IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO:JR1250/05 & JR3100/05

In the matter between:

THEMBA PRINCE MOTSAMAI Applicant

and

EVERITE BUILDING PRODUCTS (PTY) LIMITED 1st Respondent

S MTHETHWA (Commissioner) 2nd Respondent
THE COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION 3rd Respondent

RECONSTRUCTED *ex tempore* JUDGMENT

NEL, AJ

What follows is an attempt by me to reconstruct the *ex tempore* judgment I gave in these matters on 14 December 2006. The reason why I have been approached to reconstruct my *ex tempore* judgment is that on the day that the matter was argued before me an electrical outage had occurred, causing the Court to adjourn. On the Court reconvening, the hearing proceeded and I delivered my reasons for my

judgment and the order to the effect that the relevant award was set aside and substituted with an award to the effect that the applicant's dismissal was procedurally and substantially fair. I am advised that unfortunately the recording device used on the day did not record the proceedings after lunch. Leave to appeal was unsuccessfully applied for and presently the applicant wishes to petition the Judge President for leave to appeal and for that reason I have been asked to reconstruct my judgment. As I did not keep any notes, the following will not strictly speaking be a reconstruction, but rather a restatement of what I, to the best of my recollection believe were the reasons for the order I granted at the time.

[1] The first respondent filed an application for review under case number JR1250/05 in May 2005. In November 2005, the applicant filed a counter application for review under case number 3111/05. In April 2006, the two matters were consolidated.

[2] During or about June 2004, the first respondent received complaints from three of its female employees to the effect that the applicant had sexually harassed them. The applicant was suspended pending the outcome of the first respondent's investigations. Following a disciplinary enquiry, the applicant was dismissed for misconduct. This dismissal was upheld on appeal. An unfair dismissal dispute was referred to the third respondent by the applicant and an arbitration hearing took place on 14 March 2005, which was presided over by the second respondent. The second respondent found that the dismissal had been procedurally fair and that the first respondent had proved the allegations against the applicant. In his award the second respondent, *inter alia*, stated that:

> "The (first) respondent has in my view succeeded in showing that the applicant probably did behave in an inappropriate way. However, I am of the opinion that the (first) respondent's management should at least have convened an informal meeting to discuss the applicant's conduct. It may then have been more appropriate to embark upon a formal approach (if the informal did not yield any results). I am however mindful of the fact that the complainants chose to go the formal route."

[3] It would appear as if the second respondent did not find that the dismissal was substantively unfair, but merely stated that:

> "I have decided that dismissal was not an appropriate sanction in the matter before me."

The Commissioner then proceeded to say that he aimed to send a message that sexual harassment, "however minor", would be dealt with harshly". This, it would appear, the Commissioner was of the view he would achieve by ordering that the applicant be re-employed on new terms and conditions of employment as opposed to being reinstated. The Commissioner specifically in his award stated that the first respondent must not pay the applicant any arrear wages which he might have been entitled to. The Commissioner further ordered that the applicant, in addition, be given a final written warning valid for a period of 12 months. He directed that should the applicant be involved in another act of sexual harassment

(one must assume during this period of 12 months) the first respondent may dismiss him. The first respondent was further directed to arrange a counselling session (again one assumes for the applicant) at least once a week and should the applicant fail to attend these sessions, the first respondent may dismiss him.

[4] It is apparent that the Commissioner found that the first respondent had proved that he applicant had committed sexual harassment. The applicant's conduct in this regard, as testified to by Ms Msibi, was that the applicant had been her foreman. On the day of the first incident, the applicant had called her into his office and had shown her pornographic material on his computer. She stated that she had laughed and left. The applicant, however, followed her and mentioned that the size of the man's penis was similar to that of a colleague of theirs. She further testified that on a different occasion she had entered the office to fetch a key when the applicant had called her over to show her a female condom and he had asked her to come and give it to him. She advised the applicant that she did not like what he was doing and that she would tell the first respondent's plant manager, Mr Tsokodibane, about it. She had asked the applicant what he was doing and he had said that he had a lust towards her. He further stated that he could see by the look of her mouth and lips that she would "be nice".

[5] On the occasion of a third incident, in June 2004, the applicant had returned from study leave. Ms Msibi entered the office and greeted him. She extended her hand but he hugged her in response. Whilst Msibi allowed him to hug her the applicant then touched Msibi's private parts. She testified that she was very unhappy about the applicant's conduct and the next day she reported the matter to one of her superiors. Msibi further testified that she was very upset by the ordeal,

and that she had considered resigning. She explained that she had always made it clear to the applicant that she did not approve of his behaviour and had thought that the applicant would understand that.

[6] The second person who testified that she was sexually harassed by the applicant was a Ms Rammilla. She testified that the applicant was her superior and that on 10 June 2004 he had approached her and asked her what the size of her underwear was. Rammilla refused to give the applicant the size of her underwear and she told one Thoko about it. Thoko told her that when she had asked the applicant why he had asked Rammilla about the size of her underwear, the applicant said that he was just kidding. Rammilla reported the matter to a superior of hers. She testified that she was upset, not so much by the question *per se* but rather the way in which it had been asked by the applicant. She testified that the thermal clothing the applicant purportedly wanted to order were pants, not underpants. She accordingly stated that the applicant could have asked her what the size of her pants was and that the size of her underpants was irrelevant.

[7] I turn to first consider the applicant's grounds for review. It was apparent, particularly during the argument of Mr Gobile, who appeared before me on behalf of the applicant, that the applicant contended that the Commissioner erred in having concluded that the applicant was guilty of the misconduct of sexual harassment with which he was charged. It is trite that this being a review and not an appeal, what the applicant needed to satisfy me on was to show that the Commissioner had misconducted himself or had perpetrated a reviewable irregularity or had exceeded his powers in the conduct of the arbitration. It is not good enough for the applicant to simply contend that the Commissioner was wrong in his conclusion.

[8] It is apparent from a perusal of the Commissioner's award that the Commissioner analysed the evidence adduced on behalf of the first respondent and by the applicant himself. A perusal of the record in effect discloses that the applicant in effect denied most, if not all, of the allegations made by the first respondent's witnesses during the arbitration.

[9] Although the Commissioner did not in clear terms reason himself through to

a conclusion why he preferred the evidence adduced on behalf of the first respondent to that of the applicant, it is quite apparent that the Commissioner applied the correct standard of proof required in civil cases as being that he had to determine with a reasonable degree of probability, but not as high as was required in a criminal case, whether the applicant had perpetrated the misconduct with which he was charged. It is further apparent that on the probabilities, the Commissioner had concluded that the first respondent had succeeded, as the Commissioner put it, in showing that the applicant probably did behave in an inappropriate way. I do not believe that the Commissioner can be faulted in this conclusion of his as it is one which is supported, in my view, by the evidence adduced before the Commissioner. Without intending to traverse the whole of the evidence adduced at the arbitration, a few aspects in support of the probabilities being against the applicant, are that the applicant conceded that pornographic material was available on his computer, however he denied that he had showed same to Msibi. Likewise, the applicant confirmed that female condoms were available to him, yet again denying that he had showed it to Msibi. He also confirmed that it was not unusual for him to hug Msibi. Yet again he only denied the part of her evidence that he had, in the process of hugging her, also touched her private parts.

[10] It is further material to the consideration of this part of the Commissioner's finding that it is apparent from the record of the arbitration proceedings that in a number of material respects the applicant's legal representative did not put in issue parts of the evidence of the witnesses which he ought to have done in light of the applicant's later denial thereof. It is particularly relevant to note that when the applicant was asked why witnesses would give false evidence against him he responded by stating that they had been coerced by the employer to do so. This allegation was never put to any of the first respondent's witnesses.

[11] I was accordingly unpersuaded at the time of hearing this matter that the applicant had succeeded in satisfying me that the Commissioner had perpetrated any reviewable irregularity in respect of his conclusion that the applicant was guilty of the sexual harassment charges. In this regard it is relevant to recall that it would appear as if the Commissioner only found the applicant guilty of the misconduct in respect of the witness Msibi. As far as the other witness, Rammilla, was concerned, namely that she felt aggrieved by the applicant having wanted her to give him the size of her panties, the Commissioner regarded this conduct on the part of the applicant as reasonable.

[12] I am accordingly satisfied that the Commissioner's conclusion that the applicant made himself guilty of sexual harassment only in respect of the incidents to which Msidi had testified is not reviewable and accordingly should stand.

[13] I turn to consider the applicant's attack on the Commissioner's conclusion, that the applicant's dismissal was effected in a procedurally fair manner. During his argument before me I asked Mr Gobile to refer me to specific instances in the arbitration record where it was alleged by or on behalf of the applicant that the first respondent had conducted itself procedurally unfairly. From Mr Gobile's argument as well as the record of the arbitration proceedings it would appear that what the applicant did raise before the Commissioner in respect of the procedural fairness

of his dismissal related more to the employer's conduct prior to the disciplinary enquiry. In this regard it would appear that the applicant relied on the fact that after he had received his suspension letter the employer at no stage interviewed him. He further felt aggrieved by the fact that the employer at no stage convened a meeting between the applicant and the complainants where the employer tested the allegations of the complainants in question. The applicant also clearly complained before the Commissioner about the fact that he was never handed any statements of the witnesses in order for the applicant to prepare himself for his disciplinary hearing, notwithstanding the fact that the applicant appears to have asked his employer for such statements. It is apparent to me that the applicant did not attack the procedural fairness of the disciplinary enquiry itself.

[14] Turning to the Commissioner's award, it is apparent that the Commissioner did consider the applicant's complaints relating to the process followed by the employer prior to the applicant's dismissal. In this regard it is clear that the Commissioner concluded that the first respondent's management should at least have convened an informal meeting with the applicant to discuss his alleged misconduct. After such a meeting it may then have been more appropriate to embark on a formal approach, if the informal one did not yield any results. The Commissioner's reasoning appears to be that he was, however, mindful of the fact that it was the complainant who had chosen to go the formal route. It is accordingly apparent that the Commissioner considered the conduct of the employer prior to the actual disciplinary enquiry itself and, for the stated reasons, the Commissioner had concluded that he had no problem with the process followed by the employer prior to the dismissal of the applicant. What the Commissioner expressly stated was important to him was that the applicant had been afforded an opportunity to state his case during the disciplinary hearing.

[15] I am of the view that the Commissioner had reasoned himself through to a conclusion. Whilst the conclusion is possibly open to some criticism in light of the evidence adduced, the Commissioners conduct in arriving at his conclusion cannot in my view be said to constitute a reviewable irregularity. The Commissioner was clearly mindful of the fact that the employer may have first followed an informal procedure. On the other hand, it is apparent that the Commissioner was equally alert to the fact that the complainants had elected, as the Commissioner stated, to go the more formal route. Under these circumstances, I was unpersuaded that, as far as the Commissioner's conclusion that the employer had acted procedurally fairly herein is concerned, that I am at liberty to interfere with this conclusion. It is a rational one having regarding to the evidence adduced and the reasons given by the Commissioner for his conclusion.

[16] The applicant also attacked the Commissioner's award on the basis that it was ambiguous and could be understood in two different ways. On behalf of the applicant the complaint was further, so I understood it, that the Commissioner had exceeded his powers as the Act did not empower the

Commissioner to order the employer to re-employ an employee on new terms and conditions of employment.

[17] Mr Gobile, in argument before me, referred me to Section 193(b) of the LRA. This section reads as follows:

> "(1) If the Labour Court or an Arbitrator appointed in terms of this Act finds that a dismissal is unfair, the Court or the Arbitrator may –
>
> a) …..;
>
> order the employer to re-employ the employee either in the work in which the employee was employed before the dismissal or in other reasonably suitable work on any terms and from any date not earlier than the date of dismissal; or ….."

[18] The Commissioner herein in my view ordered exactly that which he was entitled to do in terms of the LRA, namely re-employment of the employee on new terms and conditions of employment. For this reason this ground of review on which the applicant relied failed.

[19] For these reasons I accordingly arrived at the decision in respect of the applicant's review application under case number JR3100/05 that;

1) The application in JR3100/05 is dismissed. The applicant and the Union who assisted him are ordered to pay the first respondent's cost of suit, the one paying, the other to be absolved.

[20] This left me to consider the first respondent's review application brought under case number JR1250/05 seeking to have the award reviewed and set

aside, particularly with reference to the fact that the Commissioner had concluded that the applicant was guilty of some of the misconduct of sexual harassment with which he was charged but that the sanction of dismissal was too harsh and that he substituted it with the sanction which I have referred to earlier herein.

[21] Miss Tolmay, who appeared before me on behalf of the first respondent, in this regard drew my attention particularly to the fact that the Commissioner, having found that the first respondent had succeeded in showing that the applicant did behave in an inappropriate manner, continued to state that "sexual harassment, however minor, will be dealt with harshly." She argued that it was a misdirection of the Commissioner, particularly against the background of his statement that sexual harassment, however minor, would be dealt with harshly, to then proceed to order the applicant to be re-employed and be given a final written warning.

[22] Very extensive heads of argument had been presented to the Court on behalf of the first respondent. In Court the essence of the first respondent's argument was that in terms of the Supreme Court of Appeal judgment in Rustenburg Platinum Mines Limited (Rustenburg Section) v Commission for Conciliation, Mediation and Arbitration 2007(1) SA 576 (SCA) a Commissioner who found that the employer had established that the employee had indeed committed the conduct for which he had been dismissed could not interfere with the sanction imposed by the employer as long as the discretion to dismiss had been fairly exercised by the employer.

[23] The argument before me was to the effect that the Commissioner arrived at an irrational conclusion (that the sanction of dismissal should be substituted with one of re-employment) against the background of him having stated how serious sexual harassment was.

[24] It was argued on behalf of the first respondent that with the Commissioner having found that the applicant had been guilty of sexual harassment, and that it was a serious offence which needed to be dealt harshly, that it was irrational to then proceed to order that the applicant be re-employed. In this regard it was further submitted on behalf of the first respondent that it was also irrational for the

Commissioner, against the background of his findings, to have expressed the view that the first respondent ought to have convened an informal meeting with the applicant to discuss the matter.

[25] During oral argument, Mr Gobile was invited by me to persuade me why the Commissioner was justified to interfere with the exercise of the discretion of the employer in having imposed the sanction of dismissal on the applicant. Mr Gobeli was invited to show me what it is that the employer had done in imposing the sanction of dismissal which could be regarded as the employer having acted irregularly, or that the employer had considered material which was improper to consider or that the employer, in the exercise of its discretion in imposing the sanction, had acted improperly.

[26] Having considered the arguments adduced as well as the record of the arbitration proceedings and the Commissioner's reasoning, I arrived at the conclusion that the Commissioner did not provide any reasons for his conclusion that the sanction imposed by the employer was too harsh. It accordingly drove me to the conclusion that the Commissioner had merely disagreed with the employer as the Commissioner felt the sanction was too harsh. This conclusion of the Commissioner was irrational and not justifiable having regard to the fact that he did not provide any reasons for this conclusion. I also arrived at this conclusion having had regard to the evidence which was adduced before the Commissioner. I accordingly was driven to the conclusion that the Commissioner had perpetrated a reviewable irregularity, having found the applicant guilty of what the Commissioner had correctly described as a serious form of misconduct, namely sexual harassment, but to have nevertheless decided to substitute the employer's sanction with that of the Commissioner's. For those reasons I accordingly concluded that in respect of matter JR1250/05, the following order should be issued:

1) The arbitration award made by the second respondent under case number GA25798-04 on 16 February 2005 is reviewed and set aside.

The said arbitration award is substituted by the following award:

"The dismissal of the applicant is found to have been procedurally and substantively fair. No order as to costs."

2) The first respondent and the Union who assisted him are jointly and severally ordered to pay the applicant's costs, the one paying the other to be absolved.

[24] I wish to reiterate that the aforegoing is not so much a reconstruction of my

judgment. It is more a matter of me having again reviewed the written heads of argument together with the parts of the oral argument, which were transcribed. I as well again traversed the record of the arbitration proceedings as well as the arbitration award herein. I then, to the best of my recollection, reconstructed my reasoning which formed part of my original *ex tempore* judgment and which led to the orders which I recorded above.

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DEON NEL

ACTING JUDGE OF THE LABOUR COURT

Date of hearing and Judgment: 14 December 2006

Appearances:

For the applicant: Mr D Gobile, Union Official.
For the first respondent: Advocate E Tolmay instructed by E A Potgieter Attorneys.