



REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

Case number: JR164/14

In the matter between:

I BOWER AND ASSOCIATES CC

Applicant

and

ME PHOOKO

First Respondent

**COMMISSION FOR CONCILIATION MEDIATION
AND ARBITRATION**

Second Respondent

SD MONENE

Third Respondent

KD APHANE

Fourth Respondent

RG MOHLAKA

Fifth Respondent

NH TJALE

Sixth Respondent

Heard: 6 January 2015

Delivered: 14 May 2015

Summary: This is a Review Application where the Applicant sought the arbitration award of the First Respondent, where the First Respondent found the dismissals of the Third to Sixth Applicants to be both substantively and procedurally unfair, be reviewed and set aside. The First Respondent found that the Third to Sixth Respondents had thrown stones during a protected strike at a motor vehicle occupied by a manager of the Applicant, but had in turn found the dismissals of the Third to Sixth Respondents to be substantively unfair as the First Respondent found that the Applicant had

acted inconsistently by dismissing the Third to Sixth Respondents but retaining in its employ a fifth transgressor. The fifth transgressor was only identified as such during the course of the arbitration proceedings. The Court found that the Third to Sixth Respondents had not established a *prima facie* case of inconsistency during the arbitration proceedings which would have necessitated the Applicant to provide a defence thereto and as such the finding that the dismissal of the Third to Sixth Respondents was substantively unfair based on inconsistency was not a decision that a reasonable decision maker could have arrived at. The First Respondent's finding that the Third to Sixth Respondents' dismissals were procedurally unfair was also found not to be a decision that a reasonable decision maker could have arrived at. The arbitration award was accordingly reviewed and set aside.

JUDGMENT

ALCOCK, AJ:

Introduction

- [1] This is a Review Application in terms of which the Applicant seeks the arbitration award of the First Respondent dated 19 December 2013 and issued under case number LP6623/13 ("Award"), which arbitration was conducted under the auspices of the Second Respondent, be reviewed and set aside ("Review Application"). This Review Application has been brought in terms of section 145 of the Labour Relations Act 66 of 1995 ("LRA").
- [2] In seeking an order to have the Award reviewed and set aside, the Applicant also seeks to have the Award corrected by determining that the dismissal of the Third to Sixth Respondents on 14 May 2013 was fair (procedurally and substantively), alternatively, ordering that a complete re-hearing of matter be conducted under the auspices of the Second Respondent and before an arbitrator other than the First Respondent.

Background Facts

- [3] The Applicant provides cleaning services to various mines, including, to those of Anglo Platinum. The Third to Sixth Respondents were employed by the Applicant and provided services at one of the Anglo Platinum mines.
- [4] On 19 November 2012, the Applicant's employees, including, the Third to Sixth Respondents, embarked on a protected strike. It was during this protected strike that an incident occurred at Anglo Platinum's premises, during which certain striking employees of the Applicant threw stones at and caused damage to a motor vehicle which was occupied by the Applicant's General Manager, Ms Lorraine Bower ("Ms Bower").
- [5] The Third to Sixth Respondents were subsequently identified by Ms Peggy Seanego ("Ms Seanego"), an Anglo Platinum security guard, as having thrown the stones at the motor vehicle occupied by Ms Bower and they were subsequently criminally charged for malicious damage to property. The protected strike continued into March 2013.
- [6] The Third to Sixth Respondents' criminal trial was concluded in early May 2013.
- [7] Following the conclusion of the criminal trial and on 9 May 2013, the Third to Sixth Respondents were furnished with notices to attend a disciplinary hearing on 14 May 2013 to answer to the allegation of malicious damage to property. The Third to Sixth Respondents were found guilty of the aforesaid charge at the conclusion of the disciplinary hearing and they were summarily dismissed by the Applicant.
- [8] The Third to Sixth Respondents, through their trade union COWUSA, referred an unfair dismissal dispute to the Second Respondent, which dispute was ultimately arbitrated upon by the First Respondent ("Arbitration"). Following the Arbitration, the First Respondent furnished the Award and I summarise the material findings, which are relevant to this Review Application, below:

- 8.1 Ms Seanego had impressed the First Respondent and was found to be a reliable witness. The First Respondent accordingly found no reason to reject her evidence;
- 8.2 Ms Seanego had testified that she had witnessed the Third to Sixth Respondents throwing stones at the motor vehicle occupied by Ms Bower;
- 8.3 Ms Seanego had testified that a fifth transgressor (Mavis) had also been involved in throwing stones at the motor vehicle occupied by Ms Bower;
- 8.4 the First Respondent found that there was evidence to show that the fifth transgressor was still employed by the Applicant and as such the Applicant had acted inconsistently in dismissing the Third to Sixth Respondents, whilst retaining the fifth transgressor in its employ. This inconsistency rendered the dismissals of the Third to Sixth Respondents substantively unfair;
- 8.5 the First Respondent then found that there was uncontested evidence that the Third to Sixth Respondents were dismissed on 23 November 2012;
- 8.6 the Third to Sixth Respondents had confirmed in their evidence that their last working day was 23 November 2012 and the disciplinary hearing of 14 May 2013 was conducted in an attempt to legitimise their dismissals;
- 8.7 the dismissals of the Third to Sixth Respondents were found to be procedurally unfair; and
- 8.8 the First Respondent awarded the Third to Sixth Respondents reinstatement with specified amounts of back pay computed for the period December 2012 to the end of December 2013.

Grounds for Review

[9] The Applicant's grounds of review are set out more specifically in paragraphs 13 to 21 of the Applicant's Founding Affidavit, and duly supplemented by paragraph 2 of the Applicant's Supplementary Affidavit, which for the purposes of this Judgment, I shall summarise as follows:

- 9.1 with regards to substantive fairness of the Third to Sixth Respondents' dismissals, the First Respondent had accepted the evidence of Ms Seanego and more particularly that she had witnessed the Third to Sixth Respondents, as well as a fifth transgressor, throwing stones at the motor vehicle occupied by Ms Bower. Notwithstanding the aforementioned, the First Respondent found that although the Third to Sixth Respondents were guilty of serious misconduct, the First Respondent determined that the dismissal of the Third to Sixth Respondents was substantively unfair based on the finding that the Applicant had acted in an inconsistent manner by dismissing the Third to Sixth Respondents and retaining the fifth transgressor in its employ;
- 9.2 the Applicant was at no stage prior to the Arbitration aware that the fifth transgressor was involved in throwing stones at the motor vehicle occupied by Ms Bower;
- 9.3 in the aforementioned circumstances, the First Respondent incorrectly and unreasonably interpreted and applied the consistency rule to such an extent that the Award should be reviewed and set aside;
- 9.4 with regard to the First Respondent's finding of procedural unfairness, the First Respondent had acted in an incorrect, irrational and unreasonable manner when he accepted that the Third to Sixth Respondents were dismissed on 23 November 2012, by finding that there was uncontested evidence thereof notwithstanding the fact that the Third to Sixth Respondents had attended the disciplinary hearing on 14 May 2013;

- 9.5 further and in circumstances where the First Respondent found that the Third to Sixth Respondents were dismissed on 23 November 2012, the First Respondent should have noted that the unfair dismissal dispute referral to the Second Respondent was not within the 30 (thirty) day prescribed period. In the absence of condonation being granted, the Second Respondent had no jurisdiction to arbitrate the unfair dismissal dispute;
- 9.6 the delay between the damaging of the motor vehicle occupied by Ms Bower on 23 November 2012 and the conducting of the disciplinary hearings on 14 May 2013 was due to the strike action that had only ended in March 2013 and the subsequent criminal proceedings that the Third to Sixth Respondents were required to attend, which only concluded in early May 2013. There was no prejudice to the Third to Sixth Respondents arising from the delay in conducting the Third to Sixth Respondents' disciplinary hearing on 14 May 2013; and
- 9.7 if the Court was to determine that the Third to Sixth Respondents are entitled to a remedy, it was inappropriate to award retrospective reinstatement or re-employment.

Test for Review

- [10] The review test was formulated by the Supreme Court of Appeal in *Herholdt v Nedbank Limited (Congress of SA Trade Unions as amicus curiae)*¹, where the Court concluded as follows:

'In summary the position regarding the review of CCMA award is this: A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in s145 (2) (a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s145 (2) (a)(ii), the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that

¹ (2013) 34 ILJ 2795 (SCA) at para 25.

was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to the particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of consequence of their effects is to render the outcome unreasonable’.

- [11] The Labour Appeal Court in the subsequent judgment in the matter of *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA and Others*², has confirmed the review test as follows:

‘Sidumo does not postulate a test that requires a simple evaluation of the evidence presented to the arbitrator and based on the evaluation, a determination of the reasonableness of the decision arrived at by the arbitrator....In other words, in a case such as the present, where a gross irregularity in the proceedings is alleged, the enquiry is not confined to whether the arbitrator misconceived the nature of the proceedings, but extends to whether the result was unreasonable, or put another way, whether the decision that the arbitrator arrived at is one that falls in a band of decisions a reasonable decision maker could come to on the available material.

The Court concluded:

In short: A review court must ascertain whether the arbitrator considered the principal issue before him/her, evaluated the facts presented at the hearing and came to a conclusion which was reasonable to justify the decision he or she arrived at’.

- [12] The review test has also more recently been confirmed in the Labour Appeal Court in the case of *Head of the Department of Education v Jonas Mohale Mofokeng and Others (JA14/2014)*.
- [13] The aforementioned constitutes the review test to which this Court is bound. Material errors of facts as well as the weight and relevance attached to any particular fact are not therefore in themselves sufficient to allow this Court to interfere with the Award, unless it renders the ultimate decision by the First

² (2014) 35 ILJ 943 (LAC) at paras 14 and 16.

Respondent unreasonable i.e. a reasonable decision maker could not have arrived at such a decision.

Merits of Review: Substantive Fairness

- [14] The thrust of the Applicant's grounds of review with regards to the First Respondent's finding that the dismissal of the Third to Sixth Respondents was substantively unfair revolves around the question as to whether, based on the current jurisprudence, the First Respondent had incorrectly and unreasonably interpreted and applied the consistency rule, which rendered the First Respondent's finding of substantive unfairness as unreasonable.
- [15] As a starting point, I intend to deal with the current jurisprudence with regard to the consistency rule and which has particular relevance to this Review Application.
- [16] In order for an inconsistency argument to have any traction, a *prima facie* case of inconsistency has to be proved by the party alleging inconsistency before the other party would be compelled to provide a defence to those allegations. These principles were described in the decision of *Frans Masubelele v Public Health and Social Development Sectoral Bargaining Council and Others*³, where the Court held as follows:

'Mr S M Shaba, representing the third respondent, contended that the applicant had the evidentiary burden to at least prove a prima facie case of inconsistency, before the third respondent could be expected to answer the same. Mr Shaba stated that in this instance, the applicant failed to even provide prima facie evidence to establish inconsistency and consequently the third respondent had nothing to answer. Mr Shaba stated that the applicant should have led evidence, and only has himself to blame for not doing so. I agree with these submissions of Mr Shaba. The applicant had to at least have provided a prima facie evidentiary platform to support his contentions of inconsistency...'

³ Unreported judgement dated 17 January 2013 under case number JR 1151/2008 at para 29

- [17] The judgment in *SA Commercial Catering and Allied Workers Union and Others v Irvin and Johnson Ltd*⁴, however determined the general principles applicable to the consistency rule, where the Court held as follows:

‘...In my view too great an emphasis is quite frequently sought to be placed on the ‘principle’ of disciplinary consistency, also called the ‘parity principle’ (as to which see eg Grogan Workplace Law (4 ed) at 145 and Le Roux and Van Niekerk The SA Law of Unfair Dismissal at 110). There is really no separate ‘principle’ involved. Consistency is simply an element of disciplinary fairness (M S M Brassey ‘The Dismissal of Strikers’ (1990) 11 *ILJ* 213 at 229). Every employee must be measured by the same standards (Reckitt and Colman (SA) (Pty) Ltd v Chemical Workers Industrial Union and others (1991) 12 *ILJ* 806 (LAC) at 813H-I). 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 a large number of offending employees, the best that one can hope for is reasonable consistency. Some inconsistency is the price to be paid for flexibility, which requires the exercise of a 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 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. In a case of a plurality of dismissals, a wrong decision can only be unfair if it is capricious, or induced by improper motives or, worse, by a discriminating management policy...Even then I dare say that it might not be so unfair as to undo the outcome of other disciplinary enquiries. If, for example, one member of a group of employees who committed a serious offence against the employer is, for improper motives, not dismissed, it would not, in my view, necessarily mean that the other miscreants should escape. Fairness is a value judgment. It might or might not in the circumstances be fair to reinstate the other offenders. The point is that consistency is not a rule unto itself’.

⁴ [1999] 8 BLLR 741 (LAC) at para 29

- [18] In the judgment of *Southern Sun Hotel Interests (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*⁵, the Court again dealt with the principles applicable to an inconsistency argument, where the Court held as follows:

‘... A claim of inconsistency (in either historical or contemporaneous terms) must satisfy a subjective element – an inconsistency challenge will fail where the employer did not know of the misconduct allegedly committed by the employee used as a comparator (see, for example, *Gcwensha v CCMA and others* [2006] 3 BLLR 234 (LAC) at paras 37-38). The objective element of the test to be applied is a comparator in the form of a similarly circumstanced employee subjected to different treatment, usually in the form of a disciplinary penalty less severe than that imposed on the claimant. (See *Shoprite Checkers (Pty) Ltd v CCMA and Others* [2001] 7 BLLR 840 (LC) at para 3). Similarity of circumstances is inevitably the most controversial component of this test. 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’.

- [19] These principles have also been confirmed and dealt with in a comprehensive manner by Snyman AJ in *Banda v General Public Service Sectoral Bargaining Council and Others*.⁶
- [20] Those principles were further confirmed more recently in the unreported decision of *ABSA Bank Limited v Devapriya Naidu and Others* (case no: DA14/12) which the Applicant’s Counsel handed up with his Heads of Argument at the hearing of this Review Application, which held as follows at paragraph 42:

‘[42] Indeed, in accordance with the parity principle, the element of consistency on the part of an employer in its treatment of employees is an important factor to take into account in the determination process of the fairness of a dismissal. However, as I say, it is only a factor to take into

⁵ (2010) 31 ILJ 452 (LC) at para 10

⁶ [2014] JOL 31486 (LC).

account in that process. It is by no means decisive of the outcome on the determination of reasonableness and fairness of the decision to dismiss. In my view, the fact that another employee committed a similar transgression in the past and was not dismissed cannot, and should not, be taken to grant a licence to every other employee, willy-nilly, to commit serious misdemeanours, especially of a dishonest nature, towards their employer on the belief that they would not be dismissed. It is well accepted in civilised society that two wrongs can never make a right. The parity principle was never intended to promote or encourage anarchy in the workplace. As state earlier, I reiterate, there are varying degrees of dishonesty and, therefore, each case will be treated on the basis of its own facts and circumstances’.

- [21] When one then looks at the aforementioned principles in the context of the Record, it is evident that Ms Seanego had identified the Third to Sixth Respondents, as well as the fifth transgressor, as those who had thrown stones at the motor vehicle occupied by Ms Bower. Although the transcript of the Arbitration proceedings was at times difficult to follow, I could not find any compelling evidence to confirm that the fifth transgressor was still employed by the Applicant at the time of the Arbitration, with Ms Seanego specifically being unable to confirm this whilst under cross examination, I have nevertheless for the purposes of the Judgment accepted that this was the case as it appears to have been subsequently conceded by the Applicant. I am however, not convinced that these facts in themselves establish a *prima facie* case of inconsistency, which would have required the Applicant to provide a defence thereto. In this regard, there was no evidence produced during the Arbitration proceedings by the Third to Sixth Respondents to show, at least on the face of it, that the Applicant was aware prior to the Arbitration proceedings that the fifth transgressor had also been implicated in the throwing of stones at the motor vehicle occupied by Ms Bower on 23 November 2012. There was also no evidence led to show the Third to Sixth Respondents, at least on the face of it, had been singled out for specific treatment by the Applicant or that the Applicant had been capricious in any manner or that the Applicant had in any way acted with improper motives. There was accordingly no *prima facie* case of inconsistency proved by the Third to Sixth Respondents that warranted that the Applicant be required to

provide a defence. This in itself has led me to conclude that the finding of the First Respondent that the dismissal of the Third to Sixth Applicants was substantively unfair as a consequence of inconsistency in that the Third to Sixth Applicants were dismissed and the fifth transgressor remained employed by the Applicant should be reviewed and set aside;

[22] In order to however, demonstrate how far off the mark the First Respondent's finding and application of the consistency rule was in this matter, even if I had found that the Applicant had known at the time of the Arbitration that the fifth transgressor had, simultaneously with the Third to Sixth Respondents, thrown stones at the motor vehicle occupied by Ms Bower during the course of the protected strike, there was again no evidence produced during the course of the Arbitration to show that the Applicant had in any way acted with, *inter alia*, improper motives or in a capricious manner towards the Third to Sixth Respondents. Further, the conduct by the Third to Sixth Respondents constituted serious misconduct and in these circumstances I can also see no reason why the Third to Sixth Respondents should therefore have benefitted at all from a possible failure by the Applicant to discipline the fifth transgressor.

[23] It is therefore the finding of this Court that the First Respondent's finding that the dismissal of the Third to Sixth Respondents was substantively unfair does not reflect a decision that a reasonable decision maker could have arrived at. The First Respondent's finding that the dismissal of the Third to Sixth Applicants was substantively unfair is accordingly reviewed and set aside.

Merits of Review: Procedural Fairness

[24] It is evident that the First Respondent's finding that the dismissal of the Third to Sixth Respondents was procedurally unfair essentially stems from his conclusion that the Third to Sixth Respondents were dismissed on 23 November 2012 and not on 14 May 2013 when the disciplinary hearing was conducted by the Applicant in respect of the Third to Sixth Respondents. In this regard, the First Respondent specifically found the following:

- 24.1 there was uncontested evidence that the Third to Sixth Respondents were dismissed on 23 November 2012;
 - 24.2 the Third to Sixth Respondents' witnesses had confirmed that the Third to Sixth Respondents' last working day was in November 2012;
 - 24.3 the only inference that could be made from the aforementioned was that the Third to Sixth Respondents had been dismissed on 23 November 2012; and
 - 24.4 the disciplinary hearing that was conducted on 14 May 2013 was only an attempt to legitimise the dismissals of 23 November 2012.
- [25] After considering the Record, and again I have to state that the transcript of the Arbitration proceedings was at times difficult to follow, the following was nevertheless evident:
- 25.1 the Third to Sixth Respondents dismissal notices which were completed following the disciplinary hearing conducted on 14 May 2013, and which are reflected on pages 25 to 40 of the Record, clearly state that their dismissals were with effect from 23 November 2012. In essence, the Applicant took the irregular step of backdating the Third to Sixth Respondents' dismissal date;
 - 25.2 this is also supported by the evidence of at least two of the Third to Sixth Respondents on pages 100 and 103 of the Record when they were asked the question by their representative regarding the date of their dismissals, they confirmed that they were dismissed on 14 May 2013 and when subsequently pushed by their representative they stated that they had been dismissed with effect from 23 November 2012;
 - 25.3 on page 175 of the Record, the Third to Sixth Respondents' referral to the Second Respondent records that the unfair dismissal dispute arose on 14 May 2013, the date of the disciplinary hearing, although the date

of dismissal is subsequently recorded in the same document on page 177 as 23 November 2012;

25.4 on page 179 of the Record and in the Third to Sixth Respondents' Application for Condonation, the Third to Sixth Respondents record that they were dismissed on 14 May 2013;

25.5 on page 125 of the Record, the Applicant's representative confirmed that the Third to Sixth Respondents were dismissed after the disciplinary hearing that was held on 14 May 2013;

25.6 the Applicant's representative further submitted that the Applicant was unable to take disciplinary action against the Third to Sixth Respondents whilst they were on strike. He further submitted that when the strike ended, the Applicant took a decision not to invoke disciplinary proceedings against the Third to Sixth Respondents until their criminal case had been finalised. The criminal case was finalised in early May 2013 and the Third to Sixth Respondents were then furnished with the notices to attend the disciplinary hearing on 9 May 2013. The Third to Sixth Respondents did not tender their services during the aforementioned period; and

25.7 the disciplinary hearing in respect of the Third to Sixth Respondents was convened on 14 May 2013 and the Third to Sixth Respondents attended and participated in that disciplinary hearing. From the Record I cannot find any evidence presented at the Arbitration that shows any procedural irregularities relative to disciplinary proceedings conducted on 14 May 2013.

[26] Based on the above, I find that the First Respondent's finding that there was uncontested evidence to show that the Third to Sixth Respondents were in fact dismissed on 23 November 2012, is not a reasonable finding. In addition and in making his finding, the First Respondent also failed to take cognisance of and made a finding which is inconsistent with section 190(1) of the LRA. What is however evident is that the Third to Sixth Respondents were

dismissed on 14 May 2013, but with the Applicant taking the irregular step of attempting to backdate the date of dismissal to 23 November 2012. This irregular step should not however detract from the factual position and that is the Third to Sixth Respondents were dismissed after the disciplinary hearing that was conducted on 14 May 2013. This is simply a factual inaccuracy on part of the Applicant which does not alter the factual position.

- [27] I also find that the First Respondent's conclusion that the Third to Sixth Respondents had in fact been dismissed on 23 November 2012 because witnesses confirmed their last working day was on 23 November 2012, is also not a reasonable finding. To this end, it is evident that the Third to Sixth Respondents were on strike and they would not have tendered their services whilst on strike. The Applicant was also unable to invoke disciplinary proceedings whilst the Third to Sixth Respondents were on strike. The First Respondents ignores these facts in his finding.
- [28] The Applicant's version as to what took place after the strike ended, more specifically that the Applicant took a decision not to invoke disciplinary proceedings until their criminal trial had been finalised and that the Third to Sixth Respondents had not tendered their services during this period, also appears to be ignored by the First Respondent.
- [29] Further and if the Third to Sixth Respondents had in fact been dismissed on 23 November 2012 as the First Respondent found, they would have been required to refer their unfair dismissal dispute to the Second Respondent within a period of 30 days calculated from 23 November 2012. This did not occur. In fact, the Third to Sixth Respondents only referred their unfair dismissal dispute to the Second Respondent after the 14 May 2013 disciplinary hearing. In addition thereto, when the Third to Sixth Respondents filed their condonation application in respect of the late filing of their unfair dismissal dispute to the Second Respondent, they stated that they had been dismissed on 14 May 2013

[30] I therefore find that the First Respondent's finding that the Third to Sixth Respondents' dismissal was procedurally unfair is again not a decision that a reasonable decision maker could have arrived at and as such the procedural unfairness finding is reviewed and set aside.

The Order

[31] The Award is reviewed and set aside.

[32] The Award is replaced with the following order:

The dismissal of the Third to Sixth Respondents was both substantively and procedurally fair.

There is no order as to costs.

[33] There is no order as to costs in this Review Application.

Alcock, AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: P.H. Kirstein

Instructed by: Borman, Snyman & Barnard Attorneys

For the Respondent: No appearance

LABOUR COURT