

**IN THE LABOUR COURT OF SOUTH AFRICA**

**HELD AT PORT ELIZABETH**

**Not reportable**

**CASE NO. P623/02**

DATE HEARD: 6/5/03

DATE DELIVERED:6/5/03

In the matter between:

**TELKOM SA LIMITED**

**Applicant**

and

**COMMISSION FOR CONCILIATION,**

**MEDIATION AND ARBITRATION  
COMMISSIONER J A VAN DER WALT**

**First Respondent  
Second Respondent**

**ANDILE CASSEL GOSANI**

**Third Respondent**

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

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PILLAY D, J

[1] This is an application for review and setting aside the award of the second respondent, the Commissioner.

[2] The applicant has failed to file a complete transcript of the tape

recorded arbitration. It relies on the notes of the Commissioner supplemented here and there with its own

notes. It is certainly not an agreed record. Nevertheless the applicant proceeded with the review for substantive relief, not only for the setting aside of the award, but also for the court substituting the Commissioner's decision with a finding of that the dismissal was procedurally and substantively fair.

[3] It relies for this order on the Commissioner's finding and the reasons for finding that the third respondent was guilty of the misconduct for which he was charged.

[4] The applicant, however, disagrees and criticises the second part of the award relating to the mitigating factors that the Commissioner found in favour of the third respondent.

[5] The third respondent on the other hand seeks to uphold the award. In particular, it relies on the mitigating circumstances which the Commissioner found favours the third respondent.

[6] Having heard the parties and considered the application before me, it is quite clear that the finding of misconduct and the charges relating thereto, feeds directly into the penalty that should be imposed on the third respondent. The two issues are inextricably linked.

[7] The court is not in a position, on the basis of the record that has been filed, to substitute its decision for that of the Commissioner. It is also not in a position to properly assess

whether the Commissioner's findings, both on the misconduct and on the existence of mitigating factors is reviewable. For the court to review both aspects, i.e. the finding of misconduct and the mitigating factors, the court requires clear evidence of what was presented to the Commissioner. That is not available. For instance on the question of the mitigating factors, it is important for the trier of fact to make a proper assessment as to whether the third respondent was genuinely under the apprehension that his absence from work arose as a result of the unacceptable medical certificate, or whether there was any connection between the medical certificate and the fact that he

was found to be at a tavern and attending a jazz festival during his absence from work. A proper assessment of such evidence goes to both the question of the misconduct *per se* and the penalty that might ensue therefrom.

[8] The authorities, particularly those emanating from the Labour Appeal Court, are quite clear as to the circumstances in which a Commissioner might interfere with a penalty imposed by an employer. It was submitted in this

case for the applicants that the Commissioner having found that the misconduct was proved, ought not to have interfered with the penalty.

[9] In my view, and in the light of the authorities, the CCMA is not a rubberstamp for the employer's decision. A Commissioner retains a discretion whether to interfere with the penalty and in what respect or how he should interfere if the facts and circumstances of each case so warrant.

[10] The applicant has the onus of ensuring that a sufficient record is available to the court to enable it to decide the matters it raises in its application. If it transpires that the record is insufficient, then the applicant runs the risk of not satisfying the requirements of a review and consequently an appropriate order of costs against it.

[11] In this case the applicant has not furnished the court with a sufficient record and the court is therefore not in a position to

decide the reviewability or otherwise of the Commissioner's decision for the reasons that I have discussed above. The applicant ought to have anticipated that consequence and accepted the offer, when it learnt of it at the very

latest, to refer the matter back to the CCMA for a rehearing. In any event as I said the onus rests on the applicant to ensure that there is a proper record, irrespective of any offer that might or might not have been made and whenever that offer might or might not have been made.

[12] The applicant has persisted to this day with its review application

on a defective record and must therefore bear the costs of this

application. The third respondent's opposition was necessary, given the relief sought in the original notice of motion, to the

extent that that relief was amended in the reply does not alter

the situation seriously as the court has benefited from argument from the third respondent in arriving at its decision. The court would have been at a disadvantage if an opposing view had not been presented.

[13] In the circumstances the court makes an order on the following terms:

1. The application for condonation of the late filing of the applicant's heads is granted, with no order

as

to costs.

2. The application to set aside the award is granted.
3. The matter is referred back to the CCMA to be heard by a Commissioner other than the second respondent.
4. The applicant is to pay the third respondent's

costs.

JUDGE D PILLAY

**APPEARANCES:**

FOR THE APPLICANT : MR S B MGAGA

(COMPANY

OFFICIAL)

FOR THE RESPONDENT : ADVOCATE T M EUIJEN

INSTRUCTED BY : ATTORNEY GRAY MOODLIAR