THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no: 827/10

FAWU O B O MBATHA & 11 OTHERS	Appellants
and	
PIONEER FOODS (PTY) LTD t/a SASKO MILLING & BAKING	First Respondent
COMMISSION FOR CONCILIATION MEDIATION & ARBITRATION	Second Respondent
COMMISSIONER LINDA MATYILA	Third Respondent

Neutral citation: *FAWU v Pioneer Foods (Pty) Ltd t/a Sasko Milling & others* (827/10) [2011] ZASCA 210 (29 November 2011)

CORAM: Navsa, Heher, Van Heerden, Wallis JJA and Petse AJA

HEARD: 17 November 2011

DELIVERED: 29 November 2011

SUMMARY: Application for leave to appeal a decision of the Labour Court – test in *National Union of Metalworkers of SA v Fry's Metals (Pty) Ltd* 2005 (5) SA 433 (SCA) to be rigorously applied – even where there has only been a refusal by the LAC of an application for leave to appeal – alleged misapplication of the test in *Sidumo v Rustenburg Platinum Mines Ltd* 2008 (2) SA 24 (CC) not sufficient in itself to justify an appeal to the SCA – consequences of contrary approach discussed.

ORDER

On appeal from: Labour Court (Durban) (Gush AJ sitting as court of first instance):

The application for leave to appeal is dismissed with costs.

JUDGMENT

NAVSA JA (HEHER, VAN HEERDEN, WALLIS JJA and PETSE AJA concurring)

[1] This application for leave to appeal was referred by this court for oral argument in terms of s 21(3)*(c)*(ii) of the Supreme Court Act 50 of 1959. The parties were informed to be prepared, if called upon to do so, to address the court on the merits. On the 17 November 2011 we heard oral argument in respect of the application for leave to appeal. On the same day we made an order dismissing the application for leave to appeal with costs and indicated that reasons for doing so would be provided before the end of the court term. The background to the application and the reasons for its dismissal are set out hereafter.

[2] The application for leave to appeal was directed against a judgment of the Labour Court (Gush AJ), in terms of which he set aside that part of an award of the third respondent, a Commissioner at the Commission for Conciliation, Mediation and Arbitration, in which she held that the dismissal of the second to twelfth applicants by the first respondent, Pioneer Foods (Pty) Limited (Pioneer Foods) was substantively unfair and that they were entitled to be reinstated. The Commissioner had already found that the dismissal was

procedurally fair. That part of her award was uncontested. The first applicant is the Food and Allied Workers Union and is the trade union to which the second to twelfth applicants belong and who at all material times represented their cause. I shall, for the sake of convenience, refer to the second to twelfth applicants as the applicants and to the first applicant as the Union.

[3] Aggrieved at the finding that the dismissal was substantively unfair, Pioneer Foods applied to the Labour Court to review and set aside that part of the award in terms of which the applicants were reinstated. In his judgment setting aside the award, Gush AJ recorded that the applicants had been subjected to a disciplinary enquiry by Pioneer Foods and had been charged with failure to comply with the latter's safety regulations (emergency procedures) and insubordination arising from their refusal to obey instructions. The disciplinary enquiry followed on what had happened during and following on a gas leak that had occurred on 25 May 2005 at Pioneer Foods' mill, at which the applicants were employed.

[4] Pioneer Foods' emergency evacuation 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 roll 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 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.'

[5] On the day of the gas leak the alarm was sounded and an announcement was made. The gas leak was very serious and dangerous. That too is uncontested. It appears from the record that a passer-by, suffering from asthma, had died as a result of the gas leak. It was not in dispute that all personnel had been trained in the emergency procedures. Subsequent to the alarm being sounded and the announcement being made, one of the applicants, Mr Mkhize, did not follow the very first step of leaving the affected area and proceeding to an assembly point. After a roll call it was determined that Mr Mkhize was not at the assembly point. The other applicants and fellow employees were at the assembly point. A safety team equipped with gas masks had in terms of the emergency procedures already been dispatched to determine whether any employees were left in the affected area. The team came across Mr Mkhize and two other employees who were in the change rooms and they were instructed to join the others at the assembly point.

[6] In the interim other employees, including the other applicants, had been instructed to remain at the assembly point until the all clear was sounded. Despite this very specific instruction the remaining applicants left the assembly point before the all clear signal and re-entered the affected area to clock-out. Thereafter they departed the premises to go home.

[7] After ascertaining that Mr Mkhize had not reported at the assembly point as instructed, a second safety team was dispatched to look for him. They found him still at the ablution facility, approximately twenty minutes after he had been instructed by the first safety team to go to the assembly point. The second team instructed Mr Mkhize, under pain of disciplinary action, immediately to comply with the instruction to follow the emergency procedure. It is common cause that Mr Mkhize did not comply with the instruction and went directly home.

[8] Unsurprisingly, management preferred charges against all errant employees, including the applicants. Disciplinary enquiries were conducted during June and July 2005. Mr Mkhize was charged as follows:

‘Charge 1 — Non-compliance with safety regulations and any other legal or internal

regulations in connection with safety of employees and committing any unsafe act endangering lives or company property;
Charge 2 ─ Refusal to carry out any reasonable work order issued officially by an authorized person; Alternatively, Gross insubordination by failing to obey a lawful and reasonable command of your employer issued by both Neil Wiggle and Walter Mayberry.'

The other applicants were charged as follows:

'Charge 1 ─ Gross misconduct in contravening company's emergency evacuation procedure
Charge 2 ─ Gross insubordination by disobeying a lawful and reasonable instruction by entering the mill at a time when it was unsafe to do so. Alternatively, failure to obey a lawful and reasonable command of your employer issued by both Neil Wiggle, the mill manager and Walter Mayberry, the production manager.'

[9] The result of the disciplinary enquiry was that it was found that all of the employees concerned had contravened Pioneer Foods' safety regulations and had been guilty of gross insubordination. The penalty imposed on the applicants was dismissal. The Union, on behalf of the applicants, referred the matter to the CCMA.

[10] Some of the applicants were shop-stewards. There was discontent on the part of the Union at what they considered to be a failure on the part of Premier Foods to consult with the Union about shop-stewards being disciplined. In her award, the Commissioner recorded that there had been numerous attempts by Pioneer Foods to involve the Union. She found that the Union itself had done very little to engage Pioneer Foods. Furthermore, the Union had complained that Pioneer Foods had not allowed it to represent the applicants at the disciplinary enquiry. The Commissioner in her award was harshly critical of the Union on this aspect. She labelled the Union arrogant. In her view it adopted the attitude that Pioneer Foods had to wait indefinitely whilst Union officials considered their availability. The Commissioner stated that she was appalled at the Union's behaviour. She recommended that the conduct of a Union official who adopted that attitude on behalf of the Union be investigated.

[11] A total of sixteen employees, including the applicants, had been charged with misconduct. Four employees had chosen to co-operate with the

disciplinary enquiry and had remained in attendance. They had acknowledged their guilt, apologised for their misconduct and had undertaken to obey workplace rules in the future and as a result had received final written warnings. The applicants, on the other hand, left the disciplinary enquiry and took no further part in it. As stated above they were all dismissed.

[12] The Commissioner, having dealt with the procedural points raised by the applicants and having found them to be without any substance, went on to consider the substantive merits of the dismissal. She accepted that Pioneer Foods by way of two safety teams had issued the instructions to Mr Mkhize to go to the assembly point. She found that by not complying Mr Mkhize had been guilty of misconduct and gross insubordination. It is necessary to consider the relevant paragraphs of the Commissioner's award in which she deals with the misconduct and the appropriate sanction:

'Mkhize denied ever being told to go to the assembly point by the 2 sets of managers. I do not accept his version because he was evasive throughout his cross-examination. I cautioned him several times on how he responded to questions, but he continued along the said line. I therefore prefer the version by Mayberry, which was corroborated by Williams that Mkhize was informed. However, both Mayberry and Williams observed that Mkhize did not take the matter seriously, meaning that he did not think the matter was serious. I therefore do not think it was blatant disregard for company rules, but rather ignorance brought about by him not taking the matter seriously. Also, the Zulu demonstrated by Williams at the arbitration was not clear at all, therefore I am giving Mkhize the benefit of the doubt that it is possible that he could not have understood Williams. The versions of both Mayberry and Williams were consistent and remained so even in cross-examination. My conclusion is that Mkhize committed the offence complained of against him.

However, Mkhize's conduct was not sufficiently serous to warrant a penalty of dismissal being imposed on him. I say this for the following reasons: It was his normal knock off time and whilst he was the respondent's responsibility until he left the premises, this was not grossly serious to have attracted the sanction of dismissal. Furthermore, Mkhize obviously did not fully understand the extent of the instruction to go to the assembly point, because Mayberry testified that he laughed and Mayberry had to threaten him with discipline in order for him to take the matter seriously. Also, Mkhize did not knock off work with the other employees who were in the change rooms, hence him behaving as if the instruction did not apply to him. I do accept though that Mayberry, Fagan, Williams and Vorster directly instructed him to go to the assembly point and he ignored said instruction and instead went home. Finally, I am mindful of the fact that the issue of the gas smell was very dangerous and

could have attracted serous criminal and civil penalties against the respondent, I have to emphasise that even though Mkhize knew about the respondent's safety procedures, that incident of the gas smell was not a simulation, but a real life incident and it happened unexpectedly and could have created confusion on the part of Mkhize. I reject the assertion by the applicants that management was confused on this day, because it is abundantly evident from the surveillance and management witnesses that management was in charge of the situation, and my conclusion henceforth is that the applicants could have been confused. I am not saying this because management caused them to be confused, but they could have been confused because all the witnesses testified that it was the first time an incident of this nature ever occurred in the workplace.

I think that the reason for Mkhize being dismissed had to do with his deliberate refusal to attend the disciplinary hearing which he was summoned to attend. Otherwise, if he attended the hearing, on a careful conspectus of the facts, the worst case scenario would have been a final written warning. Based on this, I find that the sanction of dismissal was too harsh under the circumstances. It consequently follows that Mkhize's dismissal was substantively unfair.'

[13] Significantly, on the same theme, the Commissioner, on her way to determining whether the sanction imposed by Pioneer Foods was justifiable, contradictorily, said the following:

'The applicants ended up being dismissed because they were, I conclude from the evidence, obstinate and disrespectful. I however believe that they were misled in behaving in this manner, though I am not saying that they were without guilt. I have already dealt with their culpability. I accordingly believe that the applicants have learned their lesson in being out of work for over a year with no income.'

[14] In para 29 of his judgment, Gush AJ summarised his view of the Commissioner's reasoning as follows:

'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 [She] 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 [She also accepted] 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*".' (Emphasis in original.)

[15] In para 30 Gush AJ, correctly, in my view, said the following:

'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.' (Emphasis in original.)

[16] The following eight paragraphs of the Labour Court's judgment bear repeating:

'Taking the above reasons into account and the Second Respondent's 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 inevitably leads to the conclusions that:

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

Edcon v Pillemer (199/2008) [2009] ZASCA 135 at para 15 and 16.

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 the instruction given to the remaining Respondents not to leave their assembly point was unequivocal and understood.

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.

The Second Respondent then considered specifically the question of consistency in the light of the fact that four of the Applicant's employees who had also disregarded the instruction to remain at the assembly point had been given a final written warning.

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.

The Second Respondent then turns to the appropriateness of the penalty [and] 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".

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.

As with her conclusions regarding Mkhize her conclusion that the remainder of the Respondents' 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.'

[17] Gush AJ dismissed an application by the applicants for leave to appeal his judgment. An application for leave to appeal was subsequently refused by the LAC.

[18] Before us counsel for the applicants conceded that their case is based on the alleged misapplication by Gush AJ of the now firmly established test for review of awards by the CCMA, set by the Constitutional Court in *Sidumo v Rustenburg Platinum Mines Ltd* 2008 (2) SA 24 (CC) para 110:

'Is the decision reached by the commissioner one that a reasonable decision maker could not reach?'

[19] I have difficulty in seeing why this case is deserving of the attention of this court. In *National Union of Metalworkers of SA & others v Fry's Metals (Pty) Ltd* 2005 (5) SA 433 (SCA) para 43 this court stated:

'The procedures for applying for leave to appeal, and the factors relevant to obtaining special leave, are well established. They are set out in the Supreme Court Act 59 of 1959 and in the decisions of this Court, including *Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* 1986 (2) SA 555 (A). The criterion for grant of special leave to appeal is not merely that there is a reasonable prospect that the decision of the LAC will be reversed — but whether the applicants have established "some additional factor or criterion". One is "(w)here the matter, though depending mainly on factual issues, is of very great importance to the parties or of great public importance". No doubt every appeal is of great importance to one or both parties, but this Court must be satisfied, notwithstanding that there has already been an appeal to a specialist tribunal, and that the public interest demands that labour disputes be resolved speedily, that the matter is objectively of such importance to the parties or the public that special leave should be granted. We emphasise that the fact that applicants have already enjoyed a full appeal before the LAC will normally weigh heavily against the grant of leave. And the demands of expedition in the labour field will add further weight to that.'

[20] It is true that in *Fry's Metals* there had been a full hearing before the LAC, which usually weighs heavily against the granting of leave to appeal. Still, in the present matter, the labour court, a specialist tribunal, decided the matter and thereafter refused the application for leave to appeal. Then the LAC, a specialist appeal tribunal, thought there were no prospects of success. In *Republican Press (Pty) Ltd v Chemical Energy Printing Paper and Wood & Allied Workers Union* 2008 (1) SA 404 (SCA), (2007) 28 ILJ 2503 (SCA) para 3, this court held that the same considerations as set out in *Fry's Metals* should apply where there had been a refusal by the LAC of an application for leave to appeal. As recently as August 2010 this court, in *Rawlins v Kemp t/a Centralmed* (2010) 31 ILJ 2325 (SCA), [2011] 1 BLLR 9 (SCA) para 17, referring to *Fry's Metals*, stated the following:

'Now that the appeal is before us I mention that decision only to indicate that the principle upon which it is founded is that this court will not lightly interfere with the decisions of the specialist tribunal that has been established to hear appeals in labour disputes. That is consistent with the observation by the Constitutional Court in *Dudley v City of Cape Town & another* that –

"[t]he LAC is a specialised appellate court that functions in the area of labour law. Both the LAC and the Labour Court were established to administer labour legislation. They are charged with the responsibility for overseeing the ongoing interpretation and application of labour laws and the development of labour jurisprudence." '[1]

[21] I am of the view that the Union has not given careful enough thought to the implications that follow on an acceptance that a misapplication of the test in *Sidumo* should per se constitute the basis of an appeal to this court or to the LAC. Employers with their usually greater resources would then also be free to challenge virtually every decision by a Commissioner all the way up the litigation line, including a more-than-once appeal.[2] Acceding to the request

1 *Dudley v City of Cape Town & another* 2005 (5) SA 429 (CC).

2 Paul Benjamin in 'Friend or Foe? The impact of Judicial Decisions on the operation of the CCMA' (2007) 28 *ILJ* 1, correctly states that the dispute resolution procedure introduced by the LRA sought to incorporate review proceedings of arbitration awards by the labour courts in a manner that would not undermine the purposes of a system of expeditious dispute resolution. He points out that the exclusion of a right to appeal against a decision of an arbitrator was designed to speed up the process and free it from the legalism that accompanies appeals as well as to avoid inordinate delays and high costs that flow from appeal hearings. The learned author refers to s 145 of the LRA and correctly states that it was

by the applicants to entertain appeals before this court on the basis of a misapplication of the *Sidumo* test would invite an appellate challenge to be mounted in every case in which a party was aggrieved at the Labour Court's view of an award, and further down the line, against the view taken by the LAC. The review test in *Sidumo* is one that should not lend itself to frivolous challenges to CCMA awards ─ the opposite was intended. Given how easily a challenge on the basis suggested by the applicants could, at least in theory, be constructed there would be no limit to the ensuing flood of appellate litigation, with consequent delays that are inevitable in extended litigation. As has been stated in numerous cases, the Labour Relations Act 66 of 1995 intended that labour disputes be resolved speedily. Specialist tribunals were created to that end. In the present case the matter has dragged on for approximately six years. Judgment in the Labour Court was delivered in January 2010, approximately 22 months ago. Thus, close to two years have passed, pending appellate procedures.

[22] This case, as many others before it, demonstrates, once again, how difficult it is to keep the dividing line between appeal and review. This is so because, almost inevitably, in reviewing a Commissioner's award the labour court deals with the merits of a case. Yet that dividing line has to be kept. See *Sidumo* paras 109 and 244 and the decision of this court in *Shoprite Checkers (Pty) Ltd v CCMA* 2009 (3) SA 493 para 28. In *Shoprite* para 30, this court stated the following in relation to the review powers of the Labour Court:

'Its warrant for interference with the award of the arbitrator was narrowly confined.'

It was referring to the powers of review that are fairly circumscribed in

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intended to create a narrow ground of review, subject to shorter time periods. He rightly concludes that the institution of a review does effectively constitute a major delay to the resolution of the disputes. At the time of the article the average time taken for the Labour Court to hear a review application was 23 months from the date of the arbitration award. Statistics provided by the author shows how extensively, before the Constitutional Court judgment in *Sidumo*, employers used review applications. Dealing with this Court's judgment in *Sidumo* before its ultimate hearing in the Constitutional Court, the author contemplates whether the flood of review applications would be reduced by this court's decision. He concluded that it is more likely that it would increase the number of reviews. In the event of the submissions by the applicants being upheld the system would, in my view, be flooded, with the likelihood of a greater number of reviews being brought by employers.

s 145(2) of the Labour Relations Act.

[23] When, however, an award fails, or, depending on how one looks at it, meets the *Sidumo* test it should be set aside. The Labour Court in this instance carefully considered the award, its inherently contradictory nature and flawed logic and the evidence before the Commissioner and concluded that the award fell to be set aside. The Labour Court's reasoning appears impeccable. Counsel for the applicants urged us to consider that the length of service of the applicants varied from 12 to 36 years' service and that factor by itself meant that a grave injustice flowed from the sanction of dismissal, which in constitutional terms, obliged this court to entertain the appeal. He also submitted that although the apology to management on behalf of the applicants was somewhat muted, as found by the Commissioner, it nevertheless showed contrition, deserving of the substituted sanction imposed by the Commissioner.

[24] It is important to note that the Union's referral of the matter to the CCMA did not mention the length of service of any of the applicants as a factor on which the applicants' case was based. As to the challenge on the merits of the dismissal, the following is stated on LRA form 7.11 (the referral form):

'The issue that led to the dismissal is not justifiable.'

[25] In the affidavit filed in support of the applicants' application for leave to appeal to this court, the following are said to be the justiciable issues:

'It is accordingly submitted that there are special circumstances which merit the Supreme Court of Appeal considering the present application for leave to appeal. In particular, the Supreme Court of Appeal in this matter will have to consider at least the following:

(a) the application of the test of reasonableness, as conceived by the Constitutional Court, to CCMA awards.

(b) Whether the correct review principles have been applied in the present case.'

[26] In any event, the submissions on behalf of the appellants, referred to in para 23, are in my view unfounded. Indisputably, all employees were trained in the emergency procedures which impact on the safety and thus the lives of the workforce. No-one could have been under any illusions about their importance. The specific instructions on the day in question would have brought that home. On the fateful day someone had died. The gas leak involved the safety, not only of the applicants, but also of safety teams and fellow workers. The Labour Court's conclusion that the Commissioner's reasoning and conclusions were at odds with the evidence before her appears justified.

[27] Insofar as the apology allegedly tendered on behalf of the applicants is concerned it had been half-hearted and conditional:

'It was not the intention to break the rules. We apologise if we made a mistake – the people were totally confused as they had not experienced the gas smell before.'

[28] Furthermore, the applicants chose not to engage with the disciplinary enquiry and they and the Union, so the Commissioner found, were obstructive. Not only was trust breached but Pioneer Foods would find it difficult in the future to impose discipline in a vital area, that of the safety of all workers in their mill and the surrounding area, particularly with employees such as the applicants who have still not displayed an appreciation of the danger of their attitudes to safety in the workplace. Employers are on occasion rightly criticised for failing to ensure the safety of their workers. When they make an effort to secure the health and safety of their employees they should be commended for doing so.

[29] As stated in *Fry's Metals* para 46, the starting point, even before the question of special circumstances is considered, is whether the applicants have a reasonable prospect of success. For all the reasons set out above neither question can be answered in the applicants' favour. These are the reasons for having dismissed the application for leave to appeal.

M S NAVSA
JUDGE OF APPEAL

APPEARANCES:

For Appellant:	D B Ntsebeza SC T N Ngcukaitobi
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