IN THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

Not Reportable

Case no: PR 60/16

In the matter between:

MADEIRA PHARMACIES **Applicant**

and

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION (CCMA) **First Respondent**

ELIZABETH TOM, *N.O* **Second Respondent**

SIYABULELA ZULU **Third Respondent**

Heard: 07 June 2018

Delivered: 05 December 2018

JUDGMENT

MAHOSI, J

Introduction

[1] This is an application in terms of section 145 of the Labour Relations Act[1] (LRA) to review and set aside the arbitration award issued by the second respondent (arbitrator) dated 31 March 2016 under the auspices of the first respondent, the Commission for Conciliation, Mediation and Arbitration (CCMA) with case number ECEL687. In his award, the arbitrator found the third respondent's dismissal unfair and awarded him compensation.

[2] The key question is whether the arbitrator failed to apply his mind to the relevant evidence and consequently made an award, which no reasonable arbitrator could make.

Background

[3] Prior to outlining the applicant's case in detail and considering the issues that gave rise to the claim, it is necessary to outline the facts that form the relevant background to the dispute between the parties.

[4] The applicant employed the third respondent on 4 January 2010 as a Phamarcist. On 27 January 2016, the third respondent was dismissed on account of alleged misconduct. Subsequent to his dismissal, he referred an unfair dismissal dispute to the CCMA. The dispute was conciliated unsuccessfully and was referred to arbitration. The arbitrator issued an award which is the subject matter of this application.

Arbitration award

[5] In his award, the arbitrator recorded the following three charges leveled against the third respondent for which he was dismissed:

> '(i) Insubordination- In that he was given a lawful and reasonable instruction by the Managing Director (Ms Nontuthuzelo Sibango) on the 05 January 2016 to stop giving discount to customers that is more than 10% and also to communicate the instruction to staff at the meeting held at Tshezi Building Office on the 20 January 2016.

[1] Act 66 of 1995 as amended.

(ii) Insolence- In that he refused to give report to the Managing Director (Ms. Nontuthuzelo Sibanho) regarding the instruction that was given to him on the 05 January 2016 to communicate the discount percentage allowed to staff during training held on the 20 January 2016 at Tshezi Building. He said to the Managing Director "Lonto yakho ye discount yibuze ku Sibongiseni andizi kuyiphendula mna" this means: "that discount of yours, ask it from Sibongiseni, I am not going to answer it.

(iii) Dereliction of duties- in that he failed to perform his duties as a responsible Pharmacist as a person in charge in the Pharmacy. The staff continued to give discount that is more than 10% to customers because they did not get information from Mr. Siyabulela Zulu that was supposed to be conveyed in the training.'[2]

[6] It is common cause that the third respondent was instructed to discontinue giving customers more that 10% discount. He was further instructed to inform staff members to do the same. In his analysis of the evidence and argument, the arbitrator recorded that it was common cause that the third respondent pleaded guilty to the offence of continuing to give 30% discount despite being instructed not to do so and further that he did not deny that he failed to instruct the staff to stop giving more than 10 % discount as instructed. The arbitrator rejected the third respondent's defence that he gave 30% discount because the customers were used to it. The basis on which he rejected the third respondent's reasoning was that the instruction was clear and he had a chance to seek authority from the applicant. The arbitrator found that the third respondent's conduct amounted to him challenging the authority of the applicant and further that it caused financial harm to the applicant.

[7] The arbitrator found the third respondent's conduct to have amounted to gross insubordination in that he gave a 30% discount to 3 doctors and allowed other staff members to do the same after having established that such discount resulted in financial loss in some items. By so doing, in the arbitrator's view, the third respondent challenged the authority of the employer.

[2] Index to pleadings, page 12

[8] On the charge relating to insolence, the arbitrator found that the third respondent was not guilty on the basis that the applicant failed to lead direct evidence on the response the third respondent gave after being requested to give a report relating to a staff meeting of 26 January 2016. The arbitrator's view was that the applicant's evidence remained hearsay as none of the witnesses was present at the time of the telephone conversation between the third respondent and the applicant's Managing Director.

[9] The third respondent was found guilty of the charge of deriliction of duty in that he failed to inform the staff members about the instruction not to give discount in excess of 10%.

[10] The arbitrator considered the issue of consistency of the application of the rule and found that there was no objective reason for the applicant's failure to take disciplinary measures against Siphosethu who also gave 30% discount after the dismissal of the third respondent. He further considered the issue of the trust relationship and found that it was not damaged on the basis that the respondent was remorseful. The arbitrator found that the third respondent's dismissal was substantively unfair and awarded the applicant three month's compensation. It is this award that the applicant seek to set aside.

Grounds of review

[11] The applicant submitted that the arbitrator is in conflict with the provisions of the LRA and/or the Constitution. Further that the arbitrator committed a gross irregularity and/or acted as an unreasonable decision-maker in arriving at a conclusion that no other reasonable decision maker would have arrived at by ruling that the third respondents' dismissal was unfair despite conceding that the third respondent is guilty of serious misconduct and which misconduct caused the applicant harm.

[12] It is further submitted that had the arbitrator had proper regard to the evidence before her, and had she properly construed the legal position, she would have been compelled to conclude that the third respondents' dismissal was fair. Further that the argument on inconsistency of the application of the rule which

was raised by the third respondent was not substantiated nor was the applicant aware of same.

[13] The third respondent opposed this application on the basis that the award fell within the ambit of reasonableness.

Applicable law and evaluation

[14] Arbitration awards are reviewable in terms of section 145 of the LRA that provides that any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award.

[15] The test for review which has been authoritatively stated in *Sidumo and Another v Rusternburg Platinum Mines Ltd and Others*[3] was reiterated in *Herholdt v Nedbank Ltd and Congress of South African Trade Unions*[4] as follows:

> '[25] In summary, the position regarding the review of CCMA awards is this: A review of a CCMA award is permissible if the defect in the proceedings falls in one of the grounds in s 145(2)(a) of the LRA. For a defect in the conduct of the proceedings amount to a amount to gross irregularity is contemplated by s 145(2)(a)(ii), the arbitrator must have misconceived the nature of the enquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that is reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular fact, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome and unreasonable.'

[16] The test is therefore whether the decision reached by the Commissioner is one that a reasonable decision-maker could reach. In dismissals relating to misconduct, item 7 Schedule 8 – Code of Good Practice: Dismissal, requires the arbitrator to consider:-

[3] 2007 (28) ILJ 2405 (CC).
[4] 2013 (6) SA 224 (SCA); 2013 (11) BLLR 1074 (SCA); 2013(34) ILJ 2795(SCA) at para 25.

'(a) Whether or not the employee contravened a rule or standard regulating conduct in or of relevance to, the workplace; and

(b) If a rule or standard was contravened, whether or not-

(i) The rule was a valid or reasonable rule or standard;

(ii) The employee was aware, or could reasonably be aware of the rule or standard;

(iii) The rule or standard has been consistently applied by the employer; and

(iv) Dismissal was an appropriate sanction for the contravention of the rule or standard.'

[17] The enquiry is whether the employee contravened a valid and reasonable rule that he/she (the employee) was aware of and which was consistently applied by the employer. The commissioner is further required to consider whether the dismissal was an appropriate sanction for the contravention of the rule or standard.

[18] The applicant's contention was the arbitrator's finding, that the third respondents' dismissal was unfair despite conceding that the third respondent is guilty of serious misconduct and which misconduct caused the applicant harm, was unreasonable. The arbitrator found that the third respondent committed gross insorbordination and failed to execute his duties as he was in position of trust. Further that by so doing, he caused unnecessary financial loss for the applicant. Notwithstanding his finding, the arbitrator found that the third respondent's dismissal was fair on the basis that the applicant was not consistent in applying the rule and rejected the applicant's submission that the trust relationship between the parties had broken down.

[19] Item 3 of the Code of Good Practice: Dismissal provides guidance on how the employers should deal with the determination of sanction and it provides as follows:

'3. Disciplinary measures short of dismissal.

Disciplinary procedures prior to dismissal.

(1) All employers should adopt disciplinary rules that establish the

standard of conduct required of their employees. The form and content of disciplinary rules will obviously vary according to the size and nature of the employer‘s business. In general, a larger business will require a more formal approach to discipline. An employer‘s rules must create certainty and consistency in the application of discipline. This requires that the standards of conduct are clear and made available to employees in a manner that is easily understood. Some rules of standards may be so well established and known that it is not necessary to communicate them.

(2) The courts have endorsed the concept of corrective or progressive discipline. This approach regards the purpose of discipline as a means for employees to know and understand what standards are required of them. Efforts should be made to correct employees' behaviour through a system of graduated disciplinary measures such as counselling and warnings.

(3) Formal procedures do not have to be invoked every time a rule is broken or a standard is not met. Informal advice and correction is the best and most effective way for an employer to deal with minor violations of work discipline. Repeated misconduct will warrant warnings, which themselves may be graded according to degrees of severity. More serious infringements or repeated misconduct may call for a final warning, or other action short of dismissal. Dismissal should be reserved for cases of serious misconduct or repeated offences.

(4) Generally, it is not appropriate to dismiss an employee for a first offence, except if the misconduct is serious and of such gravity that it makes a continued employment relationship intolerable. Examples of serious misconduct, subject to the rule that each case should be judged on its merits, are gross dishonesty or wilful damage to the property of the employer, wilful endangering of the safety of others, physical assault on the employer, a fellow employee, client or customer and gross insubordination. Whatever the merits of the case for dismissal might be, a dismissal will not be fair if it does not meet the requirements of section 188.

(5) When deciding whether or not to impose the penalty of dismissal, the

employer should in addition to the gravity of the misconduct consider factors such as the employee's circumstances (including length of service, previous disciplinary record and personal circumstances), the nature of the job and the circumstances of the infringement itself.

(6) The employer should apply the penalty of dismissal consistently with the way in which it has been applied to the same and other employees in the past, and consistently as between two or more employees who participate in the misconduct under consideration.'

[20] Thus, in determining the appropriateness of the sanction, the arbitrator must enquire into the gravity of the contravention of the rule; the consistent application of the rule and sanction; and the mitigating and aggravating factors. In *Sidumo,*[5] the Constitutional Court held that:

> '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.'

[21] In determining whether the sanction imposed by the employer is fair, the arbitrator is required to take into account the totality of circumstances.[6] In applying the above legal principles to the current matter, I now consider the challenge to the award.

Inconsistency

[22] The applicant challenged the arbitrator's award on the basis that in considering the issue of inconsistency in application of the rule, the arbitrator failed to take into account the undisputed evidence that the applicant was not

[5] Supra n 3 at para 78.
[6] See: *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] 12 BLLR 1097 (CC).

aware of the incident. In this regard, the third respondent, during cross examination, introduced a document to the applicant's witness, Mr Njawuzala, to show that his colleague Siphosethu gave a 30% discount on 25 February 2016. Mr. Njawuzala's evidence was that the applicant was not aware of the incident and that the incident would have to be investigated. The commissioner found as follows:

> 'The applicant argued that there was an inconsistency on the part of the respondent in dismissing him for giving 30% discount whilst Siphosethu did same on 25 February 2016 and she was not dismissed. The respondent raised a subjective defence and stated that the respondent was not aware of the document and the transaction made at the time. There was no objective reason as to why the comparator employee was treated differently whilst having committed the same misconduct. At the time this 30% discount was given on 25 February 2016, all the staff must have known that the 30% discount is no longer given to customers because it took place after the dismissal of the applicant. In the circumstances I find that there is an inconsistency on the part of the respondent.'

[23] The employee may only rely on inconsistency only if the employer was aware that the chosen comparator had perpetrated the same offence.[7] In *Chemical, Energy, Paper, Printing, Wood, and Allied Workers Union v National Bargaining Council for the Chemical Industry and Others*[8] the LAC held that:

> 'An employer can only be accused of selective application of discipline if, having evidence against a number of individual employees it arbitrarily selects only few to face disciplinary action.'

[24] In *Mogale v AD Spitz (Pty) Ltd*[9] the LAC held that:

> 'Where the employee alleges that the employer acted inconsistently, the employer will have a duty to show that it acted consistently in disciplining its

[7] Grogan: *Dismissal*, Juta page 153; See also: *Southern Sun Hotel Interests (Pty) Ltd v CCMA and Others* [2009] 11 BLLR 1128 (LC).

[8] [2011] 2 BLLR 137 (LAC).

[9] Case No: JA 36/2011 para 24.

employees or where there was differentiation the employer will have to demonstrate that the different treatment was justified. See *Early Bird Farms (Pty) Ltd v Mlambo* [1997] 5 BLLR 541 (LAC) at 545 J.'

[25] In the current matter, the arbitrator failed to apply his mind to the fact that the incident relied on by the third respondent occurred after his dismissal and further that the employer was not aware of the misconduct committed by the comparator. The arbitrator simply accepted the customer's receipt showing that the comparator committed the same offence. No case of arbitrary or subjective selection by the applicant not to discipline the comparator was proven. Therefore, the applicant's inconsistency challence has to succeed.

Trust relationship between the applicant and the third respondent

[26] A reading of the award reveals that, in rejecting the applicant's contention that the trust relationship between the parties was broken down, the arbitrator found that the third respondent's unblemished long service, his plea of guilt and the remorse he showed when confronted about the misconduct were an important consideration.

[27] The undisputed evidence before the arbitrator was that the third respondent pleaded guilty to the charge that he failed to adhere to an instruction not to give more than 10% discount. The arbitrator viewed the third respondent's conduct of challenging the authority of the applicant and found it to amount to gross insubordination. However, he took the view that misconduct relating to gross negligence did not warrant dismissal and that the employer should compensate the third respondent.

[28] There is no basis for the arbitrator to trivialize the seriousness of a misconduct relating to gross insubordination and dereliction of duty, which was committed by the third respondent. The third respondent was employed as a Pharmacist for six years and he failed to exercise the standard of care and skill that was reasonably expected of an employee with his degree of skill and experience and his conduct resulted in financial loss to the applicant. In addition, it was not in dispute that his conduct and/or omission was serious in itself. In fact, from the arbitrator's finding, it is apparent that the misconduct committed by

the employee was serious in that it involved wilful disregard to the employer's policy and procedure. The applicant was entitled to discipline him because he owes a duty of care to it (the applicant), its clients and his own colleagues. The Code of Good Practice: Dismissal, in Item 3(3) of the LRA, recognises that the sanction of dismissal is fair and appropriate in such circumstances.

[29] It is my view that the arbitrator failed to take into account the seriousness of the misconduct the employee was charged with, the importance thereof, the applicant's total disregard of its gravity and the effect the said misconduct had on the continued employment relationship between the parties. Had the arbitrator considered all the material that was before him, he would have arrived at a different conclusion.

[30] The arbitrator's decision could, therefore, not be one that a reasonable decision-maker could have arrived at. As such, his award falls to be reviewed and set aside. With regard to costs, I am of the opinion that the requirements of law and fairness dictate that there should be no order as to costs.

[31] In the premises, I make the following order:

Order

1. The arbitration award issued by the second respondent (the arbitrator) under the auspices of the first respondent, the Commission for Conciliation, Mediation and Arbitration (the CCMA), under case number ECEL687 dated 22 March 2016 is reviewed and set aside and replaced with the following order:

    '(a) The third respondent's dismissal was substantively and procedurally fair.'

2. There is no order as to costs.

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D. Mahosi

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Advocate Grobler
Instructed by:	Kirchmans Inc. Attorneys
For the Respondent:	Mr E. Van Staden of Legal Aid Board