



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR 972/12

SOUTH AFRICAN MUNICIPAL WORKERS UNION

First Applicant

MASWANGANYI MP

Second Applicant

and

JOHANNESBURG METROPOLITAN BUS

SERVICES (PTY) LTD

First Respondent

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

Second Respondent

COMMISSIONER N KESWA NO

Third Respondent

Delivered: 3 June 2015

JUDGMENT

TLHOTLHALEMAJE, AJ

Introduction:

- [1] This is an opposed application brought in terms of the provisions of section 145 of the Labour Relations Act (The LRA) to review and set aside an award

issued by the third respondent (Commissioner) under case number GAJB28324-11 dated 2 December 2011.

- [2] In the award, the Commissioner found that the dismissal of the second applicant (Maswanganyi) by the first respondent was substantively fair. The applicants seek an order declaring the dismissal of Maswanganyi to be substantively unfair to the date of his dismissal without loss of benefits. In the alternative, the applicants seek an order remitting the matter to the second respondent (CCMA) for arbitration before another commissioner.

The application for condonation:

- [3] The application for review was filed on 23 April 2012, and was therefore some three months outside of the statutory time limits. The first respondent did not oppose the application for condonation and had merely in its written heads of argument, submitted that the lateness was excessive and that the explanation thereof was not plausible or convincing. It nevertheless left the matter in the hands of the Court.
- [4] I have had regard to the averments contained in the founding affidavit of Kidibone Makhura in respect of the condonation applicant. I accept that the extent of the delay in filing the main application is indeed excessive. I have nevertheless accepted the explanation proffered for the delay. Further having considered other factors related to such applications, I am satisfied that good cause has been shown, and that the late delivery of the review application should be condoned.

Background to the application:

- [5] The facts giving rise to the proceedings under review are not contentious and I am satisfied with the factual background and evidence as succinctly summarised by the Commissioner in her award. I did not understand the parties to take issue with this summary. The only issues that are further common cause facts that need to be re-stated are the following;

- 5.1 Maswanganyi was employed as a bus driver with effect from June 2009. He was dismissed on 1 August 2011 following a disciplinary enquiry into allegations of gross negligence for failing to issue 15 bus tickets to passengers who had paid for their trips.
- 5.2 At the arbitration proceedings, Maswanganyi had admitted that he had committed the misconduct in question. The only issue he had disputed was whether the first respondent had consistently applied the sanction of dismissal in the light of other similar transgressors not having been dismissed in the past.

The grounds of review:

- [6] The applicants' main two contentions are that the award should be reviewed on two grounds *viz*;

- 6.1 The Commissioner failed to properly consider whether the employer consistently applied discipline, and further failed to deal with the allegations of inconsistent discipline raised by the applicants despite the fact that specific allegations were put to the first respondent's witnesses during cross-examination. In this regard, it was submitted that;

- 6.1.1 At the arbitration proceedings the employer was made aware that evidence will be led that it had failed to apply consistency in respect of the same or similar offences.

- 6.1.2 The employer however did not deal with the allegations of inconsistency raised by the applicants, and instead only chose to identify instances where the employer had consistently applied discipline.

- 6.1.3 The employer merely identified workers who had historically been dismissed for the same or similar reasons and neither of the witnesses called by the employer had dealt with the applicant's specific allegations of inconsistency as regards to other employees, and that the Commissioner had enquired

from the applicants whether they intended to call those witnesses, thus demonstrating her failure to understand the onus.

6.2 The Commissioner irregularly and unreasonably inverted the onus by requiring the applicants to prove that discipline was inconsistently applied by the employer.

[7] The first respondent opposed the application on the grounds that there is simply no evidence before the Court to support or justify an order declaring Maswanganyi's dismissal unfair, and that reinstatement under the circumstances in the light of the nature of the misconduct was not appropriate. The first respondent further seeks that the application be dismissed with costs because of the opportunistic manner in which the applicants are seeking relief from the Court. In the event that the Court found that the dismissal of Maswanganyi was indeed unfair, it was submitted that only compensation should be awarded rather than remitting the matter back to the CCMA.

The legal framework:

[8] In considering whether an award is reviewable, the well-known test is that as laid down in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*¹. The reviewing Court is required to enquire whether the decision reached by the arbitrator is one that a reasonable decision-maker could not reach on the material placed before him or her. Where the Court finds that the decision of the arbitrator does not fall within the band of reasonableness, it accordingly should intervene.

[9] Where the review application is based on an alleged irregularity committed by a Commissioner as alleged by the applicants in this case, a further question to be posed in line with the *Sidumo* test is whether the Commissioner misconceived the nature of the enquiry or arrived at an unreasonable result.²

¹ 2008 (2) SA 24 (CC) at para 110

² *Herholdt v Nedbank Ltd* (2013) 34 ILJ 2795 (SCA) at para 25.

[10] Flowing from the explication of the review test in *Herholdt v Nedbank Ltd* and in *Goldfields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA and others*³, the Labour Appeal Court recently in *Head of the Department of Education v Mofokeng and Others*⁴ (per Murphy AJA) held that whether or not a decision is unreasonable in its result is an exercise that is necessarily dependent on variable considerations and circumstantial factors. Thus flaws in the reasoning of the commissioner, evidence of a failure to apply the mind, reliance by the commissioner on irrelevant considerations or the ignoring of material evidence must be assessed with the purpose of establishing whether the arbitrator has undertaken a wrong enquiry, undertaken the enquiry in the wrong manner or arrived at an unreasonable result. These lapses and irregularities ought to be of such a nature as to result in a misconceived enquiry or a decision to which no reasonable decision-maker could come on the available material.

[11] The Labour Appeal Court in *Goldfields Mining South Africa (Pty) Limited (Kloof Gold Mine v CCMA & Others*⁵ also held that in assessing whether the result of an award is unreasonable, the reviewing Court should not adopt a piecemeal approach, and must further enquire whether;

“..... (i) In terms of his or her duty to deal with the matter with the minimum of legal formalities, did the process that the arbitrator employed give the parties a full opportunity to have their say in respect of the dispute? (ii) Did the arbitrator identify the dispute he or she was required to arbitrate? (This may in certain cases only become clear after both parties have led their evidence) (iii) Did the arbitrator understand the nature of the dispute he or she was required to arbitrate? (iv) Did he or she deal with the substantial merits of the dispute? (v) Is the arbitrator’s decision one that another decision-maker could reasonably have arrived at based on the evidence?”⁶

[12] In considering whether the dismissal of an employee for misconduct was substantively fair, an arbitrator is also required to have regard to basic

³ [2014] 1 BLLR 20 (LAC).

⁴ [2015] 1 BLLR 50 (LAC) at paragraphs [30] to [34]

⁵ At para 14

⁶ At para 20

guidelines as set out in the Code of Good Practice: Dismissal as contained in Schedule 8 of the LRA which provides:

‘Any person who is determining whether a dismissal for misconduct is unfair should consider -

(a) whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the workplace; and

(b) if a rule or standard was contravened, whether or not –

(i) the rule was a valid or reasonable rule or standard;

(ii) the employee was aware, or could reasonably be expected to have been aware, of the rule or standard;

(iii) the rule or standard has been consistently applied by the employer; and

(iv) dismissal was an appropriate sanction for the contravention of the rule or standard.’

[13] In this case, the only consideration before the Commissioner was whether the rule or standard, including sanction of dismissal was consistently applied by the employer. The principles regarding the ‘parity principle’ are well established flowing from *SACCAWU and Others v Irvin and Johnson (Pty) Ltd*⁷, where the Labour Appeal Court (per Conradie JA) stated 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’ ... There is really no separate principle involved. Consistency must be measured by the same standards ... Discipline must not be capricious. It really is the perception of bias inherent in selective discipline that makes it unfair. Where, however, one is faced with a large number of offending employees, the best 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,

⁷ (1999) 20 ILJ 2302 (LAC) at para 29. Reaffirmed in *Absa Bank Limited v Naidu and Others* [2015] 1 BLLR 1 (LAC) at para [37]

exercises his or her discretion in a particular case in a particular way, it would not mean that there was unfairness to the other employees. It would mean no more than 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 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 ... necessarily mean that the other miscreants should escape. Fairness is a value judgment.'

[14] Flowing from the *Irvin and Johnson* and a long line of subsequent judgments, the parity principles can thus be summarised as follows;

- 14.1 The Courts have distinguished two forms of inconsistency - historical and contemporaneous inconsistency. The former requires that an employer apply the penalty of dismissal consistently with the way in which the penalty has been applied to other employees in the past; whilst the latter requires that the penalty be applied consistently as between two or more employees who commit the same misconduct⁸.
- 14.2 The concept of parity, in the juristic sense, denotes a sense of fairness and equality before the law, which are fundamental pillars of administration of justice⁹.
- 14.3 Employees must be measured against the same standards, i.e. like cases should be treated alike¹⁰, and in determining sanction in respect of employees involved in the same misconduct, the employer must not

⁸ *Southern Sun Hotel Interests (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2010) 31 ILJ 452 (LC) at para [10]

⁹ *ABSA Bank Limited v Naidu* ibid

¹⁰ *National Union of Metalworkers of SA and Others v Henred Fruehauf Trailers (Pty) Ltd* (1994) 15 ILJ 1257 (A) at 1264A-D. See also *NUM and another v Amcoal Colliery t/a Arnot Colliery and Another* [2000] 8 BLLR 869(LAC)

"The parity principle was designed to prevent unjustified selective punishment or dismissal and to ensure that like cases are treated alike. It was not intended to force an employer to mete out the same punishment to employees with different personal circumstances just because they are guilty of the same offence".

be capricious, or act arbitrarily or be influenced by improper motives or discriminatory policies;¹¹. Thus a value judgment must always be exercised, and the principle should neither be applied rigidly¹², nor willy-nilly without any measure of caution¹³.

- 14.4 When deciding the issue of parity, the gravity of the misconduct of the employee who seeks to rely on that principle should receive serious attention¹⁴.
- 14.5 An employer cannot be accused of inconsistent application of discipline if it was not aware of evidence that there were other employees who had committed similar transgressions;
- 14.6 A claim of inconsistency can never succeed where an employer is able to differentiate between employees who 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. Thus, in appropriate cases an employer may be justified in differentiating between two employees guilty of the same transgression on the basis of their personal circumstances or on the merits of their respective cases¹⁵.

¹¹ See *National Union of Mineworkers, obo Botsane v Anglo Platinum Mine (Rustenburg Section)* (JA2013/42) [2014] ZALAC 24 (15 May 2014) at para 25 where the LAC held that:

‘The idea of inconsistency in employee discipline derives from the notion that it is unfair that like are like are not treated alike. The core of this ‘factor’ in the application of employee discipline (it would be a misconception to call it a principle) is the rejection of capricious or arbitrary conduct by an employer.’

¹² *SACCAWU and Others v Irvin and Johnson (Pty) Ltd* at 2313C-J where Conradie JA held that; “...Consistency is therefore not a rule unto itself, but rather an element of fairness that must be determined in the circumstances of each case....

¹³ *ABSA Bank Limited v Naidu* at para [36]

¹⁴ *Hulett Aluminium (Pty) Ltd v Bargaining Council for the Metal Industry and Others* (2008) 29 ILJ 1180 (LC) at para [36]

¹⁵ *Southern Sun Hotel Interests (Pty) Ltd v CCMA & others* [2009] 11 BLLR 1128 (LC). See also *Early Bird Farms (Pty) Ltd v Mlambo* [1997] 5 BLLR 541 (LAC), and *SATAWU & Others v Ikhwezi Bus Service (Pty) Ltd* (2009) 30 ILJ 205 (LC) where it was held that an employer is indeed entitled to impose different penalties on different employees who had committed the same misconduct, provided there was a fair and objective basis for doing so.

Evaluation:

- [15] Applying the above legal principles to the facts of this case, and further having had regard to the general nature of the decision attacked, and the range of relevant factors that informed the decision of the Commissioner, I am not persuaded that there is any merit in the applicants' grounds of review for the following reasons;
- [16] Firstly, I did not understand the applicants' case to be that the process followed by the Commissioner at the arbitration proceedings did not afford the parties a full opportunity to state their case. To the extent that the second ground of review can be construed as implying that the Commissioner by allegedly inverting the onus, the applicants were effectively deprived of a fair hearing and thus committed a gross irregularity, it was submitted, and correctly so, on behalf of the first respondent that the Commissioner had only considered allegations of inconsistency where the applicants could present documentary evidence.
- [17] The applicants' submissions in regards to the question of onus lose sight of the principle that where inconsistency in the application of discipline is raised, it is not sufficient for the employee to merely make that allegation. The employee alleging inconsistency is required at the very least to provide a *prima facie* evidentiary basis to support his or her contentions¹⁶. Ultimately, it is upon that employee to demonstrate in what material respects another employee was treated differently from him or her, when both had committed the same or similar form of misconduct, and why that was unfair. The evidentiary burden will then shift to the employer to justify the differentiation, if any, in the treatment of the two employees. In the absence of evidence to demonstrate that the employer had acted capriciously or was motivated by some irrelevant or unfair considerations in instituting disciplinary measures or

¹⁶ *SA Municipal Workers Union on behalf of Abrahams and Others v City Of Cape Town and Others* (2011) 32 ILJ 3018 (LC) at para 50, where this Court held that;

".....The employee must show the basis thereof, for example he must reveal the name of the concerned employee and also the circumstances of the case. This is necessary for the employer to respond properly to the allegation. Failure to do so may lead to a finding that no inconsistency exists or was committed by the employer. This situation never shifts the onus from the employer to the employee to prove that there is no consistency."

handing out sanction between the two employees, it should be concluded as the Commissioner had done in this case, that the employer's decision to differentiate between the two was fair.

- [18] Secondly, there is no reason to doubt that the Commissioner had properly identified the dispute she was required to arbitrate. In this regard the Commissioner identified the dispute as pertaining to the substantive fairness of the dismissal and more importantly, whether the employer had consistently applied the sanction of dismissal in respect of the transgression in question. There is therefore no basis for any conclusion to be reached that the Commissioner misconstrued the nature of the enquiry before her, or diverted from the correct path in the conduct of the arbitration, resulting in a failure to address the question raised for determination¹⁷.
- [19] Thirdly, in coming to her conclusions, which in my view are conclusions that a reasonable Commissioner could come to on the material before her, the Commissioner took into account the principles applicable to consistency in the application of discipline as set out in Item 7 (b) (iii) of the Code of Good Practice: Dismissal as contained in Schedule 8 of the LRA.
- [20] At the arbitration proceedings, and in the light of the disputed issues, evidence was led in respect of other bus drivers who had committed the same offence (viz, Messrs Tsima and Skwena). The Commissioner had established that even though the offences may have been similar, the merits of those cases were different to those of Maswanganyi as the latter had conceded under cross-examination that this was the case¹⁸.

¹⁷ See *Mofokeng* at para [33] where the LAC held that;

“.....The reviewing judge must then have regard to the general nature of the decision in issue; the range of relevant factors informing the decision; the nature of the competing interests impacted upon by the decision; and then ask whether a reasonable equilibrium has been struck in accordance with the objects of the LRA. Provided the right question was asked and answered by the arbitrator, a wrong answer will not necessarily be unreasonable. By the same token, an irregularity or error material to the determination of the dispute may constitute a misconception of the nature of the enquiry so as to lead to no fair trial of the issues, with the result that the award may be set aside on that ground alone. The arbitrator however must be shown to have diverted from the correct path in the conduct of the arbitration and as a result failed to address the question raised for determination”

¹⁸ Para 42 of the Award

- [21] The Commissioner had also considered the evidence led by Maswanganyi in respect of two other bus drivers, (viz, Baloyi and Maeyina) who had allegedly committed the same offence but were not dismissed. The Commissioner came to the conclusion that based on the documentary proof submitted by the applicants in regards to these two other drivers, Baloyi was indeed issued with a final written warning, but no evidence was presented in regards to the merits of that case to support inconsistency.
- [22] In regards to Maeyina, the Commissioner considered the evidence presented by the first respondent that this driver had pleaded guilty at the disciplinary enquiry, and had shown remorse, whilst Maswanganyi on the other hand had in the disciplinary enquiry, not done the same. The Commissioner was persuaded that the employer had demonstrated that the merits of Maeyane's matter were different as he had pleaded guilty and showed remorse.
- [23] As it was pointed out on behalf of the first respondent, Maswanganyi could not challenge the testimony presented in respect of other employees who were similarly dismissed for ticket irregularities. The Commissioner had as correctly pointed out, took account of the evidence that Maswanganyi had admitted guilt to the transgression in question, and that the transgression was serious and warranted dismissal.
- [24] To reiterate then, the grounds of review as relied upon by the applicants in this case have not laid a basis for any conclusion to be reached that the Commissioner committed any gross irregularity in the conduct of the proceedings, nor has it been established that there is a basis for the Court to interfere with the award on any ground contemplated in section 145 of the LRA.
- [25] I am not persuaded that the applicants were able to demonstrate that the Commissioner had not taken into account the principles relating to inconsistency as summarised elsewhere in this judgment. The Commissioner was conscious of the principle that a claim of inconsistency could never succeed where an employer as in this case, was able to differentiate between employees who committed similar transgressions on the basis of, *inter alia*,

differences in personal circumstances, the severity of the misconduct and other merits of employees' respective cases.

- [26] I did not understand it to be the applicants' case that in dismissing Maswanganyi, the employer had done so arbitrarily or capriciously, or was influenced by improper motives. In the end, the Commissioner was persuaded that even if other employees had committed the same transgression and were not dismissed, there was no basis for Maswanganyi to profit from any such failure on the part of the employer in the light of the merits and circumstances of his case.
- [27] Central to other considerations which differentiated Maswanganyi's case was the issue whether he had shown genuine contrition. The applicants in arguments appeared to have downplayed this important consideration to their detriment. Genuine contrition implies that an employee owned up to the misconduct as soon as it took place, and showed remorse from that moment. This should be distinguished from the charade of showing remorse at disciplinary proceedings, purely for the purposes of pleading in mitigation of sanction, or as it had happened in this case, belatedly showing remorse at the arbitration process itself, simply to avoid the inevitability of a confirmation of a dismissal. There is therefore merit in the first respondent's contention that in the absence of a show of remorse, Maswanganyi was not a candidate for rehabilitation and progressive discipline, as he did not acknowledged his wrongdoing.
- [28] As the Commissioner correctly pointed out, Maswanganyi failed to appreciate that his acts constituted gross misconduct, and further that he knew that he had acted dishonestly. He was more concerned about the fact that other employees who had committed similar transgressions were not dismissed. Consistency is but one of the elements to be taken into account in considering the fairness of a dismissal¹⁹. The mere fact that an employee had a clean

¹⁹ See *Sidumo* at [78] where it was held that;

"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

disciplinary record²⁰ is also but one of the factors, which on its own, or combined with an allegation of inconsistency, cannot be a license for employees to benefit from their own wrongdoing. This is even more pertinent in circumstances of this case, where Maswanganyi had by nefarious and dishonest means, profited from his conduct to the detriment of the first respondent. To this end, it is concluded that the Commissioner's award is unassailable, as it was reasonable in the light of the material before her.

[29] In conclusion, and further in regard to the issue of costs, even though I am of the view that this application was clearly ill-considered and opportunistic as correctly pointed out by the first respondent, considerations of law and fairness militates against such an order.

Order:

- i. The late filing of the review application is condoned.
- ii. The application to review and set aside the award issued by the Third Respondent under case Number GAJB28324-11 dated 22 November 2011 is dismissed.
- iii. There is no order as to costs.



Tlhotlhemaje, AJ

Acting Judge of the Labour Court of South Africa

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"

²⁰ See *Gcwensha v CCMA & others* (2006) 27 ILJ 927 (LAC), where the LAC at para [24] held that; "Even in the absence of a valid final written warning an employer is entitled to dismiss an employee in appropriate circumstances....."

Appearances:

For the Applicant: Mr R Daniels of Cheadle, Thompson & Haysom
Inc

For the First Respondent: Ms H Strijdom of Helena Strijdom Attorneys