IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Case no: JA53/16

Reportable

In the matter between:

GRINDROD LOGISTICS (PTY) LTD **Appellant**

and

SATAWU OBO KGWELE **First Respondent**

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION **Second Respondent**

COMMISSIONER R MAODI N.O **Third Respondent**

Heard: **30 May 2017**

Delivered: **18 October 2017**

Summary: Review of arbitration award – employee dismissed for reckless and/or negligent driving that resulted in substantial loss to the employer – commissioner upholding dismissal – employee contending - bias on the part of the commissioner; that he was not aware of the employer's policy which prohibited driving on gravel roads; and inconsistency in the application of discipline.

Held that the test for bias is whether a reasonable, objective and informed person would, on the correct facts, reasonably apprehend bias. Court finding that the apprehension of bias was unjustified because the employee failed to

show that the commissioner acted *mala fide* and in breach of his duties so as to afford the employer an unfair advantage when he adjourned the arbitration.

Held further that the commissioner posed elucidatory questions which did not advance the employer's case and showed nothing sinister in the conduct of the arbitration proceedings.

Held that the probabilities were overwhelming that the employee was aware of the injunction not to drive on the gravel roads.

Held that the employer is required to apply the penalty of dismissal consistently in a precedent-setting system for essentially similar misdemeanours as employees who were sanctioned in the past as the misconduct under consideration. Although the employee contended that the employees faced with same offence were not dismissed, the employer failed to adduce any evidence demonstrating that those employees' personal circumstances differed significantly from those of the employee. Employee's dismissal substantively unfair. Consequently, the Labour Court's judgment upheld albeit for different reasons – appeal dismissed.

Coram: Landman JA, Kathree-Setiloane AJA and Phatshoane AJA

JUDGMENT

PHATSHOANE AJA

[1] This is an appeal against the judgment and order of the Labour Court (Molahlehi J) handed down on 03 February 2016 under Case No: JR535/13 reviewing and setting aside the arbitration award dated 15 November 2012 issued under Case No: GATW 6431-12 by commissioner R Maodi ("the commissioner"), the third respondent, under the auspices of the Commission for Conciliation, Mediation and Arbitration (CCMA), the second respondent. The appeal is with leave of the Court *a quo.*

The factual background

[2] On 05 October 2006 Mr Andries Malesela Kgwele ("Mr Kgwele") commenced his employment at Grindrod Logistics (Pty) Ltd ("Grindrod"), the appellant, a car carrier company with a workforce of approximately 820 employees. Prior to Mr Kgwele's dismissal, which gave rise to the present litigation, he was a driver whose duty was to transport vehicles on a carrier truck to various clients of Grindrod in and outside the Republic of South Africa.

[3] On 23 March 2013 Mr Kgwele was assigned a carrier truck H208 to deliver vehicles at two destinations in Namibia, namely: Okahandja and Walvis Bay. He offloaded one unit in Okahandja and proceeded to Walvis Bay via Windhoek to offload the rest of the cargo. He was stopped by police at a roadblock. Having satisfied themselves on the particularities of his carrier truck and its cargo the police gave him directions to Walvis Bay. Although he had driven to Namibia before he had never been to Walvis Bay. The police informed him that a portion of the road was under construction.

[4] Mr Kgwele proceeded to Walvis Bay on route C26. He realised along the way that he was driving on a gravel road. It was at night and it had been drizzling when he reached a "drift" or low-lying bridge with a heavy fast flowing creek traversing the road. He stopped the carrier to assess if he could cross the rivulet. He could not make a U-turn as the road was narrow and his carrier very long (an articulated truck). He saw other vehicles passing through the drift. On the next morning, after 05h00 or 06h00, he took a calculated risk of crossing the drift but stuck. He testified:

> 'When I was trying to pass the trailer fell, I do not know, something stuck…That is when, after the trailer fell and then water started flowing and the sand and rocks as well towards the truck. I tried pressing the panic button, but there was no response.'

[5] Mr Kgwele spent about five days and nights at the scene, in the bush, and was unsuccessful in his attempts to contact Grindrod. Through the assistance of some strangers Grindrod was alerted to his plight and was rescued. The carrier and some of the cargo were damaged.

[6] Mr Jugdish Bhika, a business unit manager at the Rosslyn depot of Grindrod, who had been the initiator in Mr Kgwele's disciplinary enquiry, testified that carrier drivers are supposed to drive only on national roads and not off-route or gravel roads for the safety of the cargo and the drivers. He intimated that this rule was known to Mr Kgwele. To this extent Mr Bhika's evidence was corroborated by Mr Ross Matkovich, the regional manager of Grindrod, who added that drivers do not drive on gravel roads unless under authorised supervision. According to Mr Bhika the drivers were trained and were briefed on this aspect in each of the trips they undertook. Mr Kgwele drove the loaded carrier truck on a stretch of approximately 157 Km of a gravel road prior to the occurrence of the incident.

[7] Mr Bhika further explained that where a driver reaches a gravel road and/or is off-route or lost he/she should contact the fleet controllers of Grindrod. If his/her phone is not working he/she should press the panic button situated inside the carrier which will activate the alarms at the branches, signalling that the driver had encountered a problem and required assistance.

[8] Mr Bhika intimated that Mr Kgwele did not press the panic button when he went off-route or took the gravel road. He only did so upon the occurrence of the devastating incident near Gamsberg pass[1] and added that the carriers should never be driven through rivers. Following the incident, out of the eight vehicles that had been loaded on the hauler three were salvaged while five were written-off. The maintenance manager of Grindrod estimated that the repair costs would be in the region of R1.2 million. The evidence in respect of the actual costs incurred for the repair work done was not adduced by Grindrod. The towing costs were in the amount of R204 014.60.[2] Although the vehicles were insured Grindrod had to pay excess to the insurer in respect of its claims. The amount of excess paid is not apparent from the record.

[9] In his defence Mr Kgwele claimed to have been unaware of Grindrod's policy that prohibited driving on gravel roads. He says that certain of Grindrod's

[1] The carrier was stuck near Gamsberg pass according to the information provided by company called C-track, which tracks the location of carriers for Grindrod.
[2] This appears from Truck &Cab Invoice No 11037 dated 04 April 2012 for towing the carrier from the "drift" to Windhoek which was handed in evidence.

clients (in Ellisras, East London, Marble Hall) were situated in areas where access to their sites was gained through the use of the gravel roads. At times, he said, they travelled outside the trip sheet if the route was hazardous. However, they would call the fleet controllers and inform them of the deviation from the route.

[10] Mr Jack Mojela, an employee of Grindrod for 30 years testified that, as a driver, he was not aware of Grindrod's policy that prohibited driving on a gravel road. He also intimated having driven a carrier through a river. Mr Jan Makau, a driver at Grindrod since 1982 was also unaware of such a policy and knew that some employees drove through gravel roads from Richards Bay to Smithfield; Newcastle to Ermelo; and Nylstroom to Lephalale (Ellisras) to reach at least three of Grindrod's customers.

[11] Mr Kgwele was subjected to a disciplinary enquiry on two counts: (1) Unauthorised route - driving off-route and (2) Reckless and negligent driving. Further particulars to the charges were framed as follows: *"On the 23rd of March 2012 Mr Kgwele was assigned to deliver cargo in Namibia at two locations namely, Okahandja and Walvis Bay. While executing this assignment, it is alleged that Mr Kgwele used [an] unauthorized route and also drove the company vehicle in a reckless and negligent manner resulting in substantial damage to the company vehicle and the cargo."*

[12] Mr Kgwele was acquitted on Count 1 on the basis that he was not sufficiently briefed on the authorised route to Walvis Bay. He was found guilty on Count 2 (reckless and negligent driving) and dismissed from the services of Grindrod on 02 May 2012.

[13] The South African Transport and Allied Workers Union (SATAWU) ("the union), the first respondent, referred Mr Kgwele's unfair dismissal dispute to the CCMA for conciliation on 16 May 2012. The dispute remained unresolved. On 10 and 29 October 2012 it was arbitrated.

[14] Part of the evidence led during the arbitration relates to Grindrod's alleged inconsistency in the application of discipline. Mr Jack Mojela, a shop steward that represented Mr Kgwele during his disciplinary enquiry, testified that he

represented Mr Jan Makau, who had been charged with damaging Grindrod's property through reckless and negligent driving. He was found guilty and received a final written warning valid for a year. He represented Ms Diana Sibanyoni, who faced similar charges. She received a final written warning. He intimated that one employee, Mr Piet Mahlangu, just like Mr Kgwele, was unfamiliar with the route; was lost and hit some road poles and damaged the cargo. He was given a final written warning. Mr Mojela went on to say that one Mr Edwin Makhaya drove through the bush with Grindrod's kombi which overturned; Mr Jeffrey Rangwako and Mr Frans Motlanthe were also subjected to discipline for reckless and negligent driving. These employees were not dismissed.

The arbitration award

[15] Only the substantive fairness of the dismissal fell for determination by the commissioner. The commissioner acknowledged that recklessness and negligence were "different (legal) concepts" which required different forms of *mens rea*. He went on to distinguish recklessness from negligence. Having done so, he found that Mr Kgwele drove the truck in a reckless *and* negligent manner and held that "*no reasonable person driving a truck with the cargo on it would have crossed that drift*". He found that Mr Kgwele failed to exercise the standard of care and skill that could be expected of an employee in his position. He was of the view that Mr Kgwele ought to have awaited assistance or attempted to make a U-turn regardless of the narrow nature of the road.

[16] The commissioner rejected the union's argument that Grindrod had been inconsistent in the application of discipline. He reasoned that the workplace cases referred to by the union, to demonstrate this aspect, were not sufficiently similar to the case of Mr Kgwele. According to the commissioner, none of the employees involved in those cases were charged with reckless and negligent driving.

[17] Concerning the appropriate sanction for the transgression, the commissioner was of the view that Mr Kgwele breached the relationship of trust. He found it aggravating that he drove the truck loaded with the cargo in a reckless and

negligent fashion. He further held that, as a consequence of his action, Mr Kgwele caused Grindrod substantial loss and concluded that his dismissal was fair. He dismissed his claim.

The Judgment of the Court *a quo*

[18] On the review of the commissioner's arbitration award the Labour Court considered whether there had been gross irregularities in the conduct of the arbitration proceedings by the commissioner. It held that the record of the arbitration proceedings showed two instances where the commissioner exceeded his powers as contemplated in s138(2) of the Labour Relations Act, 66 of 1995 ("the LRA"). The Court was of the view that the approach adopted by the commissioner created a clear basis for the perception of bias on the part of the union and Mr Kgwele. This was so because: the commissioner enquired from Grindrod's representative if he wished to call further witnesses after he had made it clear that he was closing Grindrod's case; the commissioner adjourned the arbitration for a short period; on resumption, Grindrod's representative had changed his mind stating that he would call a further witness, the commissioner then postponed the arbitration. The Court held that the postponement of the arbitration, at the instance of the commissioner, was for purposes of affording Grindrod the opportunity to arrange the attendance of a witness it never intended to call but for the commissioner's intervention.

[19] The Court *a quo* reasoned that the commissioner's approach sought to send a clear message to Grindrod's representative that the case for Grindrod was incomplete and that it was not strategic to close same without calling another witness. The Court held that, in so acting, the commissioner advanced Grindrod's case and gave it an unfair advantage.

[20] The Court *a quo* further held that the questions the commissioner posed to Mr Kgwele fell outside the powers of the commissioners as envisaged in s 138(2) of the LRA because they were not clarity seeking questions but sought to advance the case of Grindrod at the expense of Mr Kgwele's case. It then held that objectively the employee reasonably perceived or reasonably

apprehended bias on the part of the commissioner and that on this point alone his arbitration award stood to be reviewed and set aside.

[21] In view of the fact that the dismissal had been effected some three and half years prior to the review proceedings the Court *a quo* was of the view that remitting the matter to the CCMA for arbitration *de novo* would prejudice the parties as this would cause further delays in disposing of their dispute. It held that the material before it was sufficient for purposes of substituting the arbitration award.

[22] On the merits, the Court held that both witnesses for Grindrod testified about the existence of the rule that prohibited drivers from travelling on the gravel roads but were unable to sustain that version through cross-examination. It held:

> 'It was in this respect not disputed that certain of the third respondent's [Grindrod's] customers, such as Nissan in Ellisras can only be reached through the gravel road. The version changed during cross-examination to say that drivers can drive on gravel roads with permission from the control officer.'

[23] The Court *a quo* found that had the commissioner properly applied his mind to the facts he ought to have found that Grindrod failed to discharge its *onus* of showing that there was a rule prohibiting drivers from driving on gravel roads. It held that, even assuming that the rule existed, the evidence demonstrated that the rule was not consistently applied and therefore it was unfair to dismiss the employee on account of the breach of the rule. The Court held that Mr Kgwele could not be blamed for having failed to put his version that he pressed the panic button to alert Grindrod's control centre when he entered the gravel road because the commissioner had stopped the union from cross-examining on the issue.

[24] The Court further held that in finding that Mr Kgwele's conduct caused Grindrod substantial loss, the commissioner did not take into account that Grindrod failed to adduce evidence of its actual loss. The commissioner relied on the testimony of Mr Bhika to the effect that five of the eight insured

vehicles were written-off; R204 000.00 was paid for towing the truck; and had estimated the repair costs of the carrier to be in the region of R1.2 million based on what he was told by someone in the maintenance department who had not been called to testify. It held that had the commissioner brought his mind to bear on the issues he ought to have found that Grindrod failed to show the seriousness of the offence based on the loss suffered.

[25] The Court found that Grindrod had been inconsistent in the application of discipline. It further held that Mr Kgwele made a judgment error by crossing the drift not only on the basis of the vehicles that he saw crossing but he had also, on three occasions, crossed drifts. It then concluded that the decision by the commissioner is not one which a reasonable decision-maker could have reached.

[26] As already alluded to, the Court *a quo* reviewed and set aside the award. It then substituted the award with an order that the dismissal of Mr Kgwele was substantively unfair. He was reinstated retrospectively from the date of his dismissal without loss of benefits and issued a final written warning valid for a period of six months.

The grounds of appeal

[27] Before us the following grounds of appeal were advanced on behalf of the Grindrod. That the Court *a quo* erred in:

27.1 finding that the arbitration award was reviewable on the basis that there had been a reasonable perception of bias on the part of the commissioner.

27.2 finding that the commissioner ought to have concluded that Grindrod had failed to discharge the duty of showing that there was a rule prohibiting drivers from driving on gravel roads. It was contended that, on the basis of Mr Kgwele's contradictory versions, pertaining to the pressing of the panic button, he must have been aware of the rule. It was also argued that the Court *a quo* attached undue weight to the fact

that the commissioner refused to allow the union to cross-examine Mr Bhika on the aspect relating to pressing the panic button.

27.3 not appreciating that the commissioner considered the varying circumstances of the employees charged with similar misconduct in arriving at his decision that the dismissal was the appropriate sanction.

27.4 finding that the decision of the commissioner was not one which a reasonable decision-maker could have arrived at and also failed to appreciate the seriousness of Mr Kgwele's misconduct by reinstating and giving him a final written warning.

The evaluation

[28] In concluding that the dismissal of Mr Kgwele was unfair the Labour Court premised its finding on three pertinent issues which are the subject of this appeal. Firstly, the question of the alleged perception of bias on the part of the commissioner against Mr Kgwele; secondly, the factual and legal basis upon which the commissioner found that Grindrod discharged the *onus* to proof that Mr Kgwele breached the workplace rule and was therefore guilty of misconduct; and thirdly, the question of the alleged inconsistency in the application of discipline by Grindrod. I now turn to consider these issues in the paragraphs below.

The alleged perception of bias on the part of the commissioner

[29] The union took issue with the commissioner that, in conducting the arbitration proceedings, he exhibited bias against Mr Kgwele. The union's perception of bias was informed by the commissioner's adjournment of the proceedings in order to afford Grindrod an opportunity to call a further witness it never intended to call; and secondly, by the manner in which the commissioner posed elucidatory questions to Mr Kgwele which, it was contended, advanced Grindrod's course.

[30] Apparent from the record is that, on 10 October 2012, after Grindrod had called its first witness, the commissioner enquired from Mr Lubbe (Grindrod's

representative at the CCMA) whether he had further witnesses to call. He responded in the negative. Thereafter the commissioner took a short adjournment. On resumption he enquired further from Mr Lubbe:

> 'Commissioner: Earlier on I asked whether you will close your case or you intend calling other witnesses.
>
> Lubbe: Yes.
>
> Commissioner: You still maintain the view that you have closed your case or do you intend calling other witnesses.
>
> Lubbe: I intend calling other witnesses.
>
> Commissioner: Thank you very much, this process is now adjourned for further hearing, for the respondent to call his further witnesses and for the applicant (sic). The date of the adjournment is 29 October, 10:00. You are not going to receive any notice of set down, you have signed and acknowledged same, is that correct, the applicant?'

[31] Ms Driver, for Grindrod, contended that the union's perception of bias on the part of the commissioner surfaced for the very first time during the review. In *Satani v Department of Education, Western Cape and Others,*[3] this Court remarked that failure to object by a party or its legal representative cannot render an unfair process or conduct fair or acceptable. The test for bias is whether a reasonable, objective and informed person would, on the correct facts, reasonably apprehend bias.[4] Mere apprehensiveness on the part of a litigant or even a strongly and honestly held anxiety would not be enough. The question to be answered is: what would an informed person, viewing the matter realistically and practically and having thought the matter through conclude.[5]

[3] (2016) 37 ILJ 2298 (LAC) at 2311 para 36.
[4] *Bernert V ABSA Bank Ltd* 2011 (3) SA 92 (CC)*at 100 para 29 and at 111 para 65; President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 (4) SA 147 (CC) at para 45
[5] *General Bar Council of the Bar of South Africa v Geach and Others* 2013 (2) SA 52 (SCA) at 79 para 91

[32] In *Bernert V ABSA Bank Ltd*[6]: The Constitutional Court pronounced on belated argument regarding the apprehension of bias as follows

> 'It is not in the interests of justice to permit a litigant, where that litigant has knowledge of all the facts upon which recusal is sought, to wait until an adverse judgment before raising the issue of recusal. Litigation must be brought to finality as speedily as possible. It is undesirable to cause parties to litigation to live with the uncertainty that, after the outcome of the case is known, there is a possibility that litigation may be commenced afresh, because of a late application for recusal which could and should have been brought earlier. To do otherwise would undermine the administration of justice.'

At 102 para 35 the Court held:

> '[35] The presumption of impartiality and the double requirement of reasonableness underscore the formidable nature of the burden resting upon the litigant who alleges bias or its apprehension. The idea is not to permit a disgruntled litigant to successfully complain of bias simply because the judicial officer has ruled against him or her. Nor should litigants be encouraged to believe that, by seeking the disqualification of a judicial officer, they will have their case heard by another judicial officer who is likely to decide the case in their favour…'

[33] There can be no question that a commissioner has a legal duty to act impartially in the conduct of the arbitration proceedings. It would defeat the whole purpose of dispensing justice if a commissioner was to surreptitiously hint, through tactical means, to any of the parties to the dispute, that their case was incomplete and required more evidence to be led. It is important to remember that in terms of s142 (1)(a) of the LRA a commissioner who has been appointed to attempt to resolve a dispute may subpoena for questioning any person who may be able to give information or whose presence at the conciliation or arbitration proceedings may help to resolve the dispute.

[34] To my mind, to establish that the commissioner acted irregularly in adjourning the proceedings thereby making room or affording Grindrod the opportunity to

[6] 2011 (3) SA 92 (CC) at 114 para 75.

call further witnesses, the union and Mr Kgwele had to show that he acted *mala fide* and in breach of his duties so as to afford Grindrod an unfair advantage. That they did not do. It would serve no purpose to speculate on the possible reasons why the commissioner acted as described.

[35] What follows constitutes the sum total of the questions the commissioner posed to Mr Kgwele in clarification of what had emerged from his evidence:

> 'Commissioner: when did you realise there was a drift here?
>
> Mr Kgwele: I stopped by the direction that is when I realized that there was a drift.
>
> Commissioner: No, my question is, when did you realize that there was a drift here, when did you realise that?
>
> Mr Kgwele: I realised at night, that is when I stopped and I saw other cars passing by.
>
> Commissioner: So when you got there it was at night?
>
> Mr Kgwele: Yes commissioner.
>
> Commissioner: Did you pass the same night or the following day
>
> Mr Kgwele: The following day.
>
> Commissioner: So I just need to know whether you saw that this is a drift, there is water passing here and that you are driving a truck which had a cargo on?
>
> Mr Kgwele: I did realise that that is when I stopped the car to check whether I could pass or not because there was no way I could make a U-turn.
>
> Commissioner: But given this drift, how long have you been a driver?
>
> Mr Kgwele: 1988.
>
> Commissioner: In your experience, when you are about to cross this, in your view, there was no risk that something could happen with you (Inaudible) cross this drift?

> Mr Kgwele: I did realise that that is when I stopped for a while to think whether I could pass or not, and after seeing that other cars could pass, that is when I passed, but my truck was too heavy, that is why I was stuck.
>
> Commissioner: Ja, but did you realise that maybe your truck could be too heavy and it will not be able to pass there?
>
> Mr Kgwele: There are certain drifts that I had passed before, that I came across before, about three of them, that is why I thought that one I could also pass'.

[36] In my view, the reading of the above extract does not disclose anything sinister in the conduct of the arbitration proceedings. The Commissioner was entitled, in light of the circumstantial evidence presented by Grindrod, to establish, *inter alia* when, on Kgwele's version, he reached the drift; at what stage he decided to cross the rivulet; and his reason for crossing it.

[37] I am of the view that the Court *a quo* was wrong in concluding that Mr Kgwele reasonably perceived or reasonably apprehended bias on the part of the commissioner. The union and Mr Kgwele did not discharge the burden resting on them to show their reasonable perception of bias on the part of the arbitrator.

[38] Generally, a finding of bias on the part of the commissioner nullifies the arbitration proceedings which would have to commence *de novo* before a different arbitrator. Having concluded that the commissioner was biased it was not open to the Court *a quo,* as it did in this case, to determine the matter on the merits. This was a clear misdirection. It ought to have remitted the matter to the CCMA for a fresh arbitration.

The factual and legal basis upon which the commissioner found that Grindrod discharged the onus to proof that Mr Kgwele breached the workplace rule and was therefore guilty of the misconduct:

[39] A contentious issue arising for consideration under this rubric is whether Grindrod succeeded in proving that there was a rule prohibiting drivers from driving on the gravel roads. The parties' versions on this aspect were

irreconcilable. On account of this disparity the credibility of witnesses, their reliability, and probabilities are important factors for the determination of the question.

[40] Messrs Bhika and Matkovich's were unwavering in their testimony that carrier drivers were not allowed to drive on the gravel roads. They were not asked about exceptions to this norm. It is therefore not surprising that when Mr Matkovich was confronted in cross-examination that Grindrod had a client in Ellisras who could only be reached through a gravel road his response was that this was only authorised under supervision. Therefore, Messrs Bhika and Matkovich cannot be said to have been unable to sustain their version through cross-examination as suggested by the Court *a quo*.

[41] Mr Kgwele and his two witnesses, Messrs Mojela and Makau, claimed not to have been aware of the stated policy. Apparent from Mr Kgwele's contradictory versions is that there was an established convention or rule of practice in terms of which carrier drivers were prohibited from travelling on the gravel roads unless authorised to do so. Mr Kgwele's evidence was to the effect that upon discovering that he was driving on a gravel road he attempted to telephonically report the situation to Grindrod but could not reach them as there was no network coverage or mobile data connection. As he puts it: "*I have been trying to press it, the panic button before I passed that gravel.*" On further probing, he contradicted this statement saying that he pressed the button many times when he was inside the "river". When pressed further he changed and said: *"I did try, I was pressing the panic button on my way before I reach that river*." In my view, it would be illogical for him to attempt to call Grindrod or press the panic button upon reaching the gravel road if he was unaware of the restriction. The probabilities are overwhelming that Mr Kgwele was aware of the injunction.

[42] It is so that the commissioner at some stage during the cross-examination of Mr Bhika sought to exclude the evidence pertaining to "the pressing of the panic button by Mr Kgwele". This was wrong. In my view, that piece of the evidence was relevant and admissible. However, the argument that the commissioner may have stymied the cross-examination on that aspect cannot

avail the union because as the evidence of Mr Bhika progressed he allowed the union to question him on the panic button issue. This is what appears on the record:

> 'Commissioner: What is the basis of the respondent saying that the applicant (Mr Kgwele) was reckless and negligent….
>
> Mr Bhika: That Mr Kgwele did not, the minute he went onto the gravel road he should have hit the panic button or called for assistance. If he did that, this would not have happened, we would have told him he is on the wrong route and he should turn around.
>
> Commissioner: so you said he was not allowed in the first place to travel on the gravel road?
>
> Bhika: No. If you look at the photographs of the actual road condition, Mr Kgwele should have contacted us to say, look, he is on a road that he does not feel safe.
>
> Mr Sindane (union representative): Mr commissioner, I am still going back to saying that the panic button was pressed and there is a proof that was submitted, and there was no response until he was assisted by a passer-by who happened to call. We have got proof here to say that he took effort, he tried, but, and at the same time Mr commissioner, apparently, I am putting to him in his words, he said there is a call centre which is working 24/7 that monitoring, at the same time it would have detected that this guy has got on route he is not supposed to and would immediately inform him to say, "where are you going, stop there' both of them they failed to avoid the accident that has happened.
>
> Commissioner: Any response to that?
>
> Mr Lubbe (for Grindrod): Can I just comment there for clarification?
>
> Commissioner: Let the witness answer that.'

[43] It is significant that Mr Kgwele's did not lead any evidence to contradict the evidence of Mr Bhika that he drove on a stretch of 157 km gravel road without

pressing the button. Bhika referred to the movement report (C-track)[7] which shows that Mr Kgwele, after the incident, pressed the panic button at 06:16 and repeatedly thereafter. In light of this Mr Kgwele's contradictory version that he pressed the panic button when he reached the gravel road must be rejected.

[44] On the conspectus of the aforegoing, the Court *a quo* erred in concluding that the commissioner ought to have found that Grindrod failed to discharge its *onus* of showing that there was a rule prohibiting drivers from driving on gravel roads.

[45] To recapitulate, Mr Kgwele was aware of the caveat that prohibited the travelling on gravel roads. He did not press the panic button when he reached the gravel road. He attempted to cross the heavy flowing stream with the carrier truck which got stuck in the process. The commissioner concluded that Mr Kgwele was reckless or negligent. The criticism of the commissioner's finding by the union that recklessness and negligence are two different forms of culpability, while true, is in my view fastidious. On the reading of the award it is clear that the commissioner's conclusions are founded on negligence. After all, the test for the review of the CCMA arbitration awards is whether the decision reached by the commissioner is one that a reasonable decision-maker could not reach.[8]

[46] There can be no cogent criticism of the commissioner's conclusion that Mr Kgwele failed to exercise the standard of care and skill that could be expected of an employee in his position. He was of the view that Mr Kgwele ought to have waited for help to arrive as opposed to taking the risk to cross the drift.

The inconsistency in the application of discipline

[7] According to Mr Bhika C-track monitored the movement of carriers. At page 263 of the record is the movement report which shows the time the panic button was pressed for the very first time and repeatedly thereafter.

[8] The test was laid down in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (2007) 28 *ILJ* 2405 (CC); dealt with in *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)* (2013) 34 *ILJ* 2795 (SCA)*;* and further expatiated in the judgments of this Court, *Inter alia, Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation & Arbitration and Others* (2014) 35 *ILJ* 943 (LAC); *Head of Department of Education v Mofokeng and Others* (2015) 36 *ILJ* 2802 (LAC).

[47] The employer is required to apply the penalty of dismissal consistently in a precedent-setting system for essentially similar misdemeanours as employees who were sanctioned in the past as the misconduct under consideration.[9] A generalised allegation of inconsistency is not sufficient. A concrete allegation identifying who the persons are who were treated differently or preferentially and the basis upon which they ought not to have been so treated must be set out clearly.[10]

[48] It was made clear at the outset of the arbitration that the union would challenge Grindrod's inconsistent application of discipline. Grindrod was therefore alive to the case it had to meet. During the cross-examination of Messrs Bhika and Matkovich sufficient particularities of cases, in respect of which the union contended were similar to the case that Mr Kgwele was facing, were put to them.

[49] Mr Bhika could not dispute that Mr Jan Makau was involved in similar misconduct of reckless and/or negligent driving involving damages to the value of approximately R315 000.00 and had not been dismissed. He was also aware that Mr Frans Motlanthe and Mr Jeffrey Rangwako were each subjected to discipline for reckless and/or negligent driving, involving damages in the amounts of R212 592.00 and R18 000.00, respectively, but were not dismissed. In defence of this, he intimated that each case was adjudicated according to the degree of the severity of the transgression.

[50] Mr Matkovich referred to annexure "R1", a list of six employees who had caused damages to Grindrod, in varying amounts (ranging from R18 000 to R2 million), through negligence,[11] who all received written warnings for their misconduct. He explained that the disciplinary enquires at Grindrod are decided by different presiding officers. Therefore, the outcomes of enquiries would differ due to various factors which are taken into account: for instance, the degree of negligence, the types of damages incurred and/or the severity

[9] Schedule 8 of the LRA the Code of Good Practice: Dismissal- Item 3(6)
[10] *National Union of Mineworkers on behalf of Botsane v Anglo Platinum Mine (Rustenburg Section)* (2014) 35 *ILJ* 2406 (LAC) at 2417 para 39
[11] The list is captured at page 260 of the record. These employees were Mr Jan Makau; Mr Jeffrey Rangoako; Mr Piet Mahlangu; Mr Frans Motlanthe; Mr Richards Lindzie; and R Cambell.

of the incident. He intimated that, although the offences may be similar, the employees' mitigating factors were completely different.

[51] As already alluded to, Grindrod did not adduce evidence of the actual damage that Mr Kgwele allegedly caused to it. Mr Bhika merely estimated it to be in the region of R1.2 million. Mr Matkovich referred to the case of a certain Mr Richard Lindzie who, through negligence, caused damages in the amount of R2 million to Grindrod. A sanction of a written warning, in the same way as in all other similar cases, was meted out to him. In an attempt to distinguish the case of Mr Lindzie to that of Mr Kgwele Mr Matkovich went on to say that in the former case there was a third party interference in that a bird had flown inside the carrier resulting in the driver losing control of the vehicle. In this case, he said, there was no third party interference.

[52] In *SACCAWU and Others v Irvin & Johnson Ltd,*[12] this Court held that if a chairperson conscientiously and honestly, but incorrectly, exercises his or her discretion in a particular case in a particular way, it would not mean that there was unfairness towards the other employees. It would mean no more than that his or her assessment of the gravity of the disciplinary offence was wrong. It cannot be fair that other employees profit from that kind of wrong decision. With reference to *Irvin & Johnson Ltd,* this Court, in *Cape Town City Council v Masitho and Others*[13] pronounced:

> 'While it is true that an employer cannot be expected to continue repeating a wrong decision in obeisance to a principle of consistency..., 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.'

[53] Needless to say, the outcomes of enquiries would differ due to various factors which ought to be thrown in the melting pot and taken into account. In this case, as testified to by Grindrod's witnesses, the degree of negligence, the types of damages incurred, the severity of the incident, the employees' mitigating factors, would have to be duly considered. Regrettably for Grindrod,

[12] (1999) 20 ILJ 2302 (LAC).
[13] (2000) 21 ILJ 1957 (LAC).

while it knew of the case it had to meet, it did not adduce any evidence of the six employees' disciplinary records and/or demonstrate that their personal circumstances differed significantly from those of Mr Kgwele.

[54] In his six years of service at Grindrod, Mr Kgwele had a clean disciplinary record. It is common cause that, although he had been to Namibia prior to the incident, it was for the very first time that he drove to Walvis Bay. It was during a rainy night when he got lost. He was acquitted on Count 1 on the basis that he was not sufficiently briefed on the authorised route to Walvis Bay. Mr Bhika was unable to say why Mr Kgwele was not so appraised by the control centre which, supposedly, monitors the vehicles en route that he was off-route and on a gravel road. In my view, Grindrod was partly to blame for the unfortunate circumstances. All these extenuating factors militated against the sanction of dismissal.

[55] The commissioner erred insofar as he concluded, without any reference to the employees' disciplinary records and/or personal circumstances, that the cases referred to by the Union to show that the employer was inconsistent in the application of discipline were not sufficiently similar to the case of Mr Kgwele. The Court *a quo* correctly found that Mr Kgwele provided sufficient information to enable Grindrod to investigate the cases of alleged inconsistency in the application of discipline. Its finding that Grindrod was inconsistent in the application of discipline cannot be faulted. In the premises, the dismissal of Mr Kgwele was substantively unfair. The corollary of this is that the arbitration award falls to be reviewed and set-aside.

Conclusion

[56] Although our finding that the dismissal was substantively unfair differs substantially from the finding of the Court *a quo*, it is not necessary to upset its order because same is in line with the order that we would have made. An appeal, by its very nature, is directed at a wrong order and not at incorrect reasoning.[14] The upshot of this is that the appeal must be dismissed.

[14] See *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at 308-309 para 85.

[57] Regard being had to the circumstances of the case, I am of the view that, it would not be in accordance with the requirements of law and fairness if Grindrod is ordered to pay the costs of this appeal. I make the following order.

Order

1. The appeal is dismissed with no order as to costs.

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MV Phatshoane

Acting Judge of the Labour Appeal Court

Landman JA and Kathree-Setiloane AJA concur in the judgment of Phatshoane AJA

APPEARANCES:

FOR THE APPELLANT: Adv J Driver

Instructed by Edward Nathan Sonnenbergs

FOR THE RESPONDENT: Ms L Tooka (an official SATAWU)