IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR1084/21

In the matter between:

LONMIN MINE **Applicant**

and

COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION **First Respondent**

ELELWANI HLUNGWANI *N.O.* **Second Respondent**

KABELO TLOMATSANA **Third Respondent**

Heard: **10 February 2022**

Delivered: **15 March 2022**

Summary: Review application - Inconsistency – principles applicable – employee party has evidentiary burden to show inconsistency – no inconsistency shown in this instance

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JUDGMENT

DEANE, AJ

Introduction and Background

[1] This is an unopposed application for the review and setting aside of an arbitration award handed down by the second respondent (Commissioner) dated 20 May 2021 under the auspices of the first respondent, under case number GATW11813-19 (Award).

[2] The third respondent (Third Respondent) was employed on 20 January 2014 and he was working as a diesel mechanic, his monthly salary was R53 825.00.

[3] After Johnathan Pieter Maritz (Maritz), the Third Respondent's shift supervisor found him sleeping on duty, the Third Respondent was charged and instructed to attend a disciplinary enquiry. Following the disciplinary enquiry, the Third Respondent was found guilty of misconduct and dismissed on 19 July 2019.

[4] In her Award, the Commissioner found, on a balance of probabilities that the Third Respondent was guilty of the misconduct.

[5] The Commissioner nonetheless found the dismissal of the Third Respondent to be substantively unfair on the basis that the applicant (Applicant) was inconsistent in its application of the rule relating to sleeping on duty.

The Arbitration Proceedings

[6] The Applicant called one witness, Maritz to testify. A summary of his evidence is set out below. Maritz testified that:

6.1 During the shift on 4 February 2019, the Third Respondent was called to attend to the breakdown of a LHD machine.

6.2 When Martiz went to check on the machine, both he and his colleague Robert found the Third Respondent lying down with his head on his suitcase, facing up and that the Third Respondent was clearly sleeping for approximately five

minutes when Robert eventually woke the Third Respondent up and he was escorted from underground.[1]

6.3 In terms of the Applicant's code of conduct, sleeping on duty is a dismissible offence.

6.4 The issue of consistency was raised, and Maritz stated that he does not know "Mahongo", Max Mudipadi and Sylvester Supulogane who are the persons that the Third Respondent alleges were treated differently by the Applicant on the basis that they also slept on duty but were never dismissed.[2]

[7] The Third Respondent testified that:

7.1 He was not sleeping and that he was merely waiting for the electrician in order to test the machine.

7.2 The Applicant had a vendetta against him.

7.3 There were three other employees who were caught sleeping but were never charged.

Grounds for Review

[8] There are two grounds for review, including that the Commissioner:

8.1 Applied the incorrect enquiry for substantive fairness in that the Commissioner incorrectly found that the Third Respondent had established a *prima facie* case of inconsistency.

8.2 Failed to attach weight to material facts which resulted in the unreasonable finding that the sanction was not appropriate. This ground of review is relevant only to the extent that this Court should find that the Third Respondent had in

[1] Transcript, p. 18.
[2] Transcript, p. 10.

fact proved a *prima facie* case and that the Applicant was inconsistent in disciplining the Third Respondent.

Legal Considerations and Analysis

[9] Regarding the first ground of review, the facts of this matter reveal that the Third Respondent breached a valid rule and which was not in dispute. The Commissioner had to take into account all surrounding factors to arrive at his decision. At the arbitration, the Applicant's witness, Maritz, testified that he found the Applicant lying down with this head on his suitcase, his face was facing up as he had made a bed for himself. Maritz also testified that he watched the Third Respondent for a further five minutes, looking at the Third Respondent sleeping. The Commissioner in her Award concluded that "*If indeed Mr Maritz stood before the Applicant for 5 minutes and if he was not sleeping, surely the applicant would have seen them before he was asked why he was sleeping…I am therefore persuaded that the Applicant was found sleeping as Mr Maritz's testimony was the one that was more convincing than that of the Applicant*"[3] and that indeed the Third Respondent had indeed broken a rule.

[10] The next stage of the enquiry that the Commissioner had to decide on was whether the rule was consistently applied.

[11] The Commissioner found that the Applicant had inconsistently applied the rule in that, it had disciplined the Third Respondent and dismissed him for the offence when it did not even charge other transgressors who may have committed the same offence. The Commissioner did not accept the Applicant's evidence that the other transgressors could not have been identified. The Commissioner was astounded that such disparity of treatment had taken place, viz: "*What baffled me was that there are still employees who are still at work who were not dismissed but they committed the same offence as the Applicant and if their conduct was accommodated why was the*

[3] Pleadings, pg. 20-21, para 25.

Applicant dismissed. The employer cannot rely on a code of conduct that is used on certain employees, the code should apply across the board and from what was presented before me there was no evidence that it is applied consistently. It is therefore my conclusion that dismissal was not an appropriate sanction under the circumstances".[4]

[12] A summary of the facts of the *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[5] (*Sidumo*) case as dealt with by the Constitutional Court, courtesy of Sangoni AJA in the Labour Appeal Court's (LAC) judgment of *Edcon Ltd v Pillemer NO and Others*[6] (*Edcon*) who simplified them as follows states that:

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

[4] Arbitration Award at para 28, pp 21-22.
[5] (2007) 12 BLLR 1097 CC.
[6] (2008) 5 BLLR 391 (LAC) at para 20.

[13] The Constitutional Court in *Sidumo* did not fault the commissioner for finding that dismissal was not an appropriate sanction based on the reasonableness test[7]. In considering this, it was held as follows:

> '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.'[8]

[14] The LAC in *Edcon,* without hesitation, followed the *Sidumo* approach with approval[9]. It is highly notable that over the years the Courts exercised caution when dealing with cases where the 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 characterised 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 is that the raising of inconsistency cannot automatically come as a bar to the imposition of dismissal. The Court clearly elaborated on this point in *Comed Health CC v National Bargaining Council* for the *Chemical Industries and Others*[10] (*Comed*) 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

[7] In terms of *Sidumo* judgment the reasonableness upon which the award may be assessed on review was formulated at para 110 on the question whether "*the decision reached by the commissioner is one that a reasonable decision maker could not reach"*.
[8] *Sidumo* at para 117.
[9] Sangoni JA in *Edcon a*t para 22 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*".
[10] (2012) 33 ILJ 623 (LC) at para 8.

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.'

[15] In *National Union of Mineworkers on behalf of Botsane v Anglo Platinum mine (Rustenburg section)*,[11] the LAC emphasised the importance of raising the inconsistency case from the beginning of the proceedings and with relevant detail. The following was thus said:

'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: *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)'.

[16] In *SA Police Services v Safety and Security Sectoral Bargaining Council and Others*[12] the Court, per Lagrange J, restated the applicable approach in matters where consistency is raised in terms of onus and the following was said:

[11] (2014) 35 ILJ 2406 (LAC) at para 39.
[12] (2011) 32 ILJ 715 (LC) at para 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:
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> > "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"'.

[17] Turning to the facts of this matter, there was simply no evidence led that there was an inconsistent application of the rule. Indeed, the issue of inconsistency was raised for the first time during the arbitration process and it was only raised after giving his opening statement and in response to the Commissioner's question as to whether the rule was consistently applied.[13] The Third Respondent simply dropped names but failed to provide evidence on his claim of inconsistency. During the cross-examination of Maritz, the Third Respondent also failed to put a version to Maritz in so far as the issue of consistency is concerned but merely confirms Maritz's evidence-in-chief that he does not know who these persons are.[14]

[18] In fact, the only evidence which the Commissioner appears to rely on in making her inconsistency finding is the following evidence that the Third Respondent gave under cross-examination: *"[T]he Applicant stated under cross-examination that the employees in question were not charged and they were not dismissed as there was no record of them sleeping on duty*".[15]

[19] The legal principles are clear that where there is an allegation of discipline being applied inconsistently by an employer, it is incumbent on the employee alleging the inconsistency to lay a credible basis for this claim and not a mere

[13] Transcript, p. 9.
[14] Transcript, p. 29.
[15] Transcript, at para 26, p. 21.

unsubstantiated allegation. In *Masubelele v Public Health and Social Development Sectoral Bargaining Council and Others*[16] the Court stated:

> 'Mr S M Shaba, representing the third respondent, contended that the applicant had the evidentiary burden to at least prove a *prima facie* case of inconsistency, before the third respondent could be expected to answer the same. Mr Shaba stated that in this instance, the applicant failed to even provide *prima facie* evidence to establish inconsistency and consequently the third respondent had nothing to answer. Mr Shaba stated that the applicant should have led evidence, and only has himself to blame for not doing so. I agree with these submissions of Mr Shaba. The applicant had to at least have provided a *prima facie* evidentiary platform to support his contentions of inconsistency.'

[20] As was said in *SA Municipal Workers Union on behalf of Abrahams and Others v City Of Cape Town and Others*[17]:

> 'This situation is, in my view, akin to the question of inconsistency where an employee alleges inconsistency. The employee must show the basis thereof, for example he must reveal the name of the concerned employee and also the circumstances of the case. This is necessary for the employer to respond properly to the allegation. Failure to do so may lead to a finding that no inconsistency exists or was committed by the employer. This situation never shifts the onus from the employer to the employee to prove that there is no consistency.'

[21] In *Comed*:[18]

> 'It is trite that the employee who seeks to rely on the parity principle as an aspect of challenging the fairness of his or her dismissal has the duty to put sufficient information before the employer to afford it (the employer) the opportunity to respond effectively to the allegation that it applied discipline in an inconsistent manner. One of the essential pieces of information which the

[16] Reportable, (JR 1151/2008) [2013] ZALCJHB (17 January 2013) at para 29.
[17] (2011) 32 ILJ 3018 (LC) at para 50. See also *Minister of Correctional Services v Mthembu No and Others* (2006) 27 ILJ 2114 (LC) at para 13.
[18] *Comed* at para 10.

> employee who alleges inconsistency has to put forward concerns the details of the employees who he or she alleges have received preferential treatment in relation to the discipline that the employer may have meted out.'

[22] *In casu*, for the Third Respondent to merely mention names of employees is insufficient. I am therefore of the view that the Third Respondent did not discharge the evidentiary burden that rested on him to provide at least *prima facie* evidence to show the existence of inconsistency, in the proceedings before the Commissioner, and which would have put the duty on the Applicant to answer the same. In applying the above principles to the current matter, the Third Respondent simply did not make out a case of inconsistency in law. On this basis alone, the Applicant's application should succeed.

[23] Regarding the appropriate sanction, in *Sidumo,* the Court held that in arriving at a decision whether or not the dismissals are fair, commissioners must exercise a value judgement. In exercising the value judgment, the commissioners need to take into account all the circumstances of the case, including the importance of the rule that was breached and the reasons why the employer imposed the sanction of dismissal.

[24] *In casu*, the Third Respondent was found sleeping on duty underground in a mine with heavy and dangerous equipment around him putting not only his safety and life at risk but also that of his colleagues. This is the reason why misconduct of this nature is a dismissible offence in terms of the Applicant's disciplinary code.

[25] The Commissioner clearly failed to take into consideration the seriousness of this misconduct. The Commissioner, having made a credibility finding against the Third Respondent and finding that he had breached a rule, the ultimate finding is therefore not reconcilable with the material facts and her findings in this regard.

[26] I, therefore, conclude that having had regard to the totality of the evidence, the decision made by the Commissioner is one which a reasonable decision maker could not have reached.

[27] In the premise the following order is made:

Order

1. The arbitration award handed down by the Second Respondent dated 20 May 2021 under the auspices of the First Respondent under case number GATW11813-19 is reviewed and set aside.
2. The award is substituted with a finding that the dismissal of the Third Respondent is substantively fair.
3. There is no order as to costs.

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T Deane

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Adv Z Ngwenya
Instructed By:	Solomon Holmes Attorneys
For the Respondent:	None