IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT BRAAMFONTEIN

CASE NO. JR 1377/06

In the matter between:

RAND WATER **Applicant**

and

T L MABUSELA N.0 **1st Respondent**

THE SOUTH AFRICAN LOCAL GOVERNMENT

BARGAINING COUNCIL **2nd Respondent**

SAMWU on behalf of S L MOSALA **3rd Respondent**

JUDGMENT

AC BASSON, J

[1] This was an application to review and set aside the arbitration award issued by the First Respondent (hereinafter referred to as "the Arbitrator") under the

auspices of the Second Respondent (the Bargaining Council – "SALGA") and in favour of the Third Respondent (hereinafter referred to as "Mosala") on 19 May 2006 under case number GPD090514. The Applicant (hereinafter referred to as "Rand Water" or "the employer") also sought an order substituting the decision of the Arbitrator with an order that the dismissal of Mosala from the employ of Rand Water was both substantively and procedurally unfair. In the alternative, Rand Water sought an order remitting the matter back to SALGA for arbitration before a different arbitrator.

Grounds for review

[2] The Applicant sought to review and set aside the arbitration award on the grounds that: (i) each of the findings regarding substantive and procedural unfairness and the remedy are independently reviewable; (ii) in making the findings on substantive and procedural fairness and the remedy, the Arbitrator ignored material evidence; (iii) the Arbitrator took into account irrelevant evidence and irrelevant case law and made such gross errors of fact and in law that they resulted in an unfair hearing; and (iv) The Arbitrator's findings were neither rational nor justifiable.

Substantive fairness of the dismissal

[3] It was common cause that Mosala was employed by the Applicant and that one of his duties was to collect samples on a 2 (two) hourly basis to determine

the quality of water supplied by Rand Water to its customers. It was the evidence of Mr. Van Rensburg (the shift supervisor of Mosala) that it was important to take the samples on an two hourly basis because the not taking thereof can result in big impacts in the water purification process. Van Rensburg further testified that it is standard procedure that if an employee is absent from work, it is the responsibility of that employee to contact the employer to indicate that he or she would not be attending work in advance of taking off from work. If an employee is sick, he must report at last four hours in advance before the commencement of his shift. The rationale for this rule is, according to Rand Water, obvious in that it allows the employer to adjust its operational affairs to make way for alternative resources to be deployed. It was further pointed out that it is a standing rule that when an employee alleges that his or her absenteeism is due to sickness that the employee must prove such sickness by the production of a medical certificate. It was the case for Rand Water that the failure to inform an employer or to contact the employer and to produce a medical certificate constitute misconduct in itself and that such misconduct is viewed as separate and distinct from the misconduct resulting from the actual absence from work. Absence from work which has not been authorised and is unjustified is in itself a misconduct which is distinct from the failure of an employee to produce a certificate or to contact the employer.

[4] The evidence confirmed that Mosala's job was of importance to the Rand Water and that if samples were not taken it could result in a significant impact in

the water purification process. If Mosala was to be absent it further had an impact on the shift system and his absence necessitate the appointment of an alternative shift worker. Advance notice was thus required in order to arrange for an alternative shift worker. Travel arrangements also had to be made. Mosala acknowledged in his evidence that his absence caused the Water Board harm but it was his evidence that he had no alternative due to unforeseen circumstances of his illness.

[5] Van Rensburg testified that Mosala had a history of absenteeism commencing in 1999 and that he had been issued with a written warning as well as a final written warning in 2001 and that he had exhausted his sick leave at that point in time. He also testified that there was a clear duty on the part of an employee to inform the employer if he did not arrive at work before the commencement of the shift and that "*when you come back to work you got to submit your proof that you were off sick or wherever you were.*" Van Resburg also testified that the fact that Mosala had previously submitted medical certificates indicate that Mosala had knowledge of the days that he was booked off and that he therefore knew that the medical certificates did not cover all the days. Mr. Lombart (the supervisor of Mosala) also stated in his evidence that the absence of Mosala negatively affected the employer's operational record. He in fact stated that Mosala's work record since July 2000 had been "atrocious". It was also his evidence that he could not trust Mosala because of his work record and the negative impact of his absence and that he regarded Mosala to be

unreliable.

[6] Ms Mkaza, the psycho social wellbeing officer at the employer, testified that she had been engaging with Mosala since July 2000. She testified that she had counseling sessions with Mosala regarding his absenteeism and that she had referred him to a local social worker.

[7] A certain Mr. Leigh also gave evidence. He confirmed that he knew Mosala. He also confirmed that on 21 June 2005 Mosala phoned the employer and that he had reported that he was "*gatvol for Rand Water*" and that he wanted to resign over the phone. This message was recorded in writing in a book and presented into evidence.

The events leading to Mosala's dismissal

[8] It was common cause that Mosala had been absent for a period of a month (prior to his dismissal) and that the last medical certificate indicated that he was to report for duty on the *13th of June 2005*. It was common cause that Mosala did not arrive on the 13th of June 2005 and absented himself until the *7th July 2005.* It was thus common cause that from *13 June 2005* until *14 July 2005*, Mosala was not at work. Mosala admitted that he did not consult a doctor during this period and that his medical aid had been exhausted. Mosala also admitted that he did not produce medical certificates for this period of absence.

[9] It was common cause that Mosala did not contact his supervisor to advise him of his whereabouts nor did he apply for leave. He was accordingly absent without leave. Mosala, by his own admission, only attended work on *4th of July 2005* to inform the Applicant that his brother had passed away. This was after a telegram had been sent by the Water Board on 7 June requesting Mosala to report for work. In this telegram Mosala was also informed that should he not report for work on 10 June 2005 disciplinary action will be taken against him. It was common cause that the Water Board did not receive any response to this telegram nor did the Water Board receive any medical certificates to indicate that Mosala was ill during the said period. I should also point out that there was an earlier telegram sent to Mosala (3 June 2005) advising him to attend work. He also did not respond to this e-mail. This e-mail advised him that his absence from work was considered to be unauthorised. It was not disputed that Mosala received these telegrams.

[10] A further telegram was sent to Mosala on 30 June 2005 in terms of which Rand Water noted in writing that Mosala had sent a message to his employer to the effect that he wished to resign. In this letter he was advised that he has to come into work and follow correct procedures. He was also informed that a disciplinary hearing was scheduled for 7 July 2005.

[11] In summary: Mosala was absent without leave for the period 8 June 2005 – 14 June 2005. It was common cause that no medical certificates were produced for this period.

Disciplinary hearing of 14 July 2005

[12] A disciplinary hearing was set down for the 4th of July 2005 in terms of telegram that had been sent to Mosala. The hearing was, however, postponed at the instance of Mosala (who was at the employer) and the hearing was reconvened on 14 July 2005. During the hearing of 4 July 2005 Mosala was verbally advised of the date. Mosala again failed to report for work on the 14 July 2005 and hearing proceeded in his absence. Mosala was dismissed for not being at work and absence without a reasonable cause or proof.

[13] Mosala's excuse (which was rejected by the chairperson) for not attending was that he did not have money to come to work. This despite the fact that he did not otherwise have problems in arriving for work and the fact that he had been paid all along. Van Rensburg testified that that the employer no longer trusted Mosala particularly in light of his explanation that he did not have money to arrange transport and especially in light of the fact that Mosala had been given 10 days notice of the hearing and he could have made arrangements to attend.

The award

[14] The Arbitrator acknowledged in the award that an employee must provide his labour to the employer in return of which he will receive remuneration. With regard to absenteeism, the Arbitrator accepted that it would depend upon the circumstances of each case whether or not absence from work justifies a dismissal.

[15] It is clear from the award that the Arbitrator placed the onus upon Water Rand to prove that Mosala was not sick. The Arbitrator stated the following:

> "With regard to the abuse of sick leave, the ***respondent failed to prove***[1] *that the employee unlawfully abused the sick leave as sick leave is regulated by the Basic Conditions of Employment Act and also by the Collective Agreement, unless evidence is tendered that the employee was not sick on those days which is something the respondent did not do."*

[16] This is, in my view, unreasonable. The Arbitrator placed the onus on the employer despite the fact that the employer's rules and the law require the *employee* to justify the absenteeism by submitting a medical certificate. What the Arbitrator also completely disregarded was the fact that the medical condition of Mosala was a fact which fell within the personal knowledge of

1 My emphasis.

Mosala and not his employer. The employer cannot be saddled with the burden of proving something that it has no personal knowledge of. Moreover, in the present case it was common cause that Mosala did not produce a medical certificate for his long period of absence (from 8 June 2005 to 14 July 2005, which is over a month). How can it thus be expected on the employer to prove that Mosala was ill? Mosala acknowledged in his evidence (as already referred to) that his absence caused harm to the Water Board given the nature of the duties that the employee performed. Yet he was not able to explain why he did not inform the Water Board of his whereabouts.

[17] I am in agreement with the submission that in making this ruling the Arbitrator clearly made so in variance with the documentary evidence placed before him as well as the evidence of the employer's witnesses relating to the duties of an employee to produce proof of sickness. It is clear that the Arbitrator did not apply his mind to the evidence and as a result arrived at an unreasonable finding. To restate: The Arbitrator fundamentally misconstrued the issue of onus. It is for an employee to submit medical certificates which are valid and which explain his absence from work. I am also in agreement with the submission that it appears from the award that, in misconstruing the onus, the Arbitrator effectively treated the matter as that being of incapacity rather that of misconduct. In doing so, Arbitrator took into account irrelevant factors which relate to cases of incapacity. What the Arbitrator thus failed to do was to properly consider the issue before him and which was one related to

misconduct. It doing so the Arbitrator completely ignored the fact that the misconduct in the present matter comprised of the following: The failure to report the absenteeism; the failure to produce medical certificates; the actual absence from work without permission; and the failure to respond to communications from the employer. This misconception of the onus clouded in my view the Arbitrator's view in respect of the substantive fairness of the dismissal. Furthermore, I am in agreement with the submission that the Arbitrator's consideration of irrelevant factors is material as it impacted on the Arbitrator's evaluation of the evidence in respect of the substantive fairness of the dismissal. In light of the aforegoing I am of the view that the decision arrived at by the Arbitrator is unreasonable.

Procedural fairness

[18] The Arbitrator held that the dismissal was procedurally unfair. The Arbitrator concluded in respect of the procedure as follows:

> "*It is common cause that the hearing was conducted in the absence of the employee on the 14th of July 2004, which date the applicant was personally informed of. Even though he knew about the date I am convinced that the principle of audi alteram rule (sic) was breached. It is not disputed that the applicant requested a postponement of the hearing, nevertheless the employer*

conducted it irrespective of his reasons for the request."

[19] It is unclear what the Arbitrator took into consideration in arriving at the decision. The evidence was that there was no request for a postponement. It is also not clear from the award whether the Arbitrator took into account that the hearing was postponed on 4 July 2005 when Mosala informed the employer that there was a death in his family and requested the postponement of the disciplinary hearing scheduled for that day. It was common cause that the matter was postponed to 14 July 2005 and Mosala knew of the postponed date. Notwithstanding Mosala did not attend the hearing. No shop steward also attended the hearing. There was also, as already pointed out, no request for a postponement by Mosala.

[20] The chairperson of the hearing rejected Mosala's excuse for not attending (because he did not have any money for transport). Was this a reasonable conclusion? It is trite that an employee does have the right to a pre-dismissal hearing. This was duly confirmed by the SCA in the *Old Mutual Life Assurance Co. SA Ltd v Gumbi* (2007) 28 ILJ 1499 (SCA).[2] However, the SCA also recognised that an employer is in certain circumstances entitled to proceed in

2 "[*4] An employee's entitlement to a pre-dismissal hearing is well recognized in our law. Such right may have, as its source, the common law or a statute which applies to the employment relationship between the parties (Modise & others v Steve's Spar Blackheath 2002 (2) SA 406 (LAC); (2000) 21 ILJ 519 (LAC) at para 21 and the authorities collected there). In cases such as the present, the parties may opt for certainty and incorporate the right in the employment agreement (Lamprecht & another v McNeillie 1994 (3) SA 665 (A) at 668; (1994) 15 ILJ 998 (A))."

the absence of an employee.[3]

[21] On behalf of Rand Water it was submitted that the finding of procedural fairness was irrational and that the Arbitrator did not apply his mind to the evidence more in particularly to the fact that Mosala dishonestly claimed that he needed transport money to attend the hearing. He had been paid his salary and on the 4th he attended, on his own version, the employer's premises. The Arbitrator also did not take into account that Mosala did not react to any of the letters that warned him to come to work. It was submitted that the only reasonable conclusion that the Arbitrator could have arrived at was that Mosala had waived his rights to rely upon the *audi alteram partem* principle and that he only had himself to blame for this.

[22] As already pointed out, there is no indication from the award that the Arbitrator had considered the surrounding circumstances and the fact that Mosala did not even attempt to inform the employer that he will not attend the hearing. The Arbitrator also failed to consider the fact that Mosala was recently paid and that he, of his own accord did attend the hearing on 4 July 2005. The Arbitrator also failed to consider no attempt was even made to request the

3 "[8]The right to a pre-dismissal hearing imposes upon employers nothing more than the obligation to afford employees the opportunity of being heard before employment is terminated by means of a dismissal. Should the employee fail to take the opportunity offered, in a case where he or she ought to have, the employer's decision to dismiss cannot be challenged on the basis of procedural unfairness (Reckitt & Colman (SA) (Pty) Ltd v Chemical Workers Industrial Union & others (1991) 12 ILJ 806 (LAC) at 813C-D)."

employer for assistance despite the fact that he had 10 days prior notice of the hearing. In light of the aforegoing I am of the view that the conclusion reached by the Arbitrator is unreasonable. This is clearly one of those instances where the employer was able to proceed in the absence of the employee.

[23] The Arbitrator also did not take into account that there was an appeal hearing and that an appeal hearing could cure any perceived defect in an initial hearing. It was clear from the opening statement of Mosala's representative that there was an appeal. See in this regard: *POPCRU & Others v Minister of Correctional Services & Others* [2006] 4 BLLR 385 (E); *Jerry's Security Services CC v CCMA & Others* [2001] 17 BLLR 751 (LC)].

The remedy of reinstatement

[24] The Arbitrator, without giving any reason why, decided to reinstate Mosala. There is no indication from the award what considerations were taken into account by the Arbitrator. In light of the fact that I am of the view that the decision should be reviewed and set aside in respect of the findings of substantive and procedural unfairness, it is strictly not necessary to review the decision to reinstate. I do, however, feel that it is necessary to make a few remarks in respect of the decision to reinstate.

In coming to a conclusion that dismissal was not a fair, the Commissioner ignored the fact that Mosala was absent for a month and that Mosala simply ignored repeated calls and instructions from his employer to

return to work. In fact, Mosala did not even bother to inform his employer of his absence. Upon his return Mosala was not able to provide any proof of his illness. More crucial is the fact that the Arbitrator simply ignored the evidence of Van Rensburg who specifically testified that reinstatement was not an option as the employer no longer trusted Mosala in light of his conduct.

[25] Although an Arbitrator may interfere with the sanction imposed by an employer, it must do so with due consideration to the evidence placed before the arbitration. This was not done.

[26] The Commissioner's award was issued before *Sidumo & another v Rustenburg Platinum Mines Ltd & others* [2007] 12 BLLR 1097 (CC) It is now accepted that in deciding whether or not to review the question must be asked whether the decision reached by the commissioner one that a reasonable decision maker could not reach? In deciding this question, the Court must scrutinize the reasonableness of the outcome irrespective of whether or not there are flaws in the reasoning of the Arbitrator. It is not the roll of this Court to decide whether or not it agrees with the decision but whether or not the decision falls within the bounds of reasonableness.[4]

4 See also: ***Fidelity Cash Management Services v CCMA & Others*** [2008] 3 BLLR 197 (LAC) the Court said the following in respect of reviews: *"[98] It will often happen that, in assessing the reasonableness or otherwise of an arbitration award or other decision of a CCMA commissioner, the Court feels that it would have arrived at a different decision or finding to that reached by the commissioner. When that happens, the Court will need to remind itself that the task of determining the fairness or otherwise of such a dismissal is in terms of the Act primarily given to the commissioner and that the system would never work if the Court would interfere with every decision or arbitration award of the CCMA simply because it, that is the Court, would have dealt with the matter differently. Obviously, this does not in any way mean that decisions or arbitration awards of the CCMA are shielded from the legitimate scrutiny of the Labour Court on review.*
[99] In my view Sidumo attempts to strike a balance between, two extremes, namely,

[27] I am satisfied that the conclusion reached by the Arbitrator is not reasonable and that it should be reviewed and set aside. The record before me is complete and I have no reason not to substitute the award with a finding of my own. I am satisfied on the evidence that Mosala is guilty as charged and that dismissal is a fair sanction in light of the evidence that was placed before the Arbitrator. I am also satisfied that Mosala knew about the hearing on the 14th and that he made no attempt to alert the employer to the fact that he was unable to attend. I am therefore in agreement that this is one of those cases where an employer is entitled to proceed with the hearing *in absentia*. I therefore find that the dismissal was substantively and procedurally fair. I can find no reason why costs should not follow the result.

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between, on the one hand, interfering too much or two easily with decisions or arbitration awards of the CCMA and, on the other refraining too much from interfering with CCMA's awards or decisions. That is not a balance that is easy to strike. Indeed, articulating it may be difficult in itself but applying it in a particular case may tend to even be more difficult. In support of the statement that Sidumo seeks to strike the aforesaid balance, it may be said that, while on the one hand, Sidumo does not allow that a CCMA arbitration award or decision be set said simply because the Court would have arrived at a different decision to that of the commissioner, it also does not require that a CCMA commissioner's arbitration award or decision be grossly unreasonable before it can be interfered with on review – it only requires it to be unreasonable. This demonstrates the balance that is sought to be made. The Court will need to remind itself that it is dealing with the matter on review and the test on review is not whether or not the dismissal is fair or unfair but whether or not the commissioner's decision one way or another is one that a reasonable decision-maker could not reach in all of the circumstances.
[100] The test enunciated by the Constitutional Court in Sidumo for determining whether a decision or arbitration award of a CCMA commissioner is reasonable is a stringent test that will ensure that such awards are not lightly interfered with. It will ensure that, more than before, and in line with the objectives of the Act and particularly the primary objective of the effective resolution of disputes, awards of the CCMA will be final and binding as long as it cannot be said that such a decision or award is one that a reasonable decision maker could not have made in the circumstances of the case. It will not be often that an arbitration award is found to be one which a reasonable decision-maker could not have made but I also do not think that it will be rare that an arbitration award of the CCMA is found to be one that a reasonable decision-maker could not, in all the circumstances, have reached.

[28] In the event the following order is made:

1. The award by the First Respondent is reviewed and set aside and replaced by an order that the dismissal of the Third Respondent Mr. SL Mosala was substantively and procedurally fair.
2. The Third Respondent is ordered to pay the costs.

AC BASSON, J

Judgment delivered on 28 August 2009

For the Applicant: Adv Mosam. Instructed by Cliffe Dekker Inc

For the Respondent: JG van Der Riet SC. Instructed by Cheadle Thompson & Haysom Inc

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