IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case No: JR 488/15

In the matter between:

STER KINEKOR THEATRES – a division of

PRIMEDIA (PTY) LTD **Applicant**

and

L. MTIYA *N. O* **First Respondent**

COMMISSION FOR CONCILIATION MEDIATION

AND ARBITRATION **Second Respondent**

ECCAWUSA obo JACQUELINE MPHONYANA

MOKUWA **Third Respondent**

Heard: **22 August 2019**

Delivered: **14 January 2020**

JUDGMENT

TLHOTLHALEMAJE, J

Introduction:

[1] The applicant (Employer) seeks an order in terms of the provisions of section 145 of the Labour Relations Act (LRA)[1], to review and set aside the arbitration award dated 26 February 2015 issued by the first respondent (the Commissioner) acting under the auspices of the Commission for Conciliation Mediation and Arbitration (CCMA). The Commissioner had found that the

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[1] Act 66 of 1995 (as amended)

dismissal of Ms Mokuwa (The Employee) was substantively unfair on account of inconsistent application of the rules and discipline. The review application is opposed by the third respondent (ECCAWUSA) acting on behalf of the Employee.

[2] The background to this dispute is summarised as follows;

2.1 The Employee was employed as a Cinema Controller with effect from 1 May 2010, and was based at the Employer's premises in Cradle Stone Mall. On 23 October 2014 the Employee was called to appear before a disciplinary hearing to answer to allegations of gross negligence or gross dishonesty, and breach of standard of the Employer's policies and procedures.[2]

2.2 In her findings dated 11 November 2014, the chairperson of the disciplinary hearing, Ms Precious Sindi Mthiya[3] of Labournet, found the Employee guilty of gross negligence and breach of the standard policies and procedures, and recommended the sanction of a dismissal.

2.3 Aggrieved by the dismissal, the Employee as assisted by ECCAWUSA referred an unfair dismissal dispute to the CCMA. When attempts at conciliation failed on 8 December 2014, the dispute was then referred for arbitration.

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[2] Index to record page 149
"…
Nature of Complaint:
2.1 **Gross negligence or gross dishonesty** in that on the 20th September 2014 you failed to perform your duties with the proper care required in that the drop was loaded on the system at about 12:23, and it was not dropped at a reasonable time after it was registered on the system. There is 1 money bag missing, and this caused the company to suffer a loss of about R1000.00
2.2 **breach of standard Ster Kinekor policy and procedure** in that:
a. You failed to drop the money in the safe within a reasonable time after it was registered on the system;
b. Application and the manager should have been present when the money was dropped into the safe;
c. you left the key of the safe inside of the safe for some time on 20 September 2014.
…"

[3] Incorrectly referred to in the transcribed record as 'Mathe'.

[3] At the arbitration proceedings before the Commissioner, the Employee only challenged the substantive fairness of the dismissal, and in particular, inconsistency in the application of the rule and sanction. The allegation against the Employee was that on 28 September 2014, a discrepancy or a shortfall in the amount of R1000 (One Thousand Rand Only) was identified at a cinema where she was stationed. It was further alleged that she, together with another cashier (Ms Nthabiseng Phakathi), had failed to drop the money into the safe within a reasonable period in direct breach of the Employer's policies and procedures. Similar charges were preferred against Phakathi, and separate disciplinary enquiries were held with Mthiya as chairperson in both. Phakathi was only issued with a final written warning, on the basis that she had occupied a junior position of responsibility compared to that of the Employee.

[4] The Employer at the arbitration proceedings relied solely on the evidence of Mthiya to demonstrate that the dismissal of the Employee was substantively fair. Mthiya's evidence before the Commissioner was that:

4.1. Phakathi reported to the Employee and was under her supervision. The procedure as she understood it was that the Employee as Controller was responsible for collecting all the proceeds from the cash points and for dropping it in a safe within a reasonable period. A reasonable period was regarded as five minutes from the time that the cash was recorded into the Employer's system.

4.2. Mthiya's view was that the conduct of the Employee warranted the sanction of dismissal on the grounds that she occupied a managerial position, whilst the position of Phakathi was subordinate to that of hers. There was further evidence that the Employee had instructed Phakathi to return to her stock taking tasks which had resulted in the latter not having control over what had transpired at the cash drop area. The procedures required that the two of them ought to be together at all material times until the cash was safely deposited in the safe.

4.3. Mthiya testified that the onus was greater on the Employee to follow standard procedures, as she was in a managerial position, as compared to a junior employee like Phakathi. She further testified that the Employee must have been aware or ought to have been aware of the standard procedures and the need to follow them.

4.4. The misconduct according to Mthiya was aggravated by the fact that the Employee had instructed Phakathi to go back and resume her stock-taking tasks, and also by the fact that the Employer had suffered a financial loss.

4.5. Under cross-examination, it was put to Mthiya that there was no written policy in regards to the timing of the cash in the drop safe. Her contention however was that there was a common policy and practice that required that the cash be dropped within the five minutes' period. She contended that this was confirmed by witnesses in the disciplinary hearing.

4.6. It was further put to her that it was only after the Employee was dismissed that the Employer had subsequently introduced the directive that the cash collected from the cashier should be dropped within a five-minute period. She disputed that version, and maintained that the common practice had always existed.

4.7. Mthiya further conceded that Phakathi and the Employee were charged with the same or similar misconduct. She however maintained that the Employee was treated differently on the basis that she held a more senior position, and further that it was the evidence of Phakathi at the disciplinary hearing that she was given instructions by the Employee to leave the drop area and to return to her stock-taking duties, rending her helpless in respect of having control.

[5] The Employee's evidence before the Commissioner was that;

5.1 On 20 September 2014, she was the only Controller on the shift, and she was required to cash drop and spot check Phakathi at the same time. She had dropped R1000.00 and then continued with her spot check and stock counting. Together they had then captured the stock on the system. She then took her float of R200.00 from Phakathi and they then went to the cash office to drop safe. She had two money bags with her, one containing the float and the other containing R1000.00, which Phakathi had to drop. Having entered the cash office to perform the drop, she had opened the drop safe shutter and put in the money bag with R1000.00 in the safe. She thereafter went to her individual safe to drop off the money bag with her float.

5.2 She conceded that she took longer to drop the cash, but testified that this was due to the reason that she was required to do a spot check first. She further testified that there was no rule or policy in regards to how long she should take the drop and that it depended on how quick she could do it.

5.3 She further conceded that she had left the safe key inside the safe, and her explanation was that she simply forgot about the keys.

5.4 Under cross-examination, she confirmed that her duties entailed giving stock and float to cashiers, securing the assets of the Employer including its cash, to brief and supervise front line staff, and to perform the tasks of a manager in his absence. She conceded that she occupied a managerial position as a Controller, and that she was aware of the Employer's policies in regards to cash and stock variance. She also conceded that she was responsible for making sure that there were no cash variances.

<u>The Commissioner's award:</u>

[6] The Commissioner in finding that the dismissal of the Employee was substantively unfair made the following observations and conclusions:

6.1 Mthiya's version that the Employee was dismissed rather than being issued with a final warning as was the case with Phakathi ought to be rejected, as both of them were equally responsible for the handling of cash as per the procedures, were charged with the same offence, and further that the only difference was that the Employee had left the keys inside the safe for some time on 20 September 2014.

6.2 The Employee was reasonably aware of the procedures she ought to have followed with regards to stock variance and banking procedures. The Stock Variance policy provided that for Multi Skilled Cashiers, and Controllers/Supervisors, a stock variance of R50.00 was dismissible. The policy also had a zero tolerance for cash variances irrespective of amounts for Controllers and Supervisors.

6.3 Since in relation to the charges the variance was above R50.00 for both the Employee and Phakathi, the Employer's contention that the Employee was treated differently because of her seniority ought to be rejected, as both charges were equally serious and dismissible. A different outcome could have been reached had Phakathi also been dismissed, especially since the Employer had suffered a financial loss as a result of the Employee's and Phakathi's conduct.

<u>The legal framework and evaluation:</u>

[7] The applicant seeks to have the arbitration award reviewed and set aside on a variety of grounds including that the Commissioner failed to apply the principles applicable to inconsistency by failing to conduct a proper enquiry, and that she had simply adopted a singular approach by stating that both the Employee and Phakathi were charged with the same misconduct. It was further submitted that the Commissioner was fixated on the wording of the charges rather than placing emphasis on the substance of the misconduct.

[8] The test on review is trite. An applicant in review proceedings must establish that the result arrived at by the Commissioner was unreasonable or that her decision is one that falls outside the band of decisions to which a reasonable decision-maker could come on the available material. Furthermore, it is now accepted that the enquiry is whether despite the Commissioner's reasoning, it can be said that the result is nonetheless capable of justification on the available material. In the end, material errors of fact on the part of the

Commissioner, as well as the weight and relevance to be attached to particular facts or a failure to have regard to particular facts are not in themselves sufficient grounds for review. Their effect must be as such as to render the outcome unreasonable[4].

[9] In this case, the Commissioner accepted that the Employee did not deny the allegations against her, and that the only issue in contention was the consistent application of the rules and discipline. To the extent that the Employee did not take issue with these findings, it is correct as pointed out on behalf of the Employer, that the primary issue is whether the Commissioner properly applied her mind to the principles applicable to inconsistency where such a defence is raised.

[10] The principles to be considered when a plea of inconsistency is raised are fairly trite. At the core of the parity principle is that discipline should not be arbitrary and unfair[5]. In *Conmed Health CC v Bargaining Council* for the *Chemical Industries and Others*[6] , it was held that the parity rule does not take away the right of the employer to impose different sanctions on employees who were involved in the same act of misconduct; that the differential sanctions do not automatically lead to the conclusion that the dismissal was unfair; and that the fairness of the dismissal has to be determined on the

[4] *Gold Fields Mining Gold Fields MiSA (Pty) Ltd (Kloof Gold Mine) v CCMA & others* [2014] 1 BLLR 20 (LAC)

[5] See *NUMSA v Henred Fruehauf Trailers (Pty) Ltd* (1994) 15 *ILJ* 1257 (A); *SA Commercial Catering and Allied Workers Union and Others v Irvin and Johnson Ltd* (1999) 20 ILJ 2302 (LAC) at para 29 where it was held;

> '... Consistency is simply an element of disciplinary fairness .... Every employee must be measured by the same standards .... 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.... 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. ...'

[6] (2012) 33 ILJ 623 (LC)

basis of whether the employer, in imposing differential sanctions, acted unfairly. Fairness in this regard involves a determination of whether there was an objective and fair reason for imposing different sanctions for misconduct arising from the same offence[7]. This approach is in line with *Cape Town City Council v Mashito*[8], where it was stated that;

> "Fairness, of course, is a value judgement, to be determined in the circumstances of the particular case, and for that reason there is necessarily room for flexibility, but where two employees have committed the same wrong, and there is nothing else to distinguish them, I can see no reason why they ought not generally to be dealt with in the same way... Without that, employees will inevitably, and in my view justifiably, consider themselves to be aggrieved in consequence of at least a perception of bias."

[11] Taking into account that inconsistency is but one factor amongst others to be taken into account in determining the fairness of the dismissal, and that it is by no means decisive of the outcome of that determination[9], I am in agreement with the submissions made on behalf of the Employer that the Commissioner clearly considered the issue of inconsistency as a stand-alone factor, to the exclusion of everything else. That approach in my view rendered the arbitration award reviewable. Once the Commissioner had accepted as she had done, that indeed the misconduct in question was committed, and that it was serious, there was clearly an obligation on her to consider all the other factors when determining the appropriateness of the sanction, including those identified in *Sidumo* [10]

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[7] At para 8

[8] (2000) 21 ILJ 1957 (LAC) 1961 A-F

[9] *Bidserv Industrial Products (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2017) 38 ILJ 860 (LAC) at para 31.

[10] *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] 12 BLLR 1097 (CC); 2008 (2) SA 24 (CC) ; (2007) 28 ILJ 2405 (CC); 2008 (2) BCLR 158 (CC), where it was held;

> "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.

[12] In this case, the Employee had conceded that she had occupied a fairly senior position, which came with immense responsibilities. She understood and acknowledged the policies and procedures that were in place, and further appreciated the reason why these were put in place.

[13] Phakathi on the other hand was the Employee's subordinate and given her position and responsibilities, it can be accepted that the Employee had an even more burden to apply and comply with the policies and procedures, particularly when it came to the handling of cash, and to ensure that her subordinates did the same Clearly that on its own was a distinguishing feature, which the Commissioner ignored.

[14] The other consideration is that the allegations in question were not denied, which implied that the Employee had been negligent, and had also breached existing policies and procedures. The Employee had conceded that she had left the safe key inside the safe, and clearly her excuse that this was attributable to mere forgetfulness is not satisfactory, given the consequences of that conduct. Notwithstanding the fact that the Commissioner had acknowledged that the issue of leaving the safe key in the safe is something that the Employee had conceded to, again, she (Commissioner) had ignored that distinguishing factor.

[15] The Employer's Cash and Stock Variance policy provided that any variance on the part of Controllers and Supervisors was a dismissible offence in the light of the policy of zero tolerance for cash variance. The Commissioner had accepted that the misconduct in question, *albeit* committed by both the Employee and Phakathi, was serious and dismissible particularly since there was a loss of R1000.00. Once the Commissioner had accepted these facts, and in particular, the seriousness of the misconduct, clearly there was an obligation to look at the distinguishing factors between the Employee and the Employer. Other than the issue of seniority, the Employee as Controller was responsible for the overall cash takings of all cashiers, cash ups and cash

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

drops. Thus, there was a difference in responsibilities. To the extent that the Employee negligently failed to perform these duties, the mere fact that both she and Phakathi were charged with the same offences should not have been the end of the enquiry.

[16] It is therefore not correct as argued on behalf of the Employee, that the Employer did not demonstrate and convince the Commissioner that there were differences in the personal circumstances of the Employee and Phakathi, or of the severity of the misconduct in question and/or any other basis. Those differences were pointed out and the Commissioner had either ignored or rejected them without any reasonable justification.

[17] In summary, the Employer was entitled to impose different penalties on the Employee and Phakathi despite the fact that they had committed the same misconduct. It was correctly argued on behalf of the Employer that the Employee's case in regard to inconsistency was not based on any discernible bad faith, discrimination or other ulterior motives on the part of Mthiya. Thus, once the distinguishing features between the Employee and Phakathi were glaring and undisputed, this provided a fair and objective basis for differentiation. Thus, any argument that such differentiation was arbitrary or capricious was bound to fail. It follows that since the Commissioner only had regard to one factor of inconsistency to the exclusion of other important considerations, it cannot be said that the decision arrived at in the light of the available material, falls within a band of reasonableness. Accordingly, the award ought to be set aside.

[18] In the light of the above conclusions and the material placed before the Court, no purpose would be served by remitting the matter back to the CCMA for a re-hearing. It is therefore my view that a substitution is the most appropriate order to be made. I have further had regard to the issue of costs, and I am of the view that the requirements of law and fairness dictate that no such an order should be made. Accordingly, the following order is made;

Order:

1. The arbitration award dated 26 September 2016 under case number GAJB 26820-14 issued by the First Respondent acting under the auspices of the Second Respondent is reviewed, set aside and substituted with the order that;

   'The dismissal of Ms Jacqueline Mphonyana Mokuwa was substantively fair'.

2. There is no as to costs.

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E. Tlhotlhalemaje

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: A.J. Postuma of Snyman Attorneys

For the Third Respondent: Adv. M.M Mafojane, instructed by Nkosi Shabalala Incorporated