



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JR 1199/21

In the matter between:

KHANYA IRVIN NJOBE

Applicant

and

**COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION**

First Respondent

NYIKO COLBERT MNGOMEZULU N. O.

Second Respondent

SIBANYE STILLWATER

Third Respondent

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court's website. The date for hand-down is deemed to be on 24 February 2025

JUDGMENT

TLHOTLHALEMAJE, J

Introduction and background:

[1] In this opposed application, the applicant seeks an order reviewing and setting aside the arbitration award issued by the second respondent (Commissioner) acting under the auspices of the first respondent, the Commission for Conciliation, Mediation and Arbitration (CCMA). In the award, the Commissioner had found that the dismissal of the applicant by the third respondent (Sibanye) was substantively fair.

[2] The applicant was employed by Sibanye as a Security Officer with effect from October 2008. He was dismissed in May 2020 following upon a disciplinary enquiry into allegations of misconduct. Although three charges of misconduct pertaining to two counts of gross negligence and breach of Sibanye's IT policies were preferred against him, he was dismissed based on one charge of gross negligence that took place on 24 July 2019.

[3] Following his dismissal, the applicant referred an unfair dismissal dispute to the CCMA. When attempts at conciliation failed, the dispute came before the Commissioner, who had issued the impugned award.

The evidence and the Commissioner's findings:

[4] Sibanye's operations at its plant include *inter alia*, the refinery of precious metals such as gold and platinum. Given the high-risk nature of Sibanye's operations, part of the applicant's responsibilities as a Security Guard and X-ray Operator (X-ray Viewer) was to ensure that all employees that exited the main entrance of the plant, were taken through an X-ray security inspection system. He was further required as X-Operator, to view the X-rays in order to detect and remove any illicit material that employees may have attempted to remove from the plant. Such material was detected through what is referred to as 'dark spot' after employees went through the X-ray system. Where any such 'dark spots' were detected, it was the responsibility of the applicant and his colleagues on duty to 'hold' the employee in question, conduct further searches and investigation to determine whether any material was on concealed.

[5] The applicant was alleged to have failed on 24 July 2019 and 7 August 2019 respectively, to 'hold' two other employees after they went through the X-ray system, which had indicated a 'dark spot' on their persons. The applicant is alleged to have failed to investigate and conduct physical searches on the two employees, to verify the cause of the 'dark spots'. At the time, the applicant was on duty with his colleague, Mr Eddie Shilaluke, who was also charged with gross negligence.

[6] Sibanye's witness, Mr Haasbroek is employed in its Protection Department. He had testified that the applicant's transgression was a pattern, after he was previously warned and counselled on no less than four occasions for the same offence. He further testified that Shilaluke was also disciplined for the same offence but was counselled on account of his clean disciplinary record.

[7] As I understood the applicant's case before the Commissioner, and as can be gleaned from his pleadings, it was his contention that that prior to the incident of July 2019, he had asked his manager to remove him from his post to another department as he was not 'in a good state of mind', and that his request was not acceded to. He had further testified that he was not made aware of the August 2019 incident, hence he had pleaded not guilty at the hearing since he was of the view that the charges were based on the same previous facts on which he was not found guilty.

[8] Against the above contentions, the applicant further added that Sibanye failed to apply discipline consistently as Shilaluke had committed the same offence but was not dismissed. He testified before the Commissioner that he ought to have been issued with a final written warning as he did not intentionally commit the misconduct; had made a request to be moved to another department, and had subsequently apologised to his manager for the incident.

[9] In the light of the evidence presented, the Commissioner accepted that both the applicant and Shilaluke had committed the same offence, and that at the internal disciplinary enquiry, the applicant was issued with a final written warning for breach of Sibanye's IT Policy as he had failed to log off his profile on 25 July 2019. The Commissioner further accepted that the applicant was not found guilty on the

incident of 7 August 2019 but was dismissed in respect of the incident of gross negligence that took place on 24 July 2019.

[10] The Commissioner accepted that there was no dispute regarding the offence that led to the dismissal, as the applicant had not denied the commission of that offence. The only issue which the Commissioner had to decide was whether Sibanye had applied discipline consistently, to the extent that Shilaluke was not dismissed for the same offence.

[11] The Commissioner having considered various authorities¹, concluded that Sibanye had demonstrated the reasons why different sanctions were applied to the applicant and Shilaluke, including their disciplinary records. Since the applicant had a history of counselling and warnings for the same offence, Sibanye could no longer trust him in his position given its responsibilities. To this end, the Commissioner concluded that the evidence suggested that progressive discipline applied in this case did not have the desired effects of changing the applicant's behaviour, and thus a sanction of dismissal was appropriate in the circumstances.

The grounds of review and evaluation:

[12] The applicant challenged the award on various grounds including that the Commissioner failed to consider the dispute surrounding inconsistent application of discipline; failed to assess the credibility of the witnesses; committed material errors; misdirected himself about the appropriateness of the sanction; and that the award fell outside the bounds of reasonableness.

[13] Sibanye in defending the award submitted that the founding affidavit lacked a basis for a review, and that this was compounded by the fact that no supplementary affidavit was filed. It was submitted that the grounds of review were generic, and merely replicated the defects listed in section 145(2) of the LRA, without

¹ *ABSA Bank Ltd v Naidu & others (Naidu)* (DA 14/12) [2014] ZALAC 60; [2015] 1 BLLR 1 (LAC); (2015) 36 ILJ 602 (LAC)
(2015) 36 ILJ 602 (LAC); *Conmed Health CC v Bargaining Council for the Chemical Industries & Other* (2012) 33 ILJ 623 (LC)

providing any basis to establish any misconduct or irregularity on the part of the Commissioner.

The review test and evaluation:

[14] It is fairly settled that the primary enquiry in review proceedings of this nature is whether the decision reached by the Commissioner in the light of the evidence placed before him, is one that a reasonable decision-maker could not reach². In *South African Municipal Workers Union obo Mosomo v Greater Tubatse Local Municipality*³, it was further held that the enquiry as to whether the decision of the Commissioner falls within a range of reasonableness, involves a broad evaluation of the merits of the dispute, and a consideration of whether, if the Commissioner's reasoning is found to be unreasonable, the result is nevertheless capable of justification for reasons other than those given in the award. Thus, an award would be unreasonable if it is entirely disconnected with the evidence, unsupported by any evidence and involves speculation by the Commissioner.

[15] Applying the above principles to the facts of this case, a starting point would be to emphasise that as pointed out on behalf of both parties, the only issues for consideration in this review application was whether the Commissioner's findings regarding the complaint of inconsistent application of discipline and the appropriateness of the sanction of a dismissal were reasonable. This was considering that the commission of the offence was not disputed.

[16] The principles applicable to misconduct related to gross negligence were restated in *National Union of Metal Workers of South Africa and Another v Commissioner for Conciliation, Mediation and Arbitration and Others (NUMSA)*⁴ as follows;

"Negligence in short, is the failure to comply with the standard of care that would be exercised in the circumstances by a reasonable person and in the employment context, the employee's conduct is compared with the standard

² *Sidumo and Another v Rustenburg Platinum Mines and Others* (2007) 28 IJL 2045; [2007] 12 BLLR 1097; 2008 (2) SA 24; 2008 (2) BCLR 158 (CC).

³ [2020] ZALAC 53 (2 December 2020) at para 27.

⁴ [2023] ZALCPE 6; (2023) 44 ILJ 1575 (LC) at para 32.

of skill and care that would have been expected of a reasonable employee in the same circumstances. The reasonable employee with whom the employee is compared must have experience and skill comparable with that of the employee charged. In labour law, negligence is not applied '*in vacuo*' or against the general standard of a 'reasonable person', but it is applied in the context of the particular workplace or industry, considering the performance standards and procedures set by the employer. Negligence is usually established with reference to workplace rules or procedures applicable in the workplace."

[17] Against the above principles, it cannot be doubted that given the nature of Sibanye's operations, any person in the position of X-ray Viewer such as the applicant, was required to be extremely vigilant, trustworthy and of high integrity in the performance of his duties. The position that the applicant occupied, was essentially the last line of defence against any illicit activities at the plant.

[18] To the extent that the commission of the offence was not seriously disputed, it is not clear as to what the applicant was referring to, when he alleged that he was in a 'bad state of mind' at the time that the offence took place. In the absence of elaboration before the Commissioner, this Court cannot take that issue further, even if the applicant may have considered it to be a mitigating factor.

[19] It was nonetheless pointed out on behalf of Sibanye that the applicant's request to be removed from his position to the extent that it may have been relevant, only came about after the first incident of 25 July 2019. In any event, his apology regarding the incident was said to have only been relevant or in mitigation of the second and third charges, for which he was not dismissed.

[20] In the light of the undisputed nature of the offence having taken place, the Court concludes that given the nature of Sibanye's operations, the applicant's misconduct, given his critical responsibilities, was clearly contrary to those responsibilities. He failed to comply with the standard of care that would have been exercised in the circumstances by a reasonable person.

[21] The only issue is whether the negligence complained of was of a gross nature to deserve a sanction of dismissal. In *Transnet Ltd t/a Portnet v MV 'Stella Tingas'*⁵, Scott JA held that;

“...[T]o qualify as gross negligence the conduct in question, although falling short of *dolus eventualis*, must involve a departure from the standard of the reasonable person to such an extent that it may properly be categorized as extreme; it must demonstrate, where there is found to be conscious risk-taking, a complete obtuseness of mind or, where there is no conscious risk-taking, total failure to take care. If something less were required, the distinction between ordinary and gross negligence would lose its validity.”

[22] It was added in *NUMSA*⁶ that;

“...whether negligence, once established, is gross, is a matter of degree, to be determined considering a number of relevant factors. Those factors are *inter alia* whether the employee is persistently negligent; the seriousness of the act or omission; whether the act or omission is inexcusable; the employee's awareness of the performance standard required or the procedure to be complied with; the seriousness of the consequences of the act or omission; damages caused and the skills and experience of the employee or the position held by the employee.”⁷,

[23] I have already indicated that the applicant's conduct involved a departure from the standard of the reasonable person in his position. Clearly as also indicated, a higher standard of care was required of the applicant in the performance of his duties, given the nature of Sibanye's operations. It is safe to conclude that his conduct evinced a total failure to take care. In addition, it is concluded that his omission was of a serious nature, particularly since there was reason to believe the individual he had failed to further search and investigate after a 'dark spot' was detected on the X-ray viewer, may have concealed or attempted to remove material from the plant, and further since he had been previously warned and counselled in regard to similar previous incidents.

⁵ [2002] ZASCA 145; [2003] 1 All SA 286 (SCA); 2003 (2) SA 473 (SCA) at para 7.

⁶ *supra*

⁷ *National Union of Metal Workers of South Africa and Another v Commissioner for Conciliation, Mediation and Arbitration and Others* [2023] ZALCPE 6; (2023) 44 ILJ 1575 (LC) at para 32.

[24] The applicant's contentions that his omission was because of his 'state of mind not in good condition' cannot amount to an excuse, in the light of the nature of that condition not having been fully explained. In the end, there were no disputes about the applicant having been aware of the standard of performance required of him, and clearly, he was aware of the consequences of his omission.

[25] In the light of the gross nature of the negligence, it is my view that the applicant's allegation of inconsistent application of discipline does not even come to his assistance. This is so in that it is trite that where inconsistent application of a rule or discipline is alleged, it is not sufficient for an employee to simply make the allegation without placing pertinent, if not comparable facts before an arbitrator. Equally so, sufficient information must be placed before the employer in order to afford it the opportunity to respond effectively to the allegation that it applied discipline in an inconsistent manner⁸. In *Naidu*⁹, the LAC made it clear that inconsistency is one factor to be considered in the fairness inquiry, and added that;

"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 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..."¹⁰

⁸ *Comed Health CC v National Bargaining Council for the Chemical Industry and Others* (2012) 33 ILJ 623 (LC) at para 10.

⁹ *supra*

¹⁰ At para 42

[26] In *Cape Town City Council v Masitho & others*¹¹, it was added that where there was a valid basis to distinguish one case from another in circumstances where employees were involved in the same misconduct, this did not amount to unfair conduct. In this case, the Commissioner's reasoning in rejecting the applicant's inconsistency claim in the light of the undisputed evidence cannot be faulted. Unlike his colleague, Shilaluke who had a clean disciplinary record, the applicant on the other hand had previous warnings and counselling in regards to the same offence. The mere fact that Shilaluke was counselled for the same offence does not make the applicant's dismissal unfair. This is so in that Shilaluke was a first offender, and clearly counselling was part of Sibanye's progressive discipline. With the applicant however, that progressive discipline had not yielded the desired results, and the fact that the warnings may have expired does not mean that they were not relevant in the overall determination of the appropriateness of the sanction¹².

[27] It follows that upon a consideration of all the facts in this case, the Commissioner's conclusions that the decision to dismiss was appropriate can equally not be faulted. It is clear in that in accordance with *Krishaveni Govender & 20 others v CCMA & Others*¹³, the Commissioner in coming to that conclusion had considered the nature, magnitude, and impact of the misconduct on the employment and trust relationship.

[28] In summary, and in line with *Gold Fields*¹⁴, the Commissioner considered the principal issue before him; evaluated the facts presented at the hearing and came to a conclusion that is reasonable. There is no basis for any conclusion to be reached that the Commissioner's award was entirely disconnected with the evidence, unsupported by any evidence or involved any speculation. Since the award falls within a range of decisions that a reasonable decision maker would have made, it follows that the review application ought to fail.

¹¹ (2000) 21 ILJ 1957 (LAC)

¹² *National Union of Mineworkers obo Selemela v Northam Platinum Ltd* (JA 25/11) [2013] ZALAC 10; (2013) 34 ILJ 3118 (LAC); [2014] 9 BLLR 870 (LAC) at para 38

¹³ Case no: DA2/2022 (Unreported and Delivered on 26 February 2024) at para 83

¹⁴ *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation Mediation and Arbitration and Others* (JA 2/2012) [2013] ZALAC 28; [2014] 1 BLLR 20 (LAC); (2014) 35 ILJ 943 (LAC).

[29] Further having had regard to the requirements of law and fairness, I am of the view that a cost award is not warranted in this case.

[30] Accordingly, the following order is made;

Order:

1. The applicant's application to review and set aside the arbitration award dated 3 May 2021, issued under case number GAEK938/20 is dismissed.
2. There is no order as to costs.

Edwin Tlhotlhemaje
Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Mr A. Tsotetsi, Union Official
For the Third Respondent:	Adv. G Bosch, instructed by Solomonholmes
Attorneys Inc.	