

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES/NO. ☒ NO.  
(2) OF INTEREST TO OTHER JUDGES: YES/NO. ☒ NO.  
(3) REVISED.

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**THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

Not Reportable

Case No: JR592/18

In the matter between:

**SOLIDARITY OBO MOTSOGI SH**

**Applicant**

and

**COMMISSION FOR CONCILIATION MEDIATION  
AND ARBITRATION**

**First Respondent**

**AMOS MTHIMUNYE N.O.**

**Second Respondent**

**AIR TRAFFIC AND NAVIGATION SERVICES  
COMPANY LIMITED**

**Third Respondent**

Heard: 16 January 2020

Delivered: 12 May 2020

**"By Email"**

**Summary: Review Application – Misconduct – Applicant dismissed for dishonesty – Raises issue of inconsistency with regards to the Third Respondent's application of its Disciplinary Code – No proper evidence with regards to inconsistency raised at the arbitration - Review Application dismissed – No order as to costs.**

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## JUDGMENT

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### RAMDAW, AJ

#### Introduction

- [1] This is an application brought to review and set aside the arbitration award dated 18 March 2018 issued under case number GAJB20821-17 by the Second Respondent (the Commissioner) acting under the auspices of the Commission for Conciliation, Mediation and Arbitration (the CCMA).
- [2] Ms Motosogi represented by Solidarity commenced her employment with the Third Respondent on 17 March 2012 and was dismissed on 6 September 2017 for having committed one act of misconduct. Motosogi's dismissal was found to be procedurally and substantively fair by the Second Respondent.
- [3] The allegations levelled against Motosogi was that she had unlawfully gained access to and utilized confidential ATS Assessments / Memos during the ATSA Rating Course.

#### Background

- [4] Motosogi and several other employees were preparing for exams/assessments to be written at the Third Respondent. Some learners had insight into past examination papers which was not permissible. Motosogi confirmed that she did receive a copy of an exam paper and memo on her cell phone but denies having solicited same. She, as well as several other employees/learners, were charged with dishonest conduct. They all pleaded guilty and admitted to committing the misconduct relating to dishonesty. All of them apart from one Nicole Govender were dismissed

[5] Ms Motsogi lodged an appeal which was dismissed. She then referred an unfair dismissal dispute to the First Respondent.

[6] The Applicant as per their heads of arguments argued as follows:

6.1 Elements of the charges of dishonesty of the charge was "*Dishonesty in that you unlawfully gained access to and utilized confidential ATS Assessments and memos*".

6.2 The Second Respondent reached an unreasonable conclusion in that he made factual errors which renders his award reviewable.

6.3 The Second Respondent misdirected himself and overlooked the fact that to be found guilty of dishonesty the Third Respondent should show the Applicants intention to deceive which is a crucial element in determining her guilt.

6.4 The Applicant was not aware of the rule at the workplace as there is no clear rule. The Second Respondent failed to consider the parity principle in that the "*rule or standard has been consistently applied by the employer*" in that seven employees including the Applicant as well as one Nicole Govender were called at the hearing room at the same time and all of them pleaded guilty to the same charge. All were dismissed apart from Nicole Govender and no evidence exists that Nicole Govender's circumstances were any different.

6.5 The Second Respondent committed a gross irregularity "*when stating that the evidence could not established the similarities in this case between how Govender was treated as compared to the Applicant who was dismissed.*"

6.6 The Second Respondent failed to consider that the sanction was harsh and as the Third Respondent is basically the only employer of this type

in Southern Africa, the dismissal has the effect of ending not only her employment but also the Applicant's career.

[7] The Third Respondent argued as follows:

- 7.1 The applicant breached a rule at the workplace in that she possessed assessments in breach of the Learner Code of Conduct irrespective of whether she solicited them or not.
- 7.2 The Third Respondent submits that any reasonable decision maker would have inferred reasonably or note that the Applicant intended to utilise and therefore benefit from the assessment she received.
- 7.3 The Third Respondent submits that the Second Respondent did not commit any irregularities as argued by the Applicant.
- 7.4 As a result the leaked assessments of the examination were postponed and the Third Respondent had to prepare new assessments which were a costly exercise let alone the delays.
- 7.5 The Applicant having been employed by the Third Respondent for over five years was better placed than other learners in understanding the rules of conduct and standard procedures of the Third Respondent. She was bound by both the Employees Code of Conduct as well as the Learners Code of Conduct.
- 7.6 No further information on similarities is submitted to establish a pattern of inconsistency which refers to the sanction of one Nicole Govender.
- 7.7 The Applicant breached the relationship of trust with the Third Respondent through her actions.

7.8 The Third Respondent has the reputation to protect globally together with ensuring traffic, safety, security and managing the credibility of standing of the aviation industry.

7.9 This Application has no merit and should be dismissed.

### Test for Review

[8] The test for review applied by our Courts was set out by the Constitutional Court in the matter of *Sidumo v Rustenburg Platinum Mines Ltd and Others*<sup>1</sup>, and determines that the test for review is based in fairness, that if a “reasonable decision-maker” would have arrived at the same finding opposed to that if the question of a reasonable employer would have imposed the sanction of dismissal.<sup>2</sup> In this case it is thus clear that the issue to consider (own emphasis): “*is whether a reasonable decision-maker, based on the evidence and the material before him or her, would have arrived at a different decision*”.<sup>3</sup>

[9] With specific regard to review of arbitration awards under section 145(2)(a) Ngcobo J stated the following in his judgment in *Sidumo*<sup>4</sup> (supra):

“The grounds of review in section 145(2)(a) provides a cause of action for the review of Commissioners’ awards by the Labour Court. Whether an arbitral award should be interfered with under the provisions of section 145(2)(a) will depend therefore on whether the conduct of the commissioner complained of falls under one or more of the grounds of review set forth in section 145 (2)(a). It is therefore for a party alleging a defect in the arbitration proceedings to show that the facts alleged constitute gross irregularity or misconduct or show that the power conferred has been exceeded, as the case may be. This will require litigants to specify the grounds of review relied upon and the facts alleged as constituting the ground of review relied upon.”

<sup>1</sup> *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (2007) 28 ILJ 2405 (CC).

<sup>2</sup> *Ibid* at para 110.

<sup>3</sup> *Hullett Aluminium (Pty) Ltd v Bargaining Council for the Metal Industry & others* [2008] 3 BLLR 241 (LC) at p. 245 at [31]

<sup>4</sup> *Id* fn 1 at para 254.

[10] Sidumo does not postulate a test that requires a simple evaluation of the evidence presented to the arbitrator and based on that evaluation, a determination of the reasonableness of the decision arrived at by the arbitrator. The court in Sidumo was at pains to state that arbitration awards made under the Labour Relations Act continue to be determined in terms of Section 1415 of the LRA but that the constitutional standard of reasonableness is "suffused" in the application of Section 145 of the LRA. This implies that an application for review sought on the grounds of misconduct, gross irregularity in the conduct of the arbitration proceedings, and/or excess of powers will not lead automatically to a setting aside of the award if any of the above grounds are found to be present. In other words, in a case such as the present, where a gross irregularity in the proceedings is alleged, the enquiry is not confined to whether the result was unreasonable, or put another way, whether the decision that the arbitrator arrived at is one that falls in a band of decisions to which a reasonable decision-maker could come on the available material."<sup>5</sup>

[11] In bringing a review application it is necessary to observe the facts of the matter holistically, having regard to the grounds as listed in Section 145 of the Labour Relations Act, the evidence before the relevant Commissioner, the reasons listed in the arbitration award as well as the result of the award, against a background of fairness as envisaged in the *Sidumo* test.

[12] It is therefore trite that a Court must be convinced that a reasonable decision-maker, based on the evidence and the material before him or her, would have arrived at a different decision. In assessing this review question, the Court should engage in a holistic analysis of all the evidence.

### Analysis

[13] The Applicant who was both an employee and a learner owed a duty to act in good faith towards the Third Respondent, her employer. She received details of an exam paper and memo on her cell phone without having solicited the

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<sup>5</sup> Id fn 1 at para 254.

same (her version). The charge was dishonesty in that she unlawfully gained access to and utilized confidential ATS Assessments and memos during the ATSA Rating Course.

[14] The Applicant raised the issue of Nicole Govender who was also found guilty of dishonesty but was not dismissed. However, no further information nor evidence on similarities was submitted at the arbitration to establish a pattern of inconsistency before the Second Respondent. In *National Union of Mineworkers on behalf of Butsane v Anglo Platinum Mine (Rustenburg Section)*<sup>6</sup> it was held that “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.”

[15] In *Southern Sun Hotels Interest (Pty) Ltd v CCMA and others*<sup>7</sup> the Court held that an inconsistency claim will fail where an employer is able to differentiate between employees who committed similar transgressions on the basis of, *inter alia*, differences in personal circumstances, the severity of the misconduct or on the basis of other material factors.

[16] In *NUM and Another v Amcoal Colliery t/a Amot Colliery and Another*<sup>8</sup> it was held that:

“The parity principle was designed to prevent unjustified selective punishment or dismissal and to ensure that like cases are treated alike. It was not intended to force an employer to mete out the same punishment to employees with different personal circumstances just because they are guilty of the same offence”.

[17] In terms of the judgment by the Labour Appeal Court in *Goldfields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA and others*<sup>9</sup> in which the Court decided that

<sup>6</sup> (2014) 35 ILJ 2406 (LAC) at 2417 para 39.

<sup>7</sup> [2007] 11 BLLR 1128 (CC).

<sup>8</sup> [2000] 8 BLLR 869 (LAC) at para 19.

<sup>9</sup> *Goldfields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA and others* 2014 (1) BLLR 20 (LAC).

a review based solely on the fact that the Commissioner did not take certain factors into account or placed undue importance on certain factors (process related factors) does not comply with the *Sidumo* test and will most likely not succeed.<sup>10</sup> In essence the Court has to find whether the decision reached was unreasonable or put in another way whether the decision that the arbitrator arrived at is one that falls within a band of decisions to which a reasonable decision maker could come to on the available material.

- [18] One has to look at the entire arbitration award issued by the Second Respondent and not employ a “*piece meal*” approach for example how the Second Respondent dealt with the issue of Nicole Govender who pleaded guilty but was not dismissed. No proper evidence of inconsistency was placed before the Second Respondent.
- [19] In *Frans Masubelele v PHSDSBC and others*<sup>11</sup>, Snyman AJ dealt with misconduct involving dishonesty where dismissal was fortified and the principles applicable to inconsistency reiterated. He found that the employee party has the evidential burden to show inconsistency and that no inconsistency was shown.

### Conclusion

- [20] The Applicant given her level of seniority and given the nature of her job in the aviation industry has to know her work to control air traffic. She cannot simply cheat in an exam, expect to pass her assessments and not know her job expectations which she was being tested on. Her action constituted dishonest conduct which destroyed the relationship of trust, the very core of the employment relationship. It is sad that her career has been brought to an abrupt end as a result of her irresponsible and dishonest behaviour. However, the Third Respondent has to protect its integrity and reputation as the Air Traffic and Navigation Service Company in Southern Africa. Dismissal becomes the

<sup>10</sup> See: *Goldfields Mining* (supra)

<sup>11</sup> *Frans Masubelele v PHSDSBC and others* (Case No: JR1151/08). Delivered on 17 January 2013.



only appropriate sanction and the Second respondent's decision was that of a reasonable decision maker. No proper case has been made out by the Applicant for any of the relief sought and the application must fail.

[21] Therefore, in conclusion, there is simply no basis to review and set aside the award of the Second Respondent.

[22] In the premises the following order is made:

Order:

1. The Applicant's review application is dismissed.
2. There is no order as to costs.



A. Ramdaw

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Herman Perry of Solidarity

For the Third Respondent: Adv. P Muthige

Instructed by: Thipa Attorneys Incorporated

LABOUR COURT