

**IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT BRAAMFONTEIN**

CASE NO JR 1055/10

In the matter between:

SCMAWU obo LINDIWE NKOSI

Applicant

and

**BARGAINING COUNCIL FOR THE RESTAURANT
CATERING AND ALLIED TRADES**

First Respondent

LISA MOSALA MATLATLE

Second Respondent

TORTELINO D'ORO

Third Respondent

JUDGMENT

COETZEE AJ:

Introduction

1. The Applicant seeks to review and set aside the arbitration award in case ARV08/12/01 dismissing Applicant's case. Applicant alleged an unfair dismissal while the Employer party relied upon a provision in the Bargaining Council Collective Agreement that provides that an Employee shall be deemed to have terminated his contract of service if absent without permission from work for more than five consecutive working days, or six working days during the preceding six months.

Background and Facts

2. Applicant relies upon the notes of the Arbitrator in the absence of a recording of the proceedings.
3. The Arbitrator in his award recorded that he was required to decide whether:
 - 3.1. *"The employee repudiates her employment with the employer or not.*
 - 3.2. *To consider and interpret the provisions of clause 13 (1) (ac) of the main agreement.*
 - 3.3. *The meaning of "deemed to have terminated his contract of service" as set (sic) in the main agreement.*
 - 3.4. *Interpret the provision of clause 14 (3) (c) of the main agreement.*
 - 3.5. *Whether the applicant absconded or not."*
4. It is in dispute that the Applicant, to which I shall refer as the Employee, was arrested on 28 September 2008 while on leave.
5. The Employee remained in custody, on her version, until 24 October 2008 when the charges against her were withdrawn.
6. She testified in the arbitration that on 25 October 2008 she visited the premises of the Third Respondent to whom I shall refer as the Employer.
7. The Employer (the date when this occurred is in issue) issued her with her UIF card reflecting the date of termination of services as 25 October 2008.
8. The Employer testified that the first visit from the Employee was on 3 December 2008 and not on 25 October 2008 as alleged by the Employee.

9. The Employee's testimony was that when she had to resume work on 9 October 2008 she was still incarcerated and unable to report for work.
10. The Employer on 13 October 2008 instructed a driver to deliver a letter to the Employee stating the following:

"With reference to the above, Tortelino D'Oro CC confirms your absenteeism without leave or valid reason in excess of five working days.

Therefore, in terms of clause 13(1)(ac) of the Bargaining Council's Collective Agreement for the restaurant trade, you have terminated your contract of service."

11. The relevant part of this provision reads as follows:

"... Any employee who deserts or who is absent without permission from work for more than five consecutive working days or six working days during the preceding six months (such an employee shall be deemed to have terminated his contract of service..."

12. The letter was issued and delivered on the fifth calendar day from the day when the Employee had to resume duty.
13. Even assuming that Saturday and Sunday, 11 and 12 October 2008 were "business days", the letter was issued prematurely.
14. This provision in the Collective Agreement does not call for any notice to the Employee when the Employer relies upon clause 13(1)(ac).
15. The Applicant's attack upon the arbitration award rests on a number of pillars.
16. The main attack is the finding of the Arbitrator rejecting the evidence of the Employee and her witnesses in favour of that of the Employer.

17. One example of such relevant evidence cited is the conflict between the Employer's witness's evidence that she first saw the Employee on the 3rd of December 2008 when she collected her UIF card and not on 25 October as alleged by the Employee.
18. In contrast Applicant testified that she attended on 25 October 2008 and collected her UIF card with the date of dismissal recorded thereon as such.
19. The UIF card presented by the Employee in the arbitration indeed reflects 25 October 2008 as the termination date and not 13 October 2008 when the letter was issued, or 3 December 2008 when according to the Employer she visited the Employer's premises.
20. The UIF card corroborates the evidence of the Employee on this point.
21. A further attack upon the arbitration award is that the Arbitrator incorrectly applied the onus of proof when considering the evidence.
22. The Employee testified that she was incarcerated for three weeks and first released on 24 October 2008.
23. The only witness for the Employer testified that she sent a driver to deliver the letter of 13 October 2008 to the Employee.
24. According to her, the driver reported back that when he delivered the letter someone accepting the letter had informed the driver, who then informed the Employer's witness that the Employee was in Zimbabwe.
25. The Arbitrator held that he was not satisfied that the Employee discharged enough proof on a balance of probability that she was in jail for a period of three weeks.
26. He also held that the Employee had to prove a negative, i.e. that she was not out on bail.

27. She testified that she was incarcerated and the SAPS official supported that evidence with documents produced to show she was in jail for that period.

Analysis of the evidence and arguments

28. The only evidence, if it can be so called, that the Employee was not in jail for three weeks is the hearsay evidence tendered by the Employer.
29. The Arbitrator approached the evidence on the basis that “The crux or the deciding factor in this case is whether the Applicant was granted a (sic) bail or not.”
30. There was no evidence whatsoever that Applicant was granted bail. only “evidence” that she might not have been in jail was the hearsay evidence (to the third degree) tendered by the Employer witness relying on what the driver had heard from a third-party.
31. The focus on the relevant evidence should have been, as recorded by the Arbitrator at the commencement of the arbitration, on an interpretation of clause 13 of the collective agreement and a consideration of the evidence pertaining thereto and not primarily whether the Employee was out on bail or not.
32. It is clear from the disputes in this matter that the Arbitrator, as recorded by the Arbitrator self, had to determine whether the Employee terminated her services in terms of clause 13(1)(ac) of the main agreement, or whether the Employer dismissed the Employee.
33. The Arbitrator failed to assess the interpretation and application of the clause in the collective agreement and also the relevant evidence pertaining thereto.
34. The relevant evidence related to whether:

- 34.1. The Agreement applies to the Employee, and
 - 34.2. More than 5 business days have expired: and
 - 34.3. The Employee had been absent from work without permission for more than five business days.
 - 34.4. The exception that absence due to incapacity applied in this case (this exception excludes the operation of this clause).
 - 34.5. Whether the provision in the collective agreement dispenses with a hearing when the Employee presented herself for duty at the Employer.
35. There is conflicting evidence on whether the Employee or one of her witnesses in good time approached the Employer and what exactly the purpose of such an approach was – to inform the Employer of the reason for the absence or to obtain permission for the absence.
36. The Arbitrator made a bald statement that the Employer's witness was more reliable than the Employee and the witnesses for the Employee.
37. The finding of the Arbitrator does not specify why and the relevant evidence is not identified to show where the Employee's case fell short and for what specific reasons the evidence tendered on behalf of the Employer was more reliable than the evidence presented by and on behalf of the Employee.
38. The Arbitrator exceeded his powers by not addressing the issues presented to him.
39. The approach of the Arbitrator and the way he dealt with the evidence and onus resulted in an unfair arbitration and it cannot be said to be an award that any reasonable Arbitrator could have made.

Order

40. The arbitration award under case number DSPARB08/12/01 is hereby reviewed and set aside.

41. The matter is referred to the Bargaining Council for the Restaurant Catering and Allied Trades for arbitration before an Arbitrator other than the Second Respondent.

COETZEE AJ
ACTING JUDGE OF THE LABOUR COURT

DATE OF HEARING: 20 DECEMBER 2010

DATE OF JUDGMENT: 22 December 2010

APPEARANCES:
FOR APPLICANT: P S Radebe of SCMAWU

FOR THE RESPONDENTS: Unopposed