



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case no: JR1981/20

In the matter between:

SAMANCOR CHROME LIMITED

Applicant

and

NUMSA OBO PORTIA MOKOENA

First Respondent

JOSEPH MPHAPHULI N.O. y

Second Respondent

**THE METAL AND ENGINEERING
INDUSTRIES BARGAINING COUNCIL**

Third Respondent

Heard: 23 May 2024

Delivered: 28 February 2025

JUDGMENT

MOLOTSI, AJ

Introduction

[1] This is an application for review in terms of section 145 of the Labour Relations Act¹ (LRA). The applicant is Samancor Chrome Limited, a company duly incorporated in terms of the company laws of the Republic of South Africa. The arbitration proceedings were held under the auspices of the third respondent, the Metal and Engineering Industries Bargaining Council (Council). The second respondent is Joseph Mphaphuli (commissioner). The commissioner issued the arbitration award dated 14 November 2020.

[2] In the arbitration award, the commissioner concluded that the dismissal of the first respondent, Portia Mokoena (employee), was both substantively and procedurally unfair and ordered the applicant to reinstate the employee. The reinstatement order was accompanied with a payment of R378 749.99.

[3] The applicant received the arbitration award on 24 November 2020 and the review application was launched on 6 January 2021.

The relevant facts

[4] The employee was employed by the applicant on 1 April 2015. At the time of her dismissal, she was employed as a Human Resources Practitioner. The employee worked with Mr. Sydney Shabangu, a Human Resources Intern. On 17 May 2019, the employee informed Mr. Shabangu that she would need him to assist with some of her tasks as she been absent for days due to her child being sick. Given that the employee had taken leave several times for the same reason, Mr. Shabangu asked the employee what was wrong with her child, intending to illicit whether she was seriously ill.

[5] The employee expressed discomfort with Mr. Shabangu's question and he subsequently apologized. On 17 May 2019, the employee lodged a grievance

¹ No. 66 of 1995, as amended.

against Mr. Shabangu alleging that he was *'mocking me by intervening in my personal family life which is confidential.'*

[6] A grievance hearing was set down for 23 May 2019. On 22 May 2019, two contract cleaners Ms Sarah Mahlangu and Ms Sibongile Hamule were approached by the employee. The employee called them into her office. The employee requested Ms Mahlangu and Ms Hamule to be witnesses at her grievance hearing and insinuated that they should testify that Mr Shabangu was screaming at her during their exchange. The employee informed them that she will write down what they needed to say and that they must come to her office during the day to pick up the statements. The employee further told them that she will give them something in exchange for them being witnesses at the grievance hearing.

[7] Ms Mahlangu and Ms Hamule had no knowledge of the incident between the employee and Mr Shabangu. Ms Hamule then approached Ms Butshe Makena, a Human Resources Practitioner and relayed the conversation that the employee had with her and Ms Mahlangu. On 23 May 2019, the employee approached Ms Mahlangu and Ms Hamule to remind them about the grievance hearing and that they needed to be present. They both told the employee that they were busy.

[8] The employee later approached Ms Mahlangu and Ms Hamule and told them that the grievance hearing was postponed and that she will inform them of the new date. The applicant investigated the incident involving the employee and Ms Mahlangu and Ms Hamule. The employee was later charged with the following act of misconduct:

'An act of Dishonesty in that you approached two Isibonelo contractors and persuaded them to provide false testimony in support of your grievance against a fellow colleague even though they did not witness the incident.'

[9] The disciplinary hearing was set down on 30 May 2019. The employee failed to attend the disciplinary hearing as she claimed that her child was sick. The further dates of the disciplinary hearing were 24 July 2019, 6 August 2019, 12 August 2019,

9 December 2019 and 12 December 2019 and 14 January 2020. The employee requested postponement for the dates: 24 July 2019, 6 August 2019 and 12 August 2019, claiming she could not attend the disciplinary hearing as she was unwell.

[10] On 9 December 2019, the employee again failed to attend the disciplinary hearing. It was alleged by the employee representative that the employee's child was sick and therefore she could not be present at the disciplinary hearing. The disciplinary hearing was postponed to 12 December 2019 and again the employee failed to attend the disciplinary hearing. The reason for failing to attend the disciplinary hearing was that her child was sick.

[11] The applicant then wrote a letter to the employee on the instructions of the chairperson of the disciplinary hearing that there will be no further postponements due to the employee's failure to attend the disciplinary hearing and that the hearing will continue in her absence. The disciplinary hearing was then postponed to 14 January 2020. On 14 January 2020, the disciplinary hearing proceeded in the absence of the employee.

[12] In respect of the grievance hearing, the employee's grievance hearing was rescheduled on numerous occasions due to the employee's non-attendance. On 21 January 2020, Mr Shabangu applied for the grievance to be dismissed due to the employee's failure to attend the grievance hearing. The grievance hearing was then dismissed.

[13] The employee was found guilty and dismissed on 22 January 2020. The employee referred an unfair dismissal dispute to the Council on 27 February 2020.

[14] The commissioner concluded that the statements of Ms Mahlangu and Ms Hamule contained striking contradictions and that the applicant's finding that the employee was guilty as charged based on the evidence of Ms Mahlangu and Ms Hamule was irrational, incorrect and unjust. In effect, the commissioner concluded that the applicant failed to discharge its onus of proof in terms of section 192(2) of the LRA.

[15] In respect of procedure, the commissioner made a finding that the applicant's policy on poor attendance at work should be addressed through a prescribed process and the applicant's failure to appreciate the policy or failed to act in accordance with the policy, gave rise to a defective dismissal where procedure was concerned.

Grounds of review

[16] The applicant's pleaded grounds of review are as follows: the commissioner committed a gross irregularity by misconstruing and/or disregarding material evidence led by other witnesses. The commissioner committed a gross irregularity by misconstruing and/or disregarding material evidence put forward by Ms Mahlangu and Ms Hamule. The commissioner committed a gross irregularity in that he did not consider Ms Mokoena's (the employee) conduct during the arbitration where she was found to have been coaching her witnesses and that the commissioner committed a gross irregularity in that he did not consider material evidence in respect of the employee's continuous failure to attend her disciplinary inquiry.

[17] The commissioner erred materially in that a reasonable commissioner would have come to a different conclusion having been presented with the same facts and evidence, the commissioner materially misconstrued the evidence and the nature of the enquiry before him and the award of reinstatement was grossly unreasonable given the evidence before the commissioner and lastly that the award is not justifiable given the commissioner's reasoning and findings.

Submissions by the parties

[18] Ms Edwards submitted that the applicant's significant grounds of review are that the commissioner rejected the evidence of the applicant's two witnesses on the basis that there were contradictions in the evidence, their testimony is highly unlikely and that the dismissal was irrational and unjust. These are not a decision of a reasonable decision maker. The evidence of Ms Mahlangu and Ms Hamule was not

mutually destructive. The contradictions were not material. The commissioner ignored the evidence of Ms Hamule when she testified that the employee wanted them to testify at the grievance hearing. Both Ms Mahlangu and Ms Hamule were in the kitchen when the employee approached them and asked them to be witnesses in the grievance hearing.

[19] The commissioner's finding that because Ms Mahlangu and Ms Hamule worked in different sites of the building, the employee could not have approached them, renders the outcome unreasonable. The commissioner said nothing about the fact that the two witnesses were together when they were approached by the employee at the kitchen. That it was possible that the employee would have written down what she wanted the witnesses to say during the grievance hearing.

[20] The commissioner's finding that Mr Shabangu admitted the employee's allegation that he mocked her was incorrect. Mr Shabangu did not admit that he mocked the employee. He merely apologized and the employee refused to accept his apology.

[21] The commissioner failed to weigh up the credibility of the employee's witnesses who testified during the arbitration. Mr Khoza and Mr Zulu, the two witnesses of the employee, were not credible witnesses. Ms Edwards submitted, that if Mr Zulu was with the employee in respect of the incident involving Mr Shabangu, it was highly unlikely that the employee would not have called Mr Zulu to be her witness during the disciplinary hearing.

[22] The commissioner failed to weigh up the probabilities of the applicant's version and compared it to the employee's version. No proper assessment of evidence was done by the commissioner. Ms Edwards further submitted that the evidence of Ms Mahlangu and Ms Hamule were not so unbelievable that it must be rejected. The Commissioner's disregard of further evidence of Mr Shabangu and Ms Makena was unreasonable. The evidence of Mr Shabangu and Ms Makena corroborated the evidence of Ms Mahlangu and Ms Hamule.

[23] In the arbitration award, there is no recordal of the evidence of Mr Shabangu and Ms Makena. The commissioner captured all the evidence of the employee's witnesses but failed to do so in respect of the applicant's witnesses.

[24] In respect of the procedure, Ms Edwards submitted that the finding by the commissioner on procedure was not a decision of a reasonable decision maker. It was never the employee's case during the arbitration proceedings that her dismissal was procedurally unfair in that the applicant failed to follow the policy on poor attendance. The employee's case was that her dismissal was procedurally unfair in that she did not attend the disciplinary hearing as her child was sick. The issue regarding abuse of sick leave related to the poor attendance policy. The commissioner disregarded all the evidence of Mrs Bea Coetzee, as to why the disciplinary hearing proceeded in the absence of the employee.

[25] In awarding reinstatement, the commissioner failed to consider the evidence of Mrs Bea Coetzee when she testified that the employment relationship has broken beyond repair. There was evidence of a strained relationship between the employee and her colleagues. The employee also lodged a grievance against Ms Butshe Makena. Given the above, the commissioner failed to apply his mind to determine whether reinstatement was appropriate.

[26] Mr Mogare, on behalf of the employee submitted that commissioners are allowed to make mistakes. The applicant failed to show why the arbitration award does not speak to the evidence. The evidence of other witnesses except Ms Mahlangu and Ms Hamule, was not ignored by the commissioner but rather their evidence was of no assistance to determine the guilt of the employee.

[27] The written statements of Ms Mahlangu and Ms Hamule contradicted each other. Ms Mahlangu in her written statement² stated that '*Shabangu asked Portia about her baby and we should say that we were at the corridor in front of the office at that time and that we heard Sydney shouting.*' Ms Hamule in her written statement³,

² Index: Record of proceedings (Volume 1: Employee bundle of documents) page(s) 2-3

³ Index: Record of proceedings (Volume 1: Employee bundle of documents) page(s) 4 - 6

stated that ‘she *said she will write down what we must say*’. Mr Mogare, submitted that the two statements cannot co-exist. Consequently, the two witnesses materially stated two different things and the commissioner’s finding was therefore reasonable. A reasonable commissioner would have arrived at the same conclusion as the commissioner.

The arbitration award

[28] In the arbitration award, the commissioner under the heading analysis of evidence stated the following (verbatim):

[55] The Respondent’s case was founded on the testimony of Mrs Bea, Sibongile, Sarah and Sydney Shabangu.

[56] The key witnesses in the Respondent’s case were Sibongile and Sarah. The two witnesses were said to have been directly approached by the Applicant to make up a version to state that Sydney had ill- treated the Applicant.

[57] The two witnesses made written statements in which they directly implicated the Applicant in wrong doing.

[58] Sibongile and Sarah’s statements showed some striking contrasts.

[59] Sibongile’s statement was to the effect that the Applicant had told her that she would give them a paper for the recital of the evidence she would want to give in her grievance case against Sydney. Further that the Applicant had approached her at her work station on the morning of 23 May 2019 to remind her that the hearing was scheduled for 10h00.

[61] Sibongile was adamant that the Applicant had told them that they were to testify that Sydney shouted at her and that they were in the vicinity when this occurred.

[63] One striking contradiction were that one witness, Sibongile testified that the Applicant did not tell them what the testimony was about. Sarah said something different that the testimony would be to the effect that Sydney shouted at the Applicant.

[64] The contradictions cast doubt on the truthfulness of either version. The witnesses were in the Applicant's office at the same time and departed from the Applicant's office at the same time.

[66] I find the witnesses' testimony highly unlikely and of less probative value, if any, in that:

[66.1.] It is not likely that someone would have to be reminded in writing to say that Sydney shouted at the Applicant.

[66.2] Sibongile's testimony that the Applicant approached her on the morning of the grievance hearing and an hour or a little more than an hour before the scheduled enquiry to remind her that she is going to testify and still not telling her what she was to testify about, is equally startling.

[66.3] Even more startling is Sibongile's testimony that the Applicant returned to tell her that the hearing was postponed after she had made her aware that she did not have the desire to testify.

[66.4] Where it concerned Sarah, her testimony that she did not ordinarily work in the vicinity of where the said incident took place diminishes the value, if any, of her testimony that the Applicant approached her to testify about the incident if in all probabilities she would not have been anyone near the scene.'

[68] I equally find it hard to comprehend that there would be any merit for the Applicant to solicit the assistance of these witnesses to testify in her favour in a grievance enquiry after the employee against whom the grievance was lodged had already admitted the incident.

[69] After the admission by Sydney in the pre- grievance hearing enquiry there was no point in presenting anymore evidence to prove that the Applicant had cause to grieve.

[70] This fact alone belies the witnesses' testimony that they were influenced to lie in the grievance enquiry.

[70] For the reasons hereabove outlined it is my conclusion that the Respondent's finding that the Applicant was guilty of the charged based on the two witnesses' testimony was irrational, incorrect and unjust."

Evaluation

[29] In *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine v CCMA and Others*⁴, the Labour Appeal Court (LAC) held that:

‘In short: A reviewing court must ascertain whether the arbitrator considered the principal issue before him/her; evaluated the facts presented at the hearing and came to a conclusion that is reasonable.’

[30] In the review application, the reviewing Court must therefore evaluate all the evidence which was before the arbitrator and determine whether the outcome reached by the arbitrator falls within the band of reasonableness.

[31] In *Herholdt v Nedbank Ltd and Another*⁵, the Supreme Court of Appeal (SCA) held that:

‘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, as well as the weight and relevance to be attached to the particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of consequence if their effect is to render the outcome unreasonable.’

[32] As per the evidence that was before the commissioner, the applicant led the evidence of five witnesses namely: Sarah Mahlangu, Sibongile Hamule, Bea Coetzee, Sydney Shabangu and Butshe Makena. In the arbitration award, there is no reference to the evidence of Sydney Shabangu and Butshe Makena. Ms Edwards submission was that the evidence of Sydney Shabangu and Butshe Makena corroborated the evidence of Ms Mahlangu and Ms Hamule. I agree.

[33] Therefore, the evidence of Mr Shabangu and Ms Makena was crucial and material to the applicant’s case. The commissioner in the arbitration award, completely ignored the evidence of Mr Shabangu and Ms Makena. There was no attempt whatsoever to analyse their evidence in respect of the evidence tendered by

⁴ (2014) 35 ILJ 943 (LAC) at para 16.

⁵ (2013) 34 ILJ 2795 (SCA) at para 25.

the employee. Failure to consider the evidence of Mr Shabangu and Ms Makena constituted gross irregularity on the part of the commissioner.

[34] Failure to consider the evidence of Mr Shabangu and Ms Makena constituted a material error on the part of the commissioner which had the effect that the outcome that he arrived at was unreasonable.

[35] The commissioner's focus in the arbitration award related to the evidence of Ms Mahlangu and Ms Hamule. One of the most important duties of the arbitrator is to resolve the factual disputes between the parties. In resolving the factual disputes, a proper analysis of evidence is required. A proper approach in the resolution of factual disputes is now settled.

[36] It however appears that the commissioner dismally failed to follow the proper approach in resolving factual disputes. In most instances, arbitration awards which are subject to review, the commissioners are not able to properly resolve the factual disputes between the parties. The commissioner in this case, chose to accept the employee's version without properly engaging in an assessment of evidence, which materially affected the outcome of the arbitration.

[37]. The proper approach in resolving factual disputes was explained by the SCA (per Nienaber JA) in *SFW Group and Another v Martell et Cie and Others*⁶ where it held that:

'On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So, too, on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows: To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) probabilities. As to (a) the court's finding on the credibility of a particular witness will depend on its impression

⁶ 2003 (1) SA 11 (SCA) at para 5

about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness- box, [ii] his bias, latent and blatant, [iii] internal contradictions in his evidence, [iv] external contradictions with what was pleaded or put on his behalf, [v] the probability or improbability of particular aspects of his version, [iv] the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident. As to (b), a witness' reliability will depend, apart from other factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of the assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it'.

[38] What the commissioner appears to have done is a half-baked process of analyses of evidence which only focused on the applicant's witnesses and ignored the employee's version and her witnesses. The commissioner further only focused on the reliability, probability or improbabilities of the evidence of Ms Mahlangu and Ms Hamule without subjecting the employee's witnesses to the same process of reliability, probabilities or improbability of her version and to provide reasons why he accepted the employee's version. Failure to do so constituted a gross irregularity.

[39] The commissioner appears to have taken the view that only the evidence of the applicant was subjected to an analysis and that the employee's version was accepted at face value. He, thereafter jumped to the end when he concluded that the applicant failed to discharge its onus. This conduct of the commissioner constituted gross irregularity.

[40] The employee's version in response to the Ms Mahlangu and Ms Hamule statements and evidence was that on 22 May 2019 she had a meeting at furnace 4 and 5 with furnace 4 and 5 employees. The meeting was around 7 o' clock and as to

the rest of the statements and evidence, she provided a bare denial of the statements⁷. The employee stated that she did not approach both Ms Mahlangu and Ms Hamule.

[41] There were two versions before the commissioner. The version of the applicant was that the employee approached the two contract cleaners and requested them to testify and lie in the grievance hearing which related to Mr Shabangu. The version of the employee was that she never approached the two contract cleaners and that the statements of Ms Mahlangu and Ms Hamule was a lie.

[42] The commissioner's focus on the statements of Ms Mahlangu and Ms Hamule related to what he termed contradictions. In one statement Ms Mahlangu stated that the employee requested them to be a witness and for them to say that they were at the corridor in front of the office at that time and they heard Mr Shabangu shouting at her. Ms Hamule's written statement on the other hand, stated that the employee stated that she will write down what they must say and they must collect the paper later during the day.

[43] The fact that Ms Mahlangu and Ms Hamule evidence was different in respect of what the employee discussed with them did not mean that they were not credible witnesses and that their evidence was to be rejected. It further did not mean that the essential features of their story were not true. In *Santam Bpk v Biddulph*⁸, the SCA held that:

'However, the proper test is not whether a witness is truthful or indeed reliable in all that he says, but whether on a balance of probabilities the essential features of the story which he tells are true (cf *R v Kristusamy* 1945 AD 549 AT 556 and *H C Nicholas Credibility of Witness* (1985) 102 SALJ 32 especially at 32 – 35).

⁷ Index: Transcript of the record pages 349 line 15- 18 & page 350- 351.

⁸ 2004 (5) SA 586 (SCA) (23 March 2004) at para 5.

[44] In *S v Mkhohle*⁹, the Appellate Division held that:

‘Contradictions per se do not lead to the rejection of a witness’ evidence... [T]hey may simply be indicative of an error... [N]ot every error made by a witness affects his credibility, in each case the trier of fact has to make an evaluation; taking into account such matters as the nature of the contradictions, their number and importance and their bearing on other parts of the witness evidence.’

[45] The contradictions in the statements of Ms Mahlangu and Ms Hamule were not material to an extent that their evidence should have been rejected by the commissioner. This is based on the following considerations: [i] Ms Mahlangu and Ms Hamule were not present on 17 May 2019 when Mr Shabangu asked the employee what was wrong with her child, [ii] Ms Mahlangu and Ms Hamule would not have known that the employee lodged a grievance against Mr Shabangu if they were not informed by the employee, [iii] Ms Mahlangu and Ms Hamule would not have known that a conversation took place between the employee and Mr Shabangu in respect of her child, [iv] If the employee did not tell Ms Mahlangu and Ms Hamule to lie about Mr Shabangu, why would Ms Mahlangu and Ms Hamule approach Ms Makena to inform her about what the employee discussed with them, [v] there were no incentives or motive for Ms Mahlangu and Ms Hamule to falsely implicate the employee, [vi] the evidence of Ms Mahlangu and Ms Hamule was corroborated by the evidence of Mr Shabangu and Ms Makena, [vii] the employee had promised Ms Mahlangu and Ms Hamule something in return for them lying about Mr Shabangu in the grievance hearing.

[46] The commissioner’s finding in rejecting the evidence of Ms Mahlangu and Ms Hamule constituted a gross irregularity and it was disconnected to the material evidence which was before him. It was illogical for the commissioner to conclude that it is not likely that someone would be reminded in writing to say that Mr Shabangu shouted at the employee. This finding ignores the fact that, Ms Mahlangu and Ms Hamule were requested to lie about Mr Shabangu. Ms Mahlangu and Ms Hamule did

⁹ 1990 (1) SACR 95 (A)

not witness the conversation between the employee and Mr Shabangu. That it was the employee who told Ms. Hamule, that she will write something down.

[47] There was nothing startling in the employee reminding Ms Hamule prior to the start of the grievance hearing that she must come and testify. It was the employee who wanted Ms Hamule and Ms Mahlangu to testify. Ordinarily, a party is responsible for securing her own witnesses in any tribunal. So, there was nothing strange when the employee's reminded the witnesses about the grievance hearing. Again, there was nothing startling, when the employee informed Ms Hamule that the grievance hearing was postponed.

[48] By approaching Ms Hamule after the postponement of the grievance hearing, shows that the employee wanted Ms Mahlangu and Ms Hamule to be her witnesses in the grievance hearing.

[49] The commissioner's finding that it was hard to comprehend that there would be any merit for the employee to solicit the assistance of these witnesses to testify in her favour in a grievance enquiry after the employee against whom the grievance was lodged had already admitted the incident, is a finding disconnected from the evidence which was before him. The employee was not satisfied with the apology from Mr Shabangu¹⁰. She wanted to press ahead with the grievance and that Mr Shabangu did not admit that she mocked the employee.

[50] In making an order for reinstatement, the commissioner simply ignored the provisions of section 193(2) (b) of the LRA. The commissioner has a discretion to order reinstatement in terms of section 193 (1) of the LRA. Section 193(2)(b) of the LRA provides that the arbitrator must require the employer to reinstate or re-employ the employee unless, the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable.

¹⁰ Index; Transcript of the proceedings page 412 lines 10- 14.

[51] Ms Bea Coetzee in respect of the strained working relationship with the employee testified that¹¹

'I think there was a whole sequence to it, there was an event where Ms Mokoena was charged, I believe in September. I am not sure about the year and from there, there events where she put grievances against me and grievances against her colleague and all of this added up to a strained relationship altogether. Then she was charged against for the dishonesty charge and the relationship deteriorated further.'

[52] It is not clear why the above evidence of Ms Coetzee was not considered by the commissioner in respect of the issue regarding reinstatement. The above evidence shows that the continued employment relationship between the applicant and the employee would have been intolerable. Failure to consider the above evidence of Ms Coetzee constituted gross irregularity and resulted in an unreasonable award.

[53] Although reinstatement is a primary remedy in terms of the LRA, a commissioner considering ordering reinstatement must apply his/her mind to the provisions of section 193(2) and clearly provide reasons why section 193(2) (a- d) is not applicable and hence the order of reinstatement. The commissioner failed to do so.

[54] In respect of the procedural finding that the applicant failed to follow the poor attendance policy, it is abundantly clear that the commissioner misconceived the nature of the enquiry and arrived at an unreasonable outcome.

[55] Mr Khoza testified in respect of procedure as follows¹²:

'Procedural why I say the company did not comply in terms of procedural because if there is anything to do with your abuse of sick leave it may call it, we have got a procedure that can sort out that. If it was an issue of running

¹¹ Index: Transcript page 21 line 9 – 14.

¹² Index: Transcript of the proceedings page 468 line 15- 19 and page 469 line 1 – 5 & page 484

away from the hearing itself, we have got also arrangement to do that, you can freeze the money and say up until you come to the hearing, we longer give you any payslip or whatever it may be.

Mr Khoza: Thandi, we got a very clear procedure, if you have got a potential incapacity, there is a procedure that was supposed to be applicable to Ms Mokoena, if a trend was identified, you call a tribunal meeting then you have all the stakeholders.'

[56] The employee was never charged with an abuse of sick leave. The poor attendance policy would have been relevant if the employee was charged with abuse of her sick leave. The poor attendance policy had nothing to do with a disciplinary hearing which was procedurally unfair. What is clear is that the employee failed to attend her disciplinary hearing after numerous postponements and the disciplinary hearing proceeded in her absence. There was nothing untoward with the disciplinary procedure followed by the applicant. The disciplinary hearing largely complied with item 4(1) of the Code of Good Practice: Dismissal.

[57] Given the totality of the evidence which was before the commissioner, the outcome reached by the commissioner was unreasonable and the arbitration award must be reviewed and set aside.

[58] In the premises the following order is made:

Order

1. The arbitration award (MEM963) dated 14 November 2020 issued by the second respondent is hereby reviewed and set aside.
2. The arbitration is remitted back to the third respondent to be heard *de novo* before another commissioner other than the second respondent.
3. There is no order as to costs.

H. Molotsi

Acting Judge of the Labour Court of South Africa.

Appearances:

For the Applicant: Adv M Edwards

Instructed by: Cliffe Dekker Hofmeyr Inc

For the Respondent : Mr. S. S. Mogare (NUMSA official)