IN THE LABOUR COURT OF SOUTH AFRICA
(HELD AT JOHANNESBURG)

Case No. : JR3108/05

In the matter between:-

GREATER LETABA LOCAL MUNICIPALITY	Applicant
and	
L S MANKGABE, NO.	First Respondent
SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING COUNCIL	Second Respondent
SOUTH AFRICAN MUNICIPAL WORKERS OBO N J MAAKE	Third Respondent

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JUDGMENT

RAMPAI, AJ

[1] These are review proceedings. In this application the applicant seeks the review and setting aside of an arbitration award. The award was handed down by the first respondent under case no. LIMP134. It is dated 27 September 2005. The applicant received it on 14 October 2005. On 25 November 2005 this review application was served on the respondents. It was filed on the same day.

[2] The application is opposed by the third respondent, the South African Municipal Workers Union on behalf of its member, Mr. Ngathe Joseph Maake. The union and its members are collectively cited as the third respondent in these proceedings. During the course of this judgment I shall refer to the union member as the employee and the applicant as the employer. The first and the second respondent abide.

[3] On Sunday 27 November 2004 the employee used the employer's vehicle. He removed the motor vehicle at or about 02h22 from the place where it was parked. He then drove towards Lydenburg in Mpumulanga. He had an accident on the main road between Tzaneen and Lydenburg. The scene of the accident was approximately eight kilometres outside Tzaneen somewhere between Hasivuna Farms and Broederstroom turn-off. The employer's loss was assessed to be R126 800,00.

[4] About four months later, on 22 March 2005, a charge sheet was formulated. The employee was charged. The misconduct for which he was charged was the unauthorised use of the employer's motor vehicle. It was alleged in the charge sheet that the motor vehicle was irreparably damaged in the aforesaid road accident.

[5] The workplace disciplinary hearing was held in the municipal council chamber at Modjadjieskloof on 12 April 2005. Attorney M.G. Phatudi presided over the disciplinary inquiry. Mr. M.S. Maake represented the employer and Mr. S.S. Mahlalela of SAMWU the employee. The employee pleaded not guilty to the charge. Two witnesses gave evidence on behalf of the employer. The employee also testified in his defence. He called no witness. Notwithstanding his plea of not guilty the employee was found guilty of the misconduct

as charged on 25 April 2005.

[6] Pursuant to the verdict of guilty, the chair recommended that the following sanction be imposed on the employee:

> "**RECOMMENDED SENTENCE**
>
> 1. That the employee be issued with a final written warning to remain valid and on the record of the employee's file for a period of six (6) months from the date of imposition of this sanction.
> 2. Further that the employer effect a suspension without pay in view of a serious nature of this conduct, for a maximum period of ten (10) working days against the employee, for which there shall be no payment."

The sanction was also pronounced on 25 April 2005.

[7] Subsequent to the finalisation of the disciplinary inquiry, the employer's executive committee met. The report by the chair of the workplace disciplinary inquiry was tabled and discussed. The verdict was accepted. But the recommended sanction was not. The executive committee reckoned that the recommended sanction was too lenient and unfair regard being had to the seriousness of the misconduct. The executive committee then *mero motu*

summarily dismissed the employee on 10 May 2005. The employer's municipal manager, Mr. I.P. Mutshinyali, notified the employee of the employer's decision by way of a letter dated 10 May 2005. The employee received the letter on 11 May 2005. His contract of employment was terminated with immediate effect – *vide* annexure "IPM3" on p. 24 of the record.

[8] The employee was aggrieved by the employer's decision. He, assisted by his union, referred the labour dispute to the CCMA, in other words the second respondent. The third respondent alleged in the statement of claim, that the employer's termination of the employee's service contract was an unfair dismissal. The second respondent appointed a commissioner to conciliate the dispute. The dispute was conciliated on 7 July 2005, but could not be resolved. The unresolved dispute was then referred to arbitration.

[9] The second respondent appointed the first respondent to arbitrate the dispute. The arbitration proceedings were held at Modjadjieskloof on 4 August 2005. Commissioner L.S. Mankgabe chaired the proceedings. Mr. P. Mahlo acted on behalf of the

employee on the instructions of the union and Mr. Manoko on behalf of the employer on the instructions of Messrs Lebea & Associates. The arbitrator heard legal argument and reserved his ruling.

[10] The arbitration award was issued at Polokwane on 27 September 2005. The arbitrator concluded: that the employer's council incorrectly disregarded the sanction as recommended by the chair of the workplace disciplinary hearing; that the employer's council incorrectly usurped the powers conferred upon Mr. M.G. Phatudi who had chaired the disciplinary hearing by substituting its decision for his; that the employee be reinstated on the conditions as recommended by the chair of the workplace disciplinary hearing and that the employee be reinstated with full back-pay without loss of any benefit.

[11] It is the aforegoing arbitration award which is the focal point of this review application. It was favourable to the employee's case and unfavourable to the employer's. The employer's ground of review is that there is no rational and objective basis justifying the connection between the material made available to the arbitrator and the conclusion he

eventually arrived at – **CAREPHONE (PTY) LIMITED v MARCUS NO & OTHERS** (1998) 19 ILJ 1425 (LAC).

[12] In the arbitration award the first respondent stated that the issue he was called upon to determine was whether the council had the power to impose a sanction other than that recommended by the chair of the workplace disciplinary tribunal.

[13] On the one hand, Mr. Hutchinson, counsel for the employer, argued before me that the above formulation of the issue to be determined, was plainly an erroneous characterisation of the true nature of the dispute. He pointed out that the employer's representative, Mr. Manoko, had articulated the issue to be determined correctly. He had submitted to the arbitrator that although the employer's decision was procedurally flawed, the substantive reason for the dismissal of the employee was fair.

[14] On the other hand, Mr. Malindi, counsel for the employee, argued in support of the arbitrator's foundation, formulation and identification of the issue to be determined. He contended that during the arbitration hearing the employee's representative, Mr. Mahlo, had called upon the first respondent to determine whether the employer had powers to impose a sanction other than that recommended by the chair of the disciplinary inquiry.

[15] It is undisputed that it was admitted by the employer's

representative that the summary dismissal of the employee was procedurally flawed. This much was conceded before the arbitrator. However, I hasten to point out that the arbitrator did not make such a finding. I was urged to find that the dismissal was procedurally fair. I am not persuaded that it was. There are two reasons as to why the employer's sanction was procedurally unfair in my view.

[16] Firstly, the employee was not afforded an opportunity to address the executive committee in defence of a ruling which was made in his favour. The favourable sanction was reversed in his absence and in his absence substituted with the harshest sanction within the context of the workplace law. The employer's claim that "*the employer also considered the rules of natural justice and followed procedural fairness*" was a vain attempt designed to conceal the true state of affairs. The truth is that the employer flagrantly violated the basic rule of natural justice. The employee's side as regards the sanction was not heard before the sanction with extremely adverse impact on his

livelihood was imposed on him.

[17] Secondly, it was not competent for the employer's executive committee itself to nullify the sanction recommended by the chair of the disciplinary hearing. This is so because it was agreed upon between the employer and the employees' union that:

> "9.4 The determination of the Disciplinary Tribunal shall be final and binding on the employer save that the employee may lodge an appeal thereto."

Vide par. 9.4 of the Disciplinary Procedure Collective Agreement, annexure "IPM4" on p. 25 of the record.

It is a collective agreement signed at Kempton Park on 3 February 2004. If the employee's dismissal in this case does not constitute procedural unfairness, then nothing will.

[18] In **SA REVENUE SERVICE v COMMISSION FOR CONCILIATION, MEDIATION & ARBITRATION & OTHERS** (2001) 22 ILJ 1680 (LC) at par. 32 – 33 my brother Francis J had this to say about the proper identification and characterisation of the issue:

> "It is crucial that an arbitrator who is conducting arbitration proceedings knows what the true issues are that he is called upon to determine. Where he issues an award which is based

> on a failure by him to appreciate the true nature of the issue before him, he commits a gross irregularity which vitiates the entire proceedings."

I am in respectful agreement.

[19] In the matter of **NDOKWENI v GAME STORES & OTHERS** (2001) 22 ILJ 1398 (LC) the court stressed that it was important for an adjudicator of a dispute to state the reasons for the decision. The reasons are important because they informed the parties why they won or lost. An award without reasons is like a castle in the air.

In an English decision of **MARTINS v MARKS AND SPENCER** [1998] IRLR 326 Mummery LJ put it as follows:

> "The duty of the Tribunal, having heard the evidence and arguments is to give reasons for its decision, so that the party who has lost knows why he has lost. In practical terms that means that it should state its findings of primary facts and any inference it draws from those facts as clearly and concisely as possible ..."

[20] The striking feature of the award we are here concerned

with, is that virtually no reasons were given to underpin the decision reached. The conclusion was derived from a vacuum. The arbitrator merely and briefly recited the argument presented to him. He did not at all apply his mind to the argument in order to take the consumers of his arbitration award down the avenue of his reasoning process to the ultimate outcome of his mental digestion of the material available to him. There is no objectively rational connection between the award he made and the legal argument presented to him. Stepping on the huge crack between the two extremes was no stroll in the park. Accordingly an award which cannot be rationally justified cannot be allowed to stand on review. In my view, the arbitrator committed a gross reviewable irregularity.

[21] It was contended on behalf of the employee that the decision of the disciplinary chair was final and binding upon the employer in terms of clause 9.4 of the collective agreement and that the employer was, therefore, not competent to alter the sanction imposed by the disciplinary chair on the

employee. The arbitrator was obviously persuaded by this contention. This is apparent from the wording of the arbitration award itself and not, as is the basic norm, from any reason he gave, because he gave none. Once the arbitrator had made such a finding he reckoned that it was a decisive finding of the entire inquiry. It appears to me that he was led to this wrong decision by his simple characterisation of the real issue. The issue was more complex than it seemed.

[22] In **HIGHVELD DISTRICT COUNCIL v COMMISSION FOR CONCILIATION, MEDIATION & ARBITRATION & OTHERS** (2003) 24 ILJ 517 (LAC) the employer disciplined an employee in connection with a misconduct. There existed a collective agreement which governed the agreed procedure for the discipline of employees by the employer. The employee was dismissed. He referred the matter to the CCMA where he complained about the unfairness of the procedure.

[23] The CCMA found that even though the employer had deviated from the disciplinary proceedings as laid down in the collective agreement applicable to the employee, the dismissal of the employee concerned had not been procedurally unfair as the employee had contended. The aggrieved employee took the matter to the Labour Court.

[24] The Labour Court reviewed the commissioner's ruling. It found that the dismissal of the employee in those circumstances had been procedurally unfair by virtue of the employer's failure to comply with the agreed disciplinary procedure as the collective agreement provided.

[25] On appeal the decision of the LC was reversed. The LAC held that the mere fact that an employer did not follow an applicable disciplinary procedure, as contained in the collective agreement, did not necessarily mean that a dismissal was procedurally unfair. In that case the court found that a fair procedure had in fact been followed and that the LC had erred in setting aside the arbitration award issued by the CCMA commissioner.

[26] What emerges from the aforesaid decision is that a mere deviation from or breach of a specific provision of the collective agreement, which governs disciplinary proceedings, is not *per se* fatal to the employer's decision whereby an employee was dismissed.

In the instant case it was honourably conceded on behalf of the employer, in the bargaining council, that strictly speaking, the employer's conduct in reconsidering the employee's case in the employee's absence and dismissing him contrary to the decision of the disciplinary chair in contravention of the collective agreement could not be said to have been procedurally fair. However, that was not where it all ended. But this is precisely the point where the arbitrator ended the inquiry. I am of the opinion that the chapter was prematurely closed.

[27] The thrust of the employer's contention was that notwithstanding the procedural defects associated with the employer's conduct subsequent to the verdict of the disciplinary hearing the dismissal of the employee was substantively for a fair reason regard been had to the circumstances of the case. The employer's representative stressed the contention by saying to the arbitrator that he took it that the employee was not going to challenge the substance of the dismissal. And indeed the employee did not. The employer's representative is recorded on p. 94 of the record to have expressed his submission to the arbitrator as follows:

> "Decision to dismiss the Applicant was taken by council. This is a procedural flaw not a substantive one. I refer the tribunal to **Sec 138(1)** of the **Act I take that the Applicant is not going to challenge the substances of the dismissal. The reason for**

> **the dismissal was a fair one.** We don't dispute the fact that the procedure was flawed but we are saying that we had good reason to dismiss or terminate."

[28] I understood the submission to mean that however one looks at the matter as a whole, one cannot objectively say, with conviction, that the dismissal, with all its unfavourable procedural deficiencies, was substantively unfair. It has been said, on more than one occasion, that:

> "Fairness, of course, is a value judgment to be determined according to the circumstances of the particular case..."

CAPE TOWN CITY COUNCIL v MASITHO & OTHERS (2000) 21 ILJ 1957 (LAC) at par. 29 per Nugent AJA. Disciplinary fairness is a flexible and elastic concept with two fundamental dimensions, namely procedural fairness, on the one hand, and substantive fairness, on the other hand. When the dismissal of an employee is contested on the grounds of an alleged procedural unfairness, but an employer relies on the grounds of an alleged substantive fairness to justify such dismissal, it is inappropriate to disregard one fundamental dimension and to decide the

dispute on the basis of the other fundamental dimension alone. At times the substance of the dismissal may be so comparatively compelling as to justify the cause of deviation from the agreed disciplinary proceedings. Whether such deviation should be condoned and a dismissal tainted with procedural defects played down as cosmetic blemishes, depends on the peculiar circumstances of a particular case.

[29] The factual matrix of the instant case reveals that the applicant was not a natural individual or a business enterprise or a small town council, but a conglomerate of different local authorities collectively called Greater Letaba Local Municipality. Such an embracive municipal structure must obviously have a huge workforce. It has to be accepted that such a huge employer has a fleet of motor vehicles. There must be rules and policy guidelines to regulate, not only the use of the vehicles, but also the conduct of many drivers themselves who use such motor vehicles. Of cardinal importance is the consistent application of the management policy and rules in enforcing discipline.

In addition, the seriousness of the misconduct and the attitude of the employee are among the factors which deserve careful consideration before a sanction can be imposed. It seems to me that neither the disciplinary chair nor the arbitrator properly considered these peculiar circumstances.

[30] As regards the misconduct, the employee removed the employer's motor vehicle without the permission of his immediate supervisor or any other senior functionary of the employer who had the power to grant permission. The employee knew very well, not only that it was impermissible to do so, but also that doing so constituted a serious transgression punishable by dismissal. The unauthorised possession by an employee of the employer's property attracts a penalty of dismissal – *vide* item 2.7.2 schedule to the South African Local Government Bargaining Council Disciplinary Procedure. His knowledge notwithstanding, he went ahead, deliberately broke the municipal rules, removed the vehicle at an ungodly hour of 02h22 on a Sunday without

permission and used it for a private purpose.

[31] To make things worse, the employee crashed the motor vehicle belonging to his employer while it was still in his unauthorised possession. The accident was apparently occasioned by the sole negligent driving of the employee. The employer's motor vehicle was so badly damaged that the employer's comprehensive insurers assessed that it was uneconomic to repair it. The employer suffered an economic loss of R126 800,00. The magnitude of this loss should not be trivialised because the employer was comprehensively insured. It must be kept in mind that insurers do not provide charitable services. The unauthorised use was a serious misconduct. The subsequent crashing was a strongly aggravating factor.

[32] To rub salt into the wound, the employee presented a false account of the incident at his disciplinary inquiry. He wanted the chair to believe that he was on standby; that he had to attend to an electrical problem at Panorama; that he was

travelling towards his supervisor's residence in connection with the electrical problem at the time of the accident and that his supervisor knew about the electrical problem he was attending. The chair rejected the employee's version as a distorted fabrication of the incident.

[33] In **DE BEERS CONSOLIDATED MINES LTD v COMMISSION FOR CONCILIATION, MEDIATION & ARBITRATION & OTHERS** (2000) 21 ILJ 1051 (LAC) at par. 25 Conradie JA had this to say about the employer's invidious position when called upon to re-employ a remorseless employee:

> "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. Acknowledgement of wrong doing is the first step towards rehabilitation. In the absence of a re-commitment 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 to continue to employ the offender is unacceptably great.**" (my emphasis.)

[34] In the instant case I am of the view that the employee's remorseless attitude did the employment relationship untold harm. Over and above the gravity of the misconduct, coupled with the magnitude of the employer's loss, the employee still falsely persists on oath in his answering affidavit that he had done no wrong. He is basically a fieldworker. Driving is an essential component of his daily work routine. His repeated but false denial speaks volume. The employer was understandably anxious and apprehensive that there was a great risk, that given another chance, the remorseless employee who did not acknowledge the wrong he had done, would do it again and that he would remain a great risk to retain as a member of the workforce allowed to drive its motor vehicles.

[35] Where, as in this case, an employer has a huge workforce, it

is of vital importance that consistent sanctions are constantly imposed on employees found guilty of the same misconduct, where there is nothing else to distinguish the one from the other. This is the general rule of the principle of consistency. An employer is required by considerations of fairness to act consistently in the application and enforcement of its disciplinary rules and management policies designed to instil discipline – **CAPE TOWN CITY COUNCIL v MASITHO & OTHERS** (2000) 21 ILJ 1957 (LAC).

[36] The principle is not rigid but flexible. In appropriate cases an employer may be justified in differentiating between two employees guilty of the same transgression by virtue of peculiar differences in their individual personal profiles or in their degree of involvement in a particular misconduct – **EARLY BIRD FARMS (PTY) LTD v MLAMBO** [1997] 5 BLLR 541 (LAC) at 545 h – j per Myburgh JP.

[37] It has been held that reasonable consistency of punishment was an indispensable element of disciplinary fairness – **SA**

COMMERCIAL CATERING & ALLIED WORKERS UNION & OTHERS v IRVIN & JOHNSON LTD (1999) 20 ILJ 2302 (LAC). A disciplinary sanction which is not in line with a series of uniform disciplinary sanctions previously meted out in identical offensive situations of misconduct inevitably opens up an abusive avenue for selective discipline. Unless an employer is seen to be manifestly consistent in punishing the offending employees even-handedly, there is the danger that the offender's fellow employees will inevitably and justifiably so consider themselves to be hard done by and aggrieved by the employer's selective discipline.

[38] The underlying rationale of the principle of consistency lies in the fact that it extenuates the perception of bias which is inherent in the labour practice of selective discipline. Unlike selective discipline, consistent discipline creates certainty and enhances the faith of the workforce in the unbiasness of the employer's disciplinary system as a fair, just and equitable system. It promotes respect and obedience for the rules which are seen to be impartially enforced.

[39] What approach must be adopted on review in dealing with the wrong decision of a chair of a disciplinary inquiry? In 1999 the LAC decided that if such a decision was honestly, but incorrectly made, it should not be interfered with on review since, so the court reasoned, it cannot be said to be unfair. However, if such an incorrect decision was not an honest decision, but rather a decision induced by improper motives such as capriciousness, discriminatory policies, nepotism and so on, then in such a situation interference would be warranted. This conservative approach was adopted in the case of **SA COMMERCIAL CATERING & ALLIED WORKERS UNION & OTHERS v IRVIN & JOHNSON LTD** (1999) 20 ILJ 2302 (LAC).

[40] In 2000 the Labour Appeal Court expressed some reservations and somewhat watered down the above conservative approach grounded on the defensive notion that a wrong decision by the chair of the disciplinary inquiry, can only be nullified on review, if and only if, it was found to

have been induced by improper motives. The crux of the decision boiled down to the view that it was not so much a question of improper motives, but rather substantive fairness which was a decisive consideration. A wrong decision whereby a comparatively lenient disciplinary sanction was imposed on one employee, completely unpolluted by any suggestion of improper motives, remains inherently unfair to other employees on whom comparatively harsh disciplinary sanctions were invariably imposed in connection with similar misconduct in the past.

[41] This liberal approach was adopted in **CAPE TOWN CITY COUNCIL v MASITHO & OTHERS** (2000) 21 ILJ 1957 (LAC) at 1961 b - c. It reinforces the paramount importance of the principle of consistency by stressing that fairness requires that the business of imposing disciplinary sanction on delinquent employees must be consistently carried out. In aligning himself with the liberal approach Tip AJ reasoned in **SRV MILL SERVICES (PTY) LTD v COMMISSION FOR CONCILIATION, MEDIATION & ARBITRATION & OTHERS**

(2004) 25 ILJ 135 (LAC) at par 26 that:

> "... 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."

[42] I am in respectful agreement. The liberal approach is to be preferred to the conservative approach. A wrong decision of the disciplinary inquiry should not be allowed to stand on the grounds of the disciplinary chairperson's innocent motives. The noble principle of consistent discipline, as informed by substantive fairness is the hallmark of any civilised system of workplace discipline. It should not be likely sacrificed on the alter of motives. In the instant case I get the distinct impression that neither the bargaining council arbitrator nor the disciplinary inquiry chair adequately or properly considered the consistency factor. It is abundantly clear that the employer reckoned that the proper cause to defend its consistent disciplinary policy was to let it be known to the

employees clearly and timeously that it, as an employer, was seriously committed to consistent discipline at the workplace.

[43] The employer readily considered that the way it went about to demonstrate its serious commitment to consistent discipline was procedurally unfair to the employee. Seeing that the chair found the employee guilty of a misconduct which he correctly described as a serious transgression, the employee's dismissal remained, on the facts, an appropriate sanction in terms of item 2.7.2 schedule SALGBC Disciplinary Procedure. The failure of the employer to afford an employee a proper second hearing undoubtedly rendered the dismissal procedurally unfair. However, the substantive fairness of the reason for the dismissal was not extinguished on account of its procedural unfairness. As a result of such procedural unfairness the employee became entitled to compensation in terms of section 194 Labour Relations Act, No. 66 of 1995. In my view, regard being had to all the circumstances of the case, compensation equal to double the employee's remuneration would go a long way towards

restoring the balance of fairness on the procedural front. The substantive fairness of the dismissal, as I see it, disqualifies the employee. He is not a suitable candidate for reinstatement.

[44] For the reasons given above I find that the first respondent committed gross irregularity in the following respects:

First, by failing to give reasons for his decision in contravention of section 138;

Second, by failing to deal with the employer's contention that, though procedurally unfair, the dismissal of the employee was substantively fair and by neglecting to make a determination to that effect;

Third, by failing to appreciate the significance of the employee's tacit admission that the dismissal was underpinned by a reason well grounded in substantive fairness; and

Fourthly, by failing to make a proper analysis of the evidence, the facts and the argument presented to him and the material on record.

[45] The aforegoing acts of omission constitute reviewable irregularities. I am persuaded that between the decision made and the material availed, there was no objectively rational connection to justify the award issued on 27 September 2005 by the first respondent.

[46] Accordingly I make the following order:

46.1 The review application succeeds. The arbitration award by the first respondent under case no. LIMP134 dated 27 September 2005 is hereby set aside.

46.2 The dismissal of the employee, Mr. N.J. Maake, by the applicant, was substantively fair and it is upheld.

46.3 The dismissal, however, was procedurally unfair and the employer is directed to pay the said employee compensation in the amount equal to his remuneration as at the time of his dismissal on 10 May 2005 for a period of two months.

46.4 There is no order of costs.

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M.H. RAMPAI, AJ

HEARD **:** 7 February 2007

DELIVERED **:** 3 October 2007

On behalf of applicant: Mr. W. Hutchinson
Instructed by:
Lebea & Associates
JOHANNESBURG

On behalf of 3rd respondent: Mr. G. Malindi
Instructed by:

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BRAAMFONTEIN

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