IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Case No JR 955/07

In the matter between:

ALSTOM ELECTRICAL

MACHINES (PTY) LIMITED **Applicant**

and

THE COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION **1st Respondent**

B DORMAND N.O. **2nd Respondent**

NUMSA obo NDEBELE **3rd Respondent**

JUDGMENT

INTRODUCTION

1] The applicant, a manufacturer of electrical rotating machines, has brought this application to review and set aside the award of the second respondent (the commissioner) issued under case number GA80470 dated 15 February 2007. In terms of the arbitration award the commissioner found the dismissal of the third respondent, Mr Ndebele, (the employee) to be unfair and ordered that he be reinstated.

2] The applicant has also applied for condonation for the late filing of its supplementary affidavit including the amendment to its notice of motion.

Back ground facts

3] At the beginning of August 1999 the applicant in an effort to combat the poor production during the night shifts, introduced a system known as "load schedule." In terms of this system, the machine operators were required to complete certain forms whenever they worked night duty.

4] On the 4th August 1999, the employees including the employee requested a meeting with management to discuss the new system. The following day, 5th August 1999, Mr Pretorius attended at the night shift and instructed the employee together with one of his fellow machine operator, Mr Malamula to fill in the forms related to the new system. They refused and instead demanded a meeting with management.

The late of the filing the supplementary.

5] The notice of motion together with the founding affidavit was filed on 20th April 2007. The supplementary affidavit was filed on 26th June 2007. The reason for the late filing of the supplementary affidavit was according to the applicant because it discovered when it consulted with its counsel that there was a need to supplement its grounds of review

which had been omitted from the original founding affidavit. The applicant did not file its supplementary affidavit once the record of the arbitration proceedings became available.

6] In essence the reason for not filing the supplementary affidavit was according to the applicant due to an oversight which it became aware of during consultation with its counsel. In the supplementary affidavit the applicant seeks to augment its ground for review. The applicant tendered costs for the condonation application.

7] Because of the conclusion reached in relation to the condonation application later in this judgment, I do not deem it necessary to the repeat the further grounds of review raised by the applicant in its supplementary affidavit and the proposed amended to the notice of motion.

8] I now proceed to deal with the time frames required to file papers by the applicant in a review application.

9] In terms of rule 7A of the Rules of the Labour Court, a party whishing to review a decision or proceedings of a body or person performing a reviewable function, reviewable by the court has to do so by delivering a notice of motion to the person or body and to all affected parties. The notice of motion must call upon the person or body, in this instance the CCMA to show cause why the decision of the commissioner should not be reviewed and corrected or set aside. The CCMA is further

required to dispatch within 10 (ten) days of receipt of the notice of motion to the registrar the record of the proceedings sought to be corrected or set aside.

10] The record must be accompanied by the decision which the applicant seeks to review. The CCMA must inform the applicant of the dispatch of the record to the registrar once it has done so.

11] In terms of rule 7A(8), the applicant must within 10(ten) days after the registrar has made the record available, file a notice accompanied by an affidavit amending, adding or varying the notice of motion and supplementing their supporting affidavit or deliver a notice indicating that the applicant stands by its notice of motion.

12] Any person wishing to oppose the granting of the order prayed in the notice of motion must, within 10 (ten) days of receipt of the notice of amendment or notice that the applicants stands by its notice of motion, deliver an affidavit in answer to the allegations made by the applicant. Thereafter, the applicant has five days of receipt of the answering affidavit to file its replying affidavit.

13] In the present instance the applicant filed its notice of motion and supporting affidavit in terms of rule 7A (1) on the respondent's attorneys of record on 20 April 2007. In the supporting affidavit the applicant set out the reason he believed that the arbitration award was not justifiable alternatively that the commissioner misdirected himself

or committed a cross irregularity.

14] The CCMA, provided the parties with notice of compliance in terms of rule 7A (3) on the same day 25 April 2007, together with the notice to abide with the decision of the Court.

15] On 16 May 2007, the applicant's attorneys filed a notice indicating that the record was provided to the registrar and that each of the respondents had simultaneously been served with such a record. And few days later the applicant sent another notice advising the respondents that it intended to stand by its own original notice of motion and the founding affidavit.

16] The applicant failed to serve and file its supplementary affidavit and amend its notice of motion within the prescribed time period and on 14 June 2007 its attorneys addressed the letter to the respondent's attorneys wherein it is inter alia stated:

"1....

2. We have perused the record and as well as the Affidavits already filed and it would appear that there are two(2) central issues that need to be addressed.

3. Firstly, the record appears to be incomplete in as much as the evidence of Ronald Watkinson is not contained therein and quite significantly there are numerous references to where the evidence was inaudible, and could not be transcribed. Thus we would

request that their representatives who attended to at the arbitration meeting in an endeavour to reconstruct the record.

4. Should this not be possible it is our submission that the court of review will probably not be in a position to hear the above matter.

5. Secondly, and upon a proper consideration the affidavits filed of record in support of our client's Review Application, there are certain aspects in the nation to the grounds of Review What client wishes to embellish upon.

6. To this end of our client wishes to file a Notice of Amendment and an accompanying Affidavit.

7. Kindly advise as per return whether your client would consent to this application and allow the amendment.

8. This application is currently being prepared and will be served and filed on your offices shortly."

17] Thereafter the respondents attorneys responded to the above letter and inter alia advised as follows:

" Your client's opportunity to peruse the record arose upon receipt of it by yourselves and was complete upon the service by yourself of the Notice in terms of rule 7A(8)(b) on these offices.

There is no provision in law for your client's attempt at the remedying any failure on its part to properly address the issues at

this point in the proceedings.

Our client is satisfied that the record is a proper record and will not accept any attempt at amendment and will vigorously oppose any such attempt.

Our client will also not accept that the matter be any further delay. According, we are attending to indexing and paginating the court file and will have the matter said down for hearing. A copy of the index accompanies this letter.

Our client is also pursuing its application in terms of section 158 (3) of the Labor Relations Act 66 of 1995."

18] Turning to the principles to apply when dealing with codonation, it is now well established that in considering application for condonation the court has a discretion, to be exercised judicially upon a consideration of all the facts of the case. In this instance the relevant considerations may include the degree of non-compliance with the rules, the explanation therefore, the prospects of success on appeal, the importance of a case, the respondent's interest in the finality of the judgment, the convenience of the court, and the avoidance of unnecessary delay in the administration of justice, but the list is not exhaustive- *Foster v Stewart Scott Inc* (1997) 18 ILJ 367(LA) There is authority that these factors are not individually decisive, but are interrelated and must be weighed one against the other. In this respect

a slight delay and good explanation for the delay may compensate for prospects of success which are not good. Similarly, good prospects of success may compensate for what may be regarded as inadequate explanation and long delay- *Melane v Santam Insurance Co. Ltd* 1962 (4) SA 531 (A).

19] In the present instance, the contention of the applicant that its failure to serve and file its supplementary affidavit and the amendment of its notice of motion was due to an oversight is unsustainable because the applicant's papers reveal gross negligence on the part of its attorneys. The time frames provided for in the rules are intended to provide an applicant sufficient opportunity to peruse the record and assess whether it wishes to supplement its founding affidavit and amend its notice of motion. It is on this ground alone and on the authority of *Saraiva Construction (PTY.) Ltd v Zulu Electrical and Engineering Wholesalers (PT.) Ltd* 1975 (1) SA 612 (D), that the condonation application stand to be dismissed. It is apparent that what the applicant sought to achieve with the amendment is to raise further grounds of review in a reply. In this respect it is apparent from the reading of the papers that the applicant realized its failure to set out the grounds of review when this issue was raised by the third respondent in his opposing affidavit. This is not permissible because of the common law rule that prohibits the racing of further grounds of the review in reply.

20] In addition to considering the reason given by the applicant for the late filing of its supplementary affidavit, I have also taken into account the offer by the applicant to pay the costs of the third respondent for the late filing of the supplement the affidavit. In the circumstances of this case I do not belief the offer takes the case of the applicant any further.

21] In my view the applicant's application for condonation for the late filing of its supplementary affidavit and notice of motion stands to be dismissed. I also see no reason why in the circumstances of this case the applicant should not be required to pay the cost of this application.

22] It would appear that the applicant has abandoned the issue of the incomplete record as was raised in its letter of the 14June, 2007.

The review application

23] I now turn to deal with the merits the of review application and having dismissed the condonation application, the case of the applicant is now limited to the complaints as setout in the founding affidavit and the notice of motion. The contention of the applicant is that the commissioner failed to consider the applicant's evidence and thereby committing a reviewable irregularity. The applicant further contended that the commissioner:

> "25.1 **...** *mistakenly held it was common cause that the meeting between myself and Ndebele and Malamula was not*

held;

25.2 ... mistakenly held that it was common cause that Malamula gave evidence at the first arbitration hearing that corroborated Ndebele's evidence.

24] The applicant states in the founding affidavit that the above facts were not common cause and that it was entirely incorrect that Mr Malamula refused to complete the forms in question. To this end the applicant also argued that the third respondent did not challenge the evidence that Mr Malamula had completed the forms the following shift.

25] The commissioner in his award found that an instruction was given to the employee to fill in the forms and that he did not comply with such an instruction but instead requested a meeting to have the forms explained. The commissioner further found that even if it was to be found that the third respondent had committed gross insubordination, he had requested a meeting to explain the forms. In other words the commissioner found that the need for the meeting to have been a reasonable explanation for failing to comply with the instruction and therefore served as a factor that weighed against the imposition of dismissal as an appropriate sanction. The second finding that influenced the conclusion reached by the commissioner was that there was inconsistent application of the rule by the applicant in that Mr Malamula who received the instruction at the same time as the

employee and also refused to fill in the forms was not dismissed.

26] The question that arises from the above is whether the conclusion reached by the commissioner falls outside the range of reasonableness so as to attract interference with the award by the court. The test to determine whether or not a conclusion reached by a commissioner is reasonable or otherwise is that of a reasonable decision-maker. The question to ask in considering the reasonableness or otherwise of an award is to determine whether the conclusion of the commissioner is one which a reasonable decision-maker could not reach. See Sidumo v Rustenburg Platinum Mines Limited (2007) 28 ILJ.

27] In addition to the general test applied in review cases the Constitutional Court in Sidumo also dealt with the approach which the CCMA commissioners should follow when determining the appropriateness of the sanction imposed by the employer. The approach developed by Constitutional Court, confirmed two of the decisions of the Labour Appeal Court in the cases of Engen Petroleum Ltd v CCMA & others (2007) 28 ILJ 1507 (LAC) and Chemical Workers Industrial Union & others v Algorax (Pty) Ltd (2003) 24 ILJ 1917 (LAC). In those cases the Labour Appeal Court held that the reasonable employer test must not be applied and there should be no deference to the employer's choice of a sanction when a CCMA commissioner decides whether dismissal as a sanction is fair in a

particular case. The commissioner is in terms of these decisions required to decide the issue of the appropriateness of the sanction in accordance with his or her own sense of fairness. (see Engen at par 117 at 1559 A, - par 119 at 1559 H-I; par 126 at 1562 C-D, par 147 and Sidumo at paras 75 and 76.). The determination of the fairness or appropriateness of a dismissal is an issue to be left to the commissioner and not the employer or the reviewing court. In this regard it was said in Sidumo (at par. 75) that:

"Ultimately, the commissioner's sense of fairness is what must prevail and not the employer's view."

28] In Sidumo the Court developed guidelines which commissioners could use in determining the fairness of the dismissal. The factors which a commissioner must take into account when weighing whether a dismissal is an appropriate sanction or otherwise, are stated in Sidumo (at par. 78) as follows:

"In approaching the dismissal dispute impartially a commissioner will take into account the totality of circumstances. He or she will necessarily take into account the importance of the rule that had been breached.; the basis of the employee's challenge to the dismissal; whether additional training and instruction may result in the employee not repeating the misconduct, the effect of

dismissal on the employee and his or her long-service record.

The commissioner must of course consider the reason the employer imposed the sanction of dismissal, as he or she must take into account the basis of the employee's challenge to the dismissal. There are other factors that will require consideration. For example, the harm caused by the employee's conduct, whether additional training and instruction may result in the employee not repeating the misconduct, the effect of dismissal on the employee and his or her long-service record."

29] The above, not being an exhaustive list, the commissioner would also, in terms of the decision in Engine, be required to consider the provisions of sections 188(1) and 192(2) of the Act, including Schedule 8 of the Code of Good Practice: Dismissal. Section 188(1) requires that the commissioner must take into account any relevant code of good practice issued in terms of the Act. And section 192 which provides that , the employer must prove that the dismissal is fair.

30] Turning to the facts in the present instance, it is common cause that the rule which the third respondent refused to obey had just been introduced and was applicable to the night shift employee only. It is also common cause that the refusal to comply with the instruction was for that shift only as the following shift both Mr Malemula and the employee worked day shift. In other words the refusal to comply was

not persistent. It is apparent that the commissioner in determining the fairness of the sanction was influenced by the fact that the employees had requested a meeting where the schedule as set out in the forms would be explained by management. Mr Sighn acceded to this request but before the meeting could be convened Mr Pretorius attended at the night duty shift and demanded that the employees should comply with the schedule. It was in this context that the commissioner found that there was some form of insubordination but one which was not so gross as to justify a sanction of dismissal.

31] The other factor which the commissioner took into account in his evaluation of the appropriateness of the sanction was the 28 (twenty eight) years of service which the third respondent had with the applicant. This long period of service was accompanied by a clean disciplinary record. There is no suggestion from the facts and the circumstances of this case and in particular taking into account the length of the service and the clean record that the employee is likely to commit the same offence in the future and therefore should not be given a second chance but be given the most severe punishment of dismissal. I strongly belief the dismissal was for this reason alone unfair and accordingly the decision of the commissioner which is so well reasoned cannot be faulted.

32] The second basis upon which the commissioner found the dismissal to

have been unfair relates to the inconsistent application of the disciplinary code. It cannot be disputed that Mr Malamula was charged with the same offence as that of the third respondent, namely insubordination in that he on exactly the same day and time as with the employee, refused to fill in the forms. The following day both of them did not work the nightshift but were booked for a day shift. Thus at the point that both of them were charged the circumstances surrounding the facts relating to the refusal to comply with the instruction were exactly the same.

33] The approach to be adopted when dealing with the issue of parity has as stated in the, soon to be published judgment of *The South African Transport and Allied Workers v Ikwezi Bus Services (unpublished case number D235/03)*, received attention from the court and evolved over many years dating back to the days of the Industrial Court. In that judgment van Niekerk AJ traverses several key decisions relating to development of the legal principles relating to the issue of parity. In essence the issue of parity relates to the fairness and equal application of discipline by the employer. In this respect an employer has the right to impose different sanctions on employees who may have been involved in the same act of misconduct, subject to the sanction being fair and objective.

34] In circumstances similar to the present case the Labour Appeal Court,

in *NUM and another v Amcoal Colliery t/a Arnot Colliery and another [2000] 8 BLLR 869(LAC)*, had to determine the fairness of the dismissal of employees who had been dismissed for failing to comply with an instruction. The distinction between that case and the present one is that in that case the employees were all found guilty but only those who had previous warnings were dismissed. In dealing with the issue of parity Mogoeng AJA (at page 875 middle para 19), in Amcoal Colliery, said:

> "*The party 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."*

35] The Labour Appeal Court, in confirming its decision in *Irvin & Johnson* (1999) 20 ILJ 2303(LAC) held in *Gcwensha v CCMA & Oth*ers (2006) 3 BLLR 234 (LAC), that**:**

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

The Court went further so say:

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

36] In the present instance, Mr Malamula who was charged with the same offence as the employee was not found guilty but the employee was, and dismissed. The fact that Mr Malamula completed the forms the following day may have been a factor to take into account in the consideration of the sanction to be imposed once found guilty and not a determining factor in relation to whether or not he was guilty. The circumstances surrounding the facts of the refusal to sign the forms were exactly the same and therefore there could have been no basis in fairness and objectivity for the differentiated treatment. It has to be emphasised that this is not a case where Mr Malamula was found guilty and in the evaluation of the appropriateness of the sanction it was found that the sanction of dismissal was inappropriate. It is for this reason that, I am of the view that the conclusion of the commissioner cannot be said to be one which a reasonable-reasonable decision maker could not reach. It is a conclusion that accords with the approach that has been followed by several authorities on how to deal with the issue of parity. In this regard see the authorities already referred to above including *National Union of Mineworkers v Free Sate Consolidated Gold Mines (Operations) Ltd (1995) 16 ILJ 1371 (a),SACTU and others v Novel Spinners (Pty) Ltd [1999] 11 BLLR 1157 (LC), Coca Cola Bottling East London v Commissioner for Conciliation, Mediation and Arbitration and others (2003) 24 ILJ 8232(LC).*

37] The complaint about the impropriety of the commissioner was not pursued by the applicant in its heads of argument. The complaint relates to the allegation that the commissioner did not call to order the third respondents attorney whenever she interrupted the applicant's counsel and that the commissioner seem to be acquainted to the attorney. This complaint has no merit. There is nothing in the record to support this allegation. There is no explanation in the applicant's papers why its counsel did not place on record these concerns in particular the allegation that he was intimidated by the third respondent's attorney.

38] Turning to the issue of relief, the commissioner ordered the maximum compensation of 12 (twelve) months including reinstatement without loss of benefits. In this regard the applicant's attorney correctly conceded that the award stands to be reviewed and corrected for this reason.

39] In the circumstances I make the following order:

1. The application for condonation for the late filing of the applicant's supplementary affidavit and the amendment of the notice of motion is dismissed with costs.
2. The commissioner's award issued under case number GA80470 and dated 15 February 2007 is reviewed and corrected as follows:

"a. The applicant, Mr Ndebele is reinstated retrospectively

into the position he occupied before his dismissal without loss of benefits and compensation."

3. There is no order as to costs in relation to the review application.

Molahlehi J

Date of Hearing : 07 April 2008

Date of Judgment : 20 August 2008

Appearances

For the Applicant : Adv Hutchinsen

Instructed by:Fluxmans Inc.

For the Respondent R Edmons

Instructed by: Ruth Edmon Attorneys