

**IN THE LABOUR COURT OF SOUTH AFRICA
(Held at Port Elizabeth)**

Case No: P45/01

In the matter between:

Applicant
CORPORATION

and

1st Respondent
MEDIATION AND ARBITRATION

2nd Respondent

3rd Respondent

4th Respondent

JUDGMENT

Landman J:

1. Ms Mtongana and Mr Tsipa were employed in the marketing and sales department of Radio Transkei. When the functions of Radio Transkei were taken over by the SABC the salespersons became employees of the SABC. They found that they were required to sell airtime in the Transkei at SABC rates. These rates were 5 times the rates of the old Radio Transkei.
2. Targets sounding in Rands, to be met each month, were set by the SABC. These targets were set with the concurrence of the salespersons. They had not previously worked with a sales target system.
3. The salespersons repeatedly did not meet their targets. Mr Yabo, the Regional Sales Manager, was made aware that

they were falling behind. He went to see them and their union at their base in Umtata. The salespersons said that they were not meeting their targets because of high rates, economic circumstances and the problems flowing from the integration with the SABC.

4.The union also stated that a market survey was required to establish whether there was business or not in the Transkei. Mr Yabo agreed with this proposal. He informed the persons at SABC head office that if the SABC did not conduct a market study the union would always raise this objection. Mr Yabo candidly told the commissioner that, if it was his business, he would have conducted a market survey to determine the level of economic activity and whether there was enough business in the area. It was, however, not for him to decide this. The SABC declined to consider a survey. The result was that Mr Yabo initiated steps to address the problem as best he could in the absence of a survey. These steps are neatly summarised in his letter of 13 January (and reiterated in a letter of 27 January) which read:

- “ 1. You were given the right to sell anywhere in the Eastern Cape whilst the Account Executives in Port Elizabeth were prevented from targeting Transkei for a limited period.
- 2.Special rates were introduced to make it possible that you sell more.
- 3.A new rate card applicable to the former Transkei only was introduced.
- 4.Special arrangements with Umhlobo Wenene to reduce their charges on Homeboy.
- 5.A workshop in Transkei was held.
- 6.A sales sweep in the East London area was conducted.
- 7.Sales training by an outside trainer Taffy Robinson.
- 8.The Sales Manager Debbie Gottschalk contributed actual sales to your target.
- 9.The visit by the Marketing and Sales Manager, ie Moses Yabo and the Sales Manager Debbie Gottschalk to assist you was carried out on numerous occasions.
- 10.The plan to transfer you to PE was canceled after discussions with the Union.”

2.Ms Mtongana’s performance for the period from the takeover of Radio Transkei to the date of her dismissal is reflected as follows:

Actual	Target	% Reached
19,582	50,000	39.16
24,056	65,000	37.01

28,292	40,000	70.73
45,662	40,000	114.15
22,604	40,000	56.51
37,722	35,000	107.78
32,252	40,000	80.63
38,038	55,000	69.16
50,317	65,000	77.41
14,089	25,000	56.36
51,149	30,000	170.50
13,361	0	n/a

3.Mr Tsipa's performance was as follows:

Actual	Target	% Reached
6,073	45,000	13.50
4,533	60,000	7.55
8,302	40,000	20.76
10,497	48,000	21.87
6,784	40,000	16.96
26,149	40,000	65.37
23,347	0	n/a
48,953	0	n/a
30,735	0	n/a
4,034	0	n/a
9,707	0	n/a
148	0	n/a

4.After counseling and several meetings the services of the salespersons were terminated on notice with effect from 31 March 2000.

5.The discounted rates were introduced in about September 1999. See Mr Tsipa's letter of 20 September 1999. This would also be about the time that the salespersons were permitted to canvass for business outside the Transkei

but within the Eastern Cape.

6.The concessions and arrangements made by Mr Yabo on behalf of the SABC were done in order to enable the salespersons to meet their targets and as a counter to the absence of an assessment of the market potential in the Transkei. It is therefore fair to judge their performance only-

(a)for the period September 1999 to February 2000; and

(b)if the employer has shown on a balance of probabilities that the counter measures neutralised the inference that there may have been no business potential remaining in the area of the former Transkei.

7.Were the counter measures effective? It may be inferred that the commissioner thought so. The onus was on the SABC to prove that the business environment in which the salespersons operated were such that the targets were realistic. The SABC set out, in some detail, the steps which were taken to counter a supposed lack of business in the Transkei. I refer to the steps outlined in Mr Yabo's letters as supplemented in his evidence.

8.What do the salespersons say about the counter measures? The most that they say is that the reduced rates applied only in the Transkei and did not assist them outside that area. The commissioner was alive to this. He opined that the salespersons were to blame. He also criticized them for dismissing with contempt the assistance offered to them by the SABC. They did not wish to learn a new way of doing business. Lastly the commissioner notes that it was not the salespersons' case that the SABC did not do enough to assist them.

9.It is clear that the employees have no complaint about the validity and the appropriateness of the counter measures.

10.I now turn to consider the salespersons' performance. The figures to February 2000 (March was not officially recorded) show that Ms Mtongana exceeded the targets in September and February 2000 but underachieved by 20%, 31%, 23% and 42% in the other months. During this period she should have sold R250 000 worth of airtime. She actually sold R172 418 worth.

11.Mr Tsipa did not achieve any target in the period under review and his sales dwindled away into insignificance.

12.The commissioner decided that Ms Mtongana had substantially met her targets for the September-February 2000 period which was a fair period within which to judge her performance. The commissioner decided this when he considered whether a fair investigation had taken place. But his finding fits more happily here. He says:

“This employee showed improvement and made her targets in the last two months of her employment but was still dismissed because she was re-assessed on the entire period of her employment. It is my view that the calculation used by the employer in re-assessing the employees is not in line with the Labour Relations Act (supra). It is further my view that this employee did meet her targets and should not have been dismissed.”

13. The commissioner’s finding and the relief granted to Ms Mtongana are rational and justifiable. They cannot be disturbed. This ends the inquiry regarding Ms Mtongana. It was unnecessary to consider the question of a fair procedure. A fair procedure cannot cure a substantively unfair dismissal.

14. What remains is the question whether the dismissal of Mr Tsipa was procedurally fair. The commissioner was of the opinion that this was not the case. He concluded:

- (a) that there was not a proper investigation as to why the salespersons’ did not perform;
- (b) a fair opportunity or period of time for improvement;
- (c) the sanction of dismissal was appropriate.

2. He found that dismissal was appropriate, but inexplicably, did not give effect to this finding. The commissioner also found that the employer did not conduct a fair investigation.

3. The commissioner’s finding ignores the steps taken to assist the employees which constituted an ongoing investigation. His finding on this point is not rationally connected to the evidence.

4. The commissioner correctly found that:

“On the basis of the above my conclusion is that this employee was given reasonable time to improve and that this time is calculated from when the employer offered assistance to the extent of introducing the fixed rates and not from the entire employment period of Mr Tsipa. Further that this employee therefore failed to meet the standards expected of him nor did he show effort to meet the target.”

5. The commissioner ought to have come to the conclusion that the dismissal of Mr Tsipa was procedurally fair.

6. In the result the application to review and set aside the award succeeds to the extent that the award of the commissioner as regards Mr Tsipa is reviewed.

- 1.Paragraph 1 of the order is deleted.
- 2.The applicant is ordered to pay the costs of the third respondent.
- 3.The fourth respondent is ordered to pay the costs of the applicant.

Signed and dated at BRAAMFONTEIN this 27th day of September 2001.

A A Landman

Judge of the Labour Court of South Africa