



IN THE LABOUR COURT OF SOUTH AFRICA, HELD AT JOHANNESBURG

Not Reportable

Case No: JR 1147/14

In the matter between:

THABISO MASHIGO

Applicant

and

MEIBC

First Respondent

MOHAMMED RAFEE

Second Respondent

BEKA (PTY) LTD

Third Respondent

Heard: 13 July 2017

Delivered: 31 August 2017

JUDGMENT

NAIDOO AJ,

Introduction

- [1] This is an application to review and set aside the arbitration award issued by the second respondent on 5 July 2012. In terms of that award, the second respondent found that the dismissal of the applicant by the third respondent was not unfair. The applicant also seeks an order remitting the matter back to the first respondent for arbitration *de novo*.

Preliminary Issues

- [2] The arbitration award in this matter is dated 5 July 2012. This application was launched on 17 June 2014, approximately two years after the award was issued.
- [3] In his founding affidavit in this application, the applicant states that he was represented during the arbitration proceedings by his trade union at the time, the National Union of Metalworkers of South Africa (NUMSA), and that he was never informed of the arbitration proceedings. He states further that he only became aware of the arbitration award on 22 May 2014 when he enquired of the status of the proceedings from the first respondent.
- [4] There is nothing in the papers before this Court to suggest that this assertion is incorrect. I am accordingly satisfied that the applicant did indeed become aware of the award only in May 2014, and this application has therefore been delivered within six weeks of the date on which the award was served on the applicant, and is thus within the period prescribed by section 145(1)(a) of the Labour Relations Act (LRA).¹

¹ Act 66 of 1995.

- [5] The third respondent has also applied for condonation for the late delivery of its answering affidavit in this application. That affidavit was delivered on 22 March 2016, approximately six months after the applicant acted in terms of Rule 7A(8) of the Rules of this Court. The applicant has not delivered a notice of objection as required in terms of Item 11.4.2 of the Practice Manual of this Court, and I am in the circumstances of the view that condonation is not necessary.

Material Facts

- [6] The material facts in this matter are largely common cause.
- [7] The applicant commenced employment with the third respondent in May 2007 as a Luminaire Assembler.
- [8] In December 2011, the applicant together with several other employees of the third respondent, were charged with various acts of misconduct following their submission of fraudulent sick notes following their absence from work on various occasions. Their charges read as follows:

“Gross misconduct in that you have:

1. Deliberately supplied incorrect or falsified information to the company in the form of a fraudulent doctors' note.
2. That this is considered fraudulent as it was not supplied by a doctor. This is a complete misrepresentation of the facts of your absence.
3. Dishonesty during the course of your employment in that you have purported to be sick when in fact you were not.
4. Breach of the trust relationship.
5. Undue enrichment in that you have been paid for sick leave that you were not entitled to.”

- [9] It was common cause that all of the third respondent's employees who were charged had indeed submitted fraudulent sick notes following their absence from work on various occasions.
- [10] The applicant and several other employees were found guilty of the allegations against them, and dismissed. However, not all of the third respondent's employees who had submitted these fraudulent certificates were dismissed. The third respondent dismissed only those employees, the applicant included, who had submitted fraudulent certificates on three or more occasions.
- [11] Following an unsuccessful internal appeal, the dismissed employees, through NUMSA, referred an unfair dismissal dispute to the first respondent for conciliation. Conciliation having failed, the matter then proceeded to arbitration.
- [12] During the arbitration, the applicant's representative, an official from NUMSA, did not lead any evidence on behalf of the applicants. He admitted during the arbitration that all of the applicants were indeed guilty of the charges against them, and challenged the fairness of the dismissals only on the basis of the third respondent's apparent inconsistency in the application of discipline.
- [13] The second respondent commenced his analysis of the issues before him from the premise that in order for the dismissal of the applicant to be unfair, it must be established that the differentiation in treatment between the applicant and those of the third respondent's employees who were not dismissed for the same offence, was not arbitrary, capricious, induced by improper motives or by a discriminating management policy. He did so,

correctly in my view, with reference to the judgment of the Labour Appeal Court in *SACCAWU and others v Irvin and Johnson Ltd.*²

- [14] As stated above, it was common cause that all of the employees who were charged were guilty of offences related to the submission of fraudulent sick notes following their absence from work on different occasions. It was also common cause that the reason why some employees were not dismissed was because they had submitted fraudulent sick notes on two or less occasions in the past, whereas the applicant and the other employees who were dismissed had done so on three occasions. The second respondent then proceeded to assess whether the actions of the third respondent in differentiating between employees on this basis was arbitrary, capricious, induced by improper motives or by some discriminating management policy.
- [15] In doing so, the second respondent considered, *inter alia*, two important judgments of this Court and the Labour Appeal Court that similarly considered issues of inconsistency in circumstances where prior the disciplinary records of the dismissed employees was the differentiating factor. I consider those judgments below.
- [16] The second respondent then found that the differentiation on the basis of the number of prior warnings for the same offence was not arbitrary, and concluded that the dismissal of the applicant was accordingly not unfair.
- [17] In his founding affidavit in this application the applicant challenges the arbitration award on two bases. First, he states that the second respondent committed a gross irregularity by failing to call upon the applicant and the other dismissed employees to give evidence at the arbitration, and proceeded to assess the fairness of their dismissals solely on the basis of the evidence presented by the third respondent. Second, the applicant

² (1999) 8 BLLR 741 (LAC).

states that the second respondent committed a gross irregularity in that he failed to properly apply his mind to the issues before him in that he found that the dismissals were unfair in circumstances where other employees who were guilty of the same offence were not dismissed. I consider the latter ground first.

[18] As appears from the summary of the second respondent's assessment of whether there was indeed a satisfactory reason to distinguish between the two categories of employees, the second respondent was indeed alive to the issues he was required to consider.

[19] In *NUM and Another v Amcoal Colliery t/a Arnot Colliery and Another*³ two employees of the respondent were dismissed on allegations of refusing to obey a lawful instruction whereas three others were issued with less severe sanctions for the same offence. The Labour Appeal Court, per Mogoeng AJA (as he then was), stated the following:

"[21] Even on the assumption that the present offence is unrelated to the previous misconduct, I still do not think the second appellant's disciplinary record should have been disregarded. The first respondent's disciplinary code provides for a progression of penalties. The rationale behind it must have been that there would come a stage beyond which the accumulated penalties cannot be allowed to progress further. Their cumulative effect would then provide clear evidence of ill-discipline which would render a continued employer-employee relationship intolerable.

[22] There was therefore justification for a differentiation of the penalties imposed on the three categories of employees. Each penalty was dictated by the different disciplinary record of each category of employees. All the circumstances of this case point to dismissal as the appropriate sanction for the second appellant."

³ (2000) 8 BLLR 869 (LAC).

[20] In a separate judgment, Zondo AJP (as he then was), agrees with these findings of Mogoeng AJA and notes in addition that his agreement is not to be seen in conflict to his earlier judgment in *SACTWU and others v Novel Spinners (Pty) Ltd.*⁴ He states in addition the following:

“My agreeing with Mogoeng AJA that the respondent was entitled to take into account the second appellant’s previous warnings is not in conflict with my judgment in *Novel Spinners*. What was argued by the appellants in this case about previous warnings is not the same point as the one that was argued by the applicants in the *Novel Spinners* case. In *Novel Spinners* it was argued that an employer is not entitled to take into account previous warnings which were in respect of individual misconduct when considering what sanction to impose in respect of collective action. In this case, the appellant’s case, upon a proper analysis of the statement of claim and the heads of argument, was that, by virtue of the fact that the conduct for which the previous warnings had been issued was not related to the conduct in respect of which the respondent had to decide an appropriate sanction, the employer was not entitled to take such previous warnings into account. These are two different points. In my view, the former has merit, the latter none.”

[21] It is this issue – the consideration of prior disciplinary records for individual misconduct in the determination of disciplinary penalties for collective misconduct that was considered by this Court in *SATAWU v Ikhwezi Bus Service (Pty) Ltd.*⁵ Van Niekerk AJ (as he then was) stated the following:

“[25] In summary, an employer is entitled in general terms to impose different penalties on different employees for the same act of misconduct, provided there is a fair and objective basis for doing so. When an existing disciplinary record is the differentiating factor, prior disciplinary action short of dismissal (in particular, warnings) can be

⁴ (1999) 11 BLLR 1157 (LC).

⁵ (2008) 10 BLLR 995 (LC).

relevant in two ways. If the disciplinary record of one employee discloses prior disciplinary action short of dismissal, this can (I would suggest must) be taken into account when the employer decides on an appropriate sanction. Thus, in general terms, the nature and extent of prior sanctions can legitimately form the basis of a differentiation in penalty, even when the nature of the misconduct differs. An exception applies when the employer considers an appropriate sanction for misconduct that is collective in nature. In this instance, prior disciplinary sanctions for individual misconduct cannot be used to justify a differentiation in penalty. The employer has no choice but to impose the same sanction in respect of all the employees engaged in the collective misconduct. However commercially compelling the considerations, to which Mr Myburgh referred in his evidence, may have been at the time, they were not legitimate basis on which to select for dismissal only those employees whose disciplinary records disclosed final warnings for acts of misconduct.” (Own emphasis)

[22] In the present matter, the prior disciplinary records considered in the determination of sanction for the applicant was for precisely the same offence as the one for which he was found guilty and ultimately dismissed. So too was it for the other employees who were disciplined for the same offence. They all related to prior individual acts of misconduct.

[23] The irregularity complained of by the applicant in this regard is that the second respondent failed to apply his mind to the material facts and as a result arrived at an “inexplicable” conclusion. The only basis provided by the applicant for this criticism of the second respondent’s award is that “the record succinctly shows that there were other employees who committed the same offences the Applicant committed [who] were not dismissed, but given final written warning[s]”.

[24] I do not agree. It is plain from a reading of the arbitration award that the second respondent properly applied his mind to the material issues before

him and to the judgments of this Court and the Labour Appeal Court referred to above. He found in those circumstances that, in his view, the differentiation then on the basis of the number of prior warnings was not arbitrary or capricious. There was also no evidence of any ulterior motive of any discriminatory management policy.

- [25] In my view, the second respondent committed no irregularity in this respect, and he arrived at a conclusion that is entirely reasonable on the material before him. As Nugent AJA (as he then was) found in *Cape Town City Council v Masitho and others*:⁶

“[T]here may be valid grounds in a particular case to distinguish one employee from another, albeit that they have engaged in the same conduct, on the basis of their respective records, or on the basis of other material factors (see, for example, *National Union of Mineworkers and others v Amcoal Collieries and Industrial Operations Ltd* (1992) 13 ILJ 1449 (LAC) at 1453B; *National Union of Mineworkers and others v Free State Consolidated Gold Mines (Operations) Ltd - President Steyn Mine; President Brand Mine; Freddie Mine* (1993) 14 ILJ 341 (LAC) at 357J; *Le Roux and Van Niekerk SA Law of Unfair Dismissal* at 110-11) but in the absence of material distinguishing features equity would generally demand parity of treatment”.

- [26] As I have stated above, I am of the view that in the present circumstances the prior disciplinary records of the applicant and those of the third respondent's employees who were issued with less severe sanctions was a material distinguishing factor. The third respondent was therefore, in my view, entitled to take into consideration the prior disciplinary records of the employees in the determination of sanction.

⁶ (2000) 21 ILJ 1957 (LAC).

- [27] However, even if it were to be said that the second respondent did commit an irregularity in the assessment of whether the differentiation was arbitrary, I do not think that it can be said that the result at which he ultimately arrived is unreasonable. At the very least, the second respondent understood the nature of the enquiry he was required to conduct and he embarked on a proper analysis of the key questions before him. The award in those circumstances ought not to be interfered with (see in this regard the judgment of the Labour Appeal Court in *Head of the Department of Education v Mofokeng and others*).⁷
- [28] Regarding the applicant's second ground of review relating to the second respondent's alleged failure to call any of the individual applicants to testify during the arbitration, I am similarly of the view that this ground has no merit.
- [29] As stated above, the applicant and his fellow applicants in the first respondent mandated their trade union at the time to refer the unfair dismissal dispute on their behalf to conciliation and to represent them during the arbitration.
- [30] The official from NUMSA who represented the applicants at the arbitration elected not to lead any evidence during the proceedings but rather to argue the matter on the crisp legal point of whether the dismissals should be found to be unfair on the basis of the differentiation used by the third respondent in deciding which employees should face what sanction.
- [31] Without making any definitive pronouncement on this issue, this approach does not strike me to be particularly problematic given the facts of this case. The transcript of the arbitration proceedings confirms that the manner in which the proceedings were conducted by the second respondent was not

⁷ (2015) 1 BLLR 50 (LAC).

inconsistent with the views of the parties and the material facts relevant to the determination of the issues at arbitration were largely common cause.

[32] It cannot in these circumstances be said that the second respondent committed a gross irregularity, patent as it is alleged to be, in this regard that prevented the applicant from having his case fully and fairly determined (*Shoprite Checkers (Pty) Ltd v Ramdaw NO and others*;⁸ *Toyota SA Motors (Pty) Ltd v Commission for Conciliation Mediation and Arbitration and others*.⁹

[33] For the reasons set out above, I am of the view that the arbitration award of the second respondent is unassailable.

[34] Regarding costs, having regard to the requirements of the law and fairness as this Court is required to do in terms of section 162 of the LRA, I do not consider this a matter necessitating an order for costs.

[35] In the circumstances, I make the following order:

Order

1. The application to review and set aside the arbitration award of the second respondent under case number MEGA 35267 is dismissed.
2. There is no order as to costs.

⁸ (2000) 7 BLLR 835 (LC).

⁹ (2016) 3 BLLR 217 (CC).

Naidoo AJ

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant: Mr J Ngubane (Trade Union official)

For the Third Respondent: Ms A Davies, Johanette Rheeder Inc.