REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JR 1151/2008

In the matter between:

FRANS MASUBELELE **Applicant**

and

PUBLIC HEALTH AND SOCIAL DEVELOPMENT

SECTORAL BARGAINING COUNCIL **First Respondent**

M J TSABADI N.O. **Second Respondent**

DEPARTMENT OF HEALTH (GAUTENG PROVINCE) **Third Respondent**

Heard: **10 January 2013**

Delivered: **17 January 2013**

Summary: **Bargaining Council arbitration proceedings – Review of proceedings, decisions and awards of arbitrators – Test for review – Section 145 of LRA 1995 – Requires the arbitrator rationally and reasonably consider the evidence as a whole – determinations of arbitrator compared with evidence on record – arbitrator's decision entirely reasonable and regular – award upheld**

Bargaining Council arbitration proceedings – Review of proceedings, decisions and awards of arbitrators – assessment of evidence by arbitrator – finding of no proper evidence as to inconsistency sustained – principles stated

Misconduct – dishonesty – principles applicable to dishonest conduct – conduct of the employee constituting an offence of dishonesty – dismissal justified

Inconsistency – principles applicable – employee party has evidentiary burden to show inconsistency – no inconsistency shown in this instance

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JUDGMENT

SNYMAN AJ

Introduction

[1] This matter concerns an application by the applicant to review and set aside an arbitration award of the second respondent in his capacity as an arbitrator of the Public Health and Social Development Sectoral Bargaining Council (the first respondent). This application has been brought in terms of Section 145 as read with Section 158(1)(g) of the Labour Relations Act[1] ("the LRA").

[2] The applicant was ultimately dismissed by the third respondent on 14 September 2006, following disciplinary and appeal proceedings in the third respondent. In an

[1] 66 of 1995.

award dated 14 April 2008, the second respondent determined that the dismissal of the applicant by the third respondent was substantively fair, and dismissed the applicant's case. It is this determination by the second respondent that forms the subject matter of the current review application brought by the applicant.

Background facts

[3] From the outset, it is pointed out that the parties in this matter chose not to lead evidence at the arbitration but to simply file heads of argument. These heads of argument where not exchanged between the applicant and the third respondent, for the purposes of answer and reply, but each party simply filed heads of argument with the second respondent on 3 April 2008. From the documents forming part of the record of proceedings in this matter, what follows is the relevant factual background.

[4] The applicant was employed by the third respondent as a driver, and commenced employment in 1988.

[5] On 30 January 2005, the applicant was on duty and was allocated a Toyota Condor motor vehicle with registration GFY 564 G to drive. The applicant actually drove such vehicle on the day. The records of the conduct of the applicant with regard to such vehicle on 30 January 2005 showed that the applicant filled the vehicle with 65.10 liters of fuel and with an odometer reading of 18 536 recorded at the time, and then later that same day filled the same vehicle again with 40.6 liters of fuel with an odometer reading of 18645.

[6] The irregularity in the above is immediately apparent. It is simply impossible to fill the same vehicle again with 40.6 liters of fuel after only having travelled 109 kilometers. The inference is dishonest conduct on the part of the applicant in this respect is irresistible.

[7] On 30 November 2005, the applicant was not on duty. According to the applicant's own explanation, he was asked by a fellow employee driver (a Mr Segooa) to substitute for him (Segooa) on 30 November 2005, to which the applicant agreed.

[8] According to the applicant, he then arrived at work on 30 November 2005 in terms of this arrangement with Segooa, only to find Segooa who had asked the applicant to substitute for him was actually at work and fulfilling his duties. The applicant then asked Segooa to drive the applicant home and Segooa refused.

[9] The applicant stated that he was then "left stranded" and then simply took one of the third respondent's vehicles home without authorisation.

[10] The fact is that the applicant of his own accord and without authorisation took a vehicle of the third respondent for his own private purposes, which was not permitted. Again, the inference of dishonesty on the part of the applicant is irresistible.

[11] According to the third respondent, the applicant was a shop steward with 18 years' experience, and should have known better and set an example.

[12] As a result of the above, the applicant was charged by the third respondent with misconduct, and ultimately, following the conclusion of appeal proceedings, was finally dismissed on 14 September 2006.

[13] In Court, Mr S Makhafola, who represented the applicant, stated that the applicant never disputed that he was guilty of the above misconduct. Mr Makhafola actually conceded this to be the case. This is in line with the applicant's review application and founding affidavit, which does not raise the issue of the applicant's guilt as an issue.

[14] The only issue raised by the applicant is one of the alleged inconsistent application

of discipline by the third respondent. This case was presented by the applicant in his heads of argument submitted to the second respondent. The applicant, however, led no evidence at all in respect of the same.

[15] In his heads of argument, the applicant's contentions of inconsistency are in essence as follows:[2]

15.1 Messrs Lebaka and Mokhwaso were arrested for transporting and loading baby napkins without being authorised to do so, and for being on the wrong route. They were not disciplined;

15.2 Messrs Ramatloo and Lekaba had on numerous occasions instructed drivers to do personal errands for them, without authority. They were not disciplined;

15.3 Mr Tsiane had an accident with a vehicle without being in possession of the necessary trip documentation. He further failed to produce petrol slips, despite being requested to do so by the supervisor. He also deviated from a prescribed route. No disciplinary action was taken against him;

15.4 Mr Buthelezi was on night duty and he took the vehicle home and only returned the same at 12 noon. He did not have the necessary authority or documentation to do so. He was not disciplined;

15.5 Mr Segooa travelled with a vehicle of the third respondent to collect iron bars, and a member of the public complained about this. He further picks up his wife on a daily basis in an ambulance without authority or documents. He was not disciplined;

15.6 Mr Mofokeng was in possession of a vehicle of the third respondent for three days without reporting his whereabouts. He was charged, but not dismissed.

[2] Record page 34 – 36.

[16] The second respondent subsequently dismissed the applicant's claim, rejecting the applicant's contentions of inconsistency, for the reasons as will be dealt with below, giving rise to these proceedings.

The relevant test for review

[17] In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others,*[3] Navsa AJ held that in the light of the constitutional requirement (in s 33 (1) of the Constitution) that everyone has the right to administrative action that is lawful, reasonable and procedurally fair, 'the reasonableness standard should now suffuse s 145 of the LRA'. The majority of the Constitutional Court set the threshold test for the reasonableness of an award or ruling as the following: 'Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?'

[18] In *CUSA v Tao Ying Metal Industries and Others,*[4] O'Regan J held: 'It is clear... that a commissioner is obliged to apply his or her mind to the issues in a case. Commissioners who do not do so are not acting lawfully and/or reasonably and their decisions will constitute a breach of the right to administrative justice.'

[19] The Labour Appeal Court had the occasion to fully ventilate the issue again in *Herholdt v Nedbank Ltd.*[5] In this judgment, the Court concluded:[6]

> '…Where a commissioner fails to have regard to material facts, this will constitute a gross irregularity in the conduct of the arbitration proceedings because the commissioner would have unreasonably failed to perform his or her mandate and thereby have prevented the aggrieved party from having its case fully and fairly determined. Proper consideration of all the relevant and material facts and issues is indispensable to a reasonable decision and if a decision maker fails to take account of a relevant factor which he or she is bound to consider, the resulting decision will

[3] (2007) 28 ILJ 2405 (CC) paras 106 and 110.
[4] (2008) 29 *ILJ* 2461 (CC) at para 84.
[5] (2012) 33 ILJ 1789 (LAC).
[6] Id at paras 36 and 39.

not be reasonable in a dialectical sense. Likewise, where a commissioner does not apply his or her mind to the issues in a case the decision will not be reasonable…

…. Whether or not an arbitration award or decision or finding of a commissioner is reasonable must be determined objectively with due regard to all the evidence that was before him or her and what the issues were. There is no requirement that the commissioner must have deprived the aggrieved party of a fair trial by misconceiving the whole nature of enquiry. The threshold for interference is lower than that; it being sufficient that the commissioner has failed to apply his mind to certain of the material facts or issues before him, with such having potential for prejudice and the possibility that the result may have been different. This standard recognizes that dialectical and substantive reasonableness are intrinsically interlinked and that latent process irregularities carry the inherent risk of causing an unreasonable substantive outcome.'

[20] The judgment in *Herholdt v Nedbank Ltd* is in any event in line with what Labour Appeal Court had earlier said in *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others*[7] when specifically interpreting the *Sidumo* test. The Court held as follows: 'To this end a CCMA arbitration award is required to be reasonable because, if it is not reasonable, it fails to meet the constitutional requirement that an administrative action must be reasonable and, once it is not reasonable, it can be reviewed and set aside.'

[21] As the Labour Appeal Court in *Herholdt v Nedbank Ltd* referred with approval to the judgment in *Southern Sun Hotel Interests (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others,*[8] reference is made to the following extract from such judgment, where it was held as follows:

'In summary, s 145 requires that the outcome of CCMA arbitration proceedings (as represented by the commissioner's decision) must fall within a band of reasonableness, but this does not preclude this court from scrutinizing the process in

[7] (2008) 29 ILJ 964 (LAC) at para 92.
[8] (2010) 31 ILJ 452 (LC) at para 17.

terms of which the decision was made. If a commissioner fails to take material evidence into account, or has regard to evidence that is irrelevant, or the commissioner commits some other misconduct or a gross irregularity during the proceedings under review and a party is likely to be prejudiced as a consequence, the commissioner's decision is liable to be set aside regardless of the result of the proceedings or whether on the basis of the record of the proceedings, that result is nonetheless capable of justification.'

[22] In *Lithotech Manufacturing Cape - A Division of Bidpaper Plus (Pty) Ltd v Statutory Council, Printing, Newspaper and Packaging Industries and Others,*[9] the Court held:

'Even where the reasoning of the arbitrator may be criticized, this in itself does not render the award reviewable particularly where the ultimate result arrived at by the arbitrator is sustainable in the light of the record. I must, however, qualify this statement by pointing out that there may be cases where, although the ultimate conclusion reached by the commissioner or arbitrator is reasonable, the reasoning adopted by the arbitrator or commissioner is so flawed (even if the ultimate result is reasonable), that it cannot be concluded that the arbitrator duly exercised his or her functions as an arbitrator by taking due consideration of matters that are vital to the dispute. In such circumstances the reviewing court may well be inclined to review and set aside the award.'

[23] Against the above principles and test, the award of the second respondent in this instance must to be determined, especially considering the grounds of review as articulated by the applicant.

Merits of the review: issue of inconsistency

[24] As referred to above, the only issue the second respondent was actually called on to determine was whether the applicant's dismissal was substantively unfair based on the inconsistent application of discipline by the third respondent. The existence of the misconduct was not in issue, and neither was procedural fairness.

[9] (2010) 31 ILJ 1425 (LC) at para 18.

[25] The fact is that what must be determined in this matter is an application to review a determination by a bargaining council arbitrator. This must be done by way of the application of the review test as defined above. It is therefore important to consider the actual reasoning of the second respondent, as embodied in the award of the second respondent.

[26] The substance of the conclusion of the second respondent on the issue he was required to determine is as follows:[10]

26.1 The second respondent recorded that the applicant accepted his guilt on the charges and specifically records that the applicant "mentioned" a number of incidents which the applicant claimed supported his contentions of inconsistency. In this regard, the second respondent was clearly referring to the applicant's own heads of argument, and properly so;

26.2 The second respondent found that "Except to merely mention these incidences no supportive evidence was placed before me. It is my view that the Applicant needed more that to merely mention these incidences." The second respondent also stated there was no "concrete evidence" before him on this issue;

26.3 The second respondent held that the applicant's averments that other employees who committed similar acts of misconduct went unpunished are unsubstantiated;

26.4 The second respondent went further and concluded that even if it were to be accepted that other employees who committed similar acts of misconduct in the past went unpunished does not in itself mean that other employees who committed similar misconduct later should not be punished;

[10] See Record page 47.

26.5 The second respondent then considered the nature of the applicant's misconduct, his position in the third respondent, his complete lack of proper explanation for what he did and the trust relationship;

26.6 On the basis of the above, the applicant's dismissal was upheld by the second respondent.

[27] Before dealing with the relevant principles of law relating to inconsistency, it is important to determine what exactly the evidence was before the second respondent with regard to the issue of inconsistency he was required to determine. The fact of the matter is that there was no evidence in this regard before the second respondent. There was no substantiating testimony, no supporting documents, and a complete lack of particularity. It is undisputed that the only reference to inconsistency before the second respondent is contained in the heads of argument the applicant submitted to the second respondent. The first and most immediate problem with this is that heads of argument do not constitute evidence. In this instance, the parties never agreed to dispense with evidence or that the heads of argument could be considered as evidence. If this was the agreement, the parties would have to have had specifically recorded this.[11] The heads of argument in this matter remained exactly what they are, which is just written submissions by the parties which in this case were without any substantiating evidence. The applicant was at all relevant times legally represented in the arbitration, and should thus have appreciated the consequences of the decision not to lead evidence. The second respondent's conclusion that there no "concrete" evidence before him on the issue of inconsistency is therefore not only reasonable, but actually correct.

[28] Mr Makhafola contended that because the issues of inconsistency were raised in the applicant's heads of argument, and these heads of argument were served on

[11] *See Shoredits Construction (Pty) Ltd v Pienaar No and Others* (1995) 16 ILJ 390 (LAC); *National Union of Metalworkers of SA and Others v Driveline Technologies (Pty) Ltd and Another* (2000) 21 ILJ 142 (LAC); *SA Commercial Catering and Allied Workers Union and Others v Sun International SA Ltd (A Division of Kersaf Investments Ltd)* (2003) 24 ILJ 594 (LC).

the third respondent, the fact that the third respondent then did not dispute or contradict the same would mean that such contention in the heads of argument be accepted as evidence. There are a number of difficulties with this contention. The first is that for the heads of argument of the applicant to be accepted as evidence in the first place, there has to be an agreement to that effect from the third respondent. Such an agreement cannot come about tacitly, especially considering that the third respondent was never asked to so agree. The fact is that the only agreement recorded to exist, on the review record in this matter, is an agreement to only submit heads of argument on a specified date. Secondly, the heads of argument in this matter were not exchanged, meaning that no provision was made for a first submission by the applicant, then an answer and then a reply. Both parties simply filed their heads of argument directly with the second respondent. There was no provision made for contradiction of each other's submissions. The third respondent thus simply cannot be blamed and suffer the consequences contended by Mr Makhafola, in this instance. By way of comparison to the contrary, and what the applicant would needed to have shown for the argument of Mr Makhafola to be sustainable, reference is made to *SA Police Service v Safety and Security Sectoral Bargaining Council and Others*[12] where it was held as follows:

> 'It is true that in this instance neither party led oral evidence as such on the issue of whether or not the employer acted consistently when imposing sanctions in cases of this nature. In this regard, the employer failed to introduce the promised evidence of how previous cases had been dealt with in Gauteng province. It is noteworthy that there was an interval of several months between the first and second days of the arbitration hearing which ought to have afforded the applicant more than ample opportunity to obtain evidence in support of its claim of having a consistent policy in such cases.'

There was no promise by the third respondent to produce any evidence about inconsistency. The third respondent was never called on to do so. There was no

[12] (2011) 32 ILJ 715 (LC) at para 11.

actual opportunity for the third respondent to produce such evidence. The third respondent was also not even confronted with particulars of the inconsistency allegations beforehand. Therefore, and once again, I conclude that the heads of argument before the second respondent cannot constitute evidence in this instance, despite the contention of Mr Makhafola.

[29] 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. As was said in *SA Municipal Workers Union on behalf of Abrahams and Others v City Of Cape Town and Others:*[13]

> '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.'

[13] (2011) 32 ILJ 3018 (LC) para 50. See also *Minister of Correctional Services v Mthembu No and Others* (2006) 27 ILJ 2114 (LC) at para 13 where it was said: 'The third respondent placed in issue the fairness of the decision to dismiss him and pertinently raised the issue of consistency. He established a basis therefor by presenting evidence with sufficient particularity in order to have enabled the applicant to deal therewith. Faced with a challenge to the consistency of the applicant's treatment of employees, the applicant, who bore the onus of proving the fairness of the dismissal (s 192(2) of the Act), elected not to place any evidence before the first respondent demonstrating that there was no inconsistent disciplining of employees.'

[30] In *Comed Health CC v National Bargaining Council for the Chemical Industry and Others*[14] the Court said the following:

> '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 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.'

[31] As the second respondent in my view correctly stated, for the applicant to "merely mention" these alleged instances of inconsistency, which is exactly all the applicant did, is insufficient. I am therefore of the view that the applicant 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 second respondent, and which would have put the duty on the third respondent to answer the same. On this basis alone, the applicant's application must fail.

[32] Despite the fact that I am of the view that the applicant failed to substantiate a case before the second respondent of inconsistency on the facts, I will nonetheless deal with the inconsistency case of the applicant on the heads of argument submitted to the second respondent as they stand, assuming what the applicant said in the aforesaid heads of argument before the third respondent is true.

[33] Firstly, as to the relevant legal principles at stake, the principle of inconsistency is also referred to in law as the so-called "parity principle". The judgment in *SA Commercial Catering and Allied Workers Union and Others v Irvin and Johnson Ltd,*[15] aptly determined the principles applicable, as follows:

[14] (2012) 33 ILJ 623 (LC) at para 10.
[15] (1999) 20 ILJ 2302 (LAC) at para 29.

> 'In my view too great an emphasis is quite frequently sought to be placed on the 'principle' of disciplinary consistency, also called the 'parity principle' (as to which see eg Grogan Workplace Law (4 ed) at 145 and Le Roux and Van Niekerk The SA Law of Unfair Dismissal at 110). There is really no separate 'principle' involved. Consistency is simply an element of disciplinary fairness (M S M Brassey 'The Dismissal of Strikers' (1990) 11 ILJ 213 at 229). Every employee must be measured by the same standards (*Reckitt and Colman (SA) (Pty) Ltd v Chemical Workers Industrial Union and others* (1991) 12 ILJ 806 (LAC) at 813H-I). Discipline must not be capricious. It is really the perception of bias inherent in selective discipline which makes it unfair. Where, however, one is faced with a large number of offending employees, the best that one can hope for is reasonable consistency. Some inconsistency is the price to be paid for flexibility, which requires the exercise of a 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 towards the other employees. It would mean no more than that his or her assessment of the gravity of the disciplinary offence was wrong. It cannot be fair that other employees profit from that kind of wrong decision. In a case of a plurality of dismissals, a wrong decision can only be unfair if it is capricious, or induced by improper motives or, worse, by a discriminating management policy.… Even then I dare say that it might not be so unfair as to undo the outcome of other disciplinary enquiries. If, for example, one member of a group of employees who committed a serious offence against the employer is, for improper motives, not dismissed, it would not, in my view, necessarily mean that the other miscreants should escape. Fairness is a value judgment. It might or might not in the circumstances be fair to reinstate the other offenders. The point is that consistency is not a rule unto itself.'

[34] In my view, the ratio in the judgment in *SA Commercial Catering and Allied Workers Union and Others v Irvin and Johnson Ltd* is clear. The following principles apply to the determination of the issue of inconsistency so as to ensure inconsistency is not found to exist in the case of dismissal of employees: (1) Employees must be measured against the same standards (like for like comparison); (2) The chairperson of the disciplinary enquiry must conscientiously and honestly determine the misconduct; (3) The decision by the employer not to dismiss other employees

involved in the same misconduct must not be capricious, or induced by improper motives or by a discriminating management policy (this conduct must be bona fide); (4) A value judgment must always be exercised.

[35] In *Minister of Correctional Services v Mthembu NO and Others,*[16] it was found as follows:

> 'The consideration of consistency of equality of treatment (the so-called parity principle) is an element of disciplinary fairness.... 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, ie 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 stated by Conradie JA in the *Irvin and Johnson* case at 2313C-J, the principle of consistency should not be applied rigidly....
>
> ....Consistency is therefore not a rule unto itself, but rather an element of fairness that must be determined in the circumstances of each case....'

[36] In *SRV Mill Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*[17] the Court said:

> 'The general requirement that there should be parity of treatment in a disciplinary context is well established. See for instance *National Union of Metalworkers of SA and others v Henred Fruehauf Trailers (Pty) Ltd* 1995 (4) SA 456 (A) at 463G-J; (1994) 15 ILJ 1257 (A). That has gone hand in hand with the recognition that differing circumstances may warrant different outcomes in respect of particular employees. See *NUM v Amcoal Collieries and Industrial Operations Ltd* (1992) 13 ILJ 1449 (LAC) at 1452I-1453B....

[16] Above n13 at paras 8 – 9.
[17] (2004) 25 ILJ 135 (LC) at paras 18; 23; 26; 31.

> An important feature of these passages is that they reassert the primacy of the criterion of fairness, this being a value judgment to be exercised on the facts of the particular case that presents itself for decision.…
>
> As is clear from these passages, it is not part of the law on consistency that bias or ulterior purpose must be established before a disciplinary outcome can be said to be inconsistent to the point that it impacts on the requirement of fairness. One of the reasons underlying the need for consistency is that the perception of bias should be avoided....
>
> Ultimately, questions of fairness and, perhaps particularly, issues of inconsistency require the exercise of a value judgment.'

[37] In *Consani Engineering (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others,*[18] it was held as follows:

> 'The requirement of consistency is not a hard and fast rule. It is something to be kept in mind as an aspect of disciplinary fairness. Flexibility in adapting to a changing environment is equally important. Shifts in policy inevitably introduce standards not consonant with past practices. The applicant's change in policy to one of zero tolerance hence can be fairly regarded as a legitimate modification of the operational means for protecting the company from ongoing stock losses. Any ensuing element of inconsistency cannot be considered arbitrary or in bad faith in the circumstances.'

[38] Of relevance to the current matter, the Court in *Chemical Energy Paper Printing Wood and Allied Workers Union v National Bargaining Council for the Chemical Industry and Others*[19] concluded:

> '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.' (emphasis added)

[18] (2004) 25 ILJ 1707 (LC) at para 19.
[19] (2010) 31 ILJ 2836 (LAC) para 20.

The Court then specifically referred to the passage from the *Irvin and Johnsson* judgment referred to above, and concluded that:[20]

> 'Hence, where a number of employees is dismissed consequent upon collective wrongful conduct, a wrong decision by the employer resulting in an acquittal of an employee who did commit the wrong can only be unfair if it is a result of some discriminatory management policy.'

[39] Two more recent judgments of the Labour Court, which were both review applications where the Court was specifically dealing with the principle of inconsistency per se, after the judgment in *Sidumo*, are of importance. In both these judgments, the awards of arbitrators which found inconsistency to exist was actually reviewed and set aside by the Labour Court. Firstly, in *Hulett Aluminium (Pty) Ltd v Bargaining Council for the Metal Industry and Others*[21] the Court held as follows:

> 'It is evidently clear from the ratio of *Irvin and Johnson* that when deciding the issue of parity, the gravity of the misconduct of the employee who seeks to rely on that principle should receive serious attention.
>
> In this case as indicated earlier the employee was found guilty of a serious offence of dishonesty and dismissed, whereas Mr Cassim was found guilty of a lesser charge of failing to follow company policy....
>
> ...Thus, even on the employee's own version the offence committed by Mr Cassim was not only different but also of a less serious nature than that committed by her.
>
> Turning to the issue of the seriousness of the offence, the presence of dishonesty tilts the scales to an extent that even the strongest mitigating factors, like long service and a clean record of discipline are likely to have minimal impact on the sanction to be imposed. In other words whatever the amount of mitigation, the relationship is unlikely to be restored once dishonesty has been established in particular in a case where the employee shows no remorse. The reason for this is

[20] Id at para 21.
[21] (2008) 29 ILJ 1180 (LC) at paras 36; 40; 41 and 42.

that there is a high premium placed on honesty because conduct that involves corruption by the employees damages the trust relationship which underpins the essence of the employment relationship.'

[40] The second judgment is *Southern Sun Hotel Interests (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others,*[22] where the Court said the following:

'The courts have distinguished two forms of inconsistency - historical and contemporaneous inconsistency. The former requires that an employer apply the penalty of dismissal consistently with the way in which the penalty has been applied to other employees in the past; the latter requires that the penalty be applied consistently as between two or more employees who commit the same misconduct.

A claim of inconsistency (in either historical or contemporaneous terms) must satisfy a subjective element - an inconsistency challenge will fail where the employer did not know of the misconduct allegedly committed by the employee used as a comparator (see, for example, *Gcwensha v CCMA and Others* [2006] 3 BLLR 234 (LAC) at paras 37-38). The objective element of the test to be applied is a comparator in the form of a similarly circumstanced employee subjected to different treatment, usually in the form of a disciplinary penalty less severe than that imposed on the claimant. (See *Shoprite Checkers (Pty) Ltd v CCMA and Others* [2001] 7 BLLR 840 (LC) at para 3). Similarity of circumstance is inevitably the most controversial component of this test. An inconsistency challenge will fail where the employer is able to differentiate between employees who have 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.

Further, the Labour Appeal Court has held that employees cannot profit from an employer's manifestly wrong decision in the name of inconsistency.'

[41] Also of relevance to the current matter is the recent judgment in *Mphigalale v Safety and Security Sectoral Bargaining Council and Others*, and the following extract from

[22] Above n8 at paras 10–11.

the judgment is apposite:[23]

> 'The evidence before the commissioner was that the chairperson's decision in respect of the two previous instances of corruption by police officers had been made in error. Applying the judgment in *SACCAWU*, the SAPS is not required to repeat a decision made in error or one which is patently wrong. This is all the more so given the nature of the misconduct committed. In *S v Shaik and Others* the Constitutional Court warned that corruption is 'antithetical to the founding values of our constitutional order'. Similarly, in *SA Association of Personal Injury Lawyers v Heath and others* 2001 (1) SA 883 (CC) this court held that: '[C]orruption and maladministration are inconsistent with the rule of law and the fundamental values of our Constitution. They undermine the constitutional commitment to human dignity, the achievement of equality and the advancement of human rights and freedoms. They are the antithesis of the open, accountable, democratic government required by the Constitution. If allowed to go unchecked and unpunished they will pose a serious threat to our democratic State.'

[42] In applying the above principles to the current matter, accepting what is stated in the applicant's heads of argument in the arbitration is true as it stands, the applicant simply did not make out a case of inconsistency in law. The second respondent was alive to this as well, and as stated above, specifically made a determination to this effect. There is no contention by the applicant or case made out by the applicant that discipline was not conscientiously and honestly applied and there were improper motives or capricious behaviour on the part of the third respondent. There certainly was no discriminating policy. The fact is that even if the third respondent was wrong in not disciplining the other employees referred to, there was no case or evidence that the third respondent was still not acting bona fide vis-à-vis the applicant. There is simply no case or reason why the applicant should profit from any such failure on the part of the third respondent, should it even exist. Given also the complete absence of any factual particularity in respect of the other employees referred to, it cannot even safely be said that the misconduct of the applicant is

[23] (2012) 33 ILJ 1464 (LC) at para 22.

readily comparable to the other employees mentioned. Most certainly, there is no case made out or reference made to the fact that responsible management at the third respondent was actually aware of the misconduct by the other employees referred to. There was also no case of arbitrary or subjective selection by the third respondent not to discipline the employees referred to, but only the applicant. Therefore, and in terms of the relevant provisions of law, the applicant's inconsistency challenge has to fail, even as it stood in the heads of argument.

[43] This then leaves the final issue of the value judgment to be exercised, as part of the principles relating to inconsistency when it comes to the dismissal of employees. In this regard, the relevant issues are that the applicant never showed any genuine remorse and persisted with what were entirely unacceptable and unreasonable explanations for his misconduct. Furthermore, the misconduct of the applicant clearly related to offences of dishonesty. As to the absence of any remorse in this instance, reference is made to the *De Beers Consolidated Mines Ltd v Commission for Conciliation, Mediation and Arbitration and Others:*[24]

> 'This brings me to remorse. It would in my view be difficult for an employer to re-employ an employee who has shown no remorse. Acknowledgment of wrongdoing is the first step towards rehabilitation. In the absence of a recommitment to the employer's workplace values, an employee cannot hope to re-establish the trust which he himself has broken. Where, as in this case, an employee, over and above having committed an act of dishonesty, falsely denies having done so, an employer would, particularly where a high degree of trust is reposed in an employee, be legitimately entitled to say to itself that the risk of continuing to employ the offender is unacceptably great.'

[44] Considering the nature of the misconduct of the applicant, his dismissal per se was justified. Mr Makhafola for the applicant conceded this to be the case. In

[24] (2000) 21 ILJ 1051 (LAC) at para 25.

Theewaterskloof Municipality v SA Local Government Bargaining Council (Western Cape Division) and Others,[25] it was held:

> 'The general principle that conduct on the part of an employee which is incompatible with the trust and confidence necessary for the continuation of an employee relationship will entitle the employer to bring it to an end is a long-established one. See *Council for Scientific and Industrial Research v Fijen* (1996) 17 ILJ 18 (A) at 26E-G.'

[45] In *De Beers Consolidated Mines Ltd v Commission for Conciliation, Mediation and Arbitration and Others,*[26] the Court held as follows, which in my view is quite apposite to the current matter:

> 'Dismissal is not an expression of moral outrage; much less is it an act of vengeance. It is, or should be, a sensible operational response to risk management in the particular enterprise. That is why supermarket shelf packers who steal small items are routinely dismissed. Their dismissal has little to do with society's moral opprobrium of a minor theft; it has everything to do with the operational requirements of the employer's enterprise.'

[46] The applicant clearly did not act with the necessary fiduciary duty, as required by law, especially having regard to his position, status and seniority, and the interests of the employer (third respondent) he was required to serve. Once again, the second respondent was alive to this, and specifically mentioned the same in his award. In this respect, reference is made to *Sappi Novoboard (Pty) Ltd v Bolleurs,*[27] where it was held as follows:

> 'It is an implied term of the contract of employment that the employee will act with good faith towards his employer and that he will serve his employer honestly and faithfully: *Pearce v Foster and Others* (1886) QB 356 at 359; *Robb v Green* (1895) 2 QB 1 at 10; *Robb v Green* (1895) 2 QB 315 (CA) at 317; *Gerry Bouwer Motors (Pty)*

[25] (2010) 31 ILJ 2475 (LC) at para 23.
[26] [2000] 9 BLLR 995 (LAC) at para 22.

> *Ltd v Preller* 1940 TPD 130 at 133; *Premier Medical and Industrial Equipment Ltd v Winkler and Others* 1971 (3) SA 866 (W) at 867H. The relationship between employer and employee has been described as a confidential one (*Robb v Green* at 319). The duty which an employee owes his employer is a fiduciary one 'which involves an obligation not to work against his master's interests' (*Premier Medical and Industrial Equipment Ltd v Winkler* at 867H; *Jones v East Rand Extension Gold Mining Co Ltd* 1917 TH 325 at 334). If an employee does 'anything incompatible with the due or faithful discharge of his duty to his master, the latter has a right to dismiss him': *Pearce v Foster* at 359. In *Gerry Bouwer Motors (Pty) Ltd v Preller* it was said at 133: 'I do not think it can be contended that where a servant is guilty of conduct inconsistent with good faith and fidelity and which amounts to unfaithfulness and dishonesty towards his employer the latter is not entitled to dismiss him.'

[47] Similarly, reference is made *Carter v Value Truck Rental (Pty) Ltd*[28] where the Court held as follows:

> 'It is trite that, both at common law and under the equitable dispensation created by the LRA, the employment relationship is regarded as one of the highest good faith: *Council for Scientific and Industrial Research v Fijen* (1996) 17 ILJ 18 (A) at 26B-F; *Standard Bank of SA Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (1998) 19 ILJ 903 (LC) at 913E-H; *Sappi Novoboard (Pty) Ltd v Bolleurs* (1998) 19 ILJ 784 (LAC) at para 7 and the copious authorities there cited. The success of any enterprise depends on the absolute integrity and honesty of its employees, and any form of dishonesty or deception potentially may have more serious and far-reaching consequences at executive level: see, for example, *JD Group Ltd v De Beer* (1996) 17 ILJ 1103 (LAC) at 1112-13. 'Honesty' in the employment context does not merely mean refraining from criminal acts; it embraces any conduct which involves deceit.'

[48] Clearly, therefore, the third respondent was entitled to dismiss the applicant, and such dismissal was substantively fair. The second respondent's conclusion to this effect was thus reasonable and justified, and there is no basis to review and set

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[27] (1998) 19 ILJ 784 (LAC) at para 7.
[28] (2005) 26 ILJ 711 (SE) at para 44.

aside this conclusion.[29]

Conclusion

[49] Therefore, and in conclusion, there is simply no basis to review and set aside the award of the second respondent, and I uphold the same.

[50] In dealing with the issue of costs, both parties in their heads of argument ask for an award of costs. No submissions were made to the contrary in Court. I was also asked to determine the issue of costs reserved by Soni AJ in respect of proceedings on 15 April 2009, and in this regard I was informed by the parties that I just needed to refer to the Court file. From the file, and the Order of Soni AJ, it appears that the proceedings on 15 April 2009 concerned an Order to compel the first and second respondents to file the record of the proceedings. Considering the nature of this matter and the fact that no evidence was actually led before second respondent as set out above, a record was not really necessary in this matter. Considering all of the above, I can see no reason why costs should not follow the result in this matter, save for the proceedings on 15 April 2009, in respect of which I intend to make no order as to costs.

Order

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

51.1 The applicant's review application is dismissed.

51.2 The applicant is ordered to pay the costs of the application, save for the proceedings on 15 April 2009, in respect of which there is no order made as to costs.

[29] See in this regard also what the Court said in *Mphigalale v Safety and Security Sectoral Bargaining Council and Others (supra)* at para 25 in circumstances comparable to the current matter.

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Snyman AJ

APPEARANCES:

For the Applicant: Mr S Makhafola of Makhafola & Verster Inc

For the Third Respondent: Adv S M Shaba

Instructed by: The State Attorney