

IN THE LABOUR COURT OF SOUTH AFRICA
(HELD AT JOHANNESBURG)

CASE NO JR 1412-05

In the matter between

VODACOM (PTY) LTD

1st Applicant

and

**COMMISSION FOR CONCILIATION,
MEDIATION & ARBITRATION**

1st Respondent

L P LUCWABA, (N.O.)

2nd Respondent

MWASA obo BENJAMIN MONTHATO

3rd Respondent

JUDGMENT

LAGRANGE, J

Introduction

1. The applicant ('Vodacom') seeks to review and set aside an award issued by the second respondent ('the commissioner') on 9 June 2005. The commissioner decided that the dismissal of Mr Monthato, the third respondent ('Monthato'), by the applicant in November 2004 was substantively and procedurally unfair and reinstated him without backpay. In terms of the award, Monthato would have returned to work on 1 July 2005.
2. Monthato was dismissed for unauthorized and uncommunicated absence from work in that he failed to notify his employer of his whereabouts from 02 to 14 November 2004.

The Award

3. The main features of the award for the purposes of this review are set out below.
4. The employee did not come to work on Tuesday 2 November 2004. His manager Mr Mokholo ('Mokholo'). Mokholo testified that he asked the other staff who normally travelled with Monthato if they had seen him, but they said they hadn't.
5. There was a dispute as to whether Mr Mabaso, a colleague of Monthato's who gave Monthato lifts to work, informed Mokholo on the morning of 2 November that Monthato was ill. Mabaso said that when he had gone to fetch Monthato that morning, Monthato had not come out of his house when he hooted. When he went in to see why he had not come out, he found Monthato who said he was ill and asked Mabaso to inform Mokholo accordingly. Mokholo did not remember Mabaso giving him such a message.
6. By 12h00, which was the cut-off time by which Monthato ought to have contacted him, Mokholo had not heard from Monthato. Accordingly, he sent Monthato an SMS asking him to contact him. The SMS read: "*Benjamin. We are concerned about your whereabouts, please give me a call ...*"The SMS did not elicit any response from Monthato. Mokholo sought advice from the HR department and was told to wait and see if Monthato called. By Friday 12 November 2004, nothing had been heard from Monthato, and the HR department then advised Mokholo to formulate charges against Monthato.
7. Mokholo delivered the charges to Monthato at his home on the same day. When Mokholo found Monthato at home the latter told him he had been sick but would be back at work on Monday. On Monday, 15 November 2004, Monthato arrived at work and provided a certificate dated 12 November, which had apparently issued by a traditional healer. The validity of the certificate was not accepted by the HR department. Mokholo tried to contact the traditional healer but could not reach her on the number provided by Monthato. Monthato said that this was the only number he had.
8. Mokholo invited Monthato to speak to him directly about his work attendance without his immediate supervisor present, if he wished. He also asked him if he had really needed nine days off for 'heartburn' and Monthato affirmed that he had.

9. The hearing was postponed on the first occasion because Monthato did not have a representative. On the second occasion it was postponed because Monthato and his representative requested the recusal of the chairperson on account of the fact that she had chaired a previous hearing which had resulted in Monthato receiving a final written warning for unauthorized absenteeism in October 2004. The chairperson accordingly recused herself and the enquiry was postponed to a third date on 25 November 2004. On 23 November 2004, Monthato's representative sent an email requesting the enquiry to be postponed to 30 November 2004 as he could not attend the scheduled hearing the following day. The email was forwarded to the applicant next day and he was advised to obtain alternative representation as the enquiry would proceed the following day. On 25 November 2004, the applicant attended alone and reiterated the request to postpone the hearing on account of not having a representative. This request was refused and the hearing proceeded. Monthato remained present but decided against giving evidence in his own defence.
10. The main reason underpinning the commissioner's conclusion that Monthato's dismissal was substantively unfair, is his finding that Vodacom had failed to prove on a balance of probabilities that Mabaso did not give Mokholo the message that Monthato was ill. The commissioner reasoned that the real issue was Monthato's failure to communicate his absence on account of illness in the proper way, not that he had failed to do so at all. Consequently, because Monthato had communicated his absence to Mokholo through Mabaso, his absence could not be said to be uncommunicated and accordingly the applicant had failed to discharge the onus of proof on the charge.
11. Three subsidiary inferences lead the commissioner to make these findings:
 - 11.1. When Mabaso testified, his evidence that he gave Mokholo the message was not directly challenged. Instead, his credibility was challenged on the basis that he himself had been dismissed for the same offence by the time he testified. The commissioner did not find this line of attack on his credibility persuasive;
 - 11.2. Secondly, even though Mokholo stated that it was a rule that it was not acceptable to send a message via colleague and this was part of the employment contract, he did not explain why the contract was not included as part of the

bundle;

11.3. Lastly, the commissioner found that it was an inescapable inference that if Monthato had not notified Mokholo of his absence, Vodacom would have treated him as having deserted. As it did not, this meant that Mokholo had been notified but not in the preferred way. This conclusion is central to the commissioner's reasoning.

12. The commissioner did accept that Monthato had acted very irresponsibly by not responding to Mokholo's SMS as he should have, but found that this failure was not sufficient to justify a conclusion that the employment relationship had completely broken down.
13. The commissioner also found the dismissal was procedurally unfair. The nub of the issue was that he concluded that the date of 25 November 2004 had been a 'tentative date' for the hearing, depending on whether or not Monthato's representative, Mr C Mashabane would be able to attend. It is apparent from the transcript of the hearing on 22 November 2004 that Mashabane did indicate that his work commitments might prevent him from attending.
14. Relying on this, the commissioner found that it could hardly have come as a surprise to the applicant when it received the email from Mashabane on 23 November that he would be available on 30 November 2004 instead. Secondly, the commissioner observed, correctly, that was a needless delay of a whole day in notifying Monthato that Mashabane would not be able to attend and he should find an alternative representative. Instead of having two day's notice to find an alternative representative, Monthato was only given a day's notice. As the commissioner put it: *"Considering that the applicant [Monthato] was on duty where was he supposed to find time to get a new representative and familiarize that representative with the merits of the case within 24 hours?"*
15. The employer interpreted the request for a further postponement as a delaying tactic. The commissioner could not understand how this could be the case when 25 November 2004 had only been a tentative date anyway. The previous postponement caused by the recusal request had been for a legitimate reason too.

Grounds of Review

16. Vodacom attacked the commissioner's reasoning on both substantive and procedural fairness. I will only focus on those grounds of review which it persisted with at the review hearing.
17. The applicant argued that even if Mabaso had communicated Monthato's absence on 2 November 2004 as she concluded, she failed to consider, that this communication did not address Monthato's much longer absence from 3 to 12 November 2004. Moreover, she failed to consider that the remaining period was not covered by the medical certificate from the traditional healer that was issued *ex-post facto* , and that the traditional healer did not even appear to be registered.
18. Vodacom attacked the commissioner's findings on procedural fairness on the basis that she failed to take account of the fact that:
 - 18.1.the postponement of the enquiry to 25 November 2004 was not a tentative or provisional postponement;
 - 18.2.the company was prepared to take steps to ensure the presence of Mashabane at the enquiry, and
 - 18.3.the enquiry had already been postponed twice at the employee's instance.
19. It appears that the commissioner's approach to the evidence before her in evaluating the issue of substantive fairness was unduly affected by her interpretation of Vodacom's failure to treat Monthato's absence as desertion. This led her in turn to disregard other pieces of evidence.
20. Firstly, the commissioner was obviously of the view that Vodacom elected not to treat Monthato's absence as an act of desertion only because it must have been notified of his absence by Mabaso. However, in so doing the commissioner closed her mind to other possibilities. Thus, an unexplained absence by an employee may be dealt with either simply as a matter of unauthorized absenteeism or as a basis for alleging desertion. It does not

follow that if Vodacom did not receive notice of Monthato's absenteeism on 2 November 2004, it was compelled to treat his case as one of desertion instead of a case of uncommunicated and unauthorized absenteeism. The commissioner closed her mind to consider the alternatives available to the employer in Vodacom's situation. Having adopted this mutually exclusive view of the alternative disciplinary approaches of desertion and unauthorized absenteeism, this was decisive in her evaluation of whether or not it was probable that Monthato's absence had been communicated to Mokholo on 2 November 2004 and she materially misdirected herself in this respect. Instead she should simply have weighed up all the evidence on this question without making an assumption about the disciplinary options available to the employer.

21. Had she done this, she would have had to consider that the SMS sent on 3 November 2004, did not indicate that Monthato's absence on the previous day had been previously communicated to Mokholo. The commissioner would also have had to consider that Monthato did not respond to the SMS in any way, even if just to say that he had asked Mabaso to speak to Mokholo. She would also have had to consider that when Mokholo was given the charges on 12 November 2004, he failed to mention that he thought he had communicated the reason for his absence.
22. It is true that the commissioner did consider Monthato's failure to respond to the SMS as irresponsible, but because of the stance she had already adopted about the likelihood of Mabaso having reported to Mokholo based on the choice of charges available to Vodacom, she did not consider how it affected the probabilities that the Mokholo had been notified of his absence by Mabaso. The arbitrator also did not appear to have had regard to Mokholo's evidence of the conversation with Monthato when he visited him at home on 12 November 2004 to deliver charges for the enquiry. According to Mokholo, he asked Monthato why he had not responded to the SMS. The answer was that he intended to. He did not say that he thought it was unnecessary because he had already informed Mokholo via Mabaso. He also conceded under cross-examination that he had a company phone, There is no record of Mokholo's cross-examination, but in his own evidence Monthato did not offer an alternative version of the conversation which took place when the charges were delivered.

23. I believe that the arbitrator's reasoning on the issue of substantive unfairness, shows that she failed to weigh the evidence for and against whether or not Monthato had indeed informed Mokholo via Mabaso of his absence in a balanced manner. This is not a question of whether or not she came to the correct conclusion, but whether she effectively disregarded much of the relevant evidence because of the approach she had adopted. The Applicant is also correct that she failed to consider the entire period of Monthato's absence from work and that, even on his own account, he did not communicate with his employer during the greater part of his absence from 3 November 2004 onwards until he received the charges from Mokholo. These issues lie at the heart of the arbitrator's substantive fairness of the dismissal together with Monthato's prior disciplinary history and for the reason discussed above the arbitrator's findings on the substantive unfairness of Monthato's dismissal must be set aside.
24. In relation to finding of procedural unfairness, I am satisfied that the transcript of the disciplinary hearing of 22 November 2004 reveals that Mashabane did raise the possibility that his work duties might make it difficult for him to attend the postponed hearing on 25 November. It is also correct that the company offered to intervene on his behalf if he had difficulties in being able to attend on account of his duties but he did not want assistance and implied he could handle them himself. When the hearing adjourned on 22 November, there was no express understanding that the date of 25 November was merely tentative. Based on the evidence, it might be more correct to say that the company had clearly decided to postpone the matter to 25 November and that Mashabane had expressed some concerns he might not be able to attend, but no agreement was reached on what would happen if he could not sort out any difficulties in that regard on his own. On a correct reading of the evidence, the commissioner might have been overstating matters in finding that 25 November was a tentative date contingent on Mashabane's availability, but I cannot say it was a finding that was insupportable on the evidence and accordingly one that no reasonable arbitrator could reach.
25. I also do not agree that the arbitrator failed to consider the fact that the enquiry had been twice postponed already. She expressly dealt with the previous postponements and found them to have been legitimate. The arbitrator also queries why the employer only conveyed the message that it would proceed on 25 November when it received notification of

Mashabane's inability to attend the hearing two days in advance.

26. Accordingly, I do not believe the commissioner was unreasonable in considering if it was procedurally unfair of the employer to have insisted on proceeding on 25 November 2004 in the absence of Monthato's representative and after notifying him later than it should have that he would have to find alternative representation.

Remedy

27. The applicant has requested that the matter be referred back to the CCMA for rehearing in view of the significant gaps in the record. In court, Monthatho's representative submitted that if the court set the award aside it should substitute its own decision for that of the arbitrator. If this matter had come to court earlier there might have been some merit in allowing the matter to go back. On the other hand, it must be said that notwithstanding the gaps in the transcript, the parties are not really at odds over the significant parts of the evidence. The differences between them relate to the interpretation of evidence that is common cause and do not entail any major dispute over what the evidence actually was. For these reasons, I believe it is more prudent to substitute the court's judgment for that of the arbitrator in so far as the arbitrator's finding of substantive unfairness should be set aside and a remedy afforded for the procedural unfairness.

28. In considering the substantive fairness of Monthato's dismissal I believe the following factors are relevant:

28.1. On balance I do not believe that Mabaso was requested to notify Mokholo of Monthato's illness on 2 November 2004. It seems that if Monthato had requested Mabaso to report his illness, it is very unlikely he would not have mentioned this when he saw Mokholo on 12 November and was asked why he had not responded to the SMS of the same day. In any event, even if he thought he had taken reasonable steps to notify his employer of his absence on 2 November 2004, it does not explain why he did not respond to the SMS which expressly asked him to contact his manager, especially when that message gave

a clear impression that his manager did not seem to know why he did not come to work on that day. Any reasonable person receiving such an SMS ought to have been concerned, even if he had asked someone to convey a message to his employer, and would have made the effort to communicate with his manager directly.

28.2. Moreover, even if Monthato had asked Mabaso to convey a message on 2 November 2004, he ought to have followed up on that when it became apparent he would not be at work on subsequent days as well, especially after he received the SMS from his manager. I agree with the applicant that even if there had been a communication to the company via Mabaso on 2 November 2004, that would have been insufficient to explain his absence on subsequent days.

28.3. When Monthato eventually tendered a reason for his extended absence he relied on a certificate issued by an unregistered traditional healer on the very date he was handed the charges. Nothing on the certificate indicates that Monthato consulted the healer prior to that date, and even if the certificate had been issued by a registered healer, it could not confirm the state of Monthato's health prior to 12 November 2004.

28.4. In the circumstances, it seems reasonable to conclude that the reason for Monthato's absence was probably not communicated on 2 November and certainly not until he offered an explanation on 12 November 2004 when Mokholo found him at home. Further, the certificate he tendered in support of his alleged illness cannot serve to justify his absence for legitimate medical reasons, because of the shortcomings mentioned already.

28.5. It is true that the contract was not produced to validate the rule that Monthato ought to have notified the employer of his absence. However, Monthato did concede that his contract at least required him to inform his employer of his absence. As he did nothing after 2 November, even on his own version, he did not comply with this requirement for most of his extended absence.

28.6. Added to this, the applicant already had two prior warnings, one of which was final and still valid for the same offence. This would seem to be an instance where the previous warnings failed to have the desired effect in correcting the particular misconduct in question and the employer was entitled to conclude that further progressive discipline was unlikely to lead to an improvement.

29. On the issue of an appropriate remedy for procedural unfairness the failing on the part of the employer was that it was over-hasty in insisting the enquiry must proceed on 25 November 2004, knowing that it had only given Monthato one day to find an alternative representative when it knew two days in advance that Mashabane would not be available. Mashabane had said he was available on 30 November 2004, but the employer does not appear to have explored the feasibility of proceeding on another date in the near future if that date was not suitable for it. The reasons for the previous postponements were not frivolous ones and the delays between dates were not extensive. The right to representation does not mean that if an employee's chosen representative is rarely available a hearing cannot proceed until that representative makes himself available. If accommodating a busy representative entails significant delays in holding the enquiry it is not unreasonable to expect an employee to be asked to find an alternative representative.
30. However, when a chosen representative does become unavailable, the employee should be afforded a reasonable opportunity to find a substitute as that individual may have to prepare for the case from scratch. To give Monthato barely a day to find and consult with an alternative representative when the employer already knew of Mashabane's unavailability a day before seems to have been unnecessarily short notice, and there is no reason why Monthato should have been expected to participate in the hearing without representation under those circumstances.
31. The hearing with representation Monthato ought to have had took place before the commissioner and ended on 22 April 2005. The period between the date of dismissal and the conclusion of the hearing was approximately 5 months, without any obvious delays attributable to the applicant. On the other hand, there is no reason to believe that it would have taken beyond mid-January 2005 to convene the internal hearing with Monthato having

an alternative representative. In the circumstances an award of one-and-a-half months' remuneration as compensation for the resulting procedural unfairness seems appropriate

Order

32. In the light of the above, an order is made in the following terms:

32.1. The second respondent's finding that the third respondent's dismissal was substantively unfair is set aside and substituted with a finding that it was substantively fair;

32.2. The second respondent's finding that the third respondent's dismissal was procedurally unfair is upheld

32.3. The applicant is ordered to pay the third respondent an amount equivalent to one and a half months' earnings calculated at his rate of remuneration as at the date of his dismissal on 25 November 2004, within 21 days of the date of this judgment, subject to the following. As there is no evidence before me of the actual rate of remuneration a specific rand amount cannot be stated, but ought to be readily ascertainable. However, in the event that the parties are unable to agree on the third respondent's monthly remuneration, either party may apply to the court to have the precise quantum determined, in which case the parties will be required to submit evidence on affidavit setting out their respective contentions on the issue with the necessary supporting documentation .

32.4. No order is made as to costs.



ROBERT LAGRANGE

JUDGE OF THE LABOUR COURT

Date of Hearing: 19 March 2010

Date of Judgment: 11 November 2010

Appearances

For the Applicant: Mr M Van As instructed by Edward Nathan Sonnenberg Inc

For the third respondent: Mr Lecoge of Denga Attorneys Inc.