IN THE LABOUR COURT OF SOUTH AFRICA

(HELD IN CAPE TOWN)

CASE NO: C 511/2023

Not Reportable

In the matter between:

MARION DE WET	**Applicant**
and	
CCMA	**First Respondent**
MELWYN NASH N.O.	**Second Respondent**
STRATEGIC FUEL FUND ASSOCIATION NP	**Third Respondent**

Heard: **24 October 2024**

Judgment delivered: **2 January 2025**

JUDGMENT

WHITCHER J

Introduction

[1] This is a review application in terms of section 145 of the Labour Relations Act, 1995.

[2] The applicant seeks to have the award issued by the second respondent (the Commissioner) in her unfair labour practice dispute with the third respondent (SFF) reviewed and set aside and substituted with an order that her suspension by SFF constituted an unfair labour practice, and as a result she is entitled to six month's compensation.

[3] The test in *Sidumo* dictates the resolution of the controversy, i.e. was the Commissioner's decision one to which no reasonable arbitrator could come on the issues he was called upon to decide and the evidence that served before him.

[4] Further to the above, the Labour Appeal Court in *Makuleni v Standard Bank of South Africa Ltd and Others*,[1] reiterated that:

> …At the heart of the exercise is a fair reading of the award, in the context of the body of evidence adduced and an even-handed assessment of whether such conclusions are untenable. Only if the conclusion is untenable is a review and setting aside warranted.

[5] While SFF opposed this application, they did not attend the arbitration[2], so the review is obviously assessed on the issues and evidence adduced at arbitration by the applicant.

The issues and evidence adduced by the applicant at arbitration

[6] SFF is a wholly owned subsidiary of the Central Energy Fund SOC Ltd. They are public entities listed in Schedule 2 of the Public Finance Management Act 1 of

[1] (2023) 44 ILJ 1005 (LAC).
[2] They explained there was an error in the email address used by the CCMA, but decided not to take issue with the matter decided in their absence because the award is in their favour.

1999 (‘the PFMA’). The SFF acquires, maintains, monitors and manages the country's strategic energy feed stock and carriers to ensure security of supply.

[7] The applicant commenced employment with SFF on 28 April 2015 as the General Manager: Commercial.

[8] In 2015/2016, SFF sold 10 million barrels of South Africa’s strategic stock of crude oil. The Board discovered the matter in February 2016. Following a forensic investigation, SFF filed to have the transactions reviewed and set aside. Judging from the applicant’s reference to pleadings at the arbitration, it seems the application was filed in 2017. In a judgment delivered on 20 November 2020, the High Court found that the transactions were unlawful and set them aside. The Court found that the person responsible for the unlawful transactions was the then Acting CEO, S Gamede, but expressed strong dissatisfaction with Gamede’s management team which included the applicant. The court also found that they failed to alert the Board regarding the transactions.

[9] The Court stated, *inter alia*:

> *Although Gamede was driving the improper disposal process and to a large extent made decisions on his own he could not have achieved what he did without the acquiescence or supineness of SFF’s senior managers and directors…The board was allowed to go in ignorance of what was happening until 5 February 2016.*

[10] Following the judgment, SFF initiated a further forensic investigation by Gobodo Forensic and Investigative Accounting (Gobodo).

[11] In a report dated 5 February 2021, Gobodo found that, notwithstanding the suggestions in the judgment, the applicant played no role in the disposal of the strategic stock. Their only criticism of her was articulated as follows:

> *It may be argued that between 19 January 2016, when she became aware of the sale of the strategic stocks, and on 5 February 2016, when the SFF Board*

was informed of the sale for the first time, she failed to communicate to the Board at the earliest practicable opportunity…the sale of the strategic crude oil stocks. This would be particularly applicable to her having remained silent at the BARC meeting on 27 January 2016.

[12] Two years after the Gobodo report, SFF placed the applicant on precautionary suspension pending disciplinary proceedings.

[13] On 27 February 2023, SFF dispatched the following notice to the applicant:

You are hereby notified that SFF intends to place you on precautionary suspension pending finalisation of a disciplinary hearing against you for your alleged involvement in the unlawful sale of South Africa's strategic stock…
As you may be aware, the sale was declared unlawful invalid and set aside on 20 November 2020 by [the High Court].
I am of the view that the intended suspension is justified because, amongst others, the alleged misconduct is very serious and/or that your continued presence in the organisation may prejudice the envisaged disciplinary process.

[14] In her response to the notice, the applicant contended that the suspension was unwarranted. She reasoned that she had not been involved in the unlawful sale; she gave her full cooperation in all the forensic and criminal investigations; and SFF had known about the matter since 2016 and in all that time there was no suggestion or concern that she was involved in or may be involved in the destruction or interference of evidence.

[15] In reply, on 7 March 2023, SFF confirmed the applicant's suspension. Their justification:

Notwithstanding your representations, the company considers that your continued access to the workplace pending the finalisation of a disciplinary process may be prejudicial to the company – given your seniority and the seriousness of the allegations against you.

> *Please note that [in the matter in the High Court and Supreme Court of Appeal] your involvement in those transactions was sharply raised. This contradicts your continued denial of any involvement in those transactions.*

[16] "Shortly thereafter" the applicant was served with a charge sheet, containing two charges of misconduct. Other than this statement and mention of a sitting in August 2023, no evidence was adduced to when the applicant was served with the disciplinary notice.

[17] In the first charge, SFF *inter alia* alleged with details that notwithstanding the Gobodo report, evidence submitted in the High Court matter indicated that the applicant had been aware of the *intended* disposal of the crude oil and in fact assisted Gamede in negotiating, drafting and concluding the agreements with Vitol.

[18] The second charge related to the applicant's alleged failure to inform the Board about the transactions, as set out in the Gobodo report.

[19] The charge sheet highlighted the fact that SFF is a public entity listed in Schedule 2 of the Public Finance Management Act 1 of 1999 ('the PFMA').

[20] Grieved, the applicant *inter alia* filed an unfair labour practice dispute concerning her precautionary suspension. The dispute was filed two months into her suspension. The matter was arbitrated on 18 September 2023 whereupon an award was issued rejecting the applicant's claim that her precautionary suspension was unfair. The review lies against that finding.

[21] While not articulated in a structured manner at arbitration, it is evident that the applicant elected to challenge her suspension on the following grounds:

> (a) SFF, in failing to take any *disciplinary action* against her from the time the Board became aware of the transactions in 2016 and/or from the date of the second Gobodo report in February 2021 to the date of her suspension coupled with their failure in those time periods to indicate an intention to take disciplinary action against her, waived its right *to take* any *disciplinary action*

against her. It was argued that if SFF intended to take disciplinary action against her, it had a duty to speak in that time. In the event of it being found that there was *such* a waiver, it was argued that the suspension was automatically unfair.

(b) The alleged unreasonable delay *in disciplining her* also automatically meant that her suspension was unfair.

(c) Her suspension served no rational and fair purpose because she posed no threat to the investigations, which were concluded two years before she was suspended.

(d) Her suspension caused her considerable humiliation and prejudice. According to the applicant, she was at a conference when she was informed about her impending suspension and judging from how other attendees treated her, they had obviously heard about it. Further, she had just completed her PhD and the university had nominated her to take part in a project that sits in the Presidency. However, SFF refused to permit her to take up the nomination/secondment citing her suspension. This meant she lost out on extra income and career opportunities. She had also received a prestigious academic award in November 2022 and was worried that she may lose the award as a result of the suspension.

[22] Before I turn to the Commissioner's findings, an important point: the applicant in her review application took issue with only the Commissioner's findings in respect of (a), (b) and (c) above. How the Commissioner approached the issue of alleged humiliation and prejudice, if at all, was not raised in the pleaded grounds of review, and accordingly will not be addressed in this judgment.

[23] The Commissioner found no merit in the waiver and unreasonable delay argument. He reasoned as follows:

Objectively viewed, the respondent always treated the matter as a priority. There were steps taken to deal with the status of the deal with the High Court *litigation. These measures signify that the outcome of those processes would have a bearing on whether actions should be taken against individuals. Overall, it is not as though the respondent sat back and decided to not give the matter its due attention and this says much about its intention as to whether it intended to abandon its right to take disciplinary action. As such I conclude that the waiver argument cannot be sustained.*

…

In relation to the argument of unreasonable delay my sentiments are the same that despite the matter dating back a considerable period, the delay was not unreasonable given there were processes in motion that impacted on the decision whether to proceed with disciplinary action against the applicant.

[24] The Commissioner also considered that SFF explained the delay following the Gobodo report, albeit at the disciplinary enquiry and that the applicant had been aware that SFF in that time was conducting disciplinary enquiries against the other Exco members implicated by the High Court. He stated:

…the applicant's account of the reasons given as to why action was not taken against her included that she must have known that disciplinary action was coming given that other individuals were in the process of disciplinary enquiries and further that disciplinary action was imposed gradually so as not to disrupt operations. The applicant testified that she was aware of other disciplinary actions, but she came to know thereof from outside the organisation. If so, irrespective of how it came to her knowledge, she would have known that disciplinary action was taken based on the controversial sale agreement. Based on the applicant's account the other two individuals were Exco' members and she too was one so it was not unreasonable to suspect that Exco members would be under the spotlight.

[25] As to the applicant's claim that her precautionary suspension was unnecessary and thus unfair because all investigations were complete and so she posed no threat to integrity of the investigation, the Commissioner found that the "matter was not a run of the mill matter." It involved high profile individuals, huge amounts of money and had received public attention. In these circumstances, it was

not unreasonable for SFF to adopt a cautious approach and put contingencies in place to protect the integrity of the disciplinary hearing.

[26] In my view, the applicant failed to demonstrate that the Commissioner failed to consider material evidence – as alleged – and that his conclusions are untenable. In fact, the award is soundly reasoned.

[27] Waiver is the legal act of abandoning a right on which one is entitled to rely and can be proved either through express actions or by conduct plainly inconsistent with an intention to enforce the right.[3]

[28] The evidence revealed that SFF's conduct was not *plainly* inconsistent with an intention to enforce its right to bring disciplinary proceedings against Exco members and Gamede's team implicated in whatever way in the unlawful transactions.

[29] On the applicant's own evidence, SFF instituted various investigations in connections with the unlawful transactions: a forensic investigation followed by a substantial court application followed by a further forensic investigation. The applicant led no evidence that the investigations were not instituted within a reasonable time after discovery of the transactions and that the investigations were uncomplicated and thus not time consuming; and, on her own account, she was very much aware of all these investigations.[4]

[30] Further on her own account, she was implicated in some way by the High Court judgment and the Gobodo report.

[31] Also, on her own account, she had been aware that SFF was busy holding disciplinary enquires against Exco members implicated by the High Court and forensic investigations.

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[3] *NUMSA v Intervalve (Pty) Ltd and Others* (2015) 36 ILJ 363 (CC) at paras 60-61.

[4] See the applicant's response to the notice of intention to suspend and her evidence that she provided an affidavit in the High Court matter.

[32] In these circumstances there was no so-called duty to speak. Her contention that she never expected to be charged because in her view she had not misconducted herself in any way was irrelevant.

[33] In any event, there is authority to the effect that no public entity may renounce a right introduced not only for its own benefit, but in the interests of the public as well in the absence of good reason[5] - good reason being for example an opinion from a proper authority that its case against the employee has poor prospects of success.

[34] As also pointed out by the Constitutional Court in *Khumalo and Another v Member of the Executive Council for Education: KwaZulu-Natal:*[6]

> 'Section 195 provides for a number of important values to guide decision makers in the context of public sector employment. When, as in this case, a responsible functionary is enlightened of a potential irregularity, s 195 lays a compelling basis for the founding of a duty on the functionary to investigate and, if need be, to correct any unlawfulness through the appropriate avenues. This duty is founded, inter alia, in the emphasis on accountability and transparency in s 195(1)*(f)* and *(g)* and the requirement of a high standard of professional ethics in s 195(1)*(a)*. ….'

[35] These principles were alluded to in the charge sheet issued to the applicant.

[36] As to the proposition that SFF unreasonably delayed in bringing disciplinary proceeding against the applicant and that automatically meant her suspension was unfair, it is trite that a delay in bringing disciplinary action *per se* does not automatically render the disciplinary proceedings unfair. A significant factor is whether there is objective evidence that the delay <u>will</u> materially prejudice the

[5] *Die Suider-Afrikaaanse Kooperatiewe Sitrousbeurs Beperk v Die Direkteur-Generaal: Handel en Nywerheid and another* [1997] 2 ALL SA 321(A); *SA Eagle Insurance Co Ltd v Bavuma* 1985 (3) SA 42 (A).
[6] (2014) 35 ILJ 613 (CC) at para 35.

employee's ability to conduct a proper defence.[7] The applicant led no evidence to this effect.

[37] But more importantly, as correctly found by the Commissioner, there was no unreasonable delay – at all critical times SFF was dealing with the matter of the unlawful transactions – conducting relevant investigations, filing a critical court application and conducting disciplinary enquires against other management employees and Exco members.

[38] Finally, the concepts of an unfair disciplinary hearing and that of an unfair suspension are materially different and judged by different factors – how the one in law automatically renders the other unfair was not addressed at arbitration.

[39] Which brings the court to the applicant's final ground of review - that the Commissioner failed to appreciate that her suspension served no fair purpose as all the investigations were complete. Here again, the Commissioner's reasoning was sound, particularly since it has been confirmed by the Constitutional Court that a precautionary suspension may be implemented to safeguard the integrity of a pending hearing (not just investigation) and/or the Office of the employer pending the hearing.[8] SFF pertinently relied on these considerations when it made the decision to proceed with the suspension, as stated in the letter. The applicant did not say why these considerations were unfair.

[40] To the extent that the issue of humiliation and prejudice may be considered in this review – the evidence on this matter was wholly insubstantial, vague and speculative. There was no evidence that the award was lost and that that she was entitled to the secondment in terms of her contract.

[41] For all these reasons, the application is dismissed, with no order as to costs.[9]

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[7] See: *Moroenyane v SAPS* [2016] ZALCJHB 330], including the Constitutional Court judgments referred to therein.
[8] See: *Long v South African Breweries (Pty) Ltd and Others* [2018] ZACC7; *Democratic Alliance and Another v Public Protector of South Africa and Others* [2023] ZACC 25.
[9] The third respondent did not seek costs.

Benita Whitcher

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant:	C De Kock, instructed by CK Inc. Attorneys
For the Third Respondent:	T Govender, instructed by Diale Mogashoa Attorneys