REPUBLIC OF SOUTH AFRICA

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case Number: JR 2679/10

In the matter between,

Tubatse Chrome (Pty) Ltd	**Applicant**
and	
Metal and Engineering Industries Bargaining Council	**First Respondent**
Raymond Dibden N O	**Second Respondent**
National Union of Mineworkers	**Third Respondent**
Sandra Mahlaela	**Fourth Respondent**

Heard: **08 January 2013**

Delivered: **08 February 2013**

Summary: **Review – dismissal for taking unauthorized leave in excess of 5 days - provision in Code for dismissal in absentia after 5 days not unfair provided procedure exists to allow employee to justify absence on return to work – irregularity in focusing on intention to desert rather than issue of justification for absence in determining substantive fairness – irregularity in finding the absence justified or reasonable on the evidence – award reviewed and set aside.**

JUDGMENT

MARCUS AJ

Introduction

[1] This is an application in terms of section 145 (1) and (2) of the Labour Relations Act 1995 to review and set aside the award dated 5 October 2010 issued by the Second Respondent under the auspices of First Respondent under case reference MEGA 29227, finding that Fourth Respondent `s dismissal by the Applicant was not for a fair and valid reason and ordering the Applicant to re-employ the Fourth Respondent on the same benefits as were applicable as at date of dismissal.

Background

[2] Fourth Respondent ("the employee") was employed by the Applicant ("the employer") in May 2008 as an operator prior to the latter terminating her services by letter on 14 April 2010 on grounds of desertion of her employment.

[3] The termination resulted from the employee absenting herself from work from 7 April 2010 until 14 April 2010 without advising her employer of her intended absence over this period or obtaining prior permission from her employer. On 7 April 2010, the first day of absence, the employee sent her supervisor an sms stating that she was "still in Joburg from Mafikeng due to personal problems with (her boyfriend).I thought I was going to arrive early." It seems her supervisor understood the sms to mean the employee would arrive at work later that day (7 April 2010) whereas the employee avers that she intended to convey she was on route to Mafikeng and might be back later that day (7 April 2010) or at

latest the following day. However the employee did not return to work until 14 April 2010. She had no further communications with her supervisor to inform him she would be away from work after 7 April 2010 or for this extended period.

[4] On 12 April 2010 (the sixth day of absence), the employee was contacted by an official from human resources department and reminded of the Applicant `s policy and procedure applicable on desertion, namely, that unauthorised unexplained absence exceeding five days would result in the employee `s dismissal. Employee intimated she would report for duty which she did two days later on 14 April 2010 when she was advised by the official that in terms of Applicant `s Code and procedure, after the fifth day of absence, her services had been terminated on grounds of deemed desertion by letter dated 14 April 2010. In terms of the Code, unauthorised absence exceeding five days is also listed as a serious offence for which the employee can be dismissed.

Reasons for absence from 7 April 2010 until 14 April 2010

[5] The explanation for her absence tendered by the employee was that she had been experiencing ongoing problems in her relationship with her boyfriend since 2009, leading to her experiencing emotional disturbance and “mental pressures” which led to her being booked off work on occasion by doctors. On 6 April 2010, the day before she was due to report for her shift, her mother put her in touch with one Mahlakoane, a sangoma, since, according to her mother, the only way to resolve her problems was for the employee to be trained as a sangoma. Without obtaining prior permission from her employer, the employee met with Mahlakoane in Mafikeng on 7 April 2010 to undergo such training, after sending aforementioned sms to her supervisor. Whilst she had believed the “initiation process” would be completed on 7 April, enabling her to return to work that day or at latest the following day, the employee claims she was informed by Mahlakoane that her initiation would take eight continuous days to complete, an averment at

odds with the note from Mahlakoane submitted by the employee upon her return to work on 14 April 2010, stating that she performed the initiation from 12-14 April 2010.

Leaving aside for the present this apparent contradiction in their versions, employee avers that she "tried to call (her supervisor) and hear whether he would allow me to spend the days up to the 13th but he did not answer the call". Having failed to get in touch with her employer to obtain authorisation to take off time to complete the initiation course, the employee decided to take the leave anyway, resulting in her extended period of uncommunicated and unauthorised absence which, after the fifth continuous day, entitled the applicant, in terms of its code, to terminate her services on grounds of deemed desertion as it did on 14 April 2010.

The employer `s code provides for termination in these circumstances at the end of the fifth day of absence. I can find nothing unfair in such a procedure, which seems to represent a rational response by an employer to an extended period of unexplained unauthorised absence by an employee, provided the employer provides the employee with a fair opportunity to explain her unauthorised absence should she return to work, enabling the dismissal to be reversed where an acceptable explanation for absence is provided, as the employer did in this instance in implementing its undertaking in the termination letter of 14 April 2010 to hold a post-dismissal enquiry to enquire into the reasons for her unauthorised absence should she return to work. Two enquiries and an appeal ensued which resulted in the Applicant confirming her dismissal. Second Respondent (the Commissioner) concluded the dismissal was not effected for a fair and valid reason and was substantively unfair, resulting in his award of re employment which is challenged by the Applicant as being subject to review on various grounds.

Basis of Second Respondent `s conclusion of substantive unfairness

[6] Whilst I agree with the submission by applicant`s counsel that the Commissioner`s conclusion of substantive unfairness was not motivated by any satisfactory or coherent reasons for such conclusion and was not preceded by any process of reasoning as might evidence that the Commissioner had properly considered and applied his mind in determining this issue, it would appear that his conclusion of substantive unfairness rests on two findings, the first being his finding that there is no evidence to show that the employee ever intended not to resume work, and the second that her absence was " involuntary as it was a result of other circumstances, namely, (employee`s) poor interpersonal relationship with her boyfriend ". Both findings are challenged by the applicant as subject to being reviewed as gross irregularities in the conduct of the arbitration in terms of section 145 (2), and, substantively, as findings which no reasonable Commissioner could have reached on the evidence before him (the latter ground referring to the standard of review enunciated by the Constitutional Court in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (2007) 28 ILJ 2405 (CC) at para 2439F).

Commissioner `s finding that employee had no intention to desert

[7] In my view, the Commissioner`s focusing on this issue in the course of his determination that the dismissal was substantively unfair, is in itself a misdirection and gross irregularity within the meaning of section 145 (2) of the Act. In so doing, I believe he misconceived and hence failed to properly consider and apply himself to the true issue before him in regard to the question of substantive fairness, namely, whether the employee had furnished sufficient and reasonable justification for her extended absence beyond 7 April 2010 (it was clear she would not have been dismissed had she returned to work that day or even the following day as she had indicated in her sms to be her intention). In my view, it was not required in the determination of substantive fairness for the Commissioner to rule on the existence or otherwise of an intention to

desert, inasmuch as, when an enquiry into the justification for her unauthorised absence was held upon the employee`s return to work, the existence of such intention was no longer significant or of particular relevance to the issue inasmuch as the employee had now returned to work. At this stage, the issue of substantive fairness translated chiefly into an enquiry into the justification for her extended unauthorized absence. This was the substantive issue to which the Commissioner was primarily required to apply himself in determining the issue of substantive fairness at the Arbitration.

In my view, the Commissioner`s approach in focusing on whether the employee intended to desert was flawed and the undue emphasis placed by him on this issue in the determination of substantive fairness, amounted to a gross irregularity within the meaning of section 145 (2) which prevented the applicant from having its case fully and fairly determined. This serves to render such approach reviewable in terms of section 145 (1). See **(***Southern Sun Hotel Interests (Pty) Ltd v CCMA and Others (*2009) 11 BLLR 1128 (LC) and *Herholdt v Nedbank Ltd.*[1]

[8] Commissioner`s finding that employee`s absence was 'involuntary as it was a result of other circumstances, namely, (employee`s) poor interpersonal relationship with her boyfriend'.

Applicant challenges this finding as one not supported by the facts or evidence before the Commissioner and hence not one that a reasonable Commissioner could have arrived at, which renders it liable to be set aside on review on application of the Sidumo test.

[9] I agree. On a proper analysis of the facts, the employee`s absence was not in direct consequence of her "poor interpersonal relationship with her boyfriend". On her own version, these problems had existed since 2009 and her supervisor was allegedly aware of them. This distinguishes her situation from the circumstances giving rise to the LAC `s finding in the recent case of *Kiewits Kroon Country Estate (Pty) Ltd v*

[1] 2012 33 ILJ 1789 (LAC), at 1801 ,para 39.

Mmoledi and Others **(**2012)11 BLLR 1099 (LAC). In the present case, the notes from the sangoma submitted by the employee in support of her absence, do not suggest her mental or emotional condition at the time made it necessary or compelling for the employee to undertake the sangoma`s initiation at the time that she did, between 7 and 14 April 2010, without prior authorisation from her employer; that there was any need or urgency for her to undertake the initiation at that point in time, particularly considering that the employee's problems which the course was intended to address had been ongoing since 2009, or that any particular harm or adverse consequence would ensue from her not performing the initiation on 7 April 2010. Indeed, the sangoma's notes do not even support the employee `s averment in her answering papers that she stayed away after 7 April 2010 in order to complete the initiation over eight days as advised by the sangoma. The note from the sangoma submitted by the employee on her return to work on 14 April 2010 states that the employee was performing the ritual initiation for her ancestors from 12-14 April 2010. A second subsequent note stated that he had examined the employee on 7 April 2010. Neither note suggests the employee's mental or physical condition prevented her reporting for work at that time or that her mental or physical health would be adversely affected by her doing so, as was the case in *Kiewits*. This places the present facts in a quite different category from the circumstances prevailing in *Kiewits* where the sangoma had given evidence at the employee `s enquiry that the employee was very ill when she attended him for treatment and "would have died or suffered a serious misfortune if she would have ignored the ancestors' calling and continued to work.". The Court there accepted the employee `s claim that she had received a call from the ancestors that she believed she was bound to obey on pain of death.

[10] In the present case, neither the employee or sangoma placed any evidence before the internal enquiry suggesting any adverse or harmful consequence to the employee would result from her not attending or continuing with the initiation course on 7 April 2010, or that her condition

called for her immediate participation in that course. The evidence before the Commissioner does not suggest her absence on the days in question was the direct or immediate consequence of her emotional problems or relationship with her boyfriend as found by the Commissioner. On her own papers, these problems had been ongoing since the previous year. Employee, on her own papers, elected to stay away from 7 April 2010 in order to complete the initiation course at her own convenience and that of the sangoma, without regard to the convenience of her employer. She acknowledges she elected to do so without obtaining prior authorisation from her employer. Her extended absence arose from the employee's decision to continue with the course after she was unable to contact her supervisor to obtain authorisation for her absence. The outcome was the confirmation of her dismissal following hearings held to enquire into her reasons for absence. Nowhere in her papers does the employee suggest her physical or emotional condition required that she perform the initiation ceremony for her ancestors there and then, when meeting with the sangoma on 7 April 2010. She only resorted to this course of action as a means of addressing her personal problems, at the suggestion and instigation of her mother. Nor do the sangoma's notes submitted by the employee, suggest that her condition required her immediate attendance to perform the initiation. Indeed, as pointed out earlier, the sangoma's note rather contradicts the employee's version in her answering papers that she took leave of absence on 7 April 2010 to comply with the sangoma`s advice that she needed eight continuous days to perform the initiation. The note from the sangoma states that she performed the ritual practice for initiation from 12-14 April 2010.

[11] I must therefore concur with applicant's submission that the evidence before the Commissioner does not suggest the employee`s unauthorised absence was involuntary or due to circumstances beyond her control. Her absence was at best for the employee the result of her voluntary decision, without authorization, to take off the eight days she claims she was advised by the sangoma were required for the initiation

process, an averment itself at odds with the sangoma `s note proffered by the employee in justification for her extended absence, in which the employee is stated to have performed her ritual practice from 12-14 April 2010.

Even were this contradiction in her explanation to be overlooked and one were to accept her explanation that she took the time off to perform the initiation, the employee does not suggest in her papers that her condition required her engagement in the process there and then without obtaining prior authorisation from her employer. This is conceded by the employee's statement in her answering papers that when she learned from the sangoma that her initiation would take eight days to complete, she 'then tried to call (her supervisor) to advise him and hear whether he would allow me to spend the days, that is, to the 13th, [my underlining], but he did not answer the calls'. Having properly attempted to contact her employer for the required authorisation to take the leave required to perform the initiation and having failed to do so, her proper course was then to return to work and seek the required authorisation. Had she done so, she would have avoided her dismissal. Instead, at best for the employee, she elected to remain in Mafikeng to perform the sangoma's initiation without obtaining the employer `s permission for her extended absence, hence the ensuing confirmation of her dismissal by the employer following her return to work.

[12] On the evidence before the Commissioner, the employee has not established reasonable justification for her unauthorised absence from 7 April 2010 until 14 April 2010, which is a dismissible offence in terms of the Code. For the reasons stated, I agree with the applicant that the Commissioner's conclusion that the dismissal was not for a fair or valid reason was not one that a reasonable Commissioner could have arrived at, which renders it liable to be set aside on review in terms of the *Sidumo test*. I am further of the view that in concluding the dismissal to be substantively unfair, the Commissioner misconceived the issues and committed a gross irregularity by focusing on the question of whether

intention to desert had been established when this issue had been overtaken by the employee `s subsequent return to work and her attempt to justify her unauthorised absence by her decision to stay away in order to perform the initiation. A further gross irregularity arose from the Commissioner's failure to properly consider and address the real issues pertaining to substantive fairness, pertinently the question as to whether the employee had justified her unauthorised absence or proffered an acceptable explanation therefore, rather than whether she had intended to desert. In finding the employee's absence to be involuntary or due to circumstances beyond her control, and in view of the absence of satisfactory evidence supporting such conclusion and the absence of reasons given by the Commissioner for this conclusion, the inevitable inference is that he has failed to apply his mind to this issue, thereby preventing the applicant from having its case fully and fairly determined. In *Herholdt*, the court stated that one of the duties of a commissioner, in answering the question whether the dismissal was for a fair reason, is to determine the material facts and then to apply the provisions of the LRA to those facts. Commissioners who do not do so do not fairly adjudicate the issues.[2]

In the *Herholdt* decision, the LAC confirmed the Labour Court's view that a failure by the Commissioner to have regard to material facts will constitute a gross irregularity in the conduct of the arbitration as this will preclude the aggrieved party from having its case fully and fairly determined. The Court stated that a 'proper consideration of all the relevant and material facts and issues is indispensable to a reasonable decision and if a decision maker fails to take account of a relevant factor… the resulting decision will not be reasonable in a dialectic sense. Likewise where a commissioner does not apply his or her mind to the issues in a case, the decision will not be reasonable'.[3] The Court stated it to be sufficient to warrant a review on this ground 'that the Commissioner has failed to apply his mind to certain of the material

[2] *Heroldt* at 1801 H.
[3] *Heroldt* 1800 F-H.

facts or issues before him, with such having potential for prejudice and the possibility that the result may have been different'[4].

[13] In conclusion, I find the commissioner, in concluding the dismissal to be substantively unfair, has ignored or discounted relevant evidence, has taken into account irrelevant evidence, and has failed to properly apply his mind to material issues and as a consequence has committed gross irregularities in the conduct of the arbitration which have precluded the Applicant from having its case fully and fairly determined. The decision was in my view also one that a reasonable Commissioner could not have come to. On both these grounds, I am of the view that the award is liable to be set aside in terms of section 145 of the Act. In light of this conclusion, there is no need for me to have regard to the further grounds of review raised by the applicant. I have decided not to make a costs order. I make the following order:

[14] It is ordered that;

1 The award dated 5 October 2010 issued by the Second Respondent under the auspices of First Respondent under case reference MEGA 29227, is reviewed and set aside.

2 The dispute is referred back to the First Respondent to conduct an arbitration de novo before a Commissioner other than the Second Respondent.

3 There is no order as to costs

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Marcus AJ

Acting Judge of the Labour Court

[4] *Heroldt* at 1802 A-C.

APPEARANCES

FOR THE APPLICANT: Adv Kutumela

FOR THE RESPONDENT: Mr M.E.S Makinta