NOT REPORTABLE

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT BRAAMFONTEIN

CASE NO: JR177/08

In the matter between

NISSAN DIESEL (PTY) LTD Applicant

and

COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION First Respondent

COMMISSIONER ELSABE MAREE Second Respondent

NATIONAL UNION OF METAL WORKERS

OF SOUTH AFRICA Third Respondent

MOTSEPE, DANIEL THIPE Fourth Respondent

J U D G M E N T

DE SWARDT AJ:

The fourth respondent in this matter, Mr Daniel Thipe Motsepe, was first

employed by the applicant, Nissan Diesel (Pty) Ltd ('Nissan'), on 7 January 1982. He was a shop steward for a period of 15 years and as from 1 July 2003 Mr Motsepe became the company's IR officer. He had 25 years' service when he was dismissed on 30 May 2007. His dismissal arose as a result of the distribution of some pornographic material via the internet.

During 2004 Mr Motsepe had inadvertently distributed pornographic material to applicant's management by e-mail when he sent a nude picture along with a minute of a work related meeting. At the time the Executive Vice President of the company, Mr Richards, verbally reprimanded him and pointed out not only that the policies and procedures of the company prohibited the keeping of pornographic material on a computer in the office environment, but that further transgressions of this nature could and would lead to disciplinary inquiry and possible dismissal.

The evidence of Mr Richards in this regard, as it appears at page 509 of the record, reads as follows:

> '*And he explained to me that he did it by mistake and I explained to him that policies and procedures of the company constitutes (sic) that you are not allowed to even keep such pornographic material on your computer in the office environment. I told him that I understand that it is a mistake, but he must understand that if this would happen again it would lead to definitely a disciplinary inquiry and that this could lead to his dismissal if so decided by the Chairman. Madam Commissioner, my feeling is that my actions at that*

> *stage were that of giving Mr Motsepe a verbal warning that he must understand that this could not be tolerated in our company and that it is against the policies and procedures of the company.*'

The reprimand was, however, not recorded on Mr Motsepe's personnel file because Mr Richards trusted that there would not be a recurrence of such conduct in the future. Mr Richards dealt with this specifically and I refer in this regard to his evidence at page 514 of the record. When he was asked why the warning or reprimand was not recorded, his response was:

> '*I did not feel it necessary at that stage. There was a trust position between the employee which I have known and I have explained earlier for 15 years, or at this stage 15 years, at that stage it was 12 years that we knew each other and that I felt that he would not do these actions again in future and I felt that a verbal warning without the recording was adequate at that stage.*'

It seems that Mr Richards' trust in Mr Motsepe was misplaced, because on 18 May 2007 Mr Motsepe again sent pornographic material by e-mail. On the latter occasion this did not happen inadvertently or by mistake. He sent a set of 23 pornographic images containing, *inter alia,* explicit photographs of a couple having intercourse in an office, to Ms Conceilia Lebese, an employee of Super Group Supply Chain Partners, a company which provided logistic and distribution support to Nissan at the latter's premises.

These images had been sent to Mr Motsepe by e-mail in 2004 by a

fellow employee, a Mr Jonas Legodi. As it happened, Ms Lebese was absent from work due to illness on 18 May 2007 and it was arranged that her e-mails would automatically be forwarded to a Ms Botha who was then her site manager.

Ms Botha was very shocked and dismayed when she opened the e-mail and saw the content. She immediately contacted Mr Wouter Combrinck, the applicant's Senior Manager: Information Technology.

10 As a result of the distribution of this e-mail Mr Motsepe was charged with contravening the applicant's policy on electronic communications. The charges read as follows:

> *'(a) You have contravened the company's IT policy by distributing email messages with an illegal content to third parties outside the company.*
> *(b) The distribution of pornographic and unacceptable information to a third party.'*

20 Mr Legodi was also charged with a contravention of the applicant's policy as aforesaid, but the charges against him related to seven different images of naked women which were found on his computer. He was not charged with transmitting the 23 images which he had forwarded to Mr Motsepe in 2004.

Mr Motsepe appeared before a disciplinary inquiry and he was dismissed on 30 May 2007. He felt himself aggrieved by his dismissal,

particularly in view of the fact that Mr Legodi was not dismissed and accordingly referred a dismissal dispute to the CCMA.

On 24 November 2007 the second respondent, who was the Commissioner at the CCMA, published her arbitration award. She found that the applicant's dismissal was substantively unfair in that Nissan had acted inconsistently and that dismissal was not appropriate. She did, however, find that the dismissal was procedurally fair. The award that she made read as follows:

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'The respondent, Nissan Diesel SA (PTY) Ltd, is ordered to:

1. *Re-employ the applicant Daniel Thipe Motsepe from 14 December 2007 in any reasonably suitable work on the terms and conditions the respondent deems fit in accordance with the said position.*

2. *The re-employment is accompanied by a final written warning valid for a period of 12 months commencing on 14*
20 *December 2007 regarding any offence that relates to the sending of 'illegal content' as per the respondent's IT policy, Electronic Communication.*

3. *The re-employment to be without the payment of any back-pay.*

4. *I make no order as to costs.'*

On 30 January 2008 Nissan launched proceedings in this Court for the
30 review and setting aside of the Commissioner's award.

In addition to the oral evidence that was led at the proceedings before the CCMA, a bundle of documents served before the Commissioner.

This bundle of documents also contained the written IT policy of the company. In fact, there were two written IT policies, the 'old' IT policy having being applicable up to the end of 2006 and a new policy which commenced in January 2007.

The old policy was the one that was still applicable in 2004 when Mr Motsepe had made the mistake in transmitting pornographic e-mail together with minutes of a meeting. In terms of that policy, it was provided in Clause 1.1 that Nissan Diesel provides electronic e-mail for internal and external communications, primarily for the purpose of improving business productivity and communications. Clause 1.2 read that '*the policy principles defined below govern the proper and professional use of the company's e-mail system by all its employees, dealers, contractors and other e-mail users. It is imperative that all users of the system adhere to the policy guidelines and criteria for use as defined below*.'

In Clause 2 of the old policy and more particularly clause 2.2.1, it was expressly stated that the main purpose for the provision of e-mail facilities was for company business use. In Clause 2.2.3 it was provided that authorised users of the company's e-mail and computer facilities were prohibited from engaging in certain activities and that users who were found to have contravened the rules may be denied access to the e-mail system and may face disciplinary charges. The prohibited activities, which were detailed in 2.2.3.1, included

transmitting items (defined as being notes, information, jokes, innuendos or images) which contain offensive, derogatory, obscene, indecent, lewd or lascivious material or material which explicitly or implicitly refers to sexual conduct.

This old policy was published on the company's sharepoint portal internet site and employees were asked to familiarise themselves with the contents thereof. In fact, an e-mail had been sent out by one Helen Van Vuuren, a legal assistant, on 26 May 2006 drawing all employees' attention to this fact.

As from January 2007 the new IT policy at Nissan became operative. That policy contained the following relevant clauses. In clause 2.1 it was expressly stated that the policy applied '*to all users as well as third parties that have temporary access to Nissan Diesel's e-mail, internet access or network and who use Nissan Diesel's facilities to send and receive e-mail messages*.'

Under clause 3, dealing with the purpose of the code, it was specifically stated that the purpose of the electronic communications policy was to create rules for the use of e-mail and the internet and to provide for disciplinary action against users who failed to comply with the policy.

Clause 5, which contained the definitions, defined illegal content as follows in clause 5.2:

> 'IC constitutes mail and websites that contain material that is pornographic, oppressive, racist, sexist, defamatory against any user or third party, offensive to any group, a violation of users' or a third party's privacy, identity or personality, copyright infringement, malicious codes such as viruses and Trojan horses and content containing any personal information of users or third parties without their consent.'

10 In clause 8.1.1 of the policy it was specifically stated that '*users are personally responsible to abide by the rules created in the policy and must delete all incoming e-mail messages that contain content or links to content that are not allowed in terms of this policy*.'

Clause 8.3, which dealt with non-acceptable and punishable use, provided in 8.3.1 that: '*The following actions and content are not allowed and will lead to investigation and disciplinary action*.' A number of bulleted points follow and one of these reads: *'receiving, storing, downloading, printing, distributing, sending or accessing illegal content* 20 *[as defined above].'* In clause 8.4 under the heading '*Consequences of Misuse'* the clause states that *'Failure and or refusal to abide by the rules detailed in this policy shall be deemed as misconduct and NDSA may initiate the appropriate investigation and disciplinary action against users.'*

In an e-mail dated 11 January 2007 Ms Helen Van Vuuren advised the workforce at Nissan of the new policy and the e-mail which she sent out specifically stated that ignorance of the policy would not constitute a

valid defence. According to the e-mail, which is to be found at page 136 of the paginated papers, it was sent to Nissan's internal distribution list and attention was drawn to three different policies, the first being the Electronic Communications Policy under the reference Information Technology, the effective date being 4 December 2006. The e-mail states:

> *'Please note that the above policy substitutes all previous policies applicable to the subject matter. The policy can be viewed on the Sharepoint portal link / Information Technology ... It is each employee's responsibility to take note of the contents and to act in accordance with the policy. Ignorance of this publication will not constitute a valid defence in the event of non-conformance. Your co-operation in the effective implementation and enforcement of the policy is appreciated.'*

The company's disciplinary code and procedure contained a clause which dealt with disciplinary action against employees and in particular with the sanction which would be imposed. In clause 2.3.4 under the heading '*General*' it is stated that

> *'The employer will strive, whenever possible and with due regard to the circumstances of each case, to be consistent in taking disciplinary action. The employer will, however, reserve its right to issue different penalties for similar misconduct based on the circumstances of each misconduct and this will not be considered as setting a precedent.'*

Examples of serious misconduct which could result in summary dismissal after a formal disciplinary inquiry had been held, include computer usage which involves distribution of pornographic or

unacceptable information to other persons.

Reverting to the circumstances of the case, it is quite clear on the record that despite Mr Motsepe's stance that he was not fully *au fait* with the company's IT policy, he indeed had knowledge of Nissan's IT policy and the Commissioner's finding in this regard is correct.

Mr Johannes Jacobus Marais, a Senior Manager: Logistics and Production Planning Control, acted as the Chairman of the disciplinary inquiries of both Mr Motsepe and Mr Legodi. He explained his reasons for dismissing Mr Motsepe and for giving Mr Legodi only a written warning. These appear in summarised form on pages 19 to 21 of the paginated papers in paragraphs 24.13 to 24.16.

In essence, Mr Marais decided not to dismiss Mr Legodi - whom I might mention was charged separately from Mr Motsepe, – inasmuch as it only came to the attention of the authorities at Nissan during the subsequent investigation of Mr Motsepe's conduct, that Mr Legodi was in fact the one who had previously sent the 23 pornographic images to Mr Motsepe. At the time of Mr Legodi's hearing, he had accordingly been regarded as a first offender, his disciplinary record having been clean. A second aspect that was taken into account, was that the nature of the images which Mr Legodi sent by e-mail differed from those sent by Mr Motsepe. The images which Mr Legodi forwarded were pictures of nude females with exceptionally heavy pubic hair, whereas the

pictures transmitted by Mr Motsepe portrayed sexual acts in an office environment which were very explicit. A further aspect which Mr Marais took into account in deciding not to dismiss Mr Legodi, was that no complaints had been raised by an outside entity in relation to Mr Legodi's actions.

In deciding to dismiss Mr Motsepe, Mr Marais took into account the fact that Mr Motsepe had already received a warning from Mr Richards as a result of the incident in 2004. He further had regard to the fact that Mr Motsepe had failed to correct his behaviour after he had been given the opportunity to do so and that he could therefore not be trusted. Mr Marais also took into account that Mr Motsepe was an IR officer and, as such, he was a leader in the workplace and had to set an example. Moreover, a complaint relating to Mr Motsepe's conduct had been raised by a third party, Ms Botha from the Super Group Supply Chain Partner, which had placed Nissan at risk for civil litigation. In addition, the 23 pornographic images forwarded by Mr Motsepe were extremely graphic in nature and portrayed various sexual acts, including intercourse, in an office situation.

Mr Marais' evidence was to the effect that in his view the company would have acted inconsistently had he dismissed Mr Legodi in circumstances where Mr Motsepe had received a warning for his first offence. Mr Legodi was accordingly offered a chance or an opportunity to redeem himself. Mr Motsepe, on the other hand, was regarded as a

repeat offender who had distributed graphic sexual material after having been warned against such conduct.

As far as the previous warning or reprimand in 2004 was concerned, the versions given by Mr Richards and Mr Motsepe differed. I have referred earlier in the course of this judgment to the evidence given by Mr Richards. Mr Motsepe, in essence, denied that he had ever been reprimanded by Mr Richards. He alleged that Richards essentially told him '*These things happen in life, do not worry, forget about it.*'

In dealing with this evidence, the Commissioner said the following at page 46 of the paginated papers. She deals specifically with the evidence of Mr Motsepe and then says:

> *'I find it a bit difficult to believe that the Executive Vice President would say this. It is more probable that the conversation went along the lines as testified to by Mr Richards. However, this does not mean that the conversation ended in the issuing of a verbal warning. I was not presented with convincing evidence that such a warning was issued and in view of the fact that the applicant and Mr Richards had known one another for approximately 15 years it is probable that Mr Richards might have merely discussed the incident with the applicant, but stopped short of issuing a warning. Based on this the applicant's dismissal constituted inconsistency. In any event, even if the applicant had a previous warning, the dismissal would still not be justified as the argument that the images sent by the applicant was more graphic than those sent by Mr Legodi is also rejected.'*

It is not clear to me how the Commissioner could have made the finding that she did in regard to the evidence of Mr Richards.

Mr Richards' evidence, according to the transcript, is quite clear that he gave Mr Motsepe a verbal warning. He told him in so many words that he had to understand that this kind of behaviour would not be tolerated in the company, that it was against the policies and the procedures of the company and that Mr Motsepe had to mend his ways.

When Mr Richards was asked specifically why the written warning was not recorded he explained that it was not recorded on the personnel file because he trusted Mr Motsepe and in those circumstances, where he had known him for 15 years, he expected that it would not be necessary to refer to this again. The evidence of Mr Richards was clear, it was explicit and he did not deviate from it in the course of cross-examination. There is thus no room for construing his evidence along the lines that he did not reprimand Mr Motsepe and that he did not point out to him what the consequences of future misconduct would be.

The Commissioner found on the evidence before her that both Mr Motsepe and Mr Legodi ought to have been dismissed, but that Mr Motsepe had to gain from the fact that Mr Legodi was only given a written warning. The Commissioner says in so many words (in the first paragraph on page 47 of the papers):

> *'I need to say that both the applicant and Mr Legodi should have been dismissed as the images they sent are equally disgusting. Fortunately for the applicant Mr Legodi was not dismissed and he thus stands to gain from the respondent's inconsistency.'*

This stance appears to have led to the Commissioner's interference with the employer's sanction. On page 48 of the paginated papers she states that the applicant's dismissal was procedurally fair and that the applicant was, unfortunately, merely benefiting from the mistakes made by the employer in not applying the policy and meting out the sanction of dismissal consistently. The order which she made, makes a mockery of the sentiments which she expressed in her award and it appears to me that the Commissioner misconceived her task, i.e. to determine whether or not the employer's decision to dismiss Mr Motsepe was fair.

It is quite clear if one has regard to the case of *Sidumo and another v Rustenburg Platinum Mines Ltd and others 2008 (2) SA 23 (CC) at 83E-J, paragraphs 177 to 179 and at 84D paragraphs 181 to 183*, that the Commissioner had to pass a value judgment against the background of all of the surrounding circumstances pertaining to Mr Motsepe's dismissal. The mere fact that there was an ostensible inconsistency in the sanctions imposed on Mr Legodi and Mr Motsepe does not offer sufficient grounds to interfere with an employer's sanction. In this regard, I would refer to what was said in *Minister of Correctional Services v Mthembu NO and others 2006 27 ILJ 2114 (LC) at 2120* a judgment of Van Zyl AJ.

> *'The consideration of consistency or equality of treatment (the so-called parity principle) is an element of disciplinary fairness, and it is really 'the perception of bias inherent in*

selective discipline that makes it unfair'… When an employer has in the past, as a matter of practice, not dismissed employees or imposed a specific sanction for contravention of a specific disciplinary rule, unfairness flows from the employee's state of mind, i.e. the employees concerned were unaware that they would be dismissed for the offence in question. When two or more employees engaged in the same or similar conduct at more or less the same time but only one or some of them are disciplined, or where different penalties are imposed, unfairness flows from the principle that like cases should in fairness be treated alike. However, as was stated by Conradie JA in the Irvin and Johnson case … the principle of consistency should not be applied rigidly and that "some inconsistency is the price to be paid for flexibility which requires the exercise of discretion in each individual case. If a chairperson conscientiously and honestly, but incorrectly exercises his or her discretion in a particular case in a particular way, it would not mean that there was unfairness to the other employees. It would mean no more than that his or her assessment of the gravity of the disciplinary offence was wrong".'

The reference to the I*rvin and Johnson* case is a reference to *SA Commercial Catering and Allied Workers Union and others v Irvin and Johnson Ltd 1999 20ILJ 2302 (LAC)*. The judge in the *Mthembu* case proceeds as follows:

'This statement was qualified by the Labour Appeal Court in the case of Cape Town City Council v Masito and others where Nugent AJA stated the following at 1961 E to F.

> *"While it is true that an employer cannot be expected to continue repeating a wrong decision in obeisance to a principle of consistency, in my view the proper course in such cases is to let it be known to employees clearly and in advance that the earlier application of disciplinary measures cannot be expected to be adhered to in the future. Fairness of course is a value judgment to be determined in the circumstances of the particular case and for that reason there is necessarily room for flexibility. Where two employees have committed the same wrong and there is nothing else to distinguish them I can see no reason why they ought not generally to be*

> *dealt with in the same way and I do not understand the decision in that case to suggest the contrary. Without that employees all inevitably and in my view justifiably consider themselves to be aggrieved in consequence of at least a perception bias".*
>
> *Consistency is therefore not a rule unto itself, but rather an element of fairness that must be determined in the circumstances of each case.'*

The case of *Cape Town City Council v Masito and others* is reported at (2000) 21ILJ 1957 (LAC).

In applying the aforegoing basic principles laid down in these cases to the instant case, it appears to me that there is in fact no inconsistency. The case of Mr Legodi is not exactly like the case of Mr Motsepe. The ostensible inconsistency which greets one at first blush is in fact not real. There are particular distinguishing features in Mr Motsepe's case, least of which is not that he had in the past committed a breach of the company's IT policy, that he was reprimanded for such break and that it was explained to him that a further breach of that nature would not be tolerated. If the principles in these previously decided cases are applied to the evidence which was before the Commissioner, it seems to me that it was abundantly clear that Mr Motsepe's case stood on a totally different footing to that of Mr Legodi, albeit that Mr Legodi was the person who had originally sent the graphic images to Mr Motsepe by email.

Mr Motsepe had not only retained these images on his computer for a

period of approximately three years, which in itself constituted a breach of the policy and to my mind is an aggravating feature, but Mr Motsepe knew quite well that the company's policy would be enforced and that it would be strictly enforced. Mr Motsepe attempted to disavow knowledge of the detail of the company's policy, in a transparently disingenuous attempt at avoiding responsibility for his actions.

On the totality of the evidence as it is on record, it would appear to me that no reasonable commissioner would have made the award that the Commissioner had made in this particular instance and that the Commissioner's award is therefore open to review.

The remaining aspect which has to be decided, is whether or not the matter ought to be remitted to the CCMA so that evidence can be led afresh before another Commissioner, or whether this Court ought to make an order on the basis of the evidence which is already on record, as was submitted by Mr Van As.

I have had regard to the principles laid down in this regard in the case of *Shield Security Group (PTY) Ltd v CCMA and others 2000 21ILJ 958 (LC) at 965 G-I*. It appears to me that this Court has the benefit of a full transcript of the evidence at the CCMA, that the material facts pertaining to the case are clear and that it is apparent that neither party's case could improve or be expanded upon in a manner which might lead to a different assessment of the underlying facts. In the circumstances it

would seem to me that a remittal of the manner to the CCMA would merely cause a delay in the final determination of the matter.

I accordingly make the following order:

1. The application for the review of the award made by the second respondent on 18 December 2007 under case number GAPT5121/07 is granted.

2. The aforesaid award made by the second respondent is hereby set aside and substituted by the following: '*The dismissal of Mr DT Motsepe by Nissan Diesel (PTY) Ltd on 13 May 2007 was procedurally and substantively fair.*'

3. The third and fourth respondents will pay the applicant's costs jointly and severally, the one paying the other to be absolved.

As regards the order for costs that I have made, I might mention that I have been persuaded by the argument of Mr Van As that where a person in a disingenuous manner attempts to avoid responsibility for his or her actions at a disciplinary inquiry and subsequent proceedings in the CCMA and then proceeds to this Court, costs should follow the result. There appears to be no justification for making a different costs order in a situation such as this.

A further factor which has influenced my decision in this regard is the fact that there is not an ongoing employment relationship and the fourth respondent only has himself to blame for this situation.

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A M DE SWARDT, A J

For Applicant	Adv M van As
Respondent	In Person
Date of Hearing	21 July 2009
Date of Judgment	21 July 2009