



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JR 535/13

Not Reportable

In the matter between:

SATAWU obo A KGWELE

Applicant

and

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

First Respondent

COMMISSIONER R MAODI *N.O.*

Second Respondent

GRINROD LOGISTICS (PTY) LTD

Third Respondent

Heard: 7 October 2015

Delivered: 3 February 2016

Summary: Review application.

JUDGMENT

MOLAHLEHI, J

Introduction

- [1] This is an application to review and set aside the arbitration award made by the second respondent (the Commissioner) under case number JR 535/13 dated 15 November 2012. In terms of the arbitration award the Commissioner found the dismissal of the individual applicant (the employee) to be both procedurally and substantively fair. The unfair dismissal claim of the employee was accordingly dismissed.
- [2] The applicant has also made an application for condonation for the late filing of the review application which was not opposed. In weighing the factors relevant to the consideration of whether to grant or refuse condonation and, in particular, the explanation proffered by the employee and the prospects of success, I am of the view that the interest of justice support the granting of condonation.

Background facts

- [3] The employee who was prior to his dismissal employed as a driver was charged with the following counts of misconduct:

- '1. Unauthorized route- driving off-route
2. Reckless and negligent driving

On 23rd of March 2012 Mr Kgwele was assigned to deliver cargo in Namibia at two locations namely, Okahandja and Walvisbay. While executing this assignment, it is alleged that Mr Kgwele used an unauthorized route and drove the company vehicle in a reckless and negligent manner resulting in substantial damage to the vehicle and cargo.'

- [4] The incident that led to the charges against the employee occurred when he had gone to Namibia to deliver cargo at Walvisbay and Okahandja. After delivering the cargo at Walvisbay, he proceeded to OKahandja, an area he was not familiar with.
- [5] On his way to Okahandja, he came across a police roadblock where after all the necessary documents were checked, he enquired from them as to whether he was on the correct route to Okahandja. After confirming that he was on the correct route,

they inform him that there are roadworks ahead and that he will encounter a gravel road.

- [6] After travelling some distance on the gravel road he came across a drift and that was early evening. As he was not sure whether it was safe to cross he parked the truck and slept there. The following morning after observing a number of cars crossing the drift and in particular a 4x4, he decided to also cross. In the process of crossing the drift, the truck got stuck resulting to the damage both to itself and the cargo.
- [7] The employee was found not guilty of the first charge but guilty of the second and dismissed for that reason.
- [8] Aggrieved by the decision to dismiss the employee, the union referred a dispute concerning an alleged unfair dismissal to the CCMA. The ultimate outcome of that referral was that the Commissioner as stated earlier found the dismissal to have been for a fair reason.
- [9] In support of its version that the dismissal of the employee was fair, the third respondent led the evidence of two witnesses, namely; Mr Matkovich, the regional manager, and Mr Bhika, the branch manager and the initiator during the disciplinary hearing.
- [10] Mr Bhika testified that the employee travelled for more than 157 km on gravel road whilst knowing that he was prohibited from doing that. He testified that drivers in South Africa are prohibited from driving on gravel road because of the risk to the cargo and their safety. The drivers are also, according to him, informed during training that they are not allowed to drive on the gravel road unless if they had prior approval from the fleet controller. If unable to reach the fleet controller through the cellphone when the need to drive on the gravel road arises, he can do so through pressing the panic button which will alert the fleet controller through an alarm of the need to contact the driver. He also testified that the employee did not press the panic button when he went onto the gravel road.
- [11] In relation to the damage to the truck occasioned by the incident in question, Mr Bhika testified that out of eight units which the employee had on the carrier four were

damaged and the costs thereof was too high. During cross examination, he estimated the damage at R1.2 million. He would, however, not dispute that the damage was, during the opening statement estimated at between R700 000.00 and R800 000. 00 by the third respondent's representative.

- [12] The focus of the testimony of the second witness of the third respondent, Mr Matkovich, was on the cases relied on by the employee in his claim of inconsistent application of discipline by the third respondent. He, in essence, contended that the third respondent applied the same process in each case of discipline. In relation to the alleged inconsistent application of discipline he testified that what differentiated the sanction in disciplinary case is the 'level of negligence and mitigating circumstances.'
- [13] Initially Mr Motkovich stated that drivers are not allowed to travel on gravel roads. However, when put to him that the third respondent has a client in Limpopo who can only be reached through the gravel road, he then stated that that was done only under supervision. When questioned further on this issue he stated that he was a regional manager and that the issues relating to the drivers are matters for the depot managers. He could not dispute that the road leading to the third respondent's client in Ellisrus is a gravel road.

The arbitration award

- [14] After recording in the arbitration award that the fairness of the procedure was not an issue, the Commissioner recorded the issues in dispute in the following terms:
- i. The Applicant denied having committed the misconduct as set out in the disciplinary enquiry notification form;
 - ii. In the event I find that the Applicant committed the misconduct, the rule or standard has been inconsistently applied by the Respondent.
 - iii. The Applicant contended that in the event that I find that he did commit the offences as set out in the disciplinary notification form, then the dismissal was inappropriate.'
- [15] The Commissioner then set out the principles governing both recklessness and negligence. He starts off by indicating that although recklessness and negligence

are different concepts, they are, however, interrelated. The concept of negligence and recklessness is stated in the arbitration award in the following terms:

- '65 Without restricting the ordinary meaning of the word "recklessly" any person who drives a vehicle in wilful or wanton disregard for the safety of persons or property shall be deemed to drive that vehicle recklessly. The nature, condition and use of the road upon which the contravention is alleged to have been committed must be taken into consideration.
- 66 An employee is negligent if his or her conduct deviates from the conduct a reasonable man would have adopted in the same circumstances. Here, three elements have been considered:
- Would a reasonable man in the particular circumstances of the Applicant have foreseen the reasonable possibility that his conduct would cause damage to the truck and cargo ;
 - Would a reasonable man have taken reasonable steps to prevent such damage from occurring
 - If the answer to the above question are in the affirmative, and the Applicant did not foresee such damage and did not take such steps, he will have been negligent.'

[16] In applying the facts of this case to the above principles, the Commissioner made the following findings:

- '(67) I find that the Applicant drove the vehicle of the Respondent in a reckless and negligent manner resulting in substantial damage to the company vehicle and cargo. No reasonable person driving a truck with cargo on it could have crossed that drift.
- (68) The Applicant failed to exercise the standard of care and skill that can be expected of an employee with his degree of skill required for his job as driver. Because it was raining he could have either waited for assistance or attempt to make a u-turn, no matter how small the road was, instead of deciding to cross a drift and risk damaging the property of the Respondent.
- (69) He was reckless and disregarded the safety of the property of the Respondent by crossing the drift. He negligently compared his truck and

cargo on it with a 4×4 vehicle and other vehicles that he allegedly saw crossing the drift.

- (70) The rule that an employee must perform his or her service with care is a clearly established common law duty. The Applicant's lack of care and skill manifested itself in an act or omission that caused loss to the Respondent.'

[17] In dealing with the issue of inconsistency in relation to the fairness of the dismissal, the Commissioner made reference to the Code of Good Practice: Dismissal. After stating the principles governing inconsistency (or the parity principle), the Commissioner lists and summarises the disciplinary cases which the employee relied on in contending that the disciplinary proceedings were inconsistently applied in the following terms:

'Mr Makau was charged with damage or loss through negligence and his sanction was first written warning valid for six months, short summary of accident was that the carrier with units on top collided with an old train bridge on N17, approximately 10km from Leandra.

- Mr Jeffery Rangako was charged with poor work performance and his sanction was final written warning valid for six months, short summary of accident was that he had 6 claims in one year;
- Mr Piet Mahlangu was charged with negligence, leading to an accident causing damage to units and his sanction was final written valid for twelve months, short summary of accident was that he did not see hanging Telkom tables, which caught unit in top of the carrier.
- Mr Frans Motlanthe was charged with negligence, leading to an accident causing damage to units and his sanction was final written warning valid for twelve months, short summary of accident, the unit he was driving started cutting out, due to fuel problems, he tried to apply the brakes, but the jerking of the unit collided with the gate;
- Mr Richard Lindze was charged with not taking proper care when descending the mountain, short summary of the accident was that a bird/bat/object flew into cab and attacked the driver. Negligence could not be proven beyond reasonable doubt.'

- [18] In applying the facts of this case to the principle governing inconsistency, the Commissioner found that the cases which the employee relied on in support of his contention were 'not sufficiently similar to the case at hand'. He further found that none of the employees who are alleged to have been treated differently were charged with recklessness and negligent driving and, furthermore, that the circumstances surrounding those cases were different to those in the present matter.
- [19] It was for the above reasons that the Commissioner found that the third respondent did not apply discipline in relation to the employee inconsistently. He also founded the rule applied by the third respondent in the case of the employee to have been important as it was designed to protect its property. And in relation to the seriousness of the offence, the Commissioner found that it had been aggravated by the fact that he drove the truck with the cargo on it.

The grounds of review

- [20] In summary the grounds of review upon which the employee relies are that the Commissioner:
- 1.1 was bias, in that interfered with the proceedings, assisted respondent this case and cross-examined the employee;
 - 1.2 did not apply his mind to the hearsay evidence, in reaching his conclusion that the dismissal was fair reason;
 - 1.3 misconceived facts and failed to apply his mind to the principle governing inconsistency in disciplinary matters, and
 - 1.4 failed to ensure that proper oath was taken in relation to the third respondent's witness.

The legal principles

- [21] The test to apply when considering a review application is that of a reasonable decision maker which requires that an inquiry be conducted into whether the award which is the subject of the review is one which a reasonable decision maker could not reach. In terms of s 145 of the Labour Relations Act (the LRA), an arbitration

award can be reviewed on the grounds of misconduct, gross irregularity and exceeding the powers of the Commissioner.

[22] The Labour Appeal Court in *Herholdt v Nedbank Ltd*¹ explained that the reasonable decision maker test does not extinguish the grounds of review set out in s 145(2) of the LRA but that those grounds are suffused into that test.

[23] In *Goldfields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA and Others*,² in restating and explaining the reasonable decision maker test, the Court had the following to say:

‘... 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...’

[24] In explaining what the reasonable decision maker test entails, the Constitutional Court in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*,³ stated that:

‘[78] 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 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.

[79] To sum up. In terms of the LRA, a commissioner has to determine whether a dismissal is fair or not. A commissioner is not given the power to consider afresh what he or she would do, but simply to decide whether what the employer did was fair. In arriving at a decision a commissioner is not required

¹ [2012] 9 BLLR 857 (LAC) at para 14.

² [2013] 11 BLLR 1074 (SCA) at para 16.

³ [2007] 12 BLLR 1097(CC) at paras 78-79.

to defer to the decision of the employer. What is required is that he or she must consider all relevant circumstances.'

- [25] The Court further held that the duties of a Commissioner in determining the fairness of a dismissal includes amongst other things having regard to the totality of circumstances of the case, the importance of the rule that had been 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; and whether additional training and instruction may result in the employee not repeating the misconduct. These factors includes the Commissioner having to consider the effect of dismissal on the employee and his or her service record.
- [26] The above factors play an important and critical role in the consideration of whether the dismissal was a fair sanction. In this regard, it has to be borne in mind that in terms of section 192(2) of the LRA, the onus is on the employer to prove that the dismissal is fair.
- [27] In a dismissal case, the Commissioner conducts a two stage inquiry; i.e involving firstly; having to determine whether the employee had breached a workplace rule and secondly; if found that the employee had breached the rule whether the sanction of dismissal was fair in the circumstances of the case. The second inquiry includes having to determine whether the trust relationship between the parties have broken down as a result of the breach.
- [28] I now turn to the principle governing the inconsistent application of discipline. It is trite that disciplinary inconsistency is not a rule but rather part of the principle of fairness whose purpose is to ensure employees are measured by the same standard and that discipline is not capricious.⁴
- [29] In *NUM and Another v Amcoal Colliery t/a Arnot Colliery and Another*,⁵ in dealing with the issue of the alleged inconsistency of discipline, the Court said the following:

'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

⁴ See *Gcwensha v CCMA* (2006) 3 BLLR 234 (LAC) and *SACCAWU and Others v Irvin Johnson Ltd* (1999) 20 ILJ 2303 (LAC).

⁵ [2000] 8 BLLR 869 (LAC) at para 19.

an employer to mete out the same punishment to employees with different personal circumstances just because they are guilty of the same offence.'

Gross irregularity

- [30] In dealing with the grounds of review in this matter, I deal first with the allegation of gross irregularity which the Commissioner is alleged to have committed. It is trite that commissioners have wide powers in determining the manner in which they wish to conduct the arbitration proceedings in terms of s 138 (1) of the LRA. The powers are designed to ensure that disputes are speedily and fairly determined.
- [31] There are generally two approaches which a Commissioner can adopt in determining the manner in which arbitration proceedings are to be conducted; adversarial and inquisitorial. At times, Commissioners do combine the two approaches. Inquisitorial approach entails a more involvement of the Commissioner directing the proceedings and asking questions of clarity. In the adversarial approach, the involvement of the Commissioner is limited to managing the process and ensuring compliance with all relevant rules.
- [32] The basic principle of our law is that whatever the approach the Commissioner adopts in exercising powers given to him or her in terms of s 138 (2) of the LRA, the proceedings must be conducted in a fair, consistent and in an even-handed manner.⁶ In dealing with this issue, Francis, J in *Vodacom Services Provider Co (Pty) Ltd v Phala NO and Others*,⁷ had the following to say:
- 'A commissioner is required to conduct the proceedings in a fair, consistent and even handed manner. A commissioner cannot assist or be seen to assist, one party to the detriment of the other. A commissioner cannot put to witnesses his propositions, should not interrupt the witnesses' answers, challenge the consistency of a witness with his own evidence, indicate that he doubted the witness's credibility, or make submissions regarding the construction of evidence.'
- [33] The issue that has arisen based on the complaint of the applicant is that the Commissioner interfered with the proceedings and, in doing so, exceeded the

⁶ *County Foods Pty Ltd v Theron NO and Another* (2002) 21 ILJ 6249 at para 8.

⁷ (2007) 28 ILJ 11335 (LC) at para 15.

bounds of fair, consistent and even handed manner of conducting arbitration proceedings.

- [34] The reading of the record of the arbitration proceedings reveals two instances in which I find the Commissioner to have exceeded the bounds of the powers envisaged in s138(2) of the LRA. In the first instance, at the completion of the testimony of the third respondent's witness, its representative indicated that he was closing the case. The Commissioner then enquired as to whether he would be calling another witness. In response the representative of the respondent indicated that he would not be calling any further witnesses.
- [35] The Commissioner then adjourned the matter for a short period, after which he pursued the issue of whether the third respondent was sure it wished to close its case. The matter was then postponed after the representative of the third respondent changed his mind and indicated that he would be calling another witness which he did not have ready at that point.
- [36] It is apparent that the postponement referred to above was initiated by the Commissioner and was for the purpose of affording the third respondent the opportunity to arrange attendance of the witness it never intended calling but for the manner in which he (the Commissioner) intervened.
- [37] Whilst it is generally accepted that commissioners do have a duty to assist lay litigants, they must do so in a fair, balanced and transparent manner. They cannot do so in a manner that seeks to assist a litigant in the presentation of his or her case. In other words, the assistance provided, where needed, should not be such that it provides a strategic approach to and advances or advantages the case of a litigant.
- [38] In the present instance, it is apparent from the reading of the record that the approach adopted by the Commissioner sought to send a clear message to the third respondent's representative that the case of the third respondent was incomplete and that it was not strategic to close the case without calling another witness. In doing so, he advanced and advantaged the case of the third respondent.

- [39] In my view, the approach adopted by the Commissioner created a clear basis for the perception of bias on the part of the employee. The same applies to the manner in which he posed questions to the employee. The question posed, in my view, strayed outside the parameters envisaged in the powers in s 138(2) of the LRA. The questions which were posed were not clarity seeking on the case of the employee but rather sought to advance the case of the third respondent at the expense of that of the employee.
- [40] In light of the above facts, I find that, objectively speaking, the employee, as an informed litigant, reasonably perceived or reasonably apprehended bias on the part of the Commissioner.⁸ Accordingly, the decision of the Commissioner stands to be reviewed for this reason alone.
- [41] The question that then arises from the above finding is whether the matter should be remitted to the CCMA for a hearing *de novo*. The answer to this question lies in the consideration of the following: (a) the delay that would be occasioned by remitting the matter to the CCMA, (b) whether there are sufficient material before the Court upon which the prejudice occasioned by the approach adopted by the Commissioner can be remedied and (c) whether the court is in a good position to substitute the decision of the Commissioner.
- [42] The dismissal of the employee occurred in May 2012, some three and a half years ago. In my view, if the matter was to be remitted to the CCMA, that will cause a further delay therefore prejudicing the parties, amongst others, by delaying finality of the matter.
- [43] The other consideration in determining whether to substitute the decision of the Commissioner is whether there is sufficient material on the record to assist the court in that regard. Having read the record I satisfied that the material before the court is sufficient to assist in considering substitution.
- [44] The case of the third respondent based on the testimony of Mr Bhika was that the employee was negligent because he drove the truck on the gravel road in contravention of the rule that drivers are not allowed to drive on such roads. The

⁸ See *Sasol Infrastructure v Safafe and Others* (2015) 36 ILJ 655 (LAC) at para 61.

other aspect of the third respondent's case is that the employee should have phoned or pressed the panic button as soon as he entered the gravel road.

- [45] The employee disputed the existence of the rule prohibiting drivers from driving on the gravel road. He contended in the alternative that if such a rule existed it was not consistently applied.
- [46] It is trite that the duty to show the existence of rule or standard of the workplace or that an employee ought to have known about the rule rests with the employer. In the present instance the third respondent had a duty to show the existence of the rule and that it was consistently applied. In evidence in chief, both witnesses of the third respondent testified about the existence of the rule prohibiting drivers from driving trucks on gravel roads. They, however, could not sustain that version during cross-examination. It was in this respect not disputed that certain of the third respondent customers, such as Nissan in Elisrus can only be reached through the gravel road. The version changed during cross examination to say that drivers can drive on gravel roads with permission from the controll officer.
- [47] Mr Bhika's version, during cross examination, was that if drivers were to drive on the gravel road, they were to ensure that they did not exceed the speed limit set down for travelling on a gravel road.
- [48] In my view, had the Commissioner properly applied his mind to the above facts, he ought to have found that the third respondent had failed to discharge its duty of showing that there was a rule prohibiting drivers from driving on gravel roads. Even if it was to be found that the rule governing driving on the gravel road existed, the matter, before the Commissioner, indicates that it was not consistently applied and thus it was unfair in the circumstances to dismiss the employee.
- [49] The other aspect of the third respondent's case is that the incident would have been avoided had the employee pressed the button when he entered the gravel road. The case of the mployee is that he pressed the panic button when he entered the gravel road but there was no response from the control room. He also tried to contact the controll room through his cellphone but was unsuccessful because there was no cellphone reception in the area.

- [50] The third respondent contended that it was not necessary for the Commissioner to have regard to the testimony of the employee that he pressed the panic button when he entered the gravel road because that version was not put to the third respondent's witness. The employee cannot be blamed for this because it was the Commissioner who stopped his representative from cross examining on the issue. In this respect the Commissioner indicated that he was not interested in the issue of the panic button but only on whether the carrier was negligently and recklessly driven.
- [51] It would appear that in as far as the seriousness of the misconduct was concerned, the third respondent attached considerable weight to the loss suffered as a result of the incident. It was indicated, in this respect, during the opening statement that evidence would be led showing that the loss suffered as a result was between R700 000.00 and R800 000,00.
- [52] Mr Bhika presented no evidence about the loss suffered as a result of the incident during his evidence in chief. He testified during cross examination that the eight vehicles which were on the carrier were insured and four of those were written off because water went into their engines and that R204 000,00 was paid for towing the carrier out of the river. He estimated the repair to the carrier at R1.2 million and this was based on what he was told by a person in the maintenance department who was never called to testify on that issue.
- [53] In my view, the Commissioner failed to take the above into account when he made the finding that the employee's conduct caused the third respondent "substantial loss." Had the Commissioner applied his mind to the facts before him, he ought to have found that the third respondent had failed to show the seriousness of the offence based on the loss suffered.
- [54] As concerning inconsistency of discipline, it is trite that the employee has to provide the details of the case/s he or she is relying on in pleading inconsistency as a ground for the alleged unfairness of the dismissal. In the present matter, it is apparent from the record that the employee did provide sufficient information to enable the third respondent to investigate those cases which the employee relied on making his allegation.

- [55] Mr Bhika conceded, during cross examination, that the drivers who the employee referred to in his allegation of inconsistency were charged with negligent and reckless driving. He also conceded that they were not dismissed for that but were given final written warning valid for periods ranging from six to twelve months. He further testified that the other drivers who were charged with negligence and reckless driving were not dismissed because the damage caused by their reckless and negligence was less than that caused by the employee.
- [56] Mr Matkovich testified about the issue of inconsistency. He distinguished the case of the applicant on the following basis; the difference in the level of negligence, mitigating circumstances, the loss incurred as a result of the incident and the different levels of the insurance cover and the amount paid to the insurance as excess. However, he conceded that he was not involved in any capacity in the six cases which the employee relied on in his alleged inconsistency and further that he did not witness anything in the applicant's case.
- [57] In the case of Mr Lindzie where the damage resulting from the negligent driving amounted to R2 million, Mr Matkovich distinguished that case from that of the employee on the basis of a mitigating factor. The mitigating factor according to him was that the cause of the accident was caused by a bird that flew into the truck causing the driver to lose control.
- [58] It is clear from the above that the employees whose cases were relied upon by the employee in his claim of inconsistency were all charged with the same offence as his, namely, negligence and reckless driving. They were found guilty but not dismissed because of various mitigating factors. The same did not apply to the employee in that his years of service with a clean disciplinary record were not taken into account. The circumstances within which the accident occurred were also not considered. This was the first time for him to travel to Okahandja. As mentioned earlier, he confirmed with the police that he was on the correct route. He arrived at the drift in the early evening. He did not cross the drift then because he was unsure about the risk of doing so. He waited until the following morning when after seeing other cars crossing, he proceeded to cross. It is apparent that he made a judgment error in assuming that because other cars were crossing he would also be able to

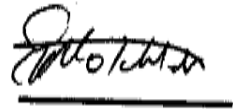
cross. His judgment was based not only on the cars that crossed but also that he had previously, whilst in the employ of the third respondent crossed three drifts.

[59] In light of the above, I find that the decision made by the Commissioner is not one which a reasonable decision maker could have reached and thus his arbitration award is reviewable. I also do not see any reason why costs should not follow the results.

Order

[60] In the premises I make the following order:

1. The late filing of the review application is condoned.
2. The arbitration award made by the second respondent under case number JR 535/13, dated 15 November 2012, is reviewed and set aside.
3. The arbitration award of the second respondent is substitute as follows:
 - a. The dismissal of the applicant Mr Kgwele was substantively unfair.
 - b. The respondent, Grinrod Logistics (Pty) Ltd is ordered to reinstate the applicant retrospectively to the date of dismissal without loss of benefits.
 - c. The applicant is issued with a final written warning valid for a period of six months.
4. The third respondent is to pay the cost of the applicants.



Molahlehi, J

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: D.M Majare of Masondo Attorneys

For the Respondent: G.M Kirby-Hirst of Macgregor Erasmus