REBUBLIC OF SOUTH AFRICA
IN THE LABOUR OF SOUTH AFRICA, JOHANNESBURG
JUDGMENT

Reportable

Case no: JR2603/08

In the matter between:

JOHN MAURICE FLETCHER **Applicant**

And

JAN STEMMET N.O. **First Respondent**

FAMSYSTEMS (PTY) LTD **Second Respondent**

TAL AND ENGINEERING INDUSTRIES

BARGAINING COUNCIL (GAUTENG) **Third Respondent**

Heard: 14 December 2011

Decided: 14 March 2012

Summary:

Application to review the Commissioner's decision on the basis of a gross

irregularity and that the Commissioner's findings were unreasonable. Held that the Commissioner's decision was supported by the evidence and that decision was not unreasonable.

JUDGMENT

WILKEN AJ

Introduction

[1] The applicant in this matter wishes to review and set aside an arbitration award issued on 6 October 2008 in which the first respondent ruled that applicant's dismissal to be both procedurally and substantively fair. The arbitration was conducted under the auspices of the Metal Engineering Industry Bargaining Council on 9 October 2007, 5 February 2008, 11 June 2008, 13 June 2008 and 9 August 2008. The applicant gave evidence and called 10 witnesses. The second respondent called 5 witnesses. Both applicant and second respondent were represented by legal practitioners from 5 December 2008.

[2] The Respondents did not oppose the application for review.

Background Facts

[3] The applicant was employed by the second respondent as technical manager on 1 February 2007. On 27 March 2007, applicant was suspended and given notice to attend a “disciplinary meeting enquiry” on 28 March 2007. On 28 March 2007, the applicant’s representative (the applicant’s wife) raised various objections to the nature of the process whereupon the second respondent adjourned the meeting.

[4] On Friday 30 March 2007, applicant received a further notice to attend a disciplinary hearing on Monday 2 April 2006. The notification of 27 March 2007 listed four complaints against the applicant and was in non-specific terms. The notification of 30 March 2007 was clearly issued to address the lack of particularity of the first notification objected to by the applicant.

[5] The notification of 30 March 2007 called upon the applicant to answer the following complaints:

> ‘1. Gross misconduct in that you refuse to work with certain staff members with specific reference Rhonda, who is the buyer for the company. This disrupts the normal flow of business;
>
> i. Gross misconduct in that on Monday 26 March 2007 you refused to take a call from one of the company’s best clients who had a query requiring technical input to make sure the correct item was delivered and also threw the message in the bin;
>
> ii. Gross misconduct in that on Monday 26 March 2007 you refused to meet with a recognised supplier in an acceptable manner;

iii. Gross misconduct in that when the client from the previous day was in contact with you telephonically on Tuesday 27 March 2007 you failed to answer the relevant query and asked him to contact others in the company;

iv. Gross misconduct in that on or about Monday 26 March 2007 you called the receptionist a "black bitch" and indicated to her that you hated her from the beginning;

v. Gross misconduct in that you placed the name of the company in disrepute by emailing clients and claiming that they should hold the company liable for damages.'

[6] The notification specifically stated that the applicant could obtain further particulars from management and reminded the applicant of his right to a formal hearing, to be represented at the hearing, to be given time to prepare his case, to be given advance warning of the charges, to be advised of the allegations and charges, to be represented or assisted at the hearing by a colleague of his choice or a shop steward, to ask questions on any evidence produced, to call witnesses to testify, to an interpreter and of the right to appeal.

[7] The applicant attended the disciplinary hearing on 2 April 2007, but did not participate in the proceedings despite being repeatedly encouraged to participate. At the commencement of the proceedings the applicant submitted a letter stating:

> 'Attendance at Famsystems Monday 2 April 2007
>
> Submission for the record by JM Fletcher
>
> Famsystems have not made available to me company policy or

> disciplinary procedures and therefore I do not recognise and accept the arbitrary nature of conducting this disciplinary enquiry. I reserve my right to reply.'

[8[On 4 April 2007, the applicant was notified that he had been found guilty of the complaints put to him and that the second respondent was implementing the recommendations of the independent third party who chaired the disciplinary hearing. The sanction imposed in respect of complaints 2, 3, 4 and 5 were dismal, in respect of complaint 1 he was issued with a written warning valid for 9 months, and in respect of complaint 6, he was issued with a final written warning valid for 9 months.

Arbitration Award

[9] The first respondent found that the applicant was not guilty, considering the evidence presented to him, in respect of complaints 2, 3 and 4.

[10] In respect of complaint 1, the first respondent held:

> 'On the evidence before me, I find on a balance of probabilities that the applicant is guilty of refusing to work with Ms Rhonda Makgoba. On the applicant's own evidence he did not want to deal with her anymore after the incident involving the courier. I find that this has disrupted the procedures and operations of the applicant, because purchases had to be done through Ms Makgoba, who was the buyer.'

[11] In respect of complaint 5, the first respondent held that:

> 'I find that applicant has called Ms Seshotele a "Bloody Black Bitch" and that he had hated her from the beginning. Ms Seshotele's evidence is corroborated by Ms Metsileng and the applicant's version is not plausible. Furthermore, the applicant did not dispute the allegations when he was telephoned by Mr van Kerckhoven or at the disciplinary

enquiry.'

[12] In respect of complaint 6, the first respondent held:

> 'On the evidence before me I find that the applicant has placed the name of the Respondent in disrepute by sending the e-mail to the Respondent's client. The applicant's explanation for sending the e-mail is not plausible. At the very least, he probably sent the e-mail to embarrass the Respondent. The gist of the e-mail is that the company should be held liable for production losses.'

[13] The first respondent also found that:

> 'I find that judged as a whole, the enquiry was procedurally fair as envisaged in the code of good practice contained in Schedule 8 of the LRA. It is clear that the applicant was given an opportunity at the disciplinary enquiry to present his case and that he did not have a valid reason to desist from participating.'

<u>Grounds of Review</u>

[14] The applicant confined his grounds of review as those advanced in the heads of argument dated 25 November 2011.

[15] In relation to complaint 1, the applicant contends that the first respondent erred in finding the applicant guilty of refusing to work with Ms Makgoba as such finding was not supported by the evidence nor the probabilities and that his finding is accordingly unreasonable.

[16] In respect of complaint 5, the applicant contends that the first respondent should have rejected the evidence of Ms Seshotele that the applicant called her a "bloody black bitch" as unreliable and fabricated. The applicant contends that he never uttered those words towards Ms Seshotele. In addition, applicant contends that first respondent should

have found that Ms Makgoba and Ms Seshotele were both unreliable witnesses as they were motivated by antipathy towards the applicant.

[17] In respect of complaint 6, applicant contends that the first respondent should have found that applicant had no intention of bringing Famsystems in to disrepute when he informed DTC about his suspension. Applicant contends that he was acting in pursuance of the provision of the contact between Famsystems and DTC and his intention was purely to remind Famsystems of its obligations. Applicant contends that the first respondent's finding of guilt is not supported by the evidence and his conclusion that applicant had placed Famsystems in disrepute is unreasonable.

[18] In relation to procedural fairness, the applicant contends that his dismissal was procedurally unfair as he did not have sufficient time to prepare himself against the 6 charges, he only received the notification of the disciplinary hearing scheduled for Monday 2 April 2007 on Friday 30 March 2007. The applicant contends that the first respondent's finding, that the dismissal was procedurally fair, is unreasonable in the circumstances.

[19] The test in determining whether the second respondent's award ought to be reviewed and set aside has been formulated in *Sidumo and Others v Rustenburg Platinum Mines Limited and Others*,[1]viz :

> 'Is the decision reached by the Commissioner one that a reasonable decision maker could reach.'

Whilst the *Sidumo* judgment advances a result-based test which tests the reasonableness of the outcome of the award, the applicant must not only assail the commissioner's reasons advanced, but also the result of the award having regard to all the material that was before the

1 (2007) 12 BLLR 1097 (CC) at para 110,

commissioner. I am mindful of the fact that this court is not precluded from scrutinising the process in terms of which the decision was made, and that I may also have regard to those grounds advanced in section 145(3) of the Labour Relations Act 66 of 1995 in determining whether the award should be set aside and reviewed.[2] Although the applicant argued the matter on the basis that the award ought to be set aside as first respondent's findings were unreasonable (in respect of complaints 1 and 6), the applicant also makes out a case in his heads that the first respondent committed a gross irregularity in evaluating the evidence before him.

Evaluation of Complaint 1

[20] The second respondent contended that the applicant refused to channel purchases through Ms Makgoba following an altercation between them regarding the sending of a package to second respondent's client, DTC in Namibia, on or about 9 March 2007.

[21] It is common cause that the altercation occurred between the applicant and Ms Makgoba concerning the collection and shipment of the package to Namibia. The second respondent contended that applicant's cash purchase of certain stainless steel nuts, bolts and washes on 9 March 2007, following the aforesaid altercation, demonstrated applicant's refusal to place orders for supplies with Ms Makgoba.

[22] Ms Makgoba testified that prior to the altercation of 9 March 2007, the applicant requisitioned his supplies by utilising the company's buying procedure by completing a requisition form and submitting it to her. However after the incident of 9 March 2007 applicant channelled all his requisitions through Mr Lengisi. Ms Van Kerkhoven testified that the applicant told her that he did not deal with Ms Makgoba when Ms van

2 See *National Union of Mineworkers and Another v Samancor Ltd (Tubatse Ferrochrome) and Others* [2011] 11 BLLR 1041 (SCA) and *Southern Sun Hotel Interests (Pty) Ltd v CCMA and Others* [2009] 11 BLLR 1128 LC.

Kerckhoven advised him to engage Ms Makgoba regarding an invoice reflecting an incorrect rate.

[23] The applicant contends that the first respondent failed to have regard to the fact that applicant would normally place his requisitions through Mr Lengisi who authorised requisitions and thereafter pass them onto Ms Makgoba. However, its evidence shows that it was not necessary for applicant to obtain Mr Lengisi's authorisation prior to submitting requisitions to Ms Makgoba. Mr Lengisi conceded that it was possible for applicant to place his orders directly with Ms Makgoba and that he probably did so prior to the incident of 9 March 2007.

[24] Insofar as applicant contended that the Commissioner's finding of guilt in respect of Complaint 1 was unreasonable on the basis that he was not required to place his orders directly with Ms Makgoba, nor did he channel his purchases through Ms Makgoba, the first respondent's findings are not unreasonable having regard to the evidence presented.

[25] Applicant further contended that the buying procedure was never explained to him. However, the applicant did not need the procedure to be explained to him as he testified:

> 'I had a requisition book and I knew how to use a requisition book and I knew I was not the buyer and I know from my 50 years of experience that you give the requisition for approval to the buyer, it is not that I think I did not know what I was doing.'

Once again on the evidence presented at the arbitration, the first respondent cannot be said to have come to an unreasonable conclusion on the evidence presented in the arbitration.

[26] Applicant also contended that he instructed an employee to buy the stainless steel washers, nuts and bolts for cash as they were urgently

required and that he only did so after having made enquiries with Ms Makgoba as to the progress that she was making in acquiring the nuts, bolts and washes. He furthermore testified that when he made the enquiry, Ms Makgoba responded that she was first obtaining three quotes.

[27] Ms Makgoba denies that she was ever approached by the applicant regarding this purchase or that she suggested she would be going out for three quotes. It emerged and became common cause that a requisition for stainless steel nuts, bolts and washes of a similar dimension had already been placed with the supplier by Ms Makgoba. Had the applicant made enquiries with Ms Makgoba, as he contended he did, he would have learnt of the bulk purchase order placed with the supplier on 9 March. It was common cause applicant instructed an employee to buy the stainless steel, nuts, bolts and washers for cash without submitting a requisition or subsequently doing so.

[28] In addition, three of applicant's own witnesses namely Motsepe, Matlala and Kgwete, all testified that the buying procedure requiring requisitions to be channelled through Ms Makgoba was well known and established. In the circumstances, the first respondent's finding of guilt is not unreasonable on account of this argument advanced by the applicant.

[29] Applicant further contended that the first respondent ought not to have come to the conclusion that he refused to work with Ms Makgoba by relying on his statement that he did not deal with Ms Makgoba, as he was merely acting in compliance with Mr van Kerckhoven's instruction not to upset Ms Makgoba. This explanation, however, does not accord with applicant's own evidence under cross-examination when it was put to him that Mr Van Kerkhoven told him not "to upset his staff". Applicant admitted Mr van Kerckhoven never mentioned Ms Makgoba's name when instructing him not to upset his staff. Accordingly, the first respondent's reliance on this statement to come to the conclusion that

applicant was guilty on the first complaint is not unreasonable in all the circumstances.

[30] Applicant's remaining challenges to the first respondent's finding of guilt on the first complaint, namely:

30.1.1 applicant had never been advised before 27 March 2007 that he had breached a company policy (bearing in mind that his failure or refusal to deal with Ms Makgoba arose on 9 March 2007);

30.1.2 he was never challenged previously about his statement to Ms van Kerckhoven that he refused to deal with Ms Makgoba; and

30.1.3 Mr van Kerckhoven testified at the arbitration proceedings that this complaint was not considered serious,

do not detract from the finding of guilt.

[31] Accordingly, first respondent's finding of guilt is not unreasonable, nor did he commit any gross irregularity in assessing the evidence before him.

<u>Complaint 5</u>

[32] Complaint 5 concerns the finding by the first respondent that the applicant had called Ms Seshotele "a bloody black bitch".

[33] Ms Seshotele testified that she was at reception together with Ms Metsileng when the applicant, on his way to the kitchen referred to her as 'you bloody black bitch, I hated you the first day I saw your face' and upon his return from the kitchen repeated the same words. Ms Metsileng confirmed these utterances in her testimony and stated she cautioned Ms Seshotele not to react to applicant's utterances.

[34] It is common cause that before applicant uttered these words, he was annoyed by Ms Seshotele, Ms Makgoba and Ms Metsileng's loud conversation in the reception area. Applicant denies having uttered the words attributed to him and contends that he only stated:

> 'I won't put up with your bloody insolence and you will have to find someone to carry you when I am gone.'

[35] Applicant acknowledges that he was disturbed by the discussion in the reception area, his office opening onto the reception area, and having been "provoked" by Ms Seshotele on rearranging the notes left on his desk earlier that day. He also contended that Ms Seshotele had banged on his desk when she addressed him earlier that morning, which further annoyed him.

[37] In argument, Advocate Makola stated that applicant's brother-in-law, Mr Endendyk, testified that applicant was not a racist and that applicant himself stated that the words he allegedly uttered was not within his vocabulary. Mr Endendyk's evidence must be viewed with circumspection having regard to the evidence presented by Messrs Lengisi and Kgwete that applicant referred to a poorly executed sales job as "an African job".

[38] Applicant argued that the first respondent should have rejected Ms Seshotele's evidence as the first respondent did not find the applicant guilty on the complaints relating to the incidents immediately preceding

the offending utterances, namely refusing to deal with a customer Mr van Dyk and supplier, Mr Meyer.

[39] The first respondent did not reject Ms Seshotele's evidence as to what transpired in relation to Messrs van Dyk and Meyer, but came to the conclusion that there was insufficient evidence before him that the applicant was guilty of the complaints put to him. The first respondent considered that there were multiple communication between Mr van Dyk and the company on the day and not only the one Ms Seshotele testified on properly. Insofar as the complaint regarding applicant's refusal to speak to Mr Meyer is concerned, applicant's denial was not challenged in cross-examination and first respondent thereafter did not reject Ms Seshotele's evidence but held that complaint had not been proved. It is apparent that no credibility finding was made nor was any of the evidence presented by Ms Seshotele rejected.

[40] Applicant further contends that Ms Seshotele's evidence ought to be rejected as she is related to Ms Makgoba, the complainant, them being sisters. The applicant further contends that Ms Seshotele's evidence should be rejected on the basis of applicant's contention that Ms Makgoba allegedly lied to applicant on two different occasions. When Advocate Makota was questioned about the conspiracy theory advanced by the applicant in relation to Mesdames Seshotele and Makgoba vis-á-vis the applicant, he conceded that no evidence of such conspiracy was ever put to either of them.

[41] The applicant contends that the evidence of both Mesdames Makgoba and Seshotele ought to be rejected as being unreliable as both were motivated by an antipathy towards the applicant. However, it was not Ms Makgoba who supports Ms Seshotele's evidence regarding the racist remarks, but Ms Metsileng, and her version was never attacked nor discredited. In the circumstances, the first respondent cannot be fault having relied on the corroborative evidence of Ms Metsileng to find the

applicant guilt of complaint 5. In the circumstances, the first respondent did not commit a gross irregularity, nor came to an unreasonable conclusion on the evidence before him in finding the applicant guilty on complaint 5.

Complaint 6

[42] This complaint relates to applicant having brought the company's name into disrepute by transmitting an email to a client drawing the client's attention to the fact that applicant's suspension may result in the project not being completed timeously.

[43] It is common cause that the applicant transmitted the offending email, but applicant contends that the purpose of the email was not motivated by any malice, but merely to inform DTC about the effect his suspension would have upon completing the project within the agreed timeframes. Applicant contends that the e-mail was not intended to alert the customer of its right to sue second respondent for penalties, but purely to remind the second respondent of its exposure should it not complete the project within the agreed timeframe. In addition, the applicant contends that the mail was motivated by his concerns for the safety of the customer's employees should the project not be completed and that he attempt to avert industrial action by the client's employees on account of their health and safety should the project not be completed timeously. Applicant believed it to be necessary to send the mail as Mr Van Kerkhoven, the MD of third respondent, in his view did not manifest any interest on what was happening in relation to the project.

[44] Advocate Makola confirmed that an objective assessment had to be made of the e-mail to determine whether it brought or aimed to bring the third respondent's name into disrepute and/or alert them to the fact that the third respondent could be held liable for damages.

[45] The evidence of the applicant during cross-examination assists in evaluating the motivation behind the transmission of the e-mail copied to client and the consulting engineer that read as follows:

> 'No the scope of work that was agreed, was agreed to be done between 13th and 17th. There still had work to be done. In fact, the list of work that is there, which remains outstanding, was not possible to be done between the 13th and 17th, but it would be enough to bring, specifically, the new fans onto site, the fans which were represented by Famsystems to the client as being in accordance with Tecnium design and it was fraudulent, they misled their client and we caught them out with the [246] anemometer readings. They were going to bring the fans in on the 13th and the 17th. What really kicked over Van Kerkhoven, when he realised I was not his man.'

[46] In addition, the applicant had no plausible explanation why the email was sent prior to dismissal, the inference being that there was no indication at that stage that he would no longer be involved in the project.

[47] Objectively speaking there was no reason for the applicant to alert the client of the second respondent's internal affairs or the fact that he had been suspended. It could only have been done to put pressure upon Famysystems in relation to the intended disciplinary hearing on the one hand, and on the other hand to bring additional pressure to be born upon the second respondent by the client regarding the project. Considering the difficulties the second respondent had experienced in executing the contract, the first respondent's finding is not at variance with the evidence nor was his conclusion unreasonable.

Procedural Fairness

[48[It was common cause that the applicant was suspended on 27 March 2007 and was summonsed to a meeting the following day, 28 March 2007. It was further common cause that the meeting of 28 March 2007 was adjourned and that applicant was provided with a detailed complaint sheet on 30 Friday March 2007 advising him to attend a hearing on Monday, 2 April 2007. It is further common cause that the applicant, despite repeated requests, refused to participate in the disciplinary hearing which was conducted on 2 April 2007.

[49] The applicant contends the dismissal is procedurally unfair because he had too little time to prepare. However, applicant never requested a postponement, nor did he request any further clarity regarding the complaints, and point blank refused to participate in the hearing. It does not lie in the applicant's mouth to now complain about the procedural fairness of the hearing in circumstances where he himself took no steps to avail himself of his right to state his case. If he was not in a position to prepare himself he ought to have sought a postponement. If he required further particulars he should have availed himself of the opportunity to request such particulars when the hearing commenced. He did none of this. In the circumstances, the first respondent's finding that the hearing was procedurally fair is not unreasonable. Accordingly, the applicant's review on this ground must also fail.

Conclusion

[50] The applicant has failed to establish that the first respondent committed any gross irregularity in the conducting of the proceedings, nor has the applicant been able to demonstrate that the first respondent's findings are unreasonable in all the circumstances. Accordingly, the review must fail.

Award

[51] The application for review is dismissed.

ST ELMO WILKEN
ACTING JUDGE OF THE LABOUR COURT

Appearances:

For the Applicant: Advocate Makola instructed by Webber Wentzel