

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, PORT ELIZABETH

Not reportable
Case No: PA11/16

In the matter between:

COLIN PETER BURTON

Appellant

NKULULEKO DOMINIC MANTANA

Second Appellant

MLINDELI MSENGANA

Third Appellant

HEMSLEY TOTO KONTYO

Fourth Appellant

and

**M E C FOR THE DEPARTMENT OF HEALTH
EASTERN CAPE PROVINCE**

First Respondent

**THE PUBLIC HEALTH AND SOCIAL DEVELOPMENT
SECTORAL BARGAINING COUNCIL**

Second Respondent

SILAS RAMUSHWANA

Third Respondent

Heard: 22 March 2022

Delivered: 5 July 2022

Coram: Phatshoane ADJP, Savage et Tokota AJJA

ORDER

SAVAGE AJA (PHATSHOANE ADJP concurring):

1. The appeal is dismissed.
2. The cross-appeal succeeds in part and the order of the Labour Court is set aside and substituted only to the following extent:

‘The review application in relation to Mr V Mheshe is dismissed with no order as to costs.’

JUDGMENT

TOKOTA AJA

Introduction

[1] This appeal, with the leave of the Labour Court (Whitcher J), is against the order of that Court in terms of which it set aside on review the award of the third respondent (the arbitrator). The Labour Court found that the dismissals of the first to fourth appellants (the appellants) were substantively fair. The appeal is concerned only with the consistency in the sanctions imposed on the appellants in circumstances in which certain of the appellants’ colleagues received a final written warning for the same misconduct.

[2] The first respondent, the MEC for the Department of Health (the MEC), cross-appeals against the orders of the Labour Court in terms of which the review application of Mr Mheshe, cited as the sixth respondent in the proceedings before the Labour Court, was upheld where it ordered that his matter be remitted to the Council for arbitration *de novo*. Mr Mheshe did not appeal against the order of the Labour Court, nor did he oppose the MEC’s cross-appeal.

Relevant factual background

[3] During August 2008 the department awarded a contract of service to a company called National Airways Corporation (Pty) Ltd (NAC) to provide air ambulance services and what was called ‘*outreach programme*’. In terms of the contract, NAC was to provide two helicopters and one fixed wing aircraft to render the said services. The primary duty of the NAC was to respond to medical

emergencies and evacuate patients to fixed medical facilities and undertake inter hospital transfer of patients within the Eastern Cape Province. The two helicopters and the fixed wing were to be at the sole disposal and authority of the Emergency Medical Rescue Services (EMRS) of the department and could not be made available to any other person without the written approval from the Director or Deputy Director with the concurrence of the Head of the Department.

[4] During June 2009 Messrs Maharaj, Mheshe, Mxesibe (employees within the EMRS division) and Mr Dreyer, an employee of the service provider, flew to Cape Town to meet one Mr Fahlem to discuss the purchasing of ambulances. During the trip Mr Dreyer offered Mr Maharaj a flight to Bloemfontein for him and departmental officials to attend a Confederations Cup soccer match. Mr Dreyer was a paramedic in the fixed wing aircraft. The aircraft was owned by Aerocare, Mr Dreyer's employer. The conversation between Messrs Maharaj and Dreyer was within the hearing shot of Mr Mxesibe.

[5] On their return to East London, and on the instructions of Mr Maharaj, Mr Mxesibe informed the EMRS metro heads of Mr Dreyer's offer. He contacted the appellants (except the first appellant who was called by Mr Mabenge, the Chief Ambulance Officer), including Messrs Gcolothela, Bokoda and Mabenge and the late Mr Kontyo and invited them to attend the soccer match in Bloemfontein. The first appellant indicated to Mr Mabenge that he was not a soccer supporter but Mr Mabenge insisted that he attends. The trip to Bloemfontein was scheduled for 24 June 2009. The following officials in the EMRS division attended the match: Mr Mantana, the Chief Ambulance Officer East London; Mr Msengana, the Chief Ambulance Officer Queenstown; Mr Mxesibe, the Provincial Fleet Manager and Mr Gcolothela, the Deputy Chief Ambulance Officer Mount Ayliff; Mr Kontyo, Mr Burton and Mabenge.

[6] On 24 June 2009, the air ambulance had, at the request of Drs Mdaka and Madiba, transported a patient from Mthatha to East London and was to return to the base in Bloemfontein. None of the officials bought entrance tickets at the match for themselves nor did they interact with any of their counterparts in Bloemfontein.

[7] The trip to Bloemfontein was an entertainment gesture by Aerocare which was a sub-contractor to NAC. Aerocare paid for transport, accommodation and all expenses attendant to the match such as entrance tickets, transport arrangements, meals and accommodation. The officials returned to East London on 25 June 2009. None of them reported the incident to the department nor did they give any report of what they had gone to do in Bloemfontein. Mr Mabenge passed away immediately after the trip.

[8] Subsequent to the trip, there was a media report of the incident. A member of the Provincial Legislature, Mr J Pienaar, directed questions to the MEC responsible for the department. The substance of the query was whether the MEC for Health was aware of the service provider of the department (Fixed Wing Aircraft) having offered free service to senior officials by flying them to Bloemfontein to watch a confederations soccer cup match. The MEC passed the questions to Mr Zitumane, the HoD, who in turn passed them to Mr Maharaj for his response. Mr Maharaj convened a meeting in Bhisho where some of the appellants attended with a view to provide answers. I accept that Mr Maharaj had already formulated answers when he called the meeting.

[9] Mr Maharaj was less than frank in his response to the questions which were directed to the MEC by a member of Legislature and stated that the trip to Bloemfontein was as a result of an invitation from the Acting HoD, Free State. To that end, he attached a letter to that effect. When he did so, he knew full well that such an invitation was never approved by the Hod. He stated that paramedical support was provided for the two matches that were played in the Free State; that the flight was at no cost to the department in that the aircraft was in any event on its routine maintenance to Free State and that no offer of gift or bribe of any nature was made by the company.

[10] Mr Zitumane was not happy with the response from Mr Maharaj thus he decided to investigate the matter. On or about 31 July 2009 he appointed Price Waterhouse Coopers (PWC) to conduct a forensic investigation into the circumstances of the Bloemfontein trip.

[11] On 5 August 2009 Mr Maharaj met with Messrs Gcolothela, Kontyo and Msengana and informed them that the trip was under investigation.

[12] After PWC had completed its investigations it submitted a report to the HoD with recommendations that disciplinary action be taken against the implicated employees. Mr Maharaj was suspended in August 2009. Pursuant to this misconduct charges were preferred against the appellants including Mr Maharaj. On 22 January 2010 the department signed an exit agreement with Mr Maharaj in terms of which he was allowed to resign. The department, represented by Dr Marimuthu Pillay, in her capacity as the Superintendent-General, undertook not to proceed with the disciplinary process against Mr Maharaj. In addition, he would be paid his pension and other exit benefits and would not be prejudiced in any way. In return, Mr Maharaj undertook to make an affidavit regarding his response to the Parliamentary questions in respect of the Bloemfontein trip.

[13] Mr Mheshe, who was due to retire in two months' time, also requested to be offered an early retirement. The request was refused and therefore he had to face the disciplinary enquiry where he was found guilty of misusing or conspiring to misuse the aircraft. Like Mr Maharaj, he did not fly to Bloemfontein. He was found to have played a substantial role in organising the trip, second only to the role played by Mr Maharaj.

[14] On 16 April 2010 Mr Mxesibe concluded what was called "*plea bargaining and sanction agreement*" with the department in terms of which he agreed to plead guilty. He also undertook to give frank and honest evidence against the other employees in return for a sanction of (a) final written warning valid for six months in respect of certain charges; and (b) suspension without pay for a period of two months.

[15] The substance of the charges preferred against the remaining four appellants was that: (a) they undertook an unauthorised trip to watch a confederations cup soccer match in Bloemfontein using an aircraft of the department's service provider for their own benefit and for which the department was invoiced; (b) they accepted a benefit from the service provider which included accommodation and entrance tickets to the soccer match; (c) they used departmental transport without authority

which conveyed them from East London to the airport for purposes of flying to Bloemfontein; (d) they provided false answers to the MEC in respect of questions relating to the trip; and (e) they failed to report or account for the trip to the department.

[16] The four appellants were found guilty of gross dishonesty in that they accepted gifts and/or benefits from the service provider and of having provided false explanations to the MEC regarding the questions raised by a member of the Provincial Legislature in relation to the Bloemfontein trip. They were dismissed.

[17] Messrs Gcolothela and Mxesibe were also found guilty but given final written warnings. The reason for giving Mr Mxesibe the final written warning was because he concluded a plea bargain with the employer. Mr Gcolothela was found guilty of benefiting from the trip but not guilty of concealing that an irregular trip had taken place. He also did not participate in the meeting with Mr Maharaj, where a false report was formulated for the MEC's consideration.

[18] Dissatisfied with the outcome of the disciplinary enquiries, the appellants referred an unfair dismissal dispute to the second respondent, the Public Health and Social Development Sectoral Bargaining Council (the Council), for conciliation and then arbitration.

The Arbitration

[19] The arbitrator found that the employer applied discipline inconsistently by giving other employees written warnings and/or settlement agreements. He held that the evidence demonstrated that most of the appellants were "*clueless*" as to whether the trip to Bloemfontein was authorised or not. He found that Mr Maharaj was a law unto himself and the mastermind of the trip who together with the service provider were aware of the nefarious nature of the trip. He was of the view that the employer did not adopt progressive and corrective approach to discipline.

[20] The arbitrator held that the employer failed to consider: (a) the harm caused by the employees; (b) the extent to which additional training and instruction could result

in the employees' not repeating the same misconduct; and (c) their length of service. In his view the misconduct was not of a degree that could damage the employment relationship to the extent of being rendered intolerable.

[21] Accordingly, the arbitrator concluded that the dismissals of the appellants were procedurally fair but substantively unfair. He ordered that the appellants be reinstated with retrospective effect from 1 September 2010 on terms and conditions not less favourable to those which they enjoyed prior to their dismissals except Mr Mheshe, who had retired at the time of the award. He further awarded compensation to all the appellants including Mr Mheshe of specified amounts for a period of two and half years. In addition, he sanctioned that the appellants be issued with final written warnings valid for six months.

The Labour Court

[22] Dissatisfied with the arbitrator's award the employer took the arbitration award on review to the Labour Court. The Labour Court held that the arbitrator's finding that the employer's dismissals were inappropriate was one that no reasonable decision maker could make. It held that the arbitrator misunderstood and misapplied the evidence and the law on inconsistency.

[23] The Labour Court reasoned that the cases of Messrs Gcolothela and Mxesibe were sufficiently distinguishable from those of the appellants. This was on the basis that Gcolothela was found guilty of benefiting from the trip but not concealing that an irregular trip had taken place. He also did not participate in the meeting with Mr Maharaj, where a false report was formulated for the MEC's consideration. In the case of Mr Mxesibe, the Labour Court reasoned that by entering into a plea bargaining with his employer he enabled the employer to acquire evidence of wrongdoing within the group. It held that the important feature in the circumstances was that the agreement itself was not aimed at recognising that the charge against him was not serious but it was rather '*a necessary compromise by the employer to induce the co-operation of an accomplice in a disciplinary hearing*'.

[24] With regard to the treatment of Mr Maharaj, the Labour Court was of the opinion that his case (Maharaj) was comparable to Mr Mheshe's case. It held that the difference between the two comparators was the legal exit. Insofar as Mr Maharaj was allowed to leave the department with a clean slate through his resignation, Mr Mheshe should likewise have been accorded the same treatment by being allowed to leave the department not under a cloud but through retirement which he had requested.

[25] The arbitrator's award to the effect that the appellants be reinstated was reviewed and set aside and replaced with an order that the dismissals of the appellants were substantively fair. The Court dismissed the application to review and set aside the arbitrator's finding that the dismissal of Mr Mheshe was substantively unfair. The arbitrator's reinstatement order of two and half years' salary, later varied to three years in favour of Mr Mheshe, was reviewed and set aside. The Labour Court remitted the issue of the relief in respect of Mr Mheshe to the Council for determination *de novo* with no order as to costs.

Issues for determination

[26] Although there was an initial attempt to challenge the finding of guilt of the appellants *Mr Dodson SC* who, together with *Ms Maharaj-Pillay*, appeared for the first to the third appellants, conceded that the only issue to be determined is that of inconsistency on the sanctions imposed upon the appellants compared with those of *Messrs Maharaj, Gcolothela and Mxesibe*. *Mr Nduzulwana*, who appeared for the fourth appellant, followed the same argument as *Mr Dodson*.

[27] Therefore, the following issues arise for determination in this appeal. First, whether the first respondent applied the discipline to its employees who were charged with misconduct inconsistently. Secondly, whether the Labour Court erred in dismissing the application to review and consequently setting aside the arbitrator's finding that the dismissal of Mr Mheshe was substantively unfair and remitting it to the Council to be determined *de novo*.

The discussion

[28] The parity principle requires that like cases be treated alike which is an element of disciplinary fairness. It applies where there are two or more employees engaged in the same or similar conduct at the same time but only one or some of them are disciplined or where different penalties are imposed. Unfairness flows from the principle that like cases should, in fairness, be treated alike.¹

[29] Where a number of employees commit the same misconduct, but the employer arbitrarily selects some of them to be disciplined, leaving the other transgressors unaffected, the employer is guilty of applying the discipline inconsistently.² In *Reckitt & Coleman (SA) (Pty) Ltd v CWIU and others*³ this Court held that there is a difference between cases where employees are arbitrarily selected for discipline and cases in which an employer selects for discipline from a mass of workers only those against whom it has evidence.

[30] The other context is where historical inconsistency is raised as a basis to challenge the fairness of the sanction of dismissal.⁴ In this instance, there would be no dispute that what the employee was charged with was indeed valid and proper to constitute misconduct, of which the employee is guilty. However, the issue would be that the dismissal of the employee for such misconduct is inconsistent with the sanction imposed by the employer for similar and related misconduct, in the past, in respect of other employees. In *Southern Sun Hotel Interests (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*⁵, the Court, in this context, said:

‘The courts have distinguished two forms of inconsistency - historical and contemporaneous inconsistency. The former requires that an employer apply

¹*National Union of Metalworkers of SA and Others v Henred Fruehauf Trailers (Pty) Ltd* (1994) 15 ILJ 1257 (A) at 1264A-D; *National Union Of Mineworkers, obo Botsane v Anglo Platinum Mine (Rustenburg Section)* (2014) 35 ILJ 2406 (LAC) at para 25.

²See: *Chemical Energy Paper Printing Wood and Allied Workers Union v National Bargaining Council for the Chemical Industry and Others* (2010) 31 ILJ 2836 (LAC) at para 20.

³ (1991) 12 ILJ 806 (LAC).

⁴See Schedule 8 Item 3(6) which reads: ‘The employer should apply the penalty of dismissal consistently with the way in which it has been applied to the same and other employees in the past, and consistently as between two or more employees who participate in the misconduct under consideration.’

⁵ (2010) 31 ILJ 452 (LC) at para 10. (‘*Southern Sun Hotel*’)

the penalty of dismissal consistently with the way in which the penalty has been applied to other employees in the past; the latter requires that the penalty be applied consistently as between two or more employees who commit the same misconduct. A claim of inconsistency (in either historical or contemporaneous terms) must satisfy a subjective element - an inconsistency challenge will fail where the employer did not know of the misconduct allegedly committed by the employee used as a comparator (see, for example, *Gcwensha v CCMA & others* [2006] 3 BLLR 234 (LAC) at paras 37-38). The objective element of the test to be applied is a comparator in the form of a similarly circumstanced employee subjected to different treatment, usually in the form of a disciplinary penalty less severe than that imposed on the claimant’.

[31] The soundness of the principle of parity is that it brings about certainty within the employment sphere. In that way employees would be aware in advance of what the resultant sanction would be in the event of an infraction of a particular rule applicable in the workplace. This of course is not a principle which is cast in stone and is to be applied inflexibly regardless of the peculiarity of a case. In *Absa Bank Limited v Naidu and Others*⁶ Ndlovu JA stated thus:

“However, it ought to be realised, in my view, that the parity principle may not just be applied willy-nilly without any measure of caution. In this regard, I am inclined to agree with Professor Grogan when he remarks as follows:⁷

‘[T]he parity principle should be applied with caution. It may well be that employees who thoroughly deserved to be dismissed profit from the fact that other employees happened not to have been dismissed for a similar offence in the past or because another employee involved in the same misconduct was not dismissed through some oversight by a disciplinary officer, or because different disciplinary officers had different views on the appropriate penalty.’

⁶ (2015) 36 ILJ 602 (LAC) para 36. (*Naidu*)

⁷ Grogan, *Dismissal, Discrimination and Unfair Labour Practices* 2nd ed, (Juta 2007) at 273-274.

[32] Save for Mr Maharaj and Mr Mheshe all the employees undertook an unauthorised trip to Bloemfontein; they all benefitted from the gift; the trip was undertaken through a service provider for the department; none of the employees enquired about the role they had to play at the match regard being had to the fact that none of them were equipped for official duties; one of them was present when the trip was discussed with Mr Maharaj and knew full well that it was all about entertainment; no report was made after the trip until it emerged from the media and a query was raised in the Provincial Parliament; the first appellant had even remarked that he was not a soccer supporter which was an indication that he knew that he was going to watch the match; when Mr Maharaj formulated the answers to the MEC's questions none of those that were present made any inputs. So, that being the case, it is immaterial if any one of them was not present at the meeting that was arranged by Mr Maharaj.

[33] Furthermore, I do not agree that most of these managers were "*clueless about whether the trip was authorised or not*". That finding is not consistent with the facts of the case. All the employees were senior in their ranks. There was an attempt on their part to shield behind the so-called instructions to go to Bloemfontein. If this was an instruction there would have been defined parameters of the trip. It must have been clear to all them that the trip was outside their official duties. In my view, this was a single act of an offer and acceptance of a benefit from the department's service provider and none of the employees were forced to accept it.

[34] The justification for differentiated sanctions was partly based on the premise that some of the employees were guilty of an unauthorised trip (charge 1) and some guilty of an unauthorised use of departmental transport (charge 3). In my view, the distinction of employees on the basis of the charges they faced was superficial in comparison to the treatment accorded to Messrs Maharaj, Gcolothela and Mxesibe as I will now demonstrate.

[35] I commence with Mr Maharaj. It is common cause that he was the sole organiser of this trip. He fraudulently obtained a letter from one Mr Mohamed, dated 16 September 2009, purporting to be coming from the National Department of Health, Pretoria. In this letter Mr Mohamed lied and stated that (a) representatives

from the Department of Health Eastern Cape and KwaZulu-Natal attended a briefing and orientation sessions which was held on 24 June 2009 in Bloemfontein (b) that the briefing addressed a variety of activities including VIP Medical Centre, Players' Medical centre, Public Medical Centre etc (c) that these two Provinces were not part of Confederations Cup in 2009 venue centres and (d) that the representatives were given a 'feel' of what was expected of the Provinces. The inference is irresistible that Mr Mohamed lied following an influence from Mr Maharaj.

[36] The circumstances under which the trip was organised makes one suspect that there was an intention to have the department pay for it. This is so because the trip was organised in such a manner that the date thereof would coincide with the trip from Mthatha transporting a patient to East London. The invoice for the Bloemfontein trip was indeed submitted with the invoice from Mthatha. Unfortunately for the service provider this was discovered before payment could be effected. The service provider submitted an invoice for Bloemfontein in the amount of R101 250. It was recorded in this invoice "*25/6/09 Outreach/Med personnel inspector Air rescue centre*". As it turned out, there was no such "*outreach*" flight that took place. The invoice dated 25 June 2009 was meant to cover the trip to Bloemfontein but payment thereof was stopped because of the impending investigation by PWC.

[37] Despite the major role played by Mr Maharaj he was let off the hook. As already said, whilst on suspension in August 2009 he arranged with the HoD, one Dr Marimuthu Pillay, to sign an agreement referred to above. During the hearing in the Labour Court further evidence was permitted to show that Mr Maharaj was subsequently re-employed *albeit* in a lower rank in 2014. Mr Maharaj may not have been a comparator in respect of the case of appellants save with regard to Mr Mheshe, which case is considered in the cross-appeal. However, it remains significant that despite the serious nature of his misconduct he got off scot-free without any loss of the benefits of employment.

[38] With regard to Mr Mxesibe, in my view, the fact that he pleaded guilty cannot be considered a distinguishing factor. An admission of guilt in circumstances where the employee is faced with an open and shut case becomes a neutral factor and cannot be counted as a weighty justification for imposing a different sanction. The

organised trip to Bloemfontein was an open secret and none of the attendees would have been in a position to credibly deny it. Furthermore, Mr Mxesibe was not frank in his admission of guilt, for example, although he was within the hearing range when the trip was planned between Messrs Maharaj and Dreyer he pretended not to have heard everything. Moreover, the presiding officer in the disciplinary hearing expressed his dissatisfaction with his evidence and treated it '*with some reservations*', a factor which in my view weighs heavily against distinguishing him from the appellants. In holding differently, the Labour Court erred.

[39] By the same token there was no ground for distinguishing the case of Mr Gcolothela from that of the appellants on the basis that he did not attend a meeting called by Mr Maharaj. His presence there would have made no material difference given the fact that Mr Maharaj prepared the answers to the Provincial Parliamentary questions alone. The meeting itself was merely called to go through the motions. As alluded to above, Mr Gcolothela attended the match; he benefitted therefrom and also concealed it from the authorities. Like the other employees, he did not make any report about it until it was questioned by a member of the Provincial Legislature. That he was not found guilty of concealing the trip is, in my view, immaterial.

[40] In the end it should be considered whether the award issued by the arbitrator was one that the reasonable decision maker could have reached. On the foregoing exposition the answer must be in the affirmative.

Cross-Appeal

[41] I now turn to consider the cross-appeal by the department against the order of the Labour Court insofar as it dismissed the review application relating to Mr Mheshe and remitted his case to the Council to be heard *de novo*. The basis of Labour Court's dismissal of the review was that the case of Mr Mheshe was comparable to that of Mr Maharaj. The court reasoned that Mr Maharaj was allowed to resign and escape disciplinary process whereas Mr Mheshe's request to be allowed to retire was refused. At that time Mr Mheshe was left with less than two months before his retirement was due.

[42] Mr Mheshe did not participate in this appeal. We were advised from the bar by Mr *Nduzulwana* that Mr Mheshe is now mentally unfit and thus no instructions could be obtained from him.

[43] The role that was played by Mr Mheshe in co-ordinating the Bloemfontein trip was almost similar to that of Mr Maharaj. He was present when Mr Maharaj arranged this trip with Mr Dreyer on their way to Cape Town. When they returned from Cape Town Mr Mheshe invited certain officials to attend the Bloemfontein soccer match. Like Mr Maharaj he did not attend the soccer match. He attended the meeting that was called by Mr Maharaj to formulate a response for the MEC. Like Mr Maharaj he was aware that Mr Maharaj was misleading the MEC in the response.

[44] It was argued on behalf of the department that the agreement between the department and Mr Maharaj was against public policy and therefore unenforceable. Consequently, so the argument ran, Maharaj could never be a legitimate comparator. It was submitted further that the Labour Court erred in referring the matter back to the arbitrator in that it would not be competent for the arbitrator to order reinstatement by reason of the fact that Mr Mheshe has retired and therefore would not be able to tender his services.

[45] It cannot be discerned why Mr Mheshe was treated differently from Mr Maharaj. The employer, in appropriate circumstances such as the present, ought not to treat its employees differently. The Labour Court correctly found the distinction to be a mere technicality. Both employees sought a remedy to end their employment relationship when they were faced with the accusations of misconduct. The only difference was the reason advanced for the request to end employment. If the employer was keen to conclude an agreement with Mr Maharaj in such a manner that he was not prejudiced following his conduct, Mr Mheshe, who was equally blameworthy like Mr Maharaj, was entitled to the same treatment. It follows, therefore, that the dismissal of Mr Mheshe was substantively unfair, as the Labour Court correctly found.

[46] Taking into account the period that this case took before it reached finality it is not in the interests of justice to remit the case of Mr Mheshe to the Council. Accordingly, the order of the Labour Court remitting the matter must be set aside.

Remedy

[47] This brings me to the consideration of an appropriate remedy. Section 193(1) of the Labour Relations Act⁸ (LRA) provides that once the arbitrator or the Labour Court finds that the dismissal was substantively unfair it must order reinstatement or re-employment or compensation to the employee concerned. Where it is not reasonably practical to order reinstatement or re-employment, compensation would be an appropriate remedy. This is so because reinstatement means placing the employees in the same positions and the conditions of service which existed prior to their dismissal.⁹

[48] At the time the arbitration award was made Mr Mheshe had already retired. An order for his reinstatement would have therefore been incompetent in that it was not practically possible for him to resume his work. The appropriate remedy in the circumstances would therefore be compensation for the loss of his two months' salary.¹⁰

[49] Mr Maharaj concluded an agreement with the department wherein the department undertook to give him all the benefits to which he would have been entitled. It was not clarified which benefits the contracting parties had in mind. It was further agreed that he would not be prejudiced by his resignation. In this regard again it remains unclear what prejudice the parties had in mind. However, the dictates of equity and fairness would require that Mr Mheshe should also not suffer any prejudice consequent upon termination of his employment due to misconduct. In the premises, he should be entitled to acquire all the benefits to which employees who retire would receive.

⁸ No. 66 of 1995, as amended.

⁹ *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* 2009 (1) SA 390 (CC) (*Equity Aviation*) at para 36.

¹⁰ *Toyota SA Motors (Pty) Ltd v CCMA and Others* (2016) 37 ILJ 313 (CC) at para 16.

[50] The other appellants' case is somewhat different from that of Messrs Mxesibe and Gcolothela. As will be shown, their conduct of this litigation is one factor which weighs heavily against reinstatement with retrospective effect from the date of their dismissals. Had it not been for the different treatment which was accorded to them, this would have been a proper case where a dismissal would have been an appropriate sanction.

[51] Ordinarily, reinstatement is accompanied by back-pay. The court has a discretion as to the date of reinstatement save that it cannot be a date earlier than the date of dismissal.¹¹ In my view, when ordering reinstatement, it is important to have regard to section 23 of the Constitution for the Republic of South Africa, 1996, which provides that everyone has a right to a fair labour practice. The right to a fair labour practice applies to both the employer and employee.

[52] Twelve years have elapsed since their dismissal. The probability is that those posts have been filled. Although we do not have evidence in this regard it is unheard of that the department would operate without these posts being filled; In *Equity Aviation*¹² it was said:

“As the language of section 193(1)(a) indicates, the extent of retrospectivity is dependent upon the exercise of a discretion by the court or arbitrator. The only limitation in this regard is that the reinstatement cannot be fixed at a date earlier than the actual date of the dismissal. The court or arbitrator may thus decide the date from which the reinstatement will run, but may not order reinstatement from a date earlier than the date of dismissal.”

[53] As foreshadowed in the preceding paragraphs the appellants did not approach the council and the courts with clean hands. They should thus not be allowed to benefit from their misconduct. In my view, this is not a case where reinstatement ought to be ordered. Although they were not charged with corruption their conduct fits in well within the ambit of corruption which is a scourge in the Government departments.

¹¹ *Equity Aviation* (Id fn 9) at para 33.

¹² *Equity Aviation* (Id fn 9) at para 36.

[54] Legislation on Prevention and Combating of Corrupt Activities Act¹³ was enacted for purposes of combating corruption. It's preamble reads inter alia:

“AND WHEREAS corruption and related corrupt activities undermine the said rights, endanger the stability and security of societies, undermine the institutions and values of democracy and ethical values and morality, jeopardise sustainable development, the rule of law and the credibility of governments, and provide a breeding ground for organised crime...”

[55] The conduct of the appellants undermined the values of democracy, ethical values and morality. It jeopardised the credibility of Government.

[56] Moreover, the conduct of the appellants in this litigation has contributed almost exclusively in the delay to its finalisation. Their flagrant non-compliance with the rules of this court dates back from 2017 when the matter was struck off the roll because appellants had failed to properly arrange the record. In 2019 the same problem was still not cured as the record included unnecessary volumes resulting in the matter being struck off the roll again. Despite the subsequent striking off of the matter this yielded no positive results.

[57] Consequently, it would be grossly unfair if the appellants were allowed to benefit from their own misconduct in this litigation. I am therefore of the view that the reinstatement which would result in the appellants being paid for entire period of twelve years would be unfair to the employer. In my view, the Labour Court should have reviewed the arbitration award and ordered re-employment. The court must ensure that an employer is not unjustly financially burdened if retrospective reinstatement is ordered or awarded.¹⁴ In these circumstances, justice and equity dictate that the employer should be ordered to re-employ the appellants.

Costs

¹³ No. 12 of 2004

¹⁴ Equity Aviation (Id fn 9) at para 43.

[58] The question of costs is one that lies within the discretion of the Court. In labour matters fairness and equity are key considerations. The state of the record, which in this case was in disarray, would invariably have an impact in exercise of the court's discretion to award costs against a defaulting party. No proper indexing and pagination in terms of the Rules was made; the date and nature of the exhibits were not briefly described;¹⁵ the discrepancies of the record continued to exist despite the fact that the matter was struck off the roll in September 2019 by reason of a deficient record; some documents were duplicated. It became difficult and time consuming to coordinate the facts by reference to relevant documents.

[59] The dismissals of the appellants took place in 2010. It is now almost twelve years after the dismissals. The delay itself, which is largely attributable to both parties, undermines the object of the LRA to resolve disputes in a speedy manner. The appellants had a duty to ensure that the record of the proceedings is in order in terms of Rule 5 of the Rules of this Court. This was flagrantly ignored. The rules are made for the convenience of the court. They facilitate the speedy preparation of the hearing and the judgment.

[60] Had it not been the fault of all the parties a cost order would have been warranted. As alluded to above, trawling through the record in the matter for purposes of writing this judgment was very tedious and frustrating. One can only hope that this will be avoided in future.

[61] I would therefore have proposed the following order:

61.1 The appeal succeeds with no order as to costs;

61.2 The cross-appeal is dismissed with no order as to costs;

61.3 The order of the Labour Court is set aside and replaced with the following:

“1. The application for review is dismissed.

2. The employer is directed to re-employ the applicants.

¹⁵Rule 5(g) of the Labour Appeal Court Rules

3. *Mr Mheshe's dismissal is set aside.*
4. *The department is directed to pay Mr Mheshe his two months' salary.*
5. *There is no order as to costs."*

TOKOTA AJA

SAVAGE AJA (Phatshoane ADJP concurring):

[62] I have had the advantage of reading the judgment of my colleague Tokota AJA, with which I respectfully am unable to agree.

[63] There is no dispute in this appeal that the four appellants committed serious misconduct in having taken an unauthorised trip to Bloemfontein in an aircraft, owned by a service provider contracted to the Department of Health, Eastern Cape (the department) for emergency medical purposes. The purpose of the trip was to attend a Confederations Cup soccer match, with all expenses related to the trip paid for by the department's service provider. The department, as the appellants' employer, knew nothing of the trip. Although Mr Maharaj played a central role, the appellants were equally complicit in misleading the department and the first respondent, the Member of the Executive Council for Health, Eastern Cape (the MEC), as to the purpose of the trip, dishonestly stating that they had attended the match in Bloemfontein on official business to provide medical services when this was not so.

[64] The appellants were senior employees with long service, employed in managerial positions by the department. Mr CP Burton was a Station Officer employed in January 1982; Mr M Msengana, a Chief Ambulance Officer, employed in October 1989; Mr H T Kontyo, a Deputy Chief Ambulance Officer, employed in July 1987; and Mr N Mantana, a Chief Ambulance Officer, employed in October 1989.

[65] Following a disciplinary hearing, the appellants were dismissed from their employment in September 2010. Aggrieved with their dismissals, the appellants referred an unfair dismissal dispute first to conciliation, and thereafter arbitration

under the auspices of the second respondent, the Public Health and Social Development Sectoral Bargaining Council. The third respondent (the arbitrator) found that most of the managers were “*clueless about whether the trip was authorised or not*” and that the misconduct committed was not of such a nature as to make the employment relationship intolerable.

[66] The arbitrator relied on the fact that another employee, Mr Gcolothela, had received a final written warning, but was not dismissed, for having gone on the trip. This was so in that he had not attended the meeting with Mr Maharaj at which the misleading response to questions raised about the trip was agreed. Another employee, Mr Mxesibe, agreed to plead guilty to the misconduct and received a final written warning, coupled with a suspension without pay for two months, on condition that he testified against his colleagues at the disciplinary hearing. Mr Maharaj, who did not go on the trip, was found to have been the mastermind behind it. He prepared the false response to the questions raised about the trip. By agreement, he resigned from his employment with the department on 22 January 2010, with no disciplinary action taken against him, on the basis that he depose to an affidavit regarding the trip.

[67] The arbitrator found that by imposing written warnings and concluding settlement agreements with some employees and not others, the employer had acted unfairly. In his view, progressive and corrective discipline was not applied, with the harm caused by the employees not properly considered. No regard was given to whether training and instruction would have been appropriate to avoid dismissal given the employees’ length of service. In addition, it was found that the trust relationship was not damaged and that the employees had showed some sense of remorse by co-operating with the investigation. For these reasons, the dismissal of the appellants was determined to be substantively unfair.

[68] The department was ordered to reinstate the appellants with retrospective effect from 1 September 2010 on terms and conditions no less favourable to those which they enjoyed prior to their dismissals, with a final written warning valid for six months imposed.

Judgment of the Labour Court

[69] On review, the Labour Court found the arbitrator's finding that the employer's dismissals were substantively unfair was one that no reasonable decision-maker could have made. The arbitrator was found to have misunderstood and misapplied the evidence and the law on inconsistency when the misconduct committed was of a serious nature, sufficient to destroy the employment relationship. The Labour Court found the cases of Mr Gcolothela and Mr Mxesibe were sufficiently distinguishable from those of the appellants in that although Mr Gcolothela benefited from the irregular trip, he had not been party to concealing the trip and was not at the meeting at which the dishonest responses to the questions raised about it were agreed. Mr Mxesibe had entered into a compromise to enable the employer to obtain evidence of the appellants' wrongdoing. As a result, it was held that the findings of inconsistency were unreasonable given the distinguishing features between the comparators relied upon and the appellants.

[70] The case of Mr Maharaj was found to be comparable to that of Mr V Mheshe, who was dismissed two months before his retirement. Since Mr Maharaj was allowed to resign, the Labour Court found that Mr Mheshe should equally have been allowed to exit through retirement, a request which was unfairly denied. The Court therefore dismissed the application to review and set aside the arbitrator's finding that the dismissal of Mr Mheshe was substantively unfair, with the issue of the relief in respect of Mr Mheshe remitted to the bargaining council for determination *de novo* with no order as to costs. In relation to the remaining appellants, the Labour Court set aside the arbitrator's award and replaced it with an order that the dismissals of the appellants were substantively fair.

Discussion

[71] In considering the fairness of the dismissal, each case is to be determined on its own merits. An arbitrator is required to take into account the totality of circumstances, including the importance of the rule breached, the reason the employer imposed the sanction of dismissal and the basis of the employee's challenge to the dismissal. In addition, the harm caused by the employee's conduct,

whether additional training and instruction may result in the employee not repeating the misconduct, the effect of dismissal on the employee and their long-service record are factors to be considered.¹⁶

[72] A disciplinary sanction imposed must be fair, and neither selective nor capricious. Historical consistency contemplates that a penalty will be applied consistently with how it has been applied to other employees in the past. Contemporaneous consistency contemplates that a penalty will be applied consistently as between two or more employees who commit the same misconduct.¹⁷ The parity principle is not an immutable rule, since the fairness of each dismissal is to be considered on its own facts. The fact that an employee has previously not been dismissed for a specific instance of serious misconduct does not in itself grant a licence to employees to commit such serious misconduct or warrant a finding that the dismissal of an employee for such misconduct is unfair. Similarly, where there has been an oversight by a disciplinary officer, or different disciplinary officers hold different views on the appropriate penalty, this in itself does not necessarily warrant a finding of unfairness.¹⁸

[73] The conduct of the appellants was of a serious nature and severely adversely impacted on the credibility and public perception of the department. As much was apparent from the fact that the trip caused a public outcry which led to questions being raised about it in the provincial legislature. As long-serving and senior state employees, the appellants would reasonably have known that their conduct in accepting the all-expenses paid unauthorised benefit was impermissible; and when asked to explain such conduct they were dishonest in their response to their superiors. Such conduct fell far short of what was required of senior public sector employees.

[74] I am not persuaded that the department acted inconsistently in its decision to dismiss the appellants. Important factual distinctions exist between the cases of Mr Maharaj, Mr Mxesibe and Mr Gcolothela and the appellants. The Labour Court

¹⁶ *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (2007) 28 ILJ 2405 (CC) at para 78.

¹⁷ *Southern Sun Hotel* (Id fn 5) at para 10.

¹⁸ *Naidu* (Id fn 6) at para 36.

correctly found that the department was within its rights to enter into agreements with Mr Mxesibe and Mr Maharaj so as to obtain information on oath regarding the misconduct committed. Mr Gcolothela, although he went on the trip, was not part of the meeting at which the dishonest version to be given to the MEC was produced.

[75] While the long-service and disciplinary record of the appellants were relevant considerations, the misconduct committed, and the harm which resulted from it, was of a serious nature and underpinned by dishonesty on the part of senior public sector employees. In *Naidu* this Court recognised that “(g)enerally, a sanction of dismissal is justifiable and, indeed, warranted where the dishonesty involved is of a gross nature.”¹⁹ In *De Beers Consolidated Mines Ltd v Commission for Conciliation, Mediation and Arbitration and Others*²⁰ it was recognised that “(d)ismissal 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”.

[76] It follows for these reasons that the decision taken by the employer to dismiss the appellants was fair. In finding differently, the decision of the arbitrator fell outside of the ambit of reasonableness required and the Labour Court correctly found as much. For these reasons, in my view, the appeal must fail.

[77] Mr Mheshe, a deputy director in the EMS department, was employed in February 1982 and was dismissed on 23 August 2010. The department cross-appeals against the order of the Labour Court remitting the dismissal of Mr Mheshe back to the bargaining council to be heard *de novo*. Like Mr Maharaj, Mr Mheshe did not participate in the trip but was involved in arrangements related to it and was aware that the response to the questions raised regarding the trip was dishonest. It appears to me that the dismissal of Mr Mheshe was unfair given the similar role he played to that of Mr Maharaj in the misconduct and having regard to the fact that he was to retire from his employment within two months. The finding of the arbitrator that his dismissal was unfair and that he be reinstated retrospectively from 1 September 2010 with back pay and a final written warning, was therefore one which

¹⁹ *Naidu* (Id fn 6) at para 52.

²⁰ (2000) ILJ 1051 (LAC) at 1058E-G;

a reasonable decision-maker on the material before him could have made. The Labour Court ought properly to have found as much and not remitted the matter back to the bargaining council for a hearing *de novo* when no purpose was to be served in doing so, more so given the delay in the matter and Mr Mheshe's age. The retirement of Mr Mheshe would then follow as a matter of course in accordance with the applicable departmental and pension fund rules.

[78] Although the Labour Court permitted evidence to be put up in the course of argument that Mr Maharaj had been re-employed at a lower rank by the department, that fact is not relevant to a consideration of the fairness of the dismissals of the appellants. It may be that a different cause of action arises from the re-employment of Mr Maharaj but that issue is not one before this Court for consideration.

[79] As to costs, there is no reason in law or fairness why an order of costs should be made in this appeal.

Order:

[80] For these reasons the following order is made:

3. The appeal is dismissed.
4. The cross-appeal succeeds in part and the order of the Labour Court is set aside and substituted only to the following extent:
'The review application in relation to Mr V Mheshe is dismissed with no order as to costs.'

SAVAGE AJA

Appearances:

For the first to third appellants:

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P Maharaj-Pillay

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For the Fourth Appellant:

Instructed by:

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