

SOUTH AFRICA / JUDGMENT

Kijima Construction v NUM and Others (JR2212/22) [2024]

ZALCJHB 364 (10 September 2024)

[2024] ZALCJHB 364

COURT

Labour Court Johannesburg

BEFORE

Myburgh

CASE / FILE NUMBER

JR2212/22

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IN

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not

reportable

Case

no: JR2212/22

In

the matter between:

KIJIMA
CONSTRUCTION
Applicant
And
NUM
First
Respondent
DANIEL
PASEKA MOFOKENG
Second
Respondent
COMMISSIONER
SEBOLELO TSHABALALA
Third
Respondent
COMMISSION
FOR CONCILIATION,
MEDIATION AND ARBITRATION
Fourth
Respondent

Heard:	3 September 2024
Delivered:	10 September 2024
Summary:	Penalty review – commissioner’s decision that dismissal not appropriate and award of reinstatement with the forfeiture of backpay found reasonable – review dismissed

JUDGMENT

MYBURGH, AJ

Introduction

- [1] This is an application in terms of section 145 of the LRA to review and set aside the arbitration award issued by the third respondent (commissioner).
- [2] In her award, the commissioner found that the dismissal of the second respondent (Mr Mofokeng) by the applicant (company) was substantively unfair and awarded his reinstatement without backpay.

The dismissal

- [3] Mr Mofokeng was employed by the company as a grader operator and worked for the company at the Isibonelo Colliery.
- [4] On 13 May 2022, these charges were brought against Mr Mofokeng:
- “Charge 1: gross negligence / damaging company property: in that it was discovered that the lights of the grader were damaged and that the steps of entering the cab were also damaged, causing damage to company property.*

Charge 2: failing to follow company processes / procedures: in that you did not follow the company processes and procedures by not doing the pre-inspection checklist for the grader.”

- [5] The pre-inspection checklist referred to in the second charge is a pro forma document which operators must complete before starting to operate machines (in this case, a grader). It requires them to record whether a host of different items / components are in working order and, if not, to record this.
- [6] On 10 June 2022, following a disciplinary enquiry, Mr Mofokeng was dismissed. He then referred an unfair dismissal dispute to the CCMA, which culminated in an arbitration.

The arbitration

- [7] It is apparent from the disciplinary and internal appeal documentation[1] that formed part of the company's bundle that Mr Mofokeng was found guilty of both charges of misconduct and dismissed on that basis.
- [8] In his opening address, Mr Mofokeng (via his representative) limited his case to a challenge to the substantive fairness of his dismissal, with the commissioner having placed on record that "we narrowed the issues that the applicant is going to be alleging [to] that there was no breach of rule, the sanction was too harsh, and consistency".
- [9] Mr Erasmus (the Isibonelo site manager) was the only witness to testify for the company. He explained that three operators of the grader (including Mr Mofokeng) were charged with the charges quoted above, and that two were given a final warning, while Mr Mofokeng was dismissed. Asked to explain this, he said that "the others got a final warning for the damages and Mr Mofokeng got dismissed because he didn't fill the pre-use inspection list correctly." In line with this, Mr Erasmus gave no evidence whatsoever to establish that Mr Mofokeng was guilty of the first charge, stating that he "was dismissed on this ... with the damages and mainly [because] ... he didn't fill in the checklist correctly."
- [10] Turning to the second charge, Mr Erasmus' evidence was not that Mr Mofokeng failed to complete the pre-inspection checklist for the grader, but rather that he failed to complete it "correctly" – this because he did not record on the checklist that there was some damage to the lights and ladder (this being the damage that formed the subject of the first charge). Although Mr Erasmus never really made it clear whether Mr Mofokeng's colleagues were found guilty of this charge, he, nevertheless, sought to distinguish their culpability on the basis that Mr Mofokeng had failed to fill in the checklist "correctly for an extended period of time", whereas his colleagues failed to do so "only a few times". Pressed for details of this under cross-examination, Mr Erasmus said that Mr Mofokeng did so continuously for "2, 3, 4 weeks", while his colleagues did so once or twice a week.
- [11] Mr Erasmus' evidence was not supported by much documentary evidence. He introduced three checklists completed by Mr Mofokeng (dated 5, 12 and 13 April 2022, respectively) and two checklists completed by Mr Mfanafuthi (dated 8 and 18 April 2022, respectively). The checklists completed by Mr Mofokeng reflect that he did not record the damage to the lights and ladder. The checklists completed by Mr Mfanafuthi – who Mr Erasmus said was an operator of another grader who was not charged – reflect that he had recorded "window cracks" on both checklists, which Mr Erasmus said was an example of how to correctly complete the checklist. Although Mr Erasmus said that these two checklists were completed on consecutive days (which was important for the company's case), the dates of the checklists do not bear this out. Glaringly missing from the company's bundle were any checklists completed by Mr Mofokeng's colleagues who were charged together with him (let alone any analysis of their misconduct versus that of Mr Mofokeng).

- [12] Mr Mofokeng was next to testify. He started by dealing with the first charge – explaining that one of the operators who he was charged with had admitted to damaging the ladder and that he was not involved in any way in the damaging of the lights. Turning to the second charge, with reference to the three checklists completed by him that were in the company’s bundle, he accepted that he had not recorded the damage / defects in question. He went on to say that all the operators were guilty of this offence, and that the company only relied on his records because it wanted to get rid of him.
- [13] Under cross-examination, Mr Mofokeng denied that his failure to complete the checklists properly was more “excessive” than his colleagues. With reference to his three checklists in the bundle, he said that he had not recorded the damages in question because they were not new. Challenged about others having properly completed the checklists, Mr Mofokeng maintained that the company had only put forward his checklists, and not those of his colleagues, who had also not recorded the defects. Regarding Mr Mfanafuthi, Mr Mofokeng appears to have implied that they operated the same grader,[2] and made the point that Mr Mfanafuthi’s checklists introduced into evidence did not record the defects in question; yet he was not charged. Finally, it warrants mention that the company’s representative did not ask Mr Mofokeng a single question in relation to charge 1.

The award

- [14] Regarding charge one, the commissioner found that the company “failed to conduct proper investigations in its case and was grasping at straws in as far as charge 1 was concerned”.
- [15] Regarding charge two, the commissioner found that “the bone of contention ... was whether Daniel [Mofokeng] had failed to complete the pre-inspection sheet, if so, whether his sanction was appropriate and whether the rule was consistently applied.”
- [16] Turning to the issue of sanction / consistency, the commissioner found:
- “25. The respondent further argued that Daniel [Mofokeng] was dismissed for failing to complete the checklist for a prolonged time, however failed to substantiate its claim with a comprehensive or comparison report of its required standard. Other operators were issued with warnings, another was not charged on the basis that they committed the same offence within an acceptable time period, however no policy document made reference to the obviously inconsistent rule.*
26. It was clear from the above assertions that the respondent’s actions were not justified, there was no policy in place which clearly defined the differentiation between the operators. The respondent proffered documentary evidence for two incidents which did not equate to its argument of 4 consecutive weeks. Daniel had breached the rule in as far as not reporting the defects, however he should have been given a final written warning which was offered to other operators. I therefore find that the respondent failed to make reasonable attempts to apply progressive discipline and correct the applicant’s behaviour.

27. I find that the dismissal of the applicant is substantively unfair. The respondent did not convince me that its sanction for dismissal was appropriate and that it was consistently applied given that other operators who committed the same offence were issued with final written warnings. I believe that the applicant should be retrospectively reinstated, however this must be effected without back-pay to accommodate the extent of the transgression.”
- [17] In circumstances where the commissioner ordered Mr Mofokeng to report for duty on 19 September 2022, the effect of the award is that he was deprived of more than three months’ backpay (amounting to in excess of R36 000).

The review

- [18] The company’s case (as set out in its heads of argument) is split into two. First, the company contends that the commissioner failed to apply her mind to the evidence, including that: (i) Mr Mofokeng failed to complete the pre-inspection checklist for an extended period of time; (ii) Mr Mofokeng’s misconduct could have resulted in the loss of the company’s contract; and (iii) Mr Mofokeng gave dishonest and contradictory evidence in relation to his misconduct. Secondly, the company contends that the commissioner was unreasonable in, amongst others: (i) finding that the company acted inconsistently; (ii) finding that the company should have applied progressive discipline; and (iii) awarding reinstatement.
- [19] To begin with the three factors that the company claims that the commissioner did not apply her mind to. Firstly, the commissioner was clearly alive to the company’s case that Mr Mofokeng failed to complete the checklist properly for four weeks (this being recorded in the award), but was (not unreasonably) sceptical about whether this had been established given the dearth of supporting documents. Secondly, the commissioner was also alive to what Mr Erasmus said about the possible loss of the contract (it also being recorded in the award). This, of course, applied equally to the misconduct of Mr Mofokeng’s colleagues who also did not complete the checklists properly, and was not compellingly advanced.[3] Thirdly, a reading of Mr Mofokeng’s evidence does not reflect that he gave evidence that can fairly be described as dishonest. In fact, on the only occasion that the company’s representative put to Mr Mofokeng that he was contradicting himself, it appeared to be the representative who was not at grips with the fact that it was the company’s case that Mr Mofokeng had not filled in the checklists properly, as opposed to not having filled them in at all. In sum, I am not persuaded that there is merit in this threefold criticism of the commissioner, and, in any event, the factors are certainly not of the nature that the ignoring of them would have rendered the outcome unreasonable.[4]
- [20] Turning to the company’s reasonableness review, essentially the matter boils down to the application of the Sidumo test: was “the decision reached by the commissioner one that a reasonable decision-maker could not reach?”[5] This in the context of the determination of penalty, where reasonable decision-makers readily disagree, which makes this a hard case to mount.

[21] To my mind, the company has fallen well short of succeeding principally for these reasons. Firstly, while Mr Mofokeng was found guilty of charge one and dismissed (in part) on that basis, the company effectively gave up on this charge at the arbitration (thus narrowing its case for dismissal). Secondly, on the evidence presented, the commissioner's finding to the effect that the company had not successfully rebutted Mr Mofokeng's inconsistency challenge is patently reasonable – particularly in the absence of the company having produced any checklists completed by Mr Mofokeng's colleagues who were charged but escaped dismissal, and instead having put up (remarkably) checklists completed by somebody else (i.e. Mr Mfanafuthi) which did not advance its case. Thirdly, leaving aside the issue of inconsistency, the commissioner was not persuaded that the sanction of dismissal was “appropriate”, which is reasonable given that the misconduct (not a failure to complete the checklists on a daily basis, but rather a failure to record known damages when completing them) is not of the nature that cries out for dismissal. Fourthly, in all the circumstances, it simply cannot be contended that the only reasonable sanction was dismissal,[6] and that the commissioner's decision to rather impose a de facto fine[7] equivalent to three months' salary was unreasonably lenient (so as to make one whistle).

[22] In the result, I conclude that the review application is without merit and falls to be dismissed.

Order

[23] Accordingly, the following order is made:

1. the review application is dismissed;
2. there is no order as to costs.

Myburgh, AJ

Acting Judge of the Labour Court of South Africa

Appearances

For the applicant: Adv L Pillay instructed by Yusuf Nagdee Attorneys

For the first respondent: Mr Mbhiza of Seleka Attorneys

[1] Bundle: pp 55-56; p 51.

[2] The machine number (CKC 181) recorded on the checklists of Mr Mofokeng and Mr Mfanafuthi contained in the bundle are the same.

[3] Transcript: p 29, lines 7-12 (re-examination).

[4] *Herholdt v Nedbank Ltd* (Congress of SA Trade Unions as Amicus Curiae)

(2013) 34 ILJ 2795 (SCA) at para 25.

[5] Sidumo & another v Rustenburg Platinum Mines Ltd & others

(2007) 28 ILJ 2405 (CC) at para 110.

[6] Or put differently, it cannot be contended that this is a case where decision-makers acting reasonably would not reach any conclusion

other than that dismissal was appropriate. See Sidumo at para 119.

[7] Sasol Nitro v National Bargaining Council for the Chemical Industry & others

(2017) 38 ILJ 2322 (LAC) at para 1.

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