REPUBLIC OF SOUTH AFRICA

Reportable

THE LABOUR APPEAL COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

Case no: JA37/09

In the matter between:

AFROX HEALTHCARE LIMITED **Appellant**

and

THE COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION **First Respondent**

HLONGWANE NO **Second Respondent**

NQOPHISO A **Third Respondent**

Date of Hearing: 13 May 2011

Date of Judgment: 28 February 2012

Summary: Labour Law - Review of CCMA award – reasonable decision maker standard – Constitutional standard of reasonableness explored – rational objective basis – focal issue remains the material placed before decision maker

and decision arrived at - Dismissal – ICU ward supervisor negligent – fair to dismiss.

JUDGMENT

MLAMBO JP

[1] On 20 May 2002, a patient underwent surgery for subdural bleeding at the Glynwood Hospital, one of the appellant's hospitals situated in Benoni, in the East of Johannesburg. The operating neurologist was satisfied that the operation had gone well and expected the patient to make a recovery to the extent that she would be served breakfast in the next morning. After the surgery, the patient was admitted in the hospital Intensive Care Unit (ICU) ward for the necessary specialised care and observation during the night.

[2] The third respondent (Nqophiso) was the night shift nursing supervisor of the ICU ward that night and he entrusted the individual care of the patient to nursing sister Lehong (Lehong). The patient however succumbed and died the following morning sometime after Nqophiso and Lehong had completed their shift. As is standard procedure when such unfortunate incidents occur, the hospital management instituted an investigation regarding the death of the patient. At the conclusion of that probe, both Nqophiso and Lehong were charged with negligence and subjected to disciplinary processes. The charges against Nqophiso were that he had failed to supervise untrained staff and that he had failed to act in a responsible manner when a suspicion of deterioration in the condition of the patient was reported.

[3] In the ensuing disciplinary enquiry, Nqophiso was found guilty and consequently dismissed. Lehong's fate was similar. Nqophiso, however, contested the fairness of his dismissal and lodged an appeal which was unsuccessful. He then referred

a dispute to the first respondent, the Commission for Conciliation Mediation and Arbitration (CCMA) for resolution through conciliation and arbitration. As it turned out, conciliation failed and arbitration ensued presided over by the Second Respondent (the commissioner).

[4] At the conclusion of the arbitration proceedings, the commissioner concluded that the appellant, by not calling Lehong to testify, had failed to substantiate its case of lack of supervision and unreasonable conduct on the part of Nqophiso leading to the death of the patient. The Commissioner further found that the appellant had not shown that it was Nqophiso's negligence that caused the patient's demise. On this basis, the commissioner concluded that Nqophiso's dismissal was unfair. He issued an award in terms of which Nqophiso was reinstated in the appellant's employ coupled with compensation equivalent to 12 month's salary. However, the appellant instituted proceedings in the Labour Court seeking to review and set aside the award. The essential ground of the review was that there was no rational connection between the evidence placed before the commissioner and his conclusion. The appellant further asserted that it was irrational for the commissioner to have expected the appellant to show that Nqophiso's negligence had caused the patient's death. The reviewing Judge in the Labour Court, Leeuw AJ,[1] (as she was then) was however not persuaded and dismissed the application with costs. She also refused to grant the appellant leave to appeal which leave was subsequently granted by this court.

[5] The issue before us, as has become customary in such matters, is the reasonableness of the commissioner's award in which it was found that the appellant had led no evidence to substantiate the charges it proffered against Nqophiso, leading to the conclusion that no negligence on his part had been shown. This is the main and probably only reason that the appellant's case floundered in the CCMA and in the Labour Court. That reason is rooted in the commissioner's view that the appellant had not called Lehong to support its

[1] Leeuw was at the time a Judge of the North West High Court but was acting in the Labour Court. She was subsequently appointed to the Labour Appeal Court and as Judge President of the North West High Court.

assertion that Nqophiso had failed to supervise her and for her to defend her entries in the patient's chart regarding the deterioration of the patient's condition. It is correct that the appellant relied mainly on documentary evidence during the arbitration proceedings which comprised witness statements including one from Lehong as well as its standard operating procedures.

[6] This being an appeal arising from a failed review of an arbitration award of a CCMA commissioner, our task is to consider the award in accordance with the reasonable decision maker standard propounded by the Constitutional Court.[2] It is primarily to that aspect that our focus in this appeal should be. Firstly, it is necessary to sketch in some detail the evidence that was before the commissioner regarding the events of the night in question. This evidence is largely common cause. I will point out the areas of disagreement where these are manifest.

[7] Nqophiso is a well qualified and experienced senior member of the nursing staff, who is held in high esteem by his peers, and members of the hospital management. He was therefore well placed and adequately competent to supervise the staff that was assigned to work in the ICU ward on the night in question. It was in any event Nqophiso's own initiative to alter the allocation made regarding the placement of the night shift nursing staff and to allocate Lehong to the patient, although he was aware that she was the least experienced. The motivation being that he desired to supervise her closely. At around midnight, Nqophiso said he became aware that Lehong had allegedly made incorrect entries on the patient's chart regarding her condition from 19h00 to 23h00. According to the entries made by Lehong in that period, the patient had showed initial signs of improvement which had then deteriorated. Nqophiso disputed these entries stating that they were contrary to his own observations of the patient whom, he stated, had remained stable throughout the night, showing no signs of either recovery or deterioration.

[2] *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (2007) 28 ILJ 2405 (CC).

[8] As observed earlier, the operating neurologist had expected the patient to have recovered sufficiently overnight to be in a position to be served breakfast in the morning. Nqophiso was also aware of the doctor's expectation though he stated that he was not aware of the period during which such recovery was expected. He further denied that he was aware of the fact that the patient was expected to have recovered sufficiently to be served breakfast in the morning. Be that as it may, Nqophiso did not make a separate note recording his own observations of the patient's condition contrasting the entries made on the patient's chart, by Lehong, which, according to the appellant's standard procedures, he could not alter. Furthermore, Nqophiso did not discuss the patient's chart entries made by Lehong as well as his own observations, with the duty doctor(s), nor with the day shift nursing personnel when he handed the ward over to them. Furthermore, at no stage did Nqophiso deem it fit to contact the patient's neurologist during the night to report the latter's condition. All these facts were before the Commissioner.

[9] The appellant's counsel submitted that the Labour Court erred when it upheld the commissioner's award as the latter had ignored critical evidence placed before him which established in no uncertain terms that Nqophiso had acted negligently on the night the patient was under his care in the ICU ward. The failure to consider such critical evidence, it was argued, rendered the resultant award deficient and therefore one that a reasonable decision maker could not have made. Nqophiso's counsel on the other hand, cautioned us, correctly in my view, that in considering the appellant's argument, we should not lose sight of the charges that were leveled at his client.

[10] The first charge was that he had failed to supervise untrained staff. In this regard, we know that Lehong was the least experienced in ICU work that night. She made entries of her observations of the patient's condition every hour from when she came on duty at 19h00. We also know that Nqophiso said he became aware after 23h00 that Lehong was making her entries incorrectly and that he had to show her how to make correct entries. He further stated that her entries did not

tally with his own observations of the patient's condition. The documentary evidence placed before the commissioner in relation to the general practice and procedure in the ICU ward was that, as the night shift supervisor, Nqophiso was required to keep close supervision of all the nurses on that shift and that all observations of patients in the ICU ward required meticulous note keeping. Such evidence, though be it documentary, also showed that, as the shift supervisor, Nqophiso was required to ensure that all documentation generated regarding the condition of each patient correctly reflected such patient's condition as well as the tests administered. It is apparent from this evidence that Nqophiso had a critical supervisory responsibility towards Lehong who he knew to be untrained and inexperienced in ICU work.

[11] This evidence, which as I have stated, was placed before the commissioner and which Nqophiso did not dispute in so far as it related to his responsibilities as night shift ward supervisor, appears to have received no attention from the commissioner i.e on a plain reading of the award. Clearly, had Nqophiso carried out proper supervision of Lehong, he would have brought to a halt her alleged incorrect chart entries early in the evening. The fact that he took no corrective action until towards midnight is testimony of his negligence in keeping Lehong under proper supervision. I must also point out that when challenged during the arbitration proceedings, to show in what respects Lehong had, as he had alleged, administered certain tests on the patient incorrectly, Nqophiso was unable to back up his assertion.

[12] The second part of the charge was that Nqophiso had failed to act in a responsible manner when a suspicion of deterioration in the condition of the patient was reported. Whilst it is correct that Nqophiso disputed the entries made by Lehong on the patient's chart, i.e that the patient initially showed signs of recovery followed by deterioration, his only explanation of failing to make a separate note regarding his own observations was that he had never done this before in his life. However, if one considers the fact that patients' charts are important sources of information to doctors and nursing personnel, he cannot escape the

consequences of his failure to separately record his own observations contradicting the entries made by Lehong. Admittedly, and if one goes by the fact that Nqophiso stated that he could not alter Lehong's entries, it appears to have been grossly negligent of him to simply hand over the ICU ward to the incoming day shift without making such a note or at the least to provide them with a verbal report of what he had observed as opposed to the chart entries. This factual matrix is missing from the commissioner's analysis.

[13] Further it is clear in the record before us that Nqophiso was also aware that the patient was expected to make a good recovery. In this regard, Nqophiso stated that he became concerned during the night when, according to his own observations, he noticed no change in the patient's condition. Due to this concern, he went to check the patient's records as well as the ambulance records to determine if any drugs were given to the patient to explain her unchanging condition. He could find no answer from the records and despite his stated concerns, he did not contact the patient's neurologist nor consult the duty doctors. Properly considered, this evidence demonstrates that Nqophiso's assertion that the patient remained stable hence he found no reason to do anything is incomprehensible but more importantly testifies to his neglect.

[14] In my view, his failure to contact the patient's neurologist was under the circumstances clearly negligent especially taking into account the fact that the doctor expected that patient to recover fully, a fact Nqophiso was well aware of. It may be so that Nqophiso may have regarded the patient's doctor as a difficult person to deal with, whom he described as a person requiring handling "with forceps". This however had to take backstage to Nqophiso's responsibilities as ward supervisor as well as the life at stake.

[15] The commissioner's reasoning in finding for Nqophiso is encapsulated in the following passage in the award:

'The company argued that chart or reports showed the following about the patient:

- *The dilation of pupils*

The confused verbal response of the patient or no response at all

The absence of any mortal response

In reply to this, the applicant maintained during the arbitration that when he checked the patient, she was clinically fine. Whether the applicant is correct or not it is a matter of evidence. The respondent has not led any evidence in this regard, cannot state if the applicant was in a position to pick up any condition that could have led to death. This is moreover if it cannot be established by the respondent if both the applicant and sister Lehong discussed the condition of the patient and made a decision of their observations.

I am alive to the fact that I am not substituting the thinking of the respondent, I must establish if the applicant has failed to carry out his duties. The correct entry on the patient's progress report was entered late in the evening of the day in question. The patient was however at all times. If a nurse who is required to check such a patient believes that the patient's life is in danger, I suppose it then becomes an academic exercise as to what would another person do under the circumstances?

The importance of Lehong would be to show if the applicant had established that the patient's condition was such that it was envisaged that the patient was going to die and that something could have been done to save her life. The respondent bore the onus of proving such and has failed to do so. Having applied my mind I find that the dismissal of the applicant was substantively unfair.'

[16] This passage represents the only portion in the whole award providing one with a sense of the analysis conducted by the commissioner of the evidence placed before him and which led him to conclude that Nqophiso's dismissal was unfair. It is clear from this passage that the commissioner's conclusion was based largely on his view that in failing to call Lehong to testify the appellant failed to show negligence on Nqophiso's part leading to the patient's death. Considering this reasoning, the conclusion is inescapable, in my view, on a holistic view of the evidence, that the commissioner, in arriving at his decision, clearly did not take proper account of the material placed before him and that he failed to conduct a

proper appraisal of some critical portions of that material. It is correct that CCMA arbitration awards should ideally be crisp and to the point. In *County Fair Foods (Pty) Ltd v CCMA and Others,*[3] Conradie JA remarked as follows regarding the approach to CCMA awards:

'Awards are expected to be brief. It seems to me to be destructive of the whole concept of CCMA arbitrations over individual dismissals that a commissioner should be held not to have applied his mind to a particular fact because it is not explicitly dealt with in his award. In casu, the commissioner approached the arbitration conscientiously.'

[17] This statement represents the approach that courts should adopt in general towards CCMA and Bargaining Council awards brought under review. This does not, however, mean that in keeping with this approach evidence that has a bearing on the ultimate conclusion of the matter should be ignored or left out of reckoning. As I point out above, the commissioner, in this matter omitted to consider evidence placed at his disposal showing that Nqophiso had been remiss in his supervisory responsibility over Lehong; in not making a separate note of his observations; nor appraising the day shift of this as well as in failing to discuss the patient's condition with duty doctors and crucially with her doctor. These are all matters implicit in the appellant's standard operating procedures for its nursing personnel which were before the commissioner. On this basis the award is irrational and clearly not one that a reasonable decision maker would have arrived at. See *Maepe v CCMA and Another,*[4] where Zondo JP stated:

'Although a commissioner is required to give brief reasons for his or her award in a dismissal dispute, he or she can be expected to include in his or her brief reasons those matters or factors which he or she took into account which are of great significance to or which are critical to one or other of the issues he or she is called upon to decide. While it is reasonable to expect a commissioner to leave out of his reasons for the award matters or factors that are of marginal significance or relevance to the issues at hand, his or her omission in his or her reasons of a matter of great significance or relevance to one or

[3] (1999) 20 ILJ 1701 ILJ (LAC), [1999] 11 BLLR (LAC) at para 47.
[4] (2008) 8 BLLR 723 LAC at para 8.

more of such issues can give rise to an inference that he or she did take such matter of factor into account.'

[18] It is important to state that my view in this matter is not because I simply hold a different view to that of the commissioner. That is impermissible. See *Fidelity Cash Management Service v CCMA and Others*[5] where this court per Zondo JP stated:

'It will often happen that, in assessing the reasonableness or otherwise of an arbirtration award or other decision of a CCMA commissioner, the court feels that it would have arrived at a different decision or finding to that reached by the commissioner. When that happens, the court will need to remind itself that the task of determining the fairness or otherwise of such a dismissal is in terms of the Act primarily given to the commissioner and that the system would never work if the court would interfere with every decision or arbitration award of the CCMA simply because it, that is the court, would have dealt with the matter differently. Obviously, this does not, in any way, mean that decisions or arbitration awards of the CCMA are shielded from scrutiny of the Labour Court on review.'

[19] What we have in the case at hand is a CCMA commissioner not taking into account all the evidence before him leading him to arrive at an unreasonable award. Compare *National Union of Mine Workers v Samancor Ltd,*[6] where the SCA reversed a judgment of this court which had itself reversed a Labour Court judgment upholding a bargaining council award. In that matter, the issue was not whether the commissioner had ignored or failed to consider evidence before him but how he treated it in making an award that the dismissal of an employee was unfair substantively and procedurally. The Labour Court had found that the award was reasonable and not susceptible to interference on review whilst this court disagreed. This court found that, on the basis of the evidence before the commissioner, the latter should have found that the dismissal of the employee was substantively fair. Remarkably, however, this court at no stage made a positive finding that the award was not one that a reasonable decision maker

[5] [2008] 3 BLLR 197 (LAC) at para 98.
[6] (2011) 32 ILJ 1618 (SCA); [2011] 11 BLLR 1041 (SCA).

would have made. The SCA, in reversing that decision, essentially found that this court had incorrectly approached the matter as an appeal and not as a review.

[20] The SCA, per Nugent JA, stated:

'Whether I would have reached the same conclusion as that reached by Mr Stemmett [the commissioner] is not germane and I express no view on the matter. It is sufficient to say that on the material before him I have no doubt that his decision was not so unreasonable that it could not have been reached by a reasonable decision maker'.[7]

This is no different to what this court said in the *Fidelity* decision as I point out above. The correct approach in matters such as this where the focus of the attack on the award is not process related but directed at the merits, especially in considering whether the mischief set out in Section 145 (2) has been shown, is to consider whether the commissioner brought his mind to bear on the material before him before making his award. This is what this court said in *Carephone (Pty) Ltd v Marcus NO and Others*[8] that:

'[I]s there a rational objective basis justifying the connection made by the administrative decision maker between the material properly available to him and the conclusion he or she eventually arrived at?'

The Constitutional Court in *Sidumo*, clearly mindful of the *Carephone* approach stated that:

'[T]he better approach is that Section 145 [of the LRA] is now suffused by the constitutional standard of reasonableness…: Is the decision reached by the commissioner one that a reasonable decision maker could not reach?'[9]

In *Samancor,*[10] the SCA remarked that in formulating what has come to be known as the reasonableness standard, the Constitutional Court in *Sidumo*

[7] Id at para 13.
[8] 1999 (3) SA 304 (LAC) at para 37
[9] Id para 110
[10] Above n 8 at para 5

"adopted what was held in Carephone that an award may also be set aside if it is one that a reasonable decision maker could not reach".

[21] The fact of the matter is that the reasonable decision maker yardstick crafted in *Sidumo*, viewed in proper context, is none other than that in the absence of a "rational objective basis" between the decision arrived at and the material placed before the decision maker, the relevant decision is clearly not one which a reasonable decision maker would have arrived at. In *Minister of Health and Another v New Clicks South Africa* (*Pty*) *Ltd and Others* (*Treatment Action Campaign and Another as amici curiae*)[11] the approach was propounded as follows:

'There is obviously an overlap between the ground of review based on failure to take into consideration a relevant factor and one based on the unreasonableness of the decision. A consideration of the factors that a decision maker is bound to take into account is essential to a reasonable decision. If a decision maker fails to take into account a factor that he or she is bound to take into consideration, the resulting decision can hardly be said to be that of a reasonable decision maker.'

See also Ngcobo CJ's remarks in the concurring judgment in *Sidumo* that:

'It follows therefore that where a commissioner fails to have regard to material facts, the arbitration proceedings cannot in principle be said to be fair because the commissioner fails to perform his or her mandate. In so doing. . . the commissioner's action prevents the aggrieved party from having its case fully and fairly determined. This constitutes a gross irregularity in the conduct of the arbitration proceedings as contemplated in section 145(2)(a)(ii) of the LRA. And the ensuing award falls to be set aside not because the result is wrong but because the commissioner has committed a gross irregularity in the conduct of the arbitration proceedings.'[12]

Viewed on this basis, clearly the award made by the commissioner *in casu* is in essence not one that a reasonable decision maker could have made.

[11] 2006 (1) BCLR 1 (CC) at para 511.
[12] Above n 2 at para 268.

[22] I now turn to the question whether in the circumstances of this case dismissal was too harsh as a sanction, as argued by Nqophiso's counsel. This is a necessary enquiry as dismissal is the ultimate sanction resulting as it does in the severance of the employment relationship. For this momentous reason, it is a sanction that should not be lightly taken and should be justified by the facts in each case.[13]

[23] In the matter at hand, counsel for the appellant has argued that every patient admitted in an ICU ward should have the confidence that every effort would be utilised to maximise that patient's chance of survival and recovery. Considering Nqophiso's experience and the respect with which he was regarded, his negligent lapses are clearly inimical to the well being of patients under his care. Such lapses are intolerable in the environment in question and in the circumstances of this case deserve no sympathy. This was a life and death situation and Nqophiso dismally failed the test despite his experience and competence. Taking into account the appellants' business and the public's expectation of a zero tolerance to the type of negligence shown here, which, in my view, impacts negatively on patient's lives, it was eminently fair to dismiss Nqophiso. I have found value in the following remarks by Conradie JA in *De Beers Consolidated Mines Ltd v Commission for Conciliation, Mediation and Arbitration and Others*:[14]

'*Dismissal is not an expression of moral outrage; much less is it an act of vengeance. It is, or should be, a sensible operational response to risk management in the particular enterprise. That is why supermarket shelf packers who steal small items are routinely dismissed. Their dismissal has little to do with society's moral opprobrium of a minor theft; it has everything to do with the operational requirements of the employer's enterprise.'*[15]

[13] *Chemical Workers Industrial Union and Others v Algorax (Pty) Ltd*. (2003) 24 ILJ 1917 at para 70.
[14] (2000) 21 ILJ 1051 (LAC) at para.22.
[15] See also *Shoprite Checkers (Pty) Ltd v CCMA and Others* [2008] 9 BLLR 838 (LAC) at para 21 *Mutual Construction Co Tvl (Pty) Ltd v Ntombela NO and Others* (2010) 31 ILJ 901 (LAC) at para 25; *Miyambo v CCMA* [2010] 10 BLLR 1017 (LAC) at para 13 ;*Transnet Freight Rail v Transnet Bargaining Council and*

[24] Clearly the award *in casu* to the effect that Nqophiso's dismissal was unfair is not one which a reasonable decision maker would have arrived at in line with the test laid down by the Constitutional Court. With regard to costs, I do not think this is a case where the costs should follow the result.

[25] In the circumstances the following order is granted:

A. The order of the Labour Court is set aside and in its stead the following order is substituted:

"1. The award of the commissioner is reviewed and set aside.

2. The dismissal of the employee party (Mr. NQOPHISO) was fair.

3. There is no order as to costs."

B. There is no order as to costs

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MLAMBO JP

Waglay DJP and Mocumie AJA concur in the judgment of Mlambo JP.

Others case no: (C644/2009) [2011] ZALCJHB 15 (4 March 2011), (unreported yet) at para 36 *; and City of Cape Town v SALGBC* [2011] 5 BLLR 504 (LC) at para 22.

Appearances:

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For the Third Respondent: Advocate A Roelofze

Instructed by: Ningiza Horner Incorporated, Johannesburg