

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

**Not reportable
Case No: JR 1383/19**

In the matter between:

SBX t/a DB THERMAL (A DIVISION OF DBT (PTY) LTD)

Applicant

and

SIMISO NHLAPO

First Respondent

**METAL AND ENGINEERING INDUSTRIES
BARGAINING COUNCIL**

Second Respondent

ELIAS LEKGWATHI N.O.

Third Respondent

Heard: 30 August 2023

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email and publication on the Labour Court's website. The date and time for hand-down is deemed to be 22 March 2024

JUDGMENT

TLHOTLHALEMAJE, J

Introduction:

- [1] Three applications are before the Court. In the first application, the applicant ('DBT') seeks an order reviewing and setting aside the arbitration award issued by the third respondent (Arbitrator). In the second application, the first respondent (Mr Nhlapo) seeks an order in terms of Rule 11 of the Rules of this Court to have the review application dismissed on account of lack of timeous prosecution. In the third application, DBT seeks an order reviving and reinstating the review application.
- [2] To the extent that the merits of that application were fundamental to the determination of the two other interlocutory applications, the parties had agreed to set out their respective arguments in the review application as well as the other applications in one composite set of arguments, and that all the matters be heard simultaneously.

The background to the applications:

- [3] Nhlapo was employed by DBT in November 2014 as a Quality Controller and was based at Eskom's Kusile Power Station. His services were terminated on 28 November 2018 following a disciplinary enquiry into two allegations of misconduct.
- [4] Nhlapo referred an alleged unfair dismissal dispute to the second respondent, the MEIBC. The matter came before the Arbitrator who issued an award on 13 May 2019. In the award, the Arbitrator concluded that the dismissal of Nhlapo was too harsh, hence an award of reinstatement together with one months' salary as backpay.

(i) The Rule 11 application and evaluation:

- [5] DBT launched an application to review and set aside the Arbitrator's award on 26 June 2019. On 22 October 2019, DBT delivered its Rule 7A(6) Notice. This was followed by DBT's supplementary affidavit on 24 October 2019.
- [6] In view of no further steps having been taken in the matter since 24 October 2019, Nhlapo through his attorneys of record addressed correspondence to DBT on 13 January 2022, notifying it of his intention to launch a Rule 11

application since the review application had lapsed (from 26 June 2020), and thus archived. Such an application was launched on 14 January 2022. In it, Nhlapo also sought an order in terms of section 158(1)(c) of the Labour Relations Act¹ (LRA) to make the arbitration award an order of this Court, and further ordering DBT to release the bond of security in possession of its attorneys of record.

- [7] On 28 January 2022, DBT filed its Notice to oppose the Rule 11 application together with its answering affidavit. Nhlapo filed a replying affidavit on 22 February 2022. The Rule 11 application is premised on paragraph 11.2.7 of the Practice Manual of this Court which provides;

“A review application is by its nature an urgent application. An applicant in a review application is therefore required to ensure that all the necessary papers in the application are filed within twelve (12) months of the date of the launch of the application (excluding Heads of Argument) and the registrar is informed in writing that the application is ready for allocation for hearing. Where this time limit is not complied with, the application will be archived and be regarded as lapsed unless good cause is shown why the application should not be archived or be removed from the archive.”

- [8] Nhlapo’s contentions were that a period of about two years and seven months had lapsed since any steps were taken by DBT in prosecuting its review application, and that by virtue of the above provisions, that application had since lapsed and thus archived.

- [9] The import of the Practice Manual and its clause 11.2.7 as held in *Macsteel/Trading Wadeville v Van der Merwe NO & others*², and as further reiterated in *E Tradex (PTY) Ltd t/a Global Trade Solution v Finch and Others*³, is;

“...the promotion of the statutory imperative of expeditious dispute resolution. It enforces and gives effect to the Rules of the Labour Court

¹ Act 66 of 1995, as amended.

² (2019) 40 ILJ 798 (LAC) at paras [20] – [26].

³ [2022] ZALAC 106; (2022) 43 ILJ 2727 (LAC) at para 15.

and the provisions of the LRA. It is binding on the parties and the Labour Court. The Labour Court does, however, have a residual discretion to apply and interpret the provisions of the Practice Manual, depending on the facts and circumstances of a particular case before the court.”⁴

And,

“...Clause 11.2.7 imposes an obligation on the applicant to ensure that all the necessary papers in the application are filed within 12 months of the date of the launch of the application (excluding heads of argument), and the registrar is informed in writing that the application is ready to be set down for hearing. Where this time-limit is not complied with, the application will be archived and be regarded as lapsed unless good cause is shown why the application should not be archived or be removed from the archive”

- [10] Arising from above, it is apparent that in circumstances such as these, where on the facts there was inaction for over two years on the part of DBT in prosecuting the review application, that application is archived and regarded as lapsed. If DBT seeks to retrieve the review application from the archives, it is required to bring a substantive application showing good cause why the review should be ‘unarchived’. DBT has filed an application in this regard.
- [11] This therefore implies that to the extent that Nhlapo seeks that the review application be dismissed and that the arbitration award be made an order of court together with other ancillary orders, the effect of such an order if granted, would be to bring the matter to a finality since such an order would not be reviewable. As observed in *Greater Taung Local Municipality v South African Local Government Bargaining Council and Others*⁵, such an order as sought in the Rule 11 application will effectively deny DBT an opportunity to bring an application to reinstate the review application, which in any event is before the Court.

⁴ At paras 22 – 23.

⁵ [2023] ZALAC 1; (2023) 44 ILJ 761 (LAC) at para 17.

[12] The upshot of these conclusions is that in circumstances where an applicant party has not complied with the provisions of the Practice Manual read with the Rules of this Court in timeously prosecuting a review application, but where a substantial application in which 'good cause' is sought to be demonstrated, it is my view that it would be non-suited for the Court to determine a Rule 11 application prior to determining the application to reinstate.

[13] If after considering the application to revive, it is found that DBT did not demonstrate good cause, it follows that the review application will remain archived, which in accordance with the provisions of clause 16.3 of the Practice Manual, shall have the same consequences as to the further conduct by any respondent party as to the matter having been dismissed. This in my view would ordinarily entitle Nhlapo the orders he seeks in the Rule 11 application. Where however the review application is reinstated on the basis that good cause was shown for the delays and non-compliance with the time frames, and further where it is found that the arbitration award is reviewable, it follows that the Rule 11 application ought to be dismissed.

(ii) *The application to reinstate the review application:*

[14] DBT had not acted on the review application since 24 October 2019 when it filed the supplementary affidavit. It was jolted into action by Nhlapo's attorneys of record's correspondence on 13 January 2022, followed by the Rule 11 application on 14 January 2022. DBT not only opposed the Rule 11 application, but also filed the application to reinstate the review application on 28 January 2022.

[15] It took DBT over two years to act on the review since its last step. In accordance with Clause 11.2.7, DBT ought to have delivered all its papers inclusive of a notice informing the Registrar that the review application was ready for enrolment. At the most, this ought to have been done by October 2020.

[16] DBT cannot dispute that the extent of the delay is excessive, even though it attempted to downplay this delay in the founding affidavit. At the very least, it

was conceded in the heads of argument that the delay is indeed excessive. In *South African Police Services v Coericius and others*⁶ it was reiterated that an applicant seeking a reinstatement of a review application that was archived, must essentially demonstrate *good cause*. In *Melane v Santam Insurance Co. Ltd*⁷ it was held that when deciding whether *good cause* has been demonstrated, the court must judicially exercise a discretion upon the consideration of all the relevant factors, which are interrelated and ought not be individually decisive. These factors includes *inter alia* the degree of lateness; the explanation therefor, the prospects of success in the main, and the importance of the case. More pertinent to applications under the Practice Manual, the LAC in *Samuels v Old Mutual Bank*⁸ (*Samuels*) added that the reinstatement application should (i) be made *bona fide*; (ii) should set out a reasonable explanation which covers the entire period of the delay; (iii) the applicant must have reasonable prospects of success in the main review application; and (iv) that it would be in the interests of justice to grant condonation.

- [17] As correctly pointed out on behalf of Nhlapo, where a party seeks condonation for non-compliance with statutory rules, it is obliged to provide a reasonable and adequate explanation for non-compliance. DBT contends that it was not dilatory in pursuing the review application, and that its failure to comply with the timeframes was not wilful.
- [18] In the founding affidavit deposed to by DBT's Managing Director and General Manager (Mr Shavhani Mutshutshu), it is averred that the Rule 7A(8)(a) Notice was filed on 23 October 2019 and served on Nhlapo's then legal representative, (Adv. Lukhele), together with the supplementary affidavit. Lukhele subsequently withdrew from the matter, and the Rule 7A(8)(a) Notice was then served on Nhlapo's trade union, MEWUSA, which appeared to be his new representatives at the time.

⁶ [2023] 1 BLLR 28 (LAC) at para 10; See also *Zono v Minister of Justice and Correctional Services; In Re: Minister of Justice and Correctional Services v Zono and Others* [2020] 11 BLLR 1160 (LC) at paras 17 – 21.

⁷ 1962 (4) SA 531 (A) at 532B – E.

⁸ [2017] 7 BLLR 681 (LAC).

- [19] Mutshutshu contends that between 24 October 2019 and 21 January 2020, correspondence was sent to MEWUSA in regards to the filing of the answering affidavit. The last time any correspondence was sent to MEWUSA without any response was on 21 January 2020. Mutshuntshu averred that DBT's attorneys did not follow up on the matter, and conceded that the Registrar was not informed that the matter was ready for allocation of a date. Equally so, indexing, pagination and a Notice in terms of Rule 22B was not attended to. This was however only done by 27 January 2022.
- [20] The substance of DBT's explanation is to blame Nhlapo for his change of representatives. It is not clear how this explanation is of assistance to DBT when it had on its own version, served all the pleadings and documentation on Nhlapo at his residential address, or at most, on MEWUSA.
- [21] DBT contends that it was its intention to provide Nhlapo with an extended opportunity to respond to the review application. This was inclusive of putting Nhlapo on terms on 21 January 2020. DBT's benevolence does not in my view assist in providing a reasonable explanation. This is particularly so in view of the fact that Nhlapo or his legal representative had not requested any such indulgence. The Rule 7A(8)(a) Notice had been filed by 23 October 2019. As at January 2020, the *dies* for the filing of the answering affidavit had passed.
- [22] The running of the time limits either in the Court Rules or the Practice Manual is for the benefit and compliance by an applicant party. This is further based on the provisions of Clause 11.4 of the Practice Manual, which entitles an applicant party to approach the Registrar in the absence of an answering affidavit, to enrol the application on the opposed motion roll. It was therefore not necessary to indulge or beg Nhlapo to file an answering affidavit, especially where no such indulgence was requested. Clearly this explanation is not reasonable.
- [23] Further explanations were that since January 2020, DBT had not followed up on the matter with its attorneys of record until Nhlapo's correspondence of

January. The delays were further attributed to internal changes in DBT; or the Covid-19 pandemic which led to closure of offices.

- [24] DBT's attorneys of record also deposed to a confirmatory affidavit in which the delay is attributed to the Covid-19 lockdown; inability to access the firm's office until July 2020; and inability to access the Court. It is further averred that there was an oversight or administrative error on their part for failing to manage the hand-over of the review application pursuant to the termination of one of their candidate attorney's employment in January 2020, who it is alleged had handled the matter from inception.
- [25] DBT's attorneys' explanation in my view boils to one issue, which is that from January 2020 the matter was not attended to because of the departure of the candidate attorney. All the other explanations attributable to Covid-19 and the lockdown or inability to access their offices or the Court are mere red herrings. This is so in that even if on their version they could only access their office in July 2020, nothing is said about why it took them until Nhlapo's attorneys of record's correspondence of 13 January 2022 to act. It is further not correct that the Court was only accessible to the public from July 2020. The Court and the Registrar's office were open to litigants after the lock-down restrictions were eased before July 2020. The Registrar's office was also receiving service of documents and attending to them before then. Be that as it may, it is apparent that the explanation proffered by DBT's attorneys for inaction for the period July 2020 and January 2022 amounts to no explanation at all.
- [26] Recently in *Krishaveni Govender & 20 others v CCMA & Others*⁹(*Govender*), the Labour Appeal Court was equally confronted with instances where a litigant had failed to follow up on matters with attorneys. Mutshutshu conceded that DBT did not follow up with its attorneys of record. It is trite that litigants cannot simply instruct attorneys and then wash their hands off their matters. There is an obligation on clients to follow up matters with their attorneys. In *Govender*, it was also reiterated that there is a limit to which a litigant can escape the result of his attorney's lack of diligence, but however

⁹ Case no: DA2/2022 (Unreported and Delivered on 26 February 2024) at paras 68 - 69.

that the facts of a matter will dictate whether the actions (or inactions) of a litigant's representative can be imputed to the litigant.

- [27] In *Govender*, it was further held that it was not simply sufficient for a candidate attorney to be blamed for non-compliance with the time frames. The LAC emphasized that there was a duty on attorneys to exercise supervision and control over candidate attorneys who are tasked with the responsibility of attending to matters allocated to them. The LAC further re-affirmed the principle that “...an attorney must take full responsibility for the conduct of his member of staff”.
- [28] In this case, and from the confirmatory affidavit deposed to by Ms Willem, a senior associate at the time, it was further averred that the candidate attorney that left in January 2020 (Ms Kimberley Ashmore), was under the supervision of both Willem and another partner, Paul Fouche. As to how any of the two senior members of the firm could not have even sought a handover from Ashmore when she left the firm is unexplained. Fouche was the partner responsible for the matter. In his confirmatory affidavit, he also confirmed lack of diligence on his part. His contention was that no follow ups were made after January 2020 when Ashmore left, because he did not regard the matter as urgent or requiring his attention. I need not say more on this flippant approach in the light of the urgency of review applications as stated in Clause 11.2.7 of the Practice Manual of this Court.
- [29] Against the clear lack of diligence on the part of DBT and its attorneys of record, and further in the light of the excessive delay, and an explanation that is less than satisfactory, the issue is whether this should be an end to DBT's case. It has been said that in considering applications of this nature, the Court should consider all the related factors, inclusive of the parties' prospects of success, and their *bona fides* or overall conduct.
- [30] In *Coericus*¹⁰, it was held that in an instance where procedural blunders are committed by the attorneys of a litigant, there was a need for a fair-minded examination of all the circumstances, and that the penalty for procedural

¹⁰ At paras 12 – 13.

blunders that have no substantive implications lie in costs orders, not in a dismissal of the matter. This was so based on the policy objectives of the Practice Manual, that did not require a mechanical application of its provisions.

- [31] In this case, it can be accepted from the common cause facts that but for the failure to attend to indexing and pagination, and the failure to file a Rule 22B Notice, DBT had timeously taken steps to impugn the Arbitrator's award. Against these factors, Nhlapo disputed that Lukhele was ever instructed by him, and that in fact the latter was on a frolic of his own. He had however conceded that MEWUSA acted on his behalf and that it was served with the transcribed record and the supplementary affidavit. As to whether any steps were taken by him or MEWUSA is not explained.
- [32] Against the above considerations, it cannot be said that the application to reinstate the review was brought in bad faith. The Court has taken account of the prejudice caused to Nhlapo as a result of the inordinate delays already alluded to and it is my view that this can only be remedied through a costs order. The Court also takes into account the parties' prospects of success on the merits as shall further be dealt with below. Against these factors, it is my view that a consideration of the interests of justice dictates that condonation ought to be granted for the delays and the review is therefore 'unarchived' and its merits should be dealt with. Of course in the light of the procedural lapses already alluded to, the requirements of law and fairness further dictate that DBT be held liable for Nhlapo's costs of the application to reinstate and those of the Rule 11 application. This is particularly so since the latter application was brought as a result of DBT's inordinate inaction.

(iii) *The review application:*

The evidence and conclusions by the Arbitrator:

- [33] Nhlapo was dismissed by DBT following upon a disciplinary enquiry into allegations of misconduct. The charges¹¹ were that on 7 November 2018, he

¹¹ 'Gross Negligence:

breached Eskom's Cardinal Rule by handling or using his cell phone whilst driving a vehicle on site. He was further charged with having signed off work that was done or completed by another employee.

- [34] It is common cause that the chairperson of the disciplinary had found Nhlapo guilty on both charges. In respect of the first charge, the chairperson imposed a sanction of dismissal, whilst for the second, a final written warning was issued. DBT contends that it did not accept the sanction of final written warning in respect of the second charge, and had instead imposed its own sanction of dismissal.
- [35] It is my view that in approaching this review application, if it is found that the conclusions and findings of the Arbitrator in respect of the first charge that led to a dismissal fails the reasonableness test as espoused in *Sidumo*¹², and that the sanction of dismissal ought not have been disturbed, it would be unnecessary to deal with the reviewability of the findings on the second charge, unless of course other factors compel the Court to do otherwise. This is so in that the sanction of a dismissal on the first charge would ordinarily have put an end to the matter.
- [36] At the arbitration proceedings, DBT led the evidence of Mr Donovan van Eeden, its Project Quality Manager, Mr Schoeman, its Quality Lead, and Mr Sinclair Paul, its EHS Lead. Nhlapo was the sole witness in his case.
- [37] In respect of the first charge, it could not be disputed that one of Eskom's cardinal rules at Kusile and related to safety on site was that all employees were prohibited from handling their mobile phones, calling or texting whilst operating a vehicle on site. Paul, who is responsible for Environmental Health and Safety testified in regards to induction of employees on safety issues, and aspects covered in that induction including use of cell phones whilst driving on

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1. In that on 7 November 2018 at approximately 15.14 you breached a (sic) Eskom Cardinal Rule by handling your cellphone handset whilst driving to Kusile Power Station Construction Site.
 2. In that you on 16/08/20018 (sic), you signed off work done or completed on K4 Intervention Point 3.01-Do Hydro Test on system - is signed off by Mr Simiso whilst TCP is still in progress getting ready for the Hydro, walk downs review of Data book etc.'(sic)

¹² *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (2007) 28 ILJ 2405 (CC) at para 110.

site. He testified that the cardinal rules were implemented by Eskom on all its sites. These rules were also displayed on board signs visible to anyone entering the Kusile site. Nhlapo did not dispute that he went through induction where these rules were emphasised. Paul had testified that a breach of the cardinal rule resulted in a dismissal in accordance with Eskom's zero tolerance policy.

- [38] The evidence against Nhlapo was that on 17 October 2019, he was observed by a Mr Henery Ronald, an Eskom employee, handling his phone whilst operating a vehicle. After Nhlapo had stopped the vehicle, Ronald approached him and retrieved his access card for breach of the rule. This implied that Nhlapo could no longer have access to the site to perform his duties. The said Ronald had testified at the internal disciplinary enquiry but did not do so at the arbitration proceedings. The Arbitrator had however accepted that nothing turned on Ronald's failure to testify before him in the light of Nhlapo's concessions as shall further be dealt with below.
- [39] Nhlapo's evidence¹³ in chief as indicated by the Transcribers in the record was hard to follow. This was because he had during the proceedings, continuously testified inter-changeably in English and his own language, and also spoke over the interpreter. This made it difficult for the transcribers to transcribe his evidence in a coherent manner.
- [40] As a side issue, there is a duty on Arbitrators/Commissioners, to ensure that there is consistency in the use of any language when witnesses testify at arbitration proceedings, and the services of an interpreter are made available. Furthermore, there is a need for control of proceedings by Commissioners when witnesses testify to ensure that they do not talk over and/or interrupt interpreters, and further to ensure that evidence is properly translated and recorded. Interpreters are there to assist Commissioners and the parties in following proceedings and the testimony presented. This will also not only assist transcribers when transcribing the record, but also the Court in its review function of assessing the overall evidence that was presented at the proceedings.

¹³ See page of the transcribed record, especially the Transcribers' NOTES.

- [41] The essence of Nhlapo's testimony to the extent that one can understand from the record, was to initially deny that he broke any cardinal rule as such a rule did not exist¹⁴. He however testified that as he was driving a vehicle on site towards the Tabular office, he had his phone between his legs. It is not known why anyone would want to operate a vehicle whilst a mobile phone is wedged between one's legs. Be that as it may, as he was driving, the phone fell and landed under the foot pedals. This caused him to stop on the side of the road as the phone would have interfered with his driving.
- [42] Nhlapo's further version was that he had stopped the vehicle not only to pick up the phone from the pedals, but also because there were other vehicles in front of him, and further since he was already at his destination at the time. As he picked up the phone, he then realised that there was a text message from someone called 'Pretty', which he had responded to. As the other vehicles in front of him moved, he had also moved closer towards a parking space, still with the phone in his hand. After alighting from the vehicle and as he was walking towards the office, Ronald saw him with his phone still in his hand, called him and asked why he had a phone in his hand whilst operating a vehicle. As he attempted to explain, Ronald was not interested and had asked to see his phone. Ronald then saw the text messages and accused him of having text whilst operating the vehicle. Nhlapo contended that despite his attempts to explain why he had his phone in his hand, and further apologising, Ronald retrieved his access card from him, which effectively barred him from accessing the site.
- [43] Nhlapo's evidence under cross examination was confusing. What can however be deduced from it is that he conceded he had operated the vehicle whilst he had his phone in his hand. He conceded that he was aware of the cardinal rules when on site having attended inductions and safety awareness sessions. Despite having earlier contended that he had no knowledge of the rules or that he had breached them, he proceeded to confirm that if an employee broke the rule, a dismissal would follow.

¹⁴ See Pages 284 line 19; page 288 line 14.

- [44] Amidst the concessions, Nhlapo's complaint was that DBT had applied discipline in regards to the cardinal rule inconsistently as he knew of other employees that were previously disciplined for the transgression, but were not dismissed. An example was given in regards to his colleague, Owen Isaacs, who Nhlapo contended broke a cardinal rule but was not dismissed.

The Arbitrator's findings on the first charge:

- [45] In regards to the first offence, the Arbitrator accepted that Nhlapo did not dispute the breach of the rule, which was valid and reasonable. The Arbitrator reasoned that Nhlapo owned up for his misdemeanour and had apologised. In regards to the appropriateness of the sanction, the Arbitrator took into account that Nhlapo had stopped off the road whilst handling his phone. In essence, the Arbitrator's view was that Nhlapo had acted reasonably by stopping the vehicle and continuing to handle the phone including texting. He concluded that Nhlapo had shown remorse and had admitted the misconduct hence a dismissal was harsh. He further concluded that discipline was inconsistently applied because other employees were not dismissed for similar breaches, a fact which according to the Arbitrator was not disputed by DBT. Despite DBT's contentions that Nhlapo's conduct had irretrievably broken down the trust relationship, the Arbitrator held that even though he had committed the offence, he ought to be given a second chance in the light of having been remorseful and since he had not denied the charge.

The grounds of review and evaluation:

- [46] DBT contends that the Commissioner's findings on substantive fairness was not a decision that a reasonable decision maker would make based on the evidence before him. It was submitted that the Arbitrator misconstrued the issues he was asked to determine; committed gross irregularities in the conduct of proceedings in various ways, including disregarding or failing to properly consider relevant evidence, placing undue weight on certain evidence, misdirected himself in regard to the evidence presented, and made mistakes of law.

- [47] The principles applicable in respect of review applications are fairly settled. The test is whether the Arbitrator's decision is one that no reasonable decision maker could reach based on the available evidence¹⁵ In *Head of the Department of Education v Mofokeng and Others*¹⁶ it was held that a review on grounds of unreasonableness involves the consideration of whether, apart from the commissioner's flawed reasoning or any irregularity demonstrated, the ultimate outcome could have nevertheless been arrived at taking into account the issues and the evidence. However, it is not only the reasonableness of the outcome which is the subject of consideration. In addition, the court must consider whether or not the commissioner misconceived the nature of the inquiry or undertaken the inquiry in a misconceived manner. This is to ensure that there was a fair trial of the issues.
- [48] In regards to the Arbitrator's findings in respect of the first charge, the only issue is whether having found that the cardinal rule was breached, his analysis on the appropriateness of the sanction of dismissal was reasonable. To the extent that the rule was breached, the court accepts the reasons why the rule was put in place by Eskom and why there was a requirement that everyone on site should obey it. Its primary objective was the safety of all 10 000 personnel on the site, and specifically prohibited all persons from handling or doing anything with a mobile phone whilst operating a vehicle or even whilst walking on the road on site.
- [49] There were designated areas where cell phones could be used on site, The rule was enforced also in view of evidence by Paul that there was constant flow of heavy duty trucks and vehicles on the road, and there had been numerous vehicle accidents and injuries resulting from drivers using phones whilst operating vehicles, or from employees walking on the roads and not paying attention to moving vehicles.

¹⁵ See *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (2007) 28 ILJ 2405 (CC) at para 110.

¹⁶ [2015] 1 BLLR 50 (LAC) at paras 31 – 33.

- [50] As a result of the accidents, Eskom had implemented a zero tolerance approach, and any employee in breach of the rule was removed from the site. This implies that an employee of DBT which is a service provider/sub-contractor on site, would be prevented from entering the site once the rule was breached. Added according to Paul was that DBT had its own campaigns on safety, which were accompanied by what is referred to as a Toolbox Talk on cell phone technology and road safety, and which Nhlapo was well aware of. Paul had further added that DBT as a sub-contractor had to apply and adhere to the principal contractor's (Eskom) as well as clients' rules.
- [51] The Court fails to appreciate how the Arbitrator could have accepted Nhlapo's explanation as to why he had handled the phone whilst operating the vehicle. In the first instance, one does not appreciate how any driver with the knowledge of the strict cardinal rules would want to operate a vehicle with a mobile phone wedged between his legs, instead of storing it in a safe place where it would not create a hindrance whilst operating a vehicle. It was submitted on behalf of Nhlapo that a proper interpretation of the rule was that it merely prohibited employees from texting or making calls whilst driving. This distinction however is of no assistance in that handling could not have been limited to whether texting or making calls. A proper understanding of the rule as attested to by Paul was that an employee should not handle a phone for whatever reason whilst operating a vehicle, and this made sense as the idea with the cardinal rule is for employees driving vehicles to do so without any distractions. As already indicated elsewhere, the Arbitrator had accepted on Nhlapo's own version, and in the absence of Ronald's evidence, that the former had indeed handled the phone whilst operating the vehicle.
- [52] A second consideration is that the Arbitrator's finding that Nhlapo had not denied breach of the rule is not supported by the evidence. In his evidence in chief, Nhlapo had on no less than two occasions denied the existence of the rule of breach. This was until under cross-examination that he had conceded that he knew of the rules and the consequences of a failure to adhere to them. He had conceded that he had indeed attended inductions in that regard.

- [53] A third consideration is that whether Nhlapo had stopped off the road to pick up the phone is of no consequence because the phone ought not to have been in his possession in the first place. Any reasonable employee in his position with knowledge of the rules and the consequences thereof, ought to have stored the phone in a safe place in the vehicle. He had to stop the vehicle due to conditions he had created himself by having the phone between his legs as he was driving, and in clear breach of the rules.
- [54] A further aggravating factor is that upon stopping the vehicle, he had continued to respond to a text from 'Pretty', whilst on his version there were other vehicles in front of him. This in my view demonstrated a complete disregard for the rule with full knowledge of the consequences thereof. A finding by the Arbitrator that Nhlapo had acted reasonably by stopping off the road whilst he handled the phone is not sustainable, and there is nothing reasonable about his conduct in relation to the conditions he had created himself.
- [55] Furthermore, it is not clear on what basis the Arbitrator could have concluded that Nhlapo showed remorse, other than at the time that he was caught out by Ronald. A person cannot be said to have shown remorse or owned up to misdemeanours in circumstances where he/she had initially denied any wrong- doing, and only conceded thereafter.
- [56] Nhlapo had denied knowledge of the rule, sought to deny that he had handled the phone, and only apologised when he appreciated the consequences of what he had done. Added to these considerations is that upon stopping the vehicle and picking up the phone, he had continued to respond to the text when the rules were clear and known to him.
- [57] The Arbitrator had to also consider whether discipline was consistently applied, and whether the sanction of a dismissal was appropriate in the circumstances. The issue of inconsistent application of discipline was raised with Paul under cross-examination, despite the Arbitrator's finding that it was not. In this regard Paul was asked about an incident involving Owen Isaacs who was still in the employ of DBT. It was put to Paul that he broke the

cardinal rule but was not dismissed. Paul indicated that it depended on what cardinal rule was breached and when this took place. He had testified that Isaacs was disciplined for a different charge related to non-compliance with safety rules.

[58] Inasmuch as it is appreciated that the parity principle remains part of our law, it needs however to be reiterated that where inconsistent application of a rule or discipline is alleged, it is not sufficient for an employee to simply make the allegation without placing pertinent, if not comparable facts before an arbitrator. Equally so, sufficient information must be placed before the employer in order to afford it the opportunity to respond effectively to the allegation that it applied discipline in an inconsistent manner¹⁷. In this case, it was alleged that Isaacs was not dismissed when the facts and circumstances in that regard were not placed before the arbitrator. All that was put to him under cross-examination was that it did not matter when the infraction took place or the circumstances under which it took place. Sadly the Arbitrator in this case failed to consider that not much was put to Paul beyond a mere allegation, and concluded that Nhlapo's contentions in this regard were not rebutted. This was not correct, and moreso, since not sufficient information was placed before DBT to rebut anything other than the mere allegations about Isaacs.

[59] It has long been held that employers are required by considerations of fairness to act consistently in the application and enforcement of its disciplinary rules and management policies designed to instil discipline¹⁸. Equally so, it was further held that even though like cases should be treated alike, there are instances where an employer may be justified in differentiating between two employees guilty of the same transgression on the basis of their personal circumstances or on their merits¹⁹.

[60] In the end, the prerogative remains that of an employer to mete out discipline. One of the considerations in determining fairness in such instances is whether

¹⁷ *Comed Health CC v National Bargaining Council for the Chemical Industry and Others* (2012) 33 ILJ 623 (LC) at para 10.

¹⁸ *Cape Town City Council v Masitho & others* (2000) 21 ILJ 1957 (LAC).

¹⁹ *Early Bird Farms (Pty) Ltd v Mlambo* [1997] 5 BLLR 541 (LAC).

the employer's decision was not capricious, induced by improper motives, or based on some discriminatory practice or policy²⁰. The implications therefore are that mere allegations of inconsistency in sanction is not sufficient to allow other employees to profit from it irrespective of their own circumstances under which the infraction took place. Thus, where an employer shows a legitimate basis to differentiate between employees, whether due to their seniority, personal circumstances, the severity of the misconduct or other material factors, no inconsistency will have been proved²¹.

- [61] Against the above principles, even though Nhlapo could not demonstrate in what manner Isaacs had breached the cardinal rule and what the circumstances of that case were, an explanation was proffered by DBT in regards to the facts of Isaacs' case, who is said to have breached a safety rule, and that the offence took place at the time when Eskom had not adopted its zero tolerance policy. Of course Paul was correct in pointing out that each case had to be dealt with on its own merits, and I did not understand Nhlapo's case to be that DBT was capricious or induced by any other improper motives for dismissing him, or that there was nothing distinguishable between the circumstances of his case, and those of Isaacs. His contention throughout his evidence was that DBT sought to get back at him because he was previously successful in a dispute he had brought against it. However, this contention in my view amounts to unsustainable conspiracy theories.
- [62] Aligned to the above question is whether the decision to dismiss was appropriate, and whether Arbitrator's conclusions to the contrary were reasonable. It was reiterated in *Govender*²² that in determining the appropriateness of a sanction, an arbitrator is required to consider the nature, magnitude, and impact of the misconduct on the employment relationship.
- [63] Given the facts of this case and the conclusions reached in this judgment in respect of the first charge, the Arbitrator clearly failed to consider the issues raised by DBT as to why the dismissal for breach of the cardinal rule was

²⁰ *SACCAWU and Others v Irvin & Johnson* (1999) 20 ILJ 1957(LAC); *Samancor Ltd v CCMA and others* (2020) 9 BLLR 908 (LAC).

²¹ *Capitec Bank v CCMA & Others* (DA5/2019) [2020] (LAC).

²² At para 83.

appropriate. It is correct that the Arbitrator had regard to *Sidumo* regarding factors to be considered when determining the appropriateness of a sanction²³ The Arbitrator's reliance however on the evidence that purportedly demonstrated contrition or reasonable conduct on the part of Nhlapo did not support his conclusions on that evidence. It is accepted that a dismissal ought to be a measure of the last resort unless the circumstances of a case demonstrates otherwise. Where however the conduct in question involves matters of safety at the workplace, and where there is zero tolerance of breaches in that regard, it has been said that the code of good practice enjoins, arbitrators to accept a zero-tolerance approach if the circumstances of the case warrant the employer adopting such an approach²⁴. In this case, the zero tolerance to the use of phones whilst operating a vehicle on site was enforced by Eskom, which in turn was expected to be enforced by contractors, sub-contractors, and any other service provider and their employees on site. This therefore implied that DBT had a proper operational objective relating to risk management that it was compelled to achieve in enforcing and adopting a zero-tolerance approach as it did. The nature and impact of Nhlapo's misconduct clearly was to destroy the employment relationship as he had denied knowledge of the rules or their breach, when in fact he had shown disregard of those rules which he was well aware of, and knowing the implications of such breach.

[64] In summary, and against what has been said above, it is concluded that the Arbitrator's determination in his award that the dismissal of Nhlapo was substantively unfair is unsustainable, as it cannot be said to fall within a band of a reasonable outcome. The Arbitrator clearly ignored or downplayed pertinent evidence and failed to apply requisite legal principles in the consideration of appropriateness of sanction or the parity question before him. This in the end led him to conclusions that are not reasonable.

[65] Furthermore, all the evidence to determine a fair sanction is before the Court. A Commissioner acting reasonably, based on the evidence presented, would

²³ At para 27 of the Award

²⁴ *Shoprite Checkers (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2015) 36 ILJ 2273 (LAC) at para 17.

have confirmed Nhlapo's dismissal and no purpose would be served by remitting the matter to the MEIBC for re-determination. Accordingly, the Court is in a position to therefore substitute the award of the Arbitrator which has been found to have failed the *Sidumo* test.

- [66] Further against all the above, the Court does not deem it necessary to deal with the second charge in the light of the conclusions reached on the first charge, which on their own are dispositive of the matter. Even if the Court were to have regard this charge, there is no basis for a conclusion to be reached as alleged by DBT, that the Arbitrator failed to consider that charge.
- [67] From paragraphs 17 – 18 of the award²⁵, it is apparent that the Arbitrator did consider the charge, albeit it is correct that he did not in his analysis, properly consider its merits, and which in my view it was not necessary based on his conclusions in that regard. The Arbitrator had regard to the internal chairperson's findings and the fact that a final written warning was issued in that regard. The fact that DBT did not confirm the sanction of a final written warning is neither here nor there, since the Arbitrator could only accept the outcome of a disciplinary enquiry as it was for reasons that will further be pointed out below.
- [68] The Arbitrator further found that DBT did not re-charge Nhlapo with the same charge after the findings of the chairperson. Against these factors, the Arbitrator had concluded that a finding of the chairperson served as a recommendation, but that it could not be ignored without reconvening a hearing, or at best, providing reasons why the recommendation was not accepted. Of course even if this might not appear to DBT to be a finding, there is no doubt that it is indeed.
- [69] DBT contends that the Arbitrator's conclusions as above are incorrect in both law and fact. Yet DBT did not refer to any authority for the proposition that it was entitled without more, to simply reject a chairperson's outcome and substitute it with its own sanction. It is irrelevant whether the decision of the chairperson is regarded as an 'outcome' or a 'recommendation'. The

²⁵ Page 25 of Annexure 'FA1' to the Founding affidavit

Arbitrator was correct in stating that there must be at least a basis for altering the sanction. This is so in that it can no longer be debated that the chairperson of an enquiry is clothed with the *persona* of the employer, and it would be impermissible for an employer to arbitrarily alter its own decision; or alternatively, without demonstrating exceptional circumstances entitling it to alter the sanction. An exposition of these principles and authorities is set out by my sister Mahosi J in *National Union of Mineworkers obo Members and Others v Arcelormittal South Africa Limited and Others* ²⁶.

[70] DBT's posture that it could accept or reject the chairperson's recommendations as it wished and without giving reasons is a classic case of 'self-help', which has no place in our modern labour law and employment relations. This is because it was common cause that DBT could not produce its own disciplinary code and procedure at the arbitration proceedings, or any other basis for rejecting the outcome, other than the fact that it could simply exercise an election. Even if DBT could rely on some exceptional circumstances, it would clearly be unfair to simply raise these at arbitration when an employee was not initially confronted with them. This posture cannot be countenanced, and any contention to the contrary gives rise to a question as to why would an employer go through a disciplinary enquiry and then not accept the outcome, unless of course the outcome was pre-determined, which in effect turns the disciplinary enquiry into a charade.

[71] It follows from the above that the Court will accept that the sanction of a final written warning in respect of the second charge stood irrespective of DBT's contentions. Further to the extent that nothing turned on that sanction in the light of the fairness to dismiss based on the first charge, no more needs to be said on this issue in the light of the overall conclusions reached in this judgment.

Costs:

²⁶ (JR 802/18) [2020] ZALCJHB 167 (2 September 2020) at paras 16 - 31
South African Revenue Services v Commission for Conciliation Mediation and Arbitration and Others
 (DA 7/11) [2013] ZALAC 26; [2014] 1 BLLR 44 (LAC); (2014) 35 ILJ 656 (LAC)

[72] I have already indicated that DBT should be burdened with the costs of the Rule 11 application. This is so in that but for inordinate delays and prejudice it caused in prosecuting the matter, it would not have been necessary for Nhlapo to bring that application. Furthermore, DBT should be burdened with the costs of the application to reinstate the review application for reasons already set out under the topic of that application in this judgment.

[73] Insofar as the costs of the review application, it is my view that a consideration of the requirements of law and fairness dictates that no award as to costs be made.

[74] In the premises, the following order is made:

Order:

1. The applicant's failure to file all the necessary papers in the review application within 12 months of the date of the application as contemplated in clause 11.2.7 of the Practice Manual is condoned .
2. The applicant's review application is retrieved from the archives and reinstated on the roll.
3. The Rule 11 application is dismissed.
4. The arbitration award issued by the third respondent under the auspices of the second respondent under case number MP10272-18 dated 13 May 2019 is reviewed, set aside and substituted with an order that;
 'The dismissal of Mr Simiso Nhlapo was substantively fair'.
5. The applicant is ordered to pay to the first respondent, the costs of the Rule 11 application.
6. The applicant is further ordered to pay to the first respondent, the costs of the application to reinstate the review application.
7. There is no order of costs in respect of the review application.

Edwin Tlhotlhemaje

Judge of the Labour Court of South Africa

APPEARANCE:

For the Applicant:

L Frahm-Arp of Fasken
(incorporated in SA as Bell Dewar
Inc.). (Heads of argument prepared
by Paul Fouche)

For the First Respondent:

MW Dlamini SC, instructed by
Ngengebule Attorneys Inc.