

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO. JR1363/07

In the matter between:

DAVIES PLUMBING CIVILS CC

APPLICANT

AND

**THE COMMISSION FOR CONCILIATION
MEDIATION AND ARBITRATION**

1ST RESPONDENT

MBOVANE N.O.

2ND RESPONDENT

RODNEY ALLEN MATTHEWS

3RD RESPONDENT

JUDGEMENT

Molahlehi J

Introduction

- 1] This is an application to review and set aside the arbitration award of the second respondent, the Commissioner, issued under case number GAJB 2350/07 dated 12 April 2007.

- 2] In terms of the award the Commissioner found the dismissal of the third respondent, Mr Matthews to be both procedurally and substantively unfair and directed that he be compensated in the amount of R49200.00.

Background facts

- 3] The third respondent (the employee) was prior to his dismissal employed as a junior site agent by the applicant.
- 4] As part of an established practice, the applicant closes its business for holidays between December and January.
- 5] It is common cause that the employee reported for duty on 16 January 2007 instead of the 8th January 2007. This gave rise to the dismissal of the employee for being absent without authorized leave.
- 6] Mr. Davies, the member and owner of the applicant testified that the only two people who could grant the employee leave were him and Mr Yoko.
- 7] The employee testified that he went overseas during the December

shut down and because he knew he would not be able to be back on time when the applicant opens in January, he approached one of the managers, a certain Mr. Hardacre for a letter indicating that he would report for work on the 16 January 2007. The letter was also required according to him for the purposes of traveling overseas.

The award and the grounds for review

- 8] The applicant contended that the Commissioner allowed the employee's consultant to be present during the hearing and that this was intimidating and unfair. The applicant also alleged that the consultant was allowed to pass notes to the employee during the proceedings.
- 9] The second complaint of the applicant is that the Commissioner in his award relied on the letter signed by Mr. Hardacre who did not have authority to do so. Also related to the letter was the complaint that the representative of the applicant saw the letter for the first time at the commencement of the arbitration hearing. This letter according to the applicant did not comply with the procedure required for an application for leave.

10] In addition the applicant contended that had the Commissioner complied with his duties properly he would have granted the applicant a postponement. The postponement would have provided an opportunity to investigate the authenticity of the signature on the letter.

11] The commissioner in finding the dismissal to be procedurally unfair reasoned that the employee was never called to a disciplinary hearing but an investigation session. The commissioner found that because of this the employee was denied an opportunity to properly prepare for his defense.

12] The relevant part of the letter notifying the employee about the hearing read as follows:

“Please note that this is not a disciplinary hearing and that no formal charges of being brought against you (sic at) this stage.

The purpose of the inquiry is to establish the facts surrounding certain allegations against you as set out here under.”

13] The applicant contended that the above quotation was inserted in the

notice by error and that there was no way that it could be said that the employee did not appreciate what he was faced with.

14] In my view, the facts and information contained in a notice to attend a disciplinary hearing must not only be unambiguous but must contain sufficient information to ensure that the right of the employee to prepare for the hearing is realized. The right to prepare for a disciplinary hearing may be undermined if insufficient or confusing information is provided as is apparently the case in the present matter. In other words the requirement to provide concise and adequate information arises from the need for adequate preparation.

15] In the case of **Police and Prisons Civil Rights Union v Minister of Correctional Services and Others [1999] 20 ILJ 2416 (LC)**, at page 2426, the court in agreeing with the submission of counsel for the applicant that the standard for the disciplinary charge sheet cannot be the same as for one in the criminal trial however held that the information *on* that charge- sheet (disciplinary) must be sufficient to make the employee's rights to prepare a real and not an illusory right.

16] It is essential that the notice containing the charges should be precise

and spell out in a precise manner the nature of the process that the accused person is to confront during the hearing. Thus, preparation for investigation and being faced with the possibility of a suspension as the notice in this case suggests is different to facing the disciplinary inquiry whose consequence included a dismissal.

- 17] Turning to the facts of this case my view is that a reasonable decision maker could have reached the same conclusion reached by the Commissioner in as far as the procedural fairness is concerned. The reasonable decision maker test to be used in determining whether or not an arbitration award should be reviewed and set aside was formulated in **Sidumo & Another v Rustenburg Platinum Mines Ltd & Others (2007) 28 ILJ 2405 (CC)**.

Substantive fairness

- 18] The Commissioner rejected the contention of the applicant that the employee's leave was unauthorized. He found that the allegation that the leave was unauthorized was negated by the letter written by one of the applicant's managers. He also rejected the argument that the manager who signed the letter did not have authority to do so. The

Commissioner correctly found that even if it was found that the manager who signed the letter did not have authority to sign, the employee could not be punished for the manager who acted outside his powers.

19] In my view the above conclusion of the Commissioner, cannot be criticize for being unreasonable. The decision is one which a reasonable decision maker could have reached.

20] The argument that the Commissioner should have postponed the matter to afford the applicant an opportunity to investigate the signature on the letter, does not take the case of the applicant any further. The postponement would not have changed the facts because we now know from the affidavit of Ms Hardcre that the letter was signed by Mr Hardcre who was the immediate superior of the employee.

21] In relation to the issue of the consultant seating in the arbitration hearing, it is common cause that he was allowed to seat in and that the applicant never objected to him seating in as an observer. It is also apparent from the reading of the record that the Commissioner made it clear right from the beginning of the hearing what the status of the

consultant during the hearing would be. It is clearly a matter which the Commissioner considered. It is also apparent from the record that at some stage the observer sought an intervention during cross examination of the employee by the applicant's representative. The applicant's representative immediately reminded him of his status in the hearing. This was then immediately confirmed by the commissioner.

22] There is nothing in the record that suggests that the observer passed notes to the employee. The probabilities also do not favour this version. If this was to have happened there seem no doubt that the applicant's representative would have objected as he did when he (the observer) tried to intervene during the cross examination of the employee. The commissioner would also have called him to order as he did during the cross examination of the employee.

23] In my view, regard being had to the evidence and the totality of the facts which were presented during the arbitration hearing, it cannot be said that the conclusion reached by the Commissioner was unreasonable. It can also not be said that the Commissioner denied the applicant a fair hearing by not granting a postponement to afford the

applicant an opportunity to investigate the authenticity of the signature of the latter in question. In fact the reading of the record reveals that the Commissioner did apply his mind to the issue of the signature of the letter and concluded that it did not warrant any postponement.

24] I see no reason in law and fairness why costs should not follow the result.

25] In the circumstances, the review application is dismissed with costs.

MOLAHLEHI J

Date of Hearing: 05 December 2007

Date of Judgement: 19 March 2008

APPEARANCES:

For the Applicant: A Snider

Instructed by: Shannon Little Attorneys.

For the Respondent: M Pye

Instructed by: Pearson & Associates