

**IN THE LABOUR COURT OF SOUTH AFRICA HELD AT DURBAN  
HELD AT DURBAN**

**CASE NO.: D709/2006**

**Not Reportable**

IN THE MATTER BETWEEN:

**PIONEER FOODS t/a SASKO MILLING AND BAKING**

**APPLICANT**

AND

**COMMISSION FOR CONCILIATION MEDIATION  
AND ARBITRATION**

**FIRST RESPONDENT**

**COMMISSIONER LINDA MATYIALA**

**SECOND RESPONDENT**

**FAWU OBO C MBATHA AND 11 OTHERS**

**THIRD RESPONDENT**

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**JUDGMENT**

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**GUSH, A J**

1. The Applicant in this matter applies to set aside the award of the Second Respondent reinstating the twelve employees of the Applicant represented by the Third Respondent ( herein after referred to as the Respondents).
2. During May 2005 as a result of a gas leak at its mill the Applicant implemented its emergency evacuation procedures.
3. The Applicant's emergency procedures are as follows:

- 3.1 When the emergency occurs an alarm bell is set off as a warning to all employees inside the mill.
  - 3.2 In addition an announcement is made over the intercom.
  - 3.3 In response to these alarms all employees are immediately required to leave their work stations and proceed to a designated assembly point.
  - 3.4 At the assembly point the Applicant's management and/or safety teams conduct a role call to determine that all employees are at the assembly point and that no employees are left in the mill; at the same time safety teams wearing protective equipment are sent into the mill to ensure all employees have vacated the area
  - 3.5 If any employees are found not to be present after the roll call another safety team, wearing the necessary safety equipment is dispatched into the mill to look for those employees who are not at the assembly point to ensure that they leave the affected area immediately.
  - 3.6 All employees including management are required to remain at the assembly point until an all clear is given by management or a safety team. The all clear means that the danger has passed and the employees are then free to return to the affected or restricted area.
4. This is the procedure which was followed by the Applicant on the day in question.  
At the time of this emergency and the sounding of the alarm warning and announcement the mill machinery was not running as the plant was undergoing maintenance. The emergency caused by the gas leak was very serious and dangerous. According to the evidence lead at the arbitration a passer-by had succumbed to the fumes and had died. In addition the Applicant lead evidence to the effect that all personnel are trained in emergency evacuation procedures.
5. On the day in question having sounded the alarm the Applicant's employees including the Respondents, excluding one of the respondents a Mr Mkhize, proceeded to the assembly point.
6. The Applicant's management and safety teams conducted a role call and ascertained that the Respondents excluding Mr Mkhize were present at the assembly point.
7. A safety team had been dispatched into the mill to determine whether any employees were still in the affected area This safety team came across Mkhize and two others who

in the change room and specifically instructed them to report to the assembly point and the safety team then left the ablution facilities and change room in order to search the rest of the affected area for any other workers who might still have been in the mill.

8. In the interim the applicants management and safety teams specifically instructed all the other employees including the Respondents to remain at the assembly point until the all clear had been sounded after which they could leave as was required by the safety procedures.
8. Despite being so specifically instructed the Respondents (excluding Mr Mkhize, who had not reported to the assembly point at all) disregarded this specific instruction and left the assembly point prior to the all clear being sounded, and left the premises.
9. As these respondents had disregarded the specific instruction to remain at the assembly point until the all clear was sounded and as a result of their disregard for the safety regulations they were charged with misconduct and following a disciplinary enquiry were dismissed.
10. Whilst conducting the first sweep of the restricted area the safety team had come across Mr Mkhize together with two other employees in the ablution facility and had specifically instructed these employees to proceed immediately to the assembly point before continuing with their sweep of the mill.
11. After having conducted their search for employees the safety team returned to the assembly point and a further roll call was taken. It was again ascertained after this roll call that the Mkhize was still not present and a second safety team was dispatched into the restricted area again with the necessary safety equipment to find out where Mkhize was.
12. The second safety team found Mkhize still in the ablution facility. This was some twenty minutes after he had been specifically instructed by the previous safety team to vacate the restricted area. The safety team again instructed Mkhize, on pain of disciplinary action, to proceed immediately to the assembly point as required by the safety procedure.

13. On their return to the assembly point it was once again determined that Mkhize had not reported to the assembly point. Subsequent efforts to locate Mkhize revealed that he instead of proceeding to the assembly point as instructed had proceeded to the exit and had clocked out.
14. As a result of his refusal to comply with this specific instruction and disregard of the safety regulations Mr Mkhize too was charged with misconduct along with the other Respondents. Following the disciplinary enquiry Mr Mkhize was dismissed.
15. The respondents were charged with not complying with the Applicants safety regulations and insubordination arising from their refusal to obey instructions.
16. The disciplinary enquiries into the misconduct of the Respondents did not go smoothly. When the enquiries were convened during June and July 2005 under the chairmanship of an independent chairperson the Respondents objected to the enquiry proceeding on two grounds.
17. The first ground was that the Applicant had appointed an independent Chairperson. The Respondents were advised that an external Chairperson had been appointed due to the gravity of the misconduct and the fact that the majority of the Applicant's mill managers had been involved in the incident. These managers would under normal circumstances dealt with the enquiry were accordingly able to do so.
18. The second ground involved the question of representation. Attempts had been made by the Applicant to secure the attendance of a Union official at the disciplinary enquiry as there were shop stewards amongst the Respondents who were involved in the alleged misconduct. Evidence was led at the Arbitration regarding the attempts made by the Applicant to secure the Unions attendance but this had not borne fruit. The actions of the Third Respondent regarding the question of representation drew harsh criticism from the Second Respondent who described their conduct as irresponsible and an abdication of their duties.

19. Prior to the Chairperson having an opportunity to deal with these objections the Respondents elected not to participate in the disciplinary enquiry and left.
20. A total of sixteen employees in total, including the Respondents, had been charged with misconduct. Four of these employees had elected to cooperate with the enquiry and had remained in attendance. During the enquiry into their misconduct they had acknowledged their guilt, apologised for their misconduct and had undertaken to comply with the rules of the workplace regarding safety in future. They received final written warnings.
21. As far as the Respondents were concerned they having left the enquiry the Applicant proceeded with it in their absence and they were found guilty of the misconduct. As a consequence of finding them guilty the Respondents were dismissed by the Applicant.
22. The Respondents having been dismissed declared a dispute over their dismissal with the First Respondent who appointed the Second Respondent to arbitrate the dispute.
23. It is clear from the record of the arbitration that the circumstances surrounding the incident were canvassed extensively. Both the Applicant and the Respondents called a number of witnesses who gave evidence in detail regarding the matter.
24. The Second Respondent in making her award considered both the question of procedural fairness and substantive fairness.
25. In considering procedural fairness the Second Respondent specifically considered the objections raised by the Respondents at the disciplinary enquiry, and concluded;
  - 25.1 firstly that there had been adequate consultation on the part of the Applicant in that it had in fact consulted with the Third Respondent prior to the disciplinary enquiry proceeding and that the Third Respondent had deliberately not taken part in the disciplinary enquiry;
  - 25.2 secondly that the outside chairperson appointed to conduct the enquiry was an independent outsider with no previous relationship with the Applicant.

26. The Second Respondents concluded that:

*the dismissal of all the Respondents was procedurally fair.*

There is no cross appeal by the Respondents regarding this finding.

27. Having dispensed with the procedural fairness of the dispute the The Second Respondent then proceeded to deal with the substantive fairness of the dismissals. In so doing the Second Respondent distinguished between the misconduct of Mkhize and the remainder of the Respondents and the fairness of the sanction imposed upon them.
28. In considering Mkhize's dismissal the Second Respondent rejected his evidence that he had not been told to proceed to the assembly point by the two safety teams. The Second Respondent found specifically that this in fact had taken place and that Mkhize had been instructed to report to the assembly point. The Second Respondent concluded in her award that Mkhize was in fact guilty of the misconduct complained of.
29. The Second Respondent however came to the conclusion that the dismissal of Mkhize was substantively unfair in that his conduct was not sufficiently serious to warrant a sanction of dismissal. The reasons proffered by the Second Respondent as to why this was so are variously as follows;
- 29.1 Mkhize did not think that the matter was serious; that it was not *"a blatant disregard for company rules but rather ignorance brought about by not taking matters seriously"*;
- 29.2 That Mkhize did not fully understand the extent of the instruction to go to the assembly point;
- 29.3 Above accepted that the safety teams had *"directly instructed him to go to the assembly point and that he ignored the said instruction and instead went home"*;
- 29.4 Above that Mkhize could have been confused although his confusion was not a fault of management and that in any event *"it was his normal knock off time"*.

30. The Second Respondent thereafter somewhat startlingly came to the conclusion that the reason for Mkhize's dismissal was *"his deliberate refusal to attend the disciplinary hearing he was summoned to attend"*. This was despite the fact that there was no evidence to support this conclusion. This was despite accepting that the emergency was serious and that the issue of the gas smell was very dangerous and could have attracted serious criminal and civil penalties;
31. Taking the above reasons into account and the Second Respondents somewhat confused logic it seems to be abundantly clear that the Second Respondent did not properly apply her mind to the material that was before her when making the award which inevitable leads to the conclusion that:

*"the award was not one that a reasonable decision maker could arrive at considering the material placed before [her]."*

*Edcon v Pillemer* (191/2008) [2009] ZASCA 135 at para 15 and 16

32. When dealing with the substantive fairness of the dismissal of the remaining Respondents the Second Respondent rejects the evidence given on their behalf at the Arbitration. The Second Respondent specifically, as with Mkhize, accepted the evidence given by the Applicant's witnesses and in particular found that that the instruction given to the remaining Respondents not to leave their assembly point was unequivocal and understood.
33. In this regard the Second Respondent finds specifically that the Respondents were in breach of the company emergency safety procedures and that they acted in a grossly insubordinate manner.
31. The Second Respondent then considered specifically the question of consistency in the light of the fact that four of the Applicants employees who had also disregarded the instruction to remain at the assembly point had been given a final written warning.
32. the Second Respondent found:
- "the [Applicant] did not act unreasonably because all the employees were charged but the outcomes were different because of how the employees responded to the discipline"*

And that therefore the Third Respondent's allegation of inconsistency could not be sustained.

33. The Second Respondent then turns to the appropriateness of the penalty concludes that, despite her finding on consistency set out above that

*"I do not believe that the sanction applied is reasonable and fair considering that the other employees committed the same offence were issued with a final warning".*

34. Despite having found that the Respondents acted in a grossly insubordinate manner the Second Respondent concluded that the employment relationship between the Respondents and the Applicant is not irretrievably broken because *"the Union and management continue to have a healthy relationship"*. This conclusion ignores the effect the misconduct had on the employment relationship between the Applicant and the Respondents.

34. As with her conclusions regarding Mkhize her conclusion that the remainder of the Respondent's dismissal was unfair is not commensurate with the facts and the evidence (material) placed before her and her award is not one that a reasonable decision maker could arrive at.

*Edcon v Pillemer* (191/2008) [2009] ZASCA 135 at para 15 and 16

36. In the circumstances I make the following order:

1. The decision of the Second Respondent reinstating the Respondents represented by the Third Respondent be set aside and replaced with an order that the dismissal of the Respondents by the Applicant was fair;
2. The Third Respondent to bear the costs of this Application.

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**GUSH AJ**

Date of Hearing: 11 December 2009

Date of Judgment: 28 January 2010



Appearances:

For the Applicant: Adv RAK Vahed SC instructed by AP Shangase

For the Respondent: PO Jafta-Jafta Inc