IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

REPORTABLE

CASE NO: JR1935/05

In the matter between:

LYNX GEOSYSTEM SA (PTY) LTD Applicant

AND

COMMISSION FOR CONCILATION,

MEDIATION & ARBITRATION 1ST Respondent

RAYNOLD BRACKS N.O 2nd Respondent

BEMAWU obo KRISHNA GOVINDER

AND SIX OTHERS 3rd Respondent to further respondents

JUDGMENT

Molahlehi J

Introduction

[1] The applicant in this matter seeks to review and set aside the arbitration award issued by the second respondent (the commissioner) under case number GA16034-04 and dated 23 June 2005.

[2] The applicant has also filed an application for condonation for the late filing of the record in terms of rule 7A (8) of the Rules of the Labour Court. I am of the view that the explanation tendered is reasonable and acceptable. It is for that reason that I am of the view that condonation should be granted.

Background facts

[3] The applicant is involved in the business of software development mainly for the mining industry. The individual respondents were prior to their dismissals employed as programme developers.

[4] The individual respondents, Mr Breed, Joseph, Mr Sandlale, Mr Naidu and Mr Verschuur, (the employees), are former employees of the applicant who were charged and dismissed for misconduct involving:

> *"Gross insubordination in that you acted in flagrant disregard of the authority of your employer by defying instruction to work on 22 March 2004."*

[5] Mr. Govinder, the other individual respondent was charged and dismissed for misconduct related to failure to attend the interview on 13 April 2004. Mr Naidu was charged with absent without leave on 13 April 2004 and use of abusive language. The employment contract of five of the respondents provides as follows:

> *"**Paid Holiday:** All statutory holidays for the mining industry. Other public holidays may be allowed at the discretion of the management of the Company."*

The contract of Mr. Joseph, on the subject of paid holidays provided as follows:

> ***Paid Holiday:** All statutory holidays for the mining industry.*
>
> *The Company may request you to make yourself available on public*

holidays."

[6] The charges of insubordination arose because of refusal by the respondents to work on 22 March 2004, which was a holiday- Human Rights Day.

[7] The applicant, through Mr De Hill raised the issue of working during public holidays during December 2003 with the repsondents. The issue was touched on again during January 2004, and at that meeting the employees were informed by Mr De Hill that there were too many public holidays and that there was a need to effect the necessary changes thereto.

[8] The employees were subsequent to the above issued with a memorandum on the 16 March 20004 which inter alia advised as follows:

> "*Our offices are open on all public holidays for business as usual. You are required to be at work on public holidays for business as usual. You are required to be at work on public holidays from 8:00 to 5:00. Leave of absence may be granted to an individual at management's discretion."*

[9] The respondents together with other employees were dissatisfied with the contents of the memo. A meeting was thereafter arranged with Mr De Hill to discuss the issue. The matter was not resolved as according to the respondents, Mr De Hill in an arrogant and using abusive language according to the respondents, persisted with the position that the employees are required to work on public holidays.

[10] The respondents adopted the view that because the issue of working during public holidays remained unresolved and there was no emergency they would not work on those days.

[11] The case of the respondents during the arbitration proceedings was that they had in general never historically worked during a public holiday if they were to work on a public holiday they would be compensated by way of giving them an off day.

The grounds for review and arbitration award

[12] The applicant contends that the arbitration award is reviewable because the commissioner committed a gross misconduct in that he failed to apply his mind to the facts and the evidence which was properly before him. The reasoning of the commissioner is also criticised for being unjustifiable in the context of the evidence which was presented before him. The commissioner is further criticised for misdirection in the application of the facts to the law of evidence. It is also the applicant's contention that the commissioner in arriving at the conclusion as he did failed to take into account the context in which the instruction to work on public holidays came into being. The applicant contends in this respect that the commissioner ignored the fact that what the applicant did was to enforce the provisions of the contract of employment between the parties.

[13] In the heads of argument the applicant contends that the commissioner failed to properly consider the evidence which was presented to him in respect of the following aspects:

> *"2.4.1 The change did not come as a bolt from the blue as it had been mooted as early as January 2004 - Guluyiv testified, at p. 812 I23 - p. 814 16 that the public holiday issue was raised in December 2003 already and at p. 367 de Hill alludes to a discussion about working on public holidays at the beginning of the year.*
>
> *2.4.2 Applicant advised all staff on 9 March 2004 (p. 226) that they were required to work on 22 March 2004, thus giving them ample time within which to make suitable arrangements. Second Respondent appears to have conveniently ignored the fact that in so doing Applicant was merely enforcing its contractual rights.*
>
> *2.4.3 The meeting called on 16 March 2004 and at which Breed acted as a spokesperson for the employees, ostensibly to "clarify" the Applicant's memorandum alluded to above, was no more than a protest action aimed at attempting to secure a volte face by Applicant - an objective that was not achieved."*

[14] The applicant also contends that the commissioner failed to recognise or realise that the employees had embarked on a wilful, deliberate and persistent refusal to

obey the instructions given to them to work on the 21st March 2004, being a public holiday but been required to do so in terms of an agreement with them. The applicant also contends in this respect that the employees were informed of the change at the beginning of 2004.

[15] With regard to the issue of inconsistency, the applicant argued that the evidence which was presented before the commissioner does not warrant a finding of inconsistent application of discipline. The evidence which was presented during the arbitration hearing according to the applicant indicates that one of the employees was dismissed and the other resigned. The applicant says that, the dismissed employee continued to render a service as an employee to the applicant "under contract."

[16] In the concluding paragraph of the heads of argument, the applicant makes the following submission:

> "*. . . Accordingly the application should be granted, the award by Second Respondent of 14 June 2005 reviewed and set aside, the order to be replaced by one determining that the dismissal of the 7 employees by Applicant was procedurally unfair and the amounts payable to them to be reduced to appropriate compensation as determined by the Court. Should this order be made it would be appropriate for there to be no order as to costs since the result, essentially, is a draw.*"

[17] The commissioner in his analysis of the evidence and the arguments presented before him makes reference to the provisions of s188 of the Labour Relations

Act 66 of 1995 (the LRA), which provides that an employee's employment should not be terminated unless the reason for such termination is fair and related to conduct, capacity or operational requirements. The commissioner further records that the burden to proof that the decision for dismissal was for a fair reason rests with the employer and that has to be done on the balance of probabilities.

[18] In the second and third paragraphs of the arbitration award the commissioner gives a summary of the principles applicable in cases of insubordination as follows:

> "*2 In the nature of things, insubordination is a serious offence because it presupposes a calculated breach by the employee of the duty to obey the employer's instructions. The code requires that defiance must be 'gross' to justify dismissal. This means that the insubordination must be serious, persistent and deliberate, and that the employer should adduce proof that the employee was in fact guilty of defying an instruction.*
>
> *3 The gravity of the insubordination(or indeed of whether the refusal to be obey an instruction amounts to insubordination) depends on a number of factors, including the action of the employer prior to the alleged insubordination, the willfulness of the employee's defiance and the reasonableness or otherwise of the order that \was defied. So refusal to obey an instruction (by) the employee to do work*

which it was illegal for him(her) to perform or which the employee legitimately felt that he was not qualified to perform was held not to amount to insubordination....”

[19] As concerning the evidence which was presented before him the commissioner accepted that the employment contract had a provision that the employees may be required to work during public holidays. He regarded that provision as much more important than the legislative enactment regulating the provisions of public holiday. However, in considering the application of that provision of the agreement the commissioner says that it was never enforced by the applicant as the employees were never prior to that instruction required to work during public holidays. The practice seems have been that whenever they worked during a public holiday, they (employees) would substitute that for a day off. It is for these reasons that the commissioner accepts the surprised reaction on the part of the employees when they were informed that they would be required to work on the public holiday of the 22 March 2004. The commissioner further accepts the employees’ reaction of requiring an explanation for the instruction and the process which was to be followed in that regard. The justification for their reaction is further explained according to the commissioner by the approach adopted by Mr De Hill, who had send a memorandum to the employees. The memorandum would have been unnecessary had the employees previously worked during the public holidays as all what would have been required was to simply remind them of that requirement.

[20] As concerning the meeting of the 16th March 2004, the commissioner found that the employees went there to engage with Mr De Hill about the memorandum. The conduct of Mr De Hill is criticised by the commissioner and is indeed taken into account with the other factors in the assessment as to whether or not the refusal to obey the instructions to work on 21 March 2004, amounted to gross insubordination. The commissioner found that the conduct and attitude of Mr De Hill to have left much to be desired because instead of engaging constructively with the employees he resorted to intimidation, walking out of the meetings and making threats of disciplinary actions against the employees.

[21] It was for the above reasons that the commissioner found that the applicant had failed to discharge its duty of showing that the employees were guilty of the charge of gross insubordination.

[22] The other reason why the commissioner found the dismissal of the employees to have been unfair was because of the inconsistent application of the discipline. In this regard the commissioner observed:

> *9. In addition it is an important principle in labour jurisprudence that employers should be consistent in their application of discipline in their organisation and that they should charge all employees where the company's rules had been breached. From R1-63 it is clear that 9 employees had signed the letter indicating that they were not coming to work on the 22nd March 2004. Yet only 7 were charged and found guilty with no plausible reason being given why the other 2 employees were not changed."*

[23] The same finding is made in relation to the procedural fairness of the dismissal. The commissioner found that the dismissal was procedurally unfair essentially because the applicant failed to give the employees the opportunity to present evidence in mitigation before a final decision to dismiss. It is important to note that the commissioner arrives at this conclusion in the context where Mr De Hill had decided to overrule the finding of the disciplinary chairperson that the employees should not be dismissed.

Evaluation

[24] In determining whether or not the arbitration award of the commissioner should be interfered with and in applying the reasonable decision maker test, consideration is to be given to the reasons proffered by the commissioner in arriving at the conclusion that the dismissals of the applicants were unfair. See ***Sidumo v Rustenburg Platinum Mines 2007 (12) BLLR 1027 (CC).*** In applying the reasonable decision maker test which has been held to be very stringent, the court is to be cautioned not to impose and apply its own reasonable standard. See ***Fidelity Cash Management Services v Commission for Conciliation, Mediation & Arbitration & others [2008] 3 BLLR 197(LAC).*** Because of the nature of the reasonable decision maker test the court is often cautioned against blearing the division between appeal and review. In other words the role of the court in review is not to determine the correctness of the decision reached by the commissioner but to confine itself to the reasonableness of the decision. The danger of blearing the distinction between review and appeal arise more particularly where the complaint by the applicant is that the

commissioner committed a mistake of law or fact. It is trite that the court should interfere only where the mistake of law or facts is of such a nature that it can be said that there has been a denial of a fair trial.

[25] The evaluation of whether or not to interfere with the decision of a commissioner has to be conceptually located within the context where the law has vested the power to determine the fairness of the dismissal with the commissioner. The power is of course not unfettered. The commissioner exercises the power by answering the question; is the dismissal in the circumstances fair? In arbitration proceedings it is only the commissioner who has to answer this question. See ***Engen Petroleum Ltd v CCMA & others (2007) 8 BLLR 707 (LAC)***. In answering the question the commissioner has to take into account the material properly before him or her including the totality of the circumstances of the given case.

[26] The commissioner is by virtue of his or her appointment an expert in determining the fairness or otherwise in labour disputes. It is for this reason that the court should not readily interfere with the decision of the commissioner. It is only in an instance where the commissioner, in carrying out his or her duties, fails the standard of reasonableness that the court should interfere.

[27] In the present instance the reasonableness the commissioner’s decision has to be assessed with reference to the following:

(a) the application of the principles governing insubordination;

(b) principles governing inconsistency in the application of discipline by the applicant;

(c) the alleged failure by the commissioner to apply his mind to the facts and the evidence presented during the arbitration proceedings.

[28] As a general rule, for insubordination to constitute misconduct justifying a dismissal it has to be shown that the employee deliberately refused to obey a reasonable and lawful order by the employer. In ***Ntsibamde** v **Union Carriage & Wagon Co (Pty) Ltd (1993) 14 ILJ 1566 (I C)*,** a case quoted with approval by this court in ***Polyoak Packaging (Pty) Ltd v Siquibo NO and Others(unreported) case number 236/2008,*** it was said that:

> *"As a general principle it may be stated that the breach of rules laid down by an employer or the refusal to obey an employer's lawful and reasonable order is to be viewed in a serious light and may in given circumstances even justify summary dismissal. However, the presence of certain prerequisites is required. In the first place, it should be evident that an order, which may even be in the form of a warning, must in fact have been given. . . . In the second place, it is required that the order must be lawful; an employee is therefore not expected to obey an unlawful order such as to work illegal overtime. Thirdly, the reasonableness of an order should be beyond reproach and will be enquired into: in cases before the court the order or request has sometimes been found to be reasonable and at other times to be unreasonable. In addition, it is*

required . . . that the refusal to obey must have been serious enough to warrant dismissal.”

[29] Turning to the facts of this case there seems to be no doubt that the employees refused to obey an instruction whose origin is the provision of the contract of employment which the commissioner also found to be valid and legitimate. The commissioner did not however make any specific finding as to whether or not the employees were guilty of an offence related to insubordination. It is however, clear from the proper reading of the award that the commissioner did find them not guilty of gross insubordination. In this respect the commissioner found that the applicant failed to discharge the onus of showing insubordination.

[30] It is apparent from the reading of the arbitration award that the commissioner reasoned his finding that the dismissals were substantively unfair on the basis of the totality of the circumstances of the case. He reasoned that whilst the employment contract required the employees to work during the public holidays that provision in the contract was never prior to the issuance of the memorandum requiring the employees to work on the 21st March 2004, implemented. A practice that had been in place prior to the memorandum was that whenever the employees worked on a public holiday they would be entitled to set off with an off day. The commissioner does not criticise the applicant for seeking to activate the provisions of the contract relating to public holidays but questioned the manner in which the applicant went about the implementation thereof as indicated earlier the commissioner further in the assessment of the

fairness of the dismissal took into account the attitude and the manner in which the representative of the applicant dealt with the matter.

[31] The above discussion indicates very clearly, in my view, that the commissioner appreciated and understood the nature of the issues he had to determine. He applied his mind to the facts and the circumstances of the dispute between the parties. In my view it cannot be said that the commissioner failed to apply his mind simply because he took into account the finding of the chairperson of the disciplinary hearing, Mr Shear, who happened to have been the senior commissioner of the CCMA. Mr Shear was appointed by the applicant and thus in conducting the disciplinary hearing and making the findings as he did, acted as a representative of the applicant and carried his mandate in that capacity. Thus the complaint that the commissioner was influenced by the finding of Mr Shear has no merit, in my view. In this respect the Constitutional Court in ***Sidumo*** held that in weighing the fairness of a dismissal the commissioner must also take into account the basis upon which the employer imposed the sanction, including the basis upon which the employee seek to challenge such a dismissal. See ***Sidumo*** at paragraph 78.

Was there inconsistent application of discipline?

[32] This court has previously said that it was well established that inconsistent application of discipline which is sometimes referred to as the "parity rule", is not as such a rule but an aspect of the principle of fairness. The leading case on this issue is ***SACCAWU and Others v Irvin v Johnson Ltd (1999) 20 ILJ***

2303(LAC). In that case, (at paragraph 29), the court in dealing with the same issue had the following to say:

> *"It was argued before us by Mr Grobler for the applicants that by not dismissing four employees who had also participated in the demonstration, the respondent applied discipline inconsistently. 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 large number of offending employees, the best that one can hope for is reasonable consistency. Some consistency 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 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 dismissal, a wrong decision can only be unfair if it is capricious, or induced by improper motives or, worse, by a discriminating management policy."*

[33] In a case whose facts are very similar to those of the present, the Labour Appeal Court, in *NUM and another v Amcoal Colliery t/a Arnot Colliery and another [2000] 8 BLLR 869(LAC)*, in determining the fairness of the dismissal of

employees who had been dismissed for failing to comply with an instruction (at page 875 middle para 19), the court said the following:

> *"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."*

[34] The basis for the principle governing the need for consistency in discipline was stated by the Labour Appeal Court in *Gcwensha v CCMA & Oth*ers (2006) 3 BLLR 234 (LAC), in the following terms:

> *"Disciplinary consistency is the hallmark of progressive labour relations that every employee must be measured by the same standards."*

The Court went further to say:

> *"... when comparing employees care should be taken to ensure that the gravity of the misconduct is evaluated* **...**"

[35] The reasons upon which the commissioner relied on in finding that the applicant had applied discipline inconsistently are quoted somewhere earlier in this judgment. Even on the version of the applicant discipline was inconsistently applied because according to it one of the employees was retained in some other capacity. There was no evidence before the commissioner as to why if the applicant regarded the offence as so serious to justify a dismissal, was that the employees retained. Thus the gravity of the offence, objectively speaking was

not serious enough to have broken the trust relationship between the parties, because another employee who had committed the same offence was retained in whatever capacity.

[36] The other reason why the commissioner found the dismissals to have been unfair concerned the fairness of the sanction of dismissal. Weighing the reasons advanced by the commissioner for this conclusion, I have not been able to find a basis upon which I can fault him for unreasonableness.

[37] In the light of the above I am of the view that the review application of the applicant stand to fail. As concerning costs, I see no reason in law and fairness why costs should not follow the results.

[38] In the premises the applicant's application to review and set aside the arbitration award issued by the second respondent under case number GA16034-04 and dated 23 June 2005, is dismissed with costs.

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Molahlehi J

Date of Hearing : 22 April 2010

Date of Judgment : 22 October 2010

Appearances

For the Applicant : Adv J L Basson

Instructed : Stegmanns Incorporated

For the Respondent: Adv M Van As of Assenmacher Attorneys and Mr Ramotlou of Maserumule Inc on behalf of Krishna Govinder