IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT PORT ELIZABETH

CASE No.199/98
In the matter between:

DELTA MOTOR CORPORATION(PTY.)LTD Applicant

and

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION First Respondent

MARTHE ANNE FINNEMORE,N O Second Respondent
MR A KAHN Third Respondent

JUDGEMENT

MASERUMULE AJ

INTRODUCTION

[1] The applicant seeks to have reviewed and set aside an arbitration award by the second respondent ("the Commissioner") in terms of which the third respondent ("the employee") was reinstated in the **MASERUMULE AJ JUDGEMENT** applicant's employ.

[2] The applicant has stated in its heads of argument

that it abandons any reliance on section 158 of the Labour relations Act 66 of 1995 ("the Act") referred to in its Notice of Motion. The applicant now relies solely on section 145 of the Act for the relief sought. The application was brought within six weeks of the date of the award and is accordingly properly before the court.

THE FACTS

[3] The employee was employed by the applicant as a motor mechanic. He was dismissed on the 22 October 1997 for misconduct, namely, absence from work without leave. The employee referred the dispute to the first respondent for conciliation and arbitration.

[4] The Commissioner arbitrated the dispute on 14 and 19 May 1998. The Commissioner reinstated the employee with effect from 1 February 1998 and ordered the applicant to pay him his wages for the period 1 February 1998 to 28 May 1998. It is this award which

the applicant seeks to have reviewed and set aside.

[5] The applicant attacks the Commissioner's award on the basis that the material placed before the Commissioner by way of evidence does not justify the conclusion she arrived at, having regard to the judgement in CAREPHONE (PTY.) LTD v MARCUS N.O. AND OTHERS (LAC), unreported. It is necessary to refer to the evidentiary material placed before the Commissioner in order to determine whether the applicant's attack on her award is justified.

[6] The evidence led at the arbitration hearing was largely common cause and undisputed, save in few respects. However, such disputes as these may have been are irrelevant in the light of the factual findings made by the Commissioner.

[7] The evidence established that the employee was absent from work without leave on the 17 October 1997. At this time, he was on a current final warning for the same offence, having previously been absent from work without leave on 9 May 1997, 4July 1997 and 8
 August 1997. The reason given by the employee for his absence on the 17 October 1997 was that his elderly mother was sick with migraine headaches and he stayed with her at home for the day although she did not go and see a doctor. It was also common cause that the applicant had access to a phone but did not call his supervisors or foreman to advise them that he would not be reporting for work. The employee was charged for his absence on the 17 October 1997 and following a disciplinary hearing was dismissed. An internal appeal confirmed the dismissal, hence the arbitration.

[8] The Commissioner found that the employee had been absent from work without leave as he had not been given permission to be absent.The Commissioner described the employee's conduct in the following terms : "However, Mr Kahn is at fault also. He had no reason not to phone in on Friday morning when he knew that he was not coming to work. His reason for not phoning in namely that he had lost faith in the granting of permission process is not
 acceptable. He could have phoned in and still given his full reasons on Monday. While permission for absence may be given retrospectively, it is acceptable to require employees to phone in if they are not coming in and they have access to a phone. Mr Kahn's pattern of absence without leave also indicates that his responsibility regarding attendance is questionable and that he has not heeded past warnings. This is taken into account in making the final award."

[9] As is apparent from the above quoted a passage, the

employee's guilt was not in dispute nor was his previous record of absenteeism. The only issue to be decided was whether the sanction of dismissal was inappropriate. Notwithstanding the Commissioner's own observations about the unacceptability of the employee's conduct on the 17 October 1997 and prior occassions and the fact that the employee had ignored prior warnings, she found that the sanction was too severe and dismissal unfair. **MASERUMULE AJ JUDGEMENT**

[10] The Commissioner's reasoning for her finding that the dismissal was unfair goes as follows : "However, the dismissal is unfair as the penalty is too severe under the circumstances of this particular absence. The issuing of the card by Mr Osele might have misled Mr Kahn into believing that permission had been granted. He may have pursued seeking permission for the absence more directly if he had suspected that permission had not been granted, especially as he knew he was on final warning for AWOL."

[11] On the strength of the above quoted passage, the Commissioner reinstated the employee with four months retrospective pay.

[12] I agree with the submission made on behalf of the applicant that whatever misunderstanding may have been created by the issue of a green card to the employee when he returned to work, it is of no relevance in the situation where the misconduct is admitted by the employee and a finding is made to that effect by the Commissioner. In addition, once he was handed the charge sheet on the 17 October

1997, the employee knew that his absence had not been condoned, hence his plea of guilty at the disciplinary hearing.

[13] It is difficult to understand how, in the light of the Commissioner's findings as set out in paragraph 8 of this judgment, she can arrive at a conclusion that the employees's dismissal was unfair, let alone to reinstate him and order that the applicant pay him four months'salary as compensation.

[14] I am satisfied that there is no rational objective basis between the Commissioner's conclusions that the employee's dismissal was unfair and the factual findings she made to the effect that the employee was absent from work without leave, had no reason for not telephonically advising his superiors of his intended absence and had ignored previous admonitions for similar conduct, including a final warning. The relief granted confirms my findings in this regard, as no reasons are furnished by the Commissioner why she finds reinstatement to be appropriate and why the employee should be paid four months' salary, notwithstanding his unacceptable and repetitive **MASERUMULE AJ JUDGEMENT** misconduct.

[15] I accordingly conclude that the applicant has made out a case for the relief it seeks in paragraph 1 of the Notice of Motion.

[16] I need to consider whether this is a matter to be referred back to the first respondent or whether I should determine the dispute. In my view, the facts are such that the dispute can be dealt with in terms of Section 145(4)(a) as the only issue requiring consideration is one about the appropriateness of the sanction.

[17] I am satisfied that in the light of the Commissioner's findings as quoted in paragraph 8 above, dismissal was an appropriate sanction.

[18] I accordingly make the following order :

18.1 The second respondent's arbitration award dated 28 May 1998 is hereby reviewed and set aside in terms of section 145(2)(a)(iii) of the Act;

MASERUMULEAJ
JUDGEMENT

18.2 The second respondent's award is hereby substituted with an order that the third respondent's dismissal was fair and he is not entitled to any relief, and

18.3 There is no order as to costs.

Date of hearing : 10 September 1998

Date of judgment : 21 September 1998

On behalf of the applicant : Mr Kroon of Chris Baker and Associates

On behalf of the third respondent : Adv. G.G. Goosen instructed by Gray

and Moodliar.

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