**REPUBLIC OF SOUTH AFRICA**

**THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG**

# JUDGMENT

Case number: JA 78/10

**KIEVITS KROON COUNTRY ESTATE (PTY) LTD** — **Appellant**

**and**

**JOHANNA MMOLEDI** — **First Respondent**

**COMMISSIONER K D MATJI** — **Second Respondent**

**COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION** — **Third Respondent**

**Heard: 20 March 2012**

**Delivered: 24 July 2012**

**Summary: appeal- review test restated-the decision of the commissioner not the one that a reasonable decision maker could not reach-distinction between appeal and review significant in scrutinising the decision based on reasonableness**

**Section 23 of the BCEA not applicable where an employee does not claim to have been absent from work on account of sickness or injury and also not demanding payment for days when absent.-employee attending sangoma sessions- reasonable accommodation by employer encouraged.**

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## JUDGMENT

TLALETSI, JA

Introduction

[1] This is an appeal against the whole of the judgement of the Labour Court (per Francis J) in a review application brought by the appellant in that court against an award issued by the second respondent ("the commissioner") on 18 July 2008. The commissioner sat as an arbitrator in a dispute of unfair dismissal referred to the third respondent being the Commission for Conciliation, Mediation and Arbitration ("the CCMA") by the first respondent ("the respondent") against the appellant.

[2] In the award, the commissioner found that the dismissal of the employee was substantively unfair. As relief the commissioner held:

> '[the appellant] is hereby ordered to reinstate the respondent with immediate effect on the same terms and conditions of employment which existed before her dismissal. The order of reinstatement is without any retrospective payment.'

The appellant was allowed 21 days from the date of receipt of the award to comply with the award.

[3] The court below dismissed Appellant's review application on 1 October 2010 and made no order as to costs. The appellant applied for leave to appeal against the judgment and order of the court below, and the said application for leave to appeal was dismissed with costs on 16 November 2010. Aggrieved by this decision the appellant petitioned the Judge President of this Court and leave was granted on 4 May 2011. A detailed notice of appeal was served and filed on 23 May 2011.

Factual Background

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[4] For a better understanding of the issues in this appeal, a brief background of the relevant facts is necessary. Most of these facts are, unless otherwise stated, common cause. The appellant conducts a business of conference and leisure resort. It employed the respondent with effect from 21 June 1999. She was with effect from 1 March 2005 promoted to the position of Chef De Partie ("Chef").

[5] Prior to the incident that led to the respondent's dismissal, the latter approached the Executive Chef of the appellant (Mr. Stephen Walter) and reported that she was attending a 'traditional healer's course'. She requested that she work morning shifts only so that she can be able to attend the sessions without adversely affecting her employment obligations. Walter felt that the request would have an impact on other chefs in the kitchen. He convened a meeting of the relevant parties at which the respondent's request was discussed. The entire staff had no problem with the request and agreed to accommodate the respondent as requested. The respondent also undertook to, where possible, assist with the night shifts. The shift schedule was changed and the employee worked morning shift.

[6] In the course of time, the respondent approached Walter and reported that she was about to complete her Sangoma "course" and that she was now required to attend full time for a month. She requested that she be allowed an unpaid leave for the entire month. Walter consulted the Human Resources Manager (Andri Dreyer). It would appear that the two were willing to accommodate the respondent by allowing her to utilise her leave days. However, they noted that the respondent did not have leave days. She was offered only one week unpaid leave of absence. The respondent found a week to be insufficient for the completion of her "course".

[7] It is common cause that the respondent was scheduled to be off duty from 3 to 5 June 2007. On 1 June 2007 the respondent left two documents on the desk of Dreyer. She failed to report for duty on 2 June 2007. She was expected back from off duty days on 6 June 2007. She did not report for duty on this date. She instead phoned Dreyer and asked him if he had seen the documents she left on his desk. Dreyer acknowledged receipt of the

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documents but told her that they did not change their position and that unless she reported for duty she would face disciplinary action. According to the appellant's disciplinary code, a person who absents himself/herself from duty for three or more days has to face disciplinary action.

[8] It is apposite at this stage to refer to the letters that are the subject of discussion. The one letter bears the letterhead "North West Dingaka Association" and the "Traditional Healer" is Agnes Mmamorena Masilo. A street address as well as the cellular phone number is provided. The body of the letter reads:

> 'This serves to certify that JOHANNAH MMOLEDI was seen by me on 13-01-07 and was diagnosed to have PERMINISIONS OF ANCESTORS.
>
> He/She under my treatment from 13-01 to 8th July 2007.
>
> He/She will be ready to assume work on 8 – 07-2007.'

The letter is dated 31 May 2007 and bears a signature of the traditional healer.

[9] The second letter is headed 'PREPARATION OF GRADUATION CEREMONY OF JOHANNAH MAITE MMOLEDI'. The body reads:

> 'I hereby inform you of the Graduation of the abovementioned Patient. I am asking you to please give her days from the 4th of June to the 8th July 2007 to complete her initiation school final ceremony to become a traditional healer.'

[10] The employee was subjected to disciplinary inquiry where she faced the following charges:

> 'RULE 24: Non compliance with established procedure and/ or managerial instructions, being detrimental to the company;
>
> RULE 38: Absent without a valid reason for 3 days or more;
>
> RULE 47: Gross insubordination/challenge of employer's authority/ not submissive to supervisors or management authority;

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> RULE 48: Wilfully does, allows or causes to be done anything detrimental to the company, its discipline and efficiency.'

[11] Despite the respondent's challenge to the charges, she was found guilty of all the alleged instances of misconduct. The chairperson of the disciplinary enquiry noted that the respondent's explanation for her absence was firstly to undergo 'the Sangoma training' and graduation or that she was ill 'since spirits of forefathers were bothering her'. As regard the first explanation, the chairperson held that he could not accept that 'an employee will attend unrelated courses on company time that would have no benefit in the specific area of economic activity of the employer'. With regard to the second or alternative explanation, the chairperson held that the respondent 'did not hand in any letter by any medical practitioner as required by the Basic Conditions of Employment Act that would provide proof of this alleged illness'. The chairperson rejected 'all her excuses' and recommended the sanction of dismissal from the date on which she "absconded".

<u>Arbitration Proceedings</u>

[12] Aggrieved by the dismissal, the respondent referred an unfair dismissal dispute to the CCMA. After an unsuccessful conciliation, the matter was arbitrated by the commissioner. The commissioner, after listening to the evidence of Walter and Ms. Dreyer on behalf of the Appellant and the evidence of the employee and her witness Ms. OAM Masilo (the traditional healer), made the following remarks in her award:

> 'It appeared very clear from the evidence of the [appellant's] witnesses, that they did not regard the [respondents] condition as a disease that would have qualified her for sick leave. Mr Walter stated in his evidence that he would have done the same thing if an employee would have requested unpaid leave for a karate course. Mrs. Masilo stated that the [respondent] was very ill when she came to her for treatment. She stated further that the [respondent] would have died or suffered a serious misfortune if she would have ignored the ancestors' calling and continued to work, she would have collapsed and no one would have been able to help her.'

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[13] The commissioner remarked further that it was abundantly clear that the parties in the case had conflicting and competing interests and further that there was a lack of empathy and understanding of cultural diversity in the appellant's workplace. The commissioner noted Walter's evidence that they were short-staffed at the time and that it was a busy period; and that the respondent would not have been dismissed had she submitted a medical certificate issued by a registered medical practitioner.

[14] The commissioner went on to say:

> 'An average person values his or her life as more important than anything else and will do anything to save his or her life. The [respondent] was faced with two evils and she chose the lesser evil. In fact, she found herself in a situation of necessity where the only recourse was to break the employer's rules in order to save her life. Necessity knows no law. It is only those people who are endowed with extraordinary qualities of courage, bravery and endurance who would risk their lives or sacrifice their lives for others. The applicant seemed to be an average person who did not posses those supernatural qualities.
>
> In my view it would appear that the applicant was justified to choose a course that would save her life. In the normal course of events and according to human experience, any person would have acted like the applicant did to save her life. A person lives once only and I can hardly imagine any person taking a chance that would cause his life. Life ranks higher in the scale of legal values than property and other things. Therefore clearly, the life of the [respondent] was more important than the interests that the [appellant] sought to safeguard and protect when it declined to grant the [respondent] leave. The respondent would not have suffered any irreparable harm arising from the absence of the [respondent].
>
> In the light of the exposition above, the inescapable conclusion at which I have arrived is that the applicant's absence from duty was due to circumstances beyond her control. In other words, the applicant was justified to disregard the respondent's instructions and attend the sangoma course. The respondent's instructions and refusal to grant the applicant unpaid leave was unreasonable as the consequence thereof would have been to place the

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life of the applicant at risk. Rather than risk the wrath of the ancestors, the applicant decided to act against her employer's wishes.'

Proceedings in the Labour Court

[15] As pointed out already, the commissioner found the dismissal of the respondent to have been substantively unfair and made the award referred to in para 2 above. The appellant thereafter instituted review proceedings in the Labour Court to have the award reviewed and/or set aside in accordance with the provisions of section 145, alternatively section 158 of the Labour Relations Act[1] (the Act). The grounds upon which the award was challenged as contained in the founding affidavit are that:

15.1 the award is not justifiable in relation to the reasons given for it;

15.2 no rational link existed between the evidence before the commissioner and the factual conclusions that were crucial to the award;

15.3 the commissioner has been so grossly careless as to have committed misconduct;

15.4 the commissioner committed an irregularity by putting himself in a position where he separated himself from the true facts of the matter and erred in his application of the law;

15.5 the commissioner exceeded his powers because of the absence of a rational connection between the evidence and his factual conclusions.

[16] The Labour Court in its judgment, *inter alia,* analysed the evidence and the award of the arbitrator in great detail and held that in assessing the fairness of the dismissal for absenteeism, the following factors are normally considered namely, the employee's work record; the reason for the employee's absence; and the employer's treatment of this misconduct in the past. The court below held further that the onus rests on the employee to tender a reasonable explanation for his or her absence. The Labour Court remarked further that

[1] Act 66 of 1995.

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the commissioner found that the respondent had breached the appellant's rule but that she was justified to do so and concluded thus:

> 'It is common cause that the [appellant] knew that the [employee] was attending a course to become a Sangoma. It had assisted her in the past to attend the said course. Arrangements were made with her to work morning shifts and to attend the course in the afternoons.
>
> This was from February 2007 to May 2007. The [appellant] was approached at the end of May 2007 for permission to take one month's unpaid leave to complete the training course. The appellant refused although the [respondent] had produced a traditional healer certificate that was treated with contempt by the [appellant]. The [appellant] knew what the reasons were for the [respondent's] absence. The duration of absence was going to be for a month. She had been working for the [appellant] for eight years. The explanation tendered for the absence was to attend a Sangoma course to appease her ancestors. This is not one of those cases where an employer did not know about the whereabouts of the employee. It was prepared to give her a week off as unpaid leave. The commissioner found that the explanation that she tendered was reasonable. This court cannot second guess the commissioner's findings.'

[17] The Labour Court reminded itself that it was sitting as a review court and not on appeal and concluded that the commissioner had rendered a well reasoned award in which he dealt with why he believed that the dismissal was harsh and why reinstatement was appropriate; that the grounds of review were baseless; and finally that it was satisfied that the award rendered by the commissioner is one that 'a reasonable decision maker would have made' and dismissed the application for review with no order as to costs.

The Appeal

[18] The appellant's contentions on appeal which encompass its grounds of appeal may be summarised as hereunder: The Labour Court:

18.1 should have found that the commissioner committed misconduct and arrived at a decision which a reasonable decision-maker will not reach

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when finding that the employee had an excuse valid in law for her to be absent for several weeks without leave to attend a Sangoma course.

18.2 erred in failing to find that in enacting the Labour Relations Act and the Basic Conditions of Employment Act ("the BCEA") the legislature opted for standards more akin to western standards than to African culture, of which sections 23(1) and 23(2) of the BCEA constitutes the clearest example.

18.3 erred in failing to find that the commissioner assumed the function of the legislature by elevating the role of traditional healers to medical practitioners, notwithstanding the common cause that the practices of traditional healers were not regulated by an Act of Parliament or Professional Council,

18.4 erred in failing to find that the commissioner discarded case law where it was held that a certificate issued by a traditional healer could not be regarded as a proper certificate which an employer should seriously consider when weighing the adequacy or otherwise of the reasons for the absence of an employee.

18.5 erred in failing to find that the effect of the commissioner's findings and award is to open the floodgates to malpractices that operate towards turning the work environment into total disarray, contrary to the latter and spirit of Labour Legislation, more particularly in as much as the green light is given to employees who believe in and subscribe to the African traditions and culture to unilaterally diagnose themselves as suffering from some disorder or illness and to expect employers to be bullied into accepting sick notes from traditional healers on the same footing as medical certificates that conform to section 23 aforesaid for unspecified period of absence.

[19] The ground of appeal of the alleged descent into the arena and interruptions by the Labour Court and that it demonstrated bias towards the appellant was abandoned during argument. The appellant's attorney assured us that there was nothing untoward and that the appellant received a fair hearing in the

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Labour Court. It is therefore not necessary to make any remarks about the said ground in this judgment.

<u>The Review test</u>

[20] The formulation of the test for review for reasonableness in *Sidumo and Another* v *Rustenburg Platinum Mines Ltd and Others*[2] is whether the decision reached by the commissioner is one that a reasonable decision maker could not reach. The aim of the test as formulated by the Constitutional Court is to give effect to the constitutional right to fair labour practice and the right to administrative action which is lawful, reasonable and procedurally fair. Section 145 of the Act must therefore be read in such a way so as to ensure that administrative action by the CCMA is lawful, reasonable and procedurally fair. The Constitutional Court in *Sidumo* emphasised that the distinction between appeals and reviews continues to be significant in scrutinising a decision based on reasonableness and that 'a judge's task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the constitution'.[3] This means that in order to assail an award of the commissioner of the CCMA on the *Sidumo* test, it is incumbent on the party to also assail the result of the award and not the reasons of the commissioner only. Put differently, the focus is on whether the result of the award falls within a range of reasonable results and not whether it is in fact the correct one. The question is whether there is justification for the decision on the material before the commissioner.[4]

[21] It must be mentioned though that an award issued under the auspices of the CCMA can still be reviewed on the grounds specified in Section 145 of the Act, namely, misconduct, gross irregularity and excess of powers. See *Fidelity Cash Management Service* v *CCMA and Others*,[5] *Maepe* v *CCMA and Another*,[6] *NUM and Another* v *Samancor Ltd*.[7]

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[2] [2007] 12 BLLR 1097 (CC).
[3] Id at para 109
[4] *Bester* v *Astral Operations Ltd and Others* [2011] 3 BLLR 129 (LAC) at para 18; *SAMWU v SALGBC* [2012] 4 BLLR 334 (LAC) at para 11; *CUSA v Tao Ying Metal Industries and* Others (2008) 29 ILJ 2461 (CC); 2009 (2) SA 204 (CC); 2009 (1) BCLR 9 (CC) at para 76.
[5] [2008] 3 BLLR 197 (LAC) at para 101.
[6] [2008] 8 BLLR 723 (LAC) at para 39.

## Analysis

[22] It is unfortunate that much emphasis was placed on the fact that the employee claimed to be sick and that the certificate from her traditional healer did not constitute a valid certificate as required by section 23 of the BCEA. It was also contended at length that no acceptable medical evidence was presented to show that the employee was ill.

[23] It is not my understanding of the facts of this case that the employee's case was that she was sick or ill in the conventional sense. Her case was that, based on her cultural and or traditional belief she was in a 'condition' and upon consultation with those that she believed to be in a position to assist her, being a traditional healer, informed her that she must undergo some sessions that would qualify her to be a sangoma as she had a calling from her ancestors. This conclusion is evident from the conduct of the parties when the issue started. The employee was accommodated without any question whether she was sick in the conventional sense. No medical evidence was required to prove that she was indeed sick. Her condition or what she claimed to have been going through her was accepted as such without questions.

[24] The problem seems to have started when the employee required a full month to conclude her sangoma sessions. It is only then that when it was found that she did not have sufficient leave days to take for a full month to comply with her request and when she found a week of absence offered to accommodate her to be insufficient, that the issue of illness and medical proof came to the fore. The appellant then took the view that she could only be accommodated if she produced a "medical certificate" as proof of her "medical condition". On the other hand, the employee, in an attempt to comply with the requirements, obtained a certificate from the person who was in charge of treating her "condition".

[25] Section 23 of the BCEA provides, *inter alia*, that an employer is exempt from paying an employee on sick leave if the employee has been absent from work for more than two consecutive days or on more than two occasions during an

[7] [2011] 11 BLLR 1041 (SCA) at para 5.

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eight week period and fails to produce a medical certificate stating that the employee was unable to work for the duration of the employee's absence on account of sickness or injury, when requested by the employer to produce such a certificate. In this case, the employee was not seeking any remuneration for the period when she would be away from work due to ill health. The common cause fact is that she requested to be accommodated by being given a month's unpaid leave to complete a process that she had already started. Section 23 of the BCEA, therefore, finds no application on the issue in this case. Similarly, the argument that by enacting section 23 of the BCEA the legislature in express terms opted for standards in line with Western standards as opposed to African culture is misplaced as well. I am as a result unable to find, as we are urged to do, that the commissioner usurped the function of the legislature by elevating the role of traditional healers to that of medical practitioners.

[26] It was contended further that the effect of the commissioner's findings and award is to open the floodgates to 'malpractices that operate towards turning the work environment into total disarray, contrary to the latter and spirit of labour legislation'. It would be disingenuous of anybody to deny that our society is characterised by a diversity of cultures, traditions and beliefs. That being the case, there will always be instances where these diverse cultural and traditional beliefs and practices create challenges within our society, the workplace being no exception. The Constitution of the country itself recognises these rights and practices. It must be recognised that some of these cultural beliefs and practices are strongly held by those who subscribe in them and regard them as part of their lives. Those who do not subscribe to the others' cultural beliefs should not trivialise them by, for example equating them to a karate course. What is required is reasonable accommodation of each other to ensure harmony and to achieve a united society. A good example of accommodation was demonstrated by Walter when the respondent first approached him about his challenge. Walter correctly involved other staff members and they all found a common ground to accommodate the employee. The fact that the appellant's attorney does not believe in the authenticity of the culture and that no credible and expert

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evidence was presented to prove that the respondent was ill is, in my view, subjective and irrelevant. A paradigm shift is necessary and one must appreciate the kind of society we live in. Accommodating one another is nothing else but "botho" or "Ubuntu" which is part of our heritage as a society.

[27] Regarding the opening of the floodgates, I can do no better than to refer to what Langa CJ said in *MEC for Education*, *Kwazulu-Natal and Others* v *Pillay*,[8]

> 'The other argument raised by the school took the form of a 'parade of horribles' or slippery slope scenario that the necessary consequence of a judgment in favour of Ms Pillay is that many more learners will come to school with dreadlocks, body piercings, tattoos and loincloths. This argument has no merit. Firstly, this judgment applies only to bona fide religious and cultural practices. It says little about other forms of expression. The possibility for abuse should not affect the rights of those who hold sincere beliefs. Secondly, if there are other learners who hitherto were afraid to express their religions or cultures and who will now be encouraged to do so, that is something to be celebrated, not feared. As a general rule, the more learners feel free to express their religions and cultures in school, the closer we will come to the society envisaged in the Constitution. The display of religion and culture in public is not a 'parade of horribles' but a pageant of diversity which will enrich our schools and in turn our country. Thirdly, acceptance of one practice does not require the school to permit all practices. If accommodating a particular practice would impose an unreasonable burden on the school, it may refuse to permit it.' (References omitted).

These authoritative remarks are equally relevant in this case. It must be left to employers and their employees to develop systems in their workplaces when confronted with these challenges.

[28] In my view, the decision reached by the commissioner on the facts is not the one that a reasonable decision maker could not reach. Her conclusions are supported by reasons. I am not persuaded that a different approach in the reasoning process by the commissioner could have resulted in a different

[8] 2008 (1) SA 474 (CC) at para 107.

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outcome, regard being had to the grounds of review and the submissions on behalf of the appellant. I am satisfied that the commissioner was alive to the issues in this matter and properly applied her mind to the material before her. Another commissioner may as well have arrived at a different conclusion. However, the matter was not on appeal but on review and the distinction between the two must be recognised. The appeal should therefore not succeed.

[29] What remains to be decided is the issue of costs. I am persuaded by the submission on behalf of the appellant that this is a matter where costs should not follow the result. The issue raised in this matter is novel and the appellant did not act unreasonably in approaching this court on appeal. It would therefore be in accordance with the requirements of the law and fairness that there be no order as to costs.

[30] In the result, the following order is made:

1. The appeal is dismissed.

2. There is no order as to costs.

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TLALETSI, JA

Judge of the Labour Appeal Court

Ndlovu JA and Murphy AJA concur in the judgment of Tlaletsi JA.

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Appearances:

For the appellant: J L Pienaar

Instructed by: Louw Pienaar Attorneys

For the respondent: P E Radali (Union official)

Instructed by: SACCAWU

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