

*****Sneller Verbatim/MS

IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN

CASE NO: J1464/00

2003-05-02

In the matter between

WORKERS

Applicant

and

1stRespondent

NG

2ND Respondent

COUNCIL

3RD Respondent

J U D G M E N T

LANDMAN, _____J: Mr Mokwena was employed by TV
Manufacturing CC. He was dismissed on 6 April 1999 for

attending an union meeting without permission and then obtained a doctor certificate to ensure that he was paid for the day.

The Commissioner of the Dispute Resolution Centre, which arbitrates disputes in the motor industry, upheld the dismissal. NUMSA and Mr Mokwena seek to review and set aside the award. The notice of motion refers to section 158 of the Labour Relations Act 66 of 1995. However, the award is reviewable in terms of the Arbitration Act 42 of 1995. The grounds of review are limited to those set out in section 33 of this act.

The tapes of the arbitration hearing have been lost. The commissioner's notes have been destroyed. All that is available is the account in the founding affidavit, which sets out what transpired during the arbitration hearing, but obviously it does not do so verbatim. The grounds of review are set out in paragraph 13 of the founding affidavit. They are the following:

- "1. The first respondent acted grossly, irregularly and misconstrued his powers under the Act, by clearly placing the onus of proof on the shoulders of the applicant rather than the respondent/employer.

2. The first respondent's finding that the medical certificate was not legitimate, because it said nothing about the applicant suffering from back ache, was not supported by the evidence placed before him.
3. The first respondent in reaching his finding that the applicant was lying, when in the arbitration it contended that he was not at the meeting and that Ndebele had made a mistake, failed to take into account some of the evidence.
4. The first respondent acted contrary to his powers, in the objects and requirements of the act in reaching his finding, that the dismissal was procedurally fair."

The applicant complains that the Commissioner acted grossly, unreasonably by placing the onus of proof on the shoulders of Mr Mokwena. The Commissioner was, however, obliged to determine whether Mr Mokwena was absent from his place of employment and whether he did so in order to attend the union meeting, when permission to be absent from work for this purpose had been denied.

The evidence before the Commissioner was that Mr Mokwena had not been refused permission to attend the meeting. But he had attended the union meeting and produced a medical certificate, which did not state that he was

unfit for duty on the day in question. It is in this context that the Commissioner examined Mr Mokwena's version. He rejected it on four grounds. The grounds involved a consideration of the probabilities and the credibility of the witnesses. It is not competent for this court to decide whether the Commissioner's finding is unjustifiable. This is not a ground which is countenanced by the Arbitration Act of 1965.

I have considered whether the Commissioner has committed a gross irregularity by misdirecting himself as regard the onus and the other findings which he made. In coming to his conclusion, the Commissioner disbelieved the union organiser, Mr Ndebele. Mr Cartwright, who appeared for the applicants, candidly conceded that the union's evidence on this score is open to some doubt. I find no irregularity on the papers. In the circumstances there is no reason to interfere with the award. The application is dismissed.

SIGNED AND DATED AT BRAAMFONTEIN ON 5 JUNE 2003

A A LANDMAN

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

FOR APPLICANT: Mr David Cartwright

APPOINTED BY: NUMSA