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THE JUDICIARY · REPUBLIC OF SOUTH AFRICA ·

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no: JR 2609/2016

In the matter between:

TASWU obo LESLEY MASHILO **Applicant**

and

ELSABE MAREE N.O **First Respondent**

SOUTH AFRICAN ROAD PASSENGER

BARGAINING COUNCIL **Second Respondent**

PUTCO LTD **Third Respondent**

Enrolled: 29 April and 3 July 2020

Delivered: 15 July 2020

In view of the measures implemented as a result of the Covid-19 outbreak, this judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be on 15 July 2020.

JUDGMENT

PRINSLOO, J

Introduction

[1] The Applicant seeks to review and set aside an arbitration award dated 21 October 2016 and issued under case number RPNT3228 wherein the First Respondent (the arbitrator) found Mr Mashilo's (the Applicant) dismissal substantively and procedurally fair and dismissed his case. The review application was filed outside the prescribed period of six weeks and for this the Applicant sought condonation. Condonation for the late filing of the review application was granted on 5 September 2017 and it is no longer an issue for this Court to decide.

[2] The Third Respondent (Respondent) opposed the review application.

[3] This matter was initially enrolled for hearing on 29 April 2020 but due to the level 5 lockdown measures that were in place during April 2020, the matter was removed from the roll. The matter was re-enrolled on 3 July 2020. In accordance with the provisions of the 'Urgent directive in respect of access to the Labour Court' dated 28 April 2020, which is applicable with effect from 4 May 2020 until the end of the July 2020 recess, the parties agreed that this matter be disposed of without oral argument. I have considered the papers filed as well as the written heads of argument submitted by the parties.

Material background facts:

[4] The Applicant was employed by the Respondent as a cashier. In October 2015, the Applicant was charged with two counts of misconduct and following a disciplinary hearing, he was dismissed.

[5] The Applicant referred an unfair dismissal dispute to the Second Respondent and he challenged the fairness of his dismissal.

The evidence adduced:

[6] The issue to be decided by the arbitrator was whether the Applicant's dismissal was substantively and procedurally fair and if not, what the appropriate relief should be.

[7] In order to assess the arbitrator's findings, it is necessary to consider the evidence adduced at the arbitration proceedings as well as the charges that the Applicant was found guilty of and dismissed for.

[8] The Applicant faced two counts of misconduct namely:

'1. Processing receipt 00033 on the 08.08.2015 for an amount of R293.00 instead of R393.00 causing D/C 52322 to leave a shortage of R 100.00;

2. Failing to declare an amount of R 100.00 in his form 162 on the 08.08.2015 collected from D/C 52322.'

The Respondent's case

[9] Mr Simelane testified that he is the head of the revenue section of the Respondent's finance department. The revenue section is the division that collects the Respondent's revenue from drivers and any other payments made to the Respondent. It also has a section called the set right office that analyses, checks and verify the drivers' route waybills. He explained that a driver would go to the set right clerk, who would verify the driver's route waybill for payment to the cashier. The driver would take the waybill to the cashier and pay the amount that had been endorsed by the set right clerk.

[10] The cashier must verify whether the set right clerk has indeed endorsed the waybill and for which amount. Once this has been verified, the cashier would request the amount from the driver, count the money and verify that it is indeed the same as the amount on the waybill and if the cashier is satisfied that it is correct, a receipt would be issued to the driver. If the cashier is not satisfied with the counting of the money, the driver will be informed and if it cannot be resolved, the driver is sent back to the set right clerk or a senior employee is called to assist.

[11] After the completion of a shift, the cashier would count all the cash received on the day, do a reconciliation with a signoff slip. The cashier would fill in a form, called form 162, which is submitted with the money received on the day to the revenue office for banking.

[12] If the cashier is satisfied, the receipt is given to the driver. It is printed at the back of the waybill, which the driver has to take back to the waybill clerk, who is responsible for all the waybills that were issued on that particular day. The waybills are submitted to the stats office, where it will be analysed for shortages and ensuring that all the money has been paid. If any shortages are found, it is sent to the traffic department for collection. The traffic department would paste

the shortages on the drivers' notice board, with the shortage against the driver's name.

[13] If a driver sees his / her name on the notice board, informing them of the shortages, in most instances the driver will go and pay the shortage.

[14] Mr Simelane testified in respect of a waybill that indicated that the driver had to pay R 349,00, which amount the set right clerk confirmed and of which only R249,00 was paid. It was placed on the notice board and the driver, one Donald, approached Mr Simelane for assistance and informed him that he was not aware of the shortage. Donald refused to pay the shortage as he insisted that he was unaware of it and he could not be held responsible.

[15] Mr Simelane investigated the matter to determine whether there was an error and he obtained the Applicant's form 162 as part of his investigation. This is the form a cashier completes at the end of a shift and the aim was to see whether the Applicant had declared the extra amount of R 100 on the form, as he had processed R 293,00 instead of R 393,00. Mr Simelane explained that he had expected that the Applicant would have declared the additional money, but that was not the case.

[16] After Mr Simelane realised that the money was not declared and that the Applicant indicated that he was unaware of any driver shortage, he formulated the charges and the Applicant was charged for failing to declare the amount of R 100,00 on his form 162. The Applicant was the first person to count the money and he should have noticed that he had an extra R 100,00, which should have been declared on the form 162.

[17] In respect of previous similar cases, Mr Simelane testified that he had dealt with such in the past, specifically the case of Ms Jeanette Makoto (Ms Makoto) and Mr Moshili Mosioua (Mr Mosioua), whose cases were similar and who were also dismissed. In respect of the case of Ms Constance Marupa (Ms Marupa) he testified that the Respondent only became aware of this case as a result of the Applicant's dispute at the bargaining council, when the Applicant specifically informed him about her case.

[18] In cross-examination Mr Simelane was referred to clause 12 of the Respondent's disciplinary procedure, which provides for the reporting of a

transgression of the rules. It provides *inter alia* that "*Where the disciplinary report slip could not be issued within three days after the discovery of the alleged transgression, the initiator of the disciplinary report slip will provide a written explanation as to the reasons the disciplinary report slip could not be issued at the time of discovery of the alleged transgression.*"

[19] Mr Simelane testified that the driver, Donald, only approached him on 1 October 2015, when he denied responsibility for the shortage, where after an investigation was done. Mr Simelane explained that he could not act in respect of an incident which he did not know about and only once he obtained the relevant information, action could have been taken. He explained that when the matter was reported to him on 1 October 2015, he had called the Applicant to his office and after the Applicant was interrogated, he was released and a further investigation was conducted.

[20] Mr Simelane confirmed that prior to 1 October 2015, he was unaware of the fact that there was a shortage. The Applicant was charged on 1 October 2015.

[21] It was put to Mr Simelane that during the internal disciplinary hearing the Applicant had conceded that he did not countercheck the amount on the waybill of the driver because he had assumed that he had done it right. The Applicant conceded that he had made a mistake by punching in R 293,00 instead of R393,00. It was further put to Mr Simelane that the Applicant was negligent in performing his duties.

[22] Mr Simelane testified that the trust relationship between the Respondent and the Applicant broke down because he failed to declare that the amount of money was missing and he never admitted that he had failed to do so. This was a matter of dishonesty and the Respondent could no longer trust the Applicant to handle cash.

[23] It was put to Mr Simelane that the incident occurred on 8 August 2015, the Applicant was only charged in October 2015 and during the period in between, the Applicant did not incur further shortages. Mr Simelane responded that it was the Applicant's responsibility to declare that he undercharged the driver and to be honest in that regard, but he had failed to declare it.

The Applicant's case

[24] The Applicant testified that he was employed by the Respondent in 2007 and at the time of his appointment, he was appointed in the position of a set right clerk. He explained the process to be followed in respect of waybills and shortages.

[25] On 8 August 2015, he worked the morning shift and knocked off at 11:00 so that the revenue officers could count the money. On the said day, the driver gave him a waybill and he inserted the information on the waybill, which included the name of the driver, the waybill number and the amount being paid by the driver. After inserting the information, he told the driver how much money to pay, took the money from the driver, counted it and put it in the box where it is supposed to be held. After that he printed the waybill with the receipt. He explained that the driver is supposed to check the amount that is to be paid with the receipt, but in this day, the driver accepted what he said must be paid.

[26] The Applicant explained that discrepancies happen all the time and if there is a situation where the driver and the cashier do not agree on a certain amount, the Applicant would reprint a receipt on the waybill so that both amounts are reflected. If such is an isolated incident, no disciplinary action is taken if the Respondent could see that it was just an oversight or a mistake. If a shortage is picked up, it is paid for by either the driver or the cashier, depending on who is responsible for the mistake and no further disciplinary action is taken.

[27] He explained that it normally takes as week to detect shortages or discrepancies, but in his case it took almost two months.

[28] In cross-examination the Applicant disputed that he had asked Donald to pay R393,00 but instead he asked him to pay R 293,00 and that is why he failed to declare it on his form 162. He conceded that he did not properly look at the waybill because of his familiarity with the work and if he did, he would have seen what the amount on the waybill was. The Applicant explained that he had worked in that office for a period of six years and there was no reason for him to all of a sudden take R 100,00. He made a mistake when he punched R 293,00 instead of R 393,00 and he insisted that he only requested Donald to pay R293,00.

[29] The Applicant testified that Mr Simelane never asked him to pay the shortage and he requested to pay it as it was his mistake, but Mr Simelane indicated that disciplinary action would be taken.

[30] In respect of Ms Mapheto and Mr Mosholi, the Applicant testified that they were dismissed. Mr Mosholi was dismissed for stealing R 90 000 and Ms Mapheto disappeared from work and was later dismissed.

[31] The Applicant testified that he had made a R 100 mistake, which was deducted from his provident fund.

[32] The Applicant called Mr Malope as a witness and he testified that he is employed by the Respondent for a period of 18 years in the capacity of a set right clerk. He prepares waybills, verifies the waybills and checks the revenue collected.

[33] Mr Malope disputed the Respondent's position that it has a zero tolerance policy for shortages because it happens all the time and get placed on the notice board for those involved to see their names and to pay the shortages.

[34] Mr Malope testified that he is also the chairperson of the shop steward committee and the president of the union TASWU. He explained that he is familiar with the Respondent's disciplinary code as he had been representing members for the past ten years. He testified that the Respondent follows progressive discipline and in this case where the shortage was R 100,00, the appropriate sanction was a written warning. He testified that the Respondent never dismissed an employee for a shortage of less than R 200,00.

Analysis of the arbitrator's findings and the grounds for review

The test on review

[35] I have to deal with the grounds for review within the context of the test that this Court must apply in deciding whether the arbitrator's decision is reviewable. The test has been set out in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[1] as whether the decision reached by the commissioner is one that a reasonable decision maker could not reach. The Constitutional Court held that

[1] 2007 28 ILJ 2405 (CC) at para 110.

the arbitrator's conclusion must fall within a range of decisions that a reasonable decision maker could make.

[36] The Labour Appeal Court (LAC) in *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA and Others* [2] affirmed the test to be applied in review proceedings and held that:

> 'In short: A reviewing court must ascertain whether the arbitrator considered the principal issue before him/her; evaluated the facts presented at the hearing and came to a conclusion that is reasonable.'

[37] The review Court must consider the totality of the evidence and then decide whether the decision made by the arbitrator is one that a reasonable decision maker could make based on the facts placed before him / her.

[38] The review test is a stringent and conservative test of reasonableness. The Applicant has to show that the arbitrator arrived at an unreasonable result.

[39] In *Bestel v Astral Operations Ltd and Others*[3] the LAC considered the limited scope possessed by this Court to review an arbitration award and accepted that an 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. The LAC held that:

> '....the ultimate principle upon which a review is based is justification for the decision as opposed to it being considered to be correct by the reviewing court; that is whatever this Court might consider to be a better decision is irrelevant to review proceedings as opposed to an appeal. Thus, great care must be taken to ensure that this distinction, however difficult it is to always maintain, is respected.'

[40] It is within this context that the application for review is to be considered.

The arbitrator's findings on substantive and procedural fairness

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[2] (2014) 35 ILJ 943 (LAC) at para 16.
[3] [2011] 2 BLLR 129 (LAC) at para 18.

[41] In her analysis of the evidence, the arbitrator referred to Item 7 of the Code of Good Practice and the provision that in determining the fairness of a dismissal, consideration should be given to the question whether or not the employee contravened a rule or standard regulating conduct and if the rule or standard was contravened, whether the employee was aware of the rule or standard and whether the rule or standard had been consistently applied and ultimately, whether dismissal was an appropriate sanction.

[42] The arbitrator held that the issues as per Item 7(b)(i) (the existence of the rule), 7(b)(ii) (awareness of the rule) and 7(b)(iv) (appropriateness of the sanction) were not disputed and the main issues were that the Applicant had not contravened the rule and that the Respondent acted inconsistently.

[43] The arbitrator recorded that the Applicant admitted that he had made a mistake regarding the R 249,00 instead of R 349,00 amount on the waybill and that he had miscalculated R 100,00. The arbitrator accepted that based on the Respondent's evidence as well as the Applicant's own concession, he was guilty of the misconduct which he was charged with.

[44] In my view, this finding is reasonable and supported by the evidence.

[45] On the issue of consistency, the arbitrator considered the Applicant's averment that the Respondent acted inconsistently in that Ms Maropa, who made the same mistake as he had made, was not charged and disciplined.

[46] The Respondent's evidence was that it was unaware of Ms Maropa's case and that Mr Simelane only became aware of it as a result of the Applicant's unfair dismissal case that was referred to the Second Respondent, but that she was under investigation. The arbitrator accepted the Respondent's evidence in this regard as well as that other employees involved in similar matters were dismissed after being found guilty. She held that the Applicant did not destroy this version under cross-examination and he did not present any further evidence to support his claim for inconsistency, than to state that Ms Maropa made the same mistake as he did.

[47] The arbitrator held that the principle of parity should be applied with caution and she placed reliance on *SACCAWU and Others v Irvin & Johnson (Pty) Ltd*[4] in support of the aforesaid principle.

[48] The arbitrator concluded that the Respondent acted consistently and that the dismissal of the Applicant was accordingly substantively fair.

[49] In my view, the arbitrator's findings on the issue of consistency are reasonable, based on the facts and evidence placed before her.

[50] The arbitrator's ultimate finding that the Applicant's dismissal was substantively fair, is the subject of this application and in my view this finding calls for further consideration. I will deal with it *infra*.

[51] In respect of procedural fairness the arbitrator recorded that the Applicant's case was that the procedure that was followed was unfair because the charges were not brought within three days from the date that the Respondent became aware of the misconduct. The arbitrator accepted the Respondent's version that Mr Simelane became aware of the misconduct on 1 October 2015 and that the Applicant was also charged on 1 October 2015. Notwithstanding the fact that the misconduct occurred on 8 August 2015, there was no evidence adduced that the Respondent was aware of it before 1 October 2015. The Applicant's evidence took this issue no further and the arbitrator found that the Applicant's dismissal was procedurally fair.

[52] In my view, this is a reasonable finding based on the evidence placed before the arbitrator.

[53] The arbitrator ultimately found that the evidence presented showed that the Applicant was guilty of the misconduct, that the Respondent acted consistently and that his dismissal was procedurally fair. In my view, these findings do pass muster in the test that this Court has to apply in an application for review and as they are reasonable and based on the evidence adduced, they are not to be interfered with on review.

Grounds for review

[4] [1999] 8 BLLR 741 (LAC).

[54] The Applicant raised a number of grounds for review. Insofar as the grounds for review relate to the arbitrator's findings which I have already found to be reasonable and supported by the evidence, the attack on those findings are without merit and I have no intention to deal with them in any detail.

[55] To the extent that the Applicant seeks to attack the arbitrator's failure to apply her mind and to consider the appropriateness of the sanction of dismissal, there is merit in that. The gist of the Applicant's grounds for review is that the arbitrator failed to take into account the totality of the circumstances, failed to assess the fairness and appropriateness of the sanction of dismissal and failed to apply the principles enunciated in *Sidumo*[5].

[56] In its heads of argument, the Respondent submitted that dismissal is an appropriate sanction where the charge relates to dishonesty. Although this submission is not incorrect, it is not applicable *in casu* for two reasons. The first is that the arbitrator did not specifically find the Applicant guilty of dishonesty and secondly, the arbitrator made no finding whatsoever on the appropriateness of the sanction.

[57] In *NUM and Another v CCMA and Others*[6] the Court has held that:

> 'The CCMA commissioners are required in dismissal cases to determine the fairness of the dismissal. In determining the fairness of the dismissal, the first inquiry that the commissioners need to conduct is a factual inquiry concerning whether or not the misconduct was committed.
>
> The second inquiry that the commissioners must conduct if it has been established that misconduct was committed, is that of determining the fairness of the dismissal. In other words the commissioners must determine whether the dismissal is in the circumstances of a given case, an appropriate sanction. In conducting the inquiry, the commissioners must take into account the reasonableness of the rule breached by the employee and the circumstances of the infringement.'

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[5] Supra n 1.
[6] (2008) 29 ILJ 1966 (LC) at paras 18 -22.

[58] It is evident that there is a bipartite inquiry to be conducted: the first inquiry is whether the misconduct was committed and if so, the second inquiry is that of determining the appropriateness of the sanction.

[59] *In casu,* the arbitrator embarked on the first enquiry and found the Applicant guilty of the charges of misconduct. Having found him guilty on the charges of misconduct, the arbitrator had to embark on the second leg of the inquiry and the remaining issue to be decided was whether dismissal was an appropriate sanction. Instead, the arbitrator moved directly from finding the Applicant guilty of misconduct to a conclusion that his dismissal was substantively fair. It appears as if the arbitrator was of the view that the appropriateness of the sanction was not an issue she had to decide, which was clearly a misconception.

[60] In deciding the appropriateness of the sanction, the arbitrator should have been guided by the provisions of Schedule 8 of the LRA and other relevant factors.

[61] The Constitutional Court in *Sidumo*[7] has set out the factors to be considered in determining the fairness of the sanction. Those are:

> 'In approaching the dismissal dispute impartially a commissioner will take into account the totality of circumstances. He or she will necessarily take into account the importance of the rule that had been breached. The commissioner must of course consider the reason the employer imposed the sanction of dismissal, as he or she must take into account the basis of the employee's challenge to the dismissal. There are other factors that will require consideration. For example, the harm caused by the employee's conduct, whether additional training and instruction may result in the employee not repeating the misconduct, the effect of dismissal on the employee and his or her long-service record. This is not an exhaustive list.
>
> To sum up. In terms of the LRA, a commissioner has to determine whether a dismissal is fair or not. A commissioner is not given the power to consider afresh what he or she would do, but simply to decide whether what the employer did was fair. In arriving at a decision a commissioner is not required to defer to the decision of the employer. What is required is that he or she must consider all relevant circumstances.'

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[7] Supra n 1 at paras 78 and 79.

[62] In *Fidelity Cash Management Services v CCMA and Others*[8] the LAC referred to the *Sidumo* factors to be considered in deciding the appropriateness of a sanction and held as follows:

> '[94] ...The Constitutional Court emphasized that this is not an exhaustive list. The commissioner would also have to consider the Code of Good Practice: Dismissal and the relevant provisions of any applicable statute including the Act. In this regard ss 188 and 192(2) of the Act will usually be of relevance. Section 188(1) provides in effect that a dismissal that is not automatically unfair is unfair if the employer fails to prove the matters stated therein. Section 182 enjoins a person considering whether a dismissal is unfair to take into account provisions of the relevant Code of Good Practice. Section 192(2) is the provision that places the onus on the employer to prove that the dismissal is fair.
>
> [95] Once the commissioner has considered all the above factors and others not mentioned herein, he or she would then have to answer the question whether dismissal was in all of the circumstances a fair sanction in such a case. In answering that question he or she would have to use his or her own sense of fairness. That the commissioner is required to use his or her own sense of justice or fairness to decide the fairness or otherwise of dismissal does not mean that he or she is at liberty to act arbitrarily or capriciously or to be mala fide. He or she is required to make a decision or finding that is reasonable.'

[63] A consideration of the factors set out in *Sidumo* and *Fidelity Cash Management* is glaringly absent from the arbitration award. The arbitrator not only dismally failed to consider any of the aforesaid factors, she also failed to consider all the relevant circumstances in deciding whether the Applicant's dismissal was an appropriate and fair sanction.

[64] The arbitrator was required to determine the appropriateness of the sanction of dismissal *de novo* and independently, based on the evidence placed before her and with due consideration of the relevant factors. The arbitrator did none of that.

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[8] (2008) 29 ILJ 964 (LAC).

[65] The arbitrator failed to consider a material issue when she failed to consider the appropriateness of the sanction and to that extent, the arbitration award stands to be reviewed.

Relief

[66] In the notice of motion, the Applicant seeks for the arbitration award to be reviewed and set aside and for the Applicant's dismissal to be found to be unfair, alternatively for the dispute to be remitted for a hearing *de novo.*

[67] *In casu,* the only ground for review that succeeded is that the appropriateness of the sanction was not considered or decided.

[68] The question is whether there is sufficient evidence before this Court to decide the issue on the appropriateness of the sanction.

[69] A perusal of the transcript shows that no evidence was placed before the arbitrator on the appropriateness of the sanction with reference to the mitigating and aggravating factors or any other relevant factors or circumstances and as such there is no such evidence before this Court to consider. For this reason, the Court is not in a position to substitute the award or to make a finding on the appropriateness of the sanction.

[70] The matter should be remitted to the Second Respondent as there is not sufficient information or evidence on the material issue of appropriateness of the sanction upon which this Court can finally determine the matter.

[71] The remittal is limited only to the issue of the appropriate sanction in the circumstances and this is the only issue to be decided. The remittal of the aforesaid issue and the determination thereof is to be done on the existing transcribed record of the arbitration proceedings. However, the parties should be afforded an opportunity to lead evidence or to make any submissions on the limited issue of the appropriateness of the sanction.

[72] I am of the view that it would be in the interest of the parties and of justice to have the question on the appropriateness of the sanction properly ventilated and decided.

[73] This Court has a wide discretion in respect of costs and in my view this is a matter where the interest of justice will be best served by making no order as to cost.

[74] In the premises, I make the following order.

Order

1. The arbitration award issued on 21 October 2016 under case number RPNT3228 is reviewed only to the following extent:

    1.1 The arbitrator's findings that the Applicant was guilty of the charges levelled against him are confirmed;

    1.2 The arbitrator's finding that the Applicant's dismissal was substantively fair is reviewed and set aside:

2. The matter is remitted to the Second Respondent for determination of the substantive fairness of the Applicant's dismissal on the following terms:

    2.1 The only issue to be decided *de novo* is whether dismissal was an appropriate sanction;

    2.2 The appropriate relief, if any, is to be decided *de novo* after determination of the aforesaid issue;

3. The presiding arbitrator may permit the parties to adduce evidence and to make submissions only on the issue of the appropriateness of the sanction.

4. There is no order as to costs.

Connie Prinsloo

Judge of the Labour Court of South Africa

Representatives:

For the Applicant:	Higgs Attorneys
For the Third Respondent:	Bowman Gilfillan Inc Attorneys