THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case No: JR742/2024

In the matter between:

FEMPOWER PERSONNEL (PTY) LTD	**Applicant**
and	
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	**First Respondent**
COMMISSIONER JAN LE FLEUR	**Second Respondent**
PULE RADITHEPA TLALE	**Third Respondent**

Heard: **26 September 2024**

Delivered: **This judgment was handed down electronically by circulation to the parties by email and publication on the Labour Court's website. The date for hand down is deemed to be 16:00 on 08 January 2025.**

JUDGMENT

MPHAHLANE, AJ

Introduction

[1] This is an application to review and set aside the arbitration award issued by the Second Respondent (the Commissioner) under case number GAVL4149-22 dated 14 September 2023, and the variation ruling of the Commissioner under the same case dated 12 October 2024, in terms of which the Commissioner found that the dismissal of the Third Respondent (the Employee) was procedurally fair but substantively unfair and awarded the Employee compensation in the amount of R214,143.48.

[2] The application is in terms of section 145, read with sections 158(1)(g) and 157(1), of the Labour Relations Act[1] (the LRA) and came before this Court on an unopposed basis. I must mention, however, that where a review application is not opposed, it does not follow that a Court of review shall exercise its review powers in the absence of grounds of review being proven, simply because the application is unopposed.

Factual background

[3] According to Lungelo Luthuli (Luthuli), the deponent to the founding affidavit, the Employee was employed by the Applicant on a fixed term contract commencing 10 October 2022 and ending 31 December 2022. However, according to the Commissioner's arbitration award, the Applicant's Accounts Manager, Mthunzi Twala (Twala), testified that the contract commenced from 25 August 2022. As will be shown below, the commencement date of the employment contract is not particularly material to the review application.

[4] The Employee was placed at the Sasolburg site of Sasol, the Applicant's client, as a miner. He worked 10 hours a day earning at an hourly rate of R221.16. The Employee was paid weekly.

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[1] No. 66 of 1995, as amended.

[5] On 25 November 2022, the Employee was dismissed by the Applicant for gross negligence following a disciplinary hearing. It was alleged that on 07 November 2022, the Employee cut 13.38 metres which was in excess of the 5 metres cut required by Sasol.

[6] Aggrieved, on 28 November 2022, the Employee referred an unfair dismissal dispute to the First Respondent, Commission for Conciliation, Mediation and Arbitration (CCMA), challenging the substantive fairness of the dismissal in that the rule or standard he transgressed has not been consistently applied by the Applicant.

[7] On 21 April 2023 and 04 September 2023, the dispute proceeded to arbitration before the Commissioner. The Employee presented evidence to the effect that miners employed by the Applicant and Sasol, often exceeded the required 5 metres and no one, except him, was disciplined for the transgression. The Employee presented a list of twelve miners, some of whom were the Applicant's employees, who the Employee alleged cut in excess of 5 metres and were never charged, let alone dismissed. The Third Respondent testified that he informed Twala about this practice, and further that the Applicant's management received daily reports from miners regarding the daily cutting. Therefore, the Applicant was aware that the miners often exceeded 5 metres.

[8] Twala, on the other hand, testified that he was informed about the transgression by the Sasol's mine captain. Twala further testified that he was not aware that other employees also cut in excess of the 5 metres requirement, but that the Applicant may have received this information from the shift boss.

[9] After hearing evidence, the Commissioner determined that the dismissal of the Employee was procedurally fair, but substantively unfair, and awarded the Employee compensation in the amount of R66,300.00, being, according to the Commissioner, six months' compensation calculated at a monthly salary of R11,050.00.

[10] The Commissioner found that the Employee's dismissal was substantively unfair because the Employee proved that the Applicant and Sasol were inconsistent in the application of the rule the Employee transgressed.

[11] Subsequently, the Employee applied for the variation of the award, that is variation of the amount of R66,300.00, on the basis that the Commissioner erroneously calculated the compensation on the salary scale of R11,050.00 per month instead of R11,050.00 per fortnight. The Applicant did not oppose the variation application, and the Commissioner accordingly varied the compensation amount to R258,558.15. The variation ruling is dated 12 October 2022.

[12] On 18 October 2023, the Applicant launched its own variation application, seeking the variation of the Commissioner's variation ruling dated 12 October 2022. The Applicant contended that *(a)* the compensation should have been based on 37.27 average weekly hours, and not 45 hours per week, and *(b)* the Employee should have been awarded not more than a month's salary as compensation.

[13] The Commissioner agreed to vary the weekly hours worked from 45 hours to 37.37 hours, but determined that compensation which was equal to six months' salary was appropriate. In the result, the total compensation amount was reduced to R214,143.48. The Commissioner's variation ruling is dated 12 April 2024.

[14] The Applicant seeks the review of this variation ruling and the arbitration award.

<u>Grounds of review</u>

[15] The Applicant's grounds of review are essentially that the Commissioner: –

15.1 committed a gross irregularity in that he failed to consider the submissions and documentary evidence presented by the Applicant and based his findings on speculation as well as hearsay evidence;

15.2 undertook the enquiry in an incorrect manner and committed misconduct in relation to the duties of the Commissioner as an arbitrator by failing to consider the submissions by the Applicant at all, as is evident from paragraphs 28 to 33 of the variation ruling;

15.3 committed a gross irregularity and misdirected himself in applying the wrong test insofar as the challenge for inconsistency is concerned;

15.4 exceeded his powers by finding that compensation equal to six months' salary is just and equitable in the circumstances; and

15.5 committed a gross irregularity and erred in considering irrelevant factors when awarding the Third Respondent six months' compensation.

<u>Evaluation</u>

Failure to consider the Applicant's submissions and documentary evidence and reliance on speculation as well as hearsay evidence.

[16] The Applicant avers that the only reason the dismissal was found not to be substantively fair was because the Employee alleged that the rule was not consistently applied in relation to twelve other miners. The Applicant contends that the Commissioner's finding was wholly based on speculation and hearsay evidence as the other miners were not called to testify and no documentary evidence was presented showing similar deviations.

[17] I do not agree that the Commissioner's finding was based on speculation. The Commissioner clearly relied on the direct evidence of the Employee, which was not controverted by the Applicant.

[18] I also do not agree that the Employee's evidence was hearsay, because the other miners the Employee referred to were not called to testify and no

documentary evidence was presented showing similar deviations. Section 3(4) of the Law of Evidence Amendment Act[2], defines hearsay as “evidence”, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence. It can hardly be said that the probative value of the Employee’s evidence depended on the credibility of other miners or documentary evidence. The Employee’s testimony regarding inconsistency was direct evidence the probative value of which depended upon the credibility of the Employee himself.

[19] Accordingly, this ground of review falls to be dismissed.

Failure to consider the submissions by the applicant

[20] The Applicant contends that it is evident from paragraphs 28 to 33 of the variation ruling that the Commissioner failed to consider the Applicant’s submissions.

[21] I do not follow the Applicant’s logic in respect of the basis of this ground. In paragraphs 28 and 29 of the variation ruling, the Commissioner sets out the relevant statutory provisions that empowers a Commissioner to vary an arbitration award. In paragraphs 30 to 32 of the variation ruling, the Commissioner sets out his determination of the compensation that must be paid to the Employee, effectively varying his variation ruling dated 12 October 2023, in so far as it relates to the calculation of the Employee’s salary.

[22] The determination by the Commissioner that the Employee must be paid compensation equal to six months’ salary, as opposed to one month’s salary, does not mean that the Commissioner did not consider the Applicant’s submissions. To the contrary, the fact that the Commissioner varied downwards the calculation of the Employee’s monthly salary, is indicative of the fact that the Commissioner considered the Applicant’s submissions.

[2] 45 of 1988.

[23] In the circumstances, this ground of review also falls to be dismissed.

Wrong inconsistency test

[24] The Employee challenged his dismissal on the basis that the Applicant applied the rule inconsistently. The Employee alleged that miners employed by the Applicant and Sasol often exceeded the required 5 metres and no one, except him, was charged and dismissed for the misconduct. The Applicant presented a list of twelve miners, some of whom were the Applicant's employees, who he alleged cut in excess of 5 metres, and were never charged. He asserted that the Applicant's management received daily reports from miners regarding the daily cutting. Therefore, the Applicant was aware that the miners often exceeded 5 metres.

[25] In response, Twala stated that he was informed by Sasol about the Employee's transgression. Twala insisted that he was not aware that other employees also cut in excess of the 5 metres requirement, but conceded that the Applicant may have received this information from the shift boss. This is a significant concession.

[26] The Commissioner found that the dismissal of the Employee was procedurally fair, but substantively unfair, on the basis that the Applicant was inconsistent in the application of discipline. The Commissioner held the view that the Employee proved that the Applicant and Sasol were inconsistent in the application of the rule. The Commissioner reasoned that:

> "23. It was common cause amongst the parties that the Applicant indeed exceeded the required 5-metre cut. It was further common cause that the other twelve miners including the Applicant also exceeded the required 5-metre cut, which included the client's employees.
>
> 24. The Applicant's witness testified that he was not aware of the other employees, neither did he go underground to check these reports. The Applicant's witness was called by the mine captain when the Applicant exceeded the 5-metre cut on 07 November 2022.

25. The Applicant's witness thinks that the Applicant may have received this report on bundle C from the shift boss. This clearly indicates the shift boss was aware that this was a norm to exceed the required cut of 5 metres.

26. The Applicant did not investigate after the arbitration was adjourned on 21 April 2023 and verify why other employees were not charged for the same offence. The Applicant's defence was that the inconsistency was only raised at arbitration and not at the disciplinary hearing. I find this as an extremely poor excuse from the Applicant.

27. In the matter of *SAPS v SSSBC and Others (2011) ILJ 715 (LC),* the Court, per Langrange J, restated the applicable approach in matters where inconsistency is raised in terms of onus and the following was said at paragraph 10. Once the employee has pertinently put the issue of consistent treatment in issue, the employer has a duty to rebut such allegations. As regards the onus, the onus of proving that the dismissal was fair, and thus of rebutting the allegations of inconsistency, is one which rests squarely on the employer.

28. The arbitration was adjourned on 21 April 2023 to enable the Respondent to rebut this allegation of inconsistency. The Respondent dismally failed to rebut this allegation on 04 September 2023.

[27] The substantive fairness of a dismissal for misconduct is assessed according to a number of criteria. These are set out in item 7 of the Code of Good Practice which provides that:

7. Guidelines in cases of dismissal for misconduct – any person who is determining whether a dismissal for misconduct is unfair should consider –

(a) whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to the workplace, and

(b) if a rule or standard was contravened, whether or not –

(i) the rule was a valid or reasonable rule or standard;

(ii) the employee was aware or could reasonably be expected to have been aware, of the rule or standard;

(iii) the rule or standard has been consistently applied by the employer, and

(iv) dismissal was an appropriate sanction for the contravention of the rule of standard.'

[28] The Applicant's contention is that the Commissioner committed a gross irregularity and misdirected himself in applying the wrong test insofar as the challenge for inconsistency is concerned. Mr Kungwimba, appearing for the Applicant, argued that the Applicant did not have oversight of all employees placed at Sasol's site, and therefore, it was not aware that other employees also exceeded the 5-metre cut. Therefore, the Commissioner's finding of inconsistency is contrary to the subjective test enunciated in *Southern Sun Hotel Interests (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*[3] *(Southern Sun)* where Van Niekerk J (as he then was) stated that:

> "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, Gowensha v CCMA & others [2006] 3 BLLR 234 (LAC) at paras 37 – 38)."

[29] Mr Kungwimba also submitted that the Employee should have raised the issue of inconsistency at the disciplinary hearing. Mr Kungwimba relied on the judgment in *Southern Sun* for this proposition.

[30] The test in evaluating whether or not to review an arbitration award of a Commissioner, is enunciated in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[4]*.* In terms of the Constitutional Court judgment, and those that followed thereafter, the question to answer in assessing whether to interfere with the arbitration award is whether the decision of the arbitrator is one which a reasonable decision maker could not reach.

[3] [2009] 11 BLLR 1128 (LC) at para 10.
[4] [2007] 12 BLLR 1097 (CC).

[31] In *Westonaria Local Municipality v South African Local Bargaining Council and Others*[5] *Molahlehi* J (as he then was) said the following:

> "[16] It is trite that in unfair dismissal disputes, the first task of the arbitrator is to determine whether the employee was guilty of the offence he or she is alleged to have committed. If it is found that indeed the employee was guilty as charged, the next task of the arbitrator is to enquire into the fairness of the sanction imposed by the employer. The onus to show that the employee was guilty of the offence and that the dismissal was fair rests with the employer. The employer also bears the duty to show that the trust relationship between it and the employee has broken down because of the offence committed by the employee."

[32] Mr Kungwimba emphatically submitted that the Applicant has a right to discipline its employees. In this regard, the Constitutional Court in *Sidumo (supra)* said the following:

> "[75] It is a practical reality that, in the first place, it is the employer who hires and fires. The act of dismissal forms the jurisdictional basis for a commissioner, in the event of an unresolved dismissal dispute, to conduct an arbitration in terms of the LRA. The commissioner determines whether the dismissal is fair. There are, therefore, no competing "discretions". Employer and commissioner each play a different part. The CCMA correctly submitted that the decision to dismiss belongs to the employer but the determination of its fairness does not. Ultimately, the commissioner's sense of fairness is what must prevail and not the employer's view."

[33] In the present case, the arbitrator's conclusion that the dismissal of the Employee was substantively unfair is based on what the Commissioner found to have been the inconsistent application of discipline by the Applicant. In *Gcwensha v CCMA and Others*[6], the Labour Appeal Court, in confirming its

[5] [2010] 3 BLLR 342 (LC) at 16.
[6] [2006] 3 BLLR 234 (LAC) at para 36.

decision in *SA Commercial Catering and Allied Workers Union and others v Irvin and Johnson Ltd*[7] held that:

> "Disciplinary consistency is a hallmark of progressive labour relations that every employee must be measured by the same standards."

[34] The Commissioner's finding on inconsistency is based on the evidence presented by the Employee which was not controverted by Twala. All Twala could say was that he was not aware about the transgressions of the other employees.

[35] It is recorded in the arbitration award that Twala was given the opportunity to investigate the Employee's allegations, but failed to do so. The Labour Court in *SAPS v SSSBC and others*[8] held that where the employee lays a credible factual basis for a claim of inconsistency, or where it is common cause that other employees had been treated differently, it is incumbent on the employer to advance a plausible explanation. The Applicant did not do so.

[36] Unlike Mr Kungwimba, I do not think that *Southern Sun* is authority for the proposition that an Employee can raise an inconsistency challenge at arbitration proceedings only if the Employee has done so at the disciplinary hearing. I am of the view that the Employee was within his rights to challenge his dismissal, which is the outcome of the disciplinary hearing, in the manner he did, that is at arbitration proceedings which, in any event, constitute a *de novo* hearing.

[37] Under the circumstances, I am of the view that the Commissioner cannot be faulted on any basis and his conclusion is clearly rationally connected to the reasons he gave, based on the material available to him.

[38] In the circumstances, I find no legal basis to interfere with the Commissioner's finding regarding inconsistency. As a result, the ground of review under discussion stands to fail.

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[7] (1999) 20 ILJ 2302 (LAC).
[8] (2011) 32 ILJ 715 (LC).

Compensation

[39] Having found that the Employee's dismissal was substantively unfair, the Commissioner ordered the Applicant to pay the Employee an amount equal to six months' salary in compensation.

[40] The Applicant avers that the Commissioner exceeded his powers in finding that six months' salary in compensation was just and equitable. The Applicant contends that the Commissioner ignored the binding judgment of the Labour Appeal Court in *Jorgensen v I Kat Computing (Pty) Ltd and others*[9] where the Court found that there was no cause to award an employee compensation more than his actual loss of income.

[41] The Employee was on a fixed term contract which expired on 31 December 2022, and was dismissed on 25 November 2022; that is one month and six days before the expiry of the contract.

[42] Section 194(1) of the LRA reads:

> 'The compensation awarded to an employee whose dismissal is found to be unfair either because the employer did not prove that the reason for dismissal was a fair reason relating to the employee's conduct or capacity or the employer's operational requirement or the employer did not follow a fair procedure, or both, must be just and equitable in all the circumstances, but may not be more than the equivalent of 12 months remuneration calculated at the employee's rate of remuneration on the date of dismissal.'

[43] The Labour Appeal Court has already observed that a determination of what is just and equitable is a difficult horse to ride.[10] However, I agree that the term '*just and equitable in all the circumstances*' implies that compensation must be fair to the unfairly dismissed employee as well as the employer.[11]

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[9] [2018] 3 BLLR 254 (LAC).
[10] See for example: *ARB Electrical Wholesalers (Pty) Ltd v Hibbert* (2015) 36 ILJ 2989 (LAC).
[11] Giles & Du Toit *Compensation for unfair dismissal* 124.

[44] In *Ledwaba v Laxness (Pty) Ltd,*[12] Moshoana J stated that:

> "Compensatory relief in terms of the LRA is not strictly speaking a payment for the loss of a job or the unfair labour practice but in fact a monetary relief for the injured feeling and humiliation that employee suffered at the hands of the employer. Put differently, it is a payment for the impairment of the employee's dignity."

[45] In the present case, it can hardly be said that the Employee's dignity was impaired, or that the Employee suffered humiliation at the hands of the Applicant.

[46] The Commissioner records in the arbitration award that he considered the period the Employee was unemployed, and the possibility of finding alternative employment. It is difficult to appreciate why the Commissioner took these two factors into consideration. To me, these factors are irrelevant given the fact that the Employee was left with approximately a month before the expiry of his contract with the Applicant, and there is no evidence to the effect that the Applicant intended to renew the Employee's contract or that the Employee had a legitimate expectation that his contract would be renewed. Thus, it would not be fair to the Applicant to award the Employee compensation equal to six months' salary on the basis alluded by the Commissioner.

[47] Clearly, the Commissioner failed to take into consideration the fact that the Employee's fixed term contract was actually a short-term contract, that is not more than 4 months, and there was only approximately a month left before its expiry. These, in my view, are relevant factors which the Commissioner should have taken into consideration. Failure to take these factors into consideration, and the taking into consideration of irrelevant factors, is an act of gross misconduct on the part of the Commissioner, warranting the review and setting aside of his arbitration award insofar as it relates to compensation.

[12] (JS571/16) [2018] ZALCJHB 377 (16 October 2018) at para 23.

[48] I agree with the Applicant that fairness dictates that the compensation that must be paid to the Employee should be limited to the balance of his fixed-term contract. Clearly, there was no cause for the Commissioner to award the Employee compensation of more than his actual loss of income.[13]

[49] The Applicant submitted that the matter be finally determined, as opposed to remitting it to the CCMA. I am of the view that remitting the matter to the CCMA would result in a further delay which would cause unjustified prejudice to the parties.

[50] Accordingly, I make the following order:

<u>Order</u>

1. The arbitration award and variation ruling dated 14 September 2023 and 12 April 2024 respectively issued by the Second Respondent under case number GAVL4149-22 are reviewed and set aside.
2. It is determined that the dismissal of the Third Respondent is procedurally fair but substantively unfair.
3. The Applicant is ordered to pay the Third Respondent an amount equal to one month's salary as compensation, to wit: R32,969.64, within 30 days of this order.
4. There is no order as to costs.

T. Mphahlane

Acting Judge of the Labour Court of South Africa

[13] See: *Jorgensen v I Kat Computing (Pty) Ltd and Others* (*supra*); *Toyota SA Motors (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* [2023] 5 BLLR 385 (LAC).

<u>Appearances:</u>

For the Applicant	:	E Kungwimba
Instructed by	:	Hunts Incorporated