

**IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT BRAAMFONTEIN**

Case Number: JR1863/01

J67/02

In the matter between:

Applicant

and

First Respondent

Second Respondent

Third Respondent

Fourth Respondent

UNION

JUDGMENT

DLODLO AJ

Introduction

1. This is a review application brought by the Applicant in terms of section 145(2)(a)(ii) and section 145(2)(a)(iii) of the Labour Relations Act 66 of 1995 (the Act). The Applicant is Telkom SA Limited, a company duly registered in terms of Company laws of SA. The first Respondent is commission for Conciliation, Mediation and

Arbitration (CCMA). The second Respondent Mr D. Matee , Commissioner who conducted arbitration under the auspices of the first respondent in regard to the dispute which is the subject of this review. The third Respondent is communications workers union. The fourth respondent is Mr Mashaba, an employee of the Applicant.

THE FACTS

2. The fourth Respondent (Mr M. Mashaba) was employed by the Applicant as a technical officer on the 21st January 1991. On the 24th November 1999, Mr Mashaba faced certain allegations of misconduct which read as follows:

“Unauthorized use of a Telkom vehicle on various occasions between the periods of March 1999 until October 1999 as misuse of company petrol card.”

Mr Mashaba was advised in writing to attend a disciplinary inquiry. The notice gave him three(3) working days. This was in compliance with the collective agreement in force at the workplace. A certain Mr Abba Essop was to chair the inquiry proceedings.

3. On the date of the inquiry, it was postponed in order to enable Mr Mashaba to arrange representation. It appears Mr Mashaba was firmly advised to bring along his representative on the new date, being the 13th December 1999. On the latter date Mr Mashaba came without a representative. The matter was stood down to enable Mr Mashaba to telephonically enquire where his representative was. On resumption there was no representative. There was also no explanation. The inquiry was proceeded with and Mr Mashaba was found guilty. The chairperson imposed dismissal as a sanction. The in-house appeal took place on the 14th February 2000. Mr Mashaba was then represented by a shop steward, Mr Lekgotla Mokotlo. The in house appeal was unsuccessful.

CONCILIATION AND ARBITRATION

4. On the 18th February 2000, Mr Mashaba referred the matter to the CCMA for

conciliation. The referral was late. An application for condonation was made. Condonation was granted. The conciliation took place on the 26th April 2001. The matter became unresolved. It was referred to arbitration which took place on the 12th November 2001. At arbitration Mr Mashaba and his union representative, on one hand, and, the applicant, on the other, agreed not to contest substantive fairness of the dismissal. This agreement was placed on record. The Applicant informed the commissioner that they would not call Mr Herman Keyser to give evidence. The reason for not calling this witness was stated to be because the merits were not in dispute. The Applicant's only witness at the arbitration hearing was Mr Abba Essop. The commissioner found that the dismissal was procedurally and substantively unfair. He issued an award in the following terms:

- “(a) The Respondent is ordered to reinstate Applicant retrospectively to the date of dismissal being the 13th December 1999.**
- (B) Any loss of salary or benefits suffered by the Applicant must be made good as if nothing happened in the beginning.”**

REVIEW APPLICATION IN TERMS OF SECTION 145(2)(A)(ii) AND SECTION 145 (2)(A)(iii) OF THE ACT.

5. The applicant brought an application to have the award reviewed and set aside. The review application seeks to attack the following findings made by the commissioner:

- “(a) That the dismissal was both procedurally and substantively unfair;**
- (b) That the inquiry was held in the mid-December when people were preparing to go on leave and that it influenced Mr Essop not to postpone the inquiry for the second time;**
- (c) That the Respondent (Mr Mashaba) did not have adequate time to prepare for his case nor his defence;**
- (d) The employer failed to charge Mr Mashaba timeously”.**

GROUND FOR ATTACKING COMMISSIONER'S FINDINGS ARE:

DISMISSAL BOTH PROCEDURALLY AND SUBSTANTIVELY UNFAIR

(Commissioner had no Power to decide a matter. That he was not called upon to decide)

6. Mr Leech, on behalf of the applicant submitted that there was no evidence on record before the commissioner regarding substantive fairness of the dismissal. There was on record instead an agreement between the parties not to address the issue of substantive fairness. He further contended that in making a finding which is not supported by evidence, the commissioner failed to apply his mind to the dispute before him. The commissioner thereby committed an irregularity in the conduct of the proceedings. He exposed himself to the provisions of section 145(2)(a)(ii) which reads:

“A defect referred to in subsection (1), means that the commissioner committed a gross irregularity in the conduct of the arbitration award.”

Mr Leech relied on **Carephone (Pty) Ltd v Marcus NO and others (1998) 19 ILJ 1425 (LAC)** and **County Fair Foods v CCMA & others (1999) 20 ILJ 1701 (LAC)** in support of his submission. Mr Mokoto (union official) on behalf of Mr Mashaba conceded that no evidence was led on the question of substantive fairness and that the commissioner was required to make a finding only on procedural fairness of the dismissal. According to Mr Mokoto, apart from the finding the commissioner made, namely, that the dismissal was **“substantively and procedurally unfair”**, the rest of the matter was properly dealt with by the commissioner. In conclusion, Mr Mokoto contended that the commissioner did apply his mind to the matter before him. He asked for the dismissal of the application with costs.

EVALUATION

7. Having read the record of proceedings before the commissioner, it can be confirmed that no evidence was led on question of substantive fairness of the

dismissal. Indeed the parties had not placed this in issue. John Grogan in his book entitled “**workplace Law**” sixth edition states the following:

1. “**The parties can agree to restrict the matter to be determined by the arbitrator by, for example, agreeing that only the Substantive fairness of a dismissal is at issue. If the commissioner proceeds to consider other matters, for example, procedural fairness, the award can be set aside.**” The learned author refers to **Northern Transvaal Motors v Phatudi & Others Labour Court case number J161/98. (Unreported)**. It is not necessary to deal with other grounds of attack on the commissioner’s finding. I find that the commissioner decided on the issue not placed before him for decision. He thereby rendered himself guilty of gross irregularity. This court is entitled to interfere. At the request of the applicant as shown on the papers before me, I decide not to deal with the matter myself, but to have it remitted back to the arbitrator.

Order

In the result therefore I make the following order:

- (a) That the Application for review in terms of section 145(2)(a)(ii) is granted.
- (b) That the finding and award made by the commissioner is set aside and the matter is remitted to the CCMA to be arbitrated afresh by a different commissioner.
- (c) That the application in terms of section 158(1)(c) of the Act in case number J67/02 is dismissed.
- (d) There is no order as to costs.

D. DLODLO AJ

Acting Judge of the Labour Court

30th July 2002

NT:

6 September 2002

MR B.E. LEECH

MR M KOTO (Union Official)