



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case No: JR546/2023

Not Reportable

In the matter between:

CASHBUILD SA LTD

Applicant

and

KGOANA J MAMOGALE N.O.

First Respondent

THE COMMISSION FOR CONCILIATION
MEDIATION AND ARBITRATION

Second Respondent

LORRAINE TSIRI

Third Respondent

Heard: 4 June 2025

Delivered: This judgment was handed down electronically by circulation to the parties and / or their legal representatives by email. The date and time for handing-down is deemed 10h00 on 3 December 2025

JUDGMENT

ALLEN-YAMAN J

Introduction

- [1] On 12 March 2023 the first respondent handed down an award in which she found the third respondent's dismissal by the applicant to have been substantively unfair, with the third respondent then being awarded reinstatement. It was this award which formed the subject of the present review application, which was opposed by the third respondent.

Analysis

- [2] On 8 August 2022 the third respondent, Ms Tsiri, was found to have committed an act of gross negligence in that on 8 July 2022 she had authorised payment of the amount of R2 847.14 out of petty cash instead of the amount of R2 482.00. Having admitted her error, the chairperson of the disciplinary enquiry, relying on the fact that Ms Tsiri had previously been given a final written warning for the same offence, and the applicant's disciplinary code imposed the sanction of dismissal.
- [3] It was Ms Tsiri's case that the applicant, in having dismissed her, had not acted consistently. She alleged that other employees employed by the applicant had not been disciplined for the infraction in question, but had instead been permitted to reimburse the applicant the amounts of the relevant losses caused by their respective errors. The first respondent upheld Ms Tsiri's contention.
- [4] In seeking to challenge the first respondent's award in these proceedings, the applicant asserted that the first respondent reached an unreasonable decision on the issue of inconsistency. It alleged:
- The comparators which had been identified by Ms Tsiri at the outset of the arbitration had been 'Betty' and 'Sandra', but changed her case pursuant to the close of the applicant's case, then having asserted that it had been 'Sarah' and 'Elizabeth' who had been treated more favourably than she had;

- Ms Tsiri presented no evidence in support of her case that there had been differential treatment, in contrast to that of the applicant which had introduced evidence to demonstrate that other employees had been disciplined for the same misconduct;
- If differentiation was found to have occurred, the first respondent did not apply the correct legal test in relation thereto, having failed to appreciate that Ms Tsiri had presented no evidence that such differentiation in discipline had been effected for some arbitrary reason; and
- The first respondent ignored the fact that Ms Tsiri had already been given a final written warning which remained operative at the time of her dismissal.

[5] Ancillary to the applicant's assertions pertaining to the award itself, the applicant alleged that the first respondent had misconducted herself by disallowing it from leading evidence on any issue other than that of consistency. Ms Tsiri's singular complaint concerning the fairness of her dismissal had been that the applicant had been inconsistent in its application of discipline, and this was accordingly the singular issue which the first respondent was required to determine. In the absence of amplification or explanation by the applicant, it is impossible to conceive what other evidence it would have sought to introduce, and or what effect, if any, the introduction of such other evidence may have had on the outcome.

[6] As regards the award itself, the first of the applicant's complaints is unsustainable on the record before this court. At the outset of proceedings, pursuant to the first respondent having established Ms Tsiri's length of service, position and salary, she requested Ms Tsiri's representative to identify the comparators upon which she relied for the purposes of the issue of consistency. In response, she was informed that the employees in question were Ms Sarah Mogale and Ms Elizabeth Ramango.

[7] The applicant's further assertion that no evidence was presented by Ms Tsiri to establish inconsistency is also unsupported by the record of the evidence before the first respondent.

- [8] In presenting its case through its singular witness, Ms Ramango, the applicant did not initially introduce any evidence in relation to either Ms Ramango or Ms Mogale. Despite having alleged in the present proceedings that Ms Tsiri's comparators had initially been 'Sandra' and 'Betty', no individual named 'Betty' was dealt with by it in the arbitration at all. In attempting to establish that it had applied the rule relating to shortages consistently, it dealt only with Ms Sandra Mokondo and Mr Sylvester Johannes. It was only when the first respondent reminded the applicant's representative of the need on the part of the applicant to deal with the named individuals when it then addressed the question of Ms Mogale, but nonetheless still failed to address the question in so far as it related to Ms Ramango.
- [9] Insofar as Ms Mogale was concerned, Ms Ramango testified that she had not had any shortages since a meeting held on 21 June 2022 at which meeting it had been explained to staff that they would not be permitted to make good shortages, which would thereafter always be treated as matters leading to disciplinary action. Although she did not deal with the issue specifically in relation to herself, she testified that since that meeting, no one at the store at which she and Ms Tsiri were employed had been afforded the opportunity to repay any shortages.
- [10] Ms Ramango's version that Ms Mogale had never had any shortages was challenged under cross-examination, it having been put to her that Ms Tsiri would testify that Ms Mogale had been short an amount of R135,00 and that rather than having disciplined her, Ms Ramango had allowed her to repay in the shortfall. As far as Ms Ramango herself was concerned, it was put to her that Ms Tsiri would testify that she had been short R102.00 in the last week of June 2022, and that she had paid in the amount herself. In response, Ms Ramango denied that either she or Ms Mogale had caused any shortages since June 2022, and repeatedly invited Ms Tsiri to provide documentary proof that this had transpired.
- [11] In her subsequent evidence, Ms Tsiri explained the circumstances which had resulted in Ms Mogale and Ms Ramango having experienced shortages, and

the payment by each which had been permitted to take place, both such issues having been known to her by virtue of her position as System Supervisor, one of the functions of which position entailed both cash and banking responsibilities.

- [12] When Ms Tsiri was cross-examined concerning the absence of any documentary proof of her assertions, she responded,

'... when these shortages happened we did not record them we were dealing with this, with this shortages orally ... to balance so there, there is no way I can have ... document evidence since this was not recorded but it was said orally.'

As Ms Tsiri had testified under oath, the applicant's assertion that Ms Tsiri presented no evidence in support of her case that it had been inconsistent in the application of discipline cannot be sustained.

- [13] As she had been required to do, the first respondent considered the mutually incompatible versions before her, being that of Ms Ramango and that of Ms Tsiri, and concluded that Ms Tsiri's version was to be preferred, having explained,

'I find the Store Manager to be very unreliable witness. It is not surprising that she is in fact the interested party in the matter. I have no reason to disbelieve the applicant in this regard. Nothing was presented to me which suggested that the applicant would have ulterior motive to implicate the Store Manager.'

- [14] In the event that this court found the first respondent's conclusion that there had been differentiation in the application of discipline to have been reasonable, (which it does) the further argument advanced by the applicant was that Ms Tsiri had nonetheless failed to establish that such differentiation was arbitrary.

- [15] The Labour Appeal Court explained the nature and ambit of the application of parity in the application of discipline in the workplace in National Union of

Mineworkers on behalf of Botsane v Anglo Platinum Mine (Rustenburg Section)
(2104) 35 ILJ 2406 (LAC),

'The notion of inconsistency in discipline

The idea of inconsistency in employee discipline derives from the notion that it is unfair that like and like are not treated alike. The core of this 'factor' in the application of employee discipline (it would be a misconception to call it a principle) is the rejection of capricious or arbitrary conduct by an employer.

*It has application in two respects. Mainly, it is a recognition of the unfairness of the condemnation of one person for genuine misconduct when another indistinguishable case of misconduct by another person is condoned. The second application is the recognition of the unfairness that results when disparate sanctions are meted out for indistinguishable misconduct to different persons.'*¹

[16] In the present matter, Ms Tsiri established that she had been disciplined for a shortage in circumstances in which Ms Mogale and Ms Ramango had been afforded opportunities to remedy their mistakes. Had there been an objectively justifiable reason for such differentiation, it was for the applicant to have disclosed it. As it failed to do so, the only conclusion which could have been arrived at was that the taking of disciplinary action against Ms Tsiri had been unfair.

[17] The final issue raised by the applicant was that the first respondent had overlooked the fact that a final written warning had been operative against Ms Tsiri at the time of her dismissal. Whilst it is correct that Ms Tsiri had been given a final written warning, such an issue was irrelevant in the face of the conclusion reached by the first respondent that the applicant had acted unfairly in having disciplined her in circumstances in which it had not disciplined other employees for the same offence.

¹ At paragraphs 25 and 26

[18] This being the case, the inconsistent application of discipline was reasonably found not to have been justified, and Ms Tsiri's dismissal was not unreasonably found by the first respondent to have been substantively unfair. In circumstances in which the applicant's grounds of review are unsustainable, the application falls to be dismissed.

Costs

[19] Albeit that the applicant asked that any respondent who opposed the application be ordered to pay costs, it abandoned such request in the course of argument. Counsel for Ms Tsiri, on the other hand, persisted in a similar request.

[20] Despite the fact that the relationship between the parties is to be restored, it is the view of this court that the interests of justice require that the applicant pay Ms Tsiri's costs. The applicant is a juristic entity, and an order for costs ought not to affect her working relationship with her colleagues. Moreover, the record demonstrates that whilst in the employ of the applicant she earned no more than a modest salary, and an order for costs will militate against any hardship she may have endured in having been obliged to fund the legal costs of the present litigation, in defending the award.

Order

1. The application is dismissed.
2. The applicant is ordered to pay the third respondent's costs, Counsel's fees to be at Scale B, where applicable.

K Allen-Yaman
Judge of the Labour Court of South Africa

Appearances

Applicant:

Mr A Posthuma, Snyman Attorneys

Third Respondent:

Mr D Makhubele, instructed by Mahapa & Montani Attorneys