

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

CASE NO JR 1403/10

In the matter between:

MOODLY, PATRICK

APPLICANT

and

COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION

1ST RESPONDENT

TM GRAHAM

2ND RESPONDENT

PIONEER FOODS IN STORE

3RD RESPONDENT

JUDGMENT

VAN NIEKERK J

[1] This is an unopposed application to review and set aside an arbitration award made by the second respondent ('the commissioner'). In his award, the commissioner ruled that the applicant's dismissal by the third respondent was substantively and procedurally fair.

[2] The arbitration proceedings concerned the applicant's absence from work for the period 24 November 2009 to 10 December 2009. The commissioner found that in terms of the third respondent's policy, absence from work for a period in excess of three days warranted dismissal, and upheld the applicant's dismissal, it would seem, on that basis. The commissioner's reasoning is apparent from the analysis of the evidence and argument. In this regard, the commissioner states the following:

From my reading of the evidence and observation of the respondent's witnesses it appeared that they all corroborated with each other on relevant and material aspects of this matter. For instance, all witnesses corroborated with each other in that they were aware that absenteeism in excess of three days warranted dismissal in terms of their disciplinary code. The applicant's version was that the respondent was not consistent in its application of discipline was never corroborated by any of the witnesses whom he called to testify on his behalf.

I find that the respondent's witnesses were credible and their evidence was truthful and I have no reason to doubt their narration of events

On the other hand I find that the applicant failed to meet the simple charges against him and as a result he resorted to base his case on issues relating to his unfortunate personal circumstances for instance he based the entire challenge respondent was aware that he suffered from stress and depression related ailments. The facts about his health issues were never placed in dispute by any of the respondent's witness. The fact remained that he failed to report to his line manager of his whereabouts for the period 24 November 2009 to 10 December 2009. In the circumstances I am satisfied that the applicant was aware that he had failed to inform the respondent of his whereabouts for the specified period in dispute. I am of the view that there are no sufficient grounds for the applicant to sustain his argument that the respondent was not sympathetic to his personal circumstances.

[3] In his founding affidavit, the applicant contends that the arbitrator misconducted himself in that he found in favour of the third respondent on the issue of consistency in the application of discipline, and that he ignored the third respondent's admission that no disciplinary action was taken against the applicant in respect of the period of absence from October to November. In his supplementary affidavit, filed after the record of proceedings had been reconstructed, expanded the grounds of review to include inter alia the contentions that the commissioner ignored undisputed and material evidence that the applicant was depressed during his absence from work, that the commissioner misconstrued evidence, that the commissioner falsified material evidence, and that the commissioner ignored an admission from the third respondent that they had failed to act in identical circumstances shortly before the incident for which the applicant was dismissed, that the commissioner ignored undisputed evidence that the applicant had been led to believe that he did not require permission to be absent, that the conclusion that the

dismissal was procedurally fair was not one that a reasonable decision maker could reach, that the commissioner's decisions regarding the credibility of the third respondents witnesses cannot be sustained by the evidence.

Legal principles

[4] The test to be applied in these proceedings is now well established. It requires the court to determine whether the commissioner's award is a decision to which no reasonable decision-maker could come (see *Sidumo & others v Rustenburg Platinum Mines Ltd* (2007) 28 ILJ 2405 (CC)). This is not to say that the enquiry is limited to the outcome or result. In relation to process, the commissioner is required to conduct him or herself as a reasonable commissioner would.

[5] The courts have emphasised that the test is one that maintains the distinction between reviews and appeals. In *Ralph Dennis Dell v Seton South Africa (Pty) Ltd & others* (case no JA 33/09) the Labour Appeal Court recently said:

It is important to note that the labour court was not sitting on appeal against the award of the commissioner. It is imperative that the distinction should always be observed. I mention this fact at this stage because the appellant contends that the labour court erred in coming to or erred in failing to come to a number of factual conclusions. Put differently, the appellant's main contention is that the commissioner made several incorrect factual findings in finding him guilty of the misconduct charges levelled against him (at paragraph [31] of the judgment).

[6] Virtually all of the grounds for review raised by the applicant ignore the distinction between an appeal and a review, and misconstrue the test established by the *Sidumo* judgment. Correctness is not in issue. The issue is whether the decision to which the commissioner came falls within a band of decisions to which reasonable persons could come given the available evidence. But it is further evident from the *Sidumo* judgment that the requirement of fairness dictates that CCMA arbitration proceedings should be conducted in fair manner, and that fairness in the conduct of the proceedings requires a commissioner to apply his or her mind to the issues that are material to a determination of the dispute. Where a commissioner fails to apply his or her mind to the issues, it can hardly be said that there was a fair trial of the issues. Any ensuing award in these circumstances falls to be set aside because the commissioner committed a gross irregularity in the conduct of the proceedings, not

because the result is wrong (see paragraph [267-8] of the judgment).

[7] To this extent, there is merit in applicant's contention that the commissioner failed to apply his mind to the issue of consistency. The issue appears to have been decided on the basis of credibility – the commissioner clearly accepts the version proffered by the third respondent's witnesses as credible and rejects the applicant's version on the basis that it was not corroborated by his own witnesses. This finding was entirely unnecessary – it is clear from the record that the applicant had been absent from work from 26 October 2009 to 6 November 2009, in circumstances where no disciplinary action was taken against him. This proposition was disputed by the witness to whom it was put in cross examination. In other words, it was not in dispute that the applicant had been absent from work from 26 October to 6 November 2009, and that no disciplinary action had been taken against him. The applicant's contention that the internal inconsistency in the third respondent's conduct (by taking disciplinary action against him only in respect of his absence from 24 November to 10 December 2009) was unfair is simply not addressed.

[8] For this reason, in my view, the commissioner failed to apply his mind to a material issue before him, and on that basis, the award is reviewable. In these circumstances, it is not necessary for me to consider any of the applicant's further grounds for review.

[9] Turning to the question of an appropriate order, the applicant submitted that the court ought to substitute the commissioner's finding with a ruling to the effect that his dismissal was unfair. Although the court has a discretion to substitute a commissioner's award, this is an exceptional remedy. I am reluctant to make an order for substitution in the present instance. Although an agreed record of the proceedings has been filed in these proceedings, it is not clear to me that the existence of any internal inconsistency in the exercise of discipline necessarily has the consequence that the applicant's dismissal was unfair. In other words, accepting for the moment that the third respondent elected not to exercise any right to discipline the applicant in respect of the first period of his absence, the similarity of circumstance in relation to the period of absence in dispute, if any, is a matter best dealt with by argument before another commissioner, as are the appropriate consequences.

For these reasons, I make the following order:

1. The arbitration award made by the second respondent on 21 May 2010 is reviewed and set aside.
2. The matter is remitted to the CCMA for a fresh arbitration hearing before a commissioner other than the second respondent
3. There is no order as to costs.

ANDRE VAN NIEKERK

JUDGE OF THE LABOUR COURT

Date of application 29 April 2011

Date of judgment 20 May 2011