



**IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

**JUDGMENT**

Not Reportable

Case no: JR 1365/13

**In the matter between:**

**Caiphus Msibi and 12 Others**

**and**

**CCMA**

**ELSABE MAREE N.O.**

**LE SEL RESEARCH (PYY) LTD**

**Heard: 2 June 2017**

**Delivered: 22 June 2017**

**Applicant**

**First Respondent**

**Second Respondent**

**Third Respondent**

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**JUDGMENT**

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**WHITCHER J**

- [1] In 2013 the applicants made application to review and set aside a ruling handed down by Commissioner W Koekemoer, who issued the following ruling:

*This matter was already dealt with in an arbitration award under case number CHEM 526-08-09132009. The commissioner found that the applicants did not establish dismissal and their case was dismissed. The case of the applicants is herewith dismissed due to this Commission lacking jurisdiction.*

- [2] On review, Wilken AJ found that the evidence before the Commissioner indicated that the applicants had in fact been dismissed because the company was of the view that the applicants had absconded. He found that the Commissioner had obviously failed to investigate these facts and deal with the real issue before him, namely a dismissal for misconduct and whether it had been a fair dismissal.
- [3] In *SABC v CCMA and Others*<sup>1</sup> it was held that desertion necessarily entails the employee's intention no longer to return to work and that the employer would have to establish this intention in a fair process. I would add that mere absence and unexplained absence is not conclusive proof of an unequivocal intention not to return. Employees must be called upon to show cause why the employer should not treat their absence as an intention not to return to work. Up to the point when the intention not to return is established – the absent employees are simply absent without leave.
- [4] When Wilken AJ stated that the Commissioner had failed to properly investigate the matter, he obviously had the aforementioned principles in mind.
- [5] Wilken AJ set the ruling aside and referred the matter back to the CCMA for arbitration before another commissioner. The court pertinently directed that the new arbitrator must address the matter as a dismissal dispute and deal with the merits of that dispute.
- [6] The award *itself* clearly indicates that the new arbitrator, the second respondent, ignored the Court's directive and did not determine the real

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<sup>1</sup> (2002) 8 BLLR 693 (LAC).

dispute, which is whether the applicants did in fact abscond and whether the employer engaged in a fair process to establish this.

- [7] The record would not have taken the matter further so the failure by the applicants to file a clear record and on time is condoned. Their explanatory affidavit also indicates that they had difficulty securing a proper record from the CCMA.
- [8] This case is important - the applicants were deprived of their UIF benefits because the company had noted abscondment on their UIF cards.

Order

- [9] The award by the second respondent dated 18 May 2013 under case number GATW1050-10 is reviewed and set aside.
- [10] The matter is remitted to another arbitrator who must accept that the applicants were dismissed and must accordingly deal the merits of the dismissal.
- [11] There is no order as to costs.

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**Whitcher J**

Judge of the Labour Court of South Africa

**APPEARANCES:**

For the Applicants: Self represented.

For the Third Respondent: Yusuf Nagdee Attorneys

LABOUR COURT