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- (1) REPORTABLE: ~~YES~~/NO.
- (2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~.
- (3) REVISED.



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THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JR1942/20

In the matter between:

FERROLAND GROUND TRUST (Pty) Ltd

Applicant

and

**COMMISSION FOR CONCILIATION
MEDIATION AND ARBITRATION**

First Respondent

MATLOGA N, N.O.

Second Respondent

FOOD AND ALLIED WORKERS UNION

Third Respondent

LEHONG A

Fourth Respondent

Heard: 26 June 2024

Delivered: 26 July 2024

JUDGMENT

LUTHULI, AJ

Introduction

- [1] The Applicant seeks to review and set aside an arbitration award issued by the Second Respondent (Commissioner). In his award, the Commissioner held that the dismissal of the Fourth Respondent (Lehong) was both substantively and procedurally unfair and ordered the reinstatement of Mr Lehong with backpay in the amount of R90 350. Mr Lehong was ordered to report for duty on 1 December 2020.

Background

- [2] Mr Lehong was employed by the Applicant in the capacity of Head Ranger Manketti Game Reserve. It was common cause that he was an elected shop steward of the Food and Allied Workers Union (FAWU) at the time of the alleged misconduct.
- [3] On 18 February 2020, Mr Lehong, in his capacity as a shop steward, sent correspondence to one Mr Marius Fuls (Fuls), who was Mr Lehong's Manager, requesting that he release the employees to attend a meeting of the union that was going to be held at the staff village.
- [4] The meeting was scheduled to take place after hours the following day. Mr Fuls responded by e-mail, informing Mr Lehong that in terms of the Recognition Agreement, formal correspondence from the union needed to be sent to the employer when it needed to meet with them at company premises.
- [5] Immediately thereafter, Mr Fuls sent a WhatsApp message to Mr Lehong reiterating the e-mail response he sent. Mr Lehong did not respond to both the e-mail and WhatsApp correspondences.
- [6] The following day, being 19 February 2020 in the morning, Mr Fuls sent another WhatsApp correspondence to Mr Lehong informing him yet again that procedures as per the Recognition Agreement had to be followed if the union wished to meet with its members and that such a meeting was not authorised

for later that day as no such request was made.

[7] Again, it is common cause that Mr Lehong did not reply to this correspondence. At the Rangers meeting that morning of the 19th of February 2020, Mr Lehong was asked by Mr Fuls whether he still intended to have the meeting as per his e-mail, he responded by saying that Mr Fuls had misunderstood the e-mail, he did not mean that the meeting was going to be with the union officials but that it was going to be with him, in his capacity as the shop steward and his fellow employees.

[8] On 20 February 2020, a fellow employee informed Mr Fuls that the meeting did take place as scheduled and that two union officials were present at that meeting.

[9] On 9 April 2020, Mr Lehong was charged as follows:

9.1. contravention of item 1.3 of Exxaro's Disciplinary Code: Failure to inform management in good time of absence;

9.2. contravention of item 2.9.2 of Exxaro's Disciplinary Code: Insubordination/refusal to obey instructions; and

9.3. contravention of item 3.1 of Exxaro's Disciplinary Code: Dishonesty through misrepresentation of the true state of affairs.

[10] After the disciplinary hearing, Mr Lehong was found not guilty of failure to inform management of absence and insubordination but was found guilty of dishonesty.

[11] The chairperson recommended a sanction of dismissal. Unhappy with the recommendation, Mr Lehong lodged an internal appeal and he was unsuccessful.

[12] Dissatisfied with the outcome of the appeal, Mr Lehong referred an dismissal dispute with the First Respondent in terms of section 191(1)(a) of the Labour

Relations Act¹ (LRA).

- [13] Conciliation failed to resolve the dismissal dispute and the arbitration proceedings served before the Second Respondent on 5 October 2020 and 5 November 2020.

The arbitration proceedings

- [14] The Commissioner was called to decide whether Mr Lehong's dismissal was both substantively and procedurally fair.
- [15] Specifically, the Commissioner was enjoined to decide whether Mr Lehong committed misconduct, and if so, whether the misconduct committed was a dismissible one and whether the employer had a duty to consult the trade union before subjecting the Mr Lehong to a disciplinary hearing.

Findings of the Commissioner

- [16] The Commissioner found that item 4(2) of Schedule 8 of the Code of Good Practice: Dismissal (Code) requires the employee to inform and consult the trade union before instituting discipline against a trade union representative or an employee who is an office bearer or official of a trade union.
- [17] The Commissioner further found that the Applicant had a duty to inform and consult the trade union and that the failure to do so rendered the dismissal of Mr Lehong procedurally unfair.
- [18] Regarding substantive fairness, the Commissioner found Mr Lehong's evidence was very contradictory even when compared to that of his own witnesses, he was evasive and his version was improbable.
- [19] The Commissioner found that Mr Lehong deliberately failed to inform Mr Fuls when requesting a meeting with the union members that union officials will also

¹ Act 66 of 1995, as amended.

be attending the meeting and thus committed an act of dishonesty.

[20] The Commissioner found that *“dishonesty has traditionally been seen as an offence serious enough to warrant dismissal as it could render an employment relationship intolerable. This is so because dishonesty damages the employer’s ability to trust the employee”*.

[21] The Commissioner went on to find that *“more recently, though, there has been a noticeable shift away from this view. It has been pointed out that the code of good practice recommends dismissal for “gross” dishonesty and not all dishonesty. The implication is that not all acts of dishonesty make the employment relationship intolerable and therefore merit dismissal”*.

[22] The Commissioner acknowledged that the employer’s Disciplinary Code warrants dismissal for dishonesty on a first offence, however, in his view, dismissal was nonetheless not an appropriate sanction taking into account the factors in *Sidumo and another v Rustenburg Platinum Mines Ltd and others*² (*Sidumo*) and these factors were:

22.1. Mr Lehong was elected shop steward prior to his dismissal;

22.2. The meeting took place after hours;

22.3. The meeting did not disrupt the operations of the employer; and

22.4. The union officials were at the meeting to attend to employment issues.

[23] He went on to award retrospective reinstatement in the amount as stated earlier.

The review application

Point in limine

[24] The Applicant raised a preliminary point in its replying affidavit, namely that Mr

² [2007] ZACC 22; (2007) 12 BLLR 1097 (CC) (*Sidumo*).

Lehong filed his answering affidavit 35 days late.

[25] It was common cause that Mr Lehong did not seek permission for the late filing of his answering affidavit despite the *point in limine* having been raised as early as 8 June 2021 when he was served with the Applicant's replying affidavit.

[26] However, on the day of the hearing of this matter, Mr Maeso, on behalf of the Applicant, abandoned this preliminary point.

[27] I find that since the point has been abandoned, it is in the interest of justice that no determination be made in this regard and that I proceed to determine the matter on its merits.

Grounds for review

[28] The arbitration award was impugned on the following grounds, *inter alia* that:

28.1. the Commissioner, in concluding that dismissal was not an appropriate sanction under the circumstances, committed gross irregularities in that he did not evaluate and determine the evidence properly, failed to apply his mind to the evidence before him and failed to have regard to the legal principles relating to the issue of appropriateness of sanction which resulted in the Commissioner arriving at an award no reasonable commissioner could have arrived at on the evidence before them;

28.2. instead of determining whether what the Applicant did was fair or unfair, the Commissioner decided the issue of sanction afresh and in doing so, applied his own sense of fairness;

28.3. the Commissioner failed to consider the fairness of the conduct of the Applicant and failed to consider the factors which the Applicant took into account in finding that dismissal was appropriate;

28.4. the Commissioner followed the wrong approach in failing to consider whether the Applicant, in handing down the sanction of dismissal, acted

fairly;

- 28.5. the Commissioner had no regard to the critical issue of remorse;
- 28.6. the Commissioner failed to take into account the totality of circumstances that the importance of the rule breached being dishonesty goes to the root of the employment relationship and that Mr Lehong was dishonest in both the disciplinary proceedings and in the arbitration proceedings before the Commissioner;
- 28.7. Mr Lehong's position as Head Ranger requires a higher degree of integrity and honesty;
- 28.8. the Applicant's disciplinary code and procedure provides that dishonesty is a dismissible first offence;
- 28.9. Mr Lehong's elected office of shop steward required a higher degree of integrity and honesty; and
- 28.10. the Commissioner's finding on procedural fairness of the dismissal was not connected to the evidence and was a finding that a reasonable commissioner could not make.

Analysis

[29] This being a review as opposed to an appeal, the Labour Appeal Court (LAC) in *Securitas Specialised Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*³ stated the following in relation to the test on review:

[19] The test for review is this: "is the decision reached by the arbitrator one that a reasonable decision-maker could not reach?"⁴ To maintain the distinction between review and appeal, an award of an arbitrator will

³ [2021] ZALAC 5; (2021) 42 ILJ 1071 (LAC) at paras 19 – 20.

⁴ *Sidumo supra* at para 110.

only be set aside if both the reasons and the result are unreasonable. In determining whether the result of an arbitrator's award is unreasonable, the Labour Court must broadly evaluate the merits of the dispute and consider whether, if the arbitrator's reasoning is found to be unreasonable, the result is, nevertheless, capable of justification for reasons other than those given by the arbitrator. The result will be unreasonable if it is entirely disconnected with the evidence, unsupported by any evidence and involves speculation by the arbitrator.⁵

[20] This court has eschewed a piecemeal approach to a review application by the Labour Court. The proper approach is for the Labour Court to consider the totality of the evidence in deciding "whether the decision made by the arbitrator is one that a reasonable decision-maker could make".⁶

[30] This Court, therefore, is enjoined to assess whether, based on the totality of the evidence, the decision made by the Second Respondent is not one that a reasonable decision-maker could reach.

[31] I now turn to consider the grounds for review.

Procedural fairness

[32] The Commissioner found that Mr Lehong was a shop steward and therefore the Applicant had a duty to inform and consult the trade union, FAWU before taking disciplinary action against him. He found that the failure to inform and consult rendered the dismissal of Mr Lehong procedurally unfair.

[33] Item 4(2) of the Code provides that :

'Discipline against a trade union representative or an employee who is an office-bearer or official of a trade union should not be instituted without first

⁵ *Herholdt v Nedbank (COSATU as amicus curiae)* [2013] ZASCA 97; [2013] 11 BLLR 1074 (SCA) at paras 12 – 13.

⁶ *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation Mediation and Arbitration and Others* [2013] ZALAC 28; [2014] 1 BLLR 20 (LAC) at paras 17 – 18.

informing and consulting the trade union.'

[34] I accept that Mr Lehong was a shop steward as found by the Commissioner. However, a failure to comply with the Code does not in itself give rise to a finding of procedural unfairness as the Code is a guideline which does not constitute legal rights.

[35] In *Moropane v Gilbeys Distillers and Vintners (Pty) Ltd & Another*⁷, Landman J held that:

'These guidelines do not give rise to rights. They are incapable of supporting an independent action, at least not in this Court. Only when their exercise or non-exercise leads to an unfair dismissal are they recognised and can the results of a failure to abide by them be remedied.'

[36] In *Gwensha v CCMA & Others*⁸ the LAC per Nicholson JA held that:

'That Code is a very clear guide to the manner in which dismissals should take place. It wisely remains expressed in general terms as each case is unique and departures from the norms established by the Code may be justified in proper circumstances.'

[37] In *casu*, the Applicant disputed that at the time that Mr Lehong was charged for the misconduct, he was still a shop steward. The contention was that he had been de-recognised by that time.

[38] The failure to inform and consult the trade union, in my view, was not fatal to the point of rendering Lehong's dismissal procedurally unfair.

[39] As per the abovementioned authorities, non-compliance with item 4(2) of the Code is not fatal by itself since the Code is a guideline and does not confer legal rights.

⁷ [1997] 10 BLLR 1320 (LC) 1325H-I.

⁸ [2006] 3 BLLR 234 (LAC) at para 27.

[40] The Labour Court and the LAC have found that a dismissal of a shop steward was not procedurally unfair despite the fact that the provisions of Item 4(2) of the Code were not followed.⁹

[41] Mr Lehong had a disciplinary hearing. Dissatisfied with the outcome thereof, he lodged an appeal wherein he was represented by a union official. The Commissioner did not explain what prejudice Mr Lehong suffered by the failure of the Applicant to notify and consult with his union.

[42] The fact that Mr Lehong was represented by his union official at the arbitration proceedings, compensated, in my view, for the procedural defect resulting from non-compliance with Item 4(2) of the Code.

[43] In *Motor Industry Staff Association & Another v Silverton Spraypainters & Panelbeaters (Pty) Ltd & Others*¹⁰, Ndlovu JA held that:

‘In any event, his complaint about the internal appeal process would have been compensated by the fact that he was subsequently accorded another opportunity to state his case and ventilate all his grievances when the dispute was dealt with *de novo* during the arbitration hearing.’

[44] Accordingly, for the abovementioned reasons, I find that the finding by the Commissioner that the dismissal of Mr Lehong was procedurally unfair falls outside the band of reasonableness and stands to be reviewed and set aside.

Substantive fairness

[45] The Commissioner found that Mr Lehong deliberately failed to inform Mr Fuls when requesting a meeting with the union, that officials will also be attending the meeting and that in so doing, Mr Lehong committed misconduct in the form of dishonesty.

⁹ See: *NCBAWU v Masinga & Others* [2000] 2 BLLR 171 (LC) at para 17 and *BIFAWU & Another v Mutual & Federal Insurance Company Ltd* [2006] 2 BLLR 118 (LAC) at paras 32 – 33, cf *Police & Prisons Civil Rights Union on behalf of Masemola & others v Minister of Correctional Services* (2010) 31 ILJ 412 (LC) at para 37.

¹⁰ [2012] ZALAC 42; (2013) 34 ILJ 1440 (LAC) at para 45.

- [46] The Commissioner further accepts that traditionally, dishonesty has been seen as a serious offence justifying dismissal since it damages the employer's ability to trust the employee.
- [47] Having made this determination, however, the Commissioner found that there was a noticeable shift away from this view and that it has been pointed out that the Code recommends dismissal for "gross" dishonesty which implies that not all acts of dishonesty make the employment relationship intolerable.
- [48] In reasoning in this way, the Commissioner does not explain where this noticeable shift is derived from and how, the Code, despite being a guideline, could trump the employer's disciplinary code.
- [49] The evidence that was led before the Commissioner was that the Applicant's disciplinary code provides that dishonesty is a dismissible offence from the first time of commission.
- [50] In *Sidumo*, it was held that a commissioner, in terms of the LRA, has to determine whether a dismissal is fair or not. A commissioner is not given the power to consider afresh what he or she would do but simply to decide whether what the employer did was fair.
- [51] The Commissioner's exercise of his value judgment in this manner was without an appropriate balancing of all the circumstances, which in this case is that the Applicant did not make a distinction between the different types of dishonesty.
- [52] The standard was simple, dishonesty at the workplace was not permissible and would be visited by a harsh comeuppance, period.
- [53] This relevant factor was ignored by the Commissioner which makes this finding an unreasonable one that no reasonable decision-maker could have arrived at in light of the material before him.
- [54] This finding that the sanction of dismissal was harsh is patently lenient to the extent that it renders it inappropriate and therefore falls outside the bounds of

reasonableness.

[55] The Commissioner accorded undue weight to factors such as the fact that this was Mr Lehong's first offence, that he was a shop steward, that the meeting did not disrupt the operations of the employer and that the union officials were in the meeting to attend to employment issues, that no evidence was led that suggested that Mr Lehong's disciplinary record was not good and that no harm or loss was caused by Mr Lehong under the circumstances.

[56] All these factors do not justify the overturning of the sanction imposed by the Applicant in light of the fact that the disciplinary code warranted dismissal on the first offence for dishonesty.

[57] Furthermore, the fact that Mr Lehong was a shop steward ought to have been viewed as an aggravating factor in light of the position of trust and good faith he was placed in.

[58] In my considered view, this is one of those cases where a reasonable decision-maker would have reached a different conclusion.

[59] The Commissioner's arbitration award is littered with scathing findings against Mr Lehong's performance as a witness.

[60] The Commissioner found Mr Lehong to be "*very evasive and only admitted the minutes which favours him and vehemently denied those which were not*".

[61] He found Mr Lehong's version and that of his witness to be marred with contradictions.

[62] In light of this negative assessment of Mr Lehong's performance as a witness, it boggles my mind why reinstatement was ordered in such circumstances where the employee continued his act of dishonesty at the disciplinary hearing, appeal hearing and ultimately at the arbitration proceedings.

[63] This finding on substantive unfairness stands to be reviewed and set aside for

falling outside of the bounds of reasonableness.

[64] I do not believe that it is practical to remit the matter to the CCMA before a different arbitrator, furthermore, this Court has the full record at its disposal and therefore an order of substitution is warranted.

[65] In the premises, the following order is made:

Order

1. The arbitration award under case number LP5459-20 is hereby reviewed and set aside.
2. The arbitration award is substituted with the following:

"The dismissal of the Fourth Respondent was procedurally and substantively fair."
3. There is no order as to costs.



B Luthuli

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr M.G. Maeso, Shepstone & Wylie

For the Fourth Respondent: Mr S Kuane, FAWU

LABOUR COURT