

SOUTH AFRICA / JUDGMENT

Van Tonder v Sibanye Stillwater Ltd and Others (JR 651/20) [2023]

ZALCJHB 265 (19 September 2023)

[2023] ZALCJHB 265

COURT

Labour Court Johannesburg

BEFORE

Mahosi

CASE / FILE NUMBER

JR 651/20

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IN

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not

Reportable

Case

no: JR 651/20

In

the matter between:

HENDRIK
CORNELIUS VAN TONDER Applicant
and
SIBANYE
STILLWATER LTD First
Respondent
COMMISSIONER
VAN STADEN, PIET N.O. Second
Respondent
COMMISSION
FOR CONCILIATION,
MEDIATION
AND ARBITRATION Third
Respondent
NUM
obo ALFRED FOLEI THEBE Fourth
Respondent

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives through email. The date and time for hand-down is deemed to be 19 September 2023.

JUDGMENT

MAHOSI. J

Introduction

- [1] The applicant, Mr. Hendrik Cornelius van Tonder (Mr. van Tonder), brought an application in terms of section 145 of the Labour Relations Act[1] (LRA) for an order to review and set aside the arbitration award (the award) dated 26 February 2020 issued by the second respondent (the commissioner) under the auspices of the third respondent, the Commission for Conciliation, Mediation and Arbitration (the CCMA), under case number GAJB 6296-19. In his award, the commissioner found that Mr. van Tonder's dismissal was substantively and procedurally fair.
- [2] Mr. van Tonder sought an order to substitute the award with a finding that his dismissal was substantively and procedurally unfair and that the respondent opposing this application would pay the legal costs.
- [3] Coupled with the above application was a condonation application for its late filing. The first respondent, Sibanye Stillwater Ltd (Sibanye), opposed both applications, while the CCMA and the commissioner filed a notice to abide by the decision of the Court.

Condonation

- [4] Considering the pleadings filed as well as the record and the importance of the case, the interest of justice requires the Court to condone the late filing of the review to enable the consideration of the review application.

Background

- [5] The facts of this matter are disheartening. Sibanye employed Mr. van Tonder from 12 January 1987 as an Engineering Superintendent at its Kloof Four Shaft (Four Shaft). At the time of his dismissal, he held the position of Acting Shaft Engineer. He was responsible for the supervision and discipline of several employees, including Mr. Morake Edward Finger (Mr. Finger) and Mr. Thabiso Sedumedi (Mr. Sedumedi), herein referred to as “the complainants”.

[6] On 04 October 2018, when the complainants reported late for a safety meeting, Mr. van Tonder instructed them to report to his office for appropriate disciplinary action, and they did. As a form of discipline, Mr. van Tonder allowed them to face a formal charge of misconduct or submerge their heads in a fishpond on Sibanye's premises.

[7] The complainants submerged their heads in a fishpond, and some of their colleagues watching took photos and videos of them. After that, Mr. van Tonder allegedly instructed them to refrain from disrespecting him in the future.

[8] Embarrassed, denigrated and belittled by submerging their heads in the pond, the complainants lodged a formal grievance with Sibanye. As a result, Sibanye charged Mr. van Tonder with the following act of misconduct:

‘Behaviour prejudicial to the maintenance of good order and/or behaviour unbecoming of a senior employee in your position in that you on 4 October 2018 at Ikamva Shaft instigated and/or subjected and/or condoned and/or allowed subordinates to submerge their heads in a fishpond instead of facing disciplinary action whilst being photographed and recorded by more than one person.’

[9] In addition, Sibanye charged and dismissed Mr. Thebe. However, the Court only considered Mr. van Tonder's dismissal as he brought this application.

[10] Following a disciplinary hearing, Sibanye dismissed Mr. van Tonder on 18 February 2019. Aggrieved by his dismissal, Mr. van Tonder referred an unfair dismissal dispute to the CCMA for conciliation, which was unsuccessful. Subsequently, he referred his dispute to arbitration, held several days from 20 September 2019 and finalised on 07 February 2020.

The arbitration and the award

[11] The issue before the commissioner was whether Mr. van Tonder's dismissal was procedurally and substantively fair. During the arbitration, Ms. van Ryneveld, the Superintendent of litigation, represented Sibanye, and Ms. De Beer, an attorney, represented Mr. van Tonder.

[12] On the one hand, Sibanye led its evidence through the complainants, its Operations Manager, Mr. Du Preez and Mr. Pakkies, its Unit Manager, HR for Three Shaft, Four Shaft, Seven Shaft and Kloof Lower.

[13] On the other hand, Mr. van Tonder and Mr. Thebe testified in support of their case and called Mr. Pienaar, Mr. Menzi, Mr. Dryer, Mr. Aswegen, Mr. Beneke and Mr. Moses Netshivhazwaulu to testify in support of their claim.

[14] In his award, the commissioner amply outlined evidence of all the witnesses. Hereunder is only a summary.

Sibanye's evidence

[15] Sibanye denied Mr. van Tonder's contention that there was a well-established custom to submerge employees' heads in a fishpond as an alternative to discipline. It submitted that its disciplinary

code, which came into effect on 1 September 2013, governed its disciplinary processes. Further, Mr. van Tonder was trained and, therefore, aware of it. In addition, he was responsible for its enforcement as a senior employee. Thus, his instruction for the complainants to submerge their heads in the fishpond violated its disciplinary code.

Mr. Van Tonder's evidence

[16] Mr. van Tonder denied that he committed any misconduct, as the practice and tradition of submerging the employees and throwing them in the fishpond had existed within Sibanye for decades.

[17] Mr. Pienaar testified that he was responsible for Four Shaft, witnessed the complainants kneeling and submerging their heads in the

fishpond, and heard Mr. van Tonder informing them that they did so voluntarily. He further testified about an incident that took place on 04 October 2018, in which the Mining Manager, Mr. Netshivhazwaulu, gave him and other shift bosses, who had not achieved their daily target, an option to drink the fishpond water, get into the fishpond or to face disciplinary action. In this instance, Mr. Pienaar removed his shoes and got into the fishpond. All the other shift bosses did the same.

[18] Mr. Menzi testified that he witnessed the complainants submerging their heads in the fishpond. After the incident, Mr. Finger

approached him with a request to assist him in getting rid of Mr. van Tonder, which indicated a personal vendetta. On the culture at Sibanye, Mr. Menzi testified that he was once thrown in the fishpond in celebration of the attainment of his qualifications. When he qualified as a tradesman, he was smeared with grease and dumped into a fishpond. Again, when he arrived at work under the influence of alcohol, he was not charged but was instructed to submerge into the fishpond to sober up.

[19] Mr. Dryer was Sibanye's former Mine Overseer who, for over 23 years, served both in Four Shaft and Seven Shaft. He testified that he was once thrown into the fishpond to celebrate his promotion and confirmed that the practice was also used as a form of discipline. He further testified that the entire management of Four Shaft and Seven Shaft used the practice for disciplinary purposes but confirmed that it had to be voluntary.

[20] Mr. van Aswagan, employed by Sibanye for 39 years, retired in August

2019. Like Mr. Dryer, he served as a shift boss in Four Shaft and Seven Shaft and confirmed that submerging employees in the fishpond was used as a form of discipline and, in other instances, to celebrate. He testified that the management was aware of the tradition of submerging employees in the fishpond as the Engineer of Seven Shaft would watch employees being subjected to it, and pictures, some taken even by HR officials, were displayed on the

notice board and meeting rooms. Further, that same happened in Four Shaft, but they did not display photos.

[21] Sibanye formerly employed Mr. Beneke as the Mining Manager and he also acted as a Mine Manager. When he started at Four Shaft in 2016, he enforced Sibanye's disciplinary code until his colleagues informed him about the alternative discipline and cautioned him against disciplinary action for minor offences as it would result in the dismissal of half the mine employees. As his first initiation at Four Shaft, Mr. Beneke was put into a fishpond.

[22] Mr. Beneke confirmed that the tradition of submerging employees in the fishpond was used for teambuilding, and some employees jumped into the fishpond on Fridays and before going underground, especially during winter. He further confirmed that the management was aware of the tradition and that the Senior Vice President for Safety, Mr. Stead, had gone through all four fishponds. Further, he testified that no one took issue with the fishponds tradition, and pictures depicting it that were circulated through Whatsapp groups and placed on the walls.

[23] Sibanye also employed Mr. Nstshivhazwaulu as the Mining Manager responsible for the stopping section. He testified that on 04 October 2018, his team agreed that, as part of the teambuilding challenge to lift the team spirit and to improve production and safety on the Shaft, all employees would put a foot in the water if their sections did not get a daily quota or if the Shaft got an accident on that day. The agreement was between the morning shift, shift bosses and the mine overseers.

[24] Further, when the section did not get their daily quota, Mr Nstshivhazwaulu took the lead in putting his foot, encouraging all the stopping mining overseers to do the same as part of the agreed teambuilding process. The employees were not forced to participate,

and no one was left humiliated or embarrassed.

Commissioner's findings

[25] Having analysed the above evidence, the commissioner accepted Sibanye's version that its code did not include employees submerging

their heads into a fishpond and found that the practice of submerging employees in a fishpond as an alternative to discipline would take away their fundamental rights to a fair hearing, which includes time to prepare, to be represented, state their cases and appeal in terms of the disciplinary code. He further found that Sibanye's disciplinary code provided for informal hearings and sanctions ranging from counselling to a final written warning.

[26] On the alleged tradition, the commissioner made the following findings:

'119. In the absence of any official endorsement by the respondent, one must accept that the "fish pond discipline" was a self-made rule by employees and that it was never instituted by the employer. It was conceded by some of the applicants' witnesses that some of the charges of personnel did follow the disciplinary code, even for minor offences. The decision to use the fish pond as an alternative would, therefore, be the decision of that manager/supervisor which, as has been stated, did not carry the endorsement of the employer. The applicants conceded that they were aware of the Disciplinary Code of the employer and its values to ensure the behaviour that is becoming of a senior employee.'

[27] The commissioner accepted Sibanye's assertion that even if the "fishpond discipline" was a tradition, it was contrary to Sibanye's rules, processes, codes and values and had the potential to lead to an infringement of the fundamental human rights of individual employees. As such, the commissioner found that such discipline was a forbidden self-made practice.

[28] The commissioner further made the following finding:

'129. The suggestion that the employer was aware of the practice and somehow condoned it has no merit. The moment the two complainants filed their grievance, the employer acted, and it resulted in the dismissal of the applicants. This would be inconsistent with the view that the respondent was aware of and tolerated the practice. In addition, any notion that the employer would only act when employees file grievance would be ludicrous.'

[29] In conclusion, the commissioner found Mr. Van Tonder's dismissal to have been substantively and procedurally fair. It is this award that is the subject of this application.

Submissions

for review

[30] Mr. van Tonder challenged the award because it was allegedly unrelated to the facts before the commissioner. He contended that the commissioner failed to apply his mind to and ignored relevant evidence. In addition, he alleges that the commissioner could not apply the law correctly, thus acting irregularly and reaching a conclusion to which a reasonable commissioner would not have come.

[31] Sibanye contended that Mr. van Tonder failed to satisfy the strict test on review as he merely itemised evidence that the commissioner

supposedly could not apply his mind to and could not show how his alleged failure had a distorting effect that rendered the award

unreasonable.

The test for review of arbitration awards

[32] The arbitration awards are reviewable in terms of section 145 of the LRA, which provides that any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award. Section 145(2) defines a defect as the commissioners' misconduct concerning their duties as arbitrators,

gross irregularities in the arbitration proceedings, exceeding the commissioner's powers, or improperly obtaining an award.

[33] The test for review, which has been authoritatively stated by the Constitutional Court in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[2] (*Sidumo*), was reiterated in *Herholdt v Nedbank Ltd and Congress of South African Trade Unions*[3] as follows:

‘In summary, the position regarding the review of CCMA awards is this: A review of a CCMA award is permissible if the defect in the

proceedings falls within one of the grounds in s 145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2)(a)(ii), the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.’

[34] Therefore, the test is whether the decision reached by the commissioner is one that a reasonable decision-maker could reach. In *Head of the Department of Education v Mofokeng and Others*,[4] The Court stated as follows:

‘Irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide a compelling indication that the arbitrator misconceived the inquiry. In the final analysis, it will depend on the materiality of the error or irregularity and its relation to the result. Whether the irregularity or error is material must be assessed and determined with reference to the distorting effect it may or may not have had upon the arbitrator’s conception of the inquiry, the delimitation of the issues to be determined and the ultimate outcome. If but for an error or irregularity a different outcome would have resulted, it will ex hypothesi be material to the determination of the dispute. A material error of this order would point to at least a prima facie unreasonable result. The reviewing judge must then have

regard to the general nature of the decision in issue; the range of relevant

factors informing the decision; the nature of the competing interests impacted upon by the decision; and then ask whether a reasonable

equilibrium has been struck in accordance with the object LRA. Provided the right question was asked and answered by the arbitrator,

a wrong answer will not necessarily be unreasonable. By the same token, an irregularity or error material to the determination of the dispute may constitute a misconception of the nature of the enquiry so as to lead to no fair trial of the issues, with the result that the award may be set aside on that ground alone. The arbitrator however must be shown to have diverted from the correct path in the conduct of the arbitration and as a result failed to address the question raised for determination.'

[35] In light of the above authority, this Court should determine the materiality of the irregularity or error and whether it resulted in an unreasonable outcome. In *Rustenburg Platinum Mines Limited (Amandelbult Section) v NUM obo Monageng and Others*,^[5] the Court stated that:

'It is well settled that the review standard, in cases such as this, is reasonableness. If the decision of the commissioner falls within the band of reasonable decisions that a commissioner could make, then, courts should not interfere with the decision. The Court must thus enquire whether the decision falls within a range of possible justifiable decisions that could be reached based on the facts before the decision-maker and the law. Courts will sometimes be tempted to interfere because they would have decided the issue differently. They should however show deference to the commissioner, because he/she has been entrusted by the legislature to arbitrate and decide labour disputes that are properly referred for arbitration. Deference however does not mean that the Court should not properly enquire into the facts that make a decision reasonable or otherwise..'

[36] The question is whether the commissioner's decision falls within the range of possible justifiable choices that could be reached based on the facts before the decision-maker and the law.

Analysis

[37] Mr. van Tonder contended that the commissioner failed to apply his mind to his witnesses' evidence, who confirmed that, by allowing and condoning the complainants to submerge their heads in the fishpond, he was adhering to a well-established custom that Sibanye was fully aware of for years before to his dismissal.

Was there custom?

[38] In support of his contention, Mr. van Tonder relied on the judgment in *Van Breda and others v Jacobs and others*[6] where the Court found that a practice must be certain, uniformly observed for an extended period and reasonable for it to be recognisable law.

[39] In addition, both parties referred the Court to *Shilubana and others v Nwamitwa*[7], where, in dealing with the authority of traditional communities to develop their customs and traditions to promote gender equality in the succession of traditional leadership following the Constitution[8], the Constitutional Court stated as follows:

‘[49] To sum up: where there is a dispute over the legal position under customary law, a court must consider both the traditions and the present practice of the community. If development happens within the community, the Court must strive to recognise and give effect to that development, to the extent consistent with adequately upholding the protection of rights. In addition, the imperative of s 39(2) must be acted on when necessary, and deference should be paid to the development by a customary community of its own laws and customs where this is possible, consistent with the continuing effective operation of the law...

...

[52] The classical test for the existence of custom as a source of law is that set out in *Van Breda v Jacobs*, in which it was held that to be recognised as law, a practice must be certain, uniformly observed for a long period of time and reasonable. The requirement of reasonableness would now, of course, be applied in a way compliant with the Constitution.’

[40] In light of the above authority, a practice must meet three requirements for it to be custom. Firstly, it must be certain. Secondly, it must be uniformly observed for an extended period. Thirdly, it must be reasonable.

[41] In the current matter, it is common cause that Sibanye Stillwater Group of companies employs approximately 90 000 employees, of which about 3 600 are placed at Four Shaft. The evidence was that some managers and supervisors allowed, condoned and instructed their subordinates to submerge their heads in the fishpond as an alternative to discipline, celebrate achievements or build team spirit.

[42] Further, they had no particular or prescribed way of doing it. In some instances, the employee just dipped their toes and in others, they put their feet in the fishpond. In the current matter, the employees had to submerge their heads in the fishpond. There needed to be certainty in the application of the practice.

[43] The next question is whether the practice was uniformly observed for a long time at the workplace. Although Mr. van Tonder’s

witnesses testified on the fishpond practice in Four Shaft, there was evidence that some of the senior employees at the head office were unaware of it. In addition, it was only practised in some operations. Mr. van Tonder conceded that the head office had to ensure that the management applied the disciplinary code in all operations. Although the tradition was only used in some operations, it follows that even if practised for a long time, it was not uniformly applied in the workplace.

[44] The last important consideration is whether the practice was reasonable. In a democratic South Africa, everyone has inherent

dignity and the right to have their dignity respected and protected[9] is enshrined in the Constitution. Allowing, condoning and instructing junior employees to submerge their heads in the fishpond as an alternative to discipline is degrading, humiliating and therefore impacting on their dignity. In *Qwelane v South African Human Rights Commission and Other*[10], the Constitutional Court considered the importance of human dignity and stated as follows:

‘[63] In *Freedom of Religion*, this Court underscored the importance of the right to human dignity:

“There is a history and context to the right to human dignity in our country. As a result, this right occupies a special place in the architectural design of our Constitution, and for good reason. As Cameron J correctly points out, the role and stressed importance of dignity in our Constitution aim ‘to repair indignity, to renounce humiliation and degradation, and to vest full moral

citizenship to those who were denied it in the past’. Unsurprisingly because not only is dignity one of the foundational

values of our democratic state, it is also one of the entrenched fundamental rights”.

[64] And, in *Makwanyane*, this Court stressed that the protection of dignity is a cornerstone of our democratic project:

“The importance of dignity as a founding value of the new Constitution cannot be overemphasised. Recognising a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern...”

Respect for the dignity of all human beings is particularly important in South Africa. For apartheid was a denial of a common humanity.

Black people were refused respect and dignity and thereby the dignity of all South Africans was diminished. The new Constitution rejects this past and affirms the equal worth of all South Africans. Thus recognition and protection of human dignity is the touchstone of the new political order and is fundamental to the new Constitution."

[65] Chaskalson, writing extra-crucially, explained that:

“[I]n a broad and general sense, respect for dignity implies respect for the autonomy of each person, and the right of everyone not to be devalued as a human being or treated in a degrading or humiliating manner.”

[66] It has been acknowledged that the concept of dignity is not easy to define in exact terms. However, in National Coalition I, this Court said that “it is clear that the constitutional protection of dignity requires us to acknowledge the value and worth of all individuals as members of our society” [Footnotes omitted]

[45] The evidence that Mr. Tonder sought to rely on was led by witnesses who formed part of Sibanye’s senior staff before its disciplinary code’s effective date, which respects all its employees’ rights to be treated fairly and with dignity. It was, therefore, not supportive of his claim. Upon becoming aware of the complainants’ grievance, Sibanye’s Executive Vice President penned a letter that reads:

‘Dear colleagues

Sibanye Stillwater is a business that is built on values-based decisions and actions. We are an organisation that respects the rights and dignity of every employee irrespective of gender, race or rank.

Recently, we have become aware of an incident that our Kloof operation, where some of our employees were subjected to acts, which resulted in loss of dignity.

These, and any incidents like these, do not reflect our values and will not be tolerated. More specifically, we will always take immediate remedial action that reflect our zero tolerance towards behaviour that is inconsistent with our values. Any employee found to have participated in similar acts will face disciplinary action, which may result in dismissal.

Our culture is grounded in our C.A.R.E.S values, and living these values is not negotiable. It is what differentiates Sibanye Stillwater and allows us all to contribute to improving lives through mining.’

[46] It is apparent from the above letter that Sibanye’s management did not condone Mr. Tonder’s conduct. They viewed his conduct as injuring the complainants’ dignity, which was in line with the values and principles contained in its disciplinary code and the Constitution.

[47] In addition, the complainants testified that they felt humiliated, degraded and traumatised by the incident. They further testified on the effect the incident had on their mental health, which resulted in them consulting with a social worker, a psychologist and a psychiatrist and getting admitted to a mental health hospital.

[48] Mr. van Tonder's contention that the commissioner should have rejected the complainants' evidence on their mental health as an expert did not support it was meritless and a sign of a lack of remorse. Whether the complainants consulted medical professionals or were admitted to a hospital is of no consequence. The act of submerging one's head in a fishpond as an alternative to discipline

is, on its own, humiliation and a violation of one's human dignity, which has psychological effects. Thus, Sibanye's submission

that there was no need for an expert witness was correct.

[49] The complainants were junior employees, and Mr. Tonder was their senior, whom they respected. Mr. Van Tonder admitted that, during the morning and after their late arrival at the meeting, he told the complainants that he was a "terminator" and instructed them to sit in front facing everyone in the forum. He further instructed them to wait for him until he came up from underground, even until 22h00. Furthermore, Mr. van Tonder did not dispute that he instructed and allowed the complainants to put their heads in the fishpond or face a disciplinary hearing.

[50] Mr. Sedumedi compared their situation to a robbery where one chooses between their life and handing over a bank card and its pin. This submission is a fair proposition. A disciplinary measure taken by an employer cannot be voluntary. Put differently, an employee can never volunteer to be disciplined, irrespective of the sanction. This principle squared with Mr. van Tonder's utterances that the complainants must never disrespect him again.

[51] Having considered the above evidence, the commissioner found that there was a power play that gave the complainants no choice but to agree to submerge their heads in the fishpond. As a result, he rejected Mr. van Tonder's contention that the complainants

voluntarily participated in the fishpond discipline. The commissioner considered all the evidence, and his conclusion was reasonable.

[52] In light of the above, Mr. van Tonder needed to establish that the practice he sought to rely on met the requirements of a custom, as it was not certain, uniformly observed or reasonable.

Was there a rule?

[53] Mr. van Tonder did not dispute that Sibanye had a disciplinary code, which took effect on 1 October 2013 to replace all previous

regulations, policies and procedures. Its foreword reads as follows:

'Dear Sibanye Gold Employees

Herewith, please find the company's new Disciplinary Code

The code was carefully drafted in order to ensure that it clearly indicates which behaviours the company deem to constitute misconduct.

By so doing, employees will be more aware of these behaviours and, therefore, refrain from misconduct.

The company firmly believes that no employee should lose his/her job as a result of misconduct and that misconduct can be avoided. Everyone has a choice to do the right

Therefore, all employees are urged to read through this disciplinary code carefully in order to understand which behaviours the company does not approve of, together with the possible consequences of engaging in such behaviours.

The Disciplinary Code supersede and replaces all other disciplinary codes which were previously in place at Sibanye Gold Operations and/or Support Organisations, and will therefore ensure that there is consistency with regards to the application of discipline.'

[54] In its introduction, the code states that:

'Sibanye Gold respects the right of all employees to be treated fairly and with dignity and recognises their interest in employment security.

In order to achieve this, Sibanye Gold has implemented a disciplinary record to be used as a guideline as to how the company will deal with disciplinary matters.

This code has been designed with the flexibility to adopt two unique circumstances whilst still ensuring fairness and consistency. should new or different rules be introduced from time to time, employees will be informed through notices on notice boards by issuing managerial briefs.'

[55] The code's objectives are to ensure that discipline is fair and consistent, define expected standards of behaviour and conduct,

communicate the company's and its employees' rights, and set out disciplinary procedures.

[56] The code provides for informal hearings applicable in misconduct warranting counselling with a verbal warning, a written warning or a final written warning. It requires Sibanye to notify its employees verbally or in writing to attend the hearing and the employee's

immediate supervisor to conduct it but allows Sibanye to nominate an alternative.

[57] It further provides that the management representative conducting the informal hearing should state the allegations and allow the employee to make representations, consider them, determine the innocence or guilt of the employee, and consider mitigating and aggravating circumstances. Should the management representative find the employee guilty, he should determine an appropriate sanction and notify the employee. In cases where the employee repeats the offence, this could result in more serious disciplinary action, including dismissal.

[58] It is apparent from the reading of the code that it replaces all the previous disciplinary codes, policies and procedures, and it seeks to create certainty and consistency in the procedures to be followed to discipline employees. As such, from 1 October 2013, there could be clarity that the code applied to issues of discipline at Sibanye. Therefore, Mr. van Tonder's contention that Sibanye created the rule after the event on 4 October 2018 was without merit.

[59] In light of the above, Sibanye had a reasonable and lawful rule, and submerging the employees in a fish pond as an alternative to formal discipline was contrary. Thus, Sibanye's contention that it was inconceivable that its code could be interpreted that it could, for any reason, be ignored was correct.

Sanction

[60] Item 3 of the Code of Good Practice: Dismissal[11] provides guidance on how employers should deal with the determination of sanctions, and it provides as follows:

'Disciplinary procedures prior to dismissal

3. Disciplinary measures short of dismissal.

- (1) All employers should adopt disciplinary rules that establish the standard of conduct required of their employees. The form and content of disciplinary rules will obviously vary according to the size and nature of the employer's business. In general, a larger business will require a more formal approach to discipline. An employer's rules must create certainty and consistency in the application of discipline. This requires that the standards of conduct are clear and made available to employees in a manner that is easily understood. Some rules or standards may be so well established and known that it is not necessary to communicate them.
- (2) The courts have endorsed the concept of corrective or progressive discipline. This approach regards the purpose of discipline as a means for employees to know and understand what standards are required of them. Efforts should be made to correct employees'

behaviour through a system of graduated disciplinary measures such as counselling and warnings.

- (3) Formal procedures do not have to be invoked every time a rule is broken or a standard is not met. Informal advice and correction is the best and most effective way for an employer to deal with minor violations of work discipline. Repeated misconduct will warrant warnings, which themselves may be graded according to degrees of severity. More serious infringements or repeated misconduct may call for a final warning, or other action short of dismissal. Dismissal should be reserved for cases of serious misconduct or repeated offences.

Dismissals for misconduct

- (4) Generally, it is not appropriate to dismiss an employee for a first offence, except if the misconduct is serious and of such gravity that it makes a continued employment relationship intolerable. Examples of serious misconduct, subject to the rule that each case should be judged on its merits, are gross dishonesty or wilful damage to the property of the employer, wilful endangering of the safety of others physical assault on the employer, a fellow employee, client or customer and gross insubordination. Whatever the merits of the case for dismissal might be, a dismissal will not be fair if it does not meet the requirements of section 188.
- (5) When deciding whether or not to impose the penalty of dismissal, the employer should in addition to the gravity of the misconduct consider factors such as the employee's circumstances (including length of service, previous disciplinary record and personal circumstances), the nature of the job and the circumstances of the infringement itself.
- (6) The employer should apply the penalty of dismissal consistently with the way in which it has been applied to the same and other employees in the past, and consistently as between two or more employees who participate in the misconduct under consideration.'

[61] In Sidumo,[12] the Constitutional Court held that:

'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 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. This is not an exhaustive list.'

[62] In determining whether the sanction imposed by the employer was fair, the commissioner should consider the totality of the

circumstances.[13] In the current matter, the commissioner took into account the seriousness of the misconduct Mr. van Tonder was charged with and the importance thereof. The commissioner further considered the evidence in relation to the allegation of a lack of consistency in the application of the rule and found that Mr. van Tonder could not substantiate his claim.

[63] Mr. van Tonder relied on the judgment in *Matshoba and others v Fry's Metals (Pty) Ltd*,[14] where the dismissal of the employees who failed to work overtime was found to be unfair because the employer had never dismissed its employees for a similar reason. However, his reliance on the above judgment was misplaced because, although the employer's consistency in its treatment of employees is an essential factor to consider in determining the fairness of its dismissal, it is not decisive. The commissioner must evaluate each case based on its facts and circumstances. The Labour Appeal Court confirmed this approach in *Absa Bank Limited v Naidu and others*,[15] where it stated that:

‘Indeed, in accordance with the parity principle, the element of consistency on the part of an employer in its treatment of employees is an important factor to take into account in the determination process of the fairness of a dismissal. However, as I say, it is only a factor to take into account in that process. It is by no means decisive of the outcome on the determination of reasonableness and fairness of the decision to dismiss. In my view, the fact that another employee committed a similar transgression in the past and was not dismissed cannot, and should not, be taken to grant a licence to every other employee, willy-nilly, to commit serious misdemeanours, especially of a dishonest nature, towards their employer in the belief that they will not be dismissed. It is well accepted in civilised society that two wrongs can never make a right. The parity principle was never intended to promote or encourage anarchy in the workplace. As stated earlier, I reiterate, there are varying degrees of dishonesty and, therefore, each case will be treated on the basis of its own facts and circumstances.’

[64] In the current matter, Mr Pakkies testified that when the employer was still Kloof Mine, there was a tradition of employees jumping into a dam to celebrate a promotion or an appointment and into a pond during social functions. He testified that the tradition was never used as an alternative to discipline and that Sibanye never received any complaint or grievance regarding the tradition.

[65] The commissioner recorded that:

‘41. In the applicants bundle, there is a document consisting of 32 employees who allegedly committed or allowed the same conduct as that for which the applicants were dismissed, and it was alleged that nothing happened to the employees recorded in the document. Mr Pakkies dealt with each of the issues and save for the incident of Moses, recorded that he was either not aware thereof [or] that he did not receive any complaints emanating from this alleged conduct.’

[66] In assessing the evidence and arguments, the commissioner differentiated this case from that of Mr Ntshivhazwaulu and found that the latter’s conduct did not humiliate anyone and that he accepted his wrongdoing. He considered both parties’

evidence and found that Mr. van Tonder's contention that Sibanye inconsistently applied the rule was meritless.

[67] Mr. van Tonder contended that he still had a solid relationship with all of his superiors on the Four Shaft and that the mere instruction never to allow the submergence of employees in the fishpond again could have been an appropriate sanction for him. In effect, he contended that dismissal was harsh.

[68] In determining the appropriateness of sanction, the commissioner took into account the importance of the rule and the gravity of its contravention and found that being in a position of trust, Mr. van Tonder was obligated to protect employees from behaviour that impaired their dignity. Furthermore, he found that Sibanye could not be seen by its international partners to promote and associate itself with the conduct that humiliates and degrades its employees. As a result, the commissioner found no reason to interfere with the employer's

sanction of dismissal. The Court could not fault his finding on the evidence before him as it was reasonable.

Conclusion

[69] In light of the above, it is apparent that the commissioner dealt exhaustively with the evidence before him and considered all the factors before concluding that Mr. van Tonder's dismissal was procedurally and substantively fair. Considering the depth of his treatment of the evidence, there is no evidence that he committed any misconduct or gross irregularity in the arbitration proceedings or exceeded his powers.

[70] As such, the commissioner's decision, in this case, is not a decision that a reasonable decision-maker could not reach. It is a sensible decision justified by the evidence that the parties placed before him. There is, therefore, no reason for this Court to interfere with the award.

Costs

[71] Regarding costs, the requirements of law and equity dictate that there should be no order as to costs.

[72] In the circumstance, the Court makes the following order:

Order

1. The application is dismissed.
2. There is no order as to costs.

D. Mahosi

Judge of the Labour Court of South Africa

Appearances

For the applicant: Advocate

H. Becksteg

Instructed by: De

Beer Incorporated Attorneys

For the first respondent: Advocate

M Mndebele

Instructed by: Solomon

Holmes Attorneys

[1] Act 66 of 1995 as amended.

- [2] [2007] ZACC 22; 2007 (28) ILJ 2405 (CC).
- [3] [2013] ZASCA 97; 2013 (6) SA 224 (SCA) at para 25.
- [4] [2014] ZALAC 50; [2015] 1 BLLR 50 (LAC) at para 33.
- [5] (JA12/20150)
- [2016] ZALAC 21 (26 May 2016) at para 11.
- [6] 1921 AD 330.
- [7] [2008] ZACC 9; 2009 (2) SA 66 (CC) at paras 49 and 52.
- [8] Constitution of the Republic of South Africa, 1996.
- [9] Section 10 of the Constitution.
- [10] [2021] ZACC 22; 2021 (6) SA 579 (CC) at paras 63 – 66.
- [11] Schedule 8 of the LRA.
- [12] Sidumo at para 78.
- [13] Sidumo Id at para 78.
- [14] (1983) 4 ILJ 107 (IC).
- [15] (2015) 36 ILJ 602 (LAC) at para 42.
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