REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C420/2015

Not Reportable

In the matter between:

IMATU OBO THEODORE CUPIDO **Applicant**

and

THE CITY OF CAPE TOWN **1st Respondent**

THE SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING COUCIL (SALBC) **2nd Respondent**

COMMISSIONER LESLIE MARTIN N.O. **3rd Respondent**

Heard: **May 18 2016**

Delivered: **2 November 2016**

JUDGMENT

RABKIN-NAICKER, J

[1] This is an opposed application to review an arbitration award. The third respondent (the Commissioner) found that the dismissal of the applicant employee (Cupido) was procedurally and substantively fair. Cupido also applied for condonation for the late filing of the review the application which was filed seven days late. This application was not opposed and condonation is granted.

[2] Cupido worked for the City as a law enforcement officer from 4 June 2011 until he was dismissed in October 2014. He was dismissed after being charged with the following:

"It is alleged that you were grossly negligent when on or about 23 March 2014, being the driver of vehicle VW Polo, registration number CA 604933, transporting passengers to work, you failed to apply caution due to the wet surface and drove well over the speed limit, which caused you to lose control of said vehicle, crash into two other vehicles which caused the vehicle to overturn."

[3] The Commissioner records certain common cause facts in his Award as follows:

"6. ….It was common cause that the applicant was involved in a motor vehicle collision on 23 March 2014 when he drove a VW Polo (Polo) hired by the respondent for general duties of a law enforcement officer, and which collided with two private vehicles on Baden Powell Drive Mitchells Plain at 06H12.

7. It was also common cause the collision occurred in an 80 kph zone. Further common cause was that the tracker device on the Polo recorded its last speed at

155kph. On impact the alternator of the polo dislodged and went through the windscreen of one of the other vehicles involved in the collision."

[4] The grounds of review listed in the founding affidavit are stated as being based 'mainly upon the misconduct' of the Commissioner in respect of his analysis of the evidence before him regarding:

(a) Whether or not the alleged misconduct had the effect of destroying the trust relationship; and

(b) Whether or not the First Respondent had been consistent in its meting out of discipline to employees who drove its vehicles negligently or recklessly; and

(c) Whether or not the First Respondent had proven gross negligence.

[5] In his founding affidavit in this application Cupido avers inter alia as follows:

"The tracking report showed that at the time of the collision my vehicle was travelling at 155 kilometers per hour. I did not deny that my speed was a contributing factor to the collision, however at the time my action of veering into the oncoming lane was an attempt to avoid a head on collision with the bakkie. I deny I was grossly negligent."

[6] Cupido submits in his replying papers that it was unreasonable for the City to refer to the amount of damages arising from the accident (some 260,000 Rand) to support the notion that 'gross negligence' and not simply negligence, was involved. His submissions repeated in argument before me, are worth recording:

"The evidence before the Arbitrator was that the City did not pay out any money in respect of the accident as the damages were covered by insurance.

Common sense dictates that the amount of damages suffered in a collision is determined by a number of factors, including the make and model of vehicles involved. A small ding on the back of a 2014 Ferrari can amount to hundreds of

thousands in repair costs whilst the same ding on the back of an old make and model car will be a fraction of the cost to repair".

[7] It is difficult to comprehend how exactly Cupido can aver there has been no loss to his employer because its insurers met the cost. Nor do his theories regarding different models of cars and 'dings' to them take his case any further. His case at arbitration also hinged on the inconsistency of penalties meted out to other employees. However he did make the following concession under cross-examination as recorded in the transcribed record:

"MR PETERSEN: Now, why do you say the City is inconsistent, if it is clear that if one only look at the amounts, plain and simple it is clear, 80 000 for those two members versus your 260 000 damage.

MR CUPIDO: At the time I was not aware of the amounts. It was only when we were here last time that I heard that amount amounted to 260. I wasn't aware of the amount.

MR PETERSEN: You are not answering my question. I said to you it's clear that your R260 000,00 damage versus that of the 80 000, that that is the difference and that is what was testified here.

MR CUPIDO: Yes.

MR PETERSEN: You agree with that?

MR CUPIDO: Yes.

MR PETERSEN: You will also agree that therefore the other accidents was dealt with in the informal, and yours would have been informal if the amount was not so gross and the accident was not so gross.

MR CUPIDO: I believe so."

[8] He also agreed that he did not know of any other accident that was as severe as the one he was involved in:

"MR CUPIDO: What's the question, sir?

MR PETERSEN: I said – I put it to you. I said you were the sole cause of the accident because of your reckless driving on that road. Number one. And then I further said to you that even if the other vehicle turned in your direction, if that would have happened, you would have had sufficient time to avoid that collision. But due to your speed, you could not stop that vehicle on that morning. And therefore you must take responsibility for that accident.

MR CUPIDO: I was driving fast, I won't deny it. I don't believe I was the sole cause of the accident. Yes, if I were driving the required speed, then I might have avoided the accident. And I'm so sorry for what happened on that specific day.

MR PETERSEN: You see, it's easy to say sorry afterwards. I'm actually of the opinion that you are not remorseful in this instance. You are blaming everyone. You are blaming the fact you were late, you're blaming other drivers. You are not taking responsibility for the accident yourself.

MR CUPIDO: I was (indistinct) the accident, yes, sir. I was speeding, yes, and that was a major factor to the accident, because of my speed. I'm not running away from that. I know I could have lost my life because the vehicle overturned. I could have lost my life. But by God's grace I'm still here. I'm not saying it wasn't my fault."

[9] The Commissioner found that the negligence was gross and that "there is nothing before me from which to conclude that the other incident were comparable to that of the applicant." He also referred to the matter of **Absa Bank**

Ltd v Naidu & others [1] in which the court surveyed commentary and jurisprudence on the parity principles thus :

"[36] However, it ought to be realised, in my view, that the parity principle may not just be applied willy-nilly without any measure of caution. In this regard, I am inclined to agree with Professor Grogan when he remarks as follows:

'[T]he parity principle should be applied with caution. It may well be that employees who thoroughly deserved to be dismissed profit from the fact that other employees happened not to have been dismissed for a similar offence in the past or because another employee involved in the same misconduct was not dismissed through some oversight by a disciplinary officer, or because different disciplinary officers had different views on the appropriate penalty.'

[37] In SACCAWU & others v Irvin and Johnson (Pty) Ltd, this court (per Conradie JA) stated:

'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" … . There is really no separate "principle" involved. Consistency is simply an element of disciplinary fairness … . Every employee must be measured by the same standards … . Discipline must not be capricious. It is really the perception of bias inherent in selective discipline that makes it unfair. Where, however, one is faced with a large number of offending employees, the best 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 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 … necessarily mean that the other miscreants should escape. Fairness is a value judgment.'"

[10] As to the breakdown of the trust relationship it was submitted on behalf of Cupido that the Commissioner failed to apply his mind as to whether the trust

[1] (2015) 36 ILJ 602 (LAC)

relationship had broken down. But the Commissioner does record that the evidence before him was that the chief of law enforcement for the City considered Cupido reckless and his negligence gross, and instructed that the sanction of dismissal be asked for at the enquiry as he could no longer trust Cupido with the City's motor vehicles.

[11] Taking all or the above into consideration I find that the Award is not susceptible to review. I refer to the **Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation & Arbitration & others** [2] in which the following was stated in relation to the task of a review court:

"The questions to ask are these: (i) In terms of his or her duty to deal with the matter with the minimum of legal formalities, did the process that the arbitrator employ give the parties a full opportunity to have their say in respect of the dispute? (ii) Did the arbitrator identify the dispute he or she was required to arbitrate? (This may in certain cases only become clear after both parties have led their evidence.) (iii) Did the arbitrator understand the nature of the dispute he or she was required to arbitrate? (iv) Did he or she deal with the substantial merits of the dispute? (v) Is the arbitrator's decision one that another decision maker could reasonably have arrived at based on the evidence?"

[12] All the above questions must be answered in the affirmative in this case. The union asked for costs in its Notice of Motion and I see no reason why costs should not follow the result in this matter. I make the following order:

Order:

1. The application is dismissed with costs.

[2] (2014) 35 ILJ 943 (LAC)

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H. Rabkin-Naicker

Judge of the Labour Court

Appearances:

Applicant: IMATU

First Respondent: Bradley Conradie Halton Cheadle Attorneys