

SOUTH AFRICA / JUDGMENT

PRASA Metrorail v Commission for Conciliation, Mediation and Arbitration and Others (JR1914/16) [2017] ZALCJHB 202 (26 May 2017) [2017] ZALCJHB 202

COURT

Labour Court Johannesburg

BEFORE

Makinta

CASE / FILE NUMBER

JR1914/16

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IN

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not

reportable

Case

no: JR 1914/16

In

the matter between

PRASA

METRORAIL/METRORAIL

GAUTENG

SOUTH

First Applicant

and

COMMISSION

FOR CONCILIATION

MEDIATION

AND ARBITRATION

First Respondent

M.P

SHAI N.O.

Second Respondent

RUDZANI

CHARLOTTE MULAUDZI

Third Respondent

UNITED

NATIONAL TRANSPORT

Fourth

Respondent

UNION

Heard: 17 January 2017

Delivered: 26 May 2017

JUDGMENT

MAKINTA AJ

Introduction

- [1] This is a review application against an Award issued by the first and second respondents, to the effect that the dismissal of the third respondent, Rudzani is unfair because the applicant had previously sanctioned another employee guilty of the same misconduct with a final written warning valid for twelve (12) months.
- [2] The applicant further applies for the substitution of United National Transport Union (UNTU) for South African Transport and Allied Workers Union (SATAWU) as the employee's representative union, and for the condonation of its late service of the review on UNTU.

Background

- [3] The applicant (Prasa) employed the third respondent (Rudzani) as a track worker, based in Wolmeton Perway.
- [4] Prasa charged Rudzani with four charges of misconduct, all of which related to one conduct, that is, representing to people seeking employment by Prasa that she could help them to get employment, and taking money from such applicants.
- [5] Prasa found her guilty of the charges, and dismissed her. She then referred the dispute to the CCMA.
- [6] At arbitration, the parties agreed that, the only issue the arbitrator had to determine was whether or not Prasa had acted consistently and fairly, by dismissing Rudzani for the conduct, whilst it had previously sanctioned an employee guilty of the same misconduct, that is, Mungwapane, with a final written warning valid for twelve (12) months.

[7] At the end of the arbitration, the second respondent, arbitrator Shai, found that Prasa had acted inconsistently and unfairly, by sanctioning Rudzani with dismissal, whereas it had previously sanctioned Mungwapane, who was guilty of the same or similar misconduct, with a final written warning valid for twelve (12) months.

[8] This review application is against the said Award.

Grounds of review

[9] The applicant contends that, the arbitrator misapplied the parity principle, in that he found that Prasa was bound to sanction Rudzani with the same sanction as Mungwapane.

[10] Prasa further contends that, the arbitrator has ignored evidence to the effect that, the final written warning with which the previous employee had been sanctioned, was too lenient, and that dismissal is the only appropriate sanction, taking into account the gravity of the misconduct, and that it was committed at least twenty five (25) times in a period of a year.

[11] Finally, Prasa contents that, the arbitrator failed to take into account the competing interest of the employer and employee.

[13] The above grounds of review are too vague, and lack the particularity required by the law. Therefore, the review should be dismissed on this basis alone.

The Award

[14] The arbitrator found that, the issue of inconsistency was raised, Prasa investigated it, and found that, indeed, an employee, Mungwanape, had previously been found guilty of the same or similar misconduct as Rudzani, and sanctioned with a final written warning, valid for (12) months.

[15] According to the evidence before the arbitrator, discovering this, Prasa charged the person who had presided on the case of Mungwanape, Phaladi, for not sanctioning Mungwapane with dismissal, and sanctioned him (Phaladi) with a warning.

[16] The arbitrator found that, whilst Prasa took action against Phaladi, it did not take any step to remove the inconsistency complained of, and that, the inconsistency remained intact.

[17] He considered that, Mungwnape remains employed by Prasa, whilst Rudzani was dismissed.

[18] He found that, the misconduct in both cases is the same, but the sanction differed, and that there is no valid basis for the differential treatment.

[19] The arbitrator found that, Prasa had to give the same sanction in both cases, and issue a circular to employees that, whilst it had previously sanctioned employees guilty of the misconduct with a final written warning, it would henceforth issue dismissal sanctions, failing which, re-open the case of Mungwanape, to reconsider his sanction.

- [20] He eventually found that, the dismissal sanction in this case is unfair on the basis of inconsistency.

Analysis

and Evaluation

- [21] It has to be noted that, the court file in this matter is in a messy state. On the other hand, the transcript appears to be incomplete. For instance, the beginning part of the evidence of Conrad, the applicant's witness, seems to be missing.
- [22] The parity principle requires that like cases should be treated alike. In *ABSA Bank Ltd v Naidu & Others*[1] Ndlovu JA stated that the parity principle should not be "applied willy-nilly without any measure of caution". Further, in paragraph 41, the learned judge of appeal suggested that, for the parity principle to be applied, the two matters must be so similar as to warrant that they should have both been treated in the same way in terms of sanction.
- [23] The Court further stated that inconsistency is not conclusive to the issue of the fairness of the sanction, but it is just one of the factors to be considered.
- [24] Coming to the present case, the evidence was that, the misconduct committed in both cases is exactly the same, and there is no basis for distinction. In terms of the Code of Good Practice: Dismissal, item 7(b)(ii) requires that an arbitrator must determined whether or not the employee was aware or could reasonably have been aware of the existence of the rule.[2] It is also trite law that, knowledge of the rule includes knowledge of the possible sanction which can be imposed. In this case, the employee could not have known or expected to know before commission of the misconduct, that dismissal was a possible sanction. On the contrary, he had reason to expect a sanction no worse than a final written warning. Therefore, considering this fact, the Award is reasonable.
- [25] Prasa's ground of review to the effect that, the arbitrator had found that it was bound to sanction Rudzani with a final written warning just like Mungwanape is not correct.
- [26] The essence of the arbitrator's finding is that the misconduct committed in both cases is so similar as to warrant the same sanction, and there is no evidence on record to the contrary.
- [27] In an attempt to explain why dismissal is appropriate, Prasa led evidence to the effect that, Phaladi had sanctioned Mungwanape with a wrong sanction, but presented no evidence to the effect that, in terms of its policy, it was not permissible for a chairperson to impose that sanction.
- [28] Therefore, Prasa has not proved that, indeed, the final written warning imposed on Mungwanape was a wrong sanction.

- [29] Prasa seems to have held a view that, unless it did something about the sanction imposed by Phaladi on Mungwanape, the sanction on Rudzani would be unfair hence it took disciplinary steps against Phaladi.
- [30] The arbitrator found that, the fact that Prasa sanctioned Phaladi for not imposing dismissal as a sanction has no bearing on the fairness of the sanction imposed on Rudzani, as opposed to that of Mungwanape.
- [31] The arbitrator was quite cautious, and he considered that Prasa took no step which addressed the differential treatment of the two employees, and that there is no evidence of the conduct of anyone of them being more dishonest or faulty than the other's.
- [32] The arbitrator considered that Prasa still keeps in its employ Mungwanape, who is no less dishonest or guilty than Rudzani, and found that, in his sense of fairness, the dismissal sanction against Rudzani is unfair.
- [33] He correctly could not find any bases for distinguishing the two cases.
- [34] He referred to the options available to Prasa, that is, re-opening the case of Mungwanape and reconsidering the sanction imposed by Phaladi, or imposing the same final written warning imposed against Mungwanape on Rudzani, and then issuing a circular informing its employees that, henceforth, they should not expect a final written warning for the same misconduct.
- [35] This is clearly in line with Schedule 8, which requires that, not only should the employee have been aware or reasonably to have been aware about the rule breached, but also the sanction applicable to breach of the rule.
- [36] In this case, on all the evidence, the only sanction Rudzani knew, or was reasonably expected to have known, is a final written warning.
- [37] The arbitrator's finding in this regard is consistent with established law, and is reasonable.
- [38] Rudzani did not profit from a wrong sanction imposed in Mungwanape's case, as there is no evidence that Mungwanape's sanction is in any way wrong. On the contrary, the evidence reveals that, Prasa has not lost trust in Mungwanape, and continues to employ him.
- [39] According to the evidence on record, the only explanation given for Rudzani's harsher sanction is that a final written warning is too lenient, and this is according to the view of Masilela, Prasa's witness. He did not refer to any policy or practice of Prasa in terms of which the sanction is too lenient to be imposed.
- [40] Whilst it is correct that, different chairpersons might hold different views about an appropriate sanction for a similar misconduct, those views must be rational on the bases of the reasons given, or on the objective facts. In this case, the chairperson's reasons for imposing dismissal are not clear.

- [41] In this case, Prasa led no evidence of the chairperson in Rudzani's case, to explain why he found dismissal to be appropriate. Masilela speculated that, it was because of the misconduct is serious, and that Rudzani had committed the same conduct twenty five
- (25) times. However, there was no evidence that Mungwanape had committed it lesser times than Rudzani. On the contrary, the common cause evidence was that the two employees were guilty of misconduct that was the same, and therefore, the arbitrator had reason to believe that the misconduct was the same in all respects.
- [42] There is no evidence to prove that, the only appropriate sanction is dismissal, contrary to one of the grounds of review raised by Prasa.
- [43] Prasa contends that, the arbitrator failed to consider the competing interests of the employer and the employee, but failed to particularize this contention. On the available evidence, the competing interests in both cases are the same.
- [44] Counsel for the applicant contended that, although the arbitrator has considered whether or not the two cases have distinguishing features, and if the Prasa has issues a circular to employees stating that the past practice of giving a final written warning for this misconduct will no longer be tolerated, he failed to consider whether the final written warning is clearly wrong, and that
- to continue with it would unfairly prejudice Prasa.
- [45] Prasa has given no evidence to the effect that a final written warning would be in breach of any workplace rule, policy or standard. There was no evidence that Prasa had at any stage before sanctioned an employee with dismissal for the same misconduct. There was no evidence of the wrongfulness of the final written warning as a sanction. Therefore, the Award is reasonable in this regard.
- [46] Counsel further contended that, to continue with the practice would unfairly prejudice Prasa. However, the Award is not to the effect that the practice must continue. Prasa is free to, after giving Rudzani a final written warning just like Mungwanape, issue a circular to all its employees to the effect that, they should not again expect a final written warning for the misconduct, but dismissal.
- [47] Therefore, this contention cannot be sustained.
- [48] The issue before this Court is not whether or not the Award is correct, but whether or not it is reasonable.
- [49] It is clear from the above that, the Award is sustainable, not only on the reasons given by the arbitrator, but also on the evidence before the arbitrator.
- [50] In the light of the above, the review should be dismissed on the basis that it is based on grounds which lack the particularity required by the law.

[51] On the other hand, the review should be dismissed also because Prasa has failed to prove that the Award is unreasonable and such that no reasonable arbitrator could have made.

Order

[52] In the light of the above, the following order is made:

1. The United National Transport Union (UNTU) is hereby substituted for the South African Transport and Allied Workers Union (SATAWU) as the fourth respondent.
2. The applicant's late service of this review application on UNTU is condoned.
3. The review application is dismissed.
4. There is no order as to costs.

E.S. Makinta

Acting Judge of the Labour Court OF South Africa

Appearances

For the Applicant:

D Norton of Mkhabela Huntley Adekeye Inc.

For the Respondent:

No Appearance

[1]

(2015) 36 ILJ 602 (LAC) at para 36.

[2] Item 7(b)(ii) provides that: "Any person who is determining whether a dismissal for misconduct is unfair should consider— (b) if a rule or standard was contravened, whether or not— . . . (ii) the employee was aware, or could reasonably be expected to have been aware, of the rule or standard."

[2] Item 7(b)(ii) provides that:

"Any person who is determining whether a dismissal for misconduct is unfair should consider—

(b) if a rule or standard was contravened, whether or not—

. . .

(ii) the employee was aware, or could reasonably be expected to have been aware, of the rule or standard."

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