IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO: JR 1993/08
Reportable

In the matter between:

Chanky Ndlovu	**Applicant**
and	
National Bargaining Council for the Chemical Industry	**First Respondent**
Commissioner Shiraz Mahomed Osman	**Second Respondent**
Chevron SA	**Third Respondent**

JUDGMENT

BHOOLA J:

Introduction

[1] The applicant seeks to review and set aside the award of second respondent ("the Commissioner") made under the auspices of the first respondent under case number NCCHEM 4209. In his award the Commissioner upheld the dismissal of the applicant for misconduct. The application is opposed by the third respondent

Background

[2] The applicant was employed by the third respondent as an operator and was also the Regional Chairperson of the Chemical Energy Paper Printing Wood and Allied Workers' Union ("CEPPWAWU") as well as the senior shop steward of CEPPWAWU at the third respondent's Kimberley Terminal.

[3] On 23 May 2007 the applicant directed the words "*You f.....coloured*" and *"I don't want to deal with a coloured person but prefer a black person"* at a security officer, Ms Valerio, who served in the reception area of the third respondent's head office in Cape Town. The applicant uttered these words in response to Ms Valerio's refusal to allow him to enter the head office without certain security procedures having been adhered to.

[4] On 24 May 2007 the applicant received an e-mail from the third respondent regarding the incident. The following day the applicant responded to the allegations and denied that he had uttered the words in question.

[5] An investigation followed and the applicant was charged with gross misconduct on 6 September 2007. A disciplinary enquiry was held on 17 September 2007 where the following charge was preferred against the applicant:

"Gross misconduct for using racial/or derogatory and/or abuse and/or offensive language in that you referred to the security officer as a "fucking colored" and went further to say "I don't want to deal with a colored but prefer a black person", in public at the Chevron Cape Town Head Office reception on 23 May 2007".

[6] On 10 October 2007 the applicant was dismissed for misconduct. He referred his dispute to the first respondent, and following arbitration the finding of guilty and sanction of dismissal was upheld by the Commissioner.

Grounds of review

[7] The applicant relies on numerous grounds of review, not all of which can be said to have been clearly articulated. However it would appear that the application is based mainly on the following grounds:

(a) The Commissioner's failure to find that there was an unreasonable delay in finalising the disciplinary enquiry and that this impacted on the appropriateness of the sanction of dismissal, constitutes "unlawful conduct".

(b) The Commissioner's failure to find that the sanction of dismissal had been inconsistently applied to the applicant given other similar offences.

(c) The Commissioner's failure to have regard to the applicant's length of service of 14 years and his clean disciplinary record.

(d) The Commissioner committed a gross irregularity in *inter alia,* making his award without having regard to the written submissions made by the applicant; and in preferring the evidence of Ms Valerio despite her admission that she had made an inconsistent statement; and in failing to have regard to the fact that the applicant was refused the opportunity to address the chairperson at the conclusion of the disciplinary enquiry.

Unreasonable delay

[8] The applicant submitted that the Commissioner committed misconduct when he stated in his analysis of evidence and argument that the applicant had been aware of the investigation, because this did not emerge from the record. However, it appears that the applicant misconstrues what was said in that the comment was made in the context of a summary of the respondent's submissions and read as follows:

"1. The respondent argued that the dispute was simple in that all that need to be confirmed was that whether the applicant had indeed made the utterances for which he was disciplined. He read the charge into the record and argued that the consistency principle did not apply to the applicant as the issues of both previous incidents could not be compared to that of the applicant. The applicant was charged in terms of Schedule 8 of the Code of Good Practice and that all the procedural rights were accorded. The applicant had indeed been charged months later however this was due to the wage negotiations which the applicant and the respondent were involved in. It was argued that the delay was justifiable so as not to disrupt the wage negotiations. The applicant was nonetheless aware of the investigation".

[9] The applicant contends that the Commissioner's finding that the delay between 25 May to August 2007 was justified, is unreasonable, alternatively constitutes a gross irregularity, alternatively illustrates the failure to apply his mind. Furthermore the Commissioner should have found that as a result of this delay it cannot be said that the relationship of trust had broken down. In this regard the applicant, citing Grogan[1] and *Moqhoishi v CCMA and others*[2] as authority, submitted that it is trite that disciplinary action must commence as soon as possible from the date of the alleged offence. In *casu* however, the Commissioner accepted that the applicant had the right to be charged within a reasonable time, but found that in the circumstances, the delay was not unreasonable or without merit.

[10] The applicant cited the following section of the award to support his contention that the Commissioner had exceeded his powers, which rendered his award reviewable in law: *"I am not convinced by the assumption that the respondent had disciplined the applicant when it had become convenient for the respondent. It is a common fact that wage negotiations are of a sensitive nature and if the respondent had charged the applicant during the negotiation it would certainly have been detrimental to the negotiation, which inevitably had led to a strike. Though the provisions of the Code of Good Conduct allows for reasonable time within which the employee must be charged, it is my opinion that in view of the circumstances the timing was indeed justified".*

[11] The applicant further submitted that the Commissioner's interpretation of the Code of Good Practice fell outside his jurisdiction and hence rendered his award reviewable: *Toyota South Africa v Radebe & Others* (2000) 21 ILJ 341 (LAC) and *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others* (2007) 28 ILJ 2405 (CC).

[12] In opposing the review on this ground the third respondent submitted that a full and detailed explanation was tendered at the arbitration for the delay in the disciplinary proceedings during the two months of June and July 2007. In essence

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[1] Grogan J., Workplace Law, 6th edition, Juta Law, 2001 at p163.
[2] Unreported decision of Ngalwana AJ JR 1552/04.

the explanation related to the wage negotiations that lasted for the entire period and the fact that the applicant was one of the negotiators representing the union. Disciplining the applicant in the middle of these negotiations would not only have been unfair to the union but would in all likelihood have caused labour unrest. The factual correctness of the explanation was not disputed by the applicant in evidence and the Commissioner accepted it. There was thus ample evidence upon which the finding that the delay was justified could be based. Aside from the explanation for the delay, the third respondent tendered evidence which was undisputed by the applicant, to the effect that no prejudice was suffered by the applicant as a result of the delay and furthermore at no time did the applicant indicate in the disciplinary enquiry or in any of the investigations and meetings with the union which preceded the enquiry, that he had been prejudiced as a result of the delay or that he had difficulty in recalling the events of 23 May 2007. The Commissioner accordingly relied on the evidence of the third respondent in concluding that the delay was justified and no prejudice was suffered by the applicant. The Commissioner's finding in this regard is based on the evaluation of the evidence before him. Accordingly, there is no basis for the contention that his finding is either unreasonable or illustrates a reasoning process so flawed as to warrant the conclusion that he misconstrued evidence, took into account irrelevant evidence or failed to take into account relevant evidence.

Trust relationship

[13] The applicant submitted in relation to this ground of review that the Commissioner completely misdirected himself on the issue of the employment relationship in that the applicant continued to work as normal between 24 May 2007 and his dismissal on 10 October 2007. The third respondent submitted that the delay *per se* does not justify the conclusion that the trust relationship remained intact. In this regard the breakdown in trust could be fully motivated with reference to the evidence by Ms Lourens, the Human Resources Manager for the third respondent, regarding the issue of diversity being a critical value at the third respondent and its zero tolerance of any form of race discrimination. Her evidence was that the employment relationship could not continue given the seriousness of the offence committed by the applicant.

Inconsistency

[14] The applicant submits that the Commissioner's failure to make a finding that there was inconsistency in the sanction imposed for similar offences at the third respondent, which implied that the sanction of dismissal against the applicant was unfair, was unreasonable and constituted a gross irregularity. It indicates a failure on the part of the Commissioner to apply his mind to the evidence before him.

[15] Three incidents were relied upon by the applicant in support of his allegation of inconsistent treatment:

(a) An incident in which the applicant's manager Bernard Pieterse referred to him as "*hardegat";*

(b) The incident where Tommy Phillips made certain queries in an e-mail concerning the definition of a black South Africans in the context of the designation under employment equity legislation and asked "*how black someone had to be"*; and

(c) An incident in which Gordon Williams told applicant about someone being allegedly referred to as a "*hotnot".*

[16] Insofar as the applicant in his pleadings makes particular reference to the findings of the Commissioner in regard to the first incident, this seems to be a reference to the Commissioner's comparison of the insult "*hardegat"* would cause compared with the word uttered by the applicant. The applicant furthermore takes issue with the Commissioner's finding that the applicant conceded that the use of the word *"hardegat*" is not racially abusive. In relation to the first incident, the Commissioner found, on the evidence, that :

a) the applicant lodged a grievance regarding the incident and was satisfied with the outcome. As such there was no need to proceed with a disciplinary enquiry.

b) Apart from this the Commissioner, conceding that the word "hardegat" may be offensive, correctly states that it cannot be equated to the utterances of the applicant.

c) The applicant conceded in cross examination that the word is does not have a racial connotation.

[17] The third respondent submitted that there is no basis in evidence for the allegation that the Commissioner's finding that the term "*hardegat"* was not as abusive and inflammatory as the words *'you f..coloured*" and "*I don't want to deal with a coloured but prefer a black person".* The former term is not racially abusive and suggests a certain attitude on behalf of the applicant while the latter expression constitutes unsolicited and pointed racial abuse directed against Ms Valerio. Moreover, the evidence of Ms Lourens was that the term was not used in a racial context against the applicant, and would not be as serious as the words uttered by the applicant. The applicant's supervisor used the term to refer to the manner in which the applicant had addressed a customer who had complained about his rudeness. The Commissioner's finding, based on the applicant's concession, that the term *"hardegat*" is not racially abusive was therefore justified. Moreover his failure to find that there had been inconsistent treatment of two employees for the same or similar incidents of misconduct is justified in the absence of evidence that the employer had applied discipline in a "*capricious and arbitrary"* manner: *SACCAWU v Irvin & Johnson* (1999) 20 ILJ 2302 (LAC) at para 29.

[18] It was not unreasonable for the Commissioner to conclude that the circumstances of the Phillips incident and the incident involving the applicant were not comparable, and would justify different outcomes**.**

[19] The basis for this conclusion is clearly set out in the award, and emerges from the evidence of Ms Lourens in which she explained why a final written warning and an apology were appropriate sanctions in respect of the offence. Phillips, she testified, was a coloured man expressing a concern about the status accorded to coloured people under employment equity legislation and how this was applied at Chevron SA. She distinguished this from the conduct of the applicant which she described as "..*a very serious offence because it was a direct attack on a person on the basis of the (sic) race",* and what was more disconcerting was that it was made by a senior shop steward who was a leader in the union. In addition, the applicant

conceded in cross examination that the term "*hardegat*" did not have a racial connotation.

[20] The applicant led no witnesses to prove the incident involving the term *hotnot*" and the Commissioner correctly declined to accept his hearsay evidence on this issue.

[21] When regard is had to the Commissioner's summary of the evidence presented by Ms Lourens in relation to the three incidents relied upon by the applicant to found the claim of inconsistency, it becomes evident that this finding can hardly be said to be unreasonable, irrational, unjustified or a misdirection on the part of the Commissioner . The findings of the Commissioner are based on the evidence led by the witnesses and his conclusions can be justified. It cannot therefore be contended that he failed to have regard to the allegations of inconsistency or the effect therefore on the sanction imposed on the applicant.

Length of service and clean record

[22] The applicant submits that the Commissioner misdirected himself to the fact that the applicant had worked for the third respondent for 14 years without being guilty of any offence. This ground emerges from the fact that the Commissioner made no express reference in his award to the applicant's length of service, and accordingly failed to take it into account as a mitigating factor in determining an appropriate and fair sanction. The Commissioner considered, as is evident from his award, the evidence relating to the position of trust held by the applicant at the time of his dismissal, the "Chevron way" policy and how it views racial abuse, and should have considered length of service and the applicant's record alongside these factors.

[23] In any event, as the third respondent submitted, it is inconceivable that the applicant would argue that, all else being equal, his length of service and clean record would alter what would otherwise be an appropriate sanction given the severity of the offence. What is significant however in this regard, the third respondent submitted, is that the omission of this fact from the award does not in itself support the conclusion that it was ignored, and even if this were the case, it

would not in itself render the award unreasonable or as manifesting misconduct on the part of the Commissioner.

Failure to consider submissions

[24] It was submitted that this constitutes a gross procedural irregularity and would vitiate the arbitration proceedings. In his award the Commissioner states that the parties, who were both legally represented, agreed to make closing arguments in the form of written submissions but the applicant's submissions were not received timeously and were accordingly not considered. The applicant however alleges that this is an error in that the parties had agreed that the applicant would file its submissions after those of the respondent had been received. Correspondence between the parties annexed to the pleadings supports this version and the third respondent's legal representative conceded the point. This leaves the question of whether it is the kind of error that is tantamount to a vitiating the proceedings on account of a gross procedure related irregularity.

The test on review

[25] It is trite that the applicable test in considering a review in terms of section 145 of the LRA is that propounded in *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others.* The test requires administrative action by the CCMA to be lawful, reasonable and procedurally fair, and has been articulated as follows by Navsa AJ:
"*[110] To summarize, Carephone held that s 145 of the LRA was suffused by the then constitutional standard that the outcome of an administrative decision should be justifiable in relation to the reasons given for it. The better approach is that s 145 is now suffused by the constitutional standard of reasonableness. That standard is the one explained in Bato Star: Is the decision reached by the commissioner one that a reasonable decision maker could not reach? Applying it will give effect not only to the constitutional right to fair labour practices, but also to the right to administrative action which is lawful, reasonable and procedurally fair."* (*Sidumo & Another v Rustenburg Platinum Mines Ltd & Others* (2007) 28 ILJ 2405 (CC) at para [110].)

[26] The Constitutional Court in *Sidumo* also gave the following guidelines to Commissioners when they are tasked with assessing whether or not misconduct was committed:

"[59] The statutory scheme requires a commissioner to determine whether a disputed dismissal was fair. In terms of s 138 of the LRA, a commissioner should do so fairly and quickly. First, he or she has to determine whether or not misconduct was committed on which the employer's decision to dismiss was based. This involves an enquiry into whether there was a workplace rule in existence and whether the employee breached that rule. This is a conventional process of factual adjudication in which the commissioner makes a determination on the issue of misconduct. This determination and the assessment of fairness, which will be discussed later, is not limited to what occurred at the internal disciplinary enquiry.
[61]…….. A plain reading of all the relevant provisions compels the conclusion that the commissioner is to determine the dismissal dispute as an impartial adjudicator. Article 8 of the International Labour Organization Convention on Termination of Employment 158 of 1982 (ILO convention) requires the same."

[27] A commissioner must thus be convinced on the evidence that the alleged misconduct did in fact take place and that it was of a sufficiently serious nature to justify dismissal.

Analysis

[28] In considering the pleadings and submissions in regard to the test on review, it cannot be said that the Commissioner's reasoning or conclusion is unreasonable in light of the evidence presented. He clearly explains the reasons for accepting the third respondent's reasons for the delay in instituting proceedings, which were not disputed. Moreover, there is no basis to justify a conclusion that the Commissioner failed to have regard to the implications for the relationship of trust between the parties in permitting the applicant to remain in employment for a few months before disciplining him. In fact, he had regard to the relevant evidence confirming the breakdown of the relationship in the context of the applicant's senior role in the union and the policy of the third respondent in regard to race discrimination. The finding,

moreover, by the Commissioner on inconsistency can be sustained on the evidence before him, in that the evidence of inconsistency was insufficient to justify a finding in that regard. His award cannot in this regard be said to constitute misconduct in performance of his duties nor can it be said to constitute a gross irregularity in procedure, as the applicant sought to argue.

[29] In my view the award is well reasoned and appears to be based on a carefully considered evaluation of the evidence presented to the Commissioner. It is clear from the record that both parties were legally represented at the arbitration, and the applicant was moreover assisted by his union. The failure to take account of his final written submissions would in my view not constitute a gross irregularity such as to vitiate the entire proceedings.

[30] In conclusion the applicant submitted in his heads of argument that *"another decision maker would have come to a different conclusion".* This clearly misconstrues the test on review. The question is whether this award is so unreasonable that it could not have been made by a decision maker in the context of the evidence before him, not whether this Court or another arbitrator could come to a different conclusion.

[31] The Commissioner provides reasons grounded in the pleadings and evidence before him, for each of his conclusions. He clearly sets out the reasons for rejecting the applicant's version and preferring that of the third respondent's on the balance of probabilities, and it cannot be said that he misdirected himself in this regard. Accordingly the award is not one that could not have been made by a reasonable decision maker.

[32] In the premises, I make the following order :

The review application is dismissed, with costs.

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Bhoola J

Judge of the Labour Court of South Africa

Date of hearing : 2 February 2010
Date of judgment : 23 February 2010

Appearance :
For the Applicant : M J Ponoane Attorneys
For the Third Respondent : Adv W G La Grange instructed by Deneys Reitz