



**IN THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH**  
**JUDGMENT**

Not Reportable

Case no: P177/14

In the matter between:

**WRIGHT SURVEILLANCE**

**Applicant**

and

**PAULSEN, N N.O.**

**First Respondent**

**COMMISSION FOR CONCILIATION  
MEDIATION AND ARBITRATION**

**Second Respondent**

**SATAWU OBO NOMVUSO FUNDE**

**Third Respondent**

Heard: 27 October 2016

Delivered: 31 January 2017

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**JUDGMENT**

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TLHOTLHALEMAJE, J:

***Introduction:***

- [1] This is an application in terms of which the Applicant seeks an order reviewing, setting aside and/ or correcting the arbitration award issued by the First Respondent (Commissioner) under case number ECPE 5352-13 dated 4 August 2014. In the award, the Commissioner found that the dismissal of Ms. Nomvuso Funde (Funde) was both substantively and procedurally unfair, and had ordered that she be paid compensation in the amount of R28 000.00, which was the equivalent of eight months' salary.

***Background:***

- [2] Funde was employed by the Applicant as a CCTV Controller, having commenced her employment during May 2009. On 25 September 2013, she received communication that her sister had passed away and was granted permission to leave the workplace on that day. Funde did not report for duty thereafter, and did not communicate with the Applicant as to her whereabouts.
- [3] It was also common cause that no formal application for leave of absence was submitted by Funde, nor had she communicated with anyone from the Applicant in regards to her absence. A telegram then sent to her on 2 October 2013, instructing her to report at the work premises on 7 October 2013 for the purposes of attending a disciplinary hearing. She was charged with absenteeism from 26 September 2013.
- [4] Funde had responded to the telegram and attended at the premises of the Applicant on 7 October 2013. The hearing was nevertheless re-scheduled to 10 October 2013 due to the non-availability of the Chairperson. The Applicant's version is that on 07 October 2013, Funde was merely given an opportunity to provide an explanation in respect of her absence. Upon her failing to do so she was then served with a notice of disciplinary inquiry that was scheduled for 10 October 2013. A day before the scheduled enquiry, Funde's Union, SATAWU, sent the Applicant a written request to postpone the hearing as Funde's representative was not available. SATAWU further suggested alternative dates.
- [5] On 10 October 2013, Funde did not make an appearance and the disciplinary hearing was held in her absence. The Applicant's approach in respect of SATAWU's request was that Funde could not be represented by a union official as the disciplinary enquiry was an internal matter. She was dismissed in her absence.

***The arbitration proceedings and the award:***

- [6] Aggrieved at her dismissal, Funde with the assistance of SATAWU had then referred a dispute to the CCMA. Failing conciliation, the dispute was then referred for arbitration and came before the Commissioner on 01 April 2014. The Applicant had presented evidence through its Administrator and Systems Co-ordinator, Ms Tanya Jansen, which is summarized as follows;

- 6.1 Funde was aware of procedures for applying for leave of absence, having done so previously after the passing of her brother in July/August 2013, and further on an occasion when she had to attend to a matter at the CCMA.
- 6.2 During her absence, Funde made no attempt to communicate with the Applicant in respect of the reason for her absence. The Applicant's policy called upon employees to contact their supervisors during their absence, and to inform them of the reasons thereof;
- 6.3 Employees are entitled to three (3) days family responsibility leave year per circle. At the time of the passing of her sister, Funde had utilised all her family responsibility leave. Nevertheless, Funde had not applied for companionate leave in respect of the passing of her sister, and had she done so, the Applicant would have granted her leave of absence, even though she had used up all her leave credits;
- 6.4 On 07 October 2013 when Funde appeared at the Applicant's premises as per the telegram that was sent to her, she refused to explain the reasons for her absence, and had simply said that the Applicant was aware of the passing of her sister. She had said that there was nothing for her to explain. When she was pressed on to explain, she had simply directed Mr Pike to read or look out for newspaper reports in regards to the passing of her sister.
- 6.5 She was then handed a notice to appear before an internal disciplinary inquiry scheduled for 10 October 2013. The notice was also read out to her by Mr Pike of the Applicant in the presence of Jansen, who had emphasised that she may only be represented by a fellow employee, as external representation was not allowed;

[7] Funde's evidence is summarised as follows:

- 7.1 Having been granted permission on 25 September 2013, she had called her supervisor one, Wendy on 27 September 2013 and informed her that she was sick and suffered from depression, and that she would approach the Applicant to apply for leave of absence;
- 7.2 On 30 September 2013 she went to the premises of the Applicant with the intention of completing leave forms and was advised that the offices were closed. The Applicant shared its premises with a company called Vukela

Security, and she had approached her brother-in-law who works for Vukela and asked him for a leave forms. She was however told that the two companies did not share the same leave forms;

7.3 The burial of her sister took place on 05 October 2013. Having received a telegram, she had attended at the Applicant's premises on 07 October 2013, and Mr Pike had informed him that the scheduled hearing was postponed due to the non-availability of the Chairperson. This was after Pike had also threatened her with dismissal. The matter was therefore re-scheduled for 10 October 2013. She contended that she was not aware that she had been dismissed, as her understanding was that she was still to be informed of a disciplinary hearing at a future time;

7.4 She had referred to a doctor's certificate, which she testified was brought to the Applicant's attention confirming that she was diagnosed with depression. She also pointed out that the death of her sister and that of her brother earlier on occurred within a space of a month and this had put strain on her. She testified that when she informed the Applicant of her illness, she was referred to the Aspen's nursing sister, and was in turn referred to a Psychologist.

[8] In the award, the Commissioner had regard to the provisions of section 192 of the LRA and Item 7 of Schedule 8 (Code of Good Practice). The Commissioner accepted that following the passing of her sister, Funde was sent home on 25 September 2013, and was pre-occupied with her sister's funeral arrangements in view of the burial having taken place on 5 October 2013. The Commissioner accepted that Funde had not completed the required leave forms for the period that she was absent. However, at the time that the telegram was sent to her informing her of the hearing scheduled for 7 October 2013, the burial had not taken place.

[9] The Commissioner was of the view that the Applicant should rather have called upon Funde to establish her whereabouts, as it was aware of the passing of her sister. He further concluded that Funde had a reasonable and adequate excuse for her absence, and that the chairperson of the enquiry did not properly take into account her personal circumstances prior to imposing a sanction of dismissal.

[10] The Commissioner further pointed out that the Chairperson of the enquiry erred in making a finding that Funde was absent for a month when in fact she was only absent between 26 September 2013 and Sunday of 6 October 2013. He further had regard to

Funde's previous bereavement in respect of the loss of his brother in August 2013, the fact that she was treated for a stress related condition, and concluded that the second bereavement had psychological effects on her, and that the Applicant should have been more sensitive towards her personal circumstances.

- [11] In regards to the procedural fairness of the dismissal, the Commissioner stated that in view of the disciplinary enquiry having been scheduled a day after Funde's sister was buried, it should have been obvious to the Applicant that she was not in a state of readiness for the hearing on 10 October 2013. The Commissioner's view was that Funde should have been granted some indulgence, and that the hearing should have been postponed to afford her an opportunity to state her case. To that end, the dismissal according to the Commissioner was procedurally unfair. In considering relief, the Commissioner took into account Funde's personal circumstances, her health condition and prospects of securing future employment, and came to the conclusion that eight months' salary was appropriate.

***The grounds of review, the submissions and evaluation:***

- [12] The review test as laid down in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*<sup>1</sup> and restated in several decisions of the Labour Appeal Court<sup>2</sup> and the Supreme Court of Appeal<sup>3</sup> is whether the decision reached by the commissioner is one that a reasonable decision-maker could not reach. The Labour Appeal Court in *Goldfields* summarised the review test as follows;

*"In short: A review court must ascertain whether the arbitrator considered the principal issue before him/her, evaluated the facts presented at the hearing and came to a conclusion which was reasonable to justify the decision he or she arrived at"*<sup>4</sup>

- [13] In this case, the Applicant attacked the award on a variety of grounds. The essence of the attack is that in the light of the evidence and the facts presented at the arbitration proceedings, the award was wrong in fact and law, was irregularly arrived at, and could not be justifiable on an objective basis, either in law and fact. By way of preliminary argument, it was submitted that to the extent that Funde's case was premised on the contention that she was dismissed because of having pursued a grievance against Pike, then that dispute pertained to an automatically unfair dismissal within the meaning

<sup>1</sup> (2007) 28 ILJ 2405 (CC).

<sup>2</sup> See *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation Mediation and Arbitration and Others* [2014] 1 BLLR 20 (LAC); *Head, Department of Education v Mofokeng and other* [2015] 1 BLLR 50 (LAC)

<sup>3</sup> *Herholdt v Nedbank Ltd (COSATU as amicus curiae)* [2012] 11 BLLR 1074 (SCA)

<sup>4</sup> At para [16]

of section 187 (1) (d) of the LRA, and therefore the Commissioner had no jurisdiction to determine the dispute. To the extent that the Commissioner had nevertheless taken scant regard of what Funde's case was, it was contended that the award as issued was *ultra vires* and a nullity.

[14] It is trite that Commissioners are obliged to determine what the real dispute between the parties is<sup>5</sup>. It is expected that due to the less than formal nature of arbitration proceedings, and in the absence of pleadings, parties, especially dismissed employees tend to 'throw' everything at Commissioners in an attempt to demonstrate that they were treated unfairly. The purposes and objectives of the LRA, and in particular, the quest for expeditious resolution of disputes will be defeated if during arbitration proceedings, Commissioners were to gratuitously halt proceedings every time some issue, other than what had been referred for determination, or agreed to during a process of narrowing down of issues, is raised during evidence. Commissioners obviously ought to be satisfied that they have the requisite jurisdiction to determine disputes before them. At the same time however, Commissioners cannot at the say-so of the respondent party, willy-nilly conclude that they lack jurisdiction midstream arbitration proceedings, without complete regard to the facts and evidence presented. Thus, in cases where the employee challenges the fairness of a dismissal, his or her case ought to be distinguished from other periphery or secondary issues that might be raised during the evidence.

[15] This court is inundated with matters that Commissioners have refused to determine on the basis of contrived, if not spurious and flimsy jurisdictional points raised at arbitration proceedings. In this case, Funde as represented by SATAWU had referred an unfair dismissal dispute, alleging that the dismissal related to misconduct, and had challenged the procedural and substantive fairness thereof. The issue surrounding alleged victimization by Pike on the basis of a grievance lodged against him by Funde was clearly a peripheral issue, and the Commissioner was correct in ignoring it in the

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<sup>5</sup> See *CUSA v Tao Ying Industries and Others* (2008) 29 ILJ 2461 (CC) at para 66 where it was held that;

*'A commissioner must, as the LRA requires, 'deal with the substantial merits of the dispute'. This can only be done by ascertaining the real dispute between the parties. In deciding what the real dispute between the parties is, a commissioner is not necessarily bound by what the legal representatives say the dispute is. The labels that parties attach to a dispute cannot change its underlying nature. A commissioner is required to take all the facts into consideration including the description of the nature of the dispute, the outcome requested by the union and the evidence presented during the arbitration. What must be borne in mind is that there is no provision for pleadings in the arbitration process which helps to define disputes in civil litigation. Indeed, the material that a commissioner will have prior to a hearing will consist of standard forms which record the nature of the dispute and the desired outcome. The informal nature of the arbitration process permits a commissioner to determine what the real dispute between the parties is on a consideration of all the facts. The dispute between the parties may only emerge once all the evidence is in.'*

determination of the real dispute, or the real reason that led to the dismissal. The Applicant's contention that the Commissioner lacked jurisdiction simply based on secondary issues raised during arbitration proceedings is not supported by the overall evidence that was led in regards to the reasons for the dismissal.

- [16] The main issue for consideration however is whether the Commissioner's award can be construed as one that a reasonable decision maker could not have arrived at in the light of the facts and evidence presented. It was common cause that there was bereavement in Funde's family, and that on the first date upon receiving the news, she was granted permission to leave the workplace. It was further common cause that there was no communication between Funde and the Applicant after she was granted permission to leave on 25 September 2013 until 07 October 2013 after a telegram was despatched to her informing her of the intended disciplinary enquiry. In my view, the fact that Funde was granted permission to leave on the first day did not entitle her to take as many as 11 days off duty without complying with the basic requirements of informing the Applicant as to how long she was going to be absent from work.
- [17] The fact that the Applicant was aware of her bereavement was not sufficient for her to assume that that it knew how long she would be absent from work. At most, the onus was upon her to at least inform the Applicant how long she was expected to be off duty, and this did not require of her to present herself at the premises to complete the necessary forms. A simple phone call would have sufficed. This is so in that the Applicant is entitled to organise its own operations to accommodate her absence. The Applicant's disciplinary code provided that absence without a reasonable explanation for longer than three days constituted a dismissible offence. To that end, in the light of Funde being aware of the applicable rules and policies in regards to absenteeism, and further in the light of her failure to comply with same, there was cause for the Applicant to charge her with misconduct in respect of her absence.
- [18] In concluding that the dismissal was unfair however, it is apparent that the Commissioner was influenced by a variety of factors which were not placed before him. In essence, the Commissioner conjured up reasons for Funde's conduct without a factual basis therefor. The first indicator in this regard is that the Commissioner inferred, without any evidence being placed before him, that the burial of Funde's sister did not take place in the first weekend of her death as the family was not in a position to arrange for that funeral to be held that week.

- [19] The Commissioner committed a gross irregularity in regards to the issue of onus. Despite it not being disputed that Funde had received the telegram on 2 October 2013, the Commissioner nevertheless shifted the onus upon the Applicant to have called Funde to establish her whereabouts. In my view, having received the telegram, and even before then, it was up to Funde to call the Applicant to inform it of her whereabouts, the reasons she had not reported for duty, and any further details in regards to funeral arrangements that may have necessitated that she absent herself for prolonged periods.
- [20] The Commissioner committed a gross irregularity in concluding that Funde had a reasonable and adequate excuse for her absence related to her sister's pending funeral, when this fact was not at any stage prior to the disciplinary enquiry made known to the Applicant. The essence of misconduct cases related to absenteeism is that the onus is upon the employee to inform the employer of the reasons for absence before or during the period of absence, and not to simply do so at the disciplinary enquiry or at arbitration proceedings. In this case, it was common cause that no explanation was forthcoming from Funde for the 11 days of her absence.
- [21] Other than the above, the Commissioner also committed a gross irregularity in concluding that the chairperson of the enquiry did not properly consider the circumstances of Funde when arriving at the decision to dismiss. This was so in that the enquiry was held in Funde's absence, and the chairperson could not have known what those circumstances were. All that the Applicant knew at that stage was that Funde's sister had passed away.
- [22] Furthermore, the Commissioner concluded that since Funde was attended to by a clinical psychologist on 2 October 2013 for a stress related condition, the second bereavement had affected her psychologically. In this regard, it is inexplicable that the Commissioner would have arrived at that conclusion without evidence having been led in that respect by the clinical psychologist. The Commissioner therefore irregularly used presumptive reasoning and unsubstantiated speculation, to justify his conclusions when there was in fact, proven yet unexplained misconduct.
- [23] The issue that remains is whether Funde's dismissal was appropriate in the circumstances. It is trite Commissioners are obliged to consider a variety of factors in determining whether a sanction of dismissal was fair or not<sup>6</sup>. These *inter alia* include the importance of security of employment; the importance of the rule that was breached;

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<sup>6</sup> Sidumo at para 78



the reasons for establishing the rule including its reasonableness; the harm caused by the employee's conduct; the impact that it had on the trust relationship; the reason why the employer imposed the sanction of dismissal; the basis of the employee's challenge to the dismissal; whether additional training and instruction may result in the employee not repeating the misconduct; the effect of dismissal on the employee; and the employee's service record. It is further trite that a sanction of dismissal should be reserved for gross forms of misconduct. Thus, the fact that the Applicant's disciplinary code called for a dismissal for the misconduct in question did not automatically imply that a dismissal ought to have followed.

[24] The Commissioner, despite having made a finding that Funde had not committed any misconduct nevertheless concluded that a written warning would have sufficed. This as correctly pointed out on behalf of the Applicant was contradictory, as a finding that there was no misconduct cannot be followed by one which suggest a lesser sanction in the same breath.

[25] In line with the factors to be considered in determining the appropriateness of the sanction as postulated in *Sidumo* as above, it is a fact in this case that the Applicant was clearly aware of Funde's bereavement. It is accepted that Funde had failed to comply with the rules related to absenteeism, and that she had not proffered any explanation in that regard. Be that as it may, and in the light of the Applicant's knowledge of Funde's bereavement, a dismissal in my view was indeed harsh, and a final written warning would have been appropriate in the circumstances.

[26] In regards to the procedural fairness of the dismissal, again the Commissioner allowed his maudlin sympathy for Funde to distract him from his task. There was no basis for him to conclude that it should have been obvious to the Applicant that Funde was not in a state of readiness to proceed with the disciplinary enquiry on 10 October 2013. Funde was aware of those proceedings and if indeed she was not in a position to proceed, nothing prevented her from attending and requesting a postponement. It is trite that an employee that choses to ignore disciplinary proceedings waives his or her rights to state his or her case. To the extent that Funde was made aware of the scheduled disciplinary hearing, and chose not to attend it, she did so at her peril. The Commissioner's conclusions therefore that that the dismissal was procedurally unfair cannot be said to be those of a reasonable decision maker.

[27] In the light of the conclusions that a sanction of dismissal was not appropriate, the remaining issue to be considered is whether the relief granted was appropriate. In

accordance with the provisions of section 194 (1) of the LRA, compensation awarded must be just and equitable in all the circumstances. In this case, and as correctly pointed out on behalf of the Applicant, even if there was unfairness on its part, compensation equivalent to eight months' salary cannot be construed to be just and equitable given all the circumstances of this case and the conclusions reached. The Commissioner based the amount on *inter alia*, the fact that the dismissal was procedurally unfair when this was clearly not the case. The only unfairness as already concluded related to the appropriateness of the sanction, and in my view, compensation equal to three months' salary would have been deemed to be just and equitable in the circumstances. Further having had regard to the requirements of law and fairness, it is my view that a cost order is not warranted in this case. Accordingly, the following order is made;

[28] In the premises, I make the following order:

**Order:**

1. The arbitration award issued by the First Respondent under case number ECPE5352-13 is reviewed, set aside and substituted with the following order;
  - a) 'The dismissal of Ms. Nomvuzo Funde was procedurally fair, and substantively unfair only in regards to the issue of sanction.
  - b) The Applicant, Wight Surveillance is ordered to pay to Ms. Funde, compensation in the amount of three months' salary calculated at her rate of pay as at 10 October 2013'
2. There is no order as to costs

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**Edwin Tlhotlhemaje**

Judge of the Labour Court of South Africa

LABOUR COURT

**APPEARANCES:**

For the Applicant: Ms Thandi Moyo of Snyman Attorneys

For the Third Respondent: Ms. Ellen Van Staden

*Instructed by:* *Legal Aid South Africa: Port Elizabeth Justice*  
*Centre*

LABOUR COURT