



**THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

**JUDGMENT**

Not Reportable

Case no: JR2744/11

In the matter between

**MCC GROUP OF COMPANIES**

**Applicant**

and

**C MOKABANE N.O**

**First Respondent**

**THE COMMISSION FOR CONCILIATION,**

**MEDIATION AND ARBITRATION**

**Second Respondent**

**NUM obo PULE KEBOTSEMANG**

**Third Respondent**

**Heard: 10 February 2016**

**Delivered: 10 February 2016**

**Edited: 21 June 2016**

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## EX TEMPORE JUDGMENT

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**CELE, J**

[1] The application before me is one brought in terms of section 145(2) of the Labour Relations Act, 66 of 1995, hereafter referred to as the Act, where the applicant seeks to be granted an order in the following terms:

1. That the arbitration award issued by the first respondent, being the Commissioner Comfort Magubane of the second respondent under case number MP4019/19 dated October 2011 between the applicant and the third respondent be reviewed and/or set aside in accordance with the provisions of section 145(1)(a) and/or 145(2) of the Act.
2. That it be determined that the dismissal of the third respondent was procedurally and substantively fair and that the third respondent is not entitled to any relief.
3. Alternatively, that the matter be remitted to the second respondent for proper determination of the dispute before a commissioner other than the first respondent.
4. That those respondents opposing granting of this application be ordered to pay the costs hereof.
5. Pending the outcome of the application, all further procedures be stayed.
6. That such further and/or alternative relief may be afforded to the applicant as the court may deem fit.

[2] The application has been opposed by the third respondent in

whose favour the award was issued. It is common cause in this matter that whilst the third respondent was on duty operating a heavy vehicle, she drove over a board, which is two by three metres wide and long. At the time that she did so, her version was that she did not even see the board. She heard what was told to her but it appears that throughout the internal hearing she was not in a position to actually deny that she committed this kind of misconduct.

- [3] As a consequence of driving over this board, she caused damaged to the value of R2 500 to the motor vehicle company. She was then subjected to a disciplinary hearing. She was found guilty and was discharged. She was aggrieved by this dismissal and she referred an unfair dismissal dispute for conciliation. Conciliation failed to resolve it. She referred it to arbitration and it came before the first respondent as the appointed commissioner. Evidence was led. It was common cause that a dismissal had taken place and therefore the applicant had to lead its evidence and to prove that the dismissal was premised on fair grounds. The third respondent, also testified in defence of her case.
- [4] A number of challenges have been brought in the founding and supplementary papers of the applicant but today Mr Snyman, appearing for the applicant, has narrowed the issue to one aspect and one aspect only. It is the fairness of the sanction in relation to consistency, what is known as inconsistent application of disciplinary rules of a company.
- [5] To this end, the third respondent called an ex-employee, Mr Ndlovu, to come and testify. His evidence was that he also was involved in a similar misconduct where he was operating a heavy vehicle. It collided with another and damage was caused to the company. He was given a warning. He was cross-examined as to why he was given a warning and he gave an obvious answer; that

he did not know. Obviously, the giving of the warning did not depend on him. As to why he was given a warning did, therefore, not depend on him but it is clear that he said he was given a warning. And there is another colleague who also appears to have caused damage to the company, Mr Justice Mohulatsi, who also was given a warning. The warning appeared to have been given on 27 April 2011.

- [6] What I need to take note of in this matter is the fact that the incident took place on 20 February 2011 and that the first date of hearing was 20 April 2011. It was not completed. It was postponed to and was finalised on 5 May 2011. The chairperson adjourned the proceedings and then submitted his written judgment on 9 May 2011.
- [7] It would appear that after the hearing started but before the outcome was made known, it is during that period that Messrs Mohulatsi and Ndlovu received their warnings. It appears common cause between the parties that the existence of these warnings was never brought to the attention of the chairperson who presided over the enquiry involving the third respondent. This is because of the time issues that were involved. That, therefore, made it probably difficult for the chairperson, and therefore the applicant, to deal with the aspect of these warnings. They would not have featured because at the time that the matter was dealt with, they featured somewhere in between the timeframes, firstly; and secondly, because none of the parties brought this to the attention of the chairperson.
- [8] It is known that arbitration proceedings are a *de novo* hearing. That is why then the third respondent brought it to the attention of the commissioner that the applicant was inconsistent in applying the disciplinary rules that it had. The commissioner upheld that approach in the award by finding that the applicant was indeed

inconsistent. To the extent that I deal with inconsistency, I refer to the findings of the commissioner from paragraph 15 onwards. Paragraph 16 reads:

- ‘16. The applicant’s averment that she did not see the board is not sufficient to exonerate her, given the overwhelming evidence to the contrary presented by the respondents’ witnesses. Having found that the applicant breached a standard workplace rule, I now turn on consistent application of the above rule. It is common cause that the applicant was dismissed for damage to company property, amounting to R2 500. Page 18 to 21 of the union bundle reflects a final written warning issued to the employees of the company for commission of the same offence. It is apparent from the above that the respondent was inconsistent in its application of a sanction of dismissal.
17. The respondent was in breach of its disciplinary code and procedure and imposing different sanctions for commission of similar offences. Although I said that each case should be determined on its own merits, the respondent failed to provide a plausible explanation as to why the above cases were treated differently; safe to say the supervisors who issued the warnings erred. There is no evidence before me that shows that the respondent made efforts to correct the alleged error committed by the supervisors. In fact, one of the warnings was issued after the applicant was charged and dismissed for the same offence.
18. For the above reasons, the dismissal of the applicant by the respondent is found to be procedurally fair and substantively unfair. The union prayed for retrospective reinstatement as remedy and the employer contended that the above prayer would not be appropriate under the circumstances. The respondent failed to advance plausible reasons in support of his argument and I have not been able to establish any exception that precludes the granting

of the desired remedy as provided in section 193(2) of the LRA.'

- [9] The applicant says that the commissioner failed to apply his mind appropriately to the evidential material before him, committed a gross irregularity and as a consequence issued an award which is unreasonable. The test for review or the law governing the test for review has become trite. I need only just briefly to refer to the decisions: 1) In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*.<sup>1</sup> I also want to refer briefly to the application or interpretation of that principle in *Sidumo in Goldfield Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA and Others*.<sup>2</sup> I have taken note of what the LAC said, in particular from paragraph 12 going through to paragraphs 21. I need not recite this. I have referred to the previous matter that I dealt with and the one that I can only highlight what the court said in paragraph 16 and paragraph 21.
- [10] The principle of inconsistency regulates the fairness of sanction. Firstly, the applicant points out that inconsistency was never raised in the disciplinary hearing. This may have created a problem because if it was raised at that time, the facts would have become clearer as they are clearer to me now; namely, that none of the parties brought to the attention of the chairperson that there were sanctions, a warning that was given to two employees after the commission of the misconduct in question but before the enquiry was finalised.
- [11] The applicant makes out a case that the documents relied on were of hearsay nature. I have been taken through the transcript. There was an argument between the commissioner and the representative of the applicant about the admissibility of the documents and how hearsay evidence should be treated. Obviously we have the law that regulates the admissibility of

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<sup>1</sup> 2008 (2) SA 24 (CC).

<sup>2</sup> (2014) 1 BLLR 20 (LAC).

hearsay evidence. I think the commissioner made a mistake to assume that hearsay evidence is by its very nature admissible. It is generally inadmissible but admissible only by the exceptions to it and there are guidelines. The decision in *Southern Sun Hotel (Pty) Ltd v SA Commercial Catering and Allied Workers Union and Another*<sup>3</sup> deals with this aspect and makes it clear that there are circumstances where hearsay evidence may be admissible and that the commissioner should be guided by these principles as well.

[12] I have indicated that one of the third respondent's colleagues testified at the arbitration hearing, namely, Mr Ndlovu. His evidence was not of a hearsay nature. He testified and he was subjected to cross-examination. So, the warning given to him or the evidence about that warning was not of hearsay nature. There was direct evidence. So, a comparison can easily be made between the treatment of the third respondent's evidence here and that of Mr Ndlovu. As I have already indicated, however, that such evidence never came to the fore and was never brought to the attention of the chairperson. It must follow that the applicant was never afforded a reasonable opportunity to deal with the question of consistency at the time that it dealt with the matter of the third respondent.

[13] The commissioner had applied his mind appropriately to the sequence of events as they have now been shown to me. And I think they were always there. One would have realised that a failure of the employer to follow what he did to Ndlovu and the other witness cannot be said to be an arbitrary application of a disciplinary principle. It cannot be said that the applicant was arbitrary and capricious. It is explainable in that it was a factor that was never brought as evidential material. It is an innocent error. And there is room for such innocent errors. It must always be

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<sup>3</sup> (2000) 21 ILJ 1315 (LAC) at paras 13 to 14.

known that each case must be seen on its own merits. It must not be assumed that each time there is a sanction that is different, therefore, unfairness prevails. Every case must be looked at on its own merits. I cannot agree with the commissioner in saying that in imposing a different sanction the applicant in this case acted capriciously or arbitrarily. It acted out of ignorance of the factors of the other employees.

[14] This may sound contradictory in that it is the same employer but we must know that the employer operates through its agents. It is incumbent on any employee who wants to say that he is being treated inconsistently in relation to sanction that he should bring such evidence to the fore. If he fails to do so, he cannot later on come at a later stage to say that he was not fairly treated.

[15] In this case, I am unable to find that the commissioner applied his mind appropriately to the evidential material before him. He allowed insufficient evidence to serve before him without conducting a proper enquiry or probe as to the details of the warnings that were issued; so that he would use them to found his judgment. He used information which was very scanty. He, therefore, compared apples with oranges, which is not proper. There must be similarity in the nature of comparison. As a result of that approach which he adopted, which was a gross irregularity, he, in my finding, issued an award which is unreasonable. He ought to have found that it was within the purview of the employer's discretion to dismiss this employee; and in so doing acting fairly.

[16] I have indicated here that every case must be looked on its own merits. One may also bear in mind the events that might have ensued before this incident. We are already aware that the third respondent got herself involved into some verbal altercation with Mr Venter or a senior manager. And from that, she went on to drive this motor vehicle. She might have been moved by anger or



something like that. I am aware of the fact that she complained about the manager and then a grievance was lodged. It seems to be that that grievance was not properly disposed of because she did not come to know of its outcome. Although it is said that by the time this matter was heard, the grievance had been finalised. But I do not think that the manner in which the grievance was dealt with has any influence on how this matter should be disposed of.

[17] In my view, the applicant has shown to me that it did not act inconsistently; that any of these warnings should not have featured in these proceedings.

[18] I, accordingly, find that:

1. The arbitration award issued by the first respondent in this matter as a commissioner of the second respondent is reviewed, set aside and substituted.
2. The dismissal of the third respondent was substantively fair.
3. No cost order is made.

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Cele, J

Judge of the Labour Court of South Africa

Appearances:

For Applicant: S Snyman, Snyman Attorneys

For Respondent: MES Makinta, instructed by MS Molebaloa Attorneys

Labour Court