THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR 1359/15

In the matter between:

NATURE'S GARDEN (PTY) LTD **Applicant**

and

RENDANI EWART MATUMBA *N.O* **First Respondent**

COMMISION FOR CONCILIATION,
MEDIATION AND ARBITRATION **Second Respondent**

GENERAL INDUSTRIES WORKERS UNION
OF SA obo PAULOS NTOA **Third Respondent**

Heard: 17 April 2019
Delivered: 17 May 2019

JUDGMENT

BALOYI, AJ

Introduction

[1] The applicant is seeking to review and set aside the arbitration award issued out by the first respondent under case number GAEK 1165-15. The first respondent made a finding that the third respondent's dismissal was substantially unfair and awarded him reinstatement with retrospective effect. The third respondent opposed the application and argued for its dismissal with costs.

Factual background

[2] The applicant employed the third respondent on 08 February 2013 as a general worker in its factory warehouse. The third respondent was, as part of his duties, required to work in the cold room. He was dismissed on 27 January 2015 after being found sleeping in the canteen at the workplace during working hours. The applicant adopted a practice of allowing employees who perform duties in the cold room to take a fifteen-minute break in order to warm themselves up in the canteen. The applicant used to allow them up to thirty minutes of warming up if there was not much work to do in the warehouse. Sleeping on duty is, in terms of the applicant's Disciplinary Code, a dismissible offence.

[3] What came before the first respondent is that on 04 December 2014 the supervisor, Mr Sam Shibiri, combed through the warehouse in search of the third respondent. He eventually found him sleeping in the canteen. After waking the third respondent up he attempted to remind him that sleeping on duty was prohibited. That did not bear any fruit as the third respondent had instead raised arguments. This prompted Shibiri to institute disciplinary proceedings against the third respondent in view of his unapologetic stance. What was specifically common cause before the first respondent was that the third respondent was found sleeping and that it was during working hours.

[4] The applicant had at some stage in the past dismissed Messrs Msindo and Ngobese for sleeping on duty. Their sanctions were however overturned on

appeal and substituted with final written warnings. It was the third respondent's version that he resorted to sleeping because he was not feeling well. Secondly, the applicant did not apply the rule consistently as Msindo and Ngobese escaped with warnings for the same misconduct.

[5] The disciplinary hearing chairperson testified that he handed down a sanction of dismissal solely because sleeping on duty was prescribed as a dismissible offence in the disciplinary code. The applicant's contention that the third respondent did not show remorse had no influence on his decision to dismiss the third respondent. He emphatically pointed that even if remorse was shown he would have nevertheless imposed the sanction of dismissal because of the disciplinary code.

[6] The first respondent rested his findings on two points. Firstly, that the applicant was inconsistent in the application of the rule or standard when considering the approach taken in respect of Msindo and Ngobese. The first respondent's reasoning on inconsistency suggested that the applicant applied the rules or standards based on Shibiri's election, that is, to charge an employee if such employee failed to apologize to him. Secondly, the applicant ignored or failed to consider the circumstances which led to the third respondent falling asleep. In essence the applicant failed to take into account that the applicant was not feeling well on the day in question.

[7] In its arguments, as pointed out by Mr Mmoue, the applicant was no longer pursuing its ground relating to the first respondent's ruling refusing legal representation. In the forefront of the applicant's argument is that the third respondent misconstrued the principle of inconsistency and that he failed to take into account that sleeping on duty was a serious misconduct. He did not take his arguments further on the disciplinary chairperson's approach of sticking to the sanction of dismissal without considering any underlying issue which might have had a mitigating effect. On the same token Mr Bayi for the third respondent argued in defense of the first respondent's decision on inconsistency. This issue was contended in so far as the applicant's decision to discipline the employees was left to the discretion of Shibiri, particularly if

he did not get an apology. He emphasized the disciplinary chairperson's rigid approach as an issue which in itself has a bearing on the unfairness of the dismissal. The third respondent also tried to persuade the Court to consider dismissing the review application by granting the order sought in the Rule 11 application.

The applicable principles

[8] This application turns on the very two points identified by the second respondent above. In *SACCAWU and Others v Irvin &Johnson*[1] the Labour Appeal Court in its endeavors to place an understanding of the principle of consistency, which to me is absolutely clear, said the following at paragraph 29::

> "……. In my view too great an emphasis is quite frequently sought to be placed on to the 'principle' of disciplinary consistency, also called the 'parity principle'. (as to which see e.g. Grogan, *Workplace Law*, fourth ed. p.145 and Le Roux & Van Niekerk, *The South African Law of Unfair Dismissal*, p.110). There is really no separate 'principle' involved. Consistency is simply an element of disciplinary fairness (The Dismissal of Strikers, MSM Brassey (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 813 HI). 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 page 21 of 25 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

[1] [1999] 8 BLLR 741 (LAC).

> 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 599 H 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."[2]

[9] The position of the third respondent conspicuously carries distinguishable features as compared to that of Msindo and Ngobese. What is critical around the concept of inconsistency is that it is unfair that like and like are not treated alike[3]. Although the two were dismissed for the same misconduct as the third respondent, it remains undisputed that the third respondent did not appeal the dismissal sanction. Unlike Msindo and Ngobese his failure to lodge an appeal has effectively denied him an opportunity to be heard prior to the confirmation of his dismissal. On this note the cases of Msindo and Ngobese are in the context of the third respondent's case not an appropriate bench mark to argue whether the applicant applied the rule consistently.

[10] What is of utmost importance in review applications is whether the decision of the arbitrator is so unreasonable to a point that no reasonable decision maker could reach the same. The Constitutional Court has in its enunciation of the test for review of an arbitration award in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[4], with no hesitation, moved towards an approach that interference with decisions of arbitrators should only be carried out if such a decision would bring about an unfair result. This was accordingly

[2] Ibid at para 29.
[3] *National Union of Mineworkers obo Botsane v Anglo Platinum Mine* (Rustenburg Section) (2014) ILJ 2406 (LAC) at paragraph 25.
[4] [2007] 12 BLLR 1097 (CC).

taken further by the Labour Appeal Court in *Fidelity Security Services v CCMA and Others*[5] where the following was said:

> "It will often happen that, in assessing the reasonableness or otherwise of an arbitration award or other decision of a CCMA commissioner, the Court feels that it would have arrived at a different decision or finding to that reached by the commissioner. When that happens, the Court will need to remind itself that the task of determining the fairness or otherwise of such a dismissal is in terms of the Act primarily given to the commissioner and that the system would never work if the Court would interfere with every decision or arbitration award of the CCMA simply because it, that is the Court, would have dealt with the matter differently. Obviously, this does not in any way mean that decisions or arbitration awards of the CCMA are shielded from the legitimate scrutiny of the Labour Court on review."[6]

[11] The test for review was interpreted further in *Herholdt v Nedbank Ltd and Others*[7] wherein the Supreme Court of Appeal had this to say:

> "In summary, the position regarding the review of CCMA awards is this: A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in s 145(2)*(a)* of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2)*(a)*(ii), the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable."[8]

[12] In *Goldfields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation Mediation & others*[9] the Labour Appeal Court cautioned

[5] [2008] 3 BLLR 197 (LAC).
[6] Ibid at para 98.
[7] [2013] 11 BLLR 1074 (SCA).
[8] Ibid at para 25.
[9] [2014] 1 BLLR 20 (LAC).

against the segmented way of determining review applications, this aspect was dealt with in paragraph 18 as follows:

> "In a review conducted under s145(2)(a)(c) (ii) of the LRA, the review court is not required to take into account every factor individually, consider how the arbitrator treated and dealt with each of those factors and then determine whether a failure by the arbitrator to deal with one or some of the factors amounts to process-related irregularity sufficient to set aside the award. This piecemeal approach of dealing with the arbitrator's award is improper as the review court must necessarily consider the totality of the evidence and then decide whether the decision made by the arbitrator is one that a reasonable decision-maker could make."

Evaluation

[13] When considering the parties' submissions, it certainly appears that the third respondent is looking at having the rule 11 application considered with a view of disposing this matter for reasons pleaded in the said application. I am of the view that it will not be in the interest of justice to overlook the review application that was ready for determination on its merit in favor of disposing the matter on technicalities. Proceeding with the review application will under the circumstances be the most appropriate way of dealing with this matter. It appears without any doubt in the arbitration award that the second respondent saw overwhelming mitigating factors in the third respondent's case, specifically that the applicant was aware that the third respondent was not feeling well and that the canteen was an accident free zone.

[14] In view of the test for review being well established as pointed out in the above authorities, for the Court to interfere with the decision of the arbitrator, such decision should be so unreasonable to the point that no reasonable decision maker could reach[10]. What deserves scrutiny is the chairperson's approach not to consider aggravating and mitigating factors prior to taking decision to dismiss the third respondent. His sole reliance on the plain reading

[10] Id fn 4 at para 110.

of the rule, that as long as the commission of misconduct is established, a sanction of dismissal should follow has regrettably failed the applicant in terms of arriving at a conclusion whether the dismissal was an appropriate sanction or otherwise. The disciplinary hearing chairperson was supposed to hold a separate enquiry post the guilty finding. The chairperson acted in derelict of his primary duty of determining the appropriate sanction. This resulted in the applicant's failure to properly conduct this enquiry to weigh up the mitigating factors as against the aggravating factors has certainly resulted in an unfair sanction.

[15] When taking into account that Shibiri at some point during the arbitration proceedings admitted to being approached by the third respondent about his health condition at the commencement of the shift, his subsequent denials do not assist the applicant's case. This is in view of the third respondent having been corroborated by Msindo that Shibiri was indeed approached by the third respondent about his health condition on the day but that was brushed off by Shibiri.

[16] Furthermore, in Shibiri's own version, being in the canteen for a 15 minute warm up session was an acceptable practice and these sessions were often overran by the employees. As a result, the applicant had tolerance of thirty-minute period and some times more than that. Proper consideration of the mitigating factors would have most likely revealed that the third respondent, to a certain extent, was found sleeping during the time set aside for regaining body heat in the canteen. Secondly, that the third respondent was not feeling well and Shibiri was aware of this. In the presence of mitigation factors which the disciplinary chairperson did not make any effort to consider, together with the totality of facts placed before the second respondent, his decision in the award cannot be found to be unreasonable.

[17] In this regard I see no reason why the second respondent's award should be interfered with. The applicant's review application is under these circumstances bound to fail. Regarding costs, considering the law and fairness it will not be appropriate to make a cost order particularly where the

parties are facing restoration of employment relationship in terms of the arbitration award.

[18] In this premises, I make the following order:

Order

1. The application is dismissed.

2. There is no order as to costs.

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M. M. Baloyi

Acting Judge of the Labour Court of South Africa

Appearances:

For the applicant: Mr K Mmuoe of Schultz Mmuoe Incorporated

For the third respondent: M V Bayi of Bayi Attorneys