IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO: JR3136/05

In the matter between:

SPECIALISED BELTING & HOSE (PTY) LTD Applicant

and

J D SELLO N.O. First Respondent

SIPHIYO JOSHUA ZWANE Second Respondent

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION ("CCMA") Third Respondent

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JUDGMENT

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FRANCIS J

Introduction

1. This is an unopposed review application to review an arbitration award dated 3 November 2005 made by the first respondent (the commissioner) after he had found that the second respondent's dismissal by the applicant was both substantively and procedurally unfair and awarded him ten months compensation amounting to R21 953,10.

2. The applicant is not challenging the commissioner's finding on procedural unfairness and leave the determination of appropriate compensation to the Court. The applicant seeks an order that the matter be remitted to the third respondent for a fresh hearing.

Background facts

3. The second respondent is an African male who was employed by the applicant in 1986

as a machine operator. He was earning R507.00 per week at the time of his dismissal. An incident happened between him and an Indiam male, Shantylal Bhana Hira, a sales manager on 10 May 2004 that caused him to be charged on 12 May 2004 with the following acts of misconduct:

"3.1 GROSS MISCONDUCT - intimidating and threatening behaviour.

3.2 GROSS INSUBORDINATION - refusal to follow instructions.

3.3 BREACH OF TRUST.

3.4 NEGLIGENCE/ DERELICTION OF DUTIES.

3.5 DISCRIMINATION "RACE".

4. He appeared at a disciplinary enquiry on 14 May 2004. He was found guilty of all the charges levelled against him and was dismissed. He referred his dispute to the CCMA for conciliation and arbitration.

The proceedings at the CCMA

5. The applicant called three witnesses on its behalf. The commissioner recorded in his award that the proceedings were mechanically recorded. The applicant's first witness was Lena Maria Helena Da Silva Heisamen (Heisamen). She testified that she is the applicant's human resources manager. At the time of the hearing she was an independent consultant and chaired the disciplinary hearing of the second respondent on 14 May 2004. His dismissal related to an incident that occurred in 10 May 2004 when he refused to take instructions from his manager, a Mr Shantylal Bhana Hira and told him that "you Indians your time is coming". He was charged with insubordination, intimidation, dereliction of duties and racial discrimination. He was given the charges on 12 May 2004. She found him guilty of all the charges and given

that the trust relationship had irretrievably broken down between the applicant and the second respondent, she recommended an "immediate dismissal with one month's notice pay. He was afforded a fair hearing and allowed to state his case, and to call and examine witnesses. After he was found guilty of the charges, he was advised of his right of appeal that he elected to waive. He referred his case to the third respondent (the CCMA) outside of the 30-day, statutory period. His application for condonation was granted despite the applicant's objection. Heisamen said that his referral was frivolous and was an attempt to extort money from the applicant. During cross examination Heisamen said that she was not the applicant's employee at the time of the incident on 10 May 2004 and did not witness the second respondent's insubordination and alleged racial slur. The disciplinary hearing was chaired by her and not Mack. Mack was not present. There were five people at the disciplinary hearing. They were the second respondent and his representative, the complianant, she as the chairperson of the hearing and observers.

6. The applicant's second witness was Belinda Evelyn Strydom (Strydom) the admin. manager. She testified that she attended the second respondent's disciplinary hearing on 14 May 2004 as a representative of the applicant, and to assist Ms Veena Hira in the proceedings. She did not witness the allegations levelled against the second respondent, and only heard of them for the first time during the disciplinary hearing. He was dismissed for a fair reason and the trust relationship between him and the applicant had broken down. He waived his right to appeal against his dismissal. During cross examination she said that she did not witness the second respondent's refusal to carry out lawful instructions. She heard during the hearing that on 10 May 2004 he idly rode up and down in a fork lift driven by Petrus. Mack was not present at

his disciplinary hearing. The second respondent was charged by HeisamEn the human resources manager of the applicant who also chaired the hearing. She had initiated the case against him. She could not refute the second respondent's claim when he put it to her that when the alleged incident occurred there were no witnesses and that it was only him and Hira. During re-examination she said that the complainant at the disciplinary hearing was Hiva. Heisamen became an employee of the applicant in June 2005.

7. The applicant's third witness was Shantylal Bhana Hira the sales manager. He testified that the second respondent was dismissed at a formal hearing for insubordination and racial discrimination. On 10 May 2005 he had asked him to assist him and he refused and said: "Indian's time is coming". He said that trust between the applicant and second respondent had broken down. During cross examination he said that he had called the second respondent. He had refused to work and was on the lift. He ignored his instructions to come and uttered the words referred to in his evidence in chief. A dispute followed between the two of them at the container. He was on the container and the second respondent on the forklift when he insulted him. He denied that he manhandled the second respondent. He said that the dispute was about the second respondent having called him an Indian. He pulled the second respondent from the container and the forklift was stationary. Present at the disciplinary hearing were Petrus with the second respondent, him as the complainant, Mack and Wilson and Strydom who were there to oversee the hearing and Huisamen who chaired the hearing.

8. The second respondent testified in his own defence. He said that he was employed as

a machine operator at the cutting table machine at the time of his dismissal. On 10 May 2005 at about 08h00 he went out of the change room and was told that told that a container had arrived. He then went to his tool box to take a crow bar. When he reached the container he and Hira had an altercation but denied that he called him any names. Hira had pulled him by the collar of his shirt and he felt pain. They were both in the container and denied that he was on the lift. There were seven people at the hearing, he, Heisamen and her daughter, Mack, Petrus, Hira and Strydom. He is a member of GIWUSA. After the hearing Heisaman asked him with Hira and Petrus to leave the room. She remained with Strydom and Mack. A short while later he was called back and advised of his dismissal. He was also told to come on a date he could not remember to fetch a dismissal letter. During cross examination he said that Heisamen chaired the disciplinary hearing. He said that Both Heismen acted as chairing the hearing. Mack was instructed by the chaierperson and he forwarded the instructions to him. He could not remember whether the lift was standing or moving when Hira manhandled him. Huisamen and Belinda advised him to leave the premises and was escorted by Lucky who guarded him like a prisoner after he was dismissed. He was not happy that the applicant had called the police. The police were not called but they threated to call them. Hira was not his senior at the time of his dismissal and he took orders from Don Monto. He denied that he fought with Hira and did not call him names.

The arbitration award

9. The commissioner has set out in his award the evidence led. He said that the burden of proof on a balance of probabilities that an employee's dismissal was fair rests with the employer. The Labour Relations Act 66 of 1995 (the Act) provides relevant law

in Schedule 8 Code of Good Practice: Dismissal. *In casu* the second respondent was charged and dismissed for gross misconduct - intimidation: gross insubordination - refusal to follow instructions, breach of trust, negligence/dereliction of duties and discrimination ("race"). The evidence of two of the applicant's witnesses, Heisamen and Strydom was secondary and therefore not the "best evidence". As a result their evidence was unreliable and lacked probative value. Strydom's evidence in particular was full of inconsistencies and contradictions. Firstly she could not clarify what her role during the second respondent's hearing was, and vaguely stated that she attended as the applicant's representative. In her evidence in chief she stated that the second respondent was dismissed for a fair reason and for refusing to carry out lawful instructions. She, however, conceded during cross examination that she was not present when the alleged incident took place, and did not know what the instruction was. She also failed to rebut the second respondent's claim that he was manhandled by Hira. Secondly, the commissioner said that this was critical and went to her credibility. She had also stated in her evidence in chief that Heisamen acted as a complainant, and later retracted and said it was a Ms Veen Hiva. The commissioner said that his inference of these contradictions was that Strydom was giving false evidence intended to mislead the hearing. It is stated in the minutes of the disciplinary hearing that: "the company was represented by Shanti (Hira) and Belinda (Strydom)". Hiva is not mentioned any where in the disciplinary minutes. This led the commissioner to conclude that she was not at the hearing and that Heisamen was indeed a complainant as testified by Strydom. The commissioner found that there were procedural irregularities concerning the second respondent's dismissal.

10. The commissioner said that Hira on the other hand gave clear and consistent evidence.

His evidence was that the second respondent refused to take instructions and said to him: "you Indian your time is coming". They were only two in the container when he uttered those words. Although the second respondent denied calling Hira and Indian, his evidence was that he was angry with Hira for pulling him by the neck of his shirt. In the circumstances the commissioner said that he found it probable that he could have uttered those words in the heat of the moment. This evidence was not denied by the applicant. Although this does not constitute intimidation, the commissioner said that in his view it was still very serious and warrants disciplinary censure against the second respondent. His contention therefore was that in the circumstances, the second respondent should have been subjected to progressive and less severe discipline. The commissioner said that racism and any racial slurs should not be tolerated in the work place. Having said that he still found it unfair that the chairperson of the disciplinary hearing neglected to take into account the circumstances in which the alleged utterances were made. Furthermore, Hira who was a belligerent party in the dispute was not subjected to any disciplinary measure. This was selective discipline that was completely unfair.

11. The commissioner found that the second respondent's dismissal was substantively unfair and that he was entitled to financial compensation as prayed. The commissioner issued an award in terms of which he found that the second respondent's dismissal was procedurally and substantively unfair. He ordered the applicant to pay him 10 months compensation.

The review application

12. The applicant felt aggrieved with the award and brought a review application on 30

November 2005 for the following relief:

"1. Reviewing the CCMA Commissioner's award made by the First Respondent on the 3 November 2005, in terms of the Labour Relations Act.

2. Declaring that the arbitration proceedings conducted under the auspices of the arbitration proceedings conducted under the auspices of the CCMA on 24 October 2005 to be defective as contemplated in section 145(1)(2) and section 158(1)(2) of the Act.

3. Setting aside the First Respondent's award referred to in prayer 1 herein before:

4. Directing that the dispute between the Applicant and the Second Respondent be referred back to the CCMA for an arbitration in terms of Section 141 as read with Section 145(4)(b) of the Act.

5. Costs of suit.

6. Further and/or alternative relief."

13. The applicant's review grounds are as follows:

"13.1 The Commissioner committed misconduct in relations to his duties as a commissioner.

13.2 The Commissioner acted Ultravires in exceeding his powers as a Commissioner, in that, he failed to apply his mind to the merits of the matter and appeared to be predisposed to favour the second respondent.

13.3 The Commissioner committed a gross irregularity in the conduct of the arbitration proceedings in that:

13.3.1 The Commissioner disregarded the severity of the misconduct and racial discrimination, which resulted in an irretrievable break down of the relationship, ruled that the company did not apply consistency by

not dismissing the Superior involved in the Dispute, even though the Superior was not the one guilty of the offense.

13.3.2 The Commissioner disregarded the fact, that the trust relationship between the parties has broken down, and that a continued employment relationship under the circumstances would be intolerable and unbearable. (It is a common law principle that an employee may be dismissed for conduct which destroys the continuation of an employment relationship).

13.3.3 The Commissioner failed to conduct the proceedings in accordance with the principles of "Fairness and Equity" as prescribed by the Labour Relations Act, in that he disregarded statements made by the Employer, and accepted only the version from the employee. Therefore the minutes of the proceedings are not a true reflection of what they perport to be.

13.3.4 The Commissioner erroneously made an award in favour of the Second Respondent, which decision by the Commissioner was a "Fait Accompli".

13.3.5 The Commissioner failed to apply his mind to the severity of the situation and the meaning of racial discrimination and misconduct. Which resulted in the dismissal.

13.3.5 The actions by the Commissioner are unfounded and do not comply with the prescribed procedure as laid down in the rules.

13.3.6 The details, background and facts of the proceedings have arbitrarily been changed by the Commissioner, and are construed as a fabrication of events.

13.37 The Commissioner has disregarded important facts of the evidence entered into and has fabricated his own scenario of events.

13.4.8 The Commissioner's failure to deal with the Merits of the matter, and/ or refer thereto is construed as a traversty of justice.

13.5 The commissioner accepted the evidence of Hira who had testified that the second respondent refused to obey his instruction to assist in off-loading a container, became arrogant and then racially insulted Hira. At the same time he appears to accept third respondent's evidence that Hira gratuitously and "out of the blue" scragged him by the neck, something that Hira denied when cross examined. In failing to resolve this factual dispute and in accepting and impliedly rejecting Hira's evidence, commissioner either misconducted himself, committed a gross irregularity or reached a conclusion that no reasonable decision maker could have reached. The same possible defects attach to his award in respect of his failure to assess the probabilities attaching to the two conflicting versions before him by the applicant and second respondent. A proper evaluation thereof would inevitably have lead to him finding second respondent's version inherently improbable and accepting Hira's version in toto.

13.6 The commissioner also failed to make a finding on one of the charges on which second respondent was dismissed, being gross insubordination in refusing to obey Hira's instruction to him to off-load the container. His failure to do so constitutes misconduct on his part or renders his ultimate conclusion, that the dismissal of second respondent was substantively unfair, one to which no reasonable commissioner could have come.

13.7 The commissioner appears himself to have determined that dismissal for the

racial insult that he correctly attributed to second respondent was excessive. In doing so he exceeded his powers as his enquiry should have been whether such a dismissal was fair in the circumstances. Should he have considered this he would have had to consider that the insult was by a subordinate (second respondent was a machine operator) to a superior (Hira was the sales manager) and was particularly vindictive given our country's history. These considerations would inevitable have lead to the dismissal being upheld".

Analysis of the facts and arguments raised

14. The applicant is not challenging the finding of procedural unfairness and it was submitted that the CCMA, in the guise of a commissioner other than the first respondent should determine appropriate compensation payable in respect of such unfairness.

15. The applicant contended that on the substantive fairness of the dismissal the commissioner appears to have reasoned that Hira, the applicant's sales manager, gave acceptable evidence and it was established that second respondent had racially abused him. This abuse was, however, provoked by Hira manhandling second respondent and its gravity was thus reduced and the infraction did not merit dismissal. The basis upon which the commissioner found that the manhandling was established was that such evidence was not denied. It was further contended that the above conclusion on substantive fairness was not one that any commissioner could reasonably have come to the evidence before the commissioner since it was not so that the evidence of the second respondent that he was manhandled by Hira, was not denied by the applicant. In his own summary of Hira's evidence the commissioner indicated that Hira denied

this allegation. The summary accurately reflected the evidence adduced before the commissioner by Hira. Even if this error did not render the ultimate conclusion one to which a reasonable commissioner could not have come, it still constituted a defect as envisaged in section 145(2) of the Act. Thus Landman J remarked in *Sasko (Pty) Ltd v Buthelezi & Others* (1997) 18 ILJ 1399 (LC) at 1430 F:

"The third respondent simply ignored this evidence. Had he not ignored it but dealt with it then this judgment may possibly have had a different result. However, as he simply ignored relevant evidence this is grossly unreasonable and amounts to misconduct which is a defect as envisaged by s 145(2) of the Act".

16. The applicant contended that the same reasoning applies to the commissioner's failure to consider the misconduct which had been established, being the second respondent's refusal to obey Hira's instruction to him to assist in off-loading a container. The commissioner appears to have been almost blinded by the allegations of a racial insult for which the second respondent was dismissed and did not deal with the offence of insubordination. On the same reasoning as set out in the *Sasko* matter it was contended that his award should be reviewed and set aside on this ground.

17. It is clear from the evidence led that an incident took place between the second respondent and Hira, the sales manager that prompted the second respondent to utter the words to the effect that "you Indian your time is coming". The commissioner had the benefit to have observed the witnesses when they testified. The record was not transcribed only the handwritten notes of the commissioner despite what is recorded in the commissioner's award about the mechanical recording of the evidence. The commissioner found that despite the second respondent's denial that the said words were uttered. He found that something must have caused him to have uttered the

words. The second respondent's version is that he had refused to do what Hira wanted him to do which prompted Hira to pull him by the collar of his shirt whilst giving him instructions. He felt pain around his neck and took umbrage at his treatment. An argument ensued between them. It is clear from the record filed that the second respondent's version of events was not challenged by the applicant. Hira's testimony was that the second respondent had refused to assist him to off-load a container. An argument ensued and the second respondent said that "your time is coming Indian". He denied manhandling the second respondent. The obvious question to ask is why the second respondent acted the way he did. Something must have given rise to him having uttered the words. The commissioner found that it was probable that he had uttered the words and that this was in the heat of the moment cannot be challenged. This seems to have been caused by Hira having grabbed him at his collar. Since there is no cross review, the commissioner's finding on this aspect as reasonable.

18. It is clear that the second respondent was not asked to explain what he meant with the words. Hira did not testify that about how he felt about the words uttered. He also did not testify that he felt intimidated. As pointed above the second respondent's version that an argument ensued between them was not challenged. Hira surely did not act like a person who was intimidated or felt intimidated. Hira did no testify that he felt threatened by the words uttered.

19. The second respondent was charged with several acts of misconduct flowing from a single incident. This is an instance of unfair splitting of charges. This is clearly indicative that the applicant wanted to throw the book at him and had hoped that all

the charges would stick. All the more reason why a complainant should also not be the chairperson of an enquiry. There was simply no evidence led about the lawful instructions that the second respondent had refused to carry out. It would appear and this is clear from Hira's evidence that he had asked the second respondent to assist him to off load a container. There was a plea for assistance but no instruction was issued. Evidence would have had to be led about the existence of the rule, that he was aware of it, that it was reasonable and he had refused to obey it.

20. Whilst it is correct that the commissioner did not deal with the charges of disobeying a lawful instruction, his failure to do so does not render his award reviewable. It is not clear from the record that any evidence was led by the applicant on this charge. The other charges relating to breach of trust, negligence/dereliction of duties and discrimination race were clearly unfounded. It is not clear how the second respondent could be charged with "discrimination racial". This presupposes that he was in a position of authority against Hira and had discriminated against him on racial lines. There was no shred of evidence led against him on this. The commissioner found that the words uttered did not constitute intimidation but it was still very serious and warrants disciplinary censure against the second respondent. The second respondent should have been subjected to progressive and less severe discipline. He said that racism and any racial slurs should not be tolerated in the work place. He found that it was unfair that the chairperson of the disciplinary hearing neglected to take into account the circumstances in which the alleged utterances were made. He said that the belligerent party was not subjected to any disciplinary measure. The selective discipline was completely unfair.

21. The review test in terms of *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others* (2007) 28 ILJ 2405 (CC), is whether the decision reached by the commissioner is one that a reasonable decision maker could not reach. The standard is now one of reasonableness. This Court is concerned with the reasonableness of the conclusion itself. If the outcome is reasonable, it does not matter that there are flaws in the reasoning employed by the commissioner. This Court is not concerned whether the commissioner was correct or whether it agrees with the commissioner. There is a range of decisions that will fall within the bounds of reasonableness by the Constitution. This Court must simply ensure that the commissioner's decision falls within those bounds. To succeed, the applicant must establish that the decision falls outside the bounds of what are reasonable.

22. A commissioner is in terms of section 138 of the Act required to decide whether a disputed dismissal was fair and should do so fairly and quickly. A commissioner must also determine whether misconduct was committed and must consider all the facts and the evidence. The commissioner must consider and evaluate the inherent probabilities and assess the credibility of a witness. Where a commissioner flagrantly disregards relevant or crucial evidence or where the reasoning is fatally flawed, or incorrectly applies legal principles, a reviewing court may be inclined to conclude that the ultimate decision arrived at is one that no reasonable commissioner could have arrived at.

23. The reasonable employer test as a means of determining whether to interfere with a sanction imposed by the employer has been rejected by *Sidumo*. Clear guidelines have been given about what factors need to be considered in considering the sanction.

The following quotation that appears at page 1131 at paragraphs 78 and 79 of *Sidumo* suffices:

"In approaching the dismissal dispute impartially, a commissioner will take into account the totality of the circumstances. He or she will necessarily take into account the importance of the rule that had been breached. The commissioner must of course consider the reason the employer imposed the sanction of dismissal, as he or she must take into account the basis of the employee's challenge to the dismissal. There are other factors that will require consideration. For example, the harm caused by the employee's conduct, whether additional training and instruction may result in the employee not repeating the misconduct, the effect of dismissal on the employee and his or her long-service record. This is not an exhaustive list.

To sum up. In terms of the LRA, a commissioner has to determine whether a dismissal is fair or not. A commissioner is not given the power to consider afresh what he or she would do, but simply to decide whether what the employer did was fair. In arriving at a decision, a commissioner is not required to defer to the decision of the employer. What is required is that he or she must consider all relevant circumstances."

24. The applicant contended that the second respondent had referred a frivolous matter to the CCMA. This contention is rather remarkable when one considers that Heisamen the applicant's human resources manager was the complainant and chaired the second respondent's disciplinary hearing. She was contradicted by the admin. manager who said that she was the complainant. If she was the complainant the question than arises who the chairperson was. Our labour law has developed to such an extent that it is now unheard of that a person can be a complainant and still chair the disciplinary

hearing. It becomes worse for the applicant in that its human resources manager and admin. manager both led false evidence before the commissioner about the disciplinary enquiry. As stated previously, the applicant has decided not to challenge the commissioner's finding on procedural unfairness. The commissioner had found that Heisamen was indeed a complainant as testified to by Strydom. Despite this, Heisaman was the applicant's representative. She signed the application and the founding affidavit. She testified at the arbitration proceedings and launched the review application and application to stay the writ of execution. She contended in her affidavit dated 24 November 2005 that the second respondent's dismissal was both procedurally and substantively fair. No reasons were advanced why it was contended that the dismissal was procedurally fair when she clearly knew that she was both the complainant and chairperson of the disciplinary enquiry.

25. This case is a clear demonstration about why the reasonable employer test was overturned by *Sidumo*. It is also a case about why commissioner's decisions should not lightly be interfered with. It is a case that shows how some scrupulous employers may gang up against employees and then throw the book at them. False evidence would be led and sympathetic chairpersons be hired to chair disciplinary hearings to rubber stamp decisions taken by those employers. The disciplinary hearing is reminiscent of the kangaroo courts of the early 1980's. How does one explain that a person with 18 years service, is dismissed for the misconduct that he was dismissed for. There surely is an honour among human resource managers. It is hoped that they are there to guide both employers and employees around employment issues. No mitigating factors were taken into account but this is demonstrative of the applicant's mind set. The sanction of dismissal was too harsh a sanction. The commissioner has

not committed any reviewable irregularity that warrants this court to interfere. This is a matter where the commissioner should have award maximum compensation. It is a pity that there is no cross review.

26. *Sidumo* enjoins the Court to remind itself that the task to decide the fairness or otherwise of a dismissal falls primarily within the domain of the commissioner. This was a legislative intent and as much as decisions of different commissioners may lead to different results, it is unfortunately a situation that has to be endured with fortitude despite the uncertainty it may create. The court must remind itself that the test ultimately, is whether the decision reached by the commissioner is one that a reasonable decision maker could reach under all the circumstances. On this test this court cannot gainsay that decision of the commissioner.

27. The application stands to be dismissed.

28. In the circumstances I make the following order:

28.1 The review application is dismissed.

28.2 There is no order as to costs.

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FRANCIS J

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

FOR THE APPLICANT:	R BEATON INSTRUCTED BY FRED VOGEL ATTORNEYS
FOR SECOND RESPONDENT:	NON APPEARANCE
DATE OF HEARING :	4 FEBRUARY 2006
DATE OF JUDGMENT :	6 FEBRUARY 2009