



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case no: JR74/24

In the matter between:

BIDVEST PROTEA COIN (PTY) LTD

Applicant

and

**SOUTH AFRICAN TRANSPORT AND ALLIED
WORKERS UNION**

First Respondent

SPHAMANDLA MLUNGWANA & ANOTHER

Second Respondent

THANDIWE TSHAYANA N.O.

Third Respondent

**COMMISSION FOR CONCILIATION
MEDIATION & ARBITRATION**

Fourth Respondent

Heard: 6 November 2024

Delivered: 16 January 2025 (This judgment was handed down electronically by emailing a copy to the parties. The 16 January 2025 is deemed to be the date of delivery of this judgment).

JUDGMENT

RAMJI, AJ

Introduction

- [1] This is an application to review and set aside an arbitration award made by the third respondent (the Commissioner) in a dispute before the fourth respondent, the Commission for Conciliation, Mediation and Arbitration (the CCMA).
- [2] The applicant is Bidvest Protea Coin, a subsidiary of the Bidvest group of companies. The applicant employed the second respondents, Mr Sphamandla Mlungwana and Mr Hans Moetlo, as “Tactical Officers”. Mr Mlungwana was a grade C security officer employed in December 2014. Mr Moetlo was a grade D security officer employed in January 2014. They are referred by their names.
- [3] On 22 March 2023, the applicant dismissed Mr Mlungwana and Mr Moetlo for misconduct (going to sleep while on duty). Mr Mlungwana and Mr Moetlo, assisted by their trade union, the first respondent, the South African Transport and Allied Workers’ Union (SATAWU), referred an unfair dismissal dispute to the CCMA. Mr Mlungwana and Mr Moetlo’s case related to substantive unfairness. The allegation of substantive unfairness was narrow: SATAWU argued that (a) the applicant acted inconsistently in dismissing them whereas several other employees in previous incidents of sleeping on duty received lesser or no sanctions, and related to this, (b) the sanction of dismissal was inappropriate.
- [4] Mr Mlungwana and Mr Moetlo do not deny that they slept while on duty in the day in question. Their case is that, in being dismissed on a first offence, they

were treated differently from other employees who slept on duty for the first time.

- [5] The Labour Appeal Court (LAC) has consistently held that employees alleging inconsistency must make a concrete allegation, which includes identifying the comparator employees and clearly setting out why they should not have been treated differently to these employees.¹ SATAWU provided eight alleged comparators. The applicant knew of each case. The applicant contends that there was no inconsistency between its approach to the previous employees and to Mr Mlungwana and Mr Moetlo, and that dismissal was an appropriate sanction in their circumstances. Its case is that Mr Mlungwana and Mr Moetlo did not merely fall asleep accidentally as previous employees had done, but that they had both taken a decision to leave their posts to go to sleep, thus intending to deceive their employer.
- [6] A challenge to an employer's consistency in the application of discipline is not without difficulty for employees seeking to rely solely on this. The LAC in *ABSA Bank Ltd v Naidu and others (ABSA)*² made it clear that inconsistency is one factor to be considered in the fairness inquiry:

“Indeed, in accordance with the parity principle, the element of consistency on the part of an employer in its treatment of employees is an important factor to take into account in the determination process of the fairness of a dismissal. However, as I say, it is only a factor to take into account in that process. It is by no means decisive of the outcome on the determination of reasonableness and fairness of the decision to dismiss. In my view, the fact that another employee committed a similar transgression in the past and was not dismissed cannot, and should not, be taken to grant a licence to every other employee, willy-nilly, to commit serious misdemeanours, especially of a dishonest nature, towards their employer in the belief that they would not be dismissed. It

¹ *National Union of Mineworkers on behalf of Botsane v Anglo Platinum Mine (Rustenburg Section)* (2014) 35 ILJ 2406 (LAC) at para 39; *Bidserv Industrial Products (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and others* (2017) 38 ILJ 860 (LAC) at para 31.

² (2015) 36 ILJ 602 (LAC) at para 42.

is well accepted in civilised society that two wrongs can never make a right. The parity principle was never intended to promote or encourage anarchy in the workplace.”

- [7] The first question is whether the Commissioner’s decision that the applicant acted inconsistently was so unreasonable that no reasonable decision-maker could reach the same decision. A second question only arises if it is found that the Commissioner’s decision was so unreasonable: Besides setting the decision aside, what is the appropriate relief? Before dealing with these substantive issues, I explain hearing this application on an unopposed basis.

Unopposed roll

- [8] There is a notice of appointment of attorneys in the applicant’s bundle prepared for the Court. Although this notice is unstamped and therefore was not filed, it suggests that at some point (the notice of appointment is also undated), SATAWU appointed Siphwe Matenzhe Attorneys to represent it and/or Mr Mlungwana and Mr Moetlo in these proceedings (the notice does not specify). The notice of appointment specifically required that the applicant continue to copy the relevant SATAWU legal officer on all correspondence.
- [9] Instead of thereafter serving all further pleadings (including the transcript) on SATAWU’s attorneys and copying the SATAWU legal officers, the applicant’s attorneys continued to serve only on SATAWU.
- [10] I would ordinarily have taken issue with this, but given the following factors, considered it appropriate that the matter proceeded on an unopposed basis: (a) the notice of appointment was never filed; (b) the notice envisioned SATAWU officials continuing to receive further pleadings and they did; (c) directives and the notice of the first hearing date was sent to SATAWU officials and their attorney on 8 July 2024; and (d) when the matter was re-enrolled, the set down notice was again sent to SATAWU officials and to their attorney – this was notification on 31 July 2024 of the hearing on 6 November 2024. Neither SATAWU nor its attorneys filed a notice of opposition or

answering affidavit prior to 8 July 2024, or in the period between 8 July 2024 and the hearing in this Court on 6 November 2024.

- [11] The applicant alleges several gross irregularities committed by the Commissioner.

First ground of review: Misconceived the nature of the inquiry into inconsistency

- [12] The applicant's first complaint was that the Commissioner "*placed a heavier burden of proof*" on it. I understand this to relate to a complaint that the Commissioner misunderstood the nature of an inconsistency challenge. The applicant expanded on this irregularity in its founding affidavit, pointing out that the Commissioner failed to correctly apply the principles of consistency.

- [13] The award states:

"I believe that [the applicant] is taking the concept of 'every case is dealt with on its own merits' too far, because sleeping on duty is just sleeping on duty, unless there is prior notification to the employer that the employee might sleep because of certain medication he is taking. If the respondent takes the circumstances under which other employees slept on duty as mitigation, there is no justifiable reason why in the case of [the security guards], the circumstances were not taken into consideration."

- [14] This part of the award does suggest that the Commissioner failed to understand the nature of the inquiry that she was required to undertake. This paragraph means that if an affected employee advances mitigating factors to reduce their sanction, and the employer was persuaded by mitigating factors in previous cases, then the employer must be persuaded in all future cases by the mere existence of mitigating factors, and not by the content of those mitigating factors.

[15] Such an approach in cases where employees allege inconsistency would lead to absurd outcomes and the content of mitigating factors would cease to hold any value. The approach might also lead to employers consistently applying the maximum sanction and not having regard to mitigating factors (as they should), because if an employer shows any one employee leniency based on mitigating factors, it runs a serious risk of justifiable dismissals being set aside based on inconsistency. It is therefore the Commissioner who has taken the parity principle too far, taking the very position that the LAC in *ABSA* sought to guard against. It is also at odds with approach required of employers in the Code of Good Practice on Dismissals, which requires that each case of misconduct be dealt with on its own merits.

[16] Even though there is merit in the first ground of review, the Commissioner did appear to engage with the cases of alleged inconsistency that were presented during the arbitration in her award. Therefore, this misconceived approach to inconsistency alone is insufficient to conclude that the Commissioner's decision is so unreasonable that no reasonable decision-maker could reach it.³ It may be that the facts do not bear out in favour of the applicant and that it was not unreasonable for the Commissioner to find that the company applied discipline in an inconsistent manner, and to such an extent that the dismissal of Mr Mlungwana and Mr Moetlo was substantively unfair. I turn now to consider the reasonableness of the Commissioner's approach to the evidence before her.

Remaining grounds of review: Failure to apply the mind and to consider relevant facts

[17] The inquiry related only to the objective elements of an inconsistency challenge, which van Niekerk J (as he then was) explained as follows with reference to LAC decisions:

³ *Head of Department of Education v Mofokeng and others* (2015) 36 ILJ 2802 (LAC) at para 30.

17.1 Was another employee treated differently in the application of discipline for the same offence?

17.2 Did the employee commit the misconduct in similar circumstances?

17.3 Circumstances include “*personal circumstances, the severity of the misconduct or on the basis of other material factors.*”⁴

[18] The law requires that employees claiming inconsistency begin by providing the employer with a “*concrete allegation identifying who the persons are who were treated differently and the basis upon which they ought not to have been treated differently must be set out clearly.*”⁵ SATAWU presented documentary evidence of the following employees who were charged with sleeping on duty and either not sanctioned or issued a sanction lesser than dismissal:

18.1 Mr Simphiwe Nkosi, who was charged with sleeping on duty at his post (a bank branch), was given a final written warning for sleeping on duty with the requirement that he not sleep on duty again.

18.2 Ms Joyce Mabusa, who similarly charged and sanctioned.

18.3 Ms Nokuthula Mhlungu who was charged with “unintentional sleeping on duty and general poor performance” and was given a final written warning.”

18.4 Mr Makwetla who, allegedly found sleeping on duty, was also given a final written warning and told, “*Medication or not, in future zero tolerance for sleeping on duty... at the site of Bidvest Protea Coin.*”

18.5 Mr Lefuna Tshimenze, who allegedly found sleeping on duty by the applicant’s client, and was charged with bringing the company into disrepute and given a final written warning.

⁴ *Southern Sun Hotel Interests (Pty) Ltd v CCMA and others* (2010) 31 ILJ 452 (LC) para 10.

⁵ See: *NUM obo Botsane* (Id fn 1) at para 39.

18.6 An S Lira, who was dismissed for sleeping on duty, challenged the dismissal in the CCMA and whose matter was settled in S Lira's favour at the CCMA during conciliation, and without the matter ever proceeding to arbitration.

18.7 Mr Mzwakhe Mafilika who was found sleeping on duty on several occasions during his shifts over a five-day period, was dismissed, challenged the substantive fairness of his dismissal in the CCMA based on inconsistency and won. was dismissed, challenged it in the CCMA on inconsistency and won.

18.8 Mr Mbhele, who was "*found sleeping on duty... and is still working.*"

[19] The applicant's case was based on different circumstances and not a change in its approach to discipline for sleeping on duty, i.e. it does not claim that it has approached misconduct of sleeping on duty wrongly in the past.⁶ The sole question is therefore whether the Commissioner was so unreasonable in finding that the applicant acted inconsistently in respect of Mr Mlungwana and Mr Moetlo, compared to the employees listed above.

[20] For whatever reason, the applicant did not aver any irregularities concerning the Commissioner's analysis (or sometimes absence of analysis) of the cases of Mr Nkosi, Ms Mhlungu, S Lira and Mr Mafilika. I shall consider only the applicant's allegations of irregularities set out in its papers. These relate to: (a) Ms Mabusa; (b) Mr Tshimenze; (c) Mr Makwetja; and (d) Mr Mbhele.

Ms Mabusa⁷

⁶ See: *Cape Town City Council v Masitho and others* (2000) 21 ILJ 1957 (LAC) at para 14: "*While it is true that an employer cannot be expected to continue repeating a wrong decision in obedience to a principle of consistency..., in my view the proper course in such cases is to let it be known to employees clearly and in advance that the earlier application of disciplinary measures cannot be expected to be adhered to in the future.*" This is not applicable to the employer in this case.

⁷ The Commissioner calls Ms Mabusa, "Ms Mabunda" in the analysis of evidence.

- [21] The Commissioner rejected the applicant's evidence that Ms Mabusa's misconduct of sleeping on duty was mitigated by submissions that she had worked a double shift and that she was fatigued when she fell asleep on duty.
- [22] When the applicant presented its case, the Commissioner writes that its witness conceded that Ms Mabusa had not just completed a double shift (24 hours) when she fell asleep, but rather that she had worked a double shift earlier in the week. This suggests that the applicant had misled the Commission, or made an error in determining Ms Mabusa's sanction. Both the inference and the approach are incorrect. First, the chairperson of Ms Mabusa's disciplinary inquiry correctly noted that Ms Mabusa had worked a double shift two days prior to falling asleep, but still considered this a mitigating factor, which it is. Second, more importantly, the Commissioner's reasoning that Ms Mabusa therefore had enough time to recover from her double shift before falling asleep on duty a few days later is not only irrelevant, but also speculative.
- [23] The applicant, as with the other cases, argued that its approach was to give Ms Mabusa a second chance because of the physical circumstances under which she was found sleeping: In her chair, in her full uniform, implying that she had accidentally dozed off while being on duty. This was uncontested. The Commissioner did not consider this, not even commenting on the probabilities. I can only conclude that this relevant factor was ignored in favour of the irrelevant material set out above.

Mr Tshimenze

- [24] SATAWU testified that another employee, Mr Tshimenze was reported to the applicant by its own client to whom it was providing security services. The client took photos of Mr Tshimenze apparently sleeping under a tree, and the client described him as being asleep. The applicant's witness explained that the photographs did not clearly prove that Mr Tshimenze was sleeping – they showed he was reclined under a tree, and one could not see whether his eyes were closed. The client (that is, the person who photographed Mr Tshimenze)

refused to testify. As a result, the applicant gave Mr Tshimenze the benefit of the doubt. It did, however, issue him with a final written warning for bringing the company into disrepute, as a case of sleeping on duty could not be shown on a balance of probabilities.

[25] The Commissioner, unimpressed with the applicant's approach, stated the following:

"If the [the applicant] wanted to dismiss Tshimenze it would have properly investigated the matter and asked clear photographs from the client but failed to do that. Furthermore, for [the applicant] to say that they do not believe their own client leaves much to be desired. There is no plausible reason why [the applicant] could not believe the [Mr Mlungwana and Mr Moetlo's] explanation for their sleeping on duty if it believed the other employees" (sic).

[26] The Commissioner's findings relating to Mr Tshimenze are difficult to understand in relation to the inconsistency test. The Commissioner did not ask whether Mr Tshimenze's conduct was like the conduct in this case. The Commissioner instead reprimanded the applicant for: (a) not seeking out better evidence against Mr Tshimenze so that it could dismiss him if it "*wanted to*", even though there was no evidence that better evidence was available; and (b) not believing its own client. These findings suggest that to find in favour of Mr Mlungwana and Mr Moetlo, the Commissioner advocates dismissing all employees against whom there is *prima facie* evidence of sleeping on duty, without giving employees an opportunity to rebut that evidence.

[27] The Commissioner's conclusions relating to Mr Tshimenze are irrelevant to the question of inconsistency, as she failed to consider the similarities and differences between the two situations. This too is irregular.

Mr Makwetja

- [28] SATAWU testified that another employee, Mr Makwetja, was issued a sanction of final written warning for sleeping on duty at the reception area. The applicant testified that he was issued a final written warning for sleeping on duty by a different legal entity and not the applicant, and that the lesser sanction was because there was no evidence to confirm or suggest that Mr Makwetja premeditated sleeping on duty.
- [29] The Commissioner did not pronounce on whether discipline was applied inconsistently between Mr Mlungwana and Mr Moetlo, and Mr Makwetla. The apparent failure to apply her mind to the evidence of Mr Makwetja is grossly irregular given the centrality of comparators in the inconsistency inquiry – particularly those put forward by the employees who are alleging unfairness.
- [30] A key consideration in this case is the common cause fact that Mr Makwetla was disciplined by Bidvest Magnum (Pty) Ltd, and not the applicant in this case. Bidvest Magnum and the applicant subsequently merged. It is therefore a fact that Bidvest Magnum, a different company, employed and disciplined Mr Makwetja in the case in question. It may be that the applicant is hiding behind the distinct registered identities at the time or “technicalities” as was suggested during Mr Mlungwana and Mr Moetlo’s case, and that Mr Makwetla was indeed a suitable comparator. This was something that the Commissioner was required to weigh up and pronounce on. Instead, the Commissioner limited evidence and submissions on the corporate structure at the time that Mr Makwetla was disciplined.
- [31] The result of the Commissioner’s lack of interest in this relevant consideration is that there was no decision taken on whether Mr Mlungwana and Mr Moetlo were treated inconsistently compared to Mr Makwetla in law. This is irregular. If the Commissioner did not regard Mr Makwetla as a comparator because he was employed by Bidvest Magnum at the time of being disciplined, then that point should have been made – especially in the context of an award upholding an inconsistency challenge.

[32] SATAWU testified that a shop steward, Mr Mbhele, was not charged after being found sleeping on duty. The applicant testified that on the evidence available (a screenshot from inside the company vehicle), it accepted Mr Mbhele's submissions that he was not sleeping. It had nothing further – no video footage, no witnesses and therefore decided that it would not be able to make out a case on a balance of probabilities for sleeping on duty, and that it was a probability he was not sleeping or that he was yawning. The Commissioner found that *"it is clear from the photograph of Mr Mbhele which is presented in the arbitration hearing that he was sleeping and not yawning."* The Commissioner continued somewhat gratuitously, *"It is not clear what is the purpose of the Respondent's dash cam if they cannot rely on it."*

[33] As was the case with the Commissioner's approach to Mr Tshimenze, the Commissioner has failed to consider the relevant factors: These are the similarities and differences in the respective cases, and not her view on what the evidence showed in the comparator's case. It is not for the Commissioner to determine the fairness of disciplinary action in a case that has not been referred to the CCMA. This is not simply irrelevant. It is beyond the CCMA's jurisdiction to revisit a prior disciplinary process against a different employee in a different matter.

Mr Mlungwana and Mr Moetlo

[34] It was common cause that:

34.1 The applicant's disciplinary code states that for the offence of sleeping on duty, the sanction may be dismissal even for a first offence.

34.2 Mr Mlungwana and Mr Moetlo had no active final warnings issued to them prior to their dismissal.

34.3 Mr Mlungwana had taken medication. Mr Moetlo had not and he *"felt fine"*.

34.4 At Eastgate, Mr Mlungwana told Mr Moetlo that he was not feeling well and Mr Moetlo “figured” that they should leave their post and go to the applicant’s premises “*because that would be a safer place*” for them.

34.5 They then left their posts at Eastgate Mall and both drove to the applicant’s Kelvin office.

34.6 They arrived at the premises at approximately 01h00. They parked in a “*dark secluded spot*” where they were both found sleeping.

34.7 They were found sleeping after 02h00, close to 03h00.

34.8 They did not report leaving their posts to the Kelvin branch control room.

[35] The following facts are in dispute:

35.1 Whether Mr Mlungwana and Mr Moetlo at least reported their actions to their team leader or anyone else.

35.2 Whether it was their intention to sleep.

35.3 Whether the medication that Mr Mlungwana took made him sleepy.

Conclusion

[36] Prinsloo J in *Masstores (Pty) Ltd v Commission for Conciliation Mediation and Arbitration and Others*⁸ in explained the limited bases on which an arbitration award can be set aside for unreasonableness on review:

⁸ (JR 2007/2020) [2023] ZALCJHB 254 (18 September 2023) unreported, para 97.

“[A]n arbitrator’s finding will be unreasonable if the finding is unsupported by any evidence, if it is based on speculation by the arbitrator, if it is disconnected from the evidence, if it is supported by evidence that is insufficiently reasonable to justify the decision or if it was made in ignorance of evidence that was not contradicted.”

[37] In this case, there is a disjuncture between the evidence on record and the Commissioner’s account of it, and in some cases, her interpretation of the evidence. The Commissioner effectively ignored relevant factors to such an extent that the award is supported by evidence that is “*insufficiently reasonable to justify the decision*”.⁹ I therefore find that the Commissioner was unreasonable in concluding that the mitigating factors advanced by SATAWU and Mr Mlungwana and Mr Moetlo were “*not different to any excuses that were provided by other employees who received final written warnings.*”

[38] The Commissioner conducted only a perfunctory inquiry into the comparators presented to her, ignored relevant evidence, and based her decision on questionable and irrelevant evidence because she misconceived the legal inquiry required in inconsistency challenges. Instead of testing each comparator for similarity with Mr Mlungwana and Mr Moetlo, the Commissioner ignored one comparator and contested the outcomes of the disciplinary processes in respect of the other three comparators – even without a record of those processes before her. As a result, the Commissioner made a decision that no reasonable decision-maker could have reached on the evidence.

Appropriate remedy

[39] I have a large portion of the record before me. However, I do not believe it is appropriate to substitute the Commissioner’s finding with a finding of my own based on the record.

⁹ Masstores Ibid.

- [40] First, there are facts in dispute (listed above), and these remain in dispute because of the approach that the Commissioner took to this matter. A finding on the disputed facts depends on the credibility of the two dismissed employees – Mr Mlungwana and Mr Moetlo must be seen and heard, and it is difficult to determine their credibility from the record.
- [41] Second, the applicant states in its founding affidavit that video footage was shown of Mr Mlungwana and Mr Moetlo illustrating the circumstances under which they slept and why these were different from those of the other employees who slept on duty but who were not dismissed. I have not been provided with the video footage.
- [42] I have also considered the age of this dispute – it is approximately one year old, which is relatively young in labour law today. Balancing the limitations discussed above with the fact that this matter has not been dragged out over an extended period, I find that the interests of justice are best served if the dispute is heard afresh.
- [43] The purpose of the hearing would be for SATAWU to advance their comparators and for Mr Mlungwana and Mr Moetlo to explain their sleeping. An arbitrator may then determine: (a) whether there are factual similarities between the circumstances under which Mr Mlungwana and Mr Moetlo slept and the circumstances of the alleged comparators; (b) whether the similarities have resulted in the inconsistent application of discipline by the applicant; and (c) whether the inconsistency or inconsistencies, if any, is a factor that renders the dismissal of the Mr Mlungwana and Mr Moetlo substantively unfair bearing in mind the *ABSA* principles.

- [44] In the result the following order is made:

Order

1. The application is granted.

2. The arbitration award dated 11 December 2023 issued under case number GAJB11245-23 is reviewed and set aside.
3. The matter is remitted to the CCMA for arbitration afresh before a different commissioner.

B. Ramji

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Sonette Lancaster, Lancaster Kungoane Attorneys

For the Respondent: No appearance