

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR2223/20

In the matter between:

SOUTH AFRICAN REVENUE SERVICE

Applicant

and

**COMMISSION FOR CONCILIATION MEDIATION
AND ARBITRATION**

First Respondent

COMMISSIONER ISAIAH NYATHI N.O.

Second Respondent

MAUDY MATHEPANE LEGWABE

Third Respondent

**NATIONAL EDUCATION, HEALTH AND ALLIED
WORKERS UNION**

Fourth Respondent

Heard: 24 January 2023

Delivered: 26 January 2024 (This judgment was handed down electronically by circulation to the parties on 26 January 2024.)

REASONS FOR ORDER

PHEHANE, J

Introduction

[1] On 24 January 2023, I issued an order reviewing and setting aside an arbitration award and substituting it with an order that the dismissal of the third

respondent is procedurally and substantively fair. The third respondent seeks reasons for the order. The reasons follow below.

Background

[2] The third respondent was employed by the applicant in the position of Operations Manager. She was dismissed for misconduct relating to gross negligence in respect of nine fictitious consignment transactions over a period of 11 months, marked, captured or processed on the applicant's computerised system using both her unique and permanent number (termed S-ID number) and password (the S-ID number is a user number – both the S-ID number and password are used together to perform a transaction). The cumulative effect of the fictitious transactions resulted in a loss to the applicant in the amount of R684 600.24.

[3] Pursuant to the dismissal, she lodged an unfair dismissal dispute with the first respondent. The outcome of which was an arbitration award by the second respondent in which he found the dismissal of the third respondent procedurally and substantively unfair and ordered retrospective reinstatement as well as compensation.

Review

[4] The applicant launched a review application in terms of section 145 of the Labour Relations Act¹ (LRA). The grounds of review, in essence, are that the second respondent committed misconduct in relation to his duties and/or a gross irregularity when he failed to properly evaluate the evidence before him and misconstrued the gravity of the charges against the third respondent and found that the applicant failed to prove gross negligence but succeeded to prove negligence. His finding resulted in a decision that dismissal was inappropriate, but he failed to impose a sanction. The applicant contends this has the effect of rewarding misconduct. This is incorrect, in paragraph 6.54 of the arbitration award, the second respondent imposes a final

¹ Act 66 of 1995, as amended.

written warning valid for 12 months – he qualifies this in the paragraphs that follow, the point I make is that it is the applicant's submission is incorrect.

[5] The applicant further contends that the second respondent failed to make a correct assessment in determining whether dismissal was an appropriate sanction. In this regard, he considered the inconsistent application of discipline with respect to two employees of the applicant who were given final written warnings for negligence. The applicant avers that no defence of the inconsistent application of discipline was raised by the third respondent at any stage during the arbitration proceedings. Mr. Ncube for the third respondent concedes this.

[6] In addition, the applicant contends that the order of both compensation and retrospective reinstatement is incompetent.

[7] The opposition to the review grounds in the main is that the second respondent's decision is reasonable. The third respondent avers that the evidence before the second respondent is that a number of instances arose where the S-ID number of the third respondent was illicitly obtained which resulted in it being used by a former employee of the applicant, Mr. Galanzhele Makhado, in nine transactions. The evidence of the third respondent is she changed her password regularly, as was required by the applicant, and she did this at least once a month. She was aware of the applicant's policy that users are held accountable for all activities and transactions performed using their S-IDs and that they are not to share their passwords and must safeguard them at all times. The further evidence is that on each occasion her S-ID number and password were used, she was not on duty and she at no stage shared her password with anyone.

[8] This Court is presented with an inadequate transcription of the arbitration proceedings. The transcribed record is replete with insertions "*indistinct*" and "*entire audio inaudible*" during the testimony of the third respondent and her witness, Mr. Chauke. Both parties informed this Court during oral argument that the transcribed record before the Court is sufficient in determining the review application. Both confirmed that the second respondent correctly captured the evidence in his arbitration award.

Evaluation

[9] The test in a review is trite.² In *Southern Sun Hotel Interests (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and others*,³ this Court per van Niekerk J, held as follows:

‘In summary, s 145 requires that the outcome of CCMA arbitration proceedings (as represented by the commissioner’s decision) must fall within a band of reasonableness, but this does not preclude this court from scrutinizing the process in terms of which the decision was made. If a commissioner fails to take material evidence into account, or has regard to evidence that is irrelevant, or the commissioner commits some other misconduct or a gross irregularity during the proceedings under review and a party is likely to be prejudiced as a consequence, the commissioner’s decision is liable to be set aside regardless of the result of the proceedings or whether on the basis of the record of the proceedings, that result is nonetheless capable of justification.’

[10] In *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation Mediation and Arbitration*,⁴ the Labour Appeal Court held as follows in relation to an irregularity committed by a Commissioner:

‘In a review conducted under s145(2)(a)(ii) of the LRA, the reviewing court is not required to take into account every factor individually, consider how the arbitrator treated and dealt with each of those factors and then determine whether a failure by the arbitrator to deal with one or some of the factors amounts to a process-related irregularity sufficient to set aside the award. This piecemeal approach of dealing with the arbitrator’s award is improper as the reviewing court must necessarily consider the totality of the evidence and then decide whether the decision made by the arbitrator is one that a reasonable decision-maker could make.’

² *Sidumo and another v Rustenburg Platinum Mines Ltd and others* [2007] ZACC 22; (2007) 28 ILJ 2405 (CC) and *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as amicus curiae)* [2013] ZASCA 97; (2013) 34 ILJ 2795 (SCA).

³ [2009] ZALC 68; (2010) 31 ILJ 452 (LC) (*Southern Sun Hotels Interests*) at para [17].

⁴ [2013] ZALAC 28; [2014] 1 BLLR 20 (LAC) at para [18].

[11] The Constitutional Court in *Sidumo and another v Rustenburg Platinum Mines Ltd and others*⁵ stated as follows pertaining to the role of a commissioner in determining the appropriateness of the sanction of dismissal:

‘In approaching the dismissal dispute impartially a commissioner will take into account the totality of circumstances. He or she will necessarily take into account the importance of the rule that had been breached. The commissioner must of course consider the reason the employer imposed the sanction of dismissal, as he or she must take into account the basis of the employee’s challenge to the dismissal. There are other factors that will require consideration. For example, 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 his or her long-service record. This is not an exhaustive list.’

[12] One further consideration a commissioner is to take into account in determining the appropriateness of the dismissal is whether the employee has shown any remorse. The applicant contends that the third respondent in the present case showed no remorse, as she distanced herself from the misconduct and presented various scenarios as to how her password, that was her duty to safeguard in terms of the applicant’s policies, could have been illicitly obtained. Further considerations include the breakdown of the employment relationship, the existence of dishonesty, the job function, and the employer’s disciplinary code and procedure.⁶

[13] Our Courts have laid out the following principles in the determination of a challenge of the inconsistent application of discipline:⁷

⁵ Fn 2 *supra* at para [78].

⁶ See: para 46 of the applicant’s heads of argument and the authorities cited in the corresponding footnote.

⁷ *South African Municipal Workers Union obo Abrahams and others v City of Cape Town and others* [2011] ZALCCT 15; (2011) 32 ILJ 3018 (LC) at para [50]; *Commed Health CC v National Bargaining Council for the Chemical Industry and others* (2012) 33 ILJ 623 (LC) at para [10]; *SA Commercial Catering and Allied Workers Union and others v Irvin & Johnson Ltd* (1999) 20 ILJ 2302 (LAC) at para [29]; *Hullet Aluminium (Pty) Ltd v Bargaining Council for the Metal Industry and Others* [2007] ZALC 93; (2008) 29 ILJ 1180 (LC) at paras [36] and [40] - [42]; *Southern Sun Hotels Interests supra*; *Cosani Engineering (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and others* (2004) 25 ILJ 1707 (LC) at para [19].

13.1 the employee must set out the basis of the inconsistency by revealing the name of the employee concerned (the comparator) and the circumstances of the case in order that the employer properly respond to the allegation;

13.2 employees must be measured against the same standards and similar circumstances;

13.3 the chairperson of the disciplinary enquiry must conscientiously and honestly determine the misconduct;

13.4 discipline must not be capricious or induced by improper motives or by a discriminating management policy;

13.5 the gravity of the misconduct should receive serious consideration;

13.6 fairness is a value judgment; and

13.7 inconsistency is not a rule unto itself - it is an aspect of disciplinary fairness.

[14] Notwithstanding the applicant's averment and concession by Mr. Ncube that no evidence was placed before the second respondent by the third respondent or Mr. Chauke regarding the challenge of the inconsistent application of discipline to afford the applicant the opportunity to challenge it, and Mr. Maserumule's submission that the arbitration award is silent about the aforesaid witness' evidence on inconsistency and that it is raised for the first time in the arbitration award, I take a different view. The second respondent states in paragraphs 5.15, 6.34 to 6.37 of his award, that the third respondent raised the issue of inconsistency properly and in advance – it was well canvassed and the applicant responded thereto and introduced exhibits "B1" and "B2" in this regard, being the disciplinary records of the two comparators. I reiterate that both parties confirmed that the second respondent properly recorded the evidence in his arbitration award. I, therefore, accept his recordal that inconsistency was properly raised and canvassed before him.

[15] In paragraphs 6.8 to 6.22 of the arbitration award, the second respondent evaluates the evidence before him. He finds, given the admission by the third respondent that she was well aware of the applicant's rule to safeguard her password at all times, the fact that it was used for nine fictitious transactions that caused financial loss to the applicant demonstrates that she contravened the policy. He finds she was correctly charged and the applicant discharged its onus and proved its case on a balance of probabilities. He grapples with her explanations of

not being on duty when the transactions were committed and finds on the volume of undisputed evidence, including circumstantial evidence (although he misapplied the test in civil proceedings), that the third respondent breached the applicant's policy.

[16] After having found that the third respondent was correctly charged, he finds that there has been an inconsistent application of discipline in that the two comparators who were charged for gross negligence had not been dismissed. He finds that the applicant did not present any argument to deviate from its past sanctions of final written warnings for gross negligence. In an about turn, the second respondent waters down the charge from gross negligence to negligence and contradicts his earlier finding and finds the applicant did not prove that the third respondent "*had a hand in any of the transactions*" performed by Mr. Makhado.

[17] There is no basis, on the totality of evidence before him, as considered by him, to alter the charge. It is not the commissioner's role to alter the charge. The commissioner's role in resolving a dispute is to properly construe the nature of the charge. He is then to properly consider the evidence before him and is to make a finding that is justifiable on the totality of evidence before him.

[18] The second respondent properly construed the nature of the charges and he had an appreciation for its gravity and that dismissal is generally the appropriate sanction for gross negligence. However, it is in considering inconsistency and the appropriate sanction that the second respondent goes off on a tangent. He finds that the applicant has on two previous occasions meted out a final written warning for gross negligence and finds that dismissal is not an appropriate sanction because the third respondent was not charged for dishonesty.⁸ The applicant contended before the second respondent that the cases of the two comparators are distinguishable.

[19] The second respondent does not engage with this. He failed to take into account the gravity of the charge and the circumstance that the third respondent was a manager. He also failed to take into account that the third respondent showed no remorse for failing to adhere to the rule or policy of the applicant nine times over a

⁸ Arbitration award at para 6.52.2, p 32.

period of almost a year, with huge financial implications for the applicant. He concludes that, because the applicant failed to dismiss its employees for gross negligence, it should live with the consequences. He misapplies the parity principle as it is one of the factors to take into consideration in determining whether dismissal is the appropriate sanction and not the sole determining factor. Having grappled with the parity principle and misapplying it as indicated, he is out of kilter with his previous finding and finds the third respondent guilty of negligence, notwithstanding the charge was gross negligence, which he was fully aware of.

[20] The issue pertaining to procedural unfairness related to the delay in the outcome of the appeal. It is common cause that the third respondent was paid her salary during the period of the delay and was not prejudiced. I therefore find that the decision ordering three months' compensation is unreasonable.

[21] In view of the afore-going, I am of the view that the second respondent committed an irregularity that distorts the outcome. In the premises, the arbitration award is reviewable.

[22] In light of the afore-going, the aforementioned order was issued.

M. T. M. Phehane

Judge of the Labour Court of South Africa