THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case no: JR1837/20

In the matter between:

MOSA IRRIS SEPHEKA	**Applicant**
and	
FAITH GUMEDE *N.O.*	**First Respondent**
GENERAL PUBLIC SECTORAL BARGAINING COUNCIL	**Second Respondent**
DEPARTMENT OF HOME AFFAIRS (SASOLBURG)	**Third Respondent**

Heard: **04 July 2024**
Delivered: **19 March 2025**

JUDGMENT

MALULEKE, AJ

Introduction

[1] This is an application to review an arbitration award under case number: GPBC2481-14 in which the Arbitrator found that the Applicant's dismissal was substantively fair and the dismissal was upheld.

[2] The Applicant require this Court to review and set aside the arbitration award issued by the Arbitrator on 26 August 2020, substituting the arbitration award with an order of this Court declaring the dismissal of the Applicant to be substantively unfair, alternatively directing that the matter to be referred back to the Second Respondent for a hearing *de novo* before a commissioner other than the First Respondent and further that the Applicant require this Court to condone the late filing of the review application.

Background facts

[3] The Applicant was employed by the Third Respondent on January 2004 as an Administration Clerk. In the year 2005, the Applicant was then promoted to the position of Senior Clerk and again in the year 2011, she was then promoted to the position of Chief Administration Clerk. On 17 July 2014, the Third Respondent preferred four charges of misconduct against the Applicant concerning an incident that occurred on 28 and 29 February 2012 and 19 May 2012, respectively. A disciplinary hearing was then constituted at which the chairperson found the Applicant guilty of three charges of misconduct and subsequently recommended a sanction of dismissal.

[4] It is perhaps of crucial importance to highlight the charges with which the Applicant was found guilty, which led to her dismissal, and these charges are outlined as follows:

> 'Allegation 1
>
> it is alleged that you committed an act of gross dishonesty in that on or about 19 of May 2012 near or at Department of Home Affairs, Sasolburg Local

Office, whilst on duty you processed the applications of passports for Mr TP Speke and Mrs MI Sepheka without following correct procedures.'

'Allegation 2

it is alleged that you committed an act of gross dishonesty in that on or about 19 of May 2012 near or at Department of Home Affairs, Sasolburg Local Office, whilst on duty you failed to collect the amount of approximately R800.00 for applications of passport belonging to Mr TP Sepheka and Mrs MI Sepheka.'

'Allegation 4

it is alleged that you committed an act of gross dishonesty in that on or about 28 and 29 of February 2012 at or near Department of Home Affairs, Sasolburg Local Office, you closed the cash register and did not hand over the collected revenue to Finance Section for banking, as a result the Department suffered a loss to the amount of approximately R4 400.00 for passport applications.'

The award

[5] The First Respondent concluded that the Applicant's dismissal was substantively fair. The core of her reasoning was the following:

'Allegation 1

52. The Respondent alleges that the Applicant processed the passport applications on 19 of May 2012 without following the correct procedure. The clause 2.13 of the Passport Manual Guide, states that "Regulation 3(3)(g) provides for the issuing of a second passport holder in the circumstances as stipulated. Applications to hold a second passport must be considered at the level of at least Senior Administrative Officer. "It was not disputed that the Senior Administrative Officer was not on duty on this date. However, the Applicant argued that they sought and granted approval from this official on 15 of May 2012 to this official. There was no evidence led to show that this official was not at work on this date.

53. However, the Respondent's evidence suggest that the physical application forms were not completed, as they were not found at Finance and

Archives Sections. Mbola and the Applicant corroborated each other in that they were duly completed on 15 of May 2012. However, the Applicant conceded that the details on the application forms are captured and scanned to the system. This implies that even if the physical application form cannot be located but the scanned copy can be retrieved from the system. However, it is not clear, as to why the Applicant did not produce this existence to substantiate her version.

54. The Respondent's witnesses also indicated that the Applicant did not update the system to show that she collected these passports. The Applicant argued that the system was offline on the day of collection and the list was compiled and sent to the Head Office in this regard. This appears, as if it is duty of the Head Office officials to update the system to show the collection dates. However, the Applicant's evidence would have carried more weight if she had furnished such a proof or if this version was corroborated by any other evidence.

Allegation 2

55. The Respondent alleges that the Applicant failed to collect the amount of approximately R800.00 for her and husband's passports on 19 of May 2012. The Respondent's witnesses corroborated each other in that the copies should have been triplicated, also to be kept by the Applicant and her husband, the other two copies to be handed over to Finance and Archives Section. However, she argued that she did not collect the money because she was not working as a cashier on this day. It is probable that she was not the cashier on this day, however they should have been a proof to show that such payment particularly, as involves her and spouse application.

56. I noted the Applicant's version which was corroborated by Mbola and her spouse that the money was paid on 15 of May 2012. However, the Applicant's spouse contradicted himself regarding who assisted him to make payment. Under cross-examination, he stated that he paid to the cashiers as opposed to his initial statement that it was Du Plessis on 15 of May 2012. It is probable that he had forgotten, as these events occurred in approximately eight years ago. However, the proof of payment should have been produced at the initial stages of these investigation regardless of the date it was made.

Allegation 4

57. The Respondent alleges that the Applicant closed the cash register and she did not hand over the collected revenue at Finance Section for banking on 28 and 29 of February 2012, as a result they suffered a loss to the amount of approximately R4 400.00 for passport applications. Majoro argued that on 29 of February 2012, the Applicant assisted LL Mashishi, C Mchavi, CP Henery and J Machakata but Finance Section did not receive payments for these applications. The Applicant conceded that she assisted above clients except LL Mashishi with the applications for the passports and finger prints.

58. Du Plessis argued that on 28 and 29 of February 2012, there were 24 receipts however the applications with reference number: 7973, 7977, 7978, 7980, 7982, 7985, 7987, 7990, 7992, 7994 were found in archives. The Applicant argued that the Respondent did not produce any receipts as evidence to validate her case in these proceedings and Finance Section would have enquired the very next day if money was handed over to them. The Applicant's version is probable that this claim was not probable supported by any other evidence.

59. Majoro argued that cashiers were exonerated of any wrongdoing, as they confirmed that they handed the money to the Applicant. Further stated that it was also discovered that the system was closing more than once, as they had two shifts. This evidence also would have carried more weight if it was corroborated by any other evidence.

60. Majoro further argued that cashiers and the Applicant were expected to co-signed the cash register book which could not be found for verification. Further averred that the cashiers confirmed that they have enclosed their cash register in the presence of their supervisor during the investigation. I noted that it was corroborated that the cash book could not be located at the office. However, it is not clear, as why the Respondent found the cashiers more credible than the Applicant. Therefore, this evidence would have carried more weight if they were called as witnesses or if the investigation report was tendered as evidence in these proceedings.'

[6] From the abovementioned, it is apparent that the First Respondent has failed to properly analyze the evidence before her for the following reasons:

6.1. it is commonly known principle that arbitration proceedings are heard *de novo,* which means that when a dispute goes to arbitration, it will be heard completely afresh, with all evidence presented anew, as if the initial hearing never happened.

6.2 Based on the abovementioned principle, the employer, therefore, bears the onus to demonstrate that the dismissal was procedurally and substantively fair. That much said, it is evident from the arbitration award that the Applicant and her witness, Mbola, corroborated each other on allegation 1, after having testified that the physical application forms were completed, although they could not be located as they were not found at Finance and Archives Section. In actual fact, it is the full responsibility of the Third Respondent to ensure that at all material times, records are kept safe, and in this instance, it has failed to do so. The Applicant, therefore, cannot be expected to adduce such evidence eight years later when invited to arbitration proceedings.

6.3 For purposes of Allegation 2, the First Respondent on paragraphs 55 and 56 of the Arbitration Award emphasizes the fact that the Applicant's husband ought to have produced proof that payment in the amount of R800.00 was paid for the passport applications. That much said, it is common cause that the incident in question occurred eight years ago, and the customer cannot be expected to keep a payment receipt for passport applications which have already been approved and received. Instead, the Third Respondent, being the custodian of the records, ought to be in possession of such documents. In addition to the above, the Third Respondent ought to have ensured that issues such as payments are verified the same day or at least the following day, you do not have to wait for two years unless it intended to conduct an investigation and in this instance, there has not been any investigation report presented by the Third Respondent.

6.4. As for Allegation 4, it has become apparent that the records have been misplaced at the Third Respondent's offices, therefore crucial documents such as receipts and cash books, could not located and this conduct cannot solely be attributed to the Applicant, and as stated above, it is the Third

Respondent's full responsibility to ensure that it has proper control channels and mechanisms to keep records safe and in this instance, it has been found wanting. Although the First Respondent in Allegation 4 questioned the credibility of the testimony of the Third Respondent's witnesses, it is unclear on what grounds the Applicant was in the end still found guilty on the charge.

Review test and evaluation

[7] The *Sidumo* test remains the landmark judgment in review applications, therefore, this Court is obliged to consider the reasonableness test as postulated by the Constitutional Court in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[1]. The question is, therefore, whether the decision arrived at by the commissioner is one that a reasonable decision-maker could reach, having regard to the material properly before them.

[8] The Labour Appeal Court (LAC) in *Head of the Department of Education v Mofokeng and Others*[2] held that:

'irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide a compelling indication that the arbitrator misconceived the inquiry. In the final analysis, it will depend on the materiality of the error or irregularity and its relation to the result. Whether the irregularity or error is material must be assessed and determined with reference to the distorting effect it may or may not have had upon the arbitrator's conception of the inquiry, the delimitation of the issues to be determined and the ultimate outcome. If but for an error or irregularity a different outcome would have resulted, it will *ex hypothesis* be material to the determination of the dispute. A material error of this order would point to at least a prima facie unreasonable result.'

[9] It is of significance to state that the incidents with which the Applicant is charged took place during the year 2012, and she was only charged with misconduct

[1] [2007] ZACC 22; [2007] 12 BLLR 1097 (CC).
[2] [2014] ZALAC 50; [2015] 1 BLLR 50 (LAC) at para 33.

two years later. The question is, therefore, why did it take so long for the Third Respondent to charge the Applicant of the misconduct? Justice delayed is justice denied is a known common law principle which aims to prevent undue delays in litigation that undermine the fundamental rights of individuals and impede the administration of justice. It is common cause in the present matter that the Third Respondent has taken at least two years to institute disciplinary proceedings for the misconduct that occurred in the year 2012, and there has not been a single shred of evidence on the reasons for such delays.

[10] In the reportable Labour Court judgment of *Moroenyane v Station Commander of the South African Police Services – Vanderbijlpark*[3], the Labour Court laid down the following test regarding delay:

> '[38] In deciding whether a delay could possibly serve to render the institution or continuation of disciplinary proceedings unreasonable and unfair, guidance in be found in referring to the issue of a stay in criminal proceedings due to an undue delay in such proceedings. In *Bothma v Els and Others*[4] the Court considered the question of a permanent stay of a private prosecution due to a delay in the bringing of the prosecution. Sachs J said:[5]
>
> "…. the delay in the present matter must be evaluated not as the foundation of a right to be tried without unreasonable delay, but as an element in determining whether, in all the circumstances, the delay would inevitably and irremediably taint the overall substantive fairness of the trial if it were to commence."
>
> In then considering whether a delay would taint overall substantive fairness, Sachs J referred with approval to the following *dictum* from the judgment in *Sanderson v Attorney-General, Eastern Cape*[6]:
>
> "…. The critical question is how we determine whether a particular lapse of time is reasonable. The seminal answer in *Barker v Wingo* is that there is a 'balancing test' in which the conduct of both the prosecution and the accused are weighed and the following considerations examined: the length of the

[3] (J1672/2016) [2016] ZALCJHB 330 (26 August 2016).
[4] 2010 (2) SA 622 (CC).
[5] Id at para 35.
[6] 1998 (2) SA 38 (CC) at para 25.

delay; the reason the government assigns to justify the delay; the accused's assertion of his right to a speedy trial; and prejudice to the accused."

Sachs J then added the following:[7]

"A word of caution: these four factors should not be dealt with as though they constitute a definitive check list. A balancing test necessarily compels courts to approach speedy trial cases on an ad hoc basis. ...."

The learned judge finally concluded:[8]

"To the list …. must be added a further factor, one not considered by the High Court. I refer to the nature of the offence. …. Without placing the specific nature of the offence in the scales, the balancing exercise is itself unbalanced."

[39] If one applies these considerations in *Sanderson* to delayed disciplinary proceedings, what has to be considered, in deciding whether the delay is unreasonable to the extent of bringing about the final termination of the proceedings, is the length of the delay, the explanation justifying the delay being inexcusable or not, the assertion of a right to a speedy hearing by the employee, the issue of prejudice, and finally the nature of the alleged offence. This approach was indeed adopted by the SCA in *Cassimjee v Minister of Finance*[9] where the Court said:

"There are no hard-and-fast rules as to the manner in which the discretion to dismiss an action for want of prosecution is to be exercised. But the following requirements have been recognized. First, there should be a delay in the prosecution of the action; second, the delay must be inexcusable; and, third, the defendant must be seriously prejudiced thereby. Ultimately, the enquiry will involve a close and careful examination of all the relevant circumstances, including the period of the delay, the reasons therefor and the prejudice, if any, caused to the defendant. There may be instances in which the delay is relatively slight but serious prejudice is caused to the defendant, and in other cases the delay may be inordinate but prejudice to the defendant is slight. The court should also have regard to the reasons, if any, for the defendant's

[7] Id at para 37.
[8] Id at para 38.
[9] 2014 (3) SA 198 SCA at para 11.

inactivity and failure to avail itself of remedies which it might reasonably have been expected to use in order to bring the action expeditiously to trial."

[40] In the employment law context, the approach in dealing with whether disciplinary proceedings should be ended on the basis of a delay is firmly founded in considerations of fairness. The former Industrial Court dealt with a delay in the conduct of a disciplinary hearing in the judgment of *Union of Pretoria Municipal Workers and Another v Stadsraad van Pretoria*[10] and said:

> "Fairness, however, dictates that disciplinary steps must be taken promptly. Both the staff regulations and the recognition agreement echo the need for prompt action as all time-limits must be adhered to strictly and time-limits are provided for in paras 5.2.5 and 5.3.1. In *Mahlangu v CIM Deltak* (1986) 7 ILJ 346 (IC) one of the guide-lines for a fair hearing was a right to have the hearing take place 'timeously'. In Brassey & others *The New Labour Law* it is said that the enquiry must be held promptly. Article 10 of ILO Recommendation 166 suggests that:
>
> 'The employer should be deemed to have waived his right to terminate the employment of a worker for misconduct if he has failed to do so within a reasonable period of time after he has knowledge of the misconduct.'"

[41] The current Labour Court followed suit, in the judgments of *Department of Public Works, Roads and Transport v Motsoso and Others*[11] *and Rope Constructions Co (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*[12] where the Labour Court referred with approval to the judgment in *Stadsraad van Pretoria*. I cannot find any fault with such an approach, in principle, provided that it is always subject to the kind of considerations as set out in the judgments of *Sanderson* and *Cassimjee*.

[42] In summary, I do not believe that what may be considered to be a lengthy delay in the institution, and then conclusion, of disciplinary proceedings, can per se lead to a conclusion of unreasonableness and unfairness. A disciplinary hearing

[10] (1992) 13 ILJ 1563 (IC) at 1659A-C.
[11] [2005] 10 BLLR 957 (LC).
[12] (2002) 23 ILJ 157 (LC) at paras 4 and 13.

cannot be directed to be aborted just because there is a long delay. More is needed. What must always be considered, in deciding whether to finish off disciplinary proceedings because of an undue delay, is the following:

42.1 The delay has to be unreasonable. In this context, firstly, the length of the delay is important. The longer the delay, the more likely it is that it would be unreasonable.

42.2 The explanation for the delay must be considered. In this respect, the employer must provide an explanation that can reasonably serve to excuse the delay. A delay that is inexcusable would normally lead to a conclusion of unreasonableness.

42.3 It must also be considered whether the employee has taken steps in the course of the process to assert his or her right to a speedy process. In other words, it would be a factor for consideration if the employee himself or herself stood by and did nothing.

42.4 Did the delay cause material prejudice to the employee? Establishing the materiality of the prejudice includes an assessment as to what impact the delay has on the ability of the employee to conduct a proper case.

42.5 The nature of the alleged offence must be taken into account. The offence may be such that there is a particular imperative to have it decided on the merits. This requirement however does not mean that a very serious offence (such as a dishonesty offence) must be dealt with, no matter what, just because it is so serious. What it means is that the nature of the offence could in itself justify a longer period of further investigation, or a longer period in collating and preparing proper evidence, thus causing a delay that is understandable.

42.6 All the above considerations must be applied, not individually, but holistically.

[43] In addition to what I have dealt with above, there may well be, depending on circumstances, another basis where an undue delay can serve to scupper the institution or continuation of disciplinary proceedings. This is founded, as said in *Stadsraad van Pretoria*, on the principle of waiver. This kind of case would be an assertion that because of the delay, it has to be inferred that that employer has

waived its right to take disciplinary action against the employee. To succeed with such a case, the employee would have the duty to satisfy all the legal requirements relating to waiver. In *National Union of Metalworkers of SA v Intervalve (Pty) Ltd and Others*[13] the Court held:

> '…. Waiver is the legal act of abandoning a right on which one is otherwise entitled to rely. It is not easily inferred or established. The onus to prove it lies with the party asserting waiver. That party is required to establish that the right-holder, with full knowledge of the right, decided to abandon it.
>
> So waiver depends on the intention of the right-holder. That can be proved either through express actions or by conduct plainly inconsistent with an intention to enforce the right. ….'

[44] Waiver has a further nuance. *In Greathead v SA Commercial Catering and Allied Workers Union*[14] the Court said that: '…The appellant could not have considered abandoning his rights if he (and his legal advisers) had not appreciated it'. This same approach was followed by the Labour Court in *EHCWAWU Obo Tshabalala and Others v M & P Bodies CC*[15] where it was held that: 'It is also trite that before a waiver can be upheld, it must be demonstrated that the person who is alleged to have waived his or her right knew that he or she was waiving her right….'. Finally in this respect, it cannot just be assumed there was a possible waiver, considering the following *dictum* in *Ullman Bros Ltd v Kroonstad Produce Co*.[16] '…A waiver is not presumed, but must be clearly established by the party who relies on it. ….'. As to what constitutes 'clear establishment', the Court in *Victoria Falls and Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd*[17] referred with approval to the following extract from the judgment of *De Villiers CJ, in Smith v Momberg* (12 SC 295):

> 'Under certain circumstances a renunciation of rights may be implied from the conduct of the person entitled to them, but his conduct must be such as to leave no reasonable doubt in the mind that he not only knew what his rights were, but intended to surrender them.'

---

[13] (2015) 36 ILJ 363 (CC) at paras 60 – 61.
[14] (2001) 22 ILJ 595 (SCA) at para 17.
[15] (1999) 20 ILJ 1787 (LC) at para 26.
[16] 1923 AD 449 at 454.
[17] 1915 ad 1.

[11] Having regard to the above-mentioned legal principles, it is clear that the First Respondent did not put much weight on the delay by the Third Respondent in instituting the disciplinary hearing proceedings against the Applicant which, in my view, is a serious error that cannot be ignored by this Court. That much said; It is common cause that the Third Respondent has delayed instituting the disciplinary proceedings at least by two years, no explanation of the delay was provided by the Third Respondent whatsoever and further that the delay has caused material prejudice to the Applicant in that the Applicant could not locate most of the required documentation to support her testimony.

[12] By the time the matter reached the arbitration proceedings stage, it was already eight years, and therefore, such can be categorized as unreasonable.

[13] As stated above that the First Respondent has also failed to analyze the evidence provided in the arbitration proceedings it would have been feasible that the matter be referred back to the Second Respondent to be arbitrated afresh by a commissioner other than the First Respondent, however because of the delay caused by the Third Respondent in instituting the disciplinary hearing proceedings against the Applicant so much prejudice has already been caused to the Applicant coupled with the fact that the Third Respondent has misplaced the proper record of the required documentation such as application forms, cash books and payment receipts, all these factors will render the rehearing of the matter a futile exercise.

[14] In consideration of the above mentioned applicable legal principles and based on what I have discussed, *supra* and more importantly, the evidence assessment in paragraph 6 above, this Court finds that the Third Respondent has failed to discharge its onus on the balance of probabilities and further to the above, this Court finds the delay by the Third Respondent in instituting the disciplinary hearing proceedings against the Applicant to be unreasonable, worsened by the fact that the Third Respondent did not provide any explanation for such delay whatsoever.

[15] The Applicant has also applied for condonation for the late filing of the review application. The review application appears to have been filed 23 days late, and this was during the COVID-19 pandemic. This Court has a wide judicial discretion to grant condonation if it would be in the interests of justice to do so after primarily considering the following interrelated factors: the degree of lateness, the explanation for the lateness, and the applicant's prospects of success in the main dispute. Having considered the Applicant's averments in her founding affidavit as well as the legal principles raised by this Court in the review application, this Court finds that it would be in interests of justice to grant the application for condonation.

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

Order

1. The application to condone the late filing of the review application under case number JR1837/20 is granted.
2. The arbitration award granted by the First Respondent on 26 August 2020 under case number GPBC 2481-14 is reviewed and set aside;
3. The First Respondent's award is substituted with an order that the dismissal of the Applicant is substantively unfair.
4. There is no order as to costs.

S Maluleke
Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Mr. Andrew Goldberg of Goldberg Attorneys
For the Third Respondent:	Adv. Zondo
Instructed by:	The State Attorney