



IN THE LABOUR COURT OF SOUTH AFRICA JOHANNESBURG

Not Reportable

Case no: JR1031/07

In the matter between:

EVA MPUDU MOLAPO

Applicant

and

GENERAL PUBLIC SERVICE SECTORAL

BARGAINING COUNCIL (SSBC) - GERMISTON

First Respondent

A SIRKHOT N.O.

Second Respondent

DEPARTMENT OF HOME AFFAIRS

Third Respondent

Heard: 01 July 2014

Delivered: 18 December 2015

Summary: Review application dismissed.

JUDGMENT

WATT-PRINGLE AJ

- [1] This is an application in terms of section 145 of the labour Relations Act 66 of 1995 (“the LRA”) to review and set aside an arbitration award made by the second respondent (“the arbitrator”) on 22 March 2007 under the auspices of the first respondent in terms of which the arbitrator ruled that the dismissal of the applicant on 10 January 2003 was both procedurally and substantively fair.
- [2] The applicant furthermore sought a declarator to the effect that her dismissal had been both procedurally and substantively unfair and reinstating her from the date of her dismissal. However at the time of the hearing of this application the applicant no longer sought reinstatement but merely twelve months remuneration as compensation for her allegedly unfair dismissal.
- [3] At the time of hearing of this application the Court had not been favoured with the transcript of evidence, which rendered the motion papers largely incomprehensible. This is no reflection on Ms Driver who appeared for the applicant, having been drafted in at a late stage to do so. The matter was nonetheless argued and I was provided with the transcript and bundle of exhibits thereafter. By arrangement Ms Baloyi who appeared for the third respondent (“the DHA”) submitted supplementary heads of argument, with the benefit of the record of the proceedings before the arbitrator.
- [4] Prior to Ms Driver’s involvement in the matter, heads of argument had been filed by the attorneys of record of the applicant which largely concentrated on a purported review of the original decision to dismiss. Ms Driver wisely did not pursue this line of argument. See *Chirwa v Transnet Ltd* 2008 (4) SA 367 (CC); *Makhanya v University of Zululand* 2010 (1) SA 62 (SCA).
- [5] The applicant held the position of Deputy Director of Administration in the offices of the DHA for the Capricorn (formerly Pietersburg) region, since the date of her appointment on 6 October 1998. At the time of her dismissal in 2003 she earned a salary of R16000.00¹ per month, plus perquisites. She thus occupied a senior, responsible position in the public service.
- [6] The applicant was dismissed for:

¹ The figure in the founding affidavit is R1600.00 per month, but I take this to be a typographical error.

- 6.1 Failing to obtain the necessary authorisation for the parking of a government vehicle at her private residence between 1 and 2 January 2002;
 - 6.2 Acting fraudulently by backdating an indemnity form in favour of the State;
 - 6.3 Transporting passengers in a government vehicle on 6, 7 and 8 July 2001 without authorisation;
 - 6.4 Travelling to Zanzibar, Pondrift and Lebowakgomo on 6, 7 and 8 July 2001 without the necessary authorisation; and
 - 6.5 Travelling to Zanzibar, Platjan and Pondrift on 3, 4, 5 and 6 August 2001 without the necessary authorisation.
- [7] The disciplinary charges instituted against the applicant arose from an auditor's investigation and report which identified certain irregularities in this region of the DHA.
- [8] At the time at which this application was launched on 2 May 2007, the matter of *Sidumo v Rustenburg Platinum Mines Ltd* 2008 (2) SA 24 (CC) ("Sidumo") had been heard but not yet decided by the Constitutional Court. (The judgement is dated 5 October 2007). Prior to Sidumo the general constitutional ground of review based on the right to fair administrative action, applicable to arbitrations under the auspices of the CCMA was as per *Rustenburg Platinum Mines Ltd (Rustenburg Section) v CCMA* 2007 (1) SA 576 (SCA). In sum, the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") applied and the requirement applied that the arbitrators' decision be rationally connected to the information before him and to the reasons for the decision.
- [9] This was changed by *Sidumo*, which held that PAJA did not find application to arbitrations to which section 145 of the LRA applies. The Court furthermore held (per Navsa AJ, as he then was):

'[110] To summarise, Carephone held that s 145 of the LRA was suffused by the then constitutional standard that the outcome of an administrative decision should be justifiable in relation to the reasons given for it. The better approach is that s 145 is now suffused by the constitutional standard of reasonableness. That standard is the one explained in Bato Star: Is the decision reached by the commissioner one that a reasonable decision-maker could not reach? Applying it will give effect not only to the constitutional right to fair labour practices, but also to the right to administrative action which is lawful, reasonable and procedurally fair.'

[10] In her argument, Ms Driver relied upon this principle, submitting that the arbitrator did not properly consider the evidence before him and accordingly reached a decision which a reasonable decision maker could not reach. Elaborating on this submission, counsel pursued the following arguments, briefly stated:

10.1 It was contended that the applicant had been singled out for discipline when there was a general malaise of a lack of proper control in relation to the use of government vehicles and the applicant had acted no differently to a myriad other employees equally guilty of this conduct;

10.2 That the DHA accordingly did not apply discipline consistently;

10.3 That the arbitrator's credibility finding in favour of the DHA's witness (and the applicant's former immediate superior), Mr Mabunda was not a decision that a reasonable decision maker could make, if certain discrepancies in Mabunda's evidence are properly considered.

10.4 Implicit in the criticism of Mabunda's evidence are several submissions to the effect that Mabunda had turned a blind eye to irregularities in the manner in which the use of DHA vehicles was purportedly authorised and in the manner in which they were actually used.

[11] On the back of these submissions, counsel submitted that applying the test in Sidumo, a reasonable decision maker in the position of the arbitrator would have concluded that the DHA was inconsistent in the application of discipline and that the applicant had unfairly been singled out. Counsel furthermore

submitted that Mabunda's evidence should not have been preferred to the applicant's.

- [12] Ms Baloyi for the DHA contended that the grounds of review relied upon by the applicant had not been articulated in the founding affidavit and that consequently the DHA had not had the opportunity to deal with them. The contention of the DHA is furthermore that the specific complaints constituting the applicant's arguments relating to inconsistency and credibility were not articulated in the founding affidavit,
- [13] There is much to be said for Ms Baloyi's complaint in this regard. I have no difficulty permitting the argument that certain findings were unreasonable (as per the test in *Sidumo*), whereas in the founding affidavit the prior test of rationality (as per the SCA decision in *Sidumo*, prior to the Constitutional Court's overturning of that judgement), was principally the basis of review. At paragraph 11.4 of the founding affidavit the applicant stated that the arbitrator had not properly considered the evidence before him and that his conclusions were not sustainable. This contention is not in essence too far removed from the test in *Sidumo*.
- [14] The applicant in her founding affidavit additionally cited every conceivable ground of review, but in general terms and then proceeded to suggest what the arbitrator ought to have found, based on the evidence before him.
- [15] The thrust of those submissions on affidavit was that Mabunda was largely complicit in the general lack of control of the use of state vehicles in his sphere of management; that the applicant had simply continued to do things as others before her had done in ignorance of the applicable codes and standards and that instead of singling her out for disciplinary action there should have been a general tightening up of controls as suggested in the audit report.
- [16] Although the general point is made in the founding affidavit, repeatedly, that the applicant was singled out and that there were others equally guilty, the founding affidavit does not refer to any specific cases, nor demonstrate that

the facts in any other cases not similarly dealt with by disciplinary means were in all material respects the same as those in the applicant's case.

- [17] As Conradie JA held in *SA Commercial Catering & Allied Workers Union & others v Irvin & Johnson Ltd* 2002 (3) SA 250 (LAC):

*'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 & Colman (SA) (Pty) Ltd v Chemical Workers Industrial Union & 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. (As was the case in *Henred Fruehauf Trailers v National Union of Metalworkers of SA & others*(1992) 13 ILJ 593 (LAC) at 599H-601B; *National Union of Mineworkers v Henred Fruehauf Trailers (Pty) Ltd*(1994) 15 ILJ 1257 (A) at 1264.) 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.'*

- [18] It is impossible to infer from the grounds advanced by the applicant that the parity principle had been breached in the manner described above and that

the arbitrator should have found the applicant's dismissal substantively unfair for that reason.

[19] It is also apparent both from the founding affidavit and the argument advanced on behalf of the applicant that the gist of the charges against her were not disputed, save on the basis that she did not always appreciate that she was acting in contravention of the applicable rules and standards. The arbitrator was not impressed by this approach, as the applicant occupied a senior position, was obliged to ensure that not only she but also her subordinates were familiar with the applicable codes and standards and that she could not hide behind her own alleged ignorance in that regard.

[20] I am similarly unimpressed by the applicant's various attempts to avoid accountability for her own actions. It follows that applying the standard in *Sidumo*, there are no grounds on which to interfere in the award of the arbitrator.

[21] I do not consider this an appropriate case in which to order the applicant to pay the costs of this application.

[22] In the result, I make the following order:

The application is dismissed, with no order as to costs.

CE Watt-Pringle AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

FOR THE APPLICANT: Adv J Driver

Instructed by: Biccari Bollo Mariano Attorneys:

FOR THE RESPONDENT: Adv S Baloyi

Instructed by: The State Attorney

LABOUR COURT