



IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

CASE NO. J2161/98

In the matter between:

KARBOCHEM SASOLBURG (a division of

Sentrachem Ltd)

Applicant

and

KRIEL AND OTHERS

Respondents

J U D G M E N T

LANDMAN J:

1. The applicant in this matter is Karbochem Sasolburg (a division of Sentrachem Ltd) which seeks to review an award handed down by a commissioner of the Commission for Conciliation, Mediation and Arbitration.
2. Mr S A Jacobs, the fourth respondent, a member of the Chemical

Workers Industrial Union, was dismissed by his employer on 2 February 1998. His dismissal eventually resulted in an arbitration award which was handed down by the commissioner on 14 August 1998.

3. Briefly stated, the facts were that Mr Jacobs was required to report for shift duty on Friday, 30 January 1998. He told the commissioner that he had been informed that his sister was involved in a motor collision in Duncanville. At 19h45 he phoned his employer to advise him of this. He spoke to one Gert Coetzee. Mr Jacobs says:

"I told the foreman that I will not be able to come to work that night. I told him that my sister was involved in an accident, so I am about to rush there and see what is going on."

4. Mr Coetzee also gave evidence at the arbitration proceedings. He said that he recorded what Mr Jacobs had said to him. He says that he wrote the following down: "Sy suster was vermoedelik in 'n motorongeluk. His sister probably was in a car accident, en is oorlede, and is deceased." I may add that that may not be the exact words because of the way in which the proceedings at the arbitration were translated.
5. However, in reply to the call, Mr Coetzee indicated that Mr Jacobs was talking "nonsens". He says he said this because he had been informed that Mr Jacobs had, from time to time, come up with peculiar excuses for not attending work. Mr Coetzee went on to say that there was no need

to grant permission to be away in these circumstances. The circumstances refer to the communication which he received from Mr Jacobs, namely that he had to deal with an emergency situation.

6. Mr Jacobs, in his evidence before the commissioner, confirms that he did not ask for permission to be away. He merely conveyed the circumstances to Mr Coetzee. It was common cause, at the arbitration proceedings, that the sister was not deceased and that, naturally, a death certificate could not be produced. It is not entirely clear from the transcript of the arbitration proceedings whether the sister was involved in an accident in Duncanville. However, it was not put to Mr Jacobs that this was not the case. On his return to work on the Saturday Mr Jacobs did not fill in a leave form.
7. It appears to have been common cause at the arbitration that Mr Jacobs' sister was either not hurt at all or not seriously hurt. Mr Jacobs did not phone his employer to tell them of this. Nor did he attempt to go back to work that Friday evening although he could have done so. Other evidence was led before the commissioner and documents were put up, including the terms and conditions of the employment relating to Mr Jacobs, but, in my view, nothing turns on those documents although much has been made of it in these review proceedings.
8. The parties were afforded an opportunity to file heads of argument in the

place of closing speeches and thereafter the commissioner delivered his award. The decision which he arrived at is the following:

"After reviewing all the evidence presented to me I find the dismissal of the applicant was substantively unfair for the following reasons:

- the applicant did phone the company to report that he won't be able to report for duty.
- the applicant did report his absence in line with the respondent's conditions of service.
- a less severe disciplinary measure would have sufficed in this case.

ARBITRATION AWARD:

The respondent is to reinstate the applicant retrospective to the date of dismissal which was 6 February 1998."

9. The commissioner's award is attacked by the employer on seven grounds. I propose dealing with each ground in turn.

10. The first attack was based on the refusal of the commissioner to allow a Mrs Malan to testify on behalf of the employer. It is said that this infringed the employer's right to *audi alteram partem*. It appears from the record that during the course of the cross-examination of Mr Jacobs a certain issue was raised with him relating to the relationship between him and his wife after he had been dismissed. Mr Prinsloo, one of the employer's team, put it to him that he would be obliged to call Mrs Malan, the other member of the team, to give

evidence on this issue. The commissioner refused to allow it and it was not persisted with.

11. In my opinion the commissioner was wrong to refuse it for the reasons which he did. He said that as Mrs Malan's name was not on the list of witnesses she could not testify. Furthermore, she was a part of the employer's team and for this reason she could not testify. Moreover, she was present during the evidence and the cross-examination of Mr Jacobs. Those are not good grounds for refusing her permission to testify but the matter was not a material issue. It was a collateral issue and evidence would not have been permissible on it in any event. In the result I find that there was no material irregularity.

12. The second cause of complaint relates to a document, the terms and conditions of employment of Mr Jacobs which was not discovered and but which was obviously in the possession of the employer. The document setting out the terms and conditions of employment was used in cross-examination of the employer's witnesses. When it was put into use an opportunity was not afforded the employer's witness to read the document. The employer's representative did not ask to see it, nor did he ask for an opportunity to make a copy of it. On behalf of the applicant it was contended that the commissioner was under a duty to advise the employer about the admissibility of the document. In my opinion the commissioner was under no such duty. I do think that he should have

allowed the employer an opportunity to peruse the document. He did not do so. Nevertheless I do not think that an injustice has been done because the document, in my opinion, is not particularly relevant. The document deals with the question of getting permission to be away in case of illness. It seems, wrongly, to have been put into a more general context. However, Mr Gert Coetzee says that no prior permission was necessary from the employer in an emergency situation such as that described to him by Mr Jacobs. All that would be required of Mr Jacobs was to prove *ex post facto* that he had grounds for being away. I find no irregularity on the part of the commissioner.

13. The third ground relates to certain new documents which were attached to the heads of argument submitted by the union to the commissioner. Some of these documents were new; some of them were not. The commissioner has said that he did not rely on them and there is no reason to believe that he did rely on them. There is no merit in this point.
14. The fourth point taken by the employer is that the commissioner exceeded his powers. Mr du Plessis, who appeared on behalf of the applicant, sought to rely on the Labour Appeal Court decision of **Carephone (Pty) Ltd v Marcus NO and Others** (1998) 19 ILJ 1425 (LAC). The employer's case on this issue is that it was common cause

that a final warning had been issued to Mr Jacobs and that it was current as at 30 January 1998 when he informed Mr Coetzee that he would be unable to attend work. Mr Jacobs, represented by the union, and his employer had entered into an agreement at the CCMA on 7 November 1997. They agreed on the following:

- "1. The employee will be reinstated effective 1 December 1997 with no back pay in a similar position (Grade P14).
 2. A final warning effective from 1 December 1997 for absenteeism will be recorded against the employee's record.
 3. The company will not assist the employee with debt or collateral security.
 4. A medical certificate must be produced by the employee for each day of absence for sick leave."
15. The employer says that the commissioner's finding was not justifiable in the light, *inter alia*, of the fact that there was a final written warning which was current. I think, to an extent, the commissioner misread the evidence in so far as he purports to record, in a very cryptic note, that permission was required for absenteeism. This is not in line with the main thrust of the evidence and the common cause evidence of Mr Coetzee and Mr Jacobs. There was no need for permission in the kind of emergency which was communicated on 30 January. The commissioner says in his affidavit:

"The fourth respondent was not guilty of misconduct relating to

absenteeism but to misconduct relating to not completing the relevant leave forms on time."

16. As the commissioner had found Mr Jacobs not guilty of absenteeism, there was clearly no need to pay any attention whatsoever to his disciplinary record. The commissioner does make reference to Mr Jacob's failing to complete the relevant leave forms and appears to suggest that he was guilty of this. But he was not charged on this count. It was not the issue before the arbitration proceedings. This is probably why the commissioner made a remark in his award that a less severe penalty would have sufficed in this case. In my opinion there is no merit in this challenge to the award
17. The fifth point raised by the applicant is that the commissioner was guilty of misconduct in that he failed to apply the code of good practice and the relevant warning. I have already indicated why the warning was of no relevance. There is also no merit in this point.
18. The sixth ground on which the applicant relies is that the commissioner failed to apply his mind to the matter. This submission is based on two passages in the arbitration award. The first passage reads:

"Mr de Fleur, production superintendent for respondent and Mr Coetzee testified that according to their knowledge an employee had to obtain permission first before absenting oneself from work."

The second passage reads:

"The applicant did report his absence in line with the respondent's conditions of service".

The essence of the employer's complaint is that it does not relate to the standard terms and conditions of employment. However, that document is in my opinion irrelevant. The remarks of the commissioner, although cryptic and although liable to be misunderstood, are not essential to the decision of this case. I have already pointed out that on the evidence of Mr Jacobs and Mr Gert Coetzee, no permission was necessary in the circumstances of an emergency. All that was required was that the employee should notify his supervisor. I should add there may well be circumstances where the employee might not be able to do that.

19. The last ground of attack is that the commissioner was biased. This attack is made in the supplementary affidavit of Mr Prinsloo. It is based on four legs. The first one is that the commissioner allowed the union to ask leading questions. The record in these proceedings is extremely bad, mainly because a suitable machine was not used to record the evidence, but, as I read the record, it cannot be said that the commissioner allowed leading questions which prejudiced the employer's case in any way. It may well be at certain stages the commissioner was unduly inflexible. For instance at the end of cross-examination a new question occurred to the employer's representative immediately before re-examination but he was not allowed to ask it. However, this does not lead to any inference of bias.

20. Then it was alleged that the commissioner was biased because he failed to allow the employer's representative to read the terms and conditions of employment before questions were put to the witness. I think the commissioner was wrong in this regard. He should have afforded the employer's representative the opportunity of reading the new document. But although he was wrong this is not indicative of bias. The third leg alleges that the commissioner took part in cross-examination. I have read the record. This complaint is not justified. The last leg of this complaint refers back to the sixth ground of complaint. But I have already dealt with it. It is unnecessary to canvass it again.

21. There is no merit in the complaint that the commissioner was biased. It may well be that the commissioner was perhaps inexperienced and appeared to want to get on with matters too hastily. He was perhaps inflexible. But to say that he was dishonourable or dishonest in the sense of bias, that he favoured the union or the employee above the applicant, is totally without any basis.

22. Counsel for the applicant did not espouse this cause. He did not submit that the commissioner was biased. He contented himself with saying that there was a reasonable suspicion of bias. I must point out that the complaint of bias was only made in the supplementary affidavit after the record had been filed. It was not made in the founding affidavit. If Mr Prinsloo had genuinely thought that there was bias, or a suspicion of bias, one

would have expected him to have raised it either during the course of the arbitration proceedings or at least in the founding affidavit. He did not do this. It is indicative, to my mind, of a groundless complaint.

23. In the circumstances the review cannot succeed and the application stands to be dismissed. The applicant suggested that costs should be ordered against the commissioner. However in order to show this court's disapproval of the groundless and baseless attack on the *bona fides* of the commissioner by alleging that he was biased, which is far more serious than alleging that there was a suspicion of bias, I intend making a special order as to costs.

24. In the premises I make the following order:

1. The application is dismissed.
2. The applicant is to pay the first respondent's (i.e commissioner's) costs, on an attorney and client scale.
3. The applicant is to pay the third and fourth respondents' costs on a party and party basis.
4. Should the applicant wish to challenge the order in paragraph 2, it shall file a notice to this effect within 14 days from today.

Signed and Dated at Johannesburg on the 3rd Day of June 1999

JUDGE A A LANDMAN

Judge of the Labour Court

Date of Hearing:
Date of Judgment:
On Behalf of Applicant:
Instructed by:

13 May 1999
14 May 1999
Adv A du Plessis
Riaan du Plessis Inc.

On Behalf of Respondents:
Instructed by:
Haysom

Adv J G van der Riet
Cheadle Thompson &