THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

CASE NO. JR 1103/13

In the matter between:

G4S CASH SERVICES SA (PTY) LTD **Applicant**

and

NATIONAL BARGAINING COUNCIL FOR THE ROAD FREIGHT AND LOGISTICS INDUSTRY **First Respondent**

COMMISSIONER THLOTHLAMEMAJE *N.O* **Second Respondent**

SATAWU obo JERRY MATLALA **Third Respondent**

Heard: **03 May 2017**

Delivered: **06 September 2017**

Summary: **Review application: Arbitrator correctly applied relevant principles on inconsistency. Review application dismissed.**

JUDGMENT

BALOYI AJ

Introduction

[1] The arbitration award issued by the Second Respondent is subject matter of this application. The Applicant is seeking its review and set aside though referred to as a *ruling* in the Applicant's notice of motion. The Second Respondent found the Third Respondent's dismissal substantively unfair and accordingly awarded him relief of reinstatement coupled with back pay. The Third Respondent opposed the application and further brought a preliminary point that was ultimately argued before me. The Third Respondent further filed an application in terms of section 158 (1) (c) of the Labour Relations Act[1] (LRA) seeking an order making the arbitration award an order of Court which the Applicant opposed.

Preliminary issues

[2] The only point pursued during arguments was about the Applicant's failure to attach the arbitration award to its papers and such omission remained stuck to the matter throughout the process of prosecution of the review application. Up to the date of the hearing still there was no attempt from the Applicant to have the arbitration award filed. The Third Respondent relied on the case of *ABSA Bank v Standard and Another*[2] to argue that the Court lacked jurisdiction to deal with the review application due to absence of the arbitration award.

[3] Given the above objection it is of high importance to first have a look at the point raised as I am inescapably called upon to determine. The absence of a document forming part of the subject matter of litigation certainly has the effect of rendering the application defective. The obvious reason being that the Court falls to be deprived of the insight to the contentious issues within such document. Section 145 of the LRA does not provide for nor make it mandatory that an arbitration award must be attached to the Applicant's founding papers. Attaching a copy of the arbitration award has over the years been the most appropriate practice in cases of this nature.

[1] Act 66 of 1995 as amended
[2] (2012) JOL 28604 (GSJ).

The omission to do so cannot necessarily render the application fatal. The application may however be fatal if the Applicant also failed to ensure that the award forms part of the decision maker's reasons dispatched in terms of Rule 7A(2) and 7(A)(3) of the Rules of conduct of proceedings in this Court. For reasons not at the Court's disposal the Applicant elected to file a transcript of the record of arbitration proceedings only. The bundle of documents used during such proceedings are normally accompanied by the arbitrator's reasons and the arbitration award was never filed. It is worth mention that on reading of the transcript many references were made to the documents which the Applicant strongly relied upon to prove its case but not included in the record.

[4] In so far as this application is concerned, I am of the view that dismissal of the application based on the omission to attach the arbitration award may be a radical measure under the circumstances. This should by no means be construed as the Court's condonation of lack of diligence in litigation. My view is based on the reason that in the Third Respondent's application in terms of section 158 (1) (c) the arbitration award in question has been attached. Proper application of discretion favours consideration of the review application on its merits as the Court had sight of the very arbitration award which the Applicant sought to be reviewed and set aside. Furthermore, the Third Respondent will not suffer any prejudice in this regard.

Background

[5] The Applicant and the Third Respondent entered into employment relationship in September 2005. The dismissal of the Applicant on 21 December 2010 brought this relationship to an end. He was found guilty of various counts of misconduct for failure to follow procedures in performance of his duties as a custodian. His duties as described and understood by both parties were to replenish the ATM's that is to load cash into these machines.

[6] Performance of his duties normally commenced upon being handed an assignment or a spreadsheet known as Cash Receipt Voucher (CRV) which identified ATM's he had to fill during his shift. The CRV also contained information as to amounts received by a Custodian in the Stop Loss Bags (SLB). He was required to acknowledge receipt of the SLB's by initialling and signing of the CRV that monies contained in the SLB's were correct. Failure to follow these steps created situations which the Applicant found itself without proper record of movement of funds. This caused difficulties towards addressing clients' complaints about shortages. The Applicant could be easily held liable for such shortages.

[7] On his return in the afternoon, the custodian was required to scan back to the box room the bar codes of the SLB's containing surplus monies which were not filled into ATM's. This was done to ensure that the staff in the box room maintained paper trail regarding further movement of monies. This HHT scanning system replaced the manual type that was carried out by way of completion of a normal receipt. Should a technical problem be experienced with the HHT system, the Custodian had a duty to inform the controller who should complete an OB to that effect. If all monies given to the Custodian happened not to fit into the relevant canister of the ATM, the surplus monies should be properly sealed in another SLB to avoid losses.

[8] Since there was no bundle of documents filed as part of the record, the Court accepts that the charges against the Third Respondent are as recorded in the award as follows:

> "(i) **Failure to comply with the correct operating procedures.**
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> - On the 25/10/2010 you failed to complete the CRV properly.
> - The 01/10/2010 you failed to use the HHT to return bags to CMC which is detrimental to the implementation of the E-Viper system.
> - On 24/09/2010 you returned money to CMA without securely sealing the money in another stop-loss bag.

- On 22.10.20, ATM Solutions reported a shortage of R1 000-00 which was confirmed after the ATM was swopped, for which you cannot account for".

[9] It was common cause before the Second Respondent that the Third Respondent did not complete the CRV. According to the Third Respondent it was not a hard and fast rule that the CRV must always be completed. The Applicant's decision to charge and dismiss him was a result of inconsistent application of discipline. He was not the only one who breached the procedures, the counting officers also failed in this respect and they were not dismissed. This was not disputed by the Applicant's witness, Jacobus Hendrick De Beer.

[10] The Second Respondent found no merit on the Third Respondent's reason that he failed to use the HHT Scanner because it was faulty. The finding was based on the Third Respondent's failure to produce the record of reporting the fault to the controller. He further found the Third Respondent's failure to correctly complete the CRV, failure to use HHT scanner and the use of bulk bags in returning the money instead of SLB's could not be attributable to a loss of R1000-00 that was not accounted for.

[11] His analysis of the evidence caused him to arrive at a conclusion that the Third Respondent was guilty of offences he was charged with. He found the sanction of dismissal inappropriate due to the Applicant's inconsistent application of discipline and that the underlying transgressions forming part of the misconduct in question did not reveal dishonesty. He also found that no evidence was led to support the Applicant's argument that the trust relationship had broken down.

<u>The Applicant's grounds of review</u>

[12] The prime focus on the Applicant's grounds was heavily rested on the Second Respondent's reliance on inconsistent application of discipline. The Second Respondent had as a result made an incorrect finding that the sanction of dismissal was not appropriate based on inconsistency. This

finding was according to the Applicant made despite the Second Respondent's acknowledgement of risks attached to the nature of the Applicant's business. Having drawn negative inferences against the Applicant to arrive at his findings was indicative of his failure to consider all facts placed before him. He failed to consider the Third Respondent's concessions that he did not complete the CRV form, did not make use of HHT scanner and that he used bulk bags instead of SLB's. The Applicant further attacked the Second Respondent's finding of inconsistency for being unsubstantiated and incorrect as it is rooted on failures on the part of counting officers and ATM official to sign the CRV form. His finding that the loss of R1000-00 could not be attributed to the Third Respondent's failure to complete the CRV form and to use the HHT scanner was incorrect and not supported by evidence.

[13] The Applicant's grounds were taken further during arguments as Mr Crafford pointed that the Third Respondent's changes to his version in arbitration proceedings was sufficient to find that the trust relationship had broken down. By concluding the matter on inconsistency with no record before him regarding the other matters demonstrated the Second Respondent's failure to consider all the facts placed before him.

[14] The Second Respondent's decision should be found to be a reasonable one given that it was a known fact that other employees who committed similar misconduct were not dismissed. This was pointed out by Mr Potas for the Third Respondent who further argued that De Beer conceded on this point. Other employees such as Motloung had shortages and were also not dismissed. Contrary to the Applicant's contentions, the issue of inconsistency was indeed raised at the disciplinary hearing. It did not come as a new issue during arbitration proceedings.

Analysis

[15] The facts of this matter reveal that the Second Respondent was mainly tasked to determine whether the sanction of dismissal was appropriate.

That the Third Respondent breached the rules was not in dispute and he had to take into account all surrounding factors to arrive at his decision. He dealt with the matter on charge by charge basis and scrutinized the Third Respondent's justifications on each charge which he accepted except for failure to use the HHT scanner. The varying findings regarding the Third Respondent's justifications still came to one result that the Third Respondent was guilty of failure to adhere to procedures.

[16] In cases where failure to comply with operational procedures is the subject matter, it becomes most imperative to conduct an enquiry on the extent of such breaches, that is prior to coming to a conclusion whether a sanction of dismissal was appropriate or not. It makes more sense for me to paste a compressed summary of facts of the *Sidumo*[3] case as dealt with by the Constitutional Court, courtesy of Sangoni AJA in the Labour Appeal Court's judgment of *Edcon Ltd v Pillemer NO and Others*[4] in paragraph 20 who simplified them as follows:

> "[20] I proceed to briefly outline the facts in the *Sidumo* case. The employee was a security officer whose duty was to search employees before leaving a certain point. Video surveillance revealed that he had, in 24 specifically monitored instances, conducted only one search in accordance with established procedures. On eight occasions, he conducted no search at all. Fifteen other searches did not conform to the procedures. The video also confirmed that *Sidumo* allowed persons to sign the search register without conducting any search at all. For this he was dismissed. The commissioner took into account the employee's long service, the fact that no losses appear to have resulted from his failure to perform his duty, that the violation had been unintentional or a 'mistake' and that it had not been shown that the employer had been dishonest and found that the dismissal was too harsh a sanction. He did not consider the offence committed to "go into the heart of the relationship (with the

[3] *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (2007) 12 BLLR 1097 CC
[4] (2008) 5 BLLR 391 (LAC)

employer), which is trust". This resulted in the award reinstating the employee."

[17] The Constitutional Court in *Sidumo* did not fault the commissioner for finding that dismissal was not an appropriate sanction based on the reasonableness test[5]. In considering this it was held as follows at paragraph 177:

> " Equally true is that when an employer determines what is an appropriate sanction in a particular case, the employer may have to choose among possible sanctions ranging from a warning to dismissal. It does not follow that all transgressions of a particular rule must attract the same sanction. The employer must apply his or her mind to the facts and determine the appropriate response. It is in this sense that the employer may be said to have discretion."

[18] The Labour Appeal Court in *Edcon* without hesitation followed the *Sidumo* approach with approval[6]. It is highly notable that over the years the Courts exercised caution when dealing with cases where inconsistent application of discipline happened to be an issue. The inconsistency issue in this matter emerged out of repeated misconduct related to non-compliance with procedures which is usually characterized as *comparing apples with apples*. It is trite that a plea of inconsistency should to a large extent be sparingly upheld by arbitrators when raised. With or without invitation the arbitrator is required to apply a discretion that is upon consideration of all facts placed before him/her. The reason being that the raising of inconsistency cannot automatically come as a bar to imposition of dismissal. The Court clearly elaborated on this point in *Conmed Health CC*

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[5] In terms of *Sidumo* judgment the reasonableness upon which the award may be assessed on review was formulated at paragraph 110 on the question whether the Commissioner's decision. *"is the one that a reasonable decision maker could not reach".*

[6] At paragraph 22 it was pointed that: "It is, in fact the relevant factors and circumstances of each case objectively viewed that should inform the element of reasonableness or lack thereof".

v Bargaining Council for the *Chemical Industries and Others*[7] at paragraph 8 as follows:

> " As stated previously by this court the parity rule does not take away the right of the employer to impose different sanctions on employees who were involved in the same act of misconduct. The issue when faced with the complaint that the employer has applied discipline inconsistently is to consider the fairness of such inconsistent application of discipline. In other words, the differential sanctions do not automatically lead to the conclusion that the dismissal was unfair. The fairness of the dismissal has to be determined on the basis of whether the employer, in imposing differential sanctions, acted unfairly. In assessing the fairness of a dismissal in a case involving the imposition of differential sanctions, the commissioner has to consider whether there is an objective and fair reason for imposing different sanctions for misconduct arising from the same offence."

[19] In *National Union of Mineworkers on behalf of Botsane v Anglo Platinum mine (Rustenburg section)*[8] The Labour Appeal Court emphasized the importance of raising the inconsistency case from the beginning of the proceedings and with relevant detail. The following was thus said at paragraph 39:

> "Moreover, as a matter of practice, a party, usually the aggrieved employee, who believes that a case for inconsistency can be argued, ought, at the outset of proceedings, to aver such an issue openly and unequivocally so that the employer is put on proper and fair terms to address it. A generalised allegation is never good enough. 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. Introducing such an issue in an ambush–like fashion, or as an afterthought, does not serve to produce a fair adjudication process. (See:

[7] (2012) 33 ILJ 623 (LC)
[8] (2014) 35 ILJ 2406 (LAC)

> *SACCAWU and Others v Irvin and Johnson Ltd* (1999) 20 ILJ 2302 (LAC) at [29]; also see: *Masubelele v Public Health and Social Development Bargaining Council and Others* [2013] ZALCJHB JR 2008/1151] which contains an extensive survey of the case law about the idea of inconsistency in employee discipline*)."*

[20] In *SA Police Services v Safety and Security Sectoral Bargaining Council and Others*[9] the Court per Lagrange J restated the applicable approach in matters where consistency is raised in terms of onus and the following was said at paragraph 10:

> " Once the employee has pertinently put the issue of consistent treatment in issue, the employer has a duty to rebut such allegations. In the context of a case in which evidence was led by the employee of inconsistent treatment, Landman J held in *Sappi Fine Papers (Pty) Ltd t/a Adamas Mill v Lallie and others* (1999) 20 ILJ 645 (LC) at 647 para 5:
> 'As regards the onus, the onus of proving that the dismissal was fair, and thus of rebutting the allegation of inconsistency, is one which rests squarely on the employer."

[21] Turning onto this instant matter, the persons who committed similar transgressions regarding failure to complete the CRV and shortages were identified. When their respective backgrounds were put to De Beer, the Applicant's witness, he was unable to dispute the Third Respondent's propositions on the issue. With no evidence led by the Applicant to rebut the Third Respondent's evidence, the Second Respondent had to come to the only conclusion that the Applicant applied discipline inconsistently on its employees. In paragraphs 29 and 30 of the arbitration award the Second Respondent in substantiation of his findings held as follows:

> "[In this case, the appropriateness of the dismissal was attached on account of inconsistent application of discipline. In regard to the proper completing of the CRVs' and the use of the HHT, it was argued that the Respondent had failed to act

[9] (2011) 32 ILJ 715 (LC)

> consistently in other employees who had committed the breaches were not disciplined. The inconsistency complained of was contemporaneous in that the account officials did not complete and sign the same document that the Applicant was disciplined for not equally signing, and furthermore, three other custodians were not disciplined for not using the HHT on or around the same time that the Applicant committed the same breach. The inconsistency could not be justified, and all that De Beer could attest to was that he did not know the reason these other employees were not disciplined. In as much as it was argued that the Respondent took such breaches seriously, it however proved to have been inconsistent in the way it dealt with them, and this cast doubt on its assertions that it took such breaches seriously.
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> [30] The second attach to this sanction was that it could not be justified on the basis of an alleged breakdown in a trust relationship. De Beer was at pains to indicate in what material respect the relationship had broken down. A conclusion was made somewhere in this award that the alleged loss R1000.00 could not be attributable to the failure to correctly complete the CRV, or the failure to use the HHT or the failure to use the bulk bag in returning the cash to the premises. Even though it has been found that the Applicant had breached the rules in regard to these three charges, the reason that the Respondent imposed the sanction of dismissal, i.e. the breakdown in the trust relationship and the loss of the R1000.00 is not supported by evidence on a balance of probabilities."

[22] The cumulative effect of the above undoubtedly demonstrates that the Second Respondent applied his mind to all material issues placed before him. He was alive to the fact that a plea of inconsistency cannot just be accepted on face value but a relevant enquiry must be undertaken to find its relevancy. The Applicant's assertion that the Second Respondent decided the issue of inconsistency without proof of the record regarding other cases being produced by the Third Respondent is unassailable under these circumstances. This appeared to be an attempt to shift onus

off the Third Respondent which is not the correct route to follow in this regard. The Applicant's application is bound to fail.

[23] In so far as costs are concerned no reason came forth as to why costs should not follow the result. It will thus not be within the requirements of law and fairness not to make a cost order in so far as the review application is concerned.

Order

[24] In this regard the following order is made:

1. The review application is dismissed with costs;

2. The arbitration award issued under case number GPRFBC 15096 is made an order of the Court.

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Moses Baloyi

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant : Mr C Crafford of Crafford Attorneys

For the Respondent : Adv. R Potas
Instructed by : Mabaso Attorneys