



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case no: JR487-22

In the matter between:

**WEG TRANSFORMERS AFRICA A DIVISION
OF ZEST WEG MANUFACTURING (PTY) LTD**

Applicant

and

**METAL ENGINEERING INDUSTRIES
BARGAINING COUNCIL**

First Respondent

COMMISSIONER THEMBA. M CEDA N.O.

Second Respondent

**NATIONAL UNION OF METAL WORKERS
OF SOUTH AFRICA (NUMSA)
OBO ABRAHAM MCHUNU**

Third Respondent

Heard: 22 May 2024

Delivered: 30 January 2025

JUDGMENT

MOLOTSI, AJ

Introduction

[1] This is an application for review in terms of section 145 of the Labour Relations Act¹ (LRA). The applicant is Weg Transformers Africa, a division of Zest Weg Manufacturing (Pty) Ltd, a manufacturing company employing approximately 180 employees. The arbitration proceedings were held under the auspices of the first respondent, the Metal Engineering Industries Bargaining Council (Council). The second respondent, Themba M Ceda (commissioner) issued an arbitration award under case number: MEGA57985. The arbitration award was issued on 28 January 2022.

[2] The commissioner in the arbitration award made a finding that the dismissal of the third respondent, Abraham Mchunu (employee), was substantively unfair and ordered the applicant to reinstate the employee to the position that he occupied before his dismissal. The finding of substantive unfairness was based on the fact that the commissioner concluded the applicant applied discipline inconsistently.

[3] The applicant approached this Court with the review application on 10 March 2022.

The relevant facts

[4] The employee was employed by the applicant on 16 April 2012 and retrenched in 2016. The employee was employed again on 25 January 2017. At the time of his dismissal, the employee was employed as an assembler in the winding department.

[5] The employee was charged with the following:

‘Gross negligence, endangering your life as well as the lives of your fellow employees, and failure to observe section 14 of OHSA in that, on 15 July

¹ Act no 66 of 1995, as amended.

2021 whilst in the process of fitting a coil over the core the project Sable 8500KVA, you performed an unsafe action without ensuring that the coil was properly secured. This resulted, the coil to detached, hit a fellow employee and dropped to the ground. The employee got hurt and the coils damage was estimated at approximately R149 000 in rework and material costs.'

[6] The employee was subjected to a disciplinary hearing which was held on 26 and 27 August 2021. The employee was found guilty of the charge and dismissed on 27 August 2021. The employee appealed the sanction of dismissal on 9 September 2021 on the basis that the sanction was too harsh and that the applicant had not applied discipline consistently. The employee's appeal was unsuccessful.

[7] The employee, assisted by his trade union, NUMSA, referred an unfair dismissal dispute to the Council. The dispute was finally resolved by means of arbitration. Two arbitration awards were issued. The arbitration award, which is the subject of this review application, was issued on 28 January 2022.

[8] During the arbitration proceedings, the employee did not dispute the procedural fairness of his dismissal. The employee challenged the substantive unfairness of his dismissal on the basis that the applicant applied discipline inconsistently. The employee pleaded guilty to the charge of gross negligence during the arbitration proceedings.

[9] Furthermore, during the arbitration, Mr. Simelane testified on behalf of the employee. His testimony was that in 2008, he committed a similar misconduct in relation to the misconduct which the employee was charged and dismissed for. He was, however, not charged by the applicant.

[10] The applicant, during the arbitration proceedings, led the evidence that it investigated the allegations made by Mr. Simelane and found no record that the incident involving Mr. Simelane ever took place.

Grounds of review

[11] The applicant submitted that the commissioner irrationally and unreasonably came to the conclusion that the dismissal of the employee was substantively unfair. The commissioner acted unreasonably, committed material errors and misdirected himself by failing to consider that the onus to prove inconsistent application of discipline rested on the employee and that the employee failed to satisfy the onus.

[12] The evidence submitted by Mr. Simelane was unsubstantiated and clearly distinguishable in comparison to the employee's misconduct. The commissioner incorporated his own value judgement and came to conclusions based on unsubstantiated evidence which is evident by the commissioner's reasoning that the applicant "*had something to hide*" and that the applicant did not conduct the investigations in good faith with an intention to actually establish whether there were similar incidents in the past.

Submissions by the parties

[13] Mr. Du Randt on behalf of the applicant submitted that the commissioner's award was unreasonable in respect of the findings that the applicant did not thoroughly investigate the incident involving Mr. Simelane. The situation involving Mr. Simelane and the employee were not similar. The employee was guilty of gross negligence. The employee performed an unsafe action, without ensuring that the coil was properly secured, which resulted in the coil detaching, lightly injuring a fellow employee and causing damage to the applicant.

[14] The employee should have used two ratchet bells when he rigged the coil, but instead, he only used one ratchet belt and lifted it with the overhead crane. The employee lifted the coil with the overhead crane above his colleague, Sandile's head, whilst operating at a dangerous height of approximately two meters above ground. The damage caused by the employee amounted to R149 000. The coil weighed about two tons. The coil was severely damaged and had to be re-manufactured.

[15] In respect of Mr. Simelane, the coil fell and caused damage to an amount of R1 000. Mr. Simelane did not admit to any guilt regarding his conduct. In the Simelane matter, the coil did not hit a fellow employee, whereas, in the incident involving the employee, his colleague Sandile was injured.

[16] Mr. Du Randt submitted that he cannot say the 2008 incident involving Mr. Simelane took place. Even if the incident took place, it is not comparable to the incident involving the employee. The Simelane incident happened 14 years before the incident involving the employee and that two wrongs did not make it right. The commissioner failed to consider that the employee received training to perform his work.

[17] Mr. Manasoe on behalf of the third respondent submitted that the damages suffered by the applicant to the value of R149 000 was not proven during the arbitration proceedings. There was no evidence led that someone was injured as a result of the conduct of the employee. The Simelane incident which took place in 2008 was similar to the incident involving the employee.

[18] Mr. Manasoe further submits that the incidents are similar in that in both instances, the coil was damaged and no one was hurt. The employee admitted the charge levelled against him but challenged the substantive fairness of the dismissal based on inconsistent application of discipline. The applicant failed to challenge the evidence regarding the inconsistent application of discipline. The applicant failed to conduct a proper investigation regarding the Simelane incident which took place in 2008. Mr. Simelane was not interviewed by the applicant when it conducted the investigation regarding the 2008 incident. The applicant's witnesses were employed after the 2008 incident involving Mr. Simelane.

[19] Finally, the third respondent submits that once the inconsistent application of discipline is raised, it is up to the employer to challenge such evidence. The applicant's investigation did not cover the 2008 incident involving Mr. Simelane. Consequently, the commissioner issued a reasonable arbitration award. There was

no evidence led regarding the breakdown of the trust relationship between the applicant and the employee.

The arbitration award

[20] The commissioner in the arbitration award made the following findings:

[22] It would seem to me that the respondent had something to hide in this regard taking into account that it was brought to its attention that similar incident occurred and it was even brought to their attention during the hearing of the applicant.

[24] The manner in which the respondent handled the investigations with regard to similar incidents that occurred in the past was questionable taking even into account what the respondents second witness, Joseph Beukes, who testified that he was not aware of any similar incident. But despite stating that they conducted investigations and they did not find any incident that occurred in the past, he said during cross examination that the names were mentioned but he did not know of employees at that time.

[25] The testimony of Pringle and Beukers served to show that they did not conduct the investigation in good faith with an intention to actually establish whether there were similar incidents in the past and to find out reasons for not taking disciplinary steps.

[26] It would appear that the respondent deliberately opted to ignore that there was similar incident that occurred in the past because there seems to be no sound or valid reasons for failing to thoroughly investigate this incident when it was brought to the respondent's attention and names were mentioned. The respondent was evasive in this regard which seemed to shrug off or dismiss the incident by failing to give it the attention it deserved.

[28] In the light if the above [sic] I find on a balance of probabilities that the respondent acted inconsistently by dismissing the applicant when it was clear that a similar incident occurred and nothing was done about it...'

Evaluation

[21] The test for review is settled. In *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others*², the Labour Appeal Court held that:

‘In short: A reviewing 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 that is reasonable.’

[22] In *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)*³, the Court said:

‘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....’

[23] The employee admitted the charge of gross negligence. The commissioner appreciated the fact that the issue that he had to determine was whether the applicant applied discipline consistently. The employee’s case was that Mr. Simelane committed a similar offence and he was not charged nor dismissed by the applicant.

[24] Item 3 (6) of the Code of Good Practice: Dismissal⁴ provides that: “*The employer should apply the penalty of dismissal consistently with the way in which it has been applied to the same and other employees in the past, and consistently as between two or more employees who participate in the misconduct under consideration*”. Item 7 (b)(iii) of schedule 8 of the Code of Good Practice: Dismissal, states that “*the rule or standard has been consistently applied by the employer*”.

[25] This Court in *Southern Sun Hotel (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration & Others*⁵, said the following:

² [2013] ZALAC 28; (2014) 35 ILJ 943 (LAC) at para 16.

³ [2013] ZASCA 97; (2013) 34 ILJ 2795 (SCA) at para 25.

⁴ Schedule 8 of the LRA.

⁵ (2010) 31 ILJ 452 (LC) at para 10.

'The legal principles applicable to consistency in the exercise of discipline as set out in item 7(b)(iii) of the Code of Good Practice: Dismissal establish as a guideline for testing the fairness of a dismissal for misconduct whether 'the rule or standard has been consistently applied by the employer'. This is often referred to as the 'parity principle', a basic tenet of fairness that requires like cases to be treated alike. The courts have distinguished two forms of inconsistency – historical and contemporaneous inconsistency. The former requires that an employer apply the penalty of dismissal consistently with the way in which the penalty has been applied to other employees in the past; the latter requires that the penalty be applied consistently as between two or more employees who commit the same misconduct. A claim of inconsistency (in either historical or contemporaneous terms) must satisfy a subjective element – an inconsistency challenge will fail where the employer did not know of the misconduct allegedly committed by the employee used as a comparator (See for Example, *Gcwensha v CCMA & Others* [2006] 3 BLLR 234 (LAC) at paras 37- 38). The objective element of the test to be applied is a comparator in the form of a similarly circumstanced employee subjected to different treatment, usually in the form of a disciplinary penalty less severe than that imposed on the claimant. (See *Shoprite Checkers (Pty) Ltd v CCMA & Others* [2001] 7 BLLR 840 (LC) at para 3. Similarity of circumstances is inevitably the most controversial component of this test. An inconsistency challenge will fail where the employer is able to differentiate between employees who have committed similar transgressions on the basis of, *inter alia*, differences in personal circumstances, the severity of the misconduct or on the basis of other material factors.'

[26] The evidence of Mr. Simelane before the commissioner was that he damaged the coil but he was not charged. Furthermore, the evidence of Mr. Simelane was that the damage caused to the coil was R1 000 and that no one was hurt as a result of the damaged coil. Finally, that on the day in question in 2008, when he was working on the coil, the shoe moved slightly in and he tried to fix it, but it snapped and the coil fell.

[27] The evidence of Ms. Pringle, the HR manager, was that during their investigation of the incident involving Mr. Simelane, there were no incidents similar to the employee's incident which were reported to the applicant. The investigation went as far back as 2008. Mr. Beukes' evidence was that there were no records which showed the transgression involving Mr. Simelane.

[28] From the evidence before the commissioner, the applicant was clearly unaware of the incident involving Mr. Simelane. This should have been the end of the employee's challenge regarding inconsistent application of discipline. The fact that the applicant was unaware of Mr. Simelane's incident which took place in 2008, ought to have resulted in the employee failing in his challenge of inconsistent application of discipline by the applicant. One cannot refer to inconsistent application of discipline under the circumstances wherein the employer was not aware of the comparable incident.

[29] Mr. Simelane's incident, whether it occurred or not, was not similar to the employee's incident. This is based on the following considerations:

29.1 Mr. Simelane was not charged for the damaged coil. The employee was charged for gross negligence and dismissed for damaging the coil.

29.2 Mr. Simelane did not admit that he had committed misconduct whilst the employee admitted the charge of gross negligence.

29.3 The amount of damage to the coil is different. As per Mr. Simelane, the damage suffered to the coil was R1 000 and the damage caused to the coil as a result of the gross negligence of the employee was about R149 000.

29.4 The employee performed an unsafe action without ensuring that the coil was properly secured, he lifted the coil with the overhead crane above Sandile's head and Sandile was hit by the coil and was slightly dazed. The employee should have used two ratchet belts when he rigged the coil but he instead used one ratchet belt. In respect of Simelane, the shoe snapped and the coil fell.

29.5 Mr. Simelane never received a penalty which was less severe than the penalty of dismissal that the employee received.

[30] Accordingly, based on the fact that the applicant was not aware of the incident involving Mr. Simelane and that the incident of Mr. Simelane and the employee incident are not similar, the employee's challenge regarding the inconsistent application of discipline ought to have failed. The commissioner, therefore, committed gross irregularity and misconceived the nature of the inquiry, when he concluded that the applicant applied discipline inconsistently. The evidence during the arbitration did not support such a finding.

[31] The commissioner failed to properly apply the law regarding inconsistent application of discipline. He failed to appreciate that the Simelane incident and the employee's incident were not similar. This constituted gross irregularity on the part of the commissioner. There was therefore no historical inconsistent application of discipline by the applicant.

[32] The commissioner's finding that the applicant had something to hide was not only illogical but was quite bizarre and was not supported by evidence which was before him. The evidence of Ms. Pringle and Mr. Beukes was clear with respect to the investigation that they conducted regarding the incident involving Mr. Simelane.

[33] The fact that the applicant, as per the commissioner's finding, handled the investigation with regard to similar incidents that occurred in the past in a questionable fashion and did not conduct the investigation in good faith, did not prove that there was inconsistent application of discipline by the applicant.

[34] The investigation conducted by the applicant was not a *sine qua non* to a finding that there was inconsistent application of discipline by the applicant. The commissioner clearly elevated the investigation conducted by the applicant to be a significant factor under the circumstances wherein the said investigation could not have played any part in the determination of whether or not there was inconsistent application of discipline by the applicant. This conduct of the commissioner amounted to gross irregularity which materially affected the reasonableness of the outcome he reached.

[35] What the commissioner was required to do was to determine whether the incident of Mr. Simelane occurred and whether that incident was similar to the employee's incident which took place on 15 July 2021. He failed to do so instead, he focused on the investigation conducted by the applicant. This was an irrelevant consideration and resulted in an unreasonable outcome.

[36] In *Absa Bank Ltd v Naidu and Others*⁶, the Court said:

'However, it ought to be realized, in my view, that the parity principle may not just be applied willy-nilly without any measure of caution. In this regard, I am inclined to agree with Professor Grogan when he remarks:

"[T]he parity principle should be applied with caution. It may well be that employees thoroughly deserved to be dismissed for the fact that other employees happened not to have been dismissed for a similar offence in the past or because another employee involved in the same misconduct was not dismissed through some oversight by a disciplinary officer, or because different disciplinary officers had different views on the appropriate penalty".'

[37] In *Bidserv Industrial Products (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*⁷, the LAC held that:

'... Inconsistency is a factor to be taken into account in the determination of the fairness of the dismissal but by no means decisive of the outcome on the determination of reasonableness and fairness of the decision to dismiss.'

[38] The commissioner failed to heed the caution mentioned above in respect of the allegation of inconsistent application of discipline. The commissioner further elevated inconsistency to be a decisive factor in the determination of whether the dismissal was fair or not. This was a material error on the part of the commissioner and is sufficient enough for the award to be set aside.

[39] The commissioner simply accepted and made a finding on the inconsistent application of discipline, without examining whether the two incidents were similar

⁶ [2014] ZALAC 60; (2015) 36 ILJ 602 (LAC) at para 36.

⁷ [2017] ZALAC 4; (2017) 38 ILJ 860 (LAC) at para 31.

and whether or not the applicant was aware of Mr. Simelane's incident which occurred in 2008, some 14 years prior to the incident that led to the dismissal of the employee.

[40] The commissioner failed to compare the incident of Mr. Simelane to that of the employee or conduct any analysis regarding the two incidents, other than to focus on the investigation conducted by the applicant.

[41] The commissioner failed to properly evaluate the evidence before him and consequently came to a conclusion that a reasonable decision maker would not have arrived at. The arbitration award fell outside the band of reasonableness. The arbitration award must be reviewed and set aside.

[42] In the premises, I make the following order:

Order

1. The arbitration award signed by the second respondent on 20 December 2021 and issued on 28 January 2022 under case number: MEGA57985 is hereby reviewed and set aside.
2. The arbitration is remitted to the first respondent to be heard *de novo* before another commissioner other than the second respondent.
3. There is no order as to costs.

H Molotsi

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr Du Randt

Instructed by: Du Randt Du Toit Pelser Attorneys

For the Respondent: Mr. T. Manasoe

Instructed by: Letsholo Manasoe Inc