IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO: JR511/08

In the matter between:

POLYMARK RECYCLING (PTY) LIMITED Applicant

and

STOFFEL MOHULATSI First Respondent

THE COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION Second Respondent

NUMSA obo DIBAKWANE Third Respondent

JUDGMENT

TIP AJ:

[1] Mr Jabu Dibakwane was employed by the applicant until his dismissal on 25 April 2007. The dismissal was contested on both procedural and substantive grounds and referred to the CCMA, where it came before the first respondent for arbitration. He found that the dismissal had been unfair on both counts and ordered the reinstatement of Dibakwane. The applicant is dissatisfied with a number of aspects of this award and has accordingly instituted the current review

proceedings.

[2] The essential chronology of the relevant events may be summarised as follows:

[2.1] As at 14 February 2007 Dibakwane was working as the operator of an extrusion machine. On that day, according to him, the machine emitted a cloud of black smoke which affected his lungs.

[2.2] On the following day he was referred by the applicant to a doctor, at the company's expense, this being Dr Du Plessis. Dr Du Plessis issued a note confirming that he had examined Dibakwane who had complained that his lungs were sore and that they were not working well (*"nie genoeg pomp nie"*). It notes that Dibakwane said that this was because of his work. Dr Du Plessis recorded that Dibakwane was a smoker and, more pertinently, that there was nothing wrong with his lungs. The medical note concludes with the observation that he, Dibakwane, was fit for work.

[2.3] Dibakwane continued to complain and was advised by the company that, if he were not in agreement with the result of the examination by Dr Du Plessis, he should obtain a proper medical assessment from his own doctor. Although Dibakwane testified that he did not have funds to do this, it is also on record that he did not approach the company at any time for financial assistance in this regard.

[2.4] Without securing prior permission, Dibakwane then took time off from work to attend the Brits Hospital and, as referred by it, to a clinic in Oukasie. This was done on 3 March 2007 and 5 March 2007. There are two notes from

the clinic and one from the Brits Hospital. The latter notes *"chronic coughing"*, but the other two merely record that he attended the clinic. There is no diagnosis and no indication of any treatment.

[2.5] Notwithstanding reminders on the part of the company, Dibakwane took his medical assessment situation no further. For its part, the company clearly remained of the view that Dibakwane had taken days off work under the false pretence that he required medical treatment.

[2.6] After some time had passed, he was issued with a notice that he was to attend a disciplinary hearing on 30 March 2007 on charges of absenteeism.

[2.7] Conflicting versions were placed before the arbitrator in respect of the events of 30 March 2007. According to the company, the only disciplinary hearing which it had scheduled for that day was in respect of Dibakwane. After he did not show up, the hearing was postponed. Dibakwane's version is that he did attend, that he waited whilst other hearings were being attended to, and that the company personnel then left without attending to his hearing, whereupon he similarly left the company premises. It is to be noted that 30 March 2007 was one of his days off.

[2.8] Further charges arose in respect of the night shift of 16 to 17 April 2007. Dibakwane was on duty. According to his supervisor, Mr Mphuthi, he found Dibakwane asleep on two occasions and when he, Mphuthi, requested Dibakwane to relieve the operator on the extrusion machine, Dibakwane refused to do so. This necessitated the closing down of the production whilst the operator was given a break.

Ordinarily, according to the charge sheet, production would have continued on the basis that Dibakwane would have operated the machine for the time necessary.

[3] A fresh notice to attend a disciplinary hearing was issued on 19 April 2007. As noted thereon and as confirmed in the evidence, Dibakwane refused to take receipt of the notice, although he was informed of the content. It is also so that a shop steward did receive the notice. There is no dispute that Dibakwane was aware that the hearing was to take place. The charges incorporated those postponed on the previous occasion and in aggregate amounted to the following:

[3.1] his failure to attend the disciplinary hearing scheduled for 30 March 2007, without informing the employer;

[3.2] absenteeism on 3 March 2007 and 5 March 2007;

[3.3] sleeping on duty on 16 April 2007;

[3.4] gross insubordination and serious disrespect or impudence on 16 April 2007 by not doing what the supervisor told him to do; and

[3.5] being absent from work on 15 February 2007 while pretending to be ill.

[4] One of the grounds of review advanced by the applicant concerns the arbitrator's treatment of the fact that the employee did not attend the disciplinary hearing on 24 April 2007. In essence, the arbitrator took up the position that because it was an off day there was no need for Dibakwane to attend, in the absence of that having been negotiated and agreed with him by the employer. Plainly, he considered it a right on the part of the employee to refuse to attend a hearing on any day other than a working day. In reaching this conclusion, the arbitrator failed to give proper regard to a number of factors, such as:

[4.1] the evidence that the applicant runs a continuous operation described as *"24/7"*, with employees working 4 days on and 2 days off;

[4.2] external chairpersons for disciplinary hearings are engaged and matters are set down for hearing in accordance with the availability of such persons;

[4.3] it has been the applicant's practice for some time that disciplinary matters are dealt with in this way;

[4.4] Dibakwane himself did not rely on the notion of an off day as a full justification for his failure to attend; indeed, Dibakwane on his version (which is contested by the applicant) attended the hearing on 30 March 2007 notwithstanding that that day, too, was for him an off day;

[4.5] the primary reason advanced by Dibakwane for not attending on 24 April 2007 was that his shack had been badly damaged by a strong wind and he wanted to do some repairs;

[4.6] in that regard, the evidence is that Dibakwane did not convey this to the applicant and did not seek to have the hearing postponed on that basis; indeed, the version that his shack had required his attention surfaced for the first time at the arbitration itself and not at any of the earlier stages of the disciplinary process;

[4.7] the applicant had made it clear to Dibakwane that his transport costs to attend the hearing would be covered and that he would be remunerated for the time that he spent at the company for that purpose.

[5] In general, it seems to me, an employer is entitled to schedule

disciplinary hearings at a time suitable to it, provided that this does not create unfairness for the employee. Where an employee does not raise a particular objection to a scheduled date and time, such employee can hardly thereafter contest the fact that the hearing took place in his absence. No authorities directly in point with the present facts were cited to me. However, some guidance may be obtained from the decision of the Labour Appeal Court in *CEPPWAWU & others v Metrofile (Pty) Ltd* [2004] 2 BLLR 103 (LAC) at para [54] and [55] where it was held that an employer can institute disciplinary proceedings against employees engaging in misconduct in the course of protected strike action. Put differently, the mere fact that employees were not at work in the ordinary way was no bar to disciplinary proceedings taking place. See the passages in question:

> *"[54] An employer has the right to institute disciplinary action at any time against employees engaging in misconduct particularly of a criminal nature as was the situation in this case. At the end of the day employees engaging in protected strike action need to know that they may only engage in legitimate activities intended to advance the course of their protected strike. Fairness also demands that an employer should not wait for a strike to end to institute disciplinary action for strike-related misconduct. By its nature, illegitimate strike-related misconduct, if unchecked, affords strikers an unwarranted advantage. Due to the illegitimacy of the misconduct it cannot be expected of an employer to tolerate it indefinitely.*
>
> *"[55] The right to be afforded a fair hearing before one's dismissal is indeed an integral part of our law. This right is explicitly recognised by the Act and has been restated in numerous decisions of this Court. However, once an employer institutes disciplinary action and gives the affected employee notice thereof, it is open to the employee to attend or refuse to attend the enquiry. Should the employee refuse to attend the enquiry such employee must be prepared to accept the consequences thereof, one of which is that the enquiry will proceed in his absence and adverse findings may be made. Of course, if employees choose to do so, they are free to send representatives to the inquiry who may do what is necessary to advance the*

> *case of the employees including the cross-examination of witnesses. Furthermore, employees may also make written representations to the person presiding at the inquiry. Employees may in practice choose to absent themselves from an enquiry when it would be disruptive to the strike for them to attend it in person. We were not referred to any provision of the Act which either expressly or by necessary implication is to the effect that an employer may not convene a disciplinary inquiry against an employee taking part in a protected strike while such strike is in progress. In fact, there is, as far as I am aware, no such provision in the Act. On the contrary, there are provisions in section 67 which were clearly designed to confer protection on a strike that complies with the Act as well as on non-criminal conduct that is resorted to in contemplation of or in furtherance of a protected strike. If the Act sought to grant employees taking part in a protected strike temporary immunity from disciplinary action or disciplinary inquiries while during the progress of a protected strike, it would in my view have said so."*

[6] The arbitrator also misdirected himself on another aspect of the issue of the damaged shack. He weighed it against the applicant that it had not produced evidence in rebuttal of the claim made by Dibakwane in the course of the arbitration. However, he should rather have had regard to the fact that this version had not been put to the company witnesses when they testified. Instead of criticising the applicant, he should have held it against Dibakwane that those witnesses had not been given an opportunity to deal with the matter.

[7] In relation to the merits of the charges, the arbitrator seems to have misconceived an important leg of the company's case against Dibakwane. This concerned the charge dealing with the visit to Dr Du Plessis of 15 February 2007 and the medical certificate issued pursuant to that consultation, to the effect that there was nothing wrong with Dibakwane and that he was fit to work. In response to this, the applicant had more than once requested Dibakwane to produce a medical certificate which would present a medical picture different from the findings made by Dr Du Plessis. No such material

was presented by Dibakwane in consequence of his visits to the clinic on 3 and 5 March 2007.

[8] Instead of viewing matters in that light, the arbitrator forcefully expressed the view that the company had not been serious about the hearing scheduled for 30 March 2007, because it had still been waiting for a medical report. The true point was not that it was still waiting for a medical report. The germane aspect of the matter was that Dibakwane had not produced a medical report to contradict the *prima facie* conclusion to be drawn from the report given by Dr Du Plessis that Dibakwane had falsely held himself out to be ill.

[9] Another aspect of the arbitrator's approach which is more than a little troubling was his treatment in the course of the hearing of the question whether Dibakwane had refused to relieve on the extrusion machine on 16 April 2007 because, at least in part, he had a dispute with the applicant in relation to whether or not he should have been paid a higher salary during the time that he was on the machine. The transcript shows that whilst Dibakwane was being led in chief, the arbitrator intervened and confirmed that he had earlier testified that he was removed from operating that machine because the company had failed to heed his request that they increase his salary as an operator. However when the company representative took that issue up in cross-examination, in those terms, the arbitrator again intervened asserting that the evidence was that the company had said that he could not operate the machine at all. This was an aspect of the case that was important to the question of insubordination and the arbitrator should not have intervened in the manner in which he did.

[10] I do not intend to traverse other aspects of this matter. The above points are in my judgment sufficient to lead to the conclusion that material aspects of the reasoning and the conclusions reached by the arbitrator, together with material aspects of the manner in which the

arbitration was conducted by him, have the consequence that it would be appropriate for me to interfere with the outcome of the arbitration.

[11] At the same time, I am not of the view that I am in a position to adjudicate the merits of the matter in any final fashion. This is principally a function of the fact that the record is not a complete one. The transcript of the mechanical recording deals basically only with the evidence of Dibakwane and the evidence presented for the company has not been similarly rendered. To some extent this was remedied for the purpose of this hearing by the furnishing of a typed version of the arbitrator's handwritten notes. However, it cannot be said that such notes are equivalent in their detail to a proper transcript of the recorded material. I should add that the transcript of that material is in any event deficient in many portions of the record, where the evidence is recorded as having been indistinct.

[12] It is therefore my conclusion that it will be appropriate for this matter to be remitted to the second respondent, the CCMA, for rehearing before a different arbitrator.

[13] Both parties approached this review on the basis that costs should be awarded and it is my view, correspondingly, that costs should follow the result.

[14] I accordingly make the following order:

[1] the award delivered by the first respondent on 23 January 2008 under case number NW2615-07 is hereby reviewed and set aside;

[2] the third respondent is ordered to pay the applicant's costs in respect of this review;

[3] this matter is remitted to the CCMA, being the second respondent, for determination before a commissioner other

than the first respondent.

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KS TIP
ACTING JUDGE OF THE LABOUR COURT

DATE OF HEARING:	4 February 2010
DATE OF JUDGMENT:	19 March 2010
FOR APPLICANT:	Advocate SU Roeloffs instructed by Philholl Malan Attorneys
FOR THIRD RESPONDENT:	Mr Mtileni of NUMSA