that the Third Respondent regarded the offence as being serious. See *Gcwentsha v CCMA and Others* [2006] 3 BLLR 34 (LAC). It is therefore my view that the employee had a previous record which contained a serious sanction in particular regard being had to the conditions imposed.

[21] The complaint about representation is not supported by the transcript of what transpired at the arbitration hearing. In this respect the following question was posed during cross-examination of the Applicant:



**“RESPONDENT:** *Okay, I put it to you Mr Erasmus that you (sic) afforded the right to a union rep but that you declined the use of such a union rep.”*

[22] The answer by the Applicant to this question was as follows:

**“MR COLIN ERASMUS:** *I was afforded the right to a union rep but at the time the company has also failed to pay my shop steward fees as I indicated to my pay slip so I did not have access to, to being a union rep to affording a rep from the union at that time (sic) only afterwards then I again approached the union and asked them about the situation and they then said to me okay we do understand that the company had made a mistake and therefore you are still represented as a union ...(rest inaudible).”*

[23] When asked further why did he not object or why did he not raised the issue of representation the Applicant answered as follows:

**“MR COLIN ERASMUS:** *I, did not object to the fact because I knew at that time that I was framed ... (rest inaudible). The guy that I approached was in horizon was hmmm what was his name hmmm ...(the rest inaudible). I wanted him to represent [me], and he referred me to my pay slips and hmmm I showed him my pay slips and he said that ... (rest inaudible).”*

[24] In my view, the Commissioner cannot be faulted for having concluded that the Applicant was afforded a procedurally fair hearing regard being had to the facts and circumstances of this case.

[25] It was on the basis of the above discussion that I made the order as follows:

“1. *The review application is dismissed.*

2. *There is no order as to costs.*”

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**Molahlehi J**

Date of Judgment : 19<sup>th</sup> February 2009

**Appearances**

For the Applicant : Adv N Sikhakhane

Instructed by : M P Mulamula Attorneys

For the Respondent: Adv JA Oberholzer of Telkom SA