



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR 2257/12

In the matter between:

SIMON MAGUMBO

Applicant

and

NKOMATI JOINT VENTURE

First Respondent

**COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION**

Second Respondent

COMMISSIONER DAVIS MAILA NO

Third Respondent

Delivered: 16 September 2015

JUDGMENT

TLHOTLHALEMAJE, AJ

Introduction:

- [1] The Applicant seeks to have an arbitration award issued by the Third Respondent (Commissioner) on 3 August 2012 under case number MP2654-12 reviewed and set aside. In the award, the Commissioner had found that

the dismissal of the Applicant was substantively and procedurally fair. The review application is opposed.

Background:

- [2] The Applicant was employed by the First Respondent (Employer) as a Financial Accountant with effect from 4 November 2009. His services were terminated on 20 March 2012 following upon a disciplinary enquiry held on 13 March 2012 into allegations of misconduct pertaining to abuse/misuse of a company vehicle in contravention of company policies, and not obtaining permission to deviate from the approved route.
- [3] The provisions of the Employer's Standard Operating Procedure (SOP) ENG 024 relates to the management of the Mine owned and hired vehicles, and provides that employees shall obey and adhere to traffic regulations at all times; that a Mine or Mine Hired vehicle shall not be used for private usage or for personal gain. A further SOP provides that an employee seeking to use a vehicle for private purposes will be required to obtain permission from the relevant HOD.

The arbitration proceedings:

- [4] Following his dismissal, the Applicant had then referred a dispute to the Second Respondent (CCMA), which matter came before the Commissioner for arbitration after conciliation attempts had failed. I did not understand the parties' case to be that the evidence as summarised by the Commissioner was not a true reflection of what transpired in the arbitration proceedings. The evidence placed before the Commissioner by the employer through its Head of Security, Deon Erasmus was that on 25 January 2012, an anonymous call was received wherein it was alleged that a Toyota Double Cab vehicle was seen being driven at excessive speeds. Erasmus had then drew up an exception report from the Netstar Tracing system and discovered that the vehicle in question was in the care of the Applicant and had indeed exceeded the speed limit and deviated from its route during the weekend of 20-22 January 2012.
- [5] Further investigations were conducted and it was established that the Applicant had authority to use the vehicle over the weekend to travel from

Nkomati Mine (Employer's premises) to Machadodorp (the Applicant's residence) in Mpumalanga Province. The vehicle according to the register and Netstar report had left the mine at 16h49 on 20 January 2012. It was recorded to have been driven at excessive speed of between 125 km/h and 174 km/h over a period between 20 and 22 January 2012. The excessive speed of 174km/h was recorded at 00h18 on the Saturday of 21 January 2012 and again at 04h41 on the Sunday of 22 January 2012.

- [6] Erasmus evidence was that from the speed violation report it was apparent that the vehicle was used over the weekend beyond the normal accepted route between Nkomati Mine and Machadodorp, and was also used in Middleburg, which was a deviation from the route. According to Erasmus, employees using company vehicles were expected to adhere to the national speed limit of 120km/h, which was also a policy of the Employer.
- [7] When Erasmus confronted the Applicant, the latter had conceded that he was indeed the sole driver of the vehicle over the period in question. He had admitted exceeding the speed limit, and had deviated from the route and went to Middleburg. The Applicant had also admitted that during that period he never drove to the Employer's premises. Erasmus' contention was that the Applicant had no authority to deviate from his route.
- [8] Derrick Van Niekerk's testimony on behalf of the Employer was that the vehicle was issued to the Applicant for his use in order to finalise his work outside of working hours over the weekend. The agreement when the vehicle was issued was that the Applicant would use it to travel between his place of residence and the Mine. The Applicant had not over the weekend used the vehicle to travel to the Mine to do his work. He had instead used it for other purposes and in the process, accumulated 375 kilometres over that weekend. He had done so without seeking the necessary permission from the Employer.
- [9] The Applicant's testimony before the Commissioner was that he had sought permission to use a company vehicle over the weekend in question as he needed to finalise financial reports before Monday. He had worked until late, and on his way home to Machadodorp he had stopped at another place to buy food. His contention was that he had permission to use the vehicle within the

Machadodorp area. He had conceded having exceeded the speed limits at some point, but had done so when he was overtaking other vehicles. He had further conceded having gone to Anford Country Estate, but had contended that he had gone there as it was a quiet area to go to and do his work and to have his meals.

- [10] The Applicant had denied having deviated from the route, or driving the vehicle over the speed limit in a sustained manner. He had also denied having used the vehicle for private purposes, and contended that if he had deviated from the route, at most he should have been issued with a final written warning. He had disputed that he had accumulated kilometres in excess of 300 km over the weekend, and contended that it was instead 296 km, as a result of traveling between his place of residence and the Mine. He had further stated that the distance between his residence and the Mine was 70 kilometres a single trip.

The award:

- [11] In regards to the substantive fairness of the dismissal, the Commissioner accepted as common cause that the Applicant had work to finish over the weekend and was granted permission to use a company vehicle, but only for work related purposes. In this regard, the Applicant was to use the vehicle for travelling between his place of residence and the Mine, and it was expected of him to seek permission if for whatever reason he sought to deviate from that route. The Commissioner had accepted that the distance between the Applicant's residence and the mine was 56 and not 70 kilometres as he had alleged, and further that at no stage during the weekend in question did he travel to the Mine. The Applicant had also conceded to having gone to Anford, which was some 15 kilometres from Machadodorp.
- [12] The Commissioner also took into account that the Applicant drove at excessive speeds of up to 174 kilometres in the early hours of the morning towards Middleburg, and had travelled a total of 240 kilometres between Friday and Monday. The Commissioner further found that there was 128 kilometres unaccounted for if regard was had to the distance between the Applicant's residence and the Mine, and came to the conclusion that the

Applicant misused the company vehicle by exceeding the speed limit and not obtaining permission to deviate from the route.

- [13] The Commissioner also concluded that the Applicant as a senior employee and part of management ought to have set an example. In regards to the issue of consistency, the Commissioner concluded that the employer had defended its decision to give final written warning to other employees who had committed similar acts of misconduct, and found that the Applicant had not adduced sufficient evidence to prove inconsistency.

The grounds of review:

- [14] It was submitted on behalf of the Applicant that the Commissioner's award was grossly flawed and should be set aside in that he disregarded evidence in regards the reason the Applicant went to Anford Country House and Restaurant that showed that the Applicant regularly had his meals there; that he failed to consider that on that particular weekend the Applicant had to work extra hours because of the financial reports that were due on Monday; that the Commissioner should have applied his mind to the fact that the Applicant chose to work at Anford for a particular reason; and failed to consider that the Altech Netstar report which was relied upon by the employer to substantiate allegations of over-speeding was inaccurate.
- [15] It was further submitted that the Applicant had not contravened any workplace rule as he did not exceed the speed limit and did not misuse the company vehicle; that there were several cases which the employer had treated differently and the employer had not known that it had acted consistently in dealing with similar or same transgressions; and further that the sanction of dismissal was inappropriate given the circumstances of the case.
- [16] Submissions made on behalf of the Employer were to the effect that the Commissioner' decision cannot be seen as irregular, and that the decision arrived at fell within a band of decisions that a reasonable decision maker could come to on the available material. In this regard, it was submitted that the Applicant had conceded to breaching the terms and conditions of the SOPs in that he had sped (even though this was done whilst overtaking) and had also used the vehicle whilst travelling on a route which had not been

authorised; and that the Applicant never disputed the accuracy of the Netstar technical report when it was presented by Erasmus that he drove as fast as 174 kilometres p/h during the weekend in question in the early hours of the morning.

- [17] It was further submitted that the rules were consistently applied as each case according to the evidence presented was treated on its merit and the sanction for the offence was informed by the circumstances of each case. In the Applicant's case, there were aggravating circumstances such as the fact that he drove at high speeds and breached the employer's disciplinary code

The test on review:

- [18] The applicable test in review applications can be said to be well established. The test is whether the decision reached by the commissioner is one that a reasonable decision-maker could not have reached in relation to the material placed before him or her¹. It has also been held that provided that the arbitrator gave the parties a full opportunity to state their respective cases at the hearing, identified the issue that he or she was required to arbitrate, understood the nature of the dispute and dealt with its substantive merits, the function of the reviewing court is limited to a determination whether the arbitrator's decision is one that could not be reached by a reasonable decision-maker on the available material².

- [19] The Labour Appeal Court in *Goldfields* summarized the test by stating that;

"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"³

Evaluation:

¹ *Sidumo and another v Rustenburg Platinum Mines Ltd and Others* [2007] 12 BLLR 1097 (CC) at para [110]

² See *Goldfields Mining South Africa (Pty) Ltd v CCMA* (2014) 35 ILJ 943 (LAC) at para [20]. See also *South African Medical Association obo Mabuza and Others v Commissioner Moletsane and Others* (JR834/12) [2014] ZALCJHB 66 (14 March 2014) at para [8]

³ At para [16]

[20] Section 188 (2) of the LRA requires any person considering whether or not the reason for dismissal is a fair reason or whether or not the dismissal was effected in accordance with a fair procedure to take into account any relevant code of good practice in terms of the LRA. In this regard Item 7 of Schedule 8 – Code of Good Practice: Dismissal provides that;

‘Guidelines in cases of dismissal for misconduct’:

‘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.’

[21] In this case, and in applying the *Sidumo* test as elucidated in *Goldfields*, it should be accepted that the Commissioner afforded the parties a full opportunity to state their respective cases at the hearing, identified the issue that he was required to arbitrate, and understood the nature of the dispute. Central to the Applicant’s grounds of review is that the Commissioner ignored certain material evidence, which essentially implies that the Commissioner did not deal with the substantive merits of the case and thus the decision arrived at does not fall within a band of reasonableness.

[22] Where it is alleged in review proceedings that a Commissioner ignored certain material, the enquiry is whether indeed this was the case, and if so, whether they were material. If it is found that they were indeed ignored as alleged, and were material, it follows that the Commissioner would have come to a different

conclusion had he taken them into account, and therefore the result arrived at would *prima facie* be unreasonable⁴.

[23] Without necessarily having made reference to Item 7 of Schedule 8, the Commissioner had correctly identified the dispute for determination as to whether the dismissal of the Applicant was procedurally and substantively fair. He had regard to the Employer's policies allegedly transgressed. I did not understand the Applicant's case as presented before the Commissioner to be that the rule was not valid or reasonable rule or standard, or that he was not aware of the rule or standard applicable to the use of company vehicle. His main contention was that he had not contravened the rule, or where there was any such contravention, the Employer had not consistently applied discipline in that regard.

[24] The facts before the Commissioner are not really in contention. It was common cause that the Applicant was authorised to use the vehicle over the weekend as he had work to complete by Monday. During the course of the weekend, not once did he travel to the Mine. Between Friday and Monday when he returned the vehicle he had according to the Netstar report, travelled over 300 kilometres even though the Commissioner accepted his version that he had travelled 240 kilometres. Evidence further presented on behalf of the Employer was that the vehicle was issued to the Applicant on condition that he would only use it for work related purposes. The Commissioner had rejected his version that the distance between the Applicant's residence and the Mine is about 70kms and that it was instead 56kms. The Commissioner had done a simple calculation and concluded that since the Applicant had not travelled to the Mine during the period he was in possession of the vehicle, he could not account for an extra 128kms, and to that end he had misused the vehicle in contravention of the SOPs.

[25] In my view, the approach and reasoning of the Commissioner is unassailable. All that the Employer had to show was that the vehicle was misused over the

⁴ *Head of the Department of Education v Mofokeng* [2015] 1 BLLR 50 (LAC). See also *Shoprite Checkers v CCMA & others* (unreported Case no: JR2471/13 (Delivered on 31 July 2015)) at para [10] where it was held that;

"The shorthand for all of this is the following: where a commissioner misdirects him or herself by ignoring material facts, the award will be reviewable if the distorting effect of this misdirection was to render the result of the award unreasonable"

weekend, and for other purposes other than intended. The Applicant's contention that he had travelled an extra 13 (or 26) kilometres in order to go to Anford where he had his meals and did his work did not justify the mileage he had covered. It is apparent that he not only sought to mislead the Commissioner by falsely stating that the distance between his residence and the Mine was longer, but also made a lame attempt in accounting for the extra mileage he had accumulated, when it was common cause that he had not at any stage travelled to the Mine over the period in question.

[26] It therefore follows from the above that the contention that the Commissioner had failed to consider the evidence that he had gone to Anford as he regularly went there for his meals, and that he could not have therefore deviated from the route is misplaced. The mere fact that the travel to Anford was not dealt with in much detail by the Commissioner does not imply that it was ignored, in that it is apparent from the Commissioner's reasoning that he took all factors into account in concluding that the extra mileage was unaccounted for. The Commissioner had accepted as conceded that the Applicant had indeed gone to Anford, which was some 13kms from his place of residence. The Applicant's further contention that he had gone to Anford to get his meals even if he had done so four times from Friday to Monday at any given time did not however explain the extra kilometres that remained unaccounted for.

[27] The Commissioner further concluded that from the Netstar report, the Applicant had driven the vehicle at excessive speeds between 125 and 174 kilometres per hour. The highest speed was recorded to have taken place at 00h14 on 21 January 2012 and at 03h41 on the Sunday of 22 January 2012⁵ in the direction of Middleburg. To the extent that the Applicant had not once driven to the Mine, it can be accepted that even if he had travelled to Anford to get his meals, there was no justification to have driven at such excessive speeds in the early hours of the morning, simply to cover an area of 13 kilometres.

[28] The fact that the Applicant also travelled at such excessive speeds in the early hours of the morning and not towards the Mine is indicative that he had utilised the vehicle for his own private purposes without having obtained the

⁵ Record of proceedings at page 54 lines 10-20

necessary permission. By driving at such excessive speeds, to which he had conceded despite it being contended in his heads of argument that the Netstar report was placed in dispute, the Applicant not only breached the Employer's SOP in regards to obeying traffic regulations, but he had also placed the lives of other road users and his at risk.

[29] It was therefore not even necessary for the Commissioner to deal with the reason proffered for driving at such high speeds in the early hours of the morning, as it equally did not make any sense. The national road speed limit is 120km/h, and in accordance with the Employer's SOP, all its vehicles were to be driven in accordance with the traffic regulations. Even if his version that he drove at such excessive speeds in order to overtake was to be believed, this can only be confirmation that he had been driving at excessive speeds in any event.

[30] The Commissioner's finding in the light of the argument and evidence surrounding the alleged inconsistent application of the rules is equally unassailable. The approach to allegations of inconsistent application of discipline is that as enunciated by the Labour Appeal Court in *SACCAWU & Others v Irvin Johnson Limited*⁶, where it was held that:

"It was argued before us by Mr Grobler for the appellants that by not dismissing four employees who had also participated in the demonstration, the respondent applied discipline inconsistently. 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 mean that there was unfairness towards the other employees. It would mean no more than that his or her assessment of gravity of the disciplinary offence was wrong. It cannot be fair that the 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."

⁶ (1999) ILJ 2303 (LAC) at paragraph [29]

- [31] The Applicant relied on several cases in which the Employer had treated other employees differently in circumstances where they had allegedly committed the same or similar transgressions. In *Southern Sun Hotel Interests (Pty) Ltd v CCMA & others*⁷, this Court acknowledged the distinction between 'historical' and 'contemporaneous' inconsistency, and 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. Furthermore, a claim of inconsistency will fail unless it can be shown that the conduct of the employer in treating employees differently was capricious or arbitrary.
- [32] The Commissioner's reasoning in finding against the argument of inconsistent application of discipline was that the Applicant had not adduced sufficient evidence in that regard, and it was not sufficient for the Applicant to merely allege names of other offenders and the penalties meted out to them without presenting a full record of the hearings which resulted in those employees receiving lesser sanctions. Essentially the Commissioner's reasoning was that in the absence of the full merits of other cases, there was nothing that could persuade him that the Employer had acted inconsistently. This approach cannot be faulted in that from the authorities cited above, each case has to be dealt with on its own merits.
- [33] In alleging that the Employer had acted inconsistently, the submissions made on behalf of the Applicant were that the employer's conduct was grossly irregular and thus constituted unfair discrimination. I do not intend to deal with these submissions in the light of the dispute that was required to be determined, save to point out that in determining whether the employer acted consistently in the application of discipline, the enquiry is whether there was a basis for differentiation, or whether the employer's conduct was arbitrary or capricious⁸.

⁷ [2009] 11 BLLR 1128 (LC) at para [10]

⁸ *National Union of Mineworkers, obo Botsane v Anglo Platinum Mine (Rustenburg Section)* (JA2013/42) [2014] ZALAC 24 (15 May 2014) at para 25

- [34] The Commissioner correctly concluded that each case had to be dealt with on its own merits. In this case, it had been concluded by the Commissioner that the Applicant had breached the Employer's SOPs in circumstances where he could not justify his conduct. As correctly pointed out, he was a senior employee in a management position and it was expected of him to set an example. Even if it can be said that he had cooperated with Erasmus' investigations and had made certain concessions, his case before the Commissioner was that he had done nothing wrong, and to this end, it cannot be said that he had consistently shown contrition.
- [35] It is trite that in determining whether the employer had acted fairly in dismissing an employee, Commissioners should also consider the factors outlined in *Sidumo*⁹. Other than these factors, where an employee claims inconsistency, further factors such as the circumstances surrounding the act of misconduct committed, the position occupied by the employee at the time of the commission of the misconduct, the nature of the duties he performed and hierarchy within the organisation; the severity of the misconduct or its impact on the employer and its operations, and the consequences of the misconduct vis-à-vis the sustainability of the employment relationship between the employer and the employee.
- [36] In the light of the Applicant's position, the gross nature of his misconduct and failure to appreciate the consequences of his misconduct, the Commissioner's finding that the Employer had not acted inconsistently or unfairly in dismissing him cannot be faulted, especially in circumstances where it had not been shown in what material respects the Employer's conduct was capricious or arbitrary.
- [37] I have further had regard to the allegations made concerning the procedural fairness of the dismissal as were placed before the Commissioner. In this regard, the sole basis of the allegation was that the Employer took long in bringing the charges against the Applicant, and that the chairperson equally

⁹ At Paras 78 – 79 These include the totality of the circumstances of the matter; whether what the employer did was fair; the importance of the rule that the employee breached; the reason the employer imposed the sanction of dismissal; the basis of the employee's challenge to the dismissal; 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 the long service record of the employee.

took long in making his verdict. The Applicant had nevertheless conceded that the hearing was conducted in line with the company's policies and procedures. The Commissioner in my view arrived at a reasonable decision in finding that there was no delay on the part of the Employer in that it was entitled to ample opportunity to investigate the allegations against the Applicant. It was common cause that the incidents that led to the charges took place between 20 and 22 January 2012. The charges against the Applicant were finalised in March 2012, and this delay cannot by all accounts constitute procedural irregularity.

- [38] Having evaluated the merits of the dispute before the Commissioner, and further having considered his reasoning in the light of the dispute he was required and the material placed before him, I am satisfied that his decision falls within the band of reasonableness. In accordance with the approach in *Goldfields*, the Commissioner had considered the principal issue before him, had also evaluated the facts presented at the arbitration proceedings and came to a conclusion which was reasonable to justify the decision he arrived at. There is therefore no basis for the Court to interfere with that decision. I have further had regard to considerations of law and fairness, and I am satisfied that there is no basis for a cost order to be made in this case.

Order:

- a) The application to review and set aside the arbitration award dated 3 August 2012 issued by the Third Respondent under case number MP2654-12 is dismissed.
- b) There is no order as to costs.



Tlhotlhalenemaje, AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

On behalf of the Applicant: N Muzah of Muzha Attorneys

On behalf of the Respondent: Adv. Snider

Instructed by: Cliffe Dekker Hofmeyr Inc

LABOUR COURT