THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR 2004/12

BP SOUTHERN AFRICA (PTY) LTD	**Applicant**
and	
NATIONAL BARGAINING COUNCIL FOR THE CHEMICAL INDUSTRY	**First Respondent**
COMMISSIONER J LE F PIENAAR	**Second Respondent**
THEO NTLOTLO	**Third Respondent**

Delivered: 11 June 2015

JUDGMENT

TLHOTLHALEMAJE, AJ

Introduction:

[1] This application came before the Court in terms of section 145 of the Labour Relations Act[1] (The LRA). The applicant (BP) seeks to review and set aside the award issued by the second respondent (Commissioner) under case number WECCHEM364-11/12 dated 13 July 2012.

[2] In the award, the Commissioner had found that the dismissal of the second applicant (Ntlotlo) by BP was procedurally fair but substantively unfair. The Commissioner had ordered that Ntlotlo be reinstated with retrospective effect from the date of his dismissal, coupled with a sanction of a final written warning valid for six months. This sanction was also to be put into effect on the proviso that Ntlotlo should not abuse his sick leave, and should he do so, further disciplinary action would be taken against him, which may result in his dismissal. The Arbitrator had further ordered BP to pay to Ntlotlo, as back pay, an amount equal to R49 000.00.

Background to the application:

[3] Ntlotlo was employed with effect from 3 December 1993. At the time of his dismissal on 2 March 2012, he was employed in the position of Bunker Crew Supervisor, with seven 'Bunker men' reporting to him. He was dismissed following a disciplinary enquiry into the following allegations;

a) From 9 to 20 January 2012 he took unauthorised absence from work;
b) Dishonesty in that he had during the month of January 2012, submitted fraudulent medical certificates to the company.

The arbitration proceedings:

[4] Following unsuccessful attempts at conciliating the dispute as referred to the first respondent, the matter came before the Commissioner for arbitration. The Commissioner recorded in the arbitration award that during the course of the evidence, indications surfaced that Ntlotlo was suffering from alcohol abuse, and he (Commissioner) had *mero motu*, raised the question whether the core

[1] 66 of 1995 as amended

of the dispute was not a matter of incapacity due to alcohol abuse, and whether Ntlotlo should not have undergone rehabilitation treatment.

[5] Evidence led on behalf of BP by Croxford, its Depot Manager and initiator of the disciplinary process was to the effect that in the light of Ntlotlo's history of bad work attendance and further since he had exhausted his 36 days sick leave over the last 4 cycles during 12 years, he had received counselling on several occasions. Although Croxford could not pinpoint the cause of the problem, he had suspected that Ntlotlo had problems with alcohol abuse. According to the company's policy, if an employee is absent for whatever reason, he or she must notify a direct supervisor by no later than 11h00 on the first day of absence.

[6] In regards to incidents leading to the dismissal in January 2012, Ntlotlo had not informed the company about his absence on 9 January 2012 in accordance with company policy, and various attempts were made to establish his whereabouts. At some point Ntlotlo's brother had called in and informed the company that Ntlotlo was injured, and conflicting messages were also received from his wife. In between attempts by Croxford to contact him, Ntlotlo also failed to answer calls to his phone.

[7] A day or two prior to Ntlotlo returning to work, Croxford had received information that he (Ntlotlo) had made enquiries about whether the company would accept medical certificates from traditional healers in support of his absence. When Ntlotlo was informed that these were not acceptable, he had then reported for duty and presented three copies of medical certificates issued by three different practitioners.

[8] The first medical certificate was issued by a Doctor MV Bikitsha, which stated that Ntlotlo was examined on 9 January 2012, and was diagnosed with cystitis, rendering him unable to report for duty between 9 to 12 January 2012. When questioned about this certificate during the course of the disciplinary enquiry, Ntlotlo had according to Croxford, stated that he went to consult with Dr Bikitsha on 9 January 2012 as he had suffered from a headache, had felt dizzy, and could not concentrate. Croxford had testified that there was no

connection between Dr Bikitsha's diagnosis (cystitis, which relates to an infection of the bladder) and the symptoms alleged by Ntlotlo.

[9] The second medical certificate was issued by a Dr. Matjekane on 12 January 2012, and Ntlotlo was diagnosed as suffering from migraines and depression. Sick leave was recommended from 12 to 17 January 2012. Croxford at the arbitration proceedings had testified that the alleged diagnosis was disconnected from Ntlotlo's brother's telephone call informing the company that he was allegedly injured hence his absence.

[10] The third medical certificate was issued by a Dr U Adam who had seen Ntlotlo on 17 January 2012, stating that he suffered from bronchitis and being declared unfit for work until 23 January 2012. Croxford had testified that at no stage had the applicant stated prior to his return that he suffered from bronchitis. Furthermore, Croxford had testified that Ntlotlo could not be reinstated as he was a supervisor and had broken the trust relationship. The company's disciplinary code and procedure made provision for a dismissal in cases of unauthorised absence, fraud and falsification of documents.

[11] When Ntlotlo returned to work on 23 January 2012, Croxford was informed that he did not look well. He had then approached the company's Wellness Advisor and a Psychiatrist to have discussions with Ntlotlo, and it was recommended that Ntlotlo should not be allowed to work.

[12] Tshayiso, a shift supervisor, had also testified and confirmed that Ntlotlo had contacted him on 11 January 2012 at about 19h11, and informed him that he was not well and would report for duty the next day. However the following day, Ntlotlo again failed to report for duty and his brother called in to say that he was injured and would not be able to come to work. Tshayiso could not recall any other days Ntlotlo or anyone had called on his behalf about his absence.

[13] Kannemeyer, who was Ntlotlo's direct shift supervisor, confirmed the latter's bad attendance record and history of absenteeism. He had held discussions with Ntlotlo about these problems. Kannemeyer in the light of Ntlotlo's absence on 9 January 2012 had contacted him and the response was that he

would report for duty the following day as he had a slight problem. The nature of the problem was not disclosed.

[14] Kannemeyer also confirmed having received a phone call from Ntlotlo's brother on 16 January 2012 who had stated that he was not feeling well and that he would report for duty on 18 January 2012. On the same date, Kannemeyer had also received a call from Ntlotlo's wife who had informed him that Ntlotlo was seeing a traditional healer, but could not confirm the nature of Ntlotlo's ailment.

[15] Dr Manjra, who is an Occupational Health Consultant for the company also testified that he had assessed the copies of medical certificates submitted by Ntlotlo, and had thereafter contacted the practitioners that had issued them. Dr Matjekane's rooms had no evidence of Ntlotlo's attendance at all, whilst Dr Bikitsha became abusive when contacted. Dr Adam on the other hand indicated that Ntlotlo had problems with alcohol abuse. Dr Manjra had concluded that Ntlotlo had an alcohol problem and that HR should intervene. Ntlotlo was then referred to a Psychiatrist who after consultations on 7 February 2012, concluded that he was not mentally ill and was fit to resume work.

[16] Matshoge is employed as a Wellness Advisor and had confirmed having held discussions with Ntlotlo as there were concerns about his alcohol abuse. Ntlotlo had denied being an alcoholic and stated that he was a social drinker, hence he was not sent for rehabilitation. Matshoge recommended that Ntlotlo be removed from duty and that he should be subjected to psychiatric evaluation. Ntlotlo was seen by a Dr George who had concluded that even though he had alcohol abuse problems, he was fit for duty.

[17] Matshoge further testified Ntlotlo had not volunteered to get help and no reports were received from his supervisors that alcohol had an impact on him. Thus only in circumstances where an employee volunteered to get assistance could the company send him for rehabilitation. Matshoge further testified in regards to the three medical certificates that Ntlotlo had submitted. When questioned, Ntlotlo could not recall how he got those copies. Matshoge had

further confirmed having given consent documents to Ntlotlo to sign in order for him to be referred for counselling for alcohol abuse.

[18] Ntlotlo, who was then […..] years old, confirmed having had discussions with Matshoge who had informed him that he should be sent for rehabilitation. Before anything could be confirmed with Matshoge, he was issued with a notice to attend a disciplinary enquiry and subsequently dismissed. In response to questions from the Commissioner, Ntlotlo had testified that he was a heavy drinker. He had further confirmed that he did not sign the consent documents to undergo rehabilitation even though he wanted to do so following his discussions with Matshoge

The award:

[19] The Commissioner in the light of the above evidence concluded that;

19.1 It was clear that the three medical certificates submitted by Ntlotlo did not reflect his true medical condition and the real reason for his absence between 9 and 20 January 2012, and accordingly his absence was unauthorised.

19.2 Ntlotlo presented false medical certificates to BP well knowing that they were false and therefore did so with fraudulent intent, causing potential prejudice to BP.

19.3 The root of Ntlotlo's problem was alcohol abuse, and the issue had to be dealt with in consideration of Item 10 of Schedule 8 to the Labour Relations Act, which dealt with matters surrounding Incapacity: Ill health or injury.

19.4 At the time of his absence from work, Ntlotlo was incapacitated to do his work due to alcohol abuse, which problem BP was fully aware of.

19.5 At the time of the disciplinary hearing Ntlotlo was willing to undergo rehabilitation, and since BP had a fully functional Wellness Department and HR section, Ntlotlo should have been sent to it. BP had instead taken a convenient route and instituted disciplinary proceedings knowing that it would lead to dismissal.

19.6 In the light of the above, the sanction of dismissal was unfair as it gave BP an opportunity to get rid of Ntlotlo instead of following the more cumbersome route of rehabilitation.

19.7 A continued employment relationship was not intolerable despite Croxford's assertions, more particularly in the light of Ntlotlo's years of service, his clean disciplinary record, and his conduct, which should be viewed in the light of his addiction.

The grounds of review:

[20] BP raised six grounds of review. The first related to the finding in respect of the allegations of dishonesty in that Ntotlo had submitted copies of fraudulent medical certificates. The second, third and fourth grounds related to the Commissioner's finding that BP should have treated Ntlotlo's case as one of medical incapacity as a result of his alcohol abuse problem. The fifth ground related to the Commissioner's finding in regards to the breakdown of the employment relationship. The sixth ground related to the relief awarded by the Commissioner in the light of the findings made.

[21] The submissions made on behalf of Ntlotlo were that the Commissioner's award was based on a correct understanding of our dismissal law and the evidence before him. It was contended that it did not contain any reviewable irregularity and there was no basis on which it could be reviewed and set aside.

The *legal framework:*

[22] In considering whether an award is reviewable, the reviewing Court is required to enquire whether the decision reached by the arbitrator is one that a reasonable decision-maker could not reach on the material placed before him

or her. Where the Court finds that the decision of the arbitrator does not fall within the band of reasonableness, it accordingly should intervene[2].

[23] Where an irregularity is alleged, a further question to be posed in line with the *Sidumo* test is whether the Commissioner misconceived the nature of the enquiry or arrived at an unreasonable result.[3] Flowing from the decisions in *Herholdt v Nedbank Ltd* and in *Goldfields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA and others*[4], the Labour Appeal Court in *Head of the Department of Education v Mofokeng and Others*[5] (per Murphy AJA) further held that whether or not a decision is unreasonable in its result is an exercise that is necessarily dependent on variable considerations and circumstantial factors. Thus flaws in the reasoning of the Commissioner, evidence of a failure to apply the mind, reliance by the Commissioner on irrelevant considerations or the ignoring of material evidence must be assessed with the purpose of establishing whether the arbitrator has undertaken a wrong enquiry, undertaken the enquiry in the wrong manner or arrived at an unreasonable result. Ultimately, the enquiry is whether these lapses and irregularities are of such a nature as to result in a misconceived enquiry or a decision to which no reasonable decision-maker could come on the material presented.

[24] The Labour Appeal Court in *Goldfields*[6] also cautioned against the adoption of a piece-meal approach in assessing whether the result of an award is unreasonable, and further held that in assessing the reasonableness of the outcome, it should be asked whether;

a) In terms of his or her duty to deal with the matter with the minimum of legal formalities, did the process that the arbitrator employed give the parties a full opportunity to have their say in respect of the dispute?

b) Did the arbitrator identify the dispute he or she was required to arbitrate? (This may in certain cases only become clear after both parties have led their evidence)

[2] *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 (CC) at para 110.
[3] *Herholdt v Nedbank Ltd* (2013) 34 ILJ 2795 (SCA) at para 25.
[4] [2014] 1 BLLR 20 (LAC).
[5] [2015] 1 BLLR 50 (LAC) at paragraphs [30] to [34]
[6] At para 14

c) Did the arbitrator understand the nature of the dispute he or she was required to arbitrate?

d) (iv) Did he or she deal with the substantial merits of the dispute?

e) (v) Is the arbitrator's decision one that another decision-maker could reasonably have arrived at based on the evidence?[7]

Evaluation:

[25] Having had regard to the record of the arbitration proceedings, the evidence led, and analysed, the conclusions arrived at by the Commissioner, as well as the submissions made in regards to the grounds of review, in this judgment, it is concluded that the application to review and set aside the award should succeed on the basis that decision reached by the Commissioner is clearly one that a reasonable decision-maker could not reach on the material placed before him. These conclusions are fortified by the following;

25.1 Section 188 of the LRA provides that;

(1) A *dismissal* that is not automatically unfair, is unfair if the employer fails to prove-

(a) that the reason for *dismissal* is a fair reason-

(i) related to the *employee's* conduct or capacity; or

(ii) based on the employer's *operational requirements*; and

(b) that the *dismissa*l was effected in accordance with a fair procedure

(2) Any person considering whether or not the reason for *dismissal* is a fair reason or whether or not the *dismissal* was effected in accordance with a fair procedure must take into account any relevant *code of good practice* issued in terms of this Act.

[7] At para [20]

25.2 Emanating from the above provisions, an arbitrator determining the fairness of a dismissal is obliged to assess the *reasons* proffered by the employer that led to that dismissal. Thus if the reason pertains to misconduct for instance, the arbitrator is required to assess and determine whether that reason relating to misconduct justified a dismissal on a proper consideration of the guidelines set out in Item 7 of Schedule 8: Code of Good Practice as contained in the LRA.

25.3 In this case Ntlotlo was dismissed on account of two allegations of misconduct, viz, unauthorised absence from work between 9 and 20 January 2012, and dishonesty in relation to the submission of fraudulent copies of medical certificates. These two acts of misconduct were the *real reasons* for the dismissal as proffered by BP, and the Commissioner in accordance with the provisions of section 188 of the LRA as indicated above was obliged to consider whether based on those reasons, the dismissal was fair.

25.4 It is accepted that in some instances, it may be alleged by the employer that the reason for a dismissal was as a result of factor Y. The evidence however as led by the dismissed employee and as accepted as being the most probable by a Commissioner could eventually show that the real reason was factor X. In these circumstances, Zondo JP as (As he then was) in *Fidelity Cash Management Services v Commission for Conciliation, Mediation and Arbitration and others*[8] , held that;

> "It is an elementary principle of not only our labour law in this country, but also of labour law in many other countries that the fairness or otherwise of the dismissal of an employee must be determined on the basis of the reasons for dismissal which the employer gave at the time of the dismissal. The exception to this general rule is where, at the time of the dismissal, the employer gave a particular reason as the reason for the dismissal in order to hide the true reason such as union membership. In such a case, the court or tribunal dealing with the

[8] [2008] 3 BLLR 197 (LAC) at para [32].

> matter can decide the fairness or validity of the dismissal not on the basis of the reason that the employer gave for the dismissal but on the basis of the true reason for the dismissal"

25.5 In this case, and even if it can be said that the Commissioner was obliged to deal with the fairness of the dismissal on the basis of any other reason, there is no hesitation in concluding that the Commissioner went on a frolic of his own, and completely misconstrued the nature of the enquiry before him based on the reason for the dismissal and evidence led in that regard. On his own, he had raised the issue whether the core of the dispute was not a matter of incapacity due to alcohol abuse and whether Ntlotlo should not undergo rehabilitation treatment for alcohol abuse. This was indeed irregular, in that;

25.5.1 It was never BP's case nor that of Ntlotlo that the dismissal was related to alcohol abuse and incapacity, and that BP used the two charges that led to a dismissal as a smokescreen. Any such conclusions could only have been reached if pleaded by Ntlotlo, and also if ultimately proven on the facts.

25.5.2 There was no evidence led by Ntlotlo that his alcohol problems had led to his alleged incapacity, or the reason for his absence, until probed and prompted by the Commissioner.

25.5.3 Only after being prompted by the Commissioner did Ntlotlo indicate that he was a heavy drinker, which revelation was not only opportunistic, but also evidence BP had not been aware of, or which it was afforded an opportunity to rebut.

25.5.4 There was evidence that Ntlotlo had been counselled before in regard to his absenteeism and bad attendance record;

25.5.5 The copies of fraudulent medical certificates submitted by Ntlotlo, even if they were to be accepted, had not indicated that he had alcohol problems or was incapacitated, and the Commissioner had accepted that they were fraudulent.

25.5.6 Ntlotlo was not decisive as to whether he sought assistance or not in relation to his alleged alcohol abuse problems. On his version, he had not signed the consent forms to volunteer for rehabilitation, and even if it had dawned on him that he should have volunteered for rehabilitation, BP had already decided to take steps against him on the basis of his dishonest conduct.

25.5.7 The Commissioner ultimately during the course of the proceedings had realised that the details surrounding alcohol abuse and alleged incapacity were not placed before him[9], and he had nevertheless continued to make his ultimate findings on those issues.

25.5.8 Despite having concluded that copies of the medical certificates were fraudulent, and thus Ntlotlo was on unauthorised absence, the Commissioner nevertheless continued to conclude, and without any basis, that his absence was due to being incapacitated to do his work due to alcohol abuse.

25.6 The Commissioner's conclusions therefore that Ntlotlo's absence was due to his alcohol addiction which had led to his incapacity was not based on facts as illustrated above. To the extent that the Commissioner adopted this approach, he not only subverted BP's case, but he had also dictated to the parties as to what the nature of their dispute and invariably, of the enquiry, should be.

25.7 Once a dismissal had taken place and the dispute was before a Commissioner, it is not within his powers during the arbitration process, without either solicitation or evidence, to give his or her opinion on what the reasons for the dismissals are, should have been or what the employee should have been charged with. This was a matter that

[9] See transcribed record at pages 657 to 658

should have been raised by Ntlotlo in his defence. This principle was emphasised in *Sidumo*[10] where the Constitution Court held that in terms of the LRA, a Commissioner has to determine whether a dismissal is fair or not. A Commissioner is not given the power to consider afresh what he or she would do, but simply to decide whether what the employer did was fair. In arriving at a decision a Commissioner is not required to defer to the decision of the employer. What is required is that he or she must consider all the relevant factors and circumstances.

25.8 It is accepted that Commissioners ultimately act as educators within the context of their functions, and that their powers within the ambit of sections 138 and 142 of the LRA are clearly wide enough to allow them latitude to determine a matter in any manner that they deem appropriate. These provisions are however not a license for Commissioners within the context of determination of unfair dismissal disputes, to assist parties in putting forward a case they had never relied upon in the first place, or to dictate to parties what their dispute ought to be.

25.9 As to what the employer ought to have done in a particular set of circumstances is a matter that the arbitrator could probably address within the context of evaluation of evidence in the award, with the purpose of educating the employer in order not to repeat incidents of unfairness. But this would only be where this is found to be the case. It is however grossly irregular for a Commissioner to on his own, and without evidence, to suggest to parties within the arbitration process, how a particular issue should have been dealt with or argued. There is a fine line between a Commissioner's attempt to establish the real dispute between the parties, and assisting a party to put up a case.

25.10 In support of the Commissioner's approach, Mr Van der Riet on behalf of Ntlotlo placed reliance on the principles set out in *CUSA v Tao Ying*

[10] at para [79]

Metal Industries and Others [11], for the proposition that the Commissioner was required to look at the nature of the real dispute between the parties in coming to his decision, and thus his reasoning could not be faulted. It was further submitted that even if Ntlotlo had not admitted that he was an alcoholic, or never explicitly articulated at the disciplinary enquiry that he should have been sent for treatment, this did not prevent a finding that it was unfair to discipline and dismiss him in the circumstances. To this end, it was further submitted that the Commissioner could not be limited in determining what issues were relevant for a proper determination of the dispute.

25.11 It is my view that the principles set out in *CUSA* in regards to the mandate of a Commissioner when determining unfair dismissal disputes, needs to be understood in context. There is a particular approach in dealing with different disputes including those pertaining to unfair dismissals as opposed to other disputes such as unfair labour practices, matters of mutual interests or those determined under the provisions of section 24 of the LRA, which may not necessarily be clear

[11] [2009] 1 BLLR 1 (CC) paras 62 to 63, where Constitutional Court held that;

Consistent with the objectives of the LRA, Commissioners are required to “deal with the substantial merits of the dispute with the minimum of legal formalities.” This requires Commissioners to deal with the substance of a dispute between the parties. They must cut through all the claims and counter-claims and reach for the real dispute between the parties. In order to perform this task effectively, Commissioners must be allowed a significant measure of latitude in the performance of their functions. Thus the LRA permits Commissioners to “conduct the arbitration in a manner that the Commissioner considers appropriate”. But in doing so, Commissioners must be guided by at least three considerations. The first is that they must resolve the real dispute between the parties. Second, they must do so expeditiously. And, in resolving the labour dispute, they must act fairly to all the parties as the LRA enjoins them to do.

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.”

unless the arbitrator adopts the approach suggested in *CUSA*. In circumstances where an employer contends that an employee was dismissed for a particular reason relating to misconduct, the provisions of section 188, and 192 (2) of the LRA, read together with the guidelines in Item 7 of Schedule 8 are clear as to what the arbitrator should look for. The Constitutional Court in *CUSA* other than outlining the obligations of the Commissioner when determining disputes, further added that;

> "It is by now axiomatic that a Commissioner is required to apply his or her mind to the issues properly before him or her. Failure to do so may result in the ensuing award being reviewed and set aside. Recently, in *Sidumo*, the matter was put thus:
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> > "It is plain from these constitutional and statutory provisions that CCMA arbitration proceedings should be conducted in a fair manner. The parties to a CCMA arbitration must be afforded a fair trial. Parties to the CCMA arbitrations have a right to have their cases fully and fairly determined. Fairness in the conduct of the proceedings requires a Commissioner to apply his or her mind to the issues that are material to the determination of the dispute. One of the duties of a Commissioner in conducting an arbitration is to determine the material facts and then to apply the provisions of the LRA to those facts in answering the question whether the dismissal was for a fair reason. In my judgment, where a Commissioner fails to apply his or her mind to a matter which is material to the determination of the fairness of the sanction, it can hardly be said that there was a fair trial of issues""[12]

25.12 It is further apparent that in adopting the particular approach in this case, and in treating the case before him as relating to incapacity when this was not the reason that led to the dismissal, the Commissioner miscategorised the charges against Ntlotlo and misdirected the nature of the enquiry as evident from his analysis where he stated that;

[12] At para [76].

"It is also clear that the root of the problem is the Applicant's alcohol abuse, and it has to be decided how this aspect should be dealt with[13]

25.13 Having stated the above, the Commissioner then proceeded to determine the matter as a dismissal for incapacity with reference to Item 10 of Schedule 8 of the LRA, when in essence, this was not the nature of the enquiry before him. The issue was whether BP had discharged the onus placed on it as contemplated in section 188 and 192 (2) of the LRA, to prove that the dismissal based on the two acts of misconduct as specified was fair. These were the issues the Commissioner was required to apply his mind to as they were properly before him.

25.14 The Commissioner in his analysis started well and found that the three copies of medical certificates submitted by Ntlotlo were fraudulent, and thus his absence between 9 and 20 January 2012 was unauthorised. Having started well, and rather than considering whether the sanction of dismissal was appropriate in the circumstances, he then inexplicably took the approach that the problem was alcohol abuse.

25.15 It is not being suggested that alcohol abuse may not have been a contributory factor to all that went wrong for Ntlotlo, as there was evidence that indeed this may have been the case. Even if the Commissioner was inclined to have concluded that alcohol was indeed an issue, there was no basis for him to reach the conclusion that the matter should have been treated as an incapacity dismissal on the grounds already stated.

25.16 A finding of unfairness cannot be based on inferences and suppositions. It must be based on facts as assessed and on a balance of probabilities. It is further appreciated that at bargaining councils and the CCMA there is no provision for pleadings, and the Commissioner is clearly bound to consider what the real dispute before him was all about. Thus where the Commissioner had formed an opinion that the

[13] At paragraph [58] of the award.

dismissal could have been as a result of Ntlotlo's alcohol abuse problem, at the very least, it was expected of him to have enquired whether Ntlotlo in the light of his belated revelations that he was a heavy drinker, now sought to rely on that reason as the reason for his dismissal, and to accordingly advise the parties to present evidence in that regard. The Commissioner nevertheless failed to afford the parties an opportunity in this regard, and thus failing to afford BP an opportunity of a fair trial. The Commissioner came to a conclusion based on his own assumptions and inferences, which were not supported by the facts before him.

25.17 To the extent that the Commissioner had concluded that the copies of medical certificates submitted were fraudulent, and further to the extent that the absence between 9 and 20 January 2012 was unauthorised, this should have been the end of the matter, and the only outstanding issue was the determination of the fairness of the sanction of dismissal. The submissions made on behalf of Ntlotlo that it could not be contended that the Commissioner had found Ntlotlo guilty on the charge of dishonesty are without substance when regard is had to the Commissioner's emphatic conclusion that;

> *"It is clear that the three medical certificated submitted by the Applicant did not reflect the Applicant's true medical condition and the real reason for his absence from 9-20 January 2012. His absence was unauthorised. It may be that the Applicant's family members played a role in the false information given to the Respondent about the Applicant's absence. But the Applicant presented false certificates to the respondent well knowing that they were false and therefore did so with fraudulent intent, causing at least potential prejudice to the Respondent. The Applicant thus acted fraudulently in submitting the three medial certificates."* (Sic)

25.18 Notwithstanding the above decisive conclusions, what made the Commissioner's reasoning even more startling and contradictory were the terms of his order of reinstatement. It was never BP's case nor that of Ntlotlo that he was dismissed for sick leave abuse. In ordering reinstatement with a final written warning on the proviso that Ntlotlo would not abuse the sick leave within the six months, the Commissioner as also correctly pointed out, misconstrued the nature of the enquiry, and arrived at a decision, which did not fall within the range of reasonableness in the light of the material before him.

[26] A further ground of review related to whether the relief granted was reasonable in the light of questions of a trust relationship and evidence led in that regard. Submissions made on behalf of Ntlotlo were to the effect that the Commissioner's findings that BP had not established that the circumstances surrounding the dismissal were such that continued employment relationship would be intolerable within the meaning of section 193 (2) (b) of the LRA could not be faulted. In this regard, the Commissioner had taken into account Ntlotlo's 19 years of service, a clean disciplinary record, his bad attendance record and BP's perception that alcohol abuse may have been a factor.

[27] It is accepted that in considering the fairness of a sanction and any relief, the Commissioner must also take into account the provisions of section 193 of the LRA, the guidelines set out in Item 7 of Schedule 8, and the factors pointed out in *Sidumo*[14]. In this case, and as already pointed out, the Commissioner in coming to his conclusions was persuaded by his opinion as to what BP should have done when there was no evidence before him to support those conclusions. Having concluded that Ntlotlo had indeed acted dishonestly and having found that his absence was unauthorised, the Commissioner's sense of fairness would have further dictated that the sanction of dismissal was fair having taken account of the following factors;

[14] At paras [72] to [78]   These are:

The general vulnerability of employees to unfair decision making; The importance of security of employment; The importance of the rule that was breached; 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 effect of setting a precedent; 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; The employee's long service record; The generally applicable industrial norms of which Commissioners will have knowledge through the institutional knowledge of the CCMA, (para [183]).

27.1 There was a decisive conclusion that Ntlotlo was dishonest in submitting copies of fraudulent medical certificates, and therefore his absence was unauthorised. Evidence led was to the effect that BP took such transgressions seriously, and its disciplinary code called for a dismissal in such cases.

27.2 Ntlotlo was well aware of the policy regarding absenteeism and had not adhered to same. He had held a supervisory position, with several subordinates looking up to him, and his bad attendance record clearly had an impact on BP's operations.

24.3 Ntlotlo's absence was unauthorised, and he had dishonestly sought to mislead BP about the reasons for his absence, and in the course of doing so, unashamedly used his family members to lie on his behalf. As correctly pointed out on behalf of BP, there is no basis for any conclusion to be reached that Ntlotlo may have been delusional in the light of the finding that he had committed the fraud with intent as found by the Commissioner.

24.4 The dishonesty in question was serious enough to impact on a trust relationship.

27.5 Ntlotlo's long service was not an automatic bar to a sanction of dismissal in circumstances where he was counselled in regards to his bad attendance record, and where it was apparent that progressive discipline would not have yielded the desired results, moreso in the light of his dishonest conduct.

27.6 Until prompted by the Commissioner, Ntlotlo never at any stage acknowledged that he had any alcohol problems, had not showed any sense of contrition or willingness to own up to his conduct, and his concessions in regards to his alcohol problem were merely a façade.

Conclusions:

[28] In terms of his duty to deal with the matter with the minimum of legal formalities, the Commissioner deprived BP in particular, a full opportunity to have its say in respect of the dispute and the issues that had led to the dismissal. The Commissioner by going on a frolic of his own therefore failed to identify the dispute he was required to arbitrate and thus failed to understand the nature of the dispute he was required to determine. Consequently, and in the light of these irregularities and flaws, he had arrived at an outcome that a reasonable Commissioner would not have arrived at in the light of the material before him. Consequently, the award should be set aside.

[29] I have further had regard to the record and the evidence that was before the Commissioner. In the light of the conclusions reached in this judgment, and in particular reference to its paragraph [27],I am of the firm view that no purpose will be served by remitting the dispute back to the first respondent. I have further had regard to the issue of costs, and it is my view that considerations of law and fairness militate against such an order. Accordingly, the following order is made;

Order:

i. The award issued by the Second Respondent (Commissioner) under case number WECCHEM364-11/12 dated 13 July 2012 is reviewed and set aside.

ii. The above award is substituted with an order that;

“The dismissal of Theo Ntlotlo by BP Southern Africa (Pty) Ltd was procedurally and substantively fair.”

iii. There is no order as to costs.

Tlhotlhalemaje

Tlhotlhalemaje, AJ

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Adv. FA Boda.
Instructed by:	North Rose South Africa
For the Third Respondent:	H Van der Riet SC
Instructed by:	Cheadle Thompson & Haysom INC