



REPUBLIC OF SOUTH AFRICA

Not reportable

**THE LABOUR COURT OF SOUTH AFRICA,
IN DURBAN
JUDGMENT**

CASE NO: D549/11

In the matter between:

TOYOTA SA MOTORS (PTY) LTD

Applicant

and

**COMMISSION FOR CONCILIATION,
MEDIATION & ARBITRATION**

First Respondent

B PILLEMER (N.O.)

Second Respondent

**NATIONAL UNION OF
METALWORKERS OF SA**

Third Respondent

PHINDILE ZIQUBU

Fourth Respondent

Heard: 16 August 2012

Delivered: 09 July 2014

Summary: (Review – Not guilty finding set aside as finding not reasonable on a consideration of all the evidence – unfairness of dismissal upheld, but appropriate sanction substituted and retrospectivity of reinstatement limited).

JUDGMENT

LAGRANGE, J

Introduction

- [1] This is a review application of an arbitration award in which the Commissioner found that the fourth respondent's dismissal was substantively unfair, and ordered his full reinstatement.
- [2] The fourth respondent, Mr P Ziqubu ('Ziqubu'), had been dismissed for the following misconduct:

- "1. Violence of an intimidating nature whether threatening or actual in that on 17 February 2010 you pointed your finger at G Mavundla and threatened to assault him;
2. Interfering with plant protection staff in execution of their duties on 17 February 2010."

Background

- [3] On the day in question, the fourth respondent Ziqubu and another employee, Mr L Sokhulu ('Sokhulu'), had been selected for a substance test by a security guard, Mr G Mavundla ('Mavundla'), charged with administering such tests on a random basis, when they were entering the workplace. Both employees were annoyed at being selected, but Sokhulu took the test without further incident and entered the premises through the turnstile.
- [4] Ziqubu refused to take the test and an altercation took place with the security guard who wanted to administer the test. Ultimately, Ziqubu also submitted to the test and was allowed to enter the premises. Mavundla no longer worked at the premises of the applicant and could not be traced by it. In consequence, he did not give evidence at the arbitration.
- [5] According to the arbitrator's summary of the employers case:

- 5.1 The applicant had refused to make a statement to the company investigator but had apologised to him for what had happened.
- 5.2 The Assistant HR manager explained that Sokhulu had not been dismissed because he had not threatened the security guards like Ziqubu had done. The arbitrator accepted the validity of this distinction.
- 5.3 Another security guard on duty at the entrance gate at the time of the incident, Mr S Cele ('Cele'), could not recall if Mavundla had called Ziqubu a "phuza face", but testified that he had to intervene when the argument broke out between Ziqubu and Mavundla, by standing in between them as Ziqubu manhandled Mavundla in an attempt to get past Mavundla and enter the premises. Cele claimed to have been pushed by Ziqubu and said that Ziqubu had threatened to assault Mavundla.
- 5.4 The other security guard on duty, Ms Z Mkhize ('Mkhize') became aware of a problem and went to investigate. She found Ziqubu was very angry and threatening to assault Mavundla. She confirmed Cele was standing in between Ziqubu and Mavundla, and Ziqubu had pushed all three of them. She also did not hear Mavundla insulting Ziqubu nor did she see Ziqubu grabbing Mavundla.

[6] The arbitrator highlighted the following aspects of the testimony of Ziqubu and his witness, Sokhulu:

- 6.1 Ziqubu had no objection to taking the test, having done so before, but became angry when Mavundla told him he had chosen him because he had a "phuza face", whereas he was a teetotaller and non-smoker.
- 6.2 He did try to enter the premises without taking the test and was stopped by Mavundla who had grabbed him. It was at this point that he angrily pointed his finger at Mavundla and warned him there would be issues if he touched him.
- 6.3 Mkhize said he saw Mavundla grab Ziqubu and he had tried to free himself. He confirmed Ziqubu had pointed his finger at Mavundla.

The arbitrator's analysis

- [7] Although there was a short CCTV clip of the incident, which had been taken from a camera located inside the premises, the arbitrator found it was "inconclusive and did not take the matter further".
- [8] The arbitrator accepted Ziqubu's version that he was insulted and humiliated in front of others standing in the queue by being selected because he allegedly had the 'face of a drunkard', having already been selected the previous day to take the test. This provoked him to become angry and he had *only* expressed his anger by pointing his finger at Mavundla *after* the latter had manhandled him to stop him entering the premises without taking the test.
- [9] An important consideration in the arbitrator favouring Ziqubu's version was the observation that:

"Mavundla was not called to testify and so applicant's version is only version in relation to most of the essential features that occurred."

- [10] The arbitrator also discounted the evidence of the other two security guards. What concerned her in particular, was that they were not able to hear what was initially said which caused the altercation. Further, they both claimed Ziqubu had pushed them and had grabbed Mavundla. From this, the arbitrator concluded that it is unlikely that the charge against Mavundla would have been 'limited to pointing a finger and threatening to assault, it would have included the actual assault to which they testified'. She concluded therefore that they appeared to have elaborated and exaggerated their evidence at the arbitration, which rendered it unreliable.
- [11] Another factor leading her to prefer Ziqubu's version as the more probable one, was his absence of a disciplinary record coupled with his long service of over 14 years.
- [12] Further, Ziqubu's angry response to a highly insulting appellation was a reasonable one which did not amount to misconduct. In any event, he took the test. The arbitrator also expressed the view that even if his conduct in

this regard had amounted to misconduct it was not of the order which should have resulted in his dismissal.

- [13] Lastly, given that Ziqubu continued working for four weeks after the incident before being suspended, the employment relationship had not broken down irretrievably.

Grounds of review

- [14] In the founding affidavit, the stated grounds of review are based on reasonableness in two respects:

14.1 the arbitrator was unreasonable in concluding that Ziqubu was provoked given the evidence before her, and

14.2 she failed to consider the evidence of Mavundla which was given in the disciplinary enquiry.

- [15] In the applicant's supplementary affidavit, the evidence which the applicant claims the arbitrator simply failed to consider in arriving at the findings is identified as follows:

15.1 Cele was standing right next to Mavundla when the incident occurred and disputed Ziqubu's evidence that Mavundla called him "a phuzu face".

15.2 The video evidence bears out the testimony of the investigator, Mr S Arrand, to the effect that the physical contact was initiated by Ziqubu and Mavundla had applied minimum force to prevent Ziqubu from entering the plant.

15.3 Contrary to Ziqubu's version, the video shows him pushing Mavundla in an effort to enter the plant.

15.4 The video footage also confirms the evidence of Cele that Ziqubu was manhandling Mavundla by the neck in his efforts to enter the plant when Cele intervened.

- [16] The applicants also claimed that the arbitrator in ignoring the allegedly violent and angry manner in which Ziqubu responded, played down the seriousness of the assault.

[17] The respondents contend in reply that:

17.1 The CCTV footage was of no use given its poor quality.

17.2 Mkhize and Cele were not present when Mavundla addressed Ziqubu and therefore could not gainsay Ziqubu's version.

17.3 It was highly improbable that Ziqubu would have become extremely angry for no reason given that he was sober and had previously taken the test.

17.4 Cele's evidence could not be relied on in view of material differences between his evidence at the arbitration and in the disciplinary enquiry, added to which the version he gave of being pushed by Ziqubu, and of separating Mavundla and Ziqubu, was not previously mentioned at the disciplinary enquiry.

17.5 The arbitrator was right to dismiss the applicant's version on whether or not Ziqubu was provoked because it was incomprehensible why someone who had behaved as aggressively as the applicant's witnesses had described, would have then simply submitted to the test and being allowed to enter the plant.

Evaluation

[18] In essence, the Court is required to determine if the arbitrator's findings are plausible ones given the evidence before her. Her findings cannot be held to be unreasonable simply because another interpretation of the evidence might yield a more probable outcome. However, the arbitrator's findings also cannot be inconsistent with undisputed facts, because such inferences could not be reasonable.

The arbitrator's failure to consider Mavundla's evidence in the disciplinary enquiry

[19] The first point which needs to be made concerns the criticism that the arbitrator did not consider the evidence of Mavundla which was provided at the disciplinary hearing. I was unable to find anywhere in the record of the arbitration where the applicant's representative sought to introduce

that evidence into the record, albeit that there would have been a question about being hearsay evidence. The only occasion when the applicant's representative referred to what transpired in the enquiry was when she was questioning the Assistant HR manager, Mr M Sosibo, about what he heard in the hearing "as to the circumstances as to how Mr Ziqubu tried to gain entry into the premises". The Commissioner at that juncture rightly said that Sosibo's evidence was not relevant because he was not there and it would constitute hearsay. She advised the company representative to lead the evidence of the security guards on that issue. Elsewhere during the enquiry, the only other time the record of the disciplinary procedure was referred to was when Cele was cross-examined and was tested on contradictions between the version he gave at the arbitration hearing and what he had said in the enquiry.

[20] It is also clear that it was the employer's intention to rely on the evidence of the other two security guards who were working on the same day in the absence of Mavundla. This much was stated at the start of the arbitration proceedings by the applicant's representative. It might have been a different matter if the company had attempted to have the handwritten notes of Mavundla's evidence in the disciplinary hearing admitted into evidence and the arbitrator had refused to do so. Then the issue of whether the evidence was unreasonably excluded as hearsay would have arisen. But that is not the case here. The applicant has not raised a ground of review based on the arbitrator's alleged failure to admit the evidence of Mavundla's enquiry testimony, but rather contends that she ought to have had regard to it even though it was not pertinently raised as evidence the applicant wished to rely on in making out its case.

[21] I do not think the arbitrator can be faulted for not considering the notes of Mavundla's testimony at the disciplinary hearing when the applicant made no effort to introduce that as evidence at the arbitration and announced its intention to rely on the evidence of Cele and Mkhize

The arbitrator's conclusion that Ziqubu was provoked

[22] Regarding the second criticism that the arbitrator could not have concluded that Ziqubu was provoked on the evidence before her, the only

eyewitness to what was said was Cele, as Mkhize conceded that she had not heard Ziqubu being asked to take the test and it was only after she left the office that she witnessed him pointing his finger and saying that he would not take the test because he did not drink alcohol. Consequently, the only eyewitness who gave evidence for the company about what was said was Cele. He denied ever hearing Mavundla call Ziqubu a “phuza face”, but did recall Ziqubu saying that he was not a drinker and would not blow on the tester. Against that version was the evidence of Ziqubu and his witness.

- [23] Ziqubu's version that he had been tested on the previous day when he had willingly agreed to undergo testing was not disputed. The following day he became angered when the same request was made. It is true that the arbitrator was of the view that neither Cele nor Mkhize could have heard the initial exchange between Mavundla and Ziqubu. In doing so, she appeared to have ignored Cele's testimony in this regard. Even so, the question is whether the conclusion on this issue was one no reasonable arbitrator could have reached on the evidence.
- [24] What Cele's version does not explain, is why a person who previously had not objected to being tested should have reacted so strongly when he was asked to take the test on this occasion, in circumstances where he was clearly not attempting to conceal any substance abuse. It was not implausible of the arbitrator to infer that something was said to him which sparked the incident. It is true that Ziqubu did not challenge the investigator's evidence that Ziqubu had apologised in a general way for the incident and did not mention Mavundla's insult to the investigator, when he was asked about it. On the other hand, as the cross-examination of Cele at the arbitration illustrated, the alleged act of provocation was in fact raised at the disciplinary hearing and was not raised for the first time at the arbitration.
- [25] Consequently, I do not think that can be said that the arbitrator's conclusion that Ziqubu was provoked because he was called ‘a phuza face’ by Mavundla is one no reasonable arbitrator could have arrived at. It is not an implausible conclusion for her to have drawn.

[26] In so far as the video evidence is concerned, it consists of a short clip of about three minutes footage. The incident took place at a turnstile entrance to the applicant's premises, where there is a double turnstile alongside a security office. At the start of the incident, Ziqubu is facing Mavundla on the street side of the turnstile on the left (when facing the street) and they appear to be in conversation with each other and Mavundla appears to have a small object in his right hand. Mavundla has his back to the camera and only Ziqubu's face can be partially seen. Then Ziqubu raises his right hand with his finger pointing a couple of times in quick succession in a scolding mannerism in front of Mavundla's face. He then moved in front of Mavundla as if heading for the right hand turnstile. The only portion of the video evidence bearing directly on a provocative act by Mavundla by that stage of the incident is the admonishing gestures of Ziqubu just described. While of limited value, it is clearly consistent with a claim that Mavundla might have said something to Ziqubu which provoked such a response.

The seriousness of Ziqubu's reaction

[27] It is true that Cele said he did not hear Mavundla call Ziqubu a "phuza face", but the arbitrator did not find Cele's evidence credible because she believed that he and Mkhize were not in a position to hear what was said. Further, she was of the view that they exaggerated their testimony at the arbitration and if Ziqubu had pushed all the guards and grabbed Mavundla, he would have been charged with actual assault rather than threatened assault.

[28] The applicant contends the arbitrator simply paid no attention to Cele's evidence that Ziqubu was manhandling Mavundla's neck 'badly' and that he had pushed Cele and said he wanted to assault Mavundla saying he would 'kick him'. The applicant also claims the arbitrator overlooked that Ziqubu initiated the physical contact. In not considering this evidence, the arbitrator did not consider the seriousness of Ziqubu's actions.

[29] Having seen the video footage it would appear that physical contact was in fact initiated by Ziqubu when he tried to push Mavundla out of the way and go through the turnstile behind him. It appears that Mavundla successfully

blocked this effort by stopping the turnstile from moving as is evident from another employee who was trapped in it while he was in the process of entering. What is also clear from the footage is that Mavundla then grabbed Ziqubu round the neck with one arm and pulled him away from the turnstile, following which Ziqubu appeared to have briefly restrained Mavundla to some extent. Thereafter Cele quickly interceded between them. From the time Ziqubu tried to get past Mavundla to go through the turnstile, to the time Cele interceded this scuffle took just over 20 seconds.

- [30] Ziqubu then attempted once more to go through the turnstile this time by going around the back of Cele and pushing him slightly to one side with his hand on his back. Cele thwarted this attempt by clutching the turnstile so it could not be turned. Cele can then be seen talking demonstratively with Ziqubu, while his left hand remains mainly on the turnstile and his right hand moves up and down as if for emphasis while he animatedly addresses. Ziqubu participates in the exchange and at some stage moves towards Cele and pushes him slightly to the right. About ten seconds later he appears to give him a mild shove on his torso and when Mkhize, who had now gone through the turnstile to the street side approached him, he appears to touch her once on her abdomen with his open hand and she rapidly withdrew from his proximity.
- [31] Despite Ziqubu's ongoing remonstrations the security personnel, within about one and a half minutes from the start of the incident he can be seen blowing into the tester and not long after that entering the plant.
- [32] What the video footage unmistakably reveals is that Ziqubu did initiate physical contact by trying to push past Mavundla, but it is far from obvious that he manhandled Mavundla on his neck. On the contrary, what appears from the video footage is Mavundla grabbing Ziqubu round the neck in a wrestling type hold to stop him getting into the turnstile and entering the plant.
- [33] What the footage also shows is that at the time Ziqubu first speaks with Mavundla and is wagging his finger at him, Cele is animatedly addressing another employee who is passing through the right hand turnstile so it is possible that even though Cele might have been close enough to them to

hear if Mavundla insulted Ziqubu initially, he might well have been distracted at that time. Mkhize is on the other side of the turnstile and Mavundla has his back to her, so the video footage is not by any means unambiguous evidence that Mkhize and Cele would necessarily have heard if Cele had said something offensive to Ziqubu, who was very close to him when they were speaking together.

- [34] Although the definition of the video is far from perfect, it cannot be said to have been of no evidentiary value and the commissioner, having taken a view on its quality decided to ignore it altogether, instead of considering whether it warranted closer attention. She adopted an undifferentiated view on the quality of the video clip, which was unreasonable on any viewing of that footage. For the most part it is not too difficult to discern what the various persons were doing, except where they are obscured by the middle of the turnstile structure.
- [35] Had the arbitrator distinguished those portions where it is difficult to make out what Mavundla and Cele were doing because they were almost entirely obscured by the turnstile structure linking the two turnstiles, she would have realised that Cele's and Mkhize's evidence of being pushed, even if they had not mentioned it at the disciplinary enquiry, was consistent with the video footage. As such, it was unreasonable for her simply to have dismissed their testimony based solely on comparing what they said in the disciplinary enquiry and what they said in the arbitration hearing, without considering the video footage. On the question of whether Ziqubu manhandled Mavundla by the neck, that is very difficult to discern from the video footage and I cannot say she was unreasonable in finding that Cele's evidence in that respect was exaggerated on what was before her even if she ignored some of it.
- [36] What emerges from this is that the only sense in which the arbitrator's evaluation can be said to be unreasonable lies in the fact that she completely discounted evidence that Ziqubu pushed, or shoved, the security guards at various points during the incident. When that is considered, her conclusion this did not take place cannot be sustained as a feasible interpretation of all the evidence before her.

- [37] In the end, what cannot stand is the arbitrator's conclusion that there was no misconduct on Ziqubu's part, which must be set aside as unreasonable and replaced with a finding that he did exert varying degrees of physical force on the guards at different times by pushing them with his hand during the brief incident when he attempted to enter the plant and when arguing with them. What the video evidence cannot assist in clarifying is whether Ziqubu did threaten to assault Mavundla, though it is not inconsistent with that given the animated way Ziqubu is seen remonstrating with Cele and Mavundla. While the evidence shows it is not improbable Ziqubu did threaten Mavundla, it equally cannot be said that it would be unreasonable to conclude that he did not threaten to assault him as such.
- [38] Even though Ziqubu's agitation is evident from the footage and even though he admitted being angry, in the scuffle which took place there was no evidence on the video footage of any attempt by him to kick Mavundla as Cele claimed he wanted to, nor does he ever appear to try and strike Mavundla in any way. The most strenuous exertion of Ziqubu appears to be when he tries to resist Mavundla grabbing him around the neck to pull him away from the turnstile: even then there is no indication of Ziqubu trying to strike out at Mavundla to force him to release him. Apart from this, there are the instances where he gave Mavundla and Cele small shoves and where he, not very forcefully, restrained Mkhize from coming closer to him when she approached him.
- [39] The arbitrator was of the view that even if Ziqubu had been guilty of misconduct in the sense of pointing his finger at Mavundla that was not the kind of conduct which warranted his dismissal. She awarded relief in the form of reinstatement without imposing any alternative sanction. Given that this finding is set aside, it is necessary to consider an appropriate sanction afresh.
- [40] On reconsideration of the finding, it must be concluded that Ziqubu was guilty of forcefully resisting being prevented from entering the plant without submitting to the test and in that sense interfered with the duties of the

security personnel, even though he did in fact comply with their instruction to take the test within a matter of minutes.

[41] Secondly, he did exert physical force on the guards by briefly pushing them on few occasions with his hand, which was a threatening act even though not one of a very serious or injurious nature. Exercising physical force against another employee is a form of assault, even if its severity may vary. By its nature it is a serious offence. In the applicant's code this is regarded as misconduct which can warrant dismissal for a first transgression. Abusive language also is regarded in a serious light and normally would justify a final written warning on the first occasion according to the code.

[42] The central question to be considered is if the circumstances of the misconduct were such that the recommended sanction of dismissal was warranted? The pertinent factors to consider in this regard are:

42.1 the insulting provocation by Mavundla which understandably angered Ziqubu, though it did not justify all his conduct after that;

42.2 the fact that the physical force he displayed was in part a result of him trying pass through the turnstile and was not aggressive action directed towards the security personnel, albeit that these efforts interfered with their intention to test him;

42.3 the other acts of physical force consisted of him briefly pushing the security personnel a few times while they remonstrated with each other, and in the case of Mkhize, it was little more than a prod;

42.4 at no stage does it appear that he attempted to cause even slight injury to any of them;

42.5 Ziqubu's general expression of regret for what had happened;

42.6 his 15 years of clean disciplinary history;

42.7 the absence of any evidence suggesting a propensity on his part to act belligerently as a norm;

42.8 the fact that he did eventually submit to the test and entered the plant where he continued to work for a month, which would have required him to pass through the turnstiles daily, and;

42.9 the seriousness with which the employer regards both violence and the kind of insulting remark which sparked the incident.

[43] I am not satisfied in weighing up all these factors that Ziqubu's conduct demonstrates that dismissal was the appropriate sanction in this instance, though it did warrant a serious one. A more appropriate sanction would have been a final written warning for both acts of misconduct, and limited retrospective reinstatement. Thus, although the arbitrator's finding that Ziqubu's dismissal was unfair still stands, her finding on misconduct and the consequential relief must be changed.

Costs

[44] As both parties were partly successful, no order is made as to costs.

Order

[45] In light of the above:

45.1 The arbitrator's finding in her award dated 19/05/2011 under case number KNDB 11475-10 that fourth respondent was not guilty of misconduct is reviewed and set aside as well as the consequential relief awarded in paragraphs [9.2] to [9.3] inclusive of the award.

45.2 The second respondent's finding that the fourth respondent was not guilty of misconduct is substituted with a finding that the fourth respondent was guilty of:

45.2.1 acting in a violent manner on 17 February 2010 by pushing or prodding plant protection staff attempting to subject him to a substance test and by forcefully resisting their attempts to prevent him from entering the premises without taking the test, and

45.2.2 interfering with plant protection staff in execution of their duties on 17 February 2010.

45.3 The fourth respondent is issued with a final written warning valid for six months for each of the above acts of misconduct with effect from the date of his return to work.

45.4 The fourth respondent is reinstated with retrospective effect to 1 January 2013, and his arrear salary for the period between the date of reinstatement and his return to work shall be calculated at R 1903.60 per week which shall be payable within 14 days of his return to work.

45.5 The fourth respondent must report for duty on or before 23 July 2014.

[46] No order is made as to costs.



R LAGRANGE, J
Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT: R J Erasmus of MacGregor Erasmus Attorneys

THIRD AND FOURTH RESPONDENTS: S Montshioa of National Union of
Metalworkers