REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, AT DURBAN

JUDGMENT

Not Reportable

Case no: D296/11

In the matter between:-

SIBONGISENI GWALA	**Applicant**
and	
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	**First Respondent**
COMMISSIONER WAYNE PAUL N.O.	**Second Respondent**
TOYOTA SA MOTORS (PTY) LTD	**Third Respondent**

Date of hearing: 21 February 2013

Date of judgment: 14 May 2013

Summary: Review application – long delay in finalisation of disciplinary enquiry – requirements for procedural fairness. Approach of arbitrator when dealing with conflicting versions – *Sasol Mining (Pty) Ltd v Ngqeleni NO & Others* followed.

JUDGMENT

CHETTY, AJ

[1] The applicant in this matter, Mr. Gwala, brought an application for review in terms of section 145 of the Labour Relations Act 66 of 1995 of the decision

handed down by the second respondent (the 'Commissioner'), acting under the auspices of the Commission for Conciliation, Mediation and Arbitration ('CCMA'). The basis of the review application is that the commissioner committed a series of gross irregularities in finding the applicant guilty of gross insubordination and a repeated failure to follow certain instructions in September 2009. The applicant was charged with one count of gross insubordination, in that it was alleged that on 10 September 2009 he repeatedly refused to follow an instruction from his group leader and senior manager, a Mr. Whitehead, to resume work and questioned the authority of his senior manager. He was also charged with two counts of refusing to obey instructions shortly after the incident listed in the first charge. It is not necessary for me to deal with the contents of the latter two counts as the applicant was found guilty only on the first charge, and dismissed on 14 September 2010. The delay in the eventual holding of the enquiry, almost a year after the charges had been laid, formed part of the applicant's attack on a ground of procedural fairness.

[2] The factual background to the matter, as found by the commissioner, is that the applicant was employed as a welder in the chassis plant section of Toyota Motors SA since 2004. Early in September 2009, the applicant and another colleague, Mr. Jacquere, had an altercation over a fan. Matters appeared to boil over when the applicant pushed a loaded trolley onto Jacquere, causing him to be injured. Both employees were members of the National Union of Metal Workers of South Africa (NUMSA), which presented problems as to how the matter should be dealt with. The shift on which the applicant and

Jacquere worked did not have a full time shop steward and when the incident was reported to their team leader, the applicant and others aligned with him were of the view that the matter had not been properly dealt with. The record suggests that other members of the team also had work related problems which had not been properly resolved. This is evident from the testimony of the applicant, as well as his witnesses at the arbitration, Mr. Zungu and Mr. Madlala. On 10 September 2009, the group leader informed the senior manager, Mr. Whitehead, that the applicant and other members of the shift were demanding to speak to him regarding their problems and refused to return to work until a meeting took place. The underlying reason for the stoppage is that the applicant, and others on the shift, refused to work with Jacquere. At this stage, the latter was off sick having received treatment as a result of the trolley accident. Whitehead was unable to meet with the applicant and his colleagues immediately due to another meeting which he was scheduled to attend, and enlisted the assistance of Mr. Madlala, a full time shop steward, in an attempt to get the employees back to work. Eventually Whitehead met with the employees, who were represented by the applicant and his colleague Mr. Zungu. It is this meeting which gave rise to the charges against the applicant. Whitehead stressed at the arbitration, that the work stoppage embarked on by the applicant and the others on the shift, had the potential for disruption, as without chassis' being manufactured, the entire assembly plant would grind to a halt.

[3] According to Whitehead, when he intervened to meet with the group of employees who had stopped working, they were represented by the applicant

and Mr. Zungu. The rest of the group remained in the background. At this time, Whitehead instructed the applicant to return to work and undertook to address the issues at a later stage. It is evident from the record that the discussion with Whitehead focused on the problems with Jacquere. When Whitehead responded that Jacquere was not at work and there was no reason to be fearful of him, it was perceived that he was not receptive of their complaint. The applicant then accused Whitehead of not wanting to assist in resolving the problem and spoke to him in a raised voice, then began shouting and raising his finger at him in the process. The evidence of Whitehead indicates that he was about a half meter away from the applicant at the time and if the applicant were any closer, according to Whitehead, his actions could have constituted an assault. Throughout this time, Zungu stood alongside the applicant. The matter was reported and after a shop steward was called to the scene the applicant and his colleagues returned to work.

[4] During the course of the interaction between Whitehead and the applicant, it is important to note that according to Whitehead, the applicant accused him of *'not respecting the union'*. The third respondent considered this allegation in a very serious light as NUMSA is the recognised union at the plant. Mr. Maeso, who appeared for the third respondent, submitted that such an allegation by the applicant could have the effect of potentially dampening relations between the union and the third respondent. The accusation could also lead to a lack of respect by the employees for a manager, on the assumption of him being disrespectful of the union. This in turn could lead to a refusal to carry out instructions or instead of only taking instructions from a shop steward.

Eventually, with the assistance of a shop steward, the situation was diffused with arrangements for a meeting between Zungu, the applicant and Whitehead to take place later in the day. However, the applicant and Zungu failed to attend the meeting, alleging that they were unhappy with the venue.

[5] Against this backdrop, both the applicant and Zungu were charged on 18 September 2009, found guilty and eventually dismissed. At the time of the applicant's arbitration, Zungu's matter at the CCMA was still part-heard. The commissioner accepted Whitehead's evidence that he had instructed the applicant and others in his group to return to work. The commissioner rejected the applicant's version that Whitehead had informed the group that they could remain in a smoking area, as improbable. Mr. Maeso further submitted that the explanation of the applicant is even more improbable in light of the urgency with which they were asked to return to work, given that the assembly of the chassis component was crucial to the final number of vehicles finally assembled. In weighing up the versions of the two parties, the commissioner preferred the version of the company's witnesses to that of the applicant. On review before this Court, the applicant contended that the commissioner committed a gross irregularity in rejecting his version regarding the issues of substantive fairness, as well as his finding that despite the delay in the holding of the disciplinary enquiry, there had nonetheless been no basis to conclude that the dismissal was procedural unfair.

[6] Ms Gqoba, a union official who appeared on behalf of the applicant, confined her argument to two discreet issues. First it was contended that the commissioner's conclusion that despite the delay in the holding of the enquiry

the dismissal was procedurally fair, was not a decision that a reasonable commissioner could arrive at under the same circumstances. The second argument was that the commissioner's decision to reject the evidence of the applicant was unreasonable for reasons set out in *Sidumo v Rustenburg Platinum Mines Limited & others*[1]. I shall deal with each ground separately.

[7] It was accepted by Mr Maeso that ordinarily, a disciplinary hearing should follow without undue delay after the issuing of the charge sheets and the incident which forms the subject matter of the enquiry. In analysing the evidence on this aspect, the commissioner noted the following:

> 'Dealing with the issue of the respondent waiting a year to release the outcome of the disciplinary hearing I have considered that the applicant was on paid suspension.
> No evidence was led dealing with the nature of prejudice and therefore I can find no prejudice sufficient to amount to procedural unfairness.'

[8] Ms Gqoba submitted that the applicant had been prejudiced by the delay in finalising the disciplinary proceedings. The exhibits placed before the Court reveal that the applicant was charged with offences allegedly committed on 10, 15 and 17 September 2009. He was placed on suspension with full pay on 18 September 2009 and at the same time was handed a notice to attend a disciplinary enquiry on a date to be advised. It would appear that the enquiry commenced on 27 November 2009 and a decision culminating in the applicant's dismissal only eventuated on 14 September 2010. I was advised that during the entire period between the applicant being charged until he was informed of his eventual dismissal – some twelve months after the incident

[1] (2007) 28 ILJ 2405 (CC).

giving rising to the charge – he remained at home in a state of uncertainty as to whether he would have any form of employment with the third respondent or whether he should spend his time trying to secure alternative employment in the event that he was dismissed. One must infer from the record at the arbitration that the applicant did not manage to secure employment after his dismissal as he was unemployed at the time of the arbitration.

In his evidence in chief, the third respondent's only witness, Mr. Whitehead, was asked about the union's complaint that there had been an undue delay between the charging of the applicant and the date when the decision was finally issued. Whitehead was asked whether there was anything "*sinister"* about the delay. In his response he stated the following

> 'No, one of the problems is the shift work there's no HR present on nightshifts. So, every second week we can do the hearings with the HR present. And also a couple of doctor's certificates were submitted resulting in postponements in the case.'

[9] Under cross examination Whitehead was asked about the delay. The response was the following

> 'Mr. Motaung: I'll come back to that question. You are saying that there has been a delay in prosecuting this matter internally due to some delays. Can you ever identify those postponements that you said took place between September 2009 and September 200[9]10?
>
> Mr. Whitehead: The shift work is one of the problems because all of the people who were involved were on nightshift together. The shift work was a concern and also there were one or two doctor's certificates submitted on the days the hearings were scheduled to proceed.
>
> Mr. Motaung: Who handed in sick notes?
>
> Mr. Whitehead: If I recall Mr. Zungu was one of the guys.

Mr. Motaung: And others?

Mr. Whitehead: Another was more than one incident of sick notes being submitted but I cannot tell you who and what dates.'

The record further reveals that Whitehead could not recall whether the applicant handed in a sick note during this period. He further testified that Zungu's absence delayed the holding of the enquiry as Zungu was the applicant's material witness. Whitehead further stated that as most of the witnesses worked night shift, it was possible for an enquiry to be convened only for two weeks within a month.

[10] Ms Gqoba relied on the decision in *Avril Elizabeth Home for the Mentally Handicapped v Commission for Conciliation, Mediation & Arbitration & others*[2] in support of her argument that the delay in providing the applicant with a decision after the holding of an enquiry, constituted a procedural irregularity. Van Niekerk AJ noted[3]

> 'To some extent, chapter VIII of the Labour Relations Act represents a codification of the jurisprudence that preceded it. The Act itself is silent on the content of any right to procedural fairness, it simply requires that an employer establish that a dismissal was effected in accordance with a fair procedure. The nature and extent of a right to fair procedure preceding a dismissal for misconduct is spelt out in specific terms in the Code of Good Practice: Dismissal in schedule 8 to the LRA.'

[11] In his article "Right to a Hearing before Dismissal" – Part 1[4], Prof Cameron (as he then was) noted that it was essential ingredient of fairness that the employee be permitted the opportunity to present his case

[2] (2006) 27 ILJ 1644 (LC).
[3] Above at 1651C-E.
[4] (1986) 7 ILJ 183, at page 200.

> '. . . effectively since delay can lead to inadequate recall on the part of the employee or to the unavailability of his witnesses. Moreover, undue delay between the occurrence of the alleged misconduct and the employer's disciplinary response blurs the impact of corrective discipline.'

The facts in the matter do not necessarily fit into the paradigm set out in the above two instances. The delay complained of is not that Mr. Gwala was charged with misconduct *after* an undue delay but that the chairperson of the enquiry, for reasons which are not entirely apparent, delayed in rendering his decision. Ms Gqoba conceded that the applicant suffered no financial prejudice, nor was his memory impacted on by the delay. The applicant was notified that he was going to be disciplined with misconduct on 18 September 2009, when he was also placed on suspension with pay. The enquiry proceeded in November 2009. There is no evidence to suggest that the applicant was prejudiced in any manner, or that he was prevented from calling witnesses. Mr. Maeso also conceded that there had indeed been a lengthy delay between the hearing and the issuing of the final sanction. However, he submitted that Whitehead's version under cross examination was left materially intact and it was never the applicant's evidence that the delay in the issuing of the decision had impacted on its fairness.

[12] Mr. Maeso further contended that the commissioner properly considered the evidence before him and applied his mind thereto in arriving at a conclusion that there had been no procedural unfairness. He submitted that accordingly the decision of the commissioner in this regard is a decision that a reasonable decision maker, given the same circumstances and evidence, would have reached. Before a court will interfere with an award on grounds of procedural

irregularity, the issue must be considered holistically to determine whether any procedural flaws were so gross and of such a nature to justify such an interference.[5] After giving due considerations to the grounds advanced by the applicant regarding procedural unfairness, I find no reason to interfere with the conclusion arrived at by the second respondent, especially as the applicant was unable to show as sign of prejudice occasioned by the delay, whether financially or in his ability to present his case.

[13] I now turn to the grounds of attack dealing with the substantive fairness of the decision of the commissioner. The thrust of the argument advanced by Ms Gqoba, was that the commissioner committed a gross irregularity by accepting the uncorroborated version of Whitehead and rejecting the version of the applicant, which was corroborated by Mr. Zungu. On the charge of gross insubordination and gross insolence arising from events on 10 September 2009, Whitehead gave direct evidence that the applicant raised his voice, while standing a half meter away from him, and pointing his finger at his senior manager. Under cross examination, Whitehead stated that if the applicant had come any closer to him during this encounter, it could have constituted an assault. A reasonable inference that could be drawn is that the applicant was acting in a threatening manner towards his manager. The applicant and his witnesses denied any knowledge that he threatened Whitehead as set out above, or that he had refused an instruction to return to work.

[5] *Mutual Construction Company Tvl (Pty) Ltd v Ntombela NO & others* (2010) 5 BLLR 513 (LAC), para 41.

[14] The commissioner, in analysing the two competing versions, notes that Whitehead's evidence of the waving of the finger in his (Whitehead's) face and the comment that Whitehead had no respect for the union, "remained materially intact". He further stated of Whitehead's version that it was "given in a clear and confident manner and was at no stage contradicted under cross examination". In contrast, the commissioner weighed up the evidence by the applicant, finding that the applicant changed his version of events under cross examination as to whether or not he was in a smoking area at the time when approached by Whitehead. Mr. Zungu, the applicant's witness, was evasive and simply refused to provide answers to questions. Mr. Maeso further submitted that Zungu's evidence should be discounted because he was in exactly the same position as the applicant, in that he too, had been charged and dismissed for the same offences as the applicant. The commissioner, on the evidence before him, proceeded to make a credibility finding in which he accepted, on a balance of probabilities, the evidence of the third respondent as remaining "intact and without contradiction", compared to the evidence of the applicant which he found had "fundamental contradictions".

[15] It was submitted by Mr. Maeso that the commissioner's decision to prefer the version of the third respondent to that of the applicant was reasonable in light of the evidence, alternatively, that his decision would fall into the range of reasonable outcomes or an "area of legitimate diversity", that is, a space

within which various reasonable choices may be made. Hence, the decision is reasonable, even if it is not correct or perfect.[6]

[16] Having regard to the evidence on record and the arbitration award, I am of the view that the commissioner approached the matter in the correct manner when faced with two competing versions. In *Sidumo and Another v Rustenburg Platinum Mines Ltd*[7] Ngcobo J stated that

> '. . . where a commissioner fails to have regard to the material facts, the arbitration proceedings cannot in principle be said to be fair because the commissioner fails to perform his or her mandate. . . And the ensuing award falls to be set aside not because the result is wrong but because the commissioner has committed a gross irregularity in the conduct of the arbitration proceedings.'

[18] In dealing with matters where an arbitrator is faced with two disputing versions, the proper approach, as set out by Van Niekerk J in *Sasol Mining (Pty) Ltd v Ngqeleni NO & Others*[8] is to conduct an

> '. . . assessment of the credibility of the witnesses, a consideration of the inherent probability or improbability of the version that is proffered by the witnesses, and an assessment of the probabilities of the irreconcilable versions before the commissioner. As Cele AJ (as he then was) observed in *Lukhnaji Municipality v Nonxuba NO & others* [2007] 2 BLLR 130 (LC), while the LRA requires a commissioner to conduct an arbitration hearing in a manner that the commissioner deems appropriate in order to determine the dispute fairly and quickly, this does not exempt the commissioner from properly resolving disputes of fact when they arise.'[9]

It is clear the arbitrator did not do this.

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[6] 'The future of Judicial Review in South African administrative law", C Hoexter, (2000) 117 SALJ 484 at 510.
[7] Above 1, at para 268.
[8] (2011) 32 ILJ 723 (LC).
[9] Above at 727C-F.

'In *SFW Group Ltd & another v Martell et Cie & others* 2003 (1) SA 11 (SCA), the proper approach to the resolution of factual disputes was explained by the Supreme Court of Appeal (per Nienaber JA) in the following terms at para 5:

> 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) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression 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, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the 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. The hard case, which will doubtless be a rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail.'[10]

[16] The arbitration award clearly records that the commissioner made a credibility finding in favour of the version of the third respondent, despite it being the

[10] Above 8, at 727E-728B.

evidence of a single witness. The commissioner took into account that Whitehead was consistent in his version of events as to what happened on 10 September 2009, whereas the applicant's testimony contained instances where he refused to make concessions where he would have been expected to, or refused to give a version of events when called upon to do so. An example of this is when the applicant was asked whether a work stoppage would compromise production. Although he was not facing a charge of participating in an illegal work stoppage, he responded that "I don't know. I don't remember." Similarly, when questioned regarding the version of Whitehead's instruction to return to work, the applicant proved to be evasive in answering questions. His witness, Mr. Zungu, did not aid his cause, especially as the employer argued that he had a self interest in supporting the applicant.

[17] I am satisfied that the commissioner reached the factual conclusions he did based on the evidence placed before him. Mlambo JP's comments in *Afrox Healthcare Limited v Commission for Conciliation, Mediation & Arbitration & others*[11] are instructive

> 'The fact of the matter is that the reasonable decision maker yardstick crafted in *Sidumo*, viewed in proper context, is none other than that in the absence of a "rational objective basis" between the decision arrived at and the material placed before the decision maker, the relevant decision is clearly not one which a reasonable decision maker would have arrived at.[12]

[18] I accordingly make the following order:

1. The application is dismissed;

[11] (2012) 33 ILJ 1381 (LAC).
[12] Above, 1391 at para 21.

2. No order as to costs.

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Chetty, AJ

Acting Judge of the Labour Court

Appearances:

For the Applicant: Ms P Gqoba, union official.

For the Third Respondent: Mr. M G Maeso.

Of Shepstone & Wylie Attorneys