

IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

REPORTABLE

CASE NO: JR 1516/07

In the matter between

SOUTH AFRICAN REVENUE SERVICES Applicant

And

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION First Respondent

MOTLATSI PHALA N.O Second Respondent

MTHUNZI Third Respondent

JUDGMENT

Molahlehi J

Introduction

[1] This is an application to review and set aside the arbitration award issued by the second respondent (the commissioner) under case number GAJB 19059-06 and dated 14 May 2007. In terms of the arbitration award the commissioner found the dismissal of the third respondent (the employee) to have been both substantively and procedurally unfair and ordered that she be re-employed.

Background facts.

[2] The employee was prior to her dismissal by the applicant employed as anti-smuggling officer based at the Oliver Tambo International Airport. The dismissal which took effect on 18 August 2006, was consequent to a disciplinary hearing wherein the employee was charged with the following offences:

“ Insubordination in that on 20 March 2006 you were informed of the requirements that you are to report for duty at the newly formed JIA profiling on 22 March 2006, but you refused to do this and not inform management of your refusal to do so. In addition the team never came through to JIA in order to train you and other colleagues, you have not attended this training and no excuse was tendered.

○ *Absent without leave:*

- *In that on 28 March 2006 you were absent from work without the necessary permission. An earlier warning letter was issued to you in this regard.*
- *In that on 22 March 2006, a team leader came to JIA in order to train you and other colleagues on profiling techniques which you*

chose not to attend and disrespectfully emailed your team leader and others that you are not interested in joining the team which was noted “I hope it is clear to those who are deaf,”.

- *Demotion of abuse and insolence behaviour:*
 - *In that on 5 April 2005 you were reprimanded for not complying with the reverse screening of the Airport Company of South Africa and decided to disrespectfully lash out against this reprimand.*
 - *In that on 31 January 2006, you were instructed to write an AST Informal Training Evaluation Paper, which you blatantly refused, by drawing a line through this and walked out whilst being disrespectful and rude.”*

[3] The charge concerning absence without leave was according to the applicant withdrawn during the disciplinary hearing. The dismissal was for insubordination and insolent behaviour.

The grounds for review

[4] The grounds of review are set out in the applicants founding affidavit as follows:

“6.1.1 At one stage we were involved in a screaming match and the Second Respondent continually slapped his hands on the table;

6.1.2 he continually interrupted my witnesses by confronting them with their previous testimonies which was not his duty but the duty of the Third Respondent’s representative;

6.1.3 when I objected to questions asked the Third Respondent’s representative, Second Respondent stated that he is not willing to listen to my objections

6.1.4 the situation became unbearable to me and when I asked for a caucus between myself, the Second Respondent and the Third Respondent’s representative, the Second Respondent simply walked out of the proceedings.”

- [5] The applicant further contended in the supplementary affidavit that although the email of the 29 March 2006, was not addressed to Ms Tripmaker (Tripmaker), she responded to it because she realised that the employee “*was shooting herself in the foot.*” The issue of insolence in the email of the employee arose from her comment where she says:

“I am not interested in the profiling secondment!! This should be clear for those who are deaf”

- [6] The insubordination charges arose from the refusal by the employee to be part of the profiling team.
- [7] Mr Roux (Roux), who at the time the dispute arose was a group manager, testified that a need to restructure the operations of the applicant arose because of the high risk of more drugs coming into the country. Part of the restructuring entailed the establishment of the profiling team. As a result of the restructuring the employee was instructed to join the profiling team. The employee was chosen as one of the people to join the profiling team because of her training and experience. The employee had received training from the United Nations on profiling. There is a disagreement as to whether she also receive training in the UK. She contended that she went to the UK only to observe and not for training.
- [8] Roux further testified that the employee failed to obey his instruction that she should join the profiling team. There were two other employees who also refused to join the profiling team. Mr Peter Zamisa (Zamisa) was one of the employees who refused to join the profiling team. He was issued with a final written warning for his insubordination. It seems no action was taken against other

employee Mr Mangolela (Mangolela) who also refused to join the profiling team. Nothing happened to him because according to Roux he took a responsible step of speaking to his line manager about the issue. In the case of the employee, Roux testified that:

“Because of her disciplinary record and her arrogant correspondence it was decided to take further disciplinary hearing.”

- [9] The other witness of the applicant was Tripmaker who testified about what the employee did and said at a training programme which was convened by the applicant. She testified that the employee stated loudly that she was not prepared to write the test which all the participants were required to write as part of the evaluation of the training. She then had to leave the training venue.
- [10] Mr Lestoalo (Lestoalo), another witness of the applicant, testified that he had on the day in question instructed the employee together with the two others to join the profiling unit. The three indicated that they were not interested in working in profiling because the work in that area was boring. It would appear that Letsoalo spoke to his manager twice that day about the refusal of the employees to work in the profiling team. Roux informed him that Mr Mboweni (Mboweni) would be instructed to issue warnings against the

employees for their Mr Mboweni (Mboweni) to issue warnings against the employees for their insubordination.

- [11] The applicant in her testimony did not dispute having refused to join the profiling team. She testified that profiling is one of the functions of an anti-smuggling officer. However, if you are assigned to profiling you do not perform other functions but focus only on risk analysis, which requires a person to be confined to the office and work only through papers.

The commissioners' award

- [12] After traversing in some details of the evidence and the background facts, the commissioner analysed both the evidence and the arguments of the parties. In his analysis he deals firstly with the issue of the insolent behaviour of the employee which was alleged to have taken place during April 2005. In this respect the commissioner makes two findings. He found, it strange that the applicant made a determination against the employee on this issue despite the fact that the issue had been addressed in that the applicant was reprimanded for the behaviour. The second point made by the commissioner in his award is that even if the issue had not been addressed, the time between when the incident occurred and when the action was taken, which was about a year,

was an unreasonable delay. As a matter of principle the commissioner correctly found that the applicant ought to have taken action against the employee whilst the facts relating to the incident was still fresh in the minds of the witnesses.

[13] In dealing with the second aspect of abusive and insolent behaviour which was alleged to have occurred on 11 January 2006 the commissioner found that this concerned the issue of performance. The issue in this respect concerned the presentation which the employee made without the use of overhead slides and production of handouts during the training.

[14] The commissioner accepted that the issue of performance could be dealt with as a form of misconduct. He went further and found that in the particular instance the applicant ought to have shown that the employee had vast experience in that line of work for that charge to be sustained.

[15] The other aspect of insolent and insubordination relates to the incident on 31 January 2006, when the employee refused to write the AST test during the training which was conducted by the applicant. On the facts the commissioner found that Roux instructed Tripmaker to issue a written warning against the employee but that was not done. Instead Tripmaker addressed a

letter to the applicant wherein, amongst other things, she urged her
“to adopt a more positive approach towards her work.”

[16] In dealing with the complaint of inconsistency concerning the application of the disciplinary procedure, the commissioner found that the approach adopted by the applicant in this respect was unacceptable, in that the three employees were given the same instructions and were not given an election whether to attend or not. The commissioner rejected the explanation of the applicant that the differential treatment of the employees was based on the fact that one of the officers gave an acceptable explanation for his conduct.

[17] In relation to the refusal to join the profiling team and the email of the 29 March 2006, wherein the employee expressly indicated her stand point about the profiling team and the insolent language used therein, the commissioner found that:

“In response to the email from Tripmaker calling on her to be courteous in her communication, the employee apologized.

The applicant had issued a final written warning on the employee but that warning was never served on the employee.

It was not clear whether Roux had been aware that Tripmaker had directly addressed the behaviour of the employee and the employee had directly apologized.

The email of the 29 March 2006 aggravated and influenced the applicant in taking the decision to discipline the employee.

By taking the decision to discipline the employee, the applicant revived an incident that had been dealt with.

On the version of Roux it was never the intention of the applicant to dismiss the employees.

The assertion by the applicant that the relationship between it and the employee had broken down was not supported by evidence.”

[18] The commissioner further held that he would not have interfered with the decision of the applicant to dismiss the employee but for the *“messy and sloppy manner in which the dispute was handled.”*

[19] The test to apply in considering a review application is set out in *Sidumo v Rustenburg Platinum Mines Ltd and others* 2007 28 ILJ 2405 (CC), at 2439 and the middle of paragraph [110] as follows:

“Is the decision reached by the commissioner one that a reasonable decision maker could not reach? Applying it will

give effect not only to the constitutional right to fair legal practices, but also to the right to administrative action which is lawful, reasonable and procedurally fair.”

[20] The Constitutional Court went further at paragraph [78] to say:

“[78] In approaching the dismissal dispute impartially, a commissioner will take into account the totality of circumstances. He or she will necessarily take into account the importance of the rule that had been breached. The commissioner must of course consider the reason the employer imposed the sanction of dismissal, as he or she must take into account the basis of the employee’s challenge to the dismissal. There are other factors that will require consideration. For example, the harm caused by the employee’s conduct, whether additional training and instruction may result in the employee not repeating the misconduct, the effect of dismissal on the employee and his or her long-service record. This is not an exhaustive list.”

[21] *In Fedelity Cash Management Services CC v CCMA & Others* [2008] 3 BLLR 197 (LAC), the Labour Appeal Court summarised

what the commissioner needs to do in assessing the fairness of the dismissal in terms of the test set out in *Sidumo* as follows:

- (a) *“take into account the totality of circumstances”* (paragraph 78);
- (b) *“consider the importance of the rule that had been breached”* (paragraph 78);
- (c) *“consider the reason the employer imposed the sanction of dismissal, as he or she must take into account the basis of the employee’s challenge to the dismissal”* (paragraph 78);
- (d) *“consider the harm caused by the employee’s conduct”* (paragraph 78);
- (e) *“consider whether additional training and instruction may result in the employee not repeating the misconduct”*;
- (f) *“consider the effect of dismissal on the employee”* (paragraph 78); and
- (g) *“consider the employee’s service record.”*

[22] The Labour Appeal Court in *Fedeliity Cash Management Services*, dealing with the approach to be adopted in applying the reasonable decision-maker test warned as follows:

"It will often happen that, in assessing the reasonableness or otherwise of an arbitration award or other decision of a CCMA commissioner, the Court feels that it would have arrived at a different decision or finding to that reached by the commissioner. When that happens, the Court will need to remind itself that the task of determining fairness or otherwise of such a dismissal is in terms of the; law primarily given to the commissioner and that the system would never work if the Court would interfere with every decision or arbitration award of the CCMA simply because it, that is the Court, would have dealt with the matter differently. Obviously, this does not in any way mean that decisions or arbitration awards of the CCMA are shielded from the legitimate scrutiny of the Labour Court on review."

[23] It is apparent in my view that the commissioner in arriving at the conclusion that the dismissal of the employee was unfair applied his mind to the facts and the relevant circumstances of the case. It

has not be noted that the commissioner arrived at the conclusion in the context of having to determine whether the employee had committed the offences for which she was charged with including the fairness of his dismissal.

[24] It has been accepted that whilst the standard required of the commissioners' awards as stated earlier is that of a reasonable decision-maker, it however does not mean that the award should be free from mistakes of law or facts. It is only those mistakes of law or facts which fundamentally deny the other party a fair hearing which will vitiate the outcome of an arbitration hearing.

[25] In the present instance whilst the commissioner does not, in his award, make a formal finding as to whether or not the employee was guilty of the offences she was charged with, it is however apparent from the reading of the award that that is what he did. The commissioner would not have awarded re-employment but reinstatement had he found the employee not guilty as charged.

[26] The reading of the commissioner's award reveals that in arriving at the conclusion that the dismissal was unfair, was influenced by the circumstances and the manner in which the respondent approach the case of the applicant.

[27] The key finding of the commissioner is that even if one accepts that the employee was guilty as charged, the relationship between the parties had not broken down such as to make the dismissal fair. Put differently, the commissioner's award can be interpreted to be saying that the applicant has failed to show that the employment relationship has broken down due to the employee's misconduct.

[28] It has been held that the duty to show that the relationship between the employer and the employee has broken down beyond reproach in the case of the charges of misconduct rests with the employer. See *Edcon Ltd v Pillemer NO & others [2009] JOL 24333 (SCA)*. In weighing the totality of the evidence and the circumstances of the present case the commissioner's decision that the relationship between the employee and the applicant has not broken cannot be faulted for unreasonableness.

[29] The evidence supporting the proposition that the relationship between the parties did not breakdown to justify a dismissal, can be found even in the version of the applicant. That proposition is supported by the email which Roux addressed to Mboweni dated 28th March 2006 at 07:01 pm which reads as follows:

“Subject re: TRAINING FOR PROFILING TEAM: 28
MARCH 2006.

Dear Abel

Thanks for the report.

Allow me to give further directions.

I am absolutely dump struck by the attitude and approach of the officers who blatantly and openly defy positive and legal instruction to join the newly formed profiling team. I am not going to elaborate on the reasons for establishing this team and would like to underscore that this necessitated by unrelenting performance.

In addition, what we are doing falls well within the scope of JDs of the officers and part of an officers' work is to profile something we seem not to be doing. While this is now an issue I don't know and I don't think the officers know themselves, apart from the fact that any and all instructions and initiatives are meeting with un-shamed disrespect and disregard

We are constantly exceeding requirements of fairness, transparency and being constructive and we time and again walked in to miss don't care attitude? This cannot and will no be accepted and an unfortunate. We will take a strong and united stand on this and rid JIAS of the creeping cancer.

I request you therefore:

Establish the facts and confirm that this was a blatant and deliberate case of a AWOL (remember, the request was that the team is up and running by last week Wednesday. Have the officers been doing since and what did the JIAS management structure do to ensure success?)

If the above is confirmed draft final written warnings to the officers for been insubordination and absence without leave and sent to me sign off. I know some of these officers already have two warnings letters issued against to and we will engage HR of this. I require feed bas ASP please no latter that 15:00 on Wednesday.

Regards

Roux.”

[30] The above was written following the report from Mboweni to Roux. The relevant part of that report reads as follows:

“Warning letters have been drafted but they were different one should be a final written warning because I am meant to believe that she is not doing this kind of thing for the first time but no warning letter was issues by Helen as requested for failure to write a test but a coaching letter was issued instead and second one will be the first written warning.

Shadow (the employee) still refuses to be part of the profiling team.

Both will be for failure or refusal to carry out lawful instructions

Regards

Abel.”

- [31] The reasoning by the commissioner that the relationship between the parties had not broken down to justify a dismissal can be found at paragraph 4.14 of the arbitration award where it is reasoned as follows:

“4.14 It is clear from the evidence of Raath (referring Roux) it was never the intention of the Respondent to terminate the employment of the Applicant. On all the occasions that there was an allegation of an infraction rather Raath issued an instruction to issue a written warning including the very incident on the profiling team. It is not sustainable to argue that the employment relationship had been broken down because there was no evidence to support this allegation.”

[32] The commissioner is correct in his evaluation and in finding that the relationship between the parties had not broken down or for that matter the applicant had not intended to terminate the relationship if regard is had to the final written warning which Roux had signed. Although the letter was never served on the employee it evinced the attitude of the applicant as concerning the offences which the employee was alleged to have committed.

[33] There is no doubt on the facts of this case that the employee refused blatantly to obey a lawful instruction. There is authority that refusal to obey lawful instructions is, depending on the circumstances of a given case, regarded as a serious offence to warrant a dismissal particular if the refusal is deliberate. As concerning the charge of insolent, which is based largely on the contents of the email of the 29th March 2006, it is apparent that the commissioner accepted that the employee had been insolent towards her seniors. In this regard it may well be that the commissioner is incorrect in finding that the employee's apology mitigated the seriousness of her behaviour. This however is not the test to apply. The test as stated earlier is whether the finding is reasonable or otherwise. It has to be emphasised that the

commissioner made this finding in the context of making a value judgment in the determination of the fairness of the dismissal.

[34] The authorities are in agreement that it is only the commissioner and no one else who has to determine the fairness of the dismissal. In the result I am unable to fault the commissioner in as far as that finding is concerned. Thus the argument of the applicant that the letter which prompted an apology from the employee was not official makes no sense.

[35] Tripmaker in that letter never said that she was writing in her personal capacity to warn the employee of the possible consequences that may arise from the contents of her email. The letter was never retracted nor is there evidence that the employee was informed that that letter was unofficial. It has to be noted in this respect that Tripmaker wrote this letter after being instructed to issue a written warning to the employee. Instead of issuing the warning to the employee, Tripmaker decided to write a letter to the employee and indicate to her that she needs to be mindful of her language. However, besides the letter of Tripmaker, it is not disputed that the employee apologised for her behaviour- a factor which the commissioner took into account in his evaluation of the fairness or otherwise of the dismissal.

Inconsistency

[36] It is now well established that inconsistent application of discipline which is sometimes referred to as the “parity rule”, is not as such a rule but an aspect of the principle of fairness. The Labour Appeal Court in dealing with this issue in *SACCAWU and Others v Irvin v Johnson Ltd*(1999) 20 ILJ 2303(LAC) at 2313 (paragraph 29) had the following to say:

“It was argued before us by Mr Grobler for the applicants that by not dismissing four employees who had also participated in the demonstration, the respondent applied discipline inconsistently. Discipline must not be capricious. It is really the perception of bias inherent in selective discipline which makes it unfair. Where, however, one is faced with large number of offending employees, the best that one can hope for is reasonable consistency. Some consistency is the price to be paid for flexibility, which requires the exercise of discretion in each individual case. If a chairperson conscientiously and honestly, but incorrectly, exercises his or her discretion in a particular case in a particular way, it would 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. In a case of a plurality dismissal, a wrong decision can only be unfair if it is capricious, or induced by improper motives or, worse, by a discriminating management policy. (as was the case in Henred Fruehauf Trailers v National Union of Metal Workers of South Africa & Others (1992) 13 ILJ 593 (LAC) at 599H-601B; National Union of Mineworkers v Henred Fruehauf Trailers (Pty) Ltd (1994) 15 ILJ 1257 (A) at 1264.)”

[37] In dealing with the facts relating to the allegation of inconsistency the commissioner found that it was common cause that the employee together with the others refused to obey the instruction to join the profiling team. He goes further to say: *“to suggest that one of the officers gave an acceptable explanation defeats the purpose of giving lawful instructions.”*

[38] The applicant contended that the reason for treating the employee differently from the others was because of her previous disciplinary record. It would seem what the commissioner was saying was that the environment that existed at the work place to

some extent tolerated disobeying lawful instructions in certain instances or that action would be taken against certain people and not others. It would also seem that that comment the serious manner in which also relates, as stated earlier, to the issue of the breakdown in the relationship between the parties.

The alleged commissioner's biasness

[39] The test for determining the existence of bias has been set out in *BTR Industries SA (Pty) Ltd & other v Metal & Allied Workers Union & Another* 1992(3) SA 673 (A) at 693 I- J wherein court held that:

“As will appear from what is said under the last hearing in this judgment, on my view of the facts it is necessary for the purposes of this appeal to decide what the proper formulation of the test is for disqualifying bias. For the reasons which follow I conclude that in our law the existence of a reasonable suspicion of bias satisfies the test; and that an apprehension of a real likelihood that the decision maker will be biased is not a prerequisite for disqualification.”

[40] The issue of bias as raised by the applicant seems to be based on the engagement between the representative of the applicant, Mr

Lebello (Lebello) and the commissioner at some stage during the arbitration proceedings. The issue seems to have arisen during the cross examination of Roux. Lebello raised an objection to the question posed to Roux by Mr Mashaba (Mashaba), the representative of the employee. The nature of the question asked by Mashaba is not clear because of “inaudibles” at page 405-407 of the transcribed record of the arbitration proceedings. However what seems clear is that Lebello objected to the question which was asked by Mashaba to the applicant’s witness.

[41] The other engagement was when the commissioner directed Lebello not to raise new issues during re-examination of a witness. And at page 435 of the record the commissioner indicated to Lebello that he was not going to allow him to testify from the bar. The commissioner also intervened during re-examination of Roux and indicated to Lebello he should refrain from asking leading questions.

[42] The record at page 509 reveals that when the matter resumed on the 23rd April 2007 and immediately after the commissioner invited the applicant to call its next witness, Lebello indicated that he wished to raise a point before the matter could proceed further.

At line 10 of that page Lebello formulated the point which he sought to raise as follows:

“In your instance, maybe before you do that there’s a preliminary issue we want to raise with yourself, with the Respondents. Obviously we are not happy with the proceedings thus far in terms of, just the nature of the conduct of the proceedings. What we’ve realised the commissioner is that you’ve very loud in this process.”

[43] In response the commissioner stated the following:

“I can’t speak softer than the way I talk. I want parties to hear what I’m saying when I talk (in audible)... that issue.”

[44] Further on and at page 510, Lebello complained as follows:

“... inaudible...but commissioner as well when you speak to us you don’t give us an opportunity. I am talking about myself.”

[45] And at page 511 of the record Lebello says; *“that you, its our view that you, you know, at times you hit the table.”* And some point in the engagement Lebello mentioned without giving any details that the commissioner was intimidating the applicant’s witnesses. I have found nothing in the transcript of the proceedings supporting this allegation.

[46] In my view the compliant of the applicant concerning the biasness of the commissioner has no substance. There are parts in the record showing that the commissioner intervened in the same way with the employee's case as he did with that of the applicant. At one stage for instance the commissioner directed Mashaba not to ask leading questions to his witnesses.

[47] It would also appear that at some stage the commissioner adjourned and advised Lebello to speak to the senior commissioner about the problem he had with the proceedings. And when the matter resumed the commissioner enquired from Lebello whether he did speak to the senior commissioner and his answer seems to have suggest he did but impliedly did not intend proceeding further with the complaint. He continued and participated in the proceedings without indicating whether he still wished to pursue his compliant.

[48] I am therefore of the view that there is no substance in the compliant that the commissioner was bias.

Gross irregularity

[49] The test to determine the existence of gross irregularity as was articulated in *Gold Fields Investment Ltd & another v City of*

Johannesburg & another 1938 TPD 551 and followed in *Sidumo* (at page 1178-F) is stated as follows:

“ . . . patent irregularities, that is irregularities that takes place openly as part of the proceedings, on the one hand, and “patent irregularities, that is irregularities that take place inside the mind of the judicial officer which are ascertainable from the reasons given by the decision maker.”

[50] This court has previously held that the crucial enquiry in determining the existence of gross irregularity is whether the conduct of the decision maker complained of prevented a fair trial of the issues. It is not every irregularity that would constitute gross-irregularity. It has however been found in a number of cases that a commissioner commits gross irregularity if he or she fails to apply his or her mind to a matter material to the determination of the dispute.

[51] In the light of the above, I am of the view that the applicant's application stand to fail. I see no reason why in law and fairness costs should not follow the results.

[52] In the premises the applicant's application to have the arbitration award of the second respondent reviewed and set aside is dismissed with cost.

Molahlehi J

Date of hearing: 27 November 2009

Date of Judgment: 7 April 2010

Appearances

For the applicant: Adv H. W Sibuyi

Instructed by: Eversheds Attorneys

For the respondent: Ms Neo Nthinya of NEHAWU