



**THE LABOUR COURT OF SOUTH AFRICA
AT CAPE TOWN**

Not Reportable/Of interest to other judges

Case no: C 497/2019

In the matter between:

ZWELETHU NTAMANE

First Applicant

And

**COMMISSION FOR CONCILIAION,
MEDIATION AND ARBITRATION**

First Respondent

**COMMISSIONER, HILARY
MOFSOWITZ**

Second Respondent

**PASSENGER RAIL AGENCY OF
SOUTH AFRICA T/A METRORAIL**

Third Respondent

Heard: 10 October 2024

Delivered: 17 June 2025

Summary: (Review –Misconduct dismissal- Dishonest misconduct relating to shift swaps – Arbitrator’s findings plausible on the evidence presented - application dismissed - Application to condone late filing of record – sufficient to reinstate review application in the absence of a formal application to reinstate it)

JUDGMENT

LAGRANGE, J

Introduction

[1] This is an opposed review application of an arbitration award in which the second respondent ('the arbitrator') found that the dismissal of the applicant, Mr Z Ntame ('Ntame') by his employer ('Prasa') on 29 October 2018 was substantively and procedurally unfair.

[2] Although he did not formally make an application to reinstate the review application, Ntame has applied for condonation for the late filing of the transcript, which should have been filed around 3 March 2020, but appeared to have been filed only around 19 August 2020, over five months' late. The application was not opposed. The main reason for the delay was the applicant needed to raise funds for the transcript, which to over 700 pages. He gave a reasonable explanation of how he eventually managed to raise the funds.

[3] In *Samuels v Old Mutual Bank*¹ the Labour Appeal Court held that:

"[17] In essence, an application for the retrieval of a file from the archives is a form of an application for condonation for failure to comply with the court rules, time frames and directives. ..."

In the circumstances, if the late filing of the record is condoned, it follows that the review application should be reinstated.

[4] In the absence of opposition, and any demonstrable prejudice complained of by Prasa, condonation should be granted for the late filing of the record and

¹ (2017) 38 ILJ 1790 (LAC)

accordingly, to the extent that the application was deemed withdrawn as a result of the record not being filed within 60 days of the registrar issuing a notice under Rule 7A (5), the review application should be reinstated. In reaching this conclusion I did not find it necessary to consider his prospects of success in the review application.

Background

[5] Ntame was a security supervisor who had been employed on 1 September 2009 by Prasa. He was dismissed after he was found guilty of three charges of gross dishonesty and another charge of gross misconduct. All the misconduct related to related to working unauthorised working hours and the remuneration he claimed on those occasions.

[6] The first three charges related to three separate weeks in 2017 when he allegedly failed to work according to the shift roster without obtaining authorisation to change which shifts he was working. The last charge that he had recorded that he had worked on 24 and 25 March 2018, whereas he was not rostered to work and did not do so. The charges read:

"1. Gross Dishonesty: it is alleged that you failed to work according to your shift roster during the month of May 2017 whereas you were to work dayshift from the 12th May 2017 till 19th May 2017 and worked Night shift during this period and not in accordance to your shift roster. Your supervisor and manager were also not aware of any changes on your roster and did not authorize the change.

2. Gross Dishonesty: it is alleged that you failed to work according to your shift roster during the month of August 2017 whereas you were to work Night shift from the 4th August 2017 till the 11 August 2017 and worked Day shift during this period and not in accordance to your shift roster. Your supervisor and manager was also not aware of any changes on your roster and did not authorise the change

3. Gross Dishonesty: It is alleged that you failed to work according to your shift roster during the month of September 2017 whereas you were to work Night shift from the 1st September 2017 till the September 2017 and worked

day shift during this period and not in accordance to your shift roster. Your supervisor and manager were also not aware of any changes on your roster and did not authorise any changes. You further allegedly completed your sign on sheet for September 2017 and your 700 according to your shift roster and not according to the day's you worked

4. Gross Misconduct: It is alleged that you allegedly booked time on 12hrs normal time on the 24th March 2018 and 12hrs Sunday time on the 25th March 2018 where as you were rostered to work, and you allegedly did not work on the weekend."

(sic)

[7] The arbitrator upheld Ntame's guilt on the first, third and fourth charges but acquitted him of the second charge.

The award

Procedural fairness

[8] Ntame had raised several allegations that his internal disciplinary enquiry was procedurally unfair. These related to: the extended time period for the internal investigation of the charges, without obtaining his input; the fact that a fourth charge was added and investigated before the Prasa had concluded disciplinary steps relating to the first three charges. The applicant argued that the extension for the disciplinary process was granted without his input and that the fourth charge was added after the extension was granted, which he claimed was against the respondent's policy.

[9] Clause 4.4 of Prasa's disciplinary code provides that a disciplinary hearing should be conducted and finalised within 30 days after an incident of misconduct is brought to management's attention, but a regional manager may extend this period if there are substantive and legitimate grounds for the delay. If extension is not granted the case was supposed to be withdrawn. In this case, an extension was requested

and granted, but Ntame complains this should have been discussed with him. The code does not provide for any representations to be made by the affected employee.

[10] The arbitrator found that the investigator was entitled to request an extension for the disciplinary process to ensure a thorough investigation of all allegations, including those that emerged later. She also found the extension of the period for investigation did not mean that it was confined to the first three charges and it was not necessary for the purposes of extending the period of investigation to specify every allegation before an investigation was conducted. As regards the fourth charge she found that Ntame had a fair opportunity to prepare his defence to that charge before the disciplinary enquiry concluded. In any event he was not hampered in the presentation of his case or calling of witnesses.

[11] Regarding the overall delay between the incidents and disciplinary enquiry the arbitrator acknowledged the process had been lengthy but found that the delay was justified due to the complexity of the case and unforeseen circumstances, such as the investigator being indisposed after an accident. As Ntame continued to work and earn a salary during this period, and there was no evidence of prejudice against him due to the delay.

[12] Ntame had also raised a claim that the chairperson of the disciplinary hearing, Mr T Nongqonqgo ('Nongqonqgo') was biased due to his previous role as employee relations manager. Ntame believed that he had prior knowledge of the case as a former employee relations manager. It appears that contrary to the procedure the presiding officer had been appointed at the last minute when the original one could not preside. The arbitrator found no evidence to support the claim of bias. Nongqonqgo had concluded his term as employee relations manager long before the investigation began and was only appointed as the presiding officer on the first day of the enquiry. The applicant, being a shop steward and a supervisor, was deemed sufficiently knowledgeable by the arbitrator to have raised an objection at the time if he had concerns about bias.

[13] Further, Ntame had argued that having the same person serve as both investigator and initiator was against the respondent's policy. This contention was also dismissed by the arbitrator. The investigator's role was to gather facts, and the applicant had the opportunity to challenge the findings during the disciplinary process. The arbitrator found no evidence to support the claim that witnesses were prevented from testifying at the disciplinary enquiry and noted that the applicant could have subpoenaed important witnesses to testify at arbitration but failed to do so.

Substantive fairness

[14] The arbitrator found that the rule requiring shift swaps to be authorised from a supervisor or manager was a reasonable one for operational efficiency and that's the applicant held a supervisory position and understood the implications of the rule. Moreover, as a supervisor he was responsible for implementing the employer's rules and monitoring compliance.

[15] On the first charge, Ntame claimed he swapped shifts to write examinations and had permission to do so. He alleged he had obtained permission by notifying Ms B McPherson of the shift swap, which he had agreed with his colleague, Mr J Dlabane ('Dlabane'). Evidence of three of Prasa's witnesses was to the effect that he had not obtained authorisation for the swap and McPherson was not in a position to approve swaps. The examination timetable did not support the applicant's claim as he did not write exams on the specified dates. The email to McPherson was not valid as she was not in a management position to authorise shift swaps. The arbitrator concluded he had not obtained authorisation for the swap.

[16] In relation to the second charge concerning unauthorised swapping of night and day shifts in August 2017, Applicant's Argument, the arbitrator rejected Ntame's defence that he was exempt from working night shift while he was obtaining treatment from the employee wellness programme, but in view of a medical certificate recommending he should not work night shift, she gave him 'the benefit of the doubt' and did not find him guilty on this charge. She reached this finding despite

accepting that the area manager had specifically instructed him to abide by the roster until a counter instruction was received.

[17] On the third charge pertaining to Ntame working on the day shift instead of the night shift without authorisation, in September 2017, the arbitrator concluded that his version that there had been a misunderstanding about the shift swap and the remuneration claimed was not convincing, and he only attempted to change his time card when he thought he might be exposed. The applicant committed misconduct by claiming pay for time not worked.

[18] In respect of the last charge, the arbitrator noted Ntame claimed he made an error in claiming pay for 24 March 2018 and asserted he was at work on 25 March 2018. He provided a death certificate to substantiate his absence on 24 March 2018. His absence to attend a funeral in East London that day was accepted. However, employer witnesses testified he was not at work the following day either. Given that the funeral was in East London, the arbitrator reasoned it was unlikely he would have returned to work by then. By claiming payment for the time he did not work, the arbitrator found Ntame had been dishonest. It is common cause someone else was working in his place.

[19] An aggravating factor was that, more than once, Ntame had put in a claim for wages which was not a true reflection of the time he worked. If it had not been detected he would have gained from his dishonesty.

[20] The arbitrator found that, regardless of his long service of approximately nine years and his unfortunate personal circumstances, he had crossed the lines of acceptable conduct and must have known that what he was doing was wrong. Honesty lay at the heart of the employment relationship and his conduct was destructive of the trust required. moreover, as a supervisor he was expected to set an example to other employees particularly in the protection/security sector in which she worked.

[21] The arbitrator decided that his dismissal was substantively fair.

Grounds of review

[22] Ntame launched the review application himself. In his founding affidavit, the grounds of review he raises concern her alleged misconstruing of evidence relating to the failure to complete the disciplinary enquiry within the time limit set down in Prasa's disciplinary code and procedure without obtaining an extension of time in relation to charges 1, 2 and 4.

[23] In his supplementary affidavit he raised additional grounds which relate to the arbitrator's findings on the merits. To some degree he has advanced these arguments in the style of grounds of appeal, whereas this is a review². However, making allowance for the fact that Ntame is a layperson, I have treated the grounds he raises as support for an argument that no reasonable arbitrator could have arrived at the findings he challenges³.

[24] Firstly, he contends that the arbitrator misunderstood his claim that Prasa had acted inconsistently in not subjecting the officer he swapped his shifts with between 12 May and 19 May 2017. She had found that there was no inconsistent treatment in not dismissing his colleague, Mr J Dlabane ('Dlabane') because the latter had not committed all the offences Ntame had and there was no evidence he had acted dishonestly or had claimed for work not done. Ntame argues that the arbitrator failed

² *Booi v Amathole District Municipality and Others* [2022] 1 BLLR 1 (CC); (2022) 43 ILJ 91 (CC) at paragraph 44

³ This is the test laid down by the Constitutional Court in *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others* (2007) 28 ILJ 2405 (CC):

"[110] To summarize, *Carephone* held that s 145 of the LRA was suffused by the then constitutional standard that the outcome of an administrative decision should be justifiable in relation to the reasons given for it. The better approach is that s 145 is now suffused by the constitutional standard of reasonableness. That standard is the one explained in *Bato Star* : Is the decision reached by the commissioner one that a reasonable decision maker could not reach? Applying it will give effect not only to the constitutional right to fair labour practices, but also to the right to administrative action which is lawful, reasonable and procedurally fair."

(emphasis added)

to apply the principle of inconsistent treatment on a charge-by-charge basis. She should have considered that Prasa acted inconsistently by not charging his colleague in relation to the swap dealt with under charge 1. Presumably, he would argue that if she had, she would have concluded that it was inconsistent not to charge his colleague in relation to the first charge.

[25] Likewise, in relation to the third charge Ntame claims the commissioner ignored the fact that his time-card had to be approved by his supervisor and before signing it, he was required to verify the information. By failing to do so, his supervisor made himself as guilty as Ntame, yet the employer took no disciplinary action against him. In Ntame's view the arbitrator acted irregularly by ignoring this inconsistency.

[26] The third charge concerned a somewhat unusual shift variation. Ntame had been rostered to work night shift. Instead, he worked on the day shift and did so without permission according to management. In any event, when it was learnt that Ntame was working the day shift, a compromise arrangement was made with him, under which he would work from 13h00 to 21h00. However, his time-card reflected that he worked a full night shift and he would have been paid accordingly had he not asked his supervisor, Mr Blom, to amend it. The arbitrator found that he only asked Blom to sign an amended time-card when he feared the discrepancy would be discovered and that he completed his time sheet for the entire month according to the hours rostered, without correcting it to account for the special arrangement. Ntame argues that the arbitrator failed to appreciate that it was normal practice for the supervisor to sign off on an amended time-card and because it was corrected, he did not obtain any undue benefit.

[27] By the time the review application was heard, Ntame was legally represented and the heads of argument traversed issues somewhat broader than the issues canvassed in his founding and supplementary affidavits, but the court is confined to dealing with the issues raised in those documents⁴.

⁴ *Commercial Workers Union of SA v Tao Ying Metal Industries & others* 2009 (2) SA 204 (CC); (2008) 29 ILJ 2461 (CC) at paragraph 67. See also *Comtech (Pty) Ltd v Molony NO and Others*

Evaluation

The claim of inconsistency

[28] Ntame raises this issue in two respects. Firstly, he refers to Dlabane with whom he swapped shifts in May 2017. However, it is clear the arbitrator did find important distinguishing factors between him and his colleague. In so far as Dlabane was also guilty of unauthorised shift swapping this only concerned a single occurrence his case, whereas Ntame was guilty of two other forms of related misconduct. Further, it was not suggested he had acted with any dishonest intention. Ntame might be correct that Dlabane should also have been charged, but he did not benefit financially from the change in hours, so it cannot be said the arbitrator made an implausible distinction between them in finding that Prasa's failure to charge Dlabane was not justified.

[29] Secondly, Ntame argues that his supervisor was complicit in the alleged misconduct under charge 3 and Prasa should have taken disciplinary action against him for negligence and the arbitrator failed to consider this in concluding Prasa had not acted inconsistently. The supervisor in question, Mr J Blaauw ('Blaauw') initially signed Ntame's time card believing it to be correct, but when he saw the occurrence book (OB) entries which accurately reflect if someone was on duty, he realised that the OB entries showed he was not working on a night shift in accordance with the time-card and he asked for an investigation to be done. The point is that Blaauw did pick up the discrepancy and acted upon it without Ntame raising it with him. So he did not simply let the matter lie. In any event, it is important to bear in mind the alleged inconsistency that is being dealt with in both instances. The inconsistency alleged concerns the failure to take disciplinary action, it is not about the imposition of inconsistent sanctions following findings that other employees were found guilty of the same offence.

(DA12/05) [2007] ZALAC 40 (21 December 2007) at paragraphs 15 – 18 and *Mpe v Polokwane Local Municipality and Others* (JR101/2023) [2024] ZALCJHB 426 (7 November 2024) at paragraphs 9 – 16.

[30] It should also be noted that Blaauw's conduct in initially signing off of Ntame's time-card cannot be equated with an endorsement of the shift change. He was obviously unaware at the time that the time-card did not correspond with Ntame working day-shift and as soon as he became aware of the discrepancy he took steps to investigate it.

[31] In relation to the other issue concerning the third charge there is no real dispute that initially Ntame started working a day shift even though he was rostered to work at night. Even though Ntame was working on the wrong shift without authorisation, Mr T Blom ('Blom'), the area manager, came to an arrangement with Ntame whereby he worked a shift which straddled the end of the day shift and a part of the night shift (from 12h00 to 21h00), to try and accommodate his problem working on night shift. However, the time sheet was not amended to reflect the change, which reflected that he was working a normal night shift (18h00 to 06h00). Blom found that Ntame had in fact been working from 10h00 to 22h00. Blom questioned Ntame, who apologised and then the time sheet was amended. Blom testified that he did not want Ntame to not be paid, even though an investigation was required, so he signed the amended time sheet. It appears that the amendments were not processed and Ntame was paid according to the unamended records.

[32] Ntame's criticism of the arbitrator's reasoning is that she should have accepted that the amendment of the time sheet after the unamended time sheet had already been sent for processing, was just part of normal practice. It is clear from the events in question that the situation was far from normal because he was not even working the hybrid shift hours which had been agreed with Blom. On the evidence, it was quite plausible for the arbitrator to conclude that it was on Blom's initiative that the amended time sheet, which ultimately did not get processed, was drawn up. The arbitrator made the point that if it had not been for Blom's intervention, time sheet would not have been corrected. By implication, Ntame would have benefitted from the longer hours recorded.

Conclusion

[33] The grounds of review raised do not succeed in casting serious doubt on whether the arbitrator's findings on the various charges and her assessment that the trust relationship had broken down can find enough support on the evidence before her. In the circumstances, I am satisfied her findings and the relief she awarded are not outcomes which no reasonable arbitrator could have arrived at.

Order

1. The late filing of the record is condoned, and the review application is re-instated.
2. The review application is dismissed.
3. No order is made as to costs.

R Lagrange
Judge of the Labour Court of South Africa.

Appearances:

For the Applicant: C May from BDP Attorneys

For the third Respondent: L Msikinya from Msikinya Attorneys and Associates