LABOUR COURT

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR696/11

SATAWU obo PETROS MCINIZELI MASHININI **Applicants**

and

NATIONAL BARGAINING COUNCIL FOR THE ROAD FREIGHT INDUSTRY **First Respondent**

MOHINI SOMAN *N.O.* **Second Respondent**

GRINDROD LOGISTICS **Third Respondent**

Heard: **22 May 2014**

Delivered: **27 July 2015**

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TLHOTLHALEMAJE, AJ

Introduction:

[1] In this application, the applicants seek an order to review and set aside the arbitration award dated 7 February 2011, issued under case number RFBC 13194 by the second respondent (the Arbitrator). In her award, the Arbitrator found that the dismissal of the employee (Mashinini) was for a fair reason and

in accordance with a fair procedure. She accordingly dismissed the application.

[2] The third respondent filed its opposing affidavit to the review application out of time, and condonation is sought in that regard. The applicants oppose this application.

Application for condonation:

[3] For the sake of convenience, the parties' citation in respect of both applications shall remain the same. The legal principles applicable to applications for condonation are fairly well established. The approach that the courts have adopted over the years in exercising a discretion to grant condonation, is based upon a consideration of a compendium of interrelated factors which include[1]:

a. The degree of non-compliance with time frames, the explanation therefor, the importance of the case and the prospects of success on the merits of the main claim. The Courts ordinarily look objectively at all these facts in exercising its discretion. Thus in circumstances where there is a negligible delay accompanied by a reasonable and acceptable explanation, this may compensate for prospects of success which may not necessarily be strong. In some instances, where there is a reasonable and satisfactory explanation, it may not be necessary to look at the prospects of success.

b. Where however the period of delay is excessive and the appellant's (respondent's herein) purported explanation for the delay is no explanation at all, the courts will not readily grant an indulgence[2]. Furthermore, the importance of the main matter and strong prospects of success may tend to compensate for a long delay. It is further

[1] See *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A); *NUM v Council for Mineral Technology* (1999) 3 BLLR 209 (LAC);
[2] See *Moila v Shai NO and Others* (JA 26/04) [2007] ZALAC 1 (10 January 2007) at para [34]

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important that an application for condonation must be brought as soon as the party which applies for it becomes aware of the need to do so[3].

c. One of the factors to determine whether or not the condonation application should be granted is whether it in the interests of justice to do so. This point was made by the Constitutional Court in *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others*[4] where Jacoob J stated that:

> *'It is appropriate that an application for condonation be considered on the same basis and that such an application should be granted if that is in the interests of justice and refused if it is not. The interests of justice must be determined by reference to all relevant factors including the nature of the relief sought, the extent and cause of the delay, the nature and cause of any other defect in respect of which condonation is sought, the effect on the administration of justice, prejudice and the reasonableness of the applicant's explanation for the delay or defect.'*[5]

The extent of the delay:

[4] The Notice of Motion together with the founding affidavit to the review application was filed and served on 1 April 2011. The Notice of Opposition was filed on 30 May 2011. The notice in terms of Rule 7A (8) was served on the third respondent's attorneys on 19 December 2012. The opposing affidavit was filed and served on 8 April 2013 instead of on or before 7 January 2013, and is accordingly three months out of time.

[5] The applicants confirmed that the delay is indeed about three months, which it was contended is excessive. I am in agreement with the applicants that the delay is indeed excessive, *albeit* not in the extreme.

The explanation for the delay:

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[3] See *Seatlolo and Others v Entertainment Logistics Service (A Division of Gallo Africa Ltd)* (2011) 32 ILJ 2206 (LC) at para [10]

[4] 2000 (5) BCLR 465 (CC).

[5] At para [3]

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[6] In explaining the delay, the third respondent's attorney of record, Mr Glen Kirby-Hirst deposed to an affidavit in which he averred that upon receipt of the notice in terms of Rule 7A (8) on 19 December 2012, his office had checked the client's file and ascertained that they had not been forwarded a notice in terms of Rule 7A (6) with the Commissioner's notes. Correspondence was then addressed to the applicants' attorneys on 21 December 2012 setting out this fact and advising that the third respondent would not be in a position to prepare any opposing affidavit until the Arbitrator's notes were received.

[7] A further complication according to Kirby-Hirst was that in the supplementary affidavit, the applicants had not utilised the arbitrator's notes but theirs. A letter was received from the applicants' attorneys advising that an undertaking was made by the third respondent's then correspondent attorneys (Eversheds) that opposing papers would be filed by 28 January 2013. The applicant's attorneys' response was to send correspondence to the applicants' attorneys referring to the letter of 21 December 2012 regarding the non-receipt of the Rule 7A (6) notice. On 12 February 2013, the third respondent's attorneys were copied in correspondence indicating that the Rule 7A (6) notice was indeed served on Eversheds on 29 November 2012.

[8] The third respondent's attorneys however believed that as at 21 December 2012 no notice in terms of Rule 7A (6) had been received and this was simply a genuine error on their part. It was only thereafter that the opposing affidavit was prepared.

[9] Further problems in preparing the opposing affidavit were encountered with the initial individual who had instructed the third respondent's attorneys on the matter having left the company's employ. The National Manager: Human Resources, Mr Lubbe had to consider the matter from inception before the opposing affidavit could be finalised, but he was further constrained as he was not readily available due to having to attend to other arbitration matters nationally.

[10] Kirby-Hirst further averred that there was no attempt by the third respondent to delay the matter and that there was a genuine error with regards to the

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receipt of the Rule 7A (6) notice, which was further compounded by separate correspondence between the third respondent's correspondent attorneys and the applicants' attorneys, which had also led to confusion.

[11] In opposing the application for condonation, the applicants in an affidavit deposed to by its Gauteng Provincial Secretary, Mr Christopher Nkosi averred that on 19 December 2012, the applicants' attorneys of record had delivered its notice in terms of Rule 7A (8) together with a supplementary affidavit. On 21 December 2012, the third respondent's attorneys had requested the Arbitrator' notes at the time when the applicants' attorneys had already delivered the Arbitrator' notes to the third respondent's correspondent attorneys.

[12] It was denied that the applicants only used their own notes when finalising the supplementary affidavit, and it was further contended that the third respondent failed to deliver an answering affidavit to the review application within 10 days of receipt of the applicants' notice in terms of Rule 7A (8) and the supplementary affidavit.

[13] It was further submitted that the third respondent's attorneys had delivered an application for condonation for the late delivery of the answering affidavit to the review application on 8 April 2013, some three months late. The third respondent had also not tendered an explanation as why the matter was only investigated after 7 February 2013 when the records had been delivered in November 2012.

[14] The application was further opposed on the basis that it took the third respondent two months to check with the correspondent attorneys if and when the records had been served; that it was improbable that someone who had no knowledge of the facts of the matter like Lubbe would have been of any assistance in finalizing the opposing affidavit, and further that even after the third respondent's attorneys had become aware of when the records were filed, it still took two months to deliver the answering affidavit. It was denied that the delay was caused by any confusion, and if indeed there was such confusion, it could have been clarified with the correspondent attorneys.

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[15] It was acknowledged by the applicants that the delay in the prosecution of this matter was occasioned by a lack of a proper record of proceedings, necessitating that such a record be reconstructed. Be that as it may, I am of the view that the explanation given for the delay in filing the opposing affidavit is less than satisfactory.

[16] The third respondent was as correctly pointed out on behalf of the applicants, aware from December 2012 that its answering affidavit was late and had not brought this application immediately it became aware of the need to do so. Furthermore, there is no explanation in regards to periods between December 2012 when the Notice in terms of Rule 7A (8) was served and 8 February when correspondence was addressed to the applicants' attorneys in response to the latter's correspondence of the previous day. At that stage, it should have been clear to the third respondent that the Rule 7A (6) had been served on its correspondent attorneys. It is not stated as to when the third respondent had allegedly began to investigate the matter, or when the true circumstances of events were ascertained, or even when the attorneys had started to prepare the opposing affidavit.

[17] The excuse surrounding the work commitments of Lubbe cannot be accepted as reasonable or acceptable in the light of the third respondent's clear appreciation as in December 2012 that there was indeed a need to file the application. Ultimately, the third respondent has not explained every period of the delay in detail as correctly pointed out on behalf of the applicants.

Prospects of success and other considerations:

[18] The prospects of success or *bona fide* defence mean that all that needs to be determined is the likelihood or chance of success when the main case is heard[6]. In determining whether the delay in bringing the proceedings is unreasonable the court is obliged to exercise a judicial discretion taking into account all the other relevant circumstances.

[6] See *Chetty v Law Society*1985 (2) SA at 765A-C.

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[19] In line with the *dictum* in *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others*[7], the interests of justice must be determined by reference to all relevant factors. Thus where the prospects of success are so good as to compensate for egregious and unexplained delays, the interests of justice will dictate that condonation should be granted. This primary consideration is premised on the fact that it would not be in the interest of justice to deny a party the right to defend an application in circumstances where it has more than good prospects of success on the merits in respect of the main claim.

[20] In this case, a further consideration is the prejudice caused to the applicants by having the merits aired after such a lengthy delay. It was conceded on behalf of the applicants that the delay was caused by the non-availability of a proper record of proceedings. The award was issued on 7 February 2011 and the applicants were only able to file the Rule 7A (6) Notice in June 2012, whilst the supplementary affidavit was only filed on 19 December 2012. Inasmuch as the delay by the third respondent in filing the opposing affidavit was three months, there was already a delay of about 19 months related to the unavailability of the record. The applicants in this regard have not stated what steps were taken to secure the record timeously other than to concede that there were delays in that regard. To this end, any prejudice to be suffered as a result of the merits of the main application being aired after a lengthy delay is not purely due to the conduct of the third respondent.

[21] In conclusion, having had regard to all the relevant factors pertinent to such applications, and further having had regard to the interests of justice, I am satisfied that the inadequate explanation for the delay is compensated by the third respondent's strong prospects of success on the merits as shall be illustrated below. To this end, it is concluded that the application should be granted.

The review application:

(i) Background:

[7] *ibid*

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[22] Mashinini was employed with effect from 31 January 2007 as a Code 14 Driver. His services were terminated on 6 July 2010. The dismissal followed upon a disciplinary enquiry into allegations of misconduct pertaining to failure to adhere and execute work in accordance with accepted rules and regulations of the company including being negligent in that he had exceeded the speed limit. Mashinini disputed the procedural and substantive fairness of his dismissal and had referred a dispute to the NBCRFI. The dispute came before the arbitrator resulting in the award which is the subject of this review application.

(ii) The arbitration proceedings and the award:

[23] At the arbitration proceedings, the third respondent in this case had relied upon the evidence of its Operations Supervisor (Dlamini), and a copy of speed violation report (C-Track). Mashinini reported directly to Dlamini. The evidence before the arbitrator was that on 23 June 2010, Mashinini had in the course of driving a company truck, exceeded the speed limit of 90km. Furthermore, between 15h30 and 15h50, he had driven the vehicle at speeds ranging between 96kh and 103km. At some point, Mashinini drove in excess of the speed limit for over thirty minutes.

[24] Further evidence led was that Mashinini was issued with a final written warning on 8 October 2009 for a similar offence. According to Dlamini, Mashinini was also counselled and disciplined for aggressive behaviour towards other employees. Dlamini further denied having instructed Mashinini at any stage to drive over the speed limit.

[25] The driving habits of Mashinini on 23 June 2010 were observed from the C-Track System. Dlamini further testified that when he was monitoring the truck and observed Mashinini exceed the speed limit, he had called him and the latter's response was that the trailer was pushing the truck.

[26] Mashinini's response to the allegations was that he had experienced problems with Dlamini who had treated him differently from other drivers by

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allocating to him lesser trips, which meant that he gained less monetary incentives (from his trips). He had lodged a grievance against Dlamini. He had also confirmed a telephone call from Dlamini on 23 June 2010 at 15h30, who had instructed him to attend to a client before 16h00. He denied that Dlamini spoke to him about exceeding the speed limit and further testified that other drivers had not been disciplined for exceeding the speed limit in the past.

[27] Mashinini further denied having been counselled or receiving any warnings. He confirmed receiving a letter from the employer informing drivers to keep to the speed limit of 90km/h. He nevertheless did not understand the contents of that letter, and believed that the letter allowed drivers to speed. His further view was that the speed limit for trucks is 120km/h, and since he had not received any speeding fines he had not broken any law. Mashinini's further evidence at the arbitration proceedings was that the employer forced drivers to travel at 90km/h even when the speed limit was 80km/h. He had conceded having exceeded the speed limit on 23 June 2010, but only due to the instruction he had received from Dlamini to rush to another client before 16h00.

[28] The arbitrator in regards to whether the dismissal was substantively fair made the following findings:

28.1 It was common cause that the required speed limit for truck drivers at the company was 90km/h. Mashinini had conceded that he had received a letter informing drivers of the required speed limit.

28.2 The C-Track report for 23 June 2010 was not placed in dispute, and it should be accepted that Mashinini was indeed driving over the required speed limit between 15h30 and 15h50. The employer reserved the right to discipline drivers who did not adhere to the required speed limit as evidenced from its letter of 16 October 2007.

28.3 It was highly improbable that Mashinini could have been instructed by Dlamini to knowingly break company rules. Mashinini was aware of the rule and the consequences should he break the rules.

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28.4 Despite Mashinini's denials, the arbitrator was satisfied that he had been previously issued with warnings for failing to adhere to prescribed speed limits.

28.5 Mashinini was not a credible witness as he had initially testified that he understood the speed limit to be 120km/h and had later conceded that it was 90km/h as per the employer's letter. Furthermore, despite Mashinini's denials that he had not received any traffic fines for road violations, he had also conceded that he had received a fine for driving over the limit in a 80km/h zone. The arbitrator rejected Mashinini's version that he had not been called by Dlamini about speeding on 23 June 2010.

28.6 The employer had presented a probable version that Mashinini was guilty of the charge against him, and had further shown that he was a habitual offender, and that the dismissal was the appropriate sanction for the offence.

28.7 In regards to procedural fairness, the arbitrator concluded that Mashinini was given sufficient time to prepare for the hearing; that he was represented by a shop steward; and had sufficient opportunity to ask for clarity on the charges prior to the hearing. Mashinini had not objected to the hearing proceedings and there was nothing to show that he was unable to respond to the charges against him. The employer had therefore shown that a fair procedure was followed.

(iii) The grounds of review:

[29] In the founding affidavit, the applicants attacked the arbitrator's award on the basis that she has concluded that Mashinini was a habitual offender without having regard to whether previous warnings were issued, and if so whether they were valid and whether they had expired or not. It was also submitted that the arbitrator failed to take into account the bad relationship between Mashinini and Dlamini, and that there was a motive to dismiss him. Furthermore, it was contended that the arbitrator failed to consider whether

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the third respondent had applied the rule consistently, thus committing gross irregularity.

[30] The supplementary affidavit deals with the same grounds of review other than to add that the arbitrator committed misconduct and/or gross irregularity in the conduct of proceedings by excluding material evidence that Mashinini had continuously been subjected to inconsistent treatment during the duration of his employment. This was in relation to previous warnings in circumstances where such warnings were not warranted and where other drivers were not disciplined for similar transgressions. It was further added that the arbitrator made errors of law in ignoring the inconsistent treatment where it was not justified; that she had failed to acknowledge that Mashinini had corrected his behaviour subsequent to the warning issued on 8 October 2009; that Mashinini had exceeded the speed limit due to the instruction issued by Dlamini to rush to a client in circumstances where Mashinini had limited time to reach that client.

[31] The issue of inconsistency was amplified in the written heads of arguments and in these proceedings, wherein the applicants alleged that the arbitrator had committed a gross irregularity in the proceedings. This according to the applicants was in the light of uncontested evidence that other truck drivers had exceeded the speed limit but were not charged or dismissed.

(iv) The legal framework in respect of review applications:

[32] The basis upon which a reviewing court can interfere with an award is where the court is satisfied that the decision reached by the arbitrator is one that a reasonable decision-maker could not reach on the material placed before him or her[8]. Central to this enquiry is for the reviewing court to ask the questions posed in *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation Mediation and Arbitration and Others*[9] being;

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[8] *Sidumo and another v Rustenburg Platinum Mines Ltd and others* [2007] 12 BLLR 1097 (CC)at par [110]:

[9] [2014] 1 BLLR 20 (LAC) at para [20]. See also *Herholdt v Nedbank Ltd* 2013 (6) SA 224 (SCA) at para [25] where the SCA held that:

> *"In summary, the position regarding the review of CCMA awards is this: A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in s 145(2)*

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"….(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 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? and (v) Is the arbitrator's decision one that another decision-maker could reasonably have arrived at based on the evidence"

(v) Evaluation:

[33] The applicants did not, in the review application, take issue with the arbitrator's findings on procedural fairness. The third respondent had correctly summarised the applicants' grounds of review under four main issues, *viz*, the defence that Mashinini was told to rush to a client; the arbitrator's conclusions that Mashinini was a habitual offender; the bad relationship between Mashinini and Dlamini which the arbitrator allegedly failed to address, and lastly, the alleged inconsistent application of discipline.

[34] In line with the questions to be posed and answered as per the *dictum* in *Goldfields*, I did not understand the applicant's case to be that the process that the arbitrator employed in the arbitration proceedings did not afford the parties a full opportunity to have their say in respect of the dispute. The attack is primarily against the conclusions reached.

[35] As evident from the arbitrator's award, the issue in dispute before her was whether Mashinini was dismissed for a fair reason and in accordance with a fair procedure. The arbitrator therefore properly identified the dispute she was

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(a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2) (a) (ii), the Commissioner 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 Commissioner could not reach on all the material that was before the Commissioner. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable".

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required to arbitrate. Similarly, I did not understand the applicants' case to be that the arbitrator misconstrued the nature of the dispute she was required to arbitrate.

[36] It is acknowledged that in terms of her duty to deal with the matter with the minimum of legal formalities as implored by the provisions of section 138 (1) of the Labour Relations Act, the arbitrator was also expected to deal with the substantial merits of the dispute. Section 138 (7) (a) of the LRA further requires the arbitrator to issue an arbitration award with *brief reasons*. Brief reasons in my view implies that the award should contain a brief summary of the evidence presented including facts that are common cause, those in dispute, a brief analysis of the issues and material presented in arbitration proceedings, and conclusions based on that evidence. Central however to the brief reasons given is that they should not be "*entirely disconnected with the evidence*" or "*unsupported by any evidence"* or *"involve speculation* by the arbitrator"[10]. Furthermore, a failure to deal with any particular fact will not constitute a reviewable irregularity, unless this failure may lead to an unreasonable result.

[37] In this case, having had regard to the record *albeit* in its reconstructed form, and further having had regard to the contents of the award, and the submissions made on behalf of the parties, I am satisfied that the arbitrator dealt with the substantial merits of the dispute before her, and arrived at a decision that falls in a band of decisions to which a reasonable decision maker could come on the available material. This conclusion is based on the following;

37.1 There is no merit in the applicants' contention that the arbitrator's conclusions in rejecting Mashinini's explanation for breaking the speed limit amounted to gross irregularity. It was common cause that Mashinini had exceeded the speed limit, and that despite his initial denials, he was aware of the company rule in regards to speed limits. Mashinini's explanation that he may have received the letter in regards to the speed limit, or that he did not understand its contents, or that he understood it

[10] *Herholdt* At para [13]

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to imply that drivers could exceed the speed limit clearly led to doubts as to the probabilities of his version.

37.2 Mashinini's version that he was instructed by Dlamini to exceed the speed limit was so inherently improbable and devoid of any truth that it was properly rejected by the arbitrator. It is apparent that Mashinini had clearly misconstrued an instruction to go to a client before a certain time as a license to exceed the speed limits. Mashinini's alternative version that he was speeding because the trailer was pushing the truck is not worth attending to due to its lack of logic.

37.3 In making a finding that Mashinini was a habitual offender, before the arbitrator was a bundle containing a written warning issued on 27 October 2009 related to exceeding the speed limit valid for 12 months; a further written warning issued on 15 May 2009 and another verbal warning issued on 18 March 2009. The fact that these warnings had expired or that Mashinini had refused to accept or acknowledge them is immaterial, as it is the cumulative effect of these warnings that informed the arbitrator that Mashinini was indeed a habitual offender. This point was made by the Labour Appeal Court in *National Union of Mineworkers obo Selemela v Northam Platinum Ltd*[11] where Ndlovu JA held that;

> *"Indeed, an employee's written warnings, even after they have lapsed, may be taken into account, in determining the fairness of his or her dismissal where the employee concerned is found to have a propensity to commit acts of misconduct at convenient intervals falling outside the period of applicability of the written warnings. In Gcwensha v CCMA and Others ([2006] 3 BLLR 234 (LAC)) this Court stated as follows:*
>
> > *'An employer is always entitled to take into account the cumulative effect of these acts of negligence, inefficiency and/or misconduct. To hold otherwise would be to open an employer to the duty to continue employing a worker who regularly commits a series of transgressions at suitable intervals, falling outside the periods of applicability of final written warnings. An employee's duties include the careful execution of his work. An employee who*

[11] (2013) 34 ILJ 3118 (LAC)

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> *continuously and repeatedly breaches such a duty is not carrying out his obligations in terms of his employment contract and can be dismissed in appropriate circumstances.*'[12]

And

> *"In other words, even if it were to be accepted that Selemela's previous written warning, final or not, had lapsed that fact should not have relieved the commissioner from taking the written warning into account in determining whether or not the dismissal was fair…"*[13]

37.4 The complaint that the arbitrator ignored the bad relationship between Dlamini and Mashinini, and that this had led to a motive to dismiss him is mere red herring, and there was no point in the arbitrator paying any attention to this issue. The fact of the matter is that there were allegations that Mashinini had committed misconduct by exceeding the speed limit, and he had conceded that this was the case. Whether there was a bad relationship between him and Dlamini was irrelevant to the determination of the fairness of the dismissal in the light of the inherent improbabilities in Mashinini's version.

37.5 The contention that the arbitrator failed to take into account that the third respondent had inconsistently applied the rules is equally without merit. In *Southern Sun Hotel Interests (Pty) Ltd v CCMA & others*[14], Van Niekerk J, having alluded to the fact that Courts had over the years recognized a distinction between *'historical'* and *'contemporaneous'* inconsistency, held that inconsistency claims more particularly within the context of similarity of circumstances will fail, where the 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[15].

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[12] At para [38]
[13] At para [39]
[14] [2009] 11 BLLR 1128 (LC)
[15] At para 10. In reference to *Early Bird Farms (Pty) Ltd v Mlambo* [1997] 5 BLLR 541 (LAC), where the Labour Appeal Court held that at 545 H-I

37.6 As correctly pointed out on behalf of the third respondent, a mere allegation of inconsistency at some stage during the course of proceedings is not sufficient to sustain the issue. Where the employer is alleged to have acted inconsistently either in the application of the company rules or applicable sanctions in cases of breach, the employee needs to show in what material respects inconsistency is claimed. If any inconsistent is shown to exist, it is thereafter for the employer to justify the differentiation in the treatment of the 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 handing out sanction between the two employees, it would be concluded that the employer's decision to differentiate between employees was fair.

37.7 In *SATAWU & Others v Ikhwezi Bus Service (Pty) Ltd*[16], the court further made the point 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.

37.8 In this case, the Arbitrator may have not addressed the issue of inconsistency in the award, but as stated by the SCA in *Herholdt*;

> *"….Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable."*[17]

37.9 Despite the omission by the Arbitrator, this on its own cannot render the award reviewable in the light of the totality of the material facts before her. The applicants have not laid the basis upon which a claim of inconsistency can be sustainable. The issues raised by the applicants in this regard further pertained to previous warnings issued to Mashinini for similar transgressions in the past in circumstances where such warnings were not warranted. In my view, this cannot be a basis of inconsistency

[16] (2009) 30 ILJ 205 (LC)
[17] At para [25]

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where those warnings were issued, were nevertheless not accepted by Mashinini and most importantly, were not challenged at any point prior to the dismissal. To this end, there is no basis for a conclusion to be reached that the arbitrator's failure to have regard to the issue of inconsistency rendered her award reviewable.

[38] In the light of the above conclusions, I am satisfied that the decision of the Arbitrator is one that another decision-maker could reasonably have arrived at based on the evidence before her. Accordingly, the application to review her award should fail. I have further had regard to considerations of law and fairness, and I am of the view that a cost order is not merited in this case.

Order:

i. The late filing of the third respondent's answering affidavit to the review application is condoned.
ii. The application to review and set aside the award issued by the second respondent dated 7 February 2011 under case number RFBC13194 is dismissed.
iii. There is no order as to costs.

Tlhotlhalemaje

Tlhotlhalemaje, AJ

Acting Judge of the Labour Court of South Africa

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APPEARANCES:

On behalf of the Applicants:	Mr DM Majare of Mabaso Attorneys
On behalf of the Third Respondent:	Mr GM Kirby-Hirst of Macgregor Erasmus Attorneys

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