REPUBLIC OF SOUTH AFRICA

Not Reportable

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Case No: JA 36/2011

In the matter between:-

REFILWE MURIEL MOGALE **Appellant**

and

A & D SPITZ (PTY) LTD **Respondent**

Heard: **22 March 2013**

Delivered: **22 August 2013**

Summary: Arbitration awards- arbitration award must be concise, well reasoned and deal with the substantive issues of the matter- the award must state why a particular decision was made- arbitration awards should not be equated to court judgments- the fact that an issue was not mentioned in the award does not mean that it was not considered. Consistency- principles relating thereto restated.

Coram: Tlaletsi JA, Musi AJA et Coppin AJA

JUDGMENT

MUSI AJA

[1] This is an appeal, with the leave of the court *a quo*, against the judgment of the Labour Court (Lagrange J). The court *a quo* granted leave on a narrow issue, which it couched as follows:

> 'The application for leave to appeal is granted against the implicit finding of the court that the arbitrator had given proper consideration to the

> evidence of the related disciplinary cases of the regional manager and stock controller in evaluating the appropriateness of the sanction of dismissal in the applicant's case and, or alternatively, that his (sic) finding on the appropriateness of the sanction of dismissal was not unreasonable in relation to the evidence of those cases.'

[2] The appellant was dissatisfied with the order granting leave to appeal on the narrow issue only. She petitioned the Judge President seeking leave to appeal against the whole judgment of Lagrange J. The petition was refused.

[3] The appellant commenced employment in May 1995 with A & D Spitz (Pty) Ltd (the respondent) a retail company which primarily sells shoes. On 1 July 2000, she was appointed as a branch manager at one of the respondent's stores situated at Sammy Marks Square Pretoria (the store). On 1 June 2008, she was promoted to the position of retail training officer and transferred to the respondent's Bryanston offices. She was charged with gross negligence and gross misconduct, relating to incidences that occurred while she was still the branch manager at the store. She was dismissed on 13 March 2009. After conciliation failed, she referred the dispute to arbitration. The arbitrator found that her dismissal was fair. She launched a review application in the Labour Court, which was dismissed. She was then given permission to escalate the matter to this Court on the basis set out in paragraph one above. I do not intend to set out a long account of the facts because of the crisp issues that have to be decided.

[4] During August 2008, shortly after Nolan Billings was appointed as the branch manager of the store, he noticed that defective stock, which was discovered and or returned during the appellant's tenure, was placed amongst sellable stock and not written-off in terms of the respondent's procedures.

[5] How write-offs occurred and whose duty it was to action on and authorise them was common cause. Write-offs occurred in various ways. Firstly, if stock arrived with a factory defect, secondly, if a customer returned

defective stock, thirdly, if stock was faded or shop soiled, fourthly, if there were odd shoes (one size bigger than the other or different in colour.) and lastly, singles (when there is only one shoe instead of a pair). All such stock will be earmarked to be written-off and sent to a warehouse. The stock so identified was to be placed separately from the sellable stock.

[6] When a customer returned stock or it is otherwise doomed to be written-off then an adjustment should be done. The stockroom controller was in charge of the stock in the storeroom and kept the stock sheets. The stockroom controller would do the stock adjustments and the store manager would verify the adjustment by checking the stock in question. It is then kept in the store and when the regional manager visited the store, the stock to be written-off and the adjustment sheets would be presented to him/her for authorisation. If he/she is satisfied s/he would authorise the write-offs.

[7] Faded, odds, singles, customer returns were supposed to be written-off by the store manager. This was not done. Selvan Francis, the respondent's risk manager, investigated the write-offs at the stores during September 2008. He verified that the stock that was written-off during September 2008 was stock that dated back four years and had to be written-off between 2004 and 2008, therefore in the appellant's tenure. The write-offs should have been done and adjusted in the year they occurred. If this is not done the profit for that financial year is inflated and employees are given incentives based on the inflated profits. Therefore, if stock is returned and properly adjusted in a particular financial year the books will reflect that there was no sale. If no adjustment is done a sale and therefore a profit would reflect. Likewise, stock which was recorded as sellable stock, which in fact should have been written-off because it was faded would have required a downward adjustment of the store's income.

[8] Mr Kutlwano Diale, the assistant manager of the store during the appellant's tenure, confirmed that the unsellable stock was kept with

sellable stock in the stockroom in full view of anyone who entered the stockroom.

[9] The appellant testified that during August 2008, the operations director of the respondent requested the regional manager, Tshepo Moyo, and herself to go and do write-offs at the store. They went and unsuspectingly did the write-offs. They were later charged. Had they been told that they might be charged she or they would have investigated the causes of the write-offs before signing the documents authorising the write-offs. She confirms that they found approximately 168 units that had to be written-off; which they wrote-off. During cross-examination, it was put to her that the regional manager was not responsible for authorising all write-offs and that he only wrote-off what was presented to him. The appellant conceded that the regional manager only dealt with stock presented to him.

[10] The arbitrator found that the appellant's dismissal was substantially and procedurally fair. She did not specifically deal with the issue of consistency of the sanction before arriving at her conclusion. However, in the award, under the heading issues to be decided, she stated that one of the issues to be decided was the inconsistency of the sanction.

[11] In the Labour Court, many grounds of review including the issue of consistency, were raised unsuccessfully. With regard to consistency, the Labour Court in rejecting the arguments that the arbitrator did not apply her mind, at all, to the issue of the inconsistency of the sanction and that the appellant was treated differently and therefore unfairly *viz-à-viz* the regional manager said the following:

> '25. A more important argument concerning the sanction was a claim that the applicant's dismissal amounted to inconsistent treatment because the regional manager who had also been charged in relation to the stock adjustments only received a final written warning. The applicant claimed the arbitrator had failed to understand this claim. Apart from the regional manager, the stock controller at the Sammy Marks store who reported to the applicant was also charged in

connection with the stock adjustments and was dismissed. The applicant clearly saw her conduct as on a par with the regional manager.

26. In the course of the applicant's evidence the outcome of the regional manager's enquiry was put to her, to try and demonstrate that her situation was not the same. In essence the company defended the different sanction meted out to the regional manager and the applicant on the basis that the responsibility of the regional manager was to check and authorise stock adjustments, but that regional managers were only expected to do so on the basis of the stock that is presented to them and were not expected to check through all stock unless they had specifically been alerted to a problem. Although the arbitrator does not expressly deal with this issue in the award, it is clear from the questions put by the arbitrator to the applicant at the end of her evidence that the arbitrator accepted that the regional manager was not expected to survey all the stock in a store, but only to attend to the stock specifically set aside for stock adjustments. The fact that the arbitrator pursued this issue with the applicant until clarity was obtained shows that the arbitrator believed it was an important issue in evaluating the relevance of what happened in the regional manager's case.

27. In argument in court, it was submitted that the applicant's responsibility was analogous to that which the regional manager had, namely that the branch manager was only responsible to check and authorise stock adjustments brought to her attention, and if this was not done she could not be held accountable for stock adjustments that ought to have taken place, but there is nothing on the record to indicate that this argument was presented to the arbitrator.'

[12] Ms Steenkamp, on behalf of the appellant, submitted that the Labour Court erred in its finding because it was clear that the arbitrator failed to deal with the issue of consistency and that the Labour Court's judgment should be set aside. She unsurprisingly failed, during argument, to make good on the proposition that the Labour Court erred. She was unable to make any submission as to why she says that the Labour Court erred in its approach and conclusion on this issue.

[13] Mr Belger, on the other hand, argued that the duties and responsibilities of the store manager and the regional manager differed. He submitted that the store manager's degree of culpability was much greater than that of the regional manager. His ultimate submission was that it lays within the reasonable bounds of fairness for a differentiation to be made between the regional manager and the appellant and that the sanction meted out in each case was clearly justifiable given the facts of the matter.

[14] The issues that fall to be decided are firstly, whether the failure of the arbitrator to specifically deal with the issue of inconsistency in her award means that she did not apply her mind thereto at all and secondly, if the answer to the first issue is in the negative, whether taking into account the inconsistent treatment, the commissioner's decision was one which a reasonable commissioner could not reach.

[15] In terms of section 138(7) of the Labour Relations Act 66 of 1995, the commissioner must within 14 days of the conclusion of the arbitration proceedings issue an award with brief reasons, signed by him/her. Although the reasons must be concise, they must be well reasoned and deal with the substantive merits of the matter. The reasons must not only include what the arbitrator decided but also why he/she decided as he/she did. A well-reasoned award that deals with all the issues properly is likely to be more palatable to the parties and might obviate the need to challenge it by way of review in the Labour Court. Commissioners must bear in mind that an award may be challenged for what was stated in the award and for that which was omitted from it.

[16] In *Country Fair Foods (Pty) Ltd v CCMA and Others*[1] it was said that:

> 'Given the finality of the awards and the limited power of the Labour Court to interfere with the awards, commissioners must approach their function with caution. They must bear in mind that their awards are final – there is no appeal against their awards. In particular, commissioners

[1] [1999] 11 BLLR 1117 (LAC) at paragraph 28.

> must exercise greater caution when they consider the fairness of the sanction imposed by an employer.'

I agree fully with this part of paragraph [28] of the *Country Fair* judgment. The rest of the paragraph relating to deference to be shown to the sanction of the employer was the subject of controversy which was ultimately resolved by the Constitutional Court *in Sidumo and Another v Rustenburg Platinum Mines and Others* [2007] 12 BLLR 1097 (CC) at paragraph [79].

[17] On the other hand, courts should be mindful of the fact that arbitration awards should not be equated to judgments of courts of law and that arbitration awards like judgments are not meant to be perfect. The fact that a particular issue was not mentioned in the award does not necessarily mean that it was not considered. The facts of the case, including the nature of the evidence, the importance of the issue and whether the issue was canvassed in the evidence will assist in determining whether the issue was considered. The fact that a particular conclusion could not have been reached without considering the issue not mentioned is also relevant. In *Rex v Dhlumayo and Another,*[2] Davis, AJA said the following:

> '… Indeed, even in a written judgment it is often impossible, without going into the facts at undue length, to refer to all the considerations that arise. Moreover, even the most careful Judge may forget, not to consider, but to mention some of them. In other words, it does not necessarily follow that, because no mention is made of certain points in the judgment – more especially, of course, if that judgment be an oral and extempore one – they have not been taken into account by the trial Judge in arriving at his decision. No Judgment can ever be perfect and all-embracing It would be most unsafe invariably to conclude that everything that is not mentioned has been overlooked.'

18] Although the arbitrator did not specifically deal with the issue of consistency of discipline in her award, it is clear that she tabulated it as

[2] 1948 (2) SA 677 AD at 702.

one of the issues that fell to be decided. Paragraph 2 of her award reads as follows:

> '2. ISSUE TO BE DECIDED (sic)
>
> 2.1 In terms of procedure, the applicant's hearing was chaired by an external person. The same charges were brought against a regional manager, his hearing was chaired by an employee of the respondent.
>
> …
>
> 2.3 The applicant was the only one dismissed, the sanction was inconsistent.
>
> 2.4 The applicant had pleaded not guilty to the charges.'

19] I agree with the Labour Court, for the reasons stated by it that the facts of this case clearly demonstrate that the issue of consistency was indeed considered, although not mentioned, by the arbitrator. This issue was pertinently canvassed in the evidence and the appellant conceded that there were differences between her case and that of the regional manager. The issue of the difference in roles and functions between the appellant and the regional manager in relation to write-offs was also emphasised by the respondent's risk manager, Selvan Francis.

[20] Having regard to the evidence led and particularly the emphasis placed, during the arbitration proceedings, on the disparity of the sanction meted out to the appellant in relation to that given to the regional manager, I am of the view that the failure of the arbitrator to mention that in her award does not render it unreasonable. In my judgment, it was considered with the other evidence but not mentioned in the award.

[21] I now turn to consider the disparity issue. In *National Union of Metalworkers of SA and Others v Henred Fruehauf Trailers (Pty) Ltd*,[3] it was said that:

[3] [1994] 15 ILJ 1257 (A) at 1264A-D.

> 'Equity requires that the courts should have regard to the so-called 'parity principle'. This has been described as the basic tenet of fairness which requires that like cases should be treated alike (see Brassey 'The Dismissal of Strikers' (1990) 11 ILJ 213 at 229-230. So it has been held by the English Court of Appeal that the word 'equity' as used in a United Kingdom statute dealing with the fairness of dismissals, 'comprehends the concept that the employees who behave in much the same way should have meted out to them much the same punishment' (*Post Office v Fennell* (1981) IRLR 221 at 223). The parity principle has been applied in numerous judgments in the Industrial Court and the LAC in which it has been held for example that an unjustified selective dismissal constitutes an unfair labour practice.'

[22] In *SACCAWU and Others v Irvin and Johnson Ltd* (1999) 20 ILJ 2303 (LAC) at paragraph 29 Conradie JA, *inter alia,* stated that there is no separate principle involved in parity of discipline and that consistency is simply an element of disciplinary fairness.

[23] In *Cape Town City Council v Masitho and Others,*[4] *Irvin & Johnson supra* was clarified and the principles stated therein reiterated as follows:

> 'In *SACCAWU & Others v Irvin & Johnson* [1999] 8 BLLR 741 (LAC) at 751B this Court reiterated that consistency is an element of disciplinary fairness, and that it "is really the perception of bias inherent in selective discipline which makes it unfair" but went on to observe that the flexibility which is inherent in the exercise of a discretion will inevitably create the potential for some inconsistency. I am not at all sure that disciplinary decisions involve the exercise of a discretion, but even if that is so, fairness would seem to me to generally require any such discretion to be exercised consistently. While it is true that an employer cannot be expected to continue repeating a wrong decision in obeisance to a principle of consistency (751D), in my view the proper course in such cases is to let it be known to employees clearly and in advance that the earlier application of disciplinary measures cannot be expected to be adhered to in the future. Fairness, of course, is a value judgment, to be determined in the circumstances of the particular case, and for that

[4] (2000) 21 ILJ 1957 (LAC) at paragraph [14].

> reason there is necessarily room for flexibility, but where two employees have committed the same wrong, and there is nothing else to distinguish them, I can see no reason why they ought not generally to be dealt with in the same way, and I do not understand the decision in that case to suggest the contrary. Without that, employees will inevitably, and in my view justifiably, consider themselves to be aggrieved in consequence of at least a perception of bias.'

[24] Where the employee alleges that the employer acted inconsistently, the employer will have a duty to show that it acted consistently in disciplining its employees or where there was differentiation the employer will have to demonstrate that the different treatment was justified. See *Early Bird Farms (Pty) Ltd v Mlambo* [1997] 5 BLLR 541 (LAC) at 545 J.

[25] The employer's reasons for imposing different sanctions are set out in the reasons for the recommendation of the chairperson of the disciplinary inquiry of Mr Tshepo Moyo, the regional manager, where he said the following:

> 'The bulk of the 'problem stock' was in fact odds and faded which is the responsibility of the branch manager. If this stock was put back into stock with (sic) that is where the fault lies.
>
> The regional manager (sic) can only be held responsible for stock that is presented to them. It would be unreasonable to expect them to have to check through all the stock in the stockroom unless they anticipated that there was a problem or had been alerted to the fact that irregularities were occurring.'

[26] The appellant admitted that the regional manager could only do write-offs that were presented to him and that he does not check the stock in the stockroom. She also admitted that it was her duty, as the store manager, to present the stock to be written-off to the regional manager; which she did not do.

[27] Billings' evidence is clear, the unsellable stock was kept amongst the sellable stock and that he saw this within a few days after arriving at the

store. Although keeping and controlling stock was the duty of the stockroom controller – who was also found guilty of misconduct and dismissed – the store manager had oversight over the stock and write-offs.

[28] I am satisfied that the employer succeeded in justifying the inconsistent treatment between the appellant and the regional manager for the following reasons demonstrated by the employer:

28.1 The appellant was in control of the store as the store manager. She had an oversight role to play.

28.2 She was supposed to write off certain stock which she did not write off.

28.3 As the store manager, she had access to the stockroom and was supposed to see that the unsellable stock is kept, contrary to company policy, with the sellable stock.

28.4 She was supposed to present stock to be written off to the regional manager. She did not do so.

28.5 Most of the stock that was not written off, contrary to company policy, was the responsibility of the appellant and not the regional manager.

28.6 The appellant was aware that write-offs should be done in the year that they were discovered or returned. She did not do that, in breach of the company policy.

[29] The arbitrator found that dismissal is an appropriate sanction ‘due to the nature of the relationship. The applicant was a senior employee and should have led by example. The trust relationship was certainly broken down as the applicant had breached policy for a four year period.’ The Court *a quo* correctly in my view found that the arbitrator’s reasoning cannot be faulted. I also agree with the Court *a quo* that the decision of

the arbitrator is not one which a reasonable arbitrator could not reach. In my view, the appeal ought to be dismissed.

[30] The dictates of fairness do not demand that a costs order be made in this matter.

[31] I accordingly make the following order:

a) The appeal is dismissed.

b) No order as to costs is made.

C. J. Musi AJA

Tlaletsi JA and Coppin AJA concur in the judgment of Musi AJA

APPEARANCES:

FOR THE APPELLANT:	Adv. Steenkamp Instructed by: E.S. Makinta Attorneys Fourways Johannesburg
FOR THE RESPONDENT:	Adv. Belger Instructed by: Wright Rose Innes Inc Saxonworld Johannesburg