



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR 1251/2014

In the matter between:

GLENCORE (PROPRIETARY) LIMITED

Applicant

and

COMMISSION FOR CONCILIATION, MEDIATION

First Respondent

AND ARBITRATION

COMMISSIONER ELIAS LEKGWATHI N.O

Second Respondent

NATIONAL UNION OF MINEWORKERS

Third Respondent

SONNYBOY MANYONI

Fourth Respondent

Heard: 17 May 2018

Delivered: 11 September 2018

JUDGMENT

TLHOTLHALEMAJE, J:

Introduction and background:

- [1] The applicant, (Glencore) seeks an order reviewing and setting aside the arbitration award issued by the second respondent (Commissioner) dated 3 April 2014. In the award, which followed upon a referral of an alleged unfair dismissal dispute by the third respondent (NUM) on behalf of its member and fourth respondent (Manyoni), the Commissioner found that the dismissal of

Manyoni was unfair, and ordered his retrospective reinstatement, coupled with an amount of back-pay equivalent to three months' salary. The review application is opposed by NUM.

[2] The facts leading to the dispute are fairly common cause;

- 2.1 Manyoni was employed as a Composite Operator with effect from March 1998 and was dismissed on 29 June 2013 following upon his absence from duty between 30 June 2013 and 16 July 2013. Prior to his absence, he had requested to take leave for the same period that he was absent. His request was declined based on Glencore's operational requirements since another Operator had also requested and was granted leave for the same period.
- 2.2 In his absence, Glencore invoked clause 4.4 of its Disciplinary Policy and Procedure¹, in terms of which if an employee was absent from the workplace for more than six consecutive shifts/days and had not reported the absence or notified a supervisor of the reasons for absence, he/she would be deemed as having deserted.
- 2.3 Upon his return, Manyoni was afforded an appeal hearing, which sat on 12 September 2013. At the appeal he had submitted two medical certificates to justify his absence for the periods 30 June 2013 to 3 July 2013, and 8 July 2013 to 11 July 2013. He had further stated that he had asked his colleague, Mofokeng to pass a message to his supervisor that he was unwell, and that he had faxed through copies of his medical certificates.

¹ Which reads:

"4.4

Procedure for Dealing with Desertion/Extended abscondment

- 4.4.1 Should an employee be absent from his/her place of employment without notification to his/her supervisor of his/her whereabouts for a continuous period of six working days/shifts, he/she will be deemed to have deserted and will be written off as a deserter
- 4.4.2 An employee whose services have been terminated on the grounds of desertion and who seeks to resume his/her employment may lodge an appeal for consideration of reinstatement.
- 4.4.3 The onus rests on the employee to show good cause why his actions should be condoned..."

- 2.4 Glencore was not satisfied that Manyoni was able to show that he had complied with the provisions of the policy by attempting to notify his supervisor of his whereabouts. It was not satisfied with his reasons for his absence, and had accordingly confirmed the dismissal.

The arbitration proceedings and award:

- [3] Attempts at conciliation having failed, the dispute came before the Commissioner for arbitration. Mr Bernard Maripe, who was Manyoni's supervisor, testified that he was not informed of the latter's absence, and the reasons thereof. In the past, Manyoni had always complied with the rules related to absenteeism before, by calling him and informing him that he was either going to see a doctor, or that he was from a doctor, and/or would also send or bring in copies of his medical certificates to justify his absence.
- [4] Prior to taking unauthorised leave of absence, Manyoni had informed Maripe that he wanted to take leave as his son was due to attend a 'circumcision school'. When Maripe informed him that he could not take leave at the time, Manyoni had nonetheless insisted that he would. Maripe had also during his absence, enquired from his colleagues whether anyone had knowledge of his whereabouts and none of them had. In accordance with the policy, once the six continuous days/shift had passed without Manyoni reporting for duty, he was then regarded as having deserted
- [5] Manyoni's testimony was that he had reported his absence to a fellow employee, and had during his sick leave, went home. He had conceded that his initial request to take leave was declined. During his last shift at work he fell ill, but contended that he had made attempts to fax through a copy of his medical certificate to another employee, Siwe at the premises. He had consulted with a medical doctor during his absence and he could not tell the nature of his ailment. Manyoni denied that he had informed Maripe that his son was due to attend a 'circumcision school'.
- [6] Manyoni's colleague, Kopano Mofokeng had testified that Manyoni had telephonically informed him that he was unwell and asked him to pass the

message to the supervisor, which he had done. Manyoni had further informed him that he would fax through a copy of his medical certificate.

[7] The Commissioner having considered the Commission for Conciliation Mediation and Arbitration (CCMA) Guidelines and the provisions of sections 138(1) and 138(6) of the LRA concluded that;

7.1 Manyoni had submitted copies of his medical certificate on the date of the appeal hearing that covered the period of absence, but was dismissed before Glencore had made any attempts whether via telephone or telegram, to contact him to return to work, unlike in other instances in the past, where another employee who was absent was contacted.

7.2 There was no evidence to suggest that Manyoni had abused his sick leave, and Glencore's approach that an employer could dismiss an employee after six days of absence on the basis of being deemed as having absconded was legally incorrect, as an employee could only be deemed to have deserted if it is proven that he/she had formed an intention not to resume work. In this case, there was no evidence that Manyoni had formed an intention not to return to work.

7.3 Manyoni's version that he was not feeling well and had consulted with his doctor should be accepted. In dismissing Manyoni, Glencore followed incorrect principles as contained in its code, and the dismissal was inappropriate.

7.4 Manyoni was last counselled in 2008 after being absent for more than five days, and had no valid warnings for the same offence during the material period. In the light of his long service and the high unemployment rate, the dismissal was substantively unfair.

The grounds of review:

[8] Glencore seeks to have the arbitration award reviewed and set aside on the basis that the Commissioner committed certain material irregularities in the

conduct of the arbitration proceedings, and reached an outcome that was not properly founded on the material placed before him. It was further submitted that the Commissioner committed an irregularity by;

- 8.1 Finding that Glencore had not challenged the veracity of the medical certificates.
- 8.2 Finding that Glencore's desertion policy was wrong and that the company had to show that Manyoni had intention to desert and not return to work, and accepting Manyoni's version that he had not been feeling well, and that it was probable that he had consulted with his doctor when he was not aware of the nature of his ailment.
- 8.3 Attaching relevance to how Glencore had dealt with similar incidents with another employee, when that issue was not tested with its witnesses.
- 8.4 Finding that Glencore failed to contact Manyoni to establish his whereabouts or the reasons for his absence prior to his dismissal.

[9] The submissions made on behalf of Manyoni and NUM were as follows;

- 9.1 In terms of the provisions of section 22 of the Basic Conditions of Employment Act (The BCEA)², an employee is entitled to sick leave. All that was required was for the employee to produce copies of medical certificates to justify absence. Manyoni had complied with these requirements.
- 9.2 Insofar as compliance with Glencore's policies was concerned, Manyoni upon failing to contact Maripe had made contact with a fellow employee, Mofokeng, who had further confirmed having passed a message to Maripe. Despite the failure to directly contact Maripe, Manyoni's efforts to contact him were sufficient for the purposes of compliance with the policies.

² Act 75 of 1997 (as amended)

- 9.3 Glencore's reliance on the decision in *Mgobhozi v Naidoo*³, was misplaced in that the judgment did not state that employers must reject copies of medical certificates on the basis that such certificates are available upon a payment of an appropriate fee. There was further no evidence to suggest that the legitimacy of the medical certificates was challenged, and if there was a concern, there was nothing that prevented Glencore from having Manyoni assessed by its own medical doctors.
- 9.4 The Commissioner did not commit any irregularity by accepting Manyoni's version that he was sick despite Glencore's dissatisfaction with his explanation of the nature of his ailment;
- 9.5 The Commissioner's conclusions that Glencore had failed to prove that Manyoni had intentions to desert his post was reasonable.
- 9.6 The Commissioner's findings in regard to inconsistency, and reliance on a letter produced by Manyoni (from Ms Makgamatha) cannot be criticised as Glencore did not object to its production. This letter demonstrated that other employees were in the past, telephonically contacted during their absence.

Evaluation:

- [10] It is trite that the test on review is based on reasonableness. The primary question to be asked by the reviewing court is whether the decision made by the commissioner is one that a reasonable decision-maker could not have made based on the material placed before him or her. A reviewing court as stated in *Goldfields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA and others*, 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 reasonable⁴.

³ [2006] 3 BLLR 242 (LAC)

⁴ [2014] 1 BLLR 20 (LAC) at para 16

- [11] Central to the review test as further explained in *Department of Education v Mofokeng & others*⁵, is that the failure by an arbitrator to apply his or her mind to issues which are material to the determination of a case will usually be an irregularity, and that before such an irregularity will result in the setting aside of the award, it must in addition reveal a misconception of the true enquiry or result in an unreasonable outcome⁶.
- [12] It further needs to be re-emphasised as it has repeatedly been done in this Court, that the starting point for Commissioners when determining the fairness of a dismissal for misconduct, is a consideration of the provisions of Item 7, Schedule 8 of the Code of Good Practice: Misconduct⁷, which must be read and applied in tandem with those of the CCMA Guidelines, Misconduct Arbitrations.
- [13] In this case, it was not in dispute that absenteeism in the workplace was governed by clause 4.4 of Glencore's Disciplinary Policy and Procedure. This was the basis upon which Manyoni's dismissal was effected. It follows in determining the dispute before him, the Commissioner was called upon to consider whether the requirements of clause 4.4 of Glencore's Policy were met. These were whether Manyoni was absent from his place of employment; whether he had notified his supervisor of his whereabouts during his absence;

⁵ [2015] 1 BLLR 50 (LAC)

⁶ At paragraph 30. See also *Herholdt v Nedbank Limited (Congress of South African Trade Unions as amicus curiae)* 2013 (6) SA 224 (SCA); [2013] 11 BLLR 1074 (SCA); (2013) 34 ILJ 2795 (SCA) at paragraph 25, where it was held that;

"In summary, the position regarding the review of CCMA awards is this: For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2) (a) (ii) ...the Arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable Arbitrator could not reach on all the material that was before the Arbitrator. Material errors of fact, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable"

⁷ Which provides:

7. Guidelines in cases of dismissal for misconduct.—Any person who is determining whether a dismissal for misconduct is unfair should consider—

- a) whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the work-place; and
- b) if a rule or standard was contravened, whether or not—
 - (i) the rule was a valid or reasonable rule or standard;
 - (ii) the employee was aware, or could reasonably be expected to have been aware, of the rule or standard;
 - (iii) the rule or standard has been consistently applied by the employer; and
 - (iv) dismissal with an appropriate sanction for the contravention of the rule or standard.

whether he was away from work for a continuous period of six shifts/days; whether he should have been deemed to have deserted in terms of the Policy; and whether he had shown good cause for his absenteeism.

- [14] Having had regard to the award, the conclusions reached therein, the parties' submissions and the transcribed record of proceedings, I have no hesitation in concluding that the Commissioner clearly misconceived the nature of the enquiry and/or undertook the enquiry in an incorrect manner. He further failed to have regard to or evaluate certain material evidence before him, and essentially arrived at an unreasonable outcome. These irregularities invariably render the award reviewable. The basis of my conclusions are as below.
- [15] It was common cause that Manyoni was absent from duty between 30 June and 15 July 2013. His contention was that he was sick during his absence. That contention in my view ought to have been tested and assessed against the undisputed fact that he had previously requested leave for the same period, which request was declined for reasons of Glencore's operational requirements.
- [16] Maripe's contention that Manyoni had stated that he intended to take leave in order to attend to his son as he was going to 'circumcision school', and that he would take leave in any event was disputed. It is significant to note that the Commissioner completely ignored that evidence⁸. To the extent that there were contrasting versions as to whether Manyoni had indeed said that he was wanted to take leave, a duty rested upon the Commissioner to have resolved that dispute by an assessment of its reliability, probabilities, and the credibility of witnesses as required in terms of Clause 56 of the CCMA Guidelines⁹. The Commissioner despite having made reference to these guidelines clearly paid

⁸ See *Gold Fields Mining SA Ltd (Kloof Gold Mine) v CCMA and Others* at paragraph 21, where it was held that;

"Where the arbitrator fails to have regard to the material facts it is likely that he or she will fail to arrive at a reasonable decision. Where the arbitrator fails to follow proper process he or she may produce an unreasonable outcome (see *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* 2006 (2) SA 311 (CC)). But again, this is considered on the totality of the evidence not on a fragmented, piecemeal analysis. As soon as it is done in a piecemeal fashion, the evaluation of the decision arrived at by the arbitrator assumes the form of an appeal. A fragmented analysis rather than a broad-based evaluation of the totality of the evidence defeats review as a process."

⁹ See also *Stellenbosch Farmers Winery v Martell et cie* 2003 (1) SA 11 (SCA) at para 5

lip service to them. It was important for the Commissioner to have resolved that factual dispute, for the purposes of determining the probabilities of Manyoni's version that he was sick, and his further version that it was pure coincidence that he fell sick at the same time or period that he had sought and was declined leave. For the Commissioner to therefore have merely accepted that Manyoni was sick based on his copies of medical certificates, when the evidence suggested that he was bent on taking leave despite it having been declined is indeed extraordinary.

- [17] The next issue for consideration is whether Manyoni had informed his supervisor of his whereabouts in the light of his absence for a continuous period of six shifts/days. It was not in dispute that Manyoni was well aware of this requirement, as on the uncontested of Maripe, he had in the past called in to report his absence and given reasons.
- [18] Manyoni had under cross-examination conceded that he had not indeed contacted Maripe, and his excuse was that he did not have his telephone number. It is inexplicable that Manyoni could suddenly not have had Maripe's telephone contact number when there was a need to call him at that stage. Sadly, the Commissioner failed to take this factor into account.
- [19] There was a dispute as to whether Manyoni's message that he was not well was conveyed by Mofokeng to Maripe. This issue was important in that on Maripe's uncontested version, an employee ought to report absence and reasons thereof before the next shift commenced. Maripe had not heard from Manyoni on 30 June 2013. He did not know of his whereabouts, and had enquired from his colleagues without success. During Maripe's cross-examination, it was never put to him that it would be Manyoni's case that Mofokeng had passed his messages to him. It is trite that there is an obligation on a party to put a version to a witness prior to a conclusion being made on the veracity of that version¹⁰. At most, all that Maripe was asked

¹⁰ See *SA Nylon Printers (Pty) Ltd v David* (1998) 2 BLLR 135 (LAC); *ABSA Brokers (Pty) Ltd v CCMA & others* (JA45/03 of 26 May 2005) at paragraph...., where it was held that;

"It is an essential part of the administration of justice that a cross-examiner must put as much of his case to a witness as concerns that witness (see *Van Tonder v Killian NO en Ander* (1992) 1 SA 67 (T) at 721). He has not only a right to cross-examination, but, indeed,

was whether he was sure that he did not receive *'anything'* of the whereabouts of Manyoni¹¹, and his answer was that he had not. He had repeatedly stated that he had asked his colleagues about his whereabouts and no one knew, and not once was he challenged on that version. The evidence that Mofokeng had passed a message only came about when Manyoni was cross-examined or when Mofokeng testified to that effect. In fact, during his examination in chief, Manyoni was asked whether he had reported to *'someone'* about his whereabouts during the period of absence, and his response was that he did report to *'someone'*¹². He never indicated in his evidence in chief who that *'someone'* was, or when that individual was contacted, or whether he had received feedback from that individual as to whether his message had reached Maripe.

- [20] It nonetheless gets worse for Manyoni in that even if Mofokeng's version, which was not put to Maripe in his cross-examination was to be believed, that version in any event was vague in the extreme. He had testified that Manyoni had called him at 06h30 in the morning and asked him to report that he was not feeling well. Under cross-examination, Mofokeng could however not recall the day or date when Manyoni had called him, but contended that they were supposed to be on the morning shift together.
- [21] The contention therefore that Maripe was contacted through Mofokeng, and that this was sufficient for the purposes of notification for Manyoni's absence in compliance with the policy is unsustainable. This is so especially in circumstances where the requirement is to contact a supervisor, and not just an ordinary fellow employee, and further where Manyoni had in the past contacted Maripe telephonically.
- [22] Considering that the Commissioner had accepted that Manyoni had reported his absence in circumstances where a version was not put to Maripe that

also a responsibility to cross-examine a witness if it is intended to argue later that the evidence of the witness should be rejected. The witness' attention must first be drawn to a particular point on the basis of which it is intended to suggest that he is not speaking the truth and thereafter be afforded an opportunity of providing an explanation (see *Zwart and Mansell v Snobberie (Cape) (Pty) Ltd 1984 (1) PH F19 (A)*). A failure to cross-examine may, in general, imply an acceptance of the witness' testimony..."

¹¹ Line 22 at page 86 of the Transcribed record

¹² Line 15 – 21 of the transcribed record, Page 98 of Index to Record

contact was made through Mofokeng; or when on Manyoni's own version it was not clear as to who and when '*someone*' was contacted to pass the message, or when Mofokeng himself could not provide specifics about that contact with Manyoni, it should be concluded that the Commissioner committed a reviewable irregularity in the conduct of proceedings, which had deprived Glencore of a fair trial of the issues.

- [23] Manyoni had further testified that he had made attempts to fax through a copy of his medical certificate. It however turned out that the individual (Siwe) to whom the copies were faxed had long been dismissed by Glencore. The Commissioner nonetheless concluded that it was sufficient if copies of the medical certificates were submitted at the appeal hearing.
- [24] The difficulty with the Commissioner's complete reliance on the submission of copies of medical certificates at the appeal hearing or when an employee returns after prolonged absence, is that it countenances a view that it is acceptable to simply stay away from work for prolonged periods without informing your employer of your whereabouts, as long as you can produce a medical certificate upon your return. This approach is clearly inimical to the operational requirements of any employer, and it is irrelevant whether the authenticity of the medical certificates is challenged or not. The issue is whether the employer/supervisor was notified of the absence on time for the purposes of the deeming provisions.
- [25] Even if the copies as submitted by Manyoni were to be accepted as justification for his prolonged absence, these indicated that he was seen on 30 June 2013, and was booked off ill until 03 July 2013. A second certificate indicates that he was seen on 08 July 2013 and was booked off until 11 July 2013. It was common cause that Manyoni came back on 16 July 2013. He could not account for his absence during 4 – 7 and 12 and 15 July 2013 other than to say that he was taking treatment. In my view, once Manyoni could not account for the full days he was not at work, there was cause to believe that he had not shown good cause for his absence.

- [26] A further criticism of the Commissioner's findings is that he placed emphasis on the provisions of the BCEA. This is in circumstances where Manyoni's dismissal followed upon the non-compliance with Glencore's Policy. The issue of whether Manyoni was entitled to sick leave as per the provisions of the BCEA was irrelevant to the determination of the primary issue, which was whether factors existed in terms of the Policy for Glencore to have deemed Manyoni as having deserted. It follows that the Commissioner's interpretation of the BCEA relating to sick leave, and his conclusions that employees were entitled to be absent for more than two days and thereafter produce a medical certificate; or that there was no evidence of sick leave abuse were issues irrelevant to the primary enquiry.
- [27] As if the above was not enough, the Commissioner's went on to criticise Glencore's own interpretation of the Policy, stating that its approach was 'legally incorrect'. The Commissioner again failed to appreciate that he was not called upon to determine whether Glencore's interpretation of its own policy was 'legally correct' or not. What he was required to determine was whether Manyoni had complied with the policy, and whether factors existed for him to have been deemed as having deserted in accordance with that policy.
- [28] It further follows that to the extent that the Commissioner had regard to the provisions of the BCEA and concluded that desertion was only established if it was proven that an employee had formed an intention not to resume work, he had misconceived the nature of the enquiry, particularly in the light of the deeming provisions of the Policy, and thus committed a reviewable irregularity. Even if for some reason, the Commissioner believed that he was on the correct path, there is nothing from the transcribed record that indicates that any evidence was placed before him, demonstrating that intention to return or not to return was proved or disproved. Again, the parties, or to be precise, Glencore, was clearly deprived of a fair trial of the issues¹³.

¹³ See *SABC v CCMA and Others* (2002) 8 BLLR 693 (LAC) at para 13 where it was held that; "It is not desertion when an employee who is absent from work intends returning to work. Desertion necessarily entails the employee's intention no longer to return to work. The employer would have to establish this intention in a fair process."

- [29] Confronted with similar deeming provisions in an employer's policy in regard to absenteeism, this Court in *Impact Ltd (Mondi Packaging SA (Pty) Ltd) v National Bargaining Council for the Wood and Paper Sector and Others*¹⁴ has since held that;

"In the first place, in terms of the employer's policy whereby it infers an intention to desert from the employee's unreported unauthorised absence for a period exceeding five days, the Applicant is not required to prove an actual intention to desert by establishing "that the employee intimated expressly or by implication that he had no intention to return to work" as ruled by the Commissioner. In terms of the employer's practice, the employee's intention to desert is, at least on a *prima facie* basis and in the absence of evidence to the contrary, inferred merely from employee's unauthorised uncommunicated absence for a period exceeding five days. In *Tubatse Chrome (Pty)Ltd v MEIBC and Others*, I took the view that this was not an unreasonable inference to draw from the employee's extended unexplained absence, my view there being that it was not unfair to dismiss the employee in these circumstances on the assumption that he did not intend returning to work, provided the dismissal was not final and did not close the door to the possibility of the dismissal being reversed upon the employee, should he return, being able to rebut the inference of desertion which dictated the dismissal by providing a satisfactory explanation for his absence and failure to inform his employer thereof. Should he return to work, fairness requires that he be afforded a fair opportunity to do so"¹⁵ (footnotes omitted)

- [30] I align myself with the views expressed above and agree that in circumstances where an employer in terms of its own disciplinary code/policy and procedure is permitted to deem an employee to have deserted after a certain period of unexplained absence, there is no requirement for that employer to establish an intention to desert on the part of the employee. Upon the employee's return and an appeal process granted in terms of the policy, the onus is on the employee to provide satisfactory justification for the absence. This entails placing factors before the appeal hearing as required in

¹⁴ (2013) 34 ILJ 2266 (LC)

¹⁵ At para 10

terms of clause 4.4.3 of Glencore Disciplinary Code, to justify why a dismissal on the grounds of desertion ought not to be confirmed.

- [31] The issue of whether there was an obligation on Glencore to make attempts to contact Manyoni seems to have persuaded the Commissioner in finding that the dismissal was substantively unfair. This was notwithstanding the fact that in terms of clause 4.4.3 of the Policy, the onus was upon Manyoni to justify his prolonged absence. I appreciate that in *Grootboom v National Prosecuting Authority and Another*¹⁶, the approach, *albeit* expressed *obiter*, seems to suggest that there is an obligation on an employer to provide some evidence that an absentee employee was contacted. That approach was long stated in *South African Broadcasting Authority v CCMA*¹⁷, where it was held that an employer who has the means of communicating with the absent employee must do so. It is my view that even if there is such a requirement or obligation on the employer, it does not absolve that employee from his/her obligations to contact the employer, especially where the company's policy explicitly so requires.
- [32] Thus, where desertion is regulated by the employer's disciplinary code as in this case, or some other statute, the principles set out in *Grootboom v National Prosecuting Authority and Another*¹⁸ by this Court in my view ought

¹⁶ 2014 (2) SA 68 (CC); 2014 (1) BCLR 65 (CC); [2014] 1 BLLR 1 (CC); (2014) 35 ILJ 121 (CC) at para 45 where it was held that;

"Although one might be tempted to conclude that, by virtue of having undertaken a scholarship to the UK, the applicant would, in all likelihood, have found it impractical to return to resume his employment if he were recalled, I find such a conclusion to be unfounded and speculative in the absence of any evidence that he was called to take up his duties and failed to do so. Moreover, the NPA knew where the applicant was at all relevant times as it was communicating with him via email. It made a conscious decision not to recall but to discharge him. This fact leads me inexorably to conclude that the finding by both the Labour Court and the Labour Appeal Court in this regard is wrong."

¹⁷ At para 15, where it was stated that;

"Where an employer has an effective means of communicating with an employee who is absent from work, the employer has an obligation to give effect to the *audi alteram partem* rule before the employer can take the decision to dismiss such an employee for his absence from work or for his failure to report for duty."

¹⁸(2010) 31 ILJ 1875 (LC) ; [2010] 9 BLLR 949 (LC) at para 56, where Molahlehi J in dealing with the deeming provisions in section 17 of the Public Service Act held that;

"It is clear in my view that the requirement of good cause in terms of section 17(5)(b) of the PSA entails the employee having to provide a reasonable explanation for his or her absence without authority. The duty is thus on the employee to provide the employer with a satisfactory explanation as to what were the reasons for being absent without authorisation. The employer in considering whether or not to reinstate the employee has to exercise a discretion given by section 17(5) (b) of the PSA. In this respect the decision by the employer

to find application, and the employee must show good cause by providing a reasonable and satisfactory explanation for his or her absence without authority, irrespective of whether the employer is required to attempt communication with that employee during his or her absence or not. The employer in considering whether or not good cause has been shown must in addition, take into account considerations of fairness and justice, and further consider whether or not the unauthorized absence was wilful on the part of the employee.

- [33] A consideration of the requirements of fairness in such circumstances would include whether the explanation is acceptable, and if not, whether a confirmation of a dismissal is appropriate. In considering whether a dismissal was fair, the principles set out in *Sidumo*¹⁹ remains paramount.
- [34] In this case, the Commissioner took into account Manyoni's employment record, his long service and the high unemployment rate in the country. Even then, these considerations were to be taken into account together with all other relevant factors in this case, which were that Manyoni had not shown good cause for his prolonged absence in that he was absent from work for prolonged periods and in circumstances where he was initially refused leave due to Glencore's operational requirements. The invariable conclusion that his

has to be influenced by fairness and justice. In other words, the employer does not have unfettered discretion in determining whether or not to reinstate the employee. The functionary responsible for considering whether or not to reinstate the employee has to apply his or her mind to the submission made by the employee for the decision to be said to be reasonable and lawful. The key factor amongst others, which the employer has to consider, is whether or not unauthorised absence was wilful on the part of the employer."

¹⁹ *Sidumo and another v Rustenburg Platinum Mines Ltd & others*(2007) 28 ILJ 2405 (CC); [2007] 12 BLLR 1097 (CC) where it was held at paragraphs 78 - 79 that;

"In approaching the dismissal dispute impartially, a commissioner will take into account the totality of circumstances. He or she will necessarily take into account the importance of the rule that had been breached. The commissioner must of course consider the reason the employer imposed the sanction of dismissal, as he or she must take into account the basis of the employee's challenge to the dismissal. There are other factors that will require consideration. For example, the harm caused by the employee's conduct, whether additional training and instruction may result in the employee not repeating the misconduct, the effect of dismissal on the employee and his or her long-service record. This is not an exhaustive list."

And,

"To sum up. 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 relevant circumstances."

absence in such circumstances was wilful is inescapable. There was no evidence placed before the Commissioner as to the impact of Manyoni's absence on its operational requirements, but even then, to reinstate him when he had scant regard to the employer's policies, when he had shown no contrition, and when the basis of his challenge to his dismissal was unsustainable, cannot in my view be appropriate.

[35] To conclude, the Commissioner misconceived the nature of the enquiry he was called upon to undertake, completely ignored relevant evidence, failed to properly apply his mind to material issues at hand and committed various other irregularities in the conduct of proceedings. These irregularities deprived Glencore of an opportunity of a fair trial of issues. In the end, the Commissioner arrived at an outcome that falls outside the band of reasonableness.

[36] Further having had regard to the transcribed record of the arbitration proceedings, and the conclusions reached in this judgment, no purpose would be served by remitting this matter to the CCMA, and the Court is in a position to substitute the Commissioner's award. I have further had regard to the requirements of law and fairness and it is my view that a cost order is not warranted in this case.

[37] Accordingly the following order is made;

Order:

1. The arbitration award issued by the second respondent under case number MP8917-13 dated 3 April 2014 is reviewed, set aside and substituted with an order that the dismissal of Mr Sonnyboy Manyoni was fair.
2. There is no order as to costs

E Tlhotlthalemaje

Judge of the Labour Court of South Africa

LABOUR COURT

APPEARANCES:

For the Applicant:

Mr. B Masuku of Mervyn Tabacks

INC

For the 3rd and 4th Respondents: Gloria Phajane

Instructed by:

Silas Molebaloa Attorneys

LABOUR COURT