

IN THE LABOUR COURT OF SOUTH AFRICABRAAMFONTEINCASE NO: JR1574/03DATE heard and delivered: 2006-11-24

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Not Reportable

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In the matter between:

MASILO ALFRED MOHALE

Applicant

And

15 FORMICA SOUTH AFRICA

Respondent

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J U D G M E N T

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PILLAY D, J: In this review the applicant seeks to set aside the award in  
20 which the second respondent, the Commissioner confirmed his dismissal.  
The applicant had tendered medical certificates issued by an obstetrician  
and gynaecologist in support of his claim for sick leave. He was dismissed  
as his conduct was regarded as fraudulent.

His union intervened and negotiated his reinstatement on certain  
25 terms. His misconduct was to be reduced to the lesser offence of not

adhering to the company policy on compassionate leave for which he would receive a final written warning. He was also not to be paid for a month. These terms were framed as an offer which the applicant had to accept before they could be implemented. The applicant refused to sign the offer.

5 No agreement accordingly came into place.

Mr West, counsel for the applicant, submitted that the third respondent, the employer had waived its right to dismiss the applicant once it made the offer. The terms of the offer implied that the relationship had not broken down and that “additional evidence”, which had not been available  
10 when the decision was taken to dismiss, had since come to light. The additional evidence referred to, namely an acknowledgement by the employer that the applicant did not enjoy a good relationship with his supervisor, was evidence quite unrelated to the fraudulent nature of the applicant’s conduct.

15 The picture that emerges is that the employer entered into constructive conciliation with the applicant and his union. In doing so it did not abandoned its rights to dismiss the applicant. Abandonment or waiver of the right to take disciplinary action has to be unequivocal to be effective. If the Commissioner or the Court were to hold otherwise it will be a disincentive  
20 to constructive and meaningful conciliation in misconduct cases.

In this award the Commissioner recognises the applicant’s conduct as fraudulent. He was paid sick leave when, on his version, he should have claimed compassionate leave as he took the leave to take care of his wife. The medical certificate had been issued in his name but had described his  
25 wife’s condition.

A lesser amount was paid for compassionate leave than for sick leave. Furthermore, the leave taken had coincided with long weekends. In all the circumstances the award is unassailable and the application for review is dismissed with costs.

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Pillay D, J  
7 February 2007