THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no: JR1907/14

In the matter between:

GLENCORE OPERATIONS SOUTH AFRICA (PTY) LTD (LION FERROCHROME) **Applicant**

and

NUM obo SOUL MTSHWENE **First Respondent**

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION **Second Respondent**

SIMON MOHUBEDU RANTHO *N.O.* **Third Respondent**

Heard: **13 July 2016**

Delivered: **01 December 2016**

JUDGMENT

KIRSTEIN AJ,

Introduction

[1] The present matter involves three separate applications, the main review (with the parties as cited above) as well as a cross review brought by the First Respondent. The cross review was brought out of the prescribed periods and accordingly is accompanied by an application for condonation. All the applications are opposed.

Background to the dispute

[2] Mr Soul Mtshwene (hereafter referred to as "the employee") was employed by the Applicant as a refractory technologist from 1 October 2012 until his dismissal on 20 February 2014. At the time of his dismissal the employee earned an amount of R43 642.44 per month.

[3] A disciplinary enquiry was held on 21 January 2014 where the employee faced the following charge:

> "Negligence with aggravating circumstances in that you failed to ensure the proper installation of the refractory lining, resulting in the company losing substantially on finance and production"

[4] The disciplinary enquiry was pursued after the refractory lining on one of the applicant's kilns began falling down after a period of six months after installation as a result of poor installation of the reinforcing anchors. The lining was however expected to last for a period of five years. The lining had to be re done which the applicant estimated would cost in the region of R4 000 000.00.

[5] The refractory lining was installed by a contractor ("Cerefmet") however the employee was responsible for quality control of the project while he was on duty and also remained ultimately responsible for the monitoring of the work done.

[6] The employee was found guilty of the charge against him and the sanction of dismissal recommended. He thereafter lodged an appeal against the substance of the disciplinary finding as well as the sanction, which sanction the employee felt was too harsh. The decision of the appeal hearing was to uphold both the decision and the recommended sanction from the disciplinary enquiry, being dismissal.

[7] The first respondent referred an unfair dismissal dispute to the second respondent. The matter was set down for arbitration on 25 July 2014. On 31 July 2014 the third respondent issued the disputed arbitration award under case number LP2351-14. The third respondent found the following in his award:

> "6.1 I hereby find that the dismissal of the applicant, **Mr. Nkeni Soul Mtshweni**, by the respondent, **Glencore Lion Ferrochrome**, was substantively unfair.
>
> 6.2 I hereby order the respondent to pay the applicant compensation in the sum of **R222 000.00** being an equivalent of his salary for a period of six (6) months not later than the 31st August 2014. The said sum of money earns interest in terms of Section 143(2) of the **Labour Relations Act of 1995**."

Condonation application:

[8] The first respondent seeks condonation for the late filing of the cross review application. The employee has addressed the four factors set out in the *Melane v Santam Insurance Co Ltd*[1] judgment briefly as follows:

[9] The period of delay is 122 days late, a period of more than four months late.

[10] The reason for lateness is that the employee did not read the award as he had been awarded compensation and he trusted his union representative to highlight any areas of concern that needed his attention. The employee further states that his union representative had informed him that he only needed to consult with attorneys once the record was served. During the subsequent consultation with his attorneys of record on 9 January 2015 the employee became aware that the third respondent had found him guilty of misconduct.

[11] The employee submits that the balance of convenience favours him as the applicant suffers no prejudice through the granting of condonation as the matter has not reached finality yet.

[12] In relation to prospects of success the employee does not specifically detail his prospects of success but relies on his grounds for review as set out in his founding affidavit. The crux of the review grounds is that the third respondent should not

[1] 1962 (4) SA 531 (A) at 532B-E

have found the employee guilty of misconduct for which the employee denies liability.

[13] The employee submits that he was responsible for *inter alia* spot checks and monitoring of the workmanship of the contractor completing the work and overseeing the project. When the employee was off duty his subordinate Salmon Biljon ("Biljon") was responsible for the same responsibilities as the employee's. The employee states that the defective workmanship of the contractor could have occurred during Biljon's shift or in instances where spot checks were not done prior to the continuation of the installation work. It is further alleged that the third respondent made various other findings which were unsustainable.

[14] The Labour Appeal Court stated the following in *NUM v Council for Mineral Technology*[2]*:*

> *"…. without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial and without prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused"*

[15] Similarly in *Moila v Shai N.O. and Others*[3] the LAC also espoused the same sentiments relating to consideration of condonation applications*:*

> *'I do not have the slightest hesitation in concluding that this is a case where the period of delay is excessive and the appellant's purported explanation for the delay is no explanation at all. I accept that the case is very important to the appellant. However, the weight to be attached to this factor is too limited to count for anything where the period of delay is as excessive as is the case in this matter and the explanation advanced is no explanation at all. If ever there was a case in which one can conclude that good cause has not been shown for condonation without even considering the prospects of success, then this is it. Where, in an application for condonation, the delay is excessive and no explanation has been given for that delay or an "explanation" has been given but such "explanation" amounts to no explanation at all, I do not think that it is necessary to consider the prospects of success.'*

[2] 1999 3 BLLR 209 (LAC) at para 10
[3] (2007) 28 ILJ 1028 (LAC) at para 34

[16] The delay of four months in the institution of the cross review is excessive. The reason that the employee gives for the delay amounts to no reason at all in that his reason is that he never read the award because he had been awarded compensation and had therefore won the matter. His further submission that he had expected his union to advise him of any area he needed to consider similarly lacks substance.

[17] It is trite that condonation is not a mere formality which a party to litigation is entitled to but is something that should only be granted in circumstances where such party is able to satisfy the requirements for the granting of condonation.[4]

[18] I am bound by the provisions of the decisions of the LAC in *NUM* and *Moila* having found that the explanation for the delay is no explanation at all with the result that I am obliged to refuse condonation. To grant condonation to an applicant whose reason for lateness was that he had not read his award would be to endorse granting of condonation to litigants who are at best negligent in the pursuit of their disputes, which endorsement is simply impermissible.

[19] Due to my refusal of condonation in respect of the cross review, the content of the cross review will not be dealt with in the judgment.

Main review application

[20] The review application is not in respect of the arbitration award *in toto* as it is specific to the third respondent's finding that the employee's dismissal was substantively unfair as well as the compensation awarded such unfairness.

[21] The third respondent found that the employee had transgressed a rule and that "*he is to be blamed for the mishap*".[5] He nevertheless found the dismissal substantively unfair on the basis of inconsistent application of discipline between the employee and Biljon and awarded him six months compensation.

[22] The third respondent accepted that the employee was employed on a level 8 whereas Biljon, the employee's subordinate, was employed at a level 4. The employee was in a position to discipline Biljon in the event that Biljon was not

[4] *High Tech Transformers (Pty) Ltd v Lombard* 7 (2012) 33 ILJ 919 (LC) .
[5] At Page 32 of the pleadings bundle

performing appropriately. The third respondent however found that the employee had not been afforded the breathing space to think about a next move and institute charges against Biljon as the disciplinary action was instituted against the employee shortly after the investigation into the incident. The employee testified that he did not discipline Biljon for the work done because Biljon had done nothing wrong. It is common cause that they performed the same duties during shut down.

[23] When doing inspections of the work performed by the contractor an employee is required to complete a checklist. The applicant's evidence during the arbitration was that the employee had failed to provide the checklists and had therefore not completed any, as there was no evidence of their existence. Checklists completed by the employee in respect of other work done. The employee disputed this and testified that he had completed the checklists and that he had given them to his supervisor, Mr Sunday Zulu (hereinafter referred to as "Zulu"). The third respondent finds that the evidence given by the Applicant was improbable in this respect and that it was probable that inspections were not carried out.

[24] The employee testified that he, whilst doing his spot checks he had come across a number of anchors that were incorrectly fitted but that, it was impossible for him to check all of the anchors. The employee further testified that, he had addressed the issue with the contractor and not with Zulu. Zulu testified that the employee should have addressed the issues with him. Zulu was therefore unaware of the bad workmanship that the employee had picked up at the time that the problems arose.

[25] It is clear that the employee had identified some problems in the workmanship but that he had not alerted his supervisor of them and it does not appear that, the employee took additional steps to monitor the workmanship at a closer level as a result of the existence of the problems in workmanship that he identified.

[26] The applicant submits that on the above evidence as well as the findings made by the third respondent, the subsequent finding of substantive unfairness with six month's compensation is unreasonable and that the third respondent committed a gross irregularity and misconduct in coming to the finding.

Evaluation

[27] The review test has been developed over time but is succinctly expressed in the following passages:

> *"In short: A review 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 which was reasonable to justify the decisions he or she arrived at"*[6]

> *"'…… (i) In terms of his or her duty to deal with the matter with the minimum of legal formalities, did the process that the arbitrator employed give the parties a full opportunity to have their say in respect of the dispute? (ii) Did the arbitrator identify the dispute he or she was required to arbitrate? (This may in certain cases only become clear after both parties have led their evidence.) (iii) Did the arbitrator understand the nature of the dispute he or she was required to arbitrate? (iv) Did he or she deal with the substantial merits of the dispute? (v) Is the arbitrator's decision one that another decision maker could reasonably have arrived at based on the evidence?'*[7]

And

> *…that it is not only the reasonableness of the outcome which is subject to scrutiny. As the SCA held in Herholdt, the arbitrator must not misconceive the enquiry or undertake the enquiry in a misconceived manner. There must be a fair trial of the issues."* [8]

[28] The requirements for the granting of a review application is strict and that a review application is not simply available for the taking. With the details of the dispute as set out hereinabove the review in the present case turns on the consideration of whether the third respondent's finding in relation to inconsistent application of discipline and the compensation flowing from that finding are reasonable or not as that is the ultimate challenge.

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[6]*Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation & Arbitration & others* (2014) 35 ILJ 943 (LAC) at para 16.
[7](2014) 35 ILJ 943 (LAC) at para 20.
[8]*Head of the Department of Education v Mofokeng and Others* [2015] 1 BLLR 50 (LAC) at para 31

[29] The Labour Appeal Court stated the following in the judgment of *ABSA Bank Ltd v Naidu*[9]:

> *It is trite that the concept of parity, in the juristic sense, denotes a sense of fairness and equality before the law, which are fundamental pillars of administration of justice. In the Australian decision in Green v The Queen,[10] it was said that "the parity principle is an aspect of the systemic objectives of consistency and equality before the law – the treatment of like cases alike, and different cases differently."[11]*
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> *[36] "However, it ought to be realised, in my view, that the parity principle may not just be applied willy-nilly without any measure of caution. In this regard, I am inclined to agree with Professor Grogan when he remarks as follows:*
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> > *'[T]he parity principle should be applied with caution. It may well be that employees who thoroughly deserved to be dismissed profit from the fact that other employees happened not to have been dismissed for a similar offence in the past or because another employee involved in the same misconduct was not dismissed through some oversight by a disciplinary officer, or because different disciplinary officers had different views on the appropriate penalty.'"[12]*
>
> *[42] "Indeed, in accordance with the parity principle, the element of consistency on the part of an applicant in its treatment of employees is an important factor to take into account in the determination process of the fairness of a dismissal. <u>However, as I say, it is only a factor to take into account in that process. It is by no means decisive of the outcome on the determination of reasonableness and fairness of the decision to dismiss.</u>"[13]*

[30] In the present matter it is common cause that the employee and Biljon performed the same work during shut down. It is also common cause that they were employed at significantly different levels with the Employee retaining ultimate responsibility for the work done.

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[9] (2015) 1 BLLR 1 (LAC).
[10] *Green v The Queen* (2011) 86 ALJR 36 at [28].
[11] (2015) 1 BLLR 1 (LAC) at para 35
[12] At para 36, footnotes omitted
[13] At para 42, underlining own emphasis

[31] The applicant argued that its decision to discipline the employee and not Biljon was justifiable because the capacities of the two employees are distinguishable. The employee is by far the senior employee between the two and was ultimately responsible and liable for the work performed by his subordinates. In this respect the employee was entitled to discipline subordinates if they were not performing appropriately. The employee was of the view that Biljon did nothing wrong and therefore there was no need to discipline him. Only Biljon and the employee were monitoring the installation of the lining in the kiln. The unavoidable conclusion of the matter is that the installation was not properly monitored for proper work performance. If this occurred on Biljon's shift then the employee should have picked it up when he was on duty as he was the supervisor and was therefore responsible for ensuring that his subordinates performed their duties as required of them.

[32] According to Ndlovu JA in *ABSA Bank Ltd* above it is clear that although the application of the parity principle is of significant importance in the assessment of the fairness of a matter it is not the only consideration and is also not a consideration of paramount importance as this could enable rightfully dismissed employees to profit from the situation. The application of the parity principle was of paramount importance to the third respondent. Although the third respondent found the employee guilty of negligence that cost his employer dearly, the third respondent nevertheless determined that the dismissal of the employee was substantively unfairly and awarded significant compensation. The third respondent also found that the trust relationship has irretrievably broken down. As a result of the third respondent's reliance on the parity principle alone when deciding the matter he committed a gross irregularity which taints the outcome of the award which it appears would have been different had other factors been properly considered.

[33] I therefore find that the third respondent's finding in relation to substantive unfairness is one that a reasonable third respondent faced with the evidence before him would not have made. I find that the relief awarded as a consequence of the finding is similarly unsustainable in the circumstances.

[34] The applicant has sought a substitution of the arbitration award with a decision to the effect that the employee's dismissal was substantively fair or alternatively that the matter be referred back to the second respondent for arbitration *de novo* before a third respondent other than the third respondent. The record available in the matter is sufficiently clear and I am of the view that this Court is in as good a position to decide the matter as a commissioner who would be presiding over the matter again at arbitration.

[35] In considering the issue of costs, I am of the view that having considered law and fairness a costs order in the present matter is not warranted.

Order

[36] In the premises, the following order is made:

1. The arbitration award issued under case number LP2351-14 by Third respondent Simon Mohubedu Rantho on 31 July 2014 is reviewed and set aside.

2. The award is substituted with the following:

"The dismissal of Soul Mtshweni was substantively fair"

3. There is no order as to costs.

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Kirstein AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

FOR THE APPLICANT:	Mr D Masher of Edward Nathan Sonnenbergs Inc
FOR THE RESPONDENT:	Mr E S Makinta of E S Makinta Attorneys