

**IN THE LABOUR COURT OF SOUTH AFRICA**

**(HELD AT DURBAN)**

**Not reportable**

**CASE NO: D496/08**

In the matter between:

**INDEPENDENT MUNICIPAL & ALLIED UNION  
Obo CPK DLAMINI**

Applicant

and

**SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING  
COUNCIL**

First Respondent

**AS DORASAMY N.O.**

Second Respondent

**ETHEKWINI MUNICIPALITY**

Third Respondent

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**J U D G M E N T**

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Heard on: 23 July 2009  
Decided on: October 2009

**MacROBERT, AJ:**

**INTRODUCTION**

1. This is an application to review and set aside an arbitration award handed down by the Second Respondent on 9 June 2008 in which Second Respondent found that Applicant's member's (Dlamini) dismissal was substantively and procedurally fair. No order as to costs was made.

2. Dlamini was dismissed after an internal disciplinary inquiry,

conducted in his absence, found him guilty on the following four charges:

2.1 Between the period 15 August 2007 and 23 October 2007:

You failed to attend work regularly and punctually in accordance with clause 1.2.1 of the Disciplinary Code in that you did not present yourself at work.

2.2 Between the period 15 August 2007 and 23 October 2007:

You failed to obey all lawful and reasonable instructions given by a person having authority to do so in accordance with clause 1.2.4 of the Disciplinary Code in that you did not present yourself for work on 22 October 2007 as was required in the ultimatum from management dated 5 October 2007.

2.3 Between the period 15 August 2007 and 23 October 2007:

You failed to request permission in advance for any leave of absence where possible in accordance with clause 1.2.6 of the Disciplinary Code in that you did not submit leave forms or sick leave forms supported by medical certificates for this period.

2.4 Between the period 15 August 2007 and 23 October

2007:

You contravened clause 1.2.7 of the Disciplinary Code in that absented yourself from duty without leave or permission.

3. Dlamini lodged an internal appeal in relation to procedural and substantive unfairness, the severity of the sanction and against the finding of guilty, which appeal was dismissed on 21 December 2007.
4. The Applicant thereafter referred a dispute to the Bargaining Council. The Second Respondent's award was handed down on 9 June 2008 in which it was held that Dlamini's dismissal was procedurally and substantively fair; his dismissal was confirmed and no order was made as to costs.

### **Background**

5. It is common cause that Dlamini was absent from work from 15 August 2007 to 23 October 2007 during which period no sick certificates or leave forms were submitted by him.
6. Two doctor's certificates were submitted by Dlamini for the first time at his appeal hearing. The first is one of Dr SE Cindi dated 29 August 2007 recording that Dlamini consulted Dr Cindi on 22 August 2007 and 29 August 2007 and that he was diagnosed with conjunctivitis, and certifies that he was expected to resume

duty on 8 September 2007.

7. The second certificate is dated 10 September 2007 indicating that he consulted Dr Cindi on that date when he was diagnosed with stress related psychosomatic symptoms and was certified to be not fit for duty from 10 September 2007 to 5 October 2007 and that he expected Dlamini to return to work on 8 October 2007.
8. Dlamini called in on 15 August 2007. On his version he spoke to a colleague, one Lungi, who thereafter handed the telephone to his co-supervisor Mr Brian Hutcheson, which Mr Hutcheson vehemently denied. Mr Hutcheson testified that he had learned of Dlamini's absence from a subordinate whose name he could not recall and said that Dlamini was in breach of established procedure (which was placed in contestation by the Applicant). No indication was given by Dlamini as to how long he would be off. Dlamini testified that he had asked his mother to call in again on 6 September 2007 and that she had left a message. His evidence was unsatisfactory in this respect and his mother was not called as a witness.
9. Numerous attempts were made by Third Respondent to contact Dlamini, including leaving messages on his mobile voicemail, but without success (in his appeal hearing Dlamini said that he could not be contacted because he did not want to speak to certain (unspecified) persons – the testimony of Mr Brian Hutcheson at

the arbitration).

10. On 25 September 2007 Dlamini's pay was suspended and, perhaps not surprisingly, Dlamini telephoned Ms Jackson, the manager of the section in which he worked, on 26 September 2007 and inquired as to why he had not been paid. She replied that he had been absent since 15 August; disciplinary action was being taken against him and that he should contact Human Resources.
11. During this conversation Dlamini made no mention of being ill but said that "people" were out to kill him; and that he had gone to a traditional healer. Ms Jackson replied that although there was no guarantee that this was sufficient he should nonetheless get a form from his traditional healer and repeated that he must in any event get in touch with Human Resources. Dlamini said he needed someone who spoke isiZulu and agreed that he would contact Mr Elliot Makhaye of Human Resources, but in the result only called him on 3 October 2007, a week after his call with Ms Jackson. Arrangements were made for him to come into Human Resources which he failed to do.
12. The uncontested evidence at the arbitration on behalf of the Third Respondent was that Dlamini and others had previously been informed and consulted with regard to leave procedures which the Third Respondent contended were subsequently not complied with by Dlamini in respect of his absence detailed above.

However, the precise nature and content of the rule with regard to notification was placed in dispute by the Applicant.

13. Dlamini testified that during his period of absence he saw his doctor often in Durban and further that he did not update the Third Respondent with his new address. His excuse for not dropping off the sick certificates with the Third Respondent was that he understood that this was only required on his return. His evidence was also unsatisfactory in this regard.

14. Dlamini was somewhat surprisingly not charged with failing to notify the Third Respondent appropriately and in line with established procedure, of his absence(s) which constitutes a breach of a separate rule.

### **Grounds of review**

#### **Attack on procedural fairness**

15. The Applicant first seeks to review the Second Respondent's finding that Dlamini's dismissal was procedurally unfair on the grounds that the decision in this regard is grossly irregular as the Second Respondent came to a decision that a reasonable decision maker would not have reached.

16. In particular it was contended that the Second Respondent found that the Applicant had been given notice to attend a disciplinary hearing; that he did not tender medical certificates at the hearing; and further that the Applicant "*was notified of the disciplinary*

*hearing, stated his side, was given the outcome of the hearing in writing and further afforded an appeal hearing" which led the Second Respondent to conclude that the Third Respondent had "satisfied the procedural aspect of the hearing".*

17. The Applicant's unanswerable factual contentions in this regard are that the notification of disciplinary inquiry was not received by Dlamini; there is no proof of service thereof on Dlamini, and that it was recorded at the internal disciplinary hearing that the notification was not delivered to the Applicant because his last known address was not occupied.
18. Moreover, the ultimatum of 5 October 2007 directed to Dlamini to return to work which was not heeded by him, was also not received by him.
19. That said, it does not however necessarily follow that the disciplinary proceedings in their entirety or taken as a whole are tainted by procedural unfairness. I say this because, as recorded above, on 26 September 2007 the Applicant was specifically advised by Ms Jackson that disciplinary proceedings were in the process of being instituted against him and that he should contact Human Resources (Mr Makhaye) which agreed to, but failed to do. Had he done so, he would have been informed as to the details of the impending disciplinary action.
20. Moreover, the law is now clear that an unfair disciplinary hearing

can be cured by an internal appeal under certain circumstances and where appropriate. (See e.g. *Semenya & Others v CCMA & Others* (2006) 6 BLLR 521 (LAC); *Nasionale Parkeraad v Terblanche* (1999) 6 BLLR 545 (LAC); *Eskom Holdings (Pty) Ltd v Ferreira N.O. & Others* (2007) JOL 20250 (LC) and *Jerry's Security Services CC v CCMA & Others* (2001) 7 BLLR 751 (LC). In this regard Dlamini lodged an appeal and an appeal hearing was indeed held which Dlamini attended represented by a shop steward. In this internal forum Dlamini was given an opportunity to provide an explanation for his absence and to respond to the charges and findings of the internal disciplinary hearing, which he duly attempted to do, during which he also handed in the two doctor's certificates referred to above and provided such explanation as he was able to, for his absence.

21. Therefore, whilst some of the Second Respondent's factual findings with regard to the disciplinary inquiry are clearly incorrect, and it is clear that the disciplinary hearing itself, conducted as it was in Dlamini's absence, was procedurally unfair. The issue of procedural fairness needs to be viewed in context and on an assessment of this aspect at the conclusion of the internal disciplinary proceedings.
22. Adv G van Niekerk SC on behalf of the Third Respondent contended that Dlamini is not entitled to require notification if he himself puts himself beyond communication; further, Dlamini ignored Ms Jackson's directive in the telephone conversation



referred to above to contact Human Resources (to which he agreed). Moreover, Dlamini had visited his doctor in Durban and yet at no time during his absence up to 26 September did he see fit to make contact with the Third Respondent to notify his employer of his absence save for the call on 15 August 2009 or provide sick certificates in relation to his absence.

23. Adv van Niekerk also contended that Dlamini had in effect absconded. The difficulty with this contention is that the Third Respondent has an abscondment policy which contains a detailed procedure as to how to deal with an employee who is believed to have absconded, which it was conceded was not followed to the letter. However, Ms Jackson on behalf of Third Respondent contended that it was followed in substance.

Although this policy was not followed to the letter, it is open to serious doubt whether even if it had been followed to the letter, it would have yielded positive results.

24. The further difficulty with approaching this matter as an abscondment lies in the decisions of *SACWU v Dyasi* (2001) 7 BLLR 731 (LAC) and *SABC v CCMA & Others* (2001) 22 ILJ 487 (LC) and *Khulani Fidelity Service v CCMA & Others* (2009) 7 BLLR 664 (LC), in that it is open to question whether the prescripts in these judgments were also followed to the letter. However, the Third Respondent then treated the matter as one of misconduct, as it was entitled to and pursued its internal processes through to

an appeal.

25. I therefore conclude in relation to Applicant's attack on procedural fairness the following. All things considered, Dlamini with his representative had a full and fair opportunity to put his case on appeal which he duly did. Dlamini himself has "dirty hands" – he put himself beyond the reach of his employer and his explanations in that regard are spurious. He breached his undertaking to contact Human Resources. He failed adequately to notify his employer of the length of his absence and the reasons therefor. He failed to provide an updated address. He cannot therefore now cry "foul".
26. The breach of the abscondment policy is a separate issue. Dlamini was dismissed on the charges set out above (to which should have been added, in my book, the failure to notify appropriately his employer of his absence in accordance with established procedure and practice although I make no findings in this regard save that this aggravated the absence) and abscondment is not the issue before me.
27. Furthermore, even if on a conspectus of the entire internal process the conclusion was to be reached that the process was tainted by procedural unfairness, no compensation would in any event be merited for the reasons given.

**Attack on substantive fairness**

28. I turn now to the Applicant's attack on the substantive unfairness of Dlamini's dismissal.
29. Applicant's counsel contended that Dlamini had a legitimate and justifiable reason for his non-attendance at work, having been declared unfit for duty for the two periods referred to in the two doctor's certificates. It was contended that these periods comprised the overwhelming majority of the period for which he was charged. It was also contended that there was no evidence that Dlamini received the ultimatum from management dated 5 October 2007, with which I agree.
30. It is common cause however that the Applicant did not submit at all, medical certificates for the period 15 August to 22 August 2007, a period of a week, and for the period 8 October to 23 October, a period of some 2 weeks. (At the arbitration Dlamini contended that he had certificates for the full period of his absence but failed to produce them, which is extraordinary given the nature of the charges against him and the fact that he was able to produce only two certificates previously at the appeal hearing). Moreover, Dlamini did not mention his illness when he called Ms Jackson on 26 September 2007 or the nature thereof but instead referred to a traditional healer, certification from which never materialised despite Ms Jackson's exhortation to him to produce same. At his appeal hearing he also mentioned that

there were "people" (unspecified) out to kill him. This provides no excuse for not responding to messages left on his cell phone from his employer. He did not notify the Third Respondent of his absence or the reasons therefor, save for the call on 15 August 2007 (above) and his allegation of a call from his mother on 6 September which is open to more than serious doubt – all of which is totally unacceptable, and aggravates the situation.

31. The Third Respondent's counsel also contended that it was dubious that conjunctivitis would warrant Dlamini's absence from work at all, let alone for the period certified; that Dlamini did not respond to messages left on his cell phone despite that his number remained in use, but that he nonetheless was able to contact Third Respondent's Ms Jackson (whose number he had) with alacrity once he realised his pay had been stopped.
32. I agree with Third Respondent's counsel that no case has been made out for interfering with the Second Respondent's award. There is no error, unreasonableness or irrationality in the underlying reasoning of the Second Respondent in relation to the substantive fairness of Dlamini's dismissal. The conclusion reached was certainly one that a reasonable decision maker could reach, and I can find no basis to interfere with it.

Insofar as costs are concerned, the following: Applicant had an arguable case in relation to the issue of procedural unfairness which was one of two legs of attack. However, the attack on the substantive

unfairness of the dismissal was devoid of any merit. I have also taken into account the ongoing relationship between the Applicant and the Respondent in coming to the conclusion that the Applicant should pay half of the Third Respondent's party-and-party costs including half the taxable costs of senior counsel.

33. In the premises the following orders are made:

33.1 The application to review and set aside the arbitration award of Second Respondent is dismissed;

33.2 The Applicant is to pay half of the Third Respondent's party-and-party costs including half the taxable costs of senior counsel.

**MacROBERT AJ**

**Date:**