REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Not Reportable

Case no: D759/2012

In the matter between:

ALVIN CHINNIAH NAIDU **Applicant**

and

MLUNGISI SABELA N.O. **First Respondent**

SOUTH AFRICAN LOCAL GOVERNMENT

BARGAINING COUNCIL **Second Respondent**

ETHEKWINI MUNICIPALITY – METRO POLICE **Third Respondent**

Heard: 10 January 2014

Delivered: 26 August 2014

Summary: Review – complaint commissioner failed to accord "sufficient" weight to corrobotratory evidence, insufficient to sustain review unless resulted in outcome of the award unreasonable. Complaint of procedural unfairness - disciplinary hearing - Refusal of further adjournment in light of history of matter and stage of disciplinary hearing did not, in the circumstances of the matter,

result in breach of employee's right to challenge evidence and to be heard.

JUDGMENT

NEL, AJ

[1] The Applicant was employed as a police inspector within the Metropolitan Police Services Department of the Third Respondent. At the time of his dismissal, 30 November 2011, the Applicant had been in the employ of the Third Respondent for fifteen (15) years.

[2] The Applicant was dismissed by the Third Respondent after having been found guilty of three charges of misconduct set out by the First Respondent ("arbitrator") in paragraph 8 of the arbitration award.[1]

[3] All three charges related to events which took place on 6 June 2011, between the hours of 21h00 and 23h00, whilst the Applicant was on duty and at the time was utilising a Durban Metropolitan Police Services vehicle bearing registration letters and numbers NDM 7495.

[4] Briefly, it was alleged by the Third Respondent that the Applicant had, whilst on official duty on 6 June 2011, together with other members of the public, stolen a hydraulic pump from an earth moving vehicle which was parked off at a construction site in the vicinity of Old North Coast Road.

[5] During the course of his misconduct, it was alleged that he had given a false and misleading report of the incident (which was alleged to have taken place on Glen Anil Road and Old R102) and had transported members of the public to the construction site in the vicinity of Old North Coast Road, in his official vehicle,

[1] Pages 80 to 82 of the indexed record of the arbitration proceeding.
Pages 73 to 78 of the indexed arbitration record.
Pages 45 and 45 of the indexed pleadings.

contrary to the Third Respondent's employment conditions and collective agreements or related regulations, orders, policies or practices.

[6] It is alleged, in relation to charge three, that he also utilised the departmental vehicle to transport the stolen hydraulic pump from the construction site.

[7] The arbitrator dismissed the Applicant's referral. The core of the arbitrator's findings appear from paragraphs 74 to 84 of the arbitration award.[2]

[8] The Applicant challenged both the procedural and substantive fairness of his dismissal. The procedural challenge was levelled at the disciplinary Chair's refusal to grant a further postponement to the Applicant of the disciplinary proceedings. It appeared from the record of the evidence as well as the arbitration award that there had been a number of postponements of the disciplinary hearing, which had been convened for the first time on Thursday, 30 June 2011.[3]

[9] It appears that the Third Respondent had led its witnesses at the disciplinary enquiry, all of whom were cross-examined by the Applicant's representative at the enquiry. The Applicant then gave evidence in chief and the matter was reconvened on 3 October 2011. Before cross examination of the Applicant could commence, it appears he had a seizure, necessitating paramedics being called to the disciplinary hearing. The matter was adjourned until 7 October 2011, being the date the parties had agreed to reconvene the hearing prior to the Applicant having his seizure.

[10] On 7 October 2011, the Applicant's representative appeared at the disciplinary enquiry and submitted that the Applicant was attending a doctor's appointment and could not be present at the disciplinary hearing. After many objections from the Third Respondent's representative, the matter was adjourned until 17 October 2011, being the second reserved date, on which the parties had agreed

[2] Pages 67 to 70 of the indexed pleadings.
[3] Page 73 of the indexed pleadings.

on 3 October 2011. The Applicant's representative was requested to have other defence witnesses available to continue with the hearing on 17 October 2011.

[11] On 17 October 2011, the Applicant was not present and his representative submitted that he could not secure the attendance of any other witnesses for the defence. The matter stood down in order to give the Applicant's representatives an opportunity to secure further witnesses and during which period the Human Resources employee of the Third Respondent attended at the Applicant's house in the presence of his representative. The Applicant's wife informed the Third Respondent's employee that the Applicant was sleeping and could not be seen. The matter was adjourned to 20 October 2011.

[12] On 20 October 2011, neither the Applicant nor his witnesses made an appearance and it appears from the record that the parties then agreed that the matter be finalised as a matter of urgency. It was agreed between the parties representatives, on that day, that the Applicant required a further 14 days in order for his representatives to consult with the Applicant and to secure further witnesses and that the matter would be reconvened for a period of three days thereafter in order to finalise the matter.

[13] On 7 November 2011, being the first of the three days for hearing after the agreed adjournment, the Applicant again did not present himself at the disciplinary hearing and he did not have any witnesses present. It is recorded in the findings by the disciplinary Chair that the Applicant's representative withdrew his representation of the Applicant. He was excused.

[14] On 7 November 2011, the Initiator, on behalf of the Third Respondent, served a further notice of set down for a continuation of the disciplinary hearing on 16 November 2011. On 16 November 2011, the Applicant's representative appeared, the Applicant was not in attendance. The Applicant's representative submitted that he was not sufficiently familiar with the facts in order to proceed. A letter was presented by the Applicant's representative (page 267 of the indexed pleadings) wherein the Third Respondent's Employee Wellness Manager,

Serena Frank, recommended that the Applicant's internal disciplinary hearing be adjourned until March 2012 which would be the date of his criminal court appearance.

[15] The disciplinary Chair was of the view this constituted an "unconvincing medical certificate"[4] and declined to grant a further adjournment. In the disciplinary Chair's findings, the Chair assessed the Applicant's guilt with reference to the evidence of the Third Respondent's witnesses and that of the Applicant (*albeit* that the Applicant's evidence remained unchallenged in cross-examination). Principally, the disciplinary Chair determined that the version of the Applicant in chief had not been put to the Third Respondent's witnesses at the disciplinary hearing.

[16] The Third Respondent's disciplinary Chair concluded that the Applicant had no legitimate reason to be in possession of the hydraulic pump or to transfer it to the marked police vehicle NDM 7495~~,~~ and that his account of events as given on the police radio on the night in question was false and inconsistent and that the Applicant did transport civilian persons with the official vehicle to the site at Old North Road without authority and with ill intentions.

[17] The Applicant was dismissed.

[18] The arbitrator found that the internal hearing had been postponed four times because the Applicant had been reportedly sick, however, not once did the doctor give evidence regarding the Applicant's medical condition for those postponements to be granted. The arbitrator found that there were no affidavits or oral evidence by a medical practitioner supporting such medical certificate as would be a requirement according to Court and in this regard cited the cases of *Mgobhozi v Naidoo and Others*[5] and *Old Mutual Life Assurance Company SA Limited v Gumbi*.[6]

[4] Page 76 of the indexed pleadings.
[5] (2006) 27 *ILJ* 786 (LAC).
[6] (2007) 28 ILJ 1499 (SCA).

[19] The arbitrator found that those medical certificates remained hearsay and the Chairperson was not wrong to refuse any postponement based on them.

[20] It was contended in argument, on the Applicant's behalf, that the arbitrator committed a reviewable irregularity justifying the review and correction of the award by the substitution thereof with a finding that, at the very least, the Applicant's dismissal was procedurally unfair and that an award of compensation be made. The submission was that the arbitrator had committed, essentially an error of law, in requiring the Applicant, at an internal disciplinary hearing, to produce evidence in support of an application for postponement based on medical incapacity in the same manner as would be required of a litigant in court proceedings. It was contended on behalf of the Applicant that a medical certificate should have sufficed and no expert testimony required to have been led at an internal disciplinary enquiry.

[21] The Third Respondent's representative contended that had the arbitrator erred in requiring the Applicant to have produced the expert evidence at the internal hearing, *albeit* in the form of an affidavit evidence, that such an error was not such as to render his determination on the procedural fairness of the dismissal reviewable, particularly given that the Applicant had suffered no prejudice as a consequence thereof in that the Applicant had already given his evidence in chief and that, to the contrary, the refusal of the postponement had resulted in his version remaining unchallenged and which version was ultimately weighed against that presented on behalf of the Third Respondent at the disciplinary but which, unlike the version of the Applicant, had been subjected to cross-examination.

[22] *Albeit* that the case of *Mgobhozi* relied upon by the arbitrator concerned the nature of the evidence required before Labour Court, the case of *Old Mutual Life Assurance Company v Gumbi (supra)* specifically dealt with the weight to be attached to a medical certificate at an internal disciplinary enquiry.[7]

[7] At paragraphs 17 to 20 of the judgment.

[23] In the letter addressed by the social worker (Serena Frank), employed by the Third Respondent, on 10 November 2011 to the Chairperson of the disciplinary enquiry, she purported to align herself with the views expressed in the Applicant's psychiatrist report dated 14 September 2011. She averred that on the basis of that report, his internal hearing should be suspended until his court date in March 2012 whereupon it was suspected (at least impliedly so) that he would be in a position to deal with his disciplinary competently.

[24] The medical report of Dr. Valgie[8] expressly stated the report was not to be "for court purposes" and recommended sick leave for the Applicant from 15 September 2011 to 15 October 2011 and treatment emanating from a diagnosis of severe depressive episode which apparently rendered the Applicant unfit to work due to poor concentration and disturbed memory. There appears to have been further certificates extending the recommended sick leave from 16 October 2011 to 16 November 2011 and on 15 November 2011 from 17 November 2011 to 17 December 2011.

[25] In short, the Chair of the disciplinary enquiry was required to assess the request for a postponement in light, not only of the certificate presented, but the Applicant's conduct in applying for a postponement based thereupon as well as the other events and surrounding circumstances which precluded the final determination of the disciplinary hearing.

[26] The Chairperson of the disciplinary enquiry commented on the fact that the Applicant's representative was not, on repeated occasions, able to proceed due to poor preparation, alternatively the absence of any further witnesses on behalf of the Applicant, notwithstanding the opportunity given to secure such witnesses. Furthermore, the disciplinary Chair determined that it was unlikely even on the basis of the certificate submitted, that any further delay would see the Applicant better or cured in the near future, however, it appeared that the Applicant was able to attend to daily responsibilities such as shopping, going to church and

[8] Page 107 of the indexed record of arbitration proceedings

attending school concerts of his child. The Chair also found that it was unlikely that the witnesses who were co-accused in the criminal matter would ever be secured and accordingly proceeded in the Applicant's absence.

[27] It appeared from the evidence of Marais (the disciplinary Chair) tendered at the arbitration that she did not have before her all the medical reports which subsequently became available at the arbitration in substantiation of the application for postponement and neither had Mr Goba, who appeared and made the final request for a postponement, been aware that the matter had in any event been adjourned over a number of periods and in so doing was ill-prepared to motivate for a further postponement. She requested the Applicant to secure Frank as a witness in order to testify as to content of her letter at page 267 of the indexed record, given particularly that the letter was unsigned and purported to refer to a report of Dr. Valgie, dated 14 September 2011 which she had not been favoured with.

[28] Given those considerations, the disciplinary Chair's approach to the weight to be attached to the medical certificate, being a letter by the Third Respondent's social worker, in support of the hearing, given only on the day of the hearing (an agreed date) and given the history of the matter,– particularly in circumstances where the Applicant had already been given an opportunity to cross examine the Third Respondent's witnesses and to present his case in evidence,– was not unreasonable. The reference to the case of *Mgobhozi* did not serve to undo the procedural fairness of the Applicant's dismissal. Indeed, the Chairperson of the disciplinary enquiry found the medical certificate unconvincing in accordance with the ratio expressed in the *Old Mutual Life Assurance Co. S.A. Limited v Gumbi*.

[29] The arbitrator's decision to uphold the disciplinary Chair's finding on the basis that the evidence remained hearsay and could be rejected on that basis, was still sustainable as being a decision of a reasonable decision maker when reference is had to the totality of evidence actually before the arbitrator justifying the refusal of the postponement. The finding remains sustainable on all the evidence before

the arbitrator, precluding its review. Accordingly, this is typically a case where an error of law or fact is not such as to render the finding of the arbitrator unreasonable given the evidence properly before the arbitrator.

[30] On the conspectus of the evidence actually served before the arbitrator, the Chair's decision to refuse a postponement did not render the dismissal unfair especially in light of the history of the matter, the evidence at the arbitration that the Chair did not have the full ambit of psychiatrist and psychologist reports before her and specifically requested clarification from the Applicant's representatives in circumstances where the Applicant's representatives appeared wholly unprepared and unfamiliar with the matter and in circumstances where the Applicant appeared to be fit to execute his normal daily tasks but not to be present at the continuation of the disciplinary hearing.[9]

[31] I turn now to deal with the finding of the First Respondent insofar as the substantive fairness of the dismissal is concerned. At the hearing of this matter, the submission in relation to the reviewability of the arbitrator's award on substantive fairness was constrained to the arbitrator alleged failure to pay sufficient regard to the aspects of the evidence set out in paragraph 52 of the founding affidavit.

[32] Paragraph 52 of the Founding Affidavit references the evidence of the Applicant and that marshalled by the five other witnesses on his behalf. He complained that the arbitrator failed to take into consideration the evidence of any of the Applicant's witnesses which corroborated that of the Applicant's testimony and that had the arbitrator taken into account such evidence, a reasonable decision maker could not have fairly reached the conclusion that the Applicant's dismissal was substantively fair.

[33] The arbitrator's finding in this regard appears at paragraphs 75 to 81 of the arbitration award, pages 67 to 69 of the indexed pleadings.

[9] Paragraph 25 of the *Herholdt* judgment.

[34] The arbitrator found that essentially, the Applicant's reason for accompanying Vishen Juggannadh and his friends to the scene of the offence, where the hydraulic pump was removed and placed in the rear of the metro vehicle being driven by the Applicant, was initially because of the dangers presented by the traffic at that time of the evening. The Applicant, when he realised that he had in fact accompanied them into the sugar cane field, remained there for almost an hour.

[35] The arbitrator thereafter commented on various aspects of the Applicant's version which he found to be highly improbable, including the absence of a prior report recorded in the control room of the Third Respondent.

[36] At paragraph 80 of the arbitration award, the arbitrator specifically commented on the testimony of Vishen Juggannadh, one of the Applicant's witnesses, whom the Applicant contends in the review that the arbitrator paid absolutely no attention to in the arbitration award. The Applicant, correctly in my view, pointed out that Juggannadh's evidence was that a reasonable person would not ask a policeman to assist them when stealing a pump. They had essentially all but implicated themselves in the wrong doing and accordingly, the arbitrator's conclusion was that the Applicant must have been involved in the theft as no thief requests a policeman to render assistance in circumstances where the theft would be taking place in front of him.

[37] It is apparent from the aforeoing, that contrary to the objections of the Applicant, the arbitrator did have some regard to the Applicant's witnesses' evidence. For him, the inexplicable obstacle to the probabilities of the Applicant's version being correct was that a group of criminals willingly called the Applicant to render assistance in circumstances where, if not at first the Applicant was alive to the criminal conduct, in due course he would become alive thereto and would be, if not himself implicated, a credible witness almost certainly securing their conviction.

[38] It is correct that the arbitrator did not embark upon a lengthy exegesis of all the

Applicant's witnesses' testimonies and essentially accepted the evidence of the Third Respondent's witnesses whom he found, at paragraph 81 of the judgment, to be impressive and who remained consistent in their versions notwithstanding lengthy cross-examination.

[39] For the Applicant to succeed in a review, he must demonstrate to the Court that had a reasonable decision maker had regard to the evidence which he apparently discounted, this would have caused a reasonable decision maker to come to a different conclusion.[10]

[40] The grounds for review were limited in the course of argument to the proposition that the arbitrator failed to pay "sufficient" regard to that evidence but no further explanation was tendered as to what a reasonable decision maker should have found, what "sufficient" meant and in what respects this would have necessitated the Applicant's version being preferred to that of the Third Respondent's.

[41] What appeared to me to be glaring on the evidence marshalled before the First Respondent at the arbitration, and which accounted for the lacuna referred to in the paragraph 40 above was, *inter alia*, the record of the Applicant's transmission to the control room (annexure "LF1" to the Answering Affidavit). Even if this was not the first transmission, what was evident from this undisputed document, was that the Applicant's account therein of the events of that evening differed materially from what was ultimately tendered by him in evidence. The Applicant requested the control room to log in at Glen Anil. It was reported by him that six bravo males (it was common cause a reference to "black males") had been seen by him on the side of the road carrying a large metal object which was to him unidentifiable and he had chased them into the bush but that they managed to corner two of them and load the object into his van. Once loaded into his van, they ran into the cane fields.

[42] The Applicant represented in that report that he had been travelling–/–en route somewhere when he first noticed them on the side of the road and chased them

[10] Paragraph 25 of the *Herholdt* judgment

into the bush. Even if not en route somewhere the representation was that he had happened upon the crime and chased the perpetrators (misstated in description) *into* the bush. It transpired that in reality the Applicant was already seated and had been for a substantial time, deep in the cane fields observing the extraction of the pump from the earth moving equipment.

[43] At the arbitration, the Applicant testified that he had stopped alongside the R102 in the Woodview area in order to chat to a friend of his, Ray Perumal, whereupon Perumal was approached by an Asian male who asked Perumal and the Applicant to render assistance with a breakdown near Duffs Road, given that the area was dangerous. He accompanied them to a business premises where a number of further passengers jumped into the Asian male's vehicle whereafter they proceeded down the R102 towards the Duffs Road area. Once on the Old North Coast Road, they left the public road and entered along a gravel road well into a sugar cane field until they reached an excavator.

[44] The Applicant was told by the individual, whom he had only met that evening, they were removing a pump in order to replace it. He waited, rendering no obvious assistance for approximately half an hour, until he became restless, exited the police vehicle, had a cigarette and went back into his police vehicle. The second vehicle allegedly being driven by the members of public whom he had accompanied in the sugar cane field had left and the excavator's pump was brought to his vehicle whereupon he was informed that the pump was in fact not broken and in need of repair but that it had in fact been bought by Vishen Juggannadh. It was only at this point in time that he allegedly suspected something was amiss and after a little bit of interrogation became sure that these individuals were stealing from the excavator.[11]

[45] He claims that he thereafter informed the control room that the people that he was assisting with the breakdown were suspected thieves and that they were stealing a machine and gave the control room his location and requested

[11] Record Volume 2 at pages 155 to 157.

assistance. This version is entirely at odds with what appears as "LF1" to the answering affidavit, even if it is to be accepted that there was a prior transmission. No explanation appears to have been rendered why the version presented to the control room in "LF1" does not accord with the Applicant's evidence serving before the arbitrator. The best the Applicant could proffer was that he was confused at the arbitration and used the wrong words.[12]

[46] The clear impression from "LF1" is that the Applicant was reporting the occurrence for the first occasion but in any event represented that he had essentially come across the six individuals along the side of the road carrying the heavy metal object and had chased them into the bush. It was not that he had rendered assistance and that the individuals now turned out to be committing an offence. The Applicant's entire version that he initially accompanied the unknown and unnamed individuals not to an area which was apparently dangerous from a traffic or crime point of view, but deep into private property and sat watching whilst they attended to, on his version, no more than a routine private matter, contrary to metro police's normal duties, is highly improbable.

[47] Accordingly, there is no merit in the submission that a reasonable decision maker presented with the material serving before the First Respondent could not have reasonably reached the conclusion that the Applicant's dismissal was substantively fair.

[48] Condonation was also sought for the late filing of the review. Apparently, the review was instituted three weeks late. The degree of lateness and prejudice to be suffered should the application simply be dismissed for the late filing of the review, was such as to warrant condonation being granted, notwithstanding the fact that the prospects of success ultimately did not justify the review. The determination of the prospects, however, was only apparent after a full consideration of the review, including the evidence serving before the arbitrator. Accordingly, insofar as is necessary, condonation is granted for the late filing of

[12] Record volume 2 at page 208 lines 1-17.

the review, however, the application for review on the merits is dismissed with costs.

Order:

1. The application for review is dismissed with costs.

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Nel, AJ

Acting Judge of the Labour Court

Appearances:

For the Applicant: Adv D Crampton

Instructed by: Brett Purdon Attorneys

For the Third Respondent: Adv D J Saks

Instructed by: Hughes Madondo Inc