

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT BRAAMFONTEIN

Case No: JR466/03

In the matter between:

SOUTH AFRICAN BROADCASTING CORPORATION Applicant

and

**COMMISSION FOR CONCILIATION, MEDIATION AND
ARBITRATION** First Respondent

MTHEMBU. J N.O. Second Respondent

**MEDIAWORKERS ASSOCIATION OF SOUTH AFRICA
(MWASA)** Third Respondent

KHOALI. N Fourth Respondent

JUDGEMENT

A. INTRODUCTION

1. This is an application for the review of the reward of a CCMA Commissioner (“**the Commissioner**”). The applicant is the South African Broadcasting Corporation. The first and second respondents are the CCMA and the Commissioner respectively. The affected employee, Ntshediseng Khoali, is the fourth respondent.

2. The fourth respondent was employed in a relatively senior management position as a regional editor responsible for the newsroom at the applicant's regional office in the Free State. She was charged with various counts of misconduct (dealt with in more detail below). Pursuant to a disciplinary enquiry held during August 2002 she was dismissed. The appeal against her dismissal was unsuccessful.
3. She declared a dispute and the dispute eventually came before the Commissioner for arbitration by him.
4. The Commissioner found that the fourth respondent "*was incorrectly dismissed for misconduct when her conduct as shown by the respondent's (that is, the applicant in the review) evidence amounted to poor work performance*". The Commissioner reinstated the fourth respondent with retrospective effect to the date of her dismissal.

B. THE CHARGES

5. At the disciplinary enquiry the fourth respondent was charged as follows:

- “1. Disruption of relations;
2. *Poor supervision; and*
3. *Undermining and harming the interests of the SABC.*”

6. Each charge comprised several counts.
7. Under the head “*Disruption of Relations*” the charge read as follows:

“Since your appointment as Regional News Editor in Bloemfontein on 01 December 1999, the Free State Region as far as the News component is concerned, has become dysfunctional and destabilised and that you have significantly contributed to the tension in the newsroom by acting in the following unacceptable manners:

- *During the period December 1999 to May 2002, you have surrounded yourself with employees whom you regard as supporting you, including but not limited to Sello Letsoha, Hlaudi Motsoeneng, Molefi Thibile and Robasana Maliehe, to the exclusion of the rest of the employees under your supervision resulting in a deep division amongst staff members.*

- *During the period December 1999 to May 2002, you have favoured certain employees, i.e. by promoting Molefi Thibile to the position of Senior Producer: Current Affairs, despite an alleged inability to present news bulletins as a result of alcohol related problems.*
- *During the period December 1999 to May 2002, you revealed to members of the management team the contents of a confidential discussion, which Pontsho Makhetha had with you about certain employees.”*

8. Under the head “*Poor Supervision*” the charge read as follows:

“Since your appointment as Regional News Editor in Bloemfontein on 01 December 1999, you have failed to take appropriate disciplinary steps against employees under your supervision as required by the SABC’s disciplinary procedure and code of conduct, contributing to the unstable environment in the News Department and creating the impression that

certain employees are immune to disciplinary action.

- *During the period December 2000 to December 2001, you failed to take action against Robasana Maliehe for not returning SABC fleet vehicles timeously on a number of occasions (see annexure A).*
- *During February 2002, you failed to take action against Robasana Maliehe who was absent from duty between the period 04 February 2002 and 06 February 2002, without prior approval.*
- *During April 2002, you failed to take disciplinary action against Liholo Liholo, who reported late for work and was also absent from work on 18 March 2002. It was also reported to you that the problem of late coming happened on a number of occasions, but you still refused to*

take any action in this regard.

- *During the period December 1999 to May 2002, you failed to take disciplinary action against Molefi Thibile for sleeping on duty and therefore being unable to present News bulletins as a result of intoxication.”*

9. Under the head “*Undermining and Harming the Interests of the SABC*” the charge read as follows:

“Since your appointment as Regional News Editor in Bloemfontein on 01 December 1999, you have engaged in conduct, which undermined or harmed the interest of the SABC by stigmatising working on the news bulletin.

- *During the period 01 December 1999 and May 2002, you referred to the News bulletin as a boring place for old people as opposed to Current Affairs. You have further told*

employees, specifically Motale Sebego and Ntsiepe Masoetsa, that you would punish them by sending them to the bulleting desk. This had serious effect on the morale of the employees on the news bulletin and affected productivity.”

(All the above quotes are direct quotes and have not been corrected by me)

10. The charges were based on provisions of the applicant’s disciplinary code.

C. THE FINDINGS OF THE DISCIPLINARY ENQUIRY

11. Set out below are relevant extracts from the findings of the employer’s disciplinary panel. They are relevant because they shed light on the nature of the charges against the fourth respondent.

12. Under charge 1:

“It was clear, through Mrs. Khoali’s own admission, that there were distinct and different groupings/cliques that were formed and operated within the Newsroom. Both groupings/cliques included but were not limited to Management and Staff. The panel has concluded that the one

grouping was under the leadership of Mrs Khoali.

It was further established that the existence of the groupings resulted in a serious breakdown of personal and work relations to the extent where the Regional Editor perceived herself to be hated by some staff members.

Through Mrs. Khoali's conduct and behaviour, she played a significant role in dividing and pollarising the Newsroom. Further to that, Mrs Khoali perceived the other grouping as "gangster" which clearly indicates the deep division that exists in the Newsroom.

Staff not belonging to the Regional Editor's grouping were deliberately disempowered and felt marginalized which led to undermining and defying her to the extent where their conduct constituted gross insubordination.

The continued defiance and insubordination of staff and the consequences of Mrs Khoali's failure to act to ensure harmonious working relations in the Newsroom resulted in the irreparable relations between her and the staff."

13. Under charge 2:

"The panel concluded that Mrs Khoali failed to adhere to the SABC disciplinary code by not exercising full responsibility and accountability over serious acts of misconduct, by not only general staff but also members of her management team.

As Mrs. Khoali is held ultimately responsible for instilling discipline in the Newsroom, she should not abdicate the responsibility of addressing serious acts of misconduct and defiance."

"Mrs. Khoali's failure to act against Liholo Liholo's serious misconduct amounts to dereliction of duty. Her attempt to address this issue does not constitute any disciplinary action in line with the serious nature of the misconduct by Liholo Liholo, a senior member of her management team. The panel therefore finds Mrs. Khoali guilty."

14. Under charge 3:

”Evidence led proved that Mrs, Khoali is partially culpable for the negative perceptions and stigmatising of the bulletin desk as she failed to combat and indeed contributed to the prevailing negative perception of the bulletin desk.”

(Again, the above quotes are direct and have not been corrected by me)

D. THE EVIDENCE

15. On the outset it should be pointed out that the record appears to be incomplete. It is further not possible to state with certainty whether the omissions are material. I refer in particular to the evidence-in-chief and the cross-examination of the fourth respondent, the evidence of Mr. Conradie, the evidence of Mr. Letsoga and the evidence of Mr. Zikalala.
16. Several witnesses testified on behalf of the applicant. Their evidence traversed a wide range of events and conduct attributed to the fourth respondent.
17. In summary, the factual allegations levelled against the applicant amounted to the following:
 - 16.1 Allegations of an improper use of her power to make or recommend appointments;

- 16.2 Allegations of an abuse of her disciplinary powers; for example, a deliberate failure to discipline favoured employees for what appeared to be serious misconduct;
 - 16.3 Allegations of an abuse of her power to recommend and bring about salary increases for favoured employees; and
 - 16.4 Allegations of an abuse of her managerial powers to punish (unjustly) those not favoured by her.
18. Further, the evidence led was to the effect that her conduct as testified to seriously harmed the interests of her employer.
19. The evidence was not fully challenged in cross-examination. In her own evidence the fourth respondent did not deal in any material detail with the allegations levelled against her but satisfied herself with a series of bare denials. The evidence given by witnesses on her behalf did not improve this situation materially.

E. THE FINDINGS OF THIS COURT

20. It does not appear from the Commissioner's award that he analysed the

evidence in any material detail. Nor did he assess its value or cogency. His approach appears to have been simply to categorise the evidence against the fourth respondent as constituting complaints of poor performance and to conclude that because she was disciplined for misconduct and not for poor performance, her dismissal was unfair.

21. By seeking to categorise the issues in the way he did, the Commissioner erred. Clearly the charges and the evidence against the fourth respondent would, if sufficiently proved, constitute evidence of conduct justifying dismissal. But more importantly, in adopting the approach that he did, he failed to address the issues that he was required to do, namely, whether the fourth respondent was guilty of conduct serious enough to warrant dismissal.
22. The notional line between the various circumstances that could give rise to a fair dismissal (misconduct, poor performance, incapacity and operational requirements) is not always easy to draw. Often the same conduct may give rise to more than one appropriate categorisation. Employers may often, not unreasonably, err in their attempts to categorise the circumstances giving rise to a potential dismissal. The failure correctly to categorise should not however detract from the appropriate inquiry in each case, namely, to assess first, whether there was a substantively fair reason for dismissal and second, whether an appropriate and fair procedure was followed by the employer.

23. There are other problems with the award. The Commissioner found that there was no evidence of procedural unfairness. Yet, his award appears to have been materially influenced by two findings. The first was that the investigation giving rise to the disciplinary proceedings was unfair. The second was that the employer was guilty of a failure to follow a fair procedure in relation to allegations of what he concluded were allegations of poor performance (something which in any event he failed to deal with properly in his findings). Finally, it is not apparent from the award that the Commissioner properly considered whether, in all the circumstances, reinstatement was an appropriate remedy.
24. Applying the test for review generally accepted in this court, I conclude that the award of the Commissioner is reviewable and stands to be set aside. The ultimate award of the Commissioner is not justifiable in relation to the reasons given. Moreover his incorrect approach resulted in a failure to do what the Labour Relations Act, 1995, required of him, namely, to assess the evidence and to make a finding as to whether the conduct complained of was proved and if so whether it was serious enough to warrant dismissal. There has not been a trial of the issues as is required by the Labour Relations Act.

See; *Carephone (Pty) Ltd v Marcus NO and others* (1998) 19 ILJ 1425 (LAC); and

Toyota SA Motors (Pty) Ltd v Radebe and others (2000) 21 ILJ 340 (LAC)

25. I have given some thought as to whether this matter should be referred back for reconsideration by the first respondent or whether I should, in this judgement, finally dispose of the matter. There is something to be said for the latter approach. Importantly, the finalization of this dispute has taken far too long.
26. However I have decided to refer the matter back to the CCMA for determination before a Commissioner other than the second respondent. I am concerned that the record appears to be incomplete and it is impossible to tell whether the omissions are material. I am further of the view that a fair outcome can only be arrived at when the evidence is properly considered in accordance with the requirements of the Labour Relations Act. This would require an assessment as to whether the conduct testified to is sufficiently proved, and if so, is serious enough to warrant dismissal. Further, consideration needs to be given to whether, in any event, reinstatement the fourth respondent would, in all the circumstances, be appropriate even if the dismissal is found to be procedurally or substantively unfair. In my view it is appropriate that these tasks be performed by the first respondent.
27. I do not believe that an award of costs is appropriate, certainly at this stage.

F. ORDER

28. Accordingly I make the following order:

26.1 The award of the fourth respondent is reviewed and set aside.

26.2 The dispute is referred back to the Commission for Conciliation, Mediation and Arbitration for reconsideration before a Commissioner other than the second respondent.

26.3 There is no order as to costs.

DATED AT JOHANNESBURG THIS 30th DAY OF DECEMBER 2005.

P J PRETORIUS S.C.

Acting Judge: Labour Court
30 December 2005

FOR THE APPLICANT: P Maserumule of Maserumule Inc.

FOR THE THIRD AND FOURTH RESPONDENTS: Adv P Kennedy S.C. instructed by
Joubert Scholtz Denga