



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case No: JR 3289/11

In the matter between:

ADELAIDE NNTSAKO MOLATUDI

Applicant

and

LERATO SIKWANE, N.O.

First Respondent

**COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION**

Second Respondent

PICK 'N PAY PHARMACIES

Third Respondent

Heard: 11 July 2013

Delivered: 24 January 2014

Summary: Review application- application of discipline; fact that employees faced the same charge but with different outcomes does not

necessarily demonstrate inconsistent application of discipline; when appropriate to remit an award for the giving of reasons for compensation by a commissioner

JUDGMENT

MOOKI,AJ

- [1] The Third Respondent employed the Applicant as a pharmacist. The Applicant was charged with “conniving and/or colluded (sic) to steal from the company” and “theft”. She was found guilty during the domestic hearing and referred the matter to the CCMA, alleging unfair dismissal.
- [2] The second respondent (“the Commissioner”) found her dismissal to be procedurally unfair but substantively fair, and granted her compensation in the amount R48 000, 00. The applicant seeks to have the award reviewed and set aside on a number of grounds.
- [3] Mr Sihlali, appearing for the Applicant, indicated to the court when the matter came for argument that the review was confined to two bases; namely the issue of compensation and the Commissioner’s handling of proceedings regarding attempts by the Applicant to cross-examine a witness for the Third Respondent on the issue of consistency.
- [4] The issue of consistency was said to pertain to the manner in which the Third Respondent treated Elizabeth Phage, who was charged at the same time as the Applicant. The complaint in respect of the compensation amount was that the Commissioner failed to take the circumstances of the applicant into account in granting compensation.
- [5] Mr Sihlali submitted that oral evidence could have proved that there was indeed inconsistency on the part of the Third Respondent had the Commissioner allowed the Applicant to cross-examine Ms Jarvis, a witness for the Third Respondent. In addition, Mr Sihlali submitted that

the evidence by Ms Jarvis on the issue of inconsistency could have changed the circumstances of the award in that the applicant could have received a lesser sanction.

- [6] It was submitted on behalf of the Third Respondent that the point on consistency was not a good one for a number of reasons; including that the circumstances pertaining to the charge against the Applicant and Elizabeth Phage differed on material respects and as such the issue of consistency did not arise. I consider these submissions below.
- [7] The Commissioner concluded that the Applicant failed to make a case for inconsistency. The Commissioner found that the Applicant did not place a record of proceedings in the disciplinary hearing of Elizabeth Phage before the tribunal. That, according to the Commissioner, would have laid a proper basis for the Commissioner considering whether or not there was inconsistent treatment on the part of the Third Respondent.
- [8] It bears noting that the Applicant does not, in her review papers, nor in submissions made to the court during the hearing of the application, take issue with the finding in the arbitration that she committed the theft and connived as set out in the allegations against her. In particular, the Applicant does not take issue with the Commissioner's conclusion that there was overwhelming evidence that the Applicant intended to steal the medicine in question and succeeded in doing so. The Commissioner determined that that finding rendered the dismissal substantively fair.
- [9] The Commissioner's finding on the dismissal being substantively fair was not challenged in any meaningful manner. No submissions were made on behalf of the Applicant that there was no basis for the Commissioner to have made the determination referred to above.
- [10] The finding by the Commissioner that the Applicant stole the medication cannot be faulted. The evidence on behalf of the Third Respondent, particularly by Mr Sagie Chetty, was overwhelming. That evidence, even if the evidence based on the recorded conversation that was disputed by the applicant were to be excluded, justified the Commissioner's finding that the Applicant stole the medication.

- [11] The Commissioner rejected the Applicant's contention that her dismissal was substantively unfair because the Third Respondent had been inconsistent in its application of discipline. This was on the basis, according to the Commissioner, that the Applicant failed to prove that she and Elizabeth were charged with the same misconduct; that the Applicant failed to submit the nature of charges against Elizabeth, or submit the minutes of the disciplinary proceedings against Elizabeth.
- [12] Mr Sihlali directed his primary attack on the award on the finding by the Commissioner on the issue of consistency. Mr Viljoen, one of the witnesses on behalf of the Third Respondent, drew the charges against both the Applicant and Elizabeth Phage (each of whom was put through a separate disciplinary hearing). Mr Viljoen conceded that the Applicant and Elizabeth Phage faced the same charges.
- [13] The Applicant gave evidence that she was found guilty and dismissed, but that Elizabeth Phage was found guilty and given a choice of suspension without pay or a dismissal. Elizabeth chose suspension.
- [14] There is no suggestion that the same evidence was given in disciplinary proceedings against the Applicant and in the disciplinary hearing concerning Elizabeth Phage. The Applicant did not allege that the evidence in her proceedings was the same as that in the proceedings concerning Elizabeth Phage. In addition, there was no evidence on whether or not Elizabeth Phage was found to have colluded to steal or that she committed theft. It bears pointing out that the Applicant emphasized the issue of the similarity of the charges as the basis for her inconsistency complaint.
- [15] The Third Respondent led evidence in the disciplinary hearing of the Applicant that the Applicant was found in possession of medication. This followed a tipoff that the Applicant tried to leave her workplace with unpaid for medication. This was on 14 October 2010. That tipoff was related to Mr Sagie Chetty. Mr Chetty advised the security personnel at the check-out booth that the Applicant was thought to be

attempting to leave the premises without having paid for medication and that the Applicant should be searched and brought to Mr Chetty's office.

- [16] The Applicant had a paper bag with a receipt stapled to it when she was taken to Mr Chetty's office. He sought the applicant's permission to open the paper bag. The applicant agreed. Mr Chetty observed that there was no pay slip for the medication. In addition, there was no prescription for the medication. The Applicant told Mr Chetty that the Applicant would bring the prescription the following day (i.e. 15 October 2010). Mr Chetty made a list of the medication in the bag and got the Applicant to sign for the medication. He then allowed the Applicant to leave the premises with the medication.
- [17] The Applicant told Mr Chetty that she required the medication urgently for her baby. Mr Chetty telephoned a fellow employee regarding the incident and they arranged to meet the following day (i.e. 15 October 2010). The meeting took place. The applicant gave Mr Chetty the prescription for the medication on 15 October 2010.
- [18] The Applicant denied meeting Mr Chetty either on 14 or 15 October 2010. The Commissioner pointed out however, that this could not be truthful because a minute of the domestic hearing, which was introduced by the Applicant in the arbitration, reflects an exchange between the Applicant and Mr Chetty. The Commissioner was justified in rejecting the Applicant's denial.
- [19] The above account illustrates that the mere fact that the two employees faced the same charges but had different outcomes does not mean that there was inconsistent application of discipline. The Applicant did not contend that Elizabeth was found in possession of unpaid for medication in the same manner as the Applicant.
- [20] It does not follow that there is inconsistent application of discipline when there are different outcomes in respect of employees who faced the same charges. An inconsistency challenge will fail where the

employer is able to differentiate between employees who have committed similar transgressions on the basis of *inter alia* differences in personal circumstances, the severity of the misconduct or on the basis of other material factors.¹

- [21] There was no evidence before the Commissioner about the disciplinary proceedings regarding Elizabeth Phage. It is not axiomatic that the mere fact that the Applicant and Elizabeth faced the same charges would result in the same outcome. I conclude that the Commissioner cannot be faulted for requesting, at least, some type of evidentiary material upon which he could test the claim on whether or not there was a basis for the inconsistency challenge.
- [22] Mr Viljoen conceded that the Applicant and Elizabeth faced the same charges. That concession, in the light of the appropriate application of the law on inconsistent application of discipline, does not render the award so defective as to warrant setting it aside. At best for the Applicant, and in accepting that Mrs Jarvis would have confirmed that Elizabeth and the Applicant faced the same charges, it does not follow that the award is so defective as to be set aside. In this regard, the Applicant did not lead evidence that Elizabeth was found in possession of medication; there was no evidence that there was similarity of circumstance as between the applicant and Elizabeth. It bears repeating that a charge sheet does not constitute evidence of the charges.
- [23] The Applicant was correct to complain about the manner in which the Commissioner dealt with her attempts to cross-examine Ms Jarvis on the issue of consistency. I find, however, that the Applicant has not shown that this error by the Commissioner renders the award defective in a material way. The Commissioner's finding that the Applicant's dismissal was substantively fair should not be disturbed.

¹ See, for example, *Cape Town City Council v Masitho and Others* (2000) 21 ILJ 1957 (LAC) at para 13.

[24] The Applicant raised three attacks concerning the Commissioner's finding on compensation, namely that the Commissioner failed to take the following into consideration:

24.1 The Applicant's length of service;

24.2 Whether the Applicant had mitigated her losses by obtaining alternative employment; and

24.3 The availability of similar positions in the labour market.

[25] The Applicant did not lead evidence during the arbitration on any of the three grounds referred to above. The Commissioner found that compensation in the amount of R48000-,00, equivalent to the Applicant's salary of two months, to be "fair and equitable". The Commissioner did not explain why that is the case.

[26] It was submitted on behalf of the Applicant that the Commissioner was obliged, at a minimum, to give "brief reasons" in justifying the compensation amount and that a failure to do so constitutes a reviewable misdirection. The Applicant relied on the decision in *Mohlakoana v CCMA and Another*.² This decision was referred to in *Matjhabeng Municipality v Mothupi NO and Others*.³

[27] I point out that the award in *Matjhabeng Municipality* was not set aside because the commissioner in that case had not given reasons for the compensation. It was set aside because the conduct of the applicant did not amount to unfair discrimination.⁴

[28] *Mohlakoana* is distinguishable from the current application. The commissioner in that case found the dismissal to be substantively unfair but determined that the applicant be paid compensation equivalent to two months' remuneration, declaring such compensation

² (2010) 31 ILJ 2688 (LC)

³ (2011) 32 ILJ 2154 (LC)

⁴ Para 70

'just and equitable'. The court found that "The applicant, who contends that the award of compensation was not just and equitable in the circumstances, was evidently mystified why the commissioner awarded two months' compensation having found the dismissal substantively unfair, particularly given the fact that already more than four months had elapsed between the date of his dismissal and the date of the arbitration award being issued."⁵

[29] The Commissioner in the present matter found the dismissal to be substantively fair. The failure to give reasons for compensation awarded by a commissioner is not per se a reviewable irregularity. *Absa Brokers (Pty) Ltd v Moshwana NO and Others*.⁶

[30] I agree that the Commissioner should ordinarily have given a fuller account of why he granted compensation in the amount that he did, as opposed to merely stating that he found such compensation to be "fair and equitable". I disagree however, that the finding is fatal such that the court should interfere with the award on that account.

[31] The case for the Applicant is essentially that she ought to have received a greater amount in compensation and that the amount of compensation is so inadequate as to make it reviewable. It is correct that another Commissioner may have awarded the Applicant greater compensation. It does not follow however, that the award in the case of the Applicant was so unreasonable that no reasonable commissioner could have granted the same compensation.⁷ Section 194 of the Act requires that compensation be just and equitable in all the circumstances. There is nothing in the record that justifies disturbing

⁵ Para 10

⁶ (2005) 26 ILJ 1652 (LAC) at paras 44 and 47, *Bezuidenhout v Johnston NO and Others* (2006) 27 ILJ 2337 (LC); [2006] 12 BLLR 1131 (LC) at paras 57-59.

⁷ 9 *Sidumo and another v Rustenburg Platinum Mines Ltd & others* 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 (CC)

the discretion exercised by the Commissioner in the compensation awarded to the Applicant.

- [32] The court in *Mohlakoana* remitted the matter to the commissioner for the commissioner to reconsider his decision on an appropriate award of compensation, after setting out his reasons for his original ruling of compensation and after hearing any evidence the parties may lead which is relevant to the determination of an appropriate award of compensation.⁸ The court indicated that it was following the approach in *Boxer Superstores (Pty) Ltd v Zuma and Others*⁹ in remitting the award as indicated.
- [33] I regret that I do not consider *Boxer Superstores* to lay a general rule in the manner suggested by the court in *Mohlakoana*. The court in *Boxer* dealt with the failure by a commissioner to give reasons in a particular context. Procedural unfairness was not an issue in the *Boxer* decision. The commissioner in *Boxer* determined that he was unable to decide on the issue of the substantive fairness of the dismissal. He however, awarded “minor compensation” to the employee.
- [34] The failure by the commissioner in *Boxer* to make a finding on the substantive fairness of the dismissal, meant that the employer failed to discharge the onus. The Labour Court found that the award of compensation was incongruent with a finding that the employer failed to discharge the onus on the substantive fairness of the dismissal. The Labour Court set the award aside and ordered reinstatement as the only appropriate remedy.
- [35] The Labour Appeal Court found that the Labour Court was wrong to conclude that reinstatement was the only remedy without taking account of section 193(2). Reinstatement may well have been the

⁸ Para 24

⁹ (2008) 29 ILJ 2680 (LAC)

appropriate remedy but that the enquiry had to be done as contemplated in section 193 (2).¹⁰

- [36] The court in *Boxer* found that the commissioner did not give reasons for awarding compensation, notwithstanding, that the employer failed to discharge the onus in relation to substantive dismissal.¹¹
- [37] The Labour Appeal Court upheld the appeal on two bases. First, that there was no evidence upon which the Labour Court could have ordered reinstatement. Second, the commissioner did not give reasons why he awarded compensation instead of granting reinstatement, which is the default position where an employer failed to discharge the onus for the substantive fairness of a dismissal.¹²
- [38] The “failure to give reasons” referred to in *Boxer* are reasons that the commissioner might have given to justify granting compensation as opposed to reinstatement. The failure to give reasons in *Mohlakoane* dealt with an entirely different set of circumstances.
- [39] I am not inclined to follow the decision in *Mohlakoane* that the matter be remitted for the Commissioner to give reasons why he awarded compensation as set out in the award. That approach is not supported by the decision in *Boxer*.
- [40] It should be remembered that the Commissioner granted the Applicant compensation because the Commissioner concluded that the charges were not explained to the Applicant. The Third Respondent does not challenge this finding. I am mindful that this court sits as a court of review and not as an appellate tribunal. It is important to note, however, that the finding by the Commissioner on the issue of procedural unfairness is not supported by the evidence.
- [41] The Commissioner found that the charges, as drawn, “were fatally flawed in that they lacked particularities. The charge does not tell the

¹⁰ *Boxer*, para 9

¹¹ *Boxer* para 11

¹² *Boxer*, para 11

date of the commission of the misconduct, what was stolen and the applicant partner in crime. It is therefore my finding that the applicant's dismissal was procedurally unfair only in this instance". The Commissioner, in making the above determination, did not take account of the evidence. He did not take account of evidence by Mr Viljoen that Mr Viljoen explained the charge sheet to the Applicant when he served the applicant with the charges. In addition, Mr Viljoen gave further evidence that it was clear that the applicant understood the charges against her.

[42] The Applicant did not dispute Mr Viljoen's evidence in the arbitration. The Applicant's protestation that she did not know the case that she had to answer is not borne by a fair examination of the record of proceedings.

[43] The Applicant had raised a number of other complaints in her application. Those were not persisted with when the matter was heard. In any event, such complaints had no merit. The complaints included that the Commissioner failed to take into account that the Applicant was unrepresented during the arbitration. The record of proceedings shows that the Commissioner took note of the fact that the Applicant was unrepresented. It also bears noting that the Applicant, at the commencement of the arbitration, advised the Commissioner that she would proceed without representation. The Commissioner was prepared to postpone the arbitration to allow her to secure the services of a representative.

[44] There is no warrant to disturb the award. I make the following order:

1. The application is dismissed.
2. There is no order as to costs.

Mooki O

Acting Judge of the Labour Court of South Africa

APPEARANCES:

APPLICANT: Mr C M Sihlali, Motlanthe Inc.

RESPONDENT: Mr K Makapane (Attorney), Bowman Gilfillan Inc.

LABOUR COURT