



REPUBLIC OF SOUTH AFRICA

Reportable

**THE LABOUR COURT OF SOUTH AFRICA,
JUDGMENT**

Case no: JR3457/09

In the matter between:

NORTHAM PLATINUM LTD

Applicant

and

M E PHOOKO N.O

First Respondent

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

Second Respondent

**NATIONAL UNION OF
MINEWORKERS OBO J L
NTHOLENG**

Third Respondent

Heard: 31 May 2012

Delivered: 27 June 2012

JUDGMENT

BHOOLA J

Introduction

- 1] This is an application in terms of section 145 (2) of the Labour relations Act, 66 of 1995 ("the LRA"), to review and set aside an award made by the first respondent ("the arbitrator").

Background facts

- 2] Mr Ntholeng ("the employee") was a machine operator who was dismissed on 21 April 2009 following a safety related incident which occurred on 11 February 2009. He was charged at a disciplinary enquiry held on 11 and 12 March 2009 with misconduct in that he endangered his safety and that of fellow employees by forcefully trying to gain access to a cage after the onsetter had signalled that it could not move. He pleaded guilty to the charge and the chairperson of the disciplinary enquiry imposed a final written warning.
- 3] Thereafter, on 8 April 2009, Mr D J Gonsalves, the General Manager of the applicant, issued a memorandum to him informing him that the sanction of a final written warning had been altered to a dismissal. The memorandum explained that this was in consequence of the seriousness of the offence and his actions could not be condoned. The employee was given the right to make written submissions by 14 April 2009 should he feel that the sanction of dismissal was unfair. He duly made representations in writing on the issue. On 20 April 2009 Gonsalves advised him in a further memorandum that his representations had been considered but since his conduct was unacceptable, dangerous and placed the health and safety of employees at risk he had no option but to confirm the sanction of dismissal. The employee was dismissed the next day and lodged an appeal following which he referred a dispute concerning the substantive unfairness of his dismissal to the second respondent.

Grounds of review

- 4] In its founding affidavit the applicant relies on two grounds for the

submission that the arbitrator committed a gross irregularity and therefore misconduct in the performance of his duties :

- a) Firstly, in his reasons for his finding that the dismissal was procedurally unfair the arbitrator states that no hearing was held prior to the sanction being changed. However, he ignores the fact that the employee was given the opportunity to make submissions on the changed sanction.
- b) Secondly, the arbitrator gave no reasons for his finding that the dismissal was substantively unfair. The only reasonable inference is that he ignored evidence that the employee's conduct could have been fatal and that other employees who committed the same misconduct had been dismissed.

Procedural unfairness

- 5] The applicant in its supplementary affidavit does not advance additional grounds for review but concedes that that on the procedural aspect since the employee was given a post as opposed to a pre-dismissal hearing does not cure the procedural shortcoming but does mitigate it. Accordingly the quantum of compensation should not be extensive and should be determined by this court.
- 6] Mr Bekker confirmed the two grounds relied upon and submitted in amplification thereof that the arbitrator misconstrued the issue to be determined in that it is clear from the referral, the answering affidavit as well as the pre-arbitration agreement that he was not required to determine procedural fairness. The only issue before him was the substantive fairness of the dismissal and he was only required to determine whether dismissal was an appropriate sanction.
- 7] Mr Bekker submitted further that it is clear from the pre-arbitration minute that the following issues are not in dispute, i.e. the employee was aware of the rule; the rule was fairly and consistently applied; and the merits of the matter are not in dispute as the employee pleaded guilty during the entire process. This made it clear that the third respondent conceded that the applicant acted fairly and consistently in disciplining for this type of offence

and the only issue to be determined was the last factor in the Code of Good Practice: Dismissal i.e. whether dismissal was the appropriate sanction. In addition the applicant explained its reasons for the revised sanction in its memoranda as being based on severity of the misconduct and precedents. The applicant also acted fairly in giving him the opportunity to make submissions on the appropriateness dismissal as a sanction for the misconduct, even though this was *ex post facto*. In this context he submitted that the conclusion of procedural fairness is not based on any apparent reasoning whatsoever, constitutes a gross irregularity and reflects misconduct in the performance of the arbitrator's duties.

- 8] However even if the arbitrator is correct in determining procedural unfairness (which is not conceded), Mr Bekker submitted that the arbitrator was still required to determine the substantive fairness of the dismissal as a procedural flaw does not necessarily render a dismissal substantively unfair, as he appears to have concluded. A proper consideration of substantive fairness would have led to the conclusion that dismissal was an appropriate and fair sanction. In any event compensation is the only competent relief for procedural unfairness and the arbitrator exceeded his powers in reinstating the employee. The third respondent admits in its answering affidavit that the issue is only whether the applicant was justified in altering the sanction, and further confirms that the employee admitted guilt which is a sign of remorse and relevant to mitigation.
- 9] Mr Bekker submitted that in law there is no absolute prohibition on an employer reviewing the sanction of a disciplinary chairperson and substituting it with a different sanction. This was accepted in *Semenya and Others v CCMA and Others*¹ where the court held that “...*although generally speaking such an opportunity (an opportunity to be heard) should be given before the decision can be taken, there are circumstances where an opportunity to be heard that is given after the decision has been taken is acceptable*”. The applicant was therefore not required to hold a formal enquiry prior to amending the sanction provided the employee was

¹ 2006 (27) ILJ 1627 (LAC).

given the opportunity to make representations. In this regard he submitted that the arbitrator misconstrued *Branford v Metrorail Services (Durban) and Others*² where the Labour Appeal Court rejected the approach that further disciplinary action is permissible only in exceptional circumstances and confirmed that the test is one of fairness, which requires the interests of both the employer and employee to be taken into account. The fairness test was confirmed in *MEC Finance, Kwazulu Natal and Another v Dorkin N.O and Another*.³ The Labour Court has also confirmed the principle that an employer is entitled to revisit a disciplinary penalty. In this regard Mr Bekker relied on the following *dictum* of Van Niekerk J in *Samson v CCMA and Others* :⁴

It is not disputed in these proceedings that the Applicant's misconduct was serious, or that the company's disciplinary code prescribed dismissal as the appropriate penalty for employees found guilty of distributing pornography. In these circumstances, I fail to appreciate how it can be said that the Commissioner, in concluding that the company's failure to afford the Applicant a hearing before Gazendam when he considered the appropriateness of the penalty imposed by Hawley did not render the Applicant's dismissal procedurally fair can be said to constitute a gross irregularity, or that it is a decision to which no reasonable decision maker could come.

- 10] The arbitrator therefore misconstrued the approach of the Labour Appeal Court and his reliance on *BMW (SA) (Pty) Ltd v Van der Walt* ⁵ is also incorrect in that it is clear that a formal disciplinary hearing was held.

Substantive unfairness

- 11] The crux of the matter however, Mr Bekker submitted, is that the arbitrator ignored evidence (that he himself alluded to) to the effect that the

2 2003 (24) ILJ 2269 (LAC).

3 (2008) 29 ILJ 1707 (LAC).

4 (2010) 31 ILJ 170 (LC), para E to H, page 179.

5 (2000) 21 ILJ 113 (LAC).

employee's conduct could have been fatal and that other employees who committed the same offence had been dismissed. He therefore failed to have regard to the seriousness of the offence and the principle of consistency in discipline. He displayed no obvious reasoning in his determination of substantive unfairness and simply concludes that the dismissal was substantively unfair because "the appropriate sanction was changed unfairly." This is a gross irregularity in circumstances where the employee had pleaded guilty at the disciplinary enquiry and the arbitrator was required to determine only the appropriateness of the sanction.

- 12] In amplification of this ground Mr Bekker submitted that in reaching the conclusion on substantive unfairness the arbitrator failed to apply his mind to the undisputed evidence that it was common practice at the applicant to review the disciplinary decisions of chairpersons and that this was not prohibited in the applicant's Disciplinary Code, which emphasised the responsibility of management to ensure consistency and fairness in discipline. Robert Kendall, the Manager – Engineering Shaft and Surface Environment also testified that disciplinary sanctions had been reviewed by management on more than one occasion in the 19 years that he had been in employment with the applicant. Kendall further confirmed that he had a meeting with the employee's union representative on the same day he was handed the memorandum regarding the revised sanction. The arbitrator failed to have regard to this and instead deviated into an irrelevant discussion on the principal agent relationship. The applicant's evidence that similar misconduct had resulted in dismissal of a number of employees in the past; had led to a fatal incident in 2006; and was considered to be very serious misconduct was not challenged. Kendall further confirmed that the trust relationship had broken down and it was never put to him that this was not the case. In this regard the employee relies solely on the fact that he continued working for a month before the sanction was changed. The employee led no evidence to dispute the applicant's version that consistency and fairness were the key factors and that management was entitled to revisit the decision of an inexperienced chairperson who failed to appreciate the severity of the offence. It was therefore not disputed during the arbitration that the misconduct that the

employee had pleaded guilty to was a very serious breach of the applicant's safety policies, in respect of which discipline was consistently applied and that such a breach warranted a sanction of dismissal.

The arbitration award

- 13] The arbitrator records the evidence of Kendall that he differed with the view of the chairperson as he is the one who maintains discipline on the shaft, and that there were employees dismissed for similar misconduct in the past. He admitted that the employee had continued to work for thirty days after the warning but stated that the chairperson had been subjected to counselling. In relation to the employee's evidence the arbitrator records that he pleaded guilty to the charge.

- 14] In his analysis of evidence and arguments the arbitrator states that he is guided by the Code of Good Practice: Dismissal in the determination of the dispute. The reflects that the crux of the dispute is that the employee was "charged, pleaded guilty and given a final written warning, he worked for thirty days and the sanction was changed to dismissal." He notes the applicant's contention that the chairperson of the hearing did not take account of the seriousness of the charge as well as the past discipline to other employees for similar misconduct. He then refers to the decisions cited by the applicant, i.e. *BMW (supra)* wherein it was held that the employer acted fairly in reconstituting the disciplinary hearing and imposing a new sanction. He finds that this is consistent with the approach in *Branford (supra)* but distinguishes this decision as dealing with an instance where the supervisor imposes a warning without a formal disciplinary hearing which was later altered by a duly constituted disciplinary hearing into a dismissal.

- 15] The arbitrator concludes by referring to *Greater Letaba Local Municipality v Mankgaba N.O & Others*⁶ where he says the court emphasised that the

6 [2008] 6 BLLR 229 (LC),

employer is entitled to ensure fairness but that the employee is equally entitled to be heard before the sanction can be changed. He concludes as follows :

[t]he evidence before me suggests that the [employee] was only advised that the sanction was changed from final written warning to dismissal. There is no evidence to suggest that he was allowed to make representations before the sanction could be changed. There is a principle of agency that says the principal is bound by the conduct of the agent. Applied to the facts before me that principle would entail that the [applicant] is bound by the conduct of the chairperson who acted upon its mandate. Further, it takes (sic) into account that the [applicant] did not allow the [employee] to present his case when the sanction was reviewed, it goes without saying that the employer's conduct was unfair and as such did not meet the standard of fairness laid down in the BMW case referred to above.

- 16] On this basis he proceeds to find that the dismissal was “substantively and procedurally unfair (the appropriate sanction was changed unfairly”); confirms the final written warning and orders the employee to be reinstated.

The review test

- 17] It is now well-established that this court is entitled to set aside an arbitration award if and only if the arbitrator's decision falls outside of a band of decisions to which no reasonable person could come on the available evidence: *Sidumo & another v Rustenburg Platinum Mines Ltd & others*.⁷ At paragraph [110] of the judgment, the court set out the test as follows:

To summarise, Carephone held that section 145 of the LRA was suffused by the then constitutional standard that the outcome of an administrative decision should be justifiable in relation to the reasons given for it. The better approach is that section 145 is now suffused by the constitutional standard of reasonableness. That

⁷ [2007] 12 BLLR 1097 (CC)

standard is the one explained in Bato Star: 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 labour practices, but also to the right to administrative action which is lawful, reasonable and procedurally fair.

- 18] In *Bestel v Astral Operations Ltd & others*⁸ the Labour Appeal Court stated that what is paramount is the justification for the arbitrator's decision, rather than it being considered correct. In other words, what the reviewing court considers to be a better decision on the available evidence is irrelevant. This approach maintains the necessary distinction between an appeal on the one hand and the scope of the right of review contemplated by the LRA on the other.
- 19] The strict application of the test for review was emphasised by Zondo JP in *Fidelity Cash Management (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* as follows: ⁹

The test enunciated by the Constitutional Court in Sidumo for determining whether a decision or arbitration award of a CCMA commissioner is reasonable is a stringent one that will ensure that such awards are not lightly interfered with. It will ensure that, more than before, and in line with the objectives of the Act and particularly the primary objective of effective resolution of disputes, awards of the CCMA will be finding and binding as long as it cannot be said that such a decision or award is one that a reasonable decision maker could not have made in the circumstances of the case. It will not be often that an arbitration award is found to be one which a reasonable decision maker could not have made.

Analysis of the award and submissions

- 20] In regard to the submission that the arbitrator misconstrued the issue to be determined it appears that although the pre-arbitration agreement reflects

⁸ [2011] 2 BLLR 129 (LAC) at para [18].

⁹ (2008) 29 ILJ 964 (LAC) at paragraph [100]

that “no issues regarding procedure is in dispute”, under substantive fairness it records the issue as “....process related to dismissal unfair and dismissal is not the appropriate sanction”. In this context it cannot be submitted that the arbitrator’s mandate was clearly circumscribed and that in dealing with procedural fairness it cannot be said that the arbitrator exceeded his mandate or committed misconduct in the performance of his duties.

- 21] Nor can the submission that he misconstrued the law be upheld. In my view he properly refers to the applicable test being fairness as was established by the Labour Appeal Court in *Branford* and *BMW* and makes reference to fairness being equally applicable to the employer and employee as was established in *Greater Letaba (supra)*. In *Branford* (which the arbitrator correctly points out dealt with an instance where a supervisor imposes a warning and a formal disciplinary enquiry is then held which changes the sanction to dismissal) Jafta AJA held as follows (at para [17]):

Even though, strictly speaking, there was only one enquiry in the present matter, I am prepared to approach it on the assumption that there were two enquiries, as it was the position in *Van der Walt’s* case, because two successive punishments were imposed. I shall further assume that the principle in *Van der Walt* equally applies to the present matter. In accordance with that principle, the employer is entitled to hold a second disciplinary enquiry if it would be fair to do so. The arbitrator’s award deviates from the aforesaid principle. Even if the test was that a second enquiry was permissible only in exceptional circumstances, the arbitrator would have still failed to, on the present facts, apply it and consider issues placed before him.

- 22] Even if Mr Bekker is correct that *Greater Letaba (supra)* is distinguishable on the facts and the arbitrator did not pay heed to this because in that matter the employee was dismissed summarily after the sanction was *mero motu* changed to one of dismissal and in *casu* he was given the opportunity to make representations *albeit* after the event, the arbitrator’s error cannot be said to constitute a gross irregularity. In fact it would seem that the approach he takes is that the alteration of sanction by the employer in circumstances where the employee is given an opportunity

after the event to make submissions is tantamount to a unilateral alteration.

- 23] I further agree with the submission made by Mr Malan that given the concession in the supplementary affidavit regarding procedural fairness the applicant cannot seriously contend that the arbitrator failed to apply his mind to the evidence and submissions on this issue. This concession on its own renders the first ground of review unsustainable. The arbitrator therefore cannot be said to have committed a gross irregularity or made an unreasonable decision when he found on the evidence that “the respondent did not allow the applicant to present his case when the sanction was reviewed, it goes without saying that the employer’s conduct was unfair and as such did not meet the standard of fairness laid down in the *BMW* case¹⁰....In the final analysis I find that the changing of the sanction in the circumstances was unfair and the sanction of dismissal ought to be changed”. The arbitrator’s conclusion on procedural fairness therefore cannot be faulted.
- 24] Mr Malan, appearing for the third respondent, submitted that the decisions in *Branford* and *Semenya* are clear that the circumstances in each case will determine whether or not granting an opportunity to be heard after the relevant decision is taken complies with *audi alteram partem*. They also deal with the fairness of a second disciplinary enquiry and in this context the requirement is that the opportunity to be heard must be fair. In *casu* the employee was not given a second opportunity to be heard in respect of sanction or mitigation, nor was he afforded the benefit of a hearing *de novo*. He was simply informed that the sanction had been changed to one of dismissal and afforded the opportunity to make written representations “should [he] feel that the sanction of dismissal is unfair...”
- 25] I agree with Mr Malan that the approach of the applicant was therefore nothing short of shifting the onus onto the employee to prove his innocence. It is trite that section 192 (2) of the LRA places the onus on the applicant to adduce sufficient evidence to prove that dismissal is fair, in

10 *BMW (SA) (Pty) Ltd v Van der Walt* (2000) 21 *ILJ* 113 (LAC).

other words that it is the appropriate sanction in the circumstances. In this regard the applicant adduced no evidence before the arbitrator to show that, at the very least, it confronted the employee with the reasons for changing the sanction to that of dismissal. This would have afforded him a proper opportunity to respond to those reasons and to defend himself. Moreover, Kendall was the only witness for the applicant and despite his lack of participation in the disciplinary enquiry he made the recommendation to Gonsalves that the sanction should be changed. Gonsalves acted on his recommendation but did not give evidence about the facts he may or may not have considered in arriving at his decision, or as to his reasons for doing so or for rejecting the representations of the employee and confirming the changed sanction. In these circumstances the applicant unilaterally reviewed the finding of the chairperson and incorrectly submits that this is consistent with its Disciplinary Code and/or that it constitutes common practice at the applicant. Indeed the contrary appears to be the case in that there was no evidence before the arbitrator that the Disciplinary Code makes provision for overriding a disciplinary decision in these circumstances (or even in circumstances where, as the applicant suggests, the chairperson was inexperienced).

- 26] The Labour Appeal Court has clearly held that without a provision in the employer's code permitting the managing director to interfere with the decision of a disciplinary enquiry chairperson, such interference was unjustified : see *County Fair Foods (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration*.¹¹ The employer does not have *carte blanche* to disregard the provisions of its disciplinary code when it is convenient, and in engaging in the unilateral override of the disciplinary enquiry chairperson's decision management committed an act of procedural unfairness and the arbitrator cannot be faulted on the basis of *Sidumo* or otherwise for finding that the evidence confirmed this. In effect the decision of the chairperson could be said in these circumstances to be *res judicata*. He is moreover in this capacity, as the arbitrator correctly points out, an agent of the applicant and whether or not he performs his duties competently or not is no relevance to the employee.

¹¹ 2003 (24) ILJ 355 (LAC) at para 23.

- 27] In my view in this context the arbitrator cannot be said to have failed to apply his mind or to have committed any other gross irregularity. He appears to have applied his own assessment of fairness based on the facts and the law and his conclusion cannot be faulted even if this court would differ in its assessment of fairness. In *Branford (supra)* Jafta AJA (as he then was) held as follows :

*“The concept of fairness, in this regard, applies to both employer and the employee. It involves the balancing of competing and sometimes conflicting interests of the employer, on the one hand, and the employee on the other. The weight to be attached to those respective interests depends largely on the overall circumstances of each case.”*¹²

- 28] In regard to the conclusion that the dismissal was substantively unfair, Mr Malan submitted that the absence of detailed reasons does not necessarily justify an adverse inference that the arbitrator failed to apply his mind. The enquiry for purposes of a review is more accurately whether evidence was placed before him to prove that the dismissal was the appropriate sanction in the circumstances. In this regard except for the say-so by Kendall, there was no objective evidence to support the allegation that dismissal was appropriate. There was also no evidence on the breakdown of the trust relationship and it is trite that in the absence of evidence to this effect a dismissal is unfair: see *Edcon v Pillemer NO & Others*.¹³ In fact it was common cause that the employee continued performing his duties for a month without incident before the sanction was changed. The applicant furthermore failed to place before the arbitrator proper evidence to support the bald allegation that other employees had been dismissed for similar misconduct. Lastly, there was no evidence before the arbitrator that the applicant had a practice of reviewing disciplinary enquiry chairpersons or that it had reserved the right in this instance to do so, or indeed that this was a practice provided for in the Disciplinary Code. This was not the import of Kendall’s evidence and in this regard the present matter is distinguishable from *Samson* where there

¹² At page 2278 para [16].

¹³ 2009 (30) *ILJ* 2642 (SCA).

was evidence to the effect that it was a practice to review. *In casu* the only evidence was to the effect that the Disciplinary Code provides for consistency and fairness and this was the reason for the amendment of the sanction. However this cannot *per se* justify a review by management of the sanction in these circumstances. Consistency and fairness remain principles of law that must be established. Mr Malan further submitted that in any event notwithstanding the employee's plea of guilty, if regard is has to his explanation for his conduct and the full context thereof (which appears from the disciplinary enquiry record), his dismissal cannot be said to have been substantively fair. Therefore, he submitted that the arbitrator did determine whether or not, given the guilt of the employee and all the circumstances, dismissal was an appropriate sanction.¹⁴

- 29] On this point however I am in agreement with Mr Bekker that although the failure or omission by the commissioner to provide reasons does not *per se* render the award irrational and therefore reviewable on the grounds of irregularity, as was held by Pillay J in *Amalgamated Pharmaceuticals Limited v Grobler N.O and Others*,¹⁵ there has to be at least some indication of an obvious reasoning process as to why a remedy was granted or a decision made. The award is deficient in this regard and it can be inferred that the arbitrator did not apply his mind to whether dismissal, notwithstanding the defective procedure, was nevertheless an appropriate sanction given the interests of fairness and consistency. To the extent that the arbitrator records the evidence of Kendall he stops short of indicating whether he rejects the evidence of dismissal for similar misconduct in the past and the fatal accident, nor does he attribute any significance to the employee's plea of guilt other than mentioning it. Even though it can reasonably be inferred from the award that there was insufficient evidence to prove substantive fairness it does not necessarily follow that these were the same facts and considerations that the arbitrator applied his mind to. The submissions made on behalf of the third respondent are therefore justified, in the absence of any indication by the

14 *BMW South Africa (Pty) Ltd v Van Der Walt supra* at para [19].

15 (2004) 29 *ILJ* 523 LC at 525.

arbitrator of his reasoning process or indeed his reasons for the conclusion as to substantive fairness. His only reason appears to be that there was procedural unfairness and *a fortiori* the sanction of dismissal was also substantively unfair. In my view this the kind of gross irregularity envisaged in *Sidumo (supra)* that would render the award unreasonable. The arbitrator therefore failed to determine whether the dismissal was substantively unfair, and the finding to that effect is reviewed and set aside. The matter is remitted to the second respondent for determination of this issue only.

Order

30] In the premises, I make the following order :

1. The review on the ground that the first respondent's finding in respect of procedural fairness is unreasonable is dismissed;
2. The review on the ground that the first respondent's finding in respect of substantive fairness is unreasonable succeeds. The matter is remitted to the second respondent for determination of this issue by a commissioner other than the first respondent.
3. The applicant does not seek costs in light of the existing relationship between the parties and there is no order as to costs.

Bhoola J

Judge of the Labour Court of South Africa

APPLICANT:

W P Bekker

THIRD RESPONDENT: Instructed by Van Zyl Le Roux Inc.
M Malan

Instructed by Finger Phukubje Inc.