THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable

Case no: C539-20

In the matter between:

PIONEER FOODS (PTY) LTD	**Applicant**
and	
COMMISSION FOR CONCILIATION,	
MEDIATION AND ARBITRATION	**First Respondent**
MAUREEN DE BEER N.O.	**Second Respondent**
FAWU obo JOCHEN MATJAN	**Third Respondent**

Heard: **20 June 2023**

Delivered: **30 June 2023**

Summary: CCMA arbitration proceedings – review of proceedings, decisions and awards of arbitrators – test for review – s 145 of LRA 1995 – determination of gross irregularities and reasonable outcome

Evidence – evaluation and determination thereof – arbitrator not properly and reasonably determining evidence and considering probabilities – factual findings made were unreasonable – award set aside

JUDGMENT

VENTER, AJ

Introduction

[1] The applicant has launched an application to review and set aside an arbitration award of the second respondent in her capacity as an arbitrator of the Commission for Conciliation, Mediation and Arbitration (the first respondent). The application has been brought by the applicant in terms of section 145 of the Labour Relations Act[1] ('the LRA').

[2] The third respondent's member (the "member") was dismissed by the applicant for misconduct relating to being under the influence of alcohol when reporting for duty and he was dismissed following disciplinary proceedings. The third respondent challenged the dismissal as an unfair dismissal dispute, to the first respondent, and this dispute ultimately came before the second respondent for arbitration. As it was common cause that the member had been dismissed by the third respondent on 5 November 2019, the second respondent was called upon to decide whether such dismissal was substantively fair as procedural fairness was not in dispute during the arbitration proceedings.

[3] In an award, incorrectly dated 18 November 2019 (instead of 2020), the second respondent made a determination to the effect that the member's dismissal was substantively unfair. It is this determination by the second respondent that forms the subject matter of the review application brought by the applicant.

[4] During the proceedings in court, the third respondent sought postponement of the proceedings and an indulgence to file opposing papers. The representative argued that the third respondent had insufficient time to serve and file opposing papers and that they had only two full-time legal officers that could handle review applications.

[1] Act 66 of 1995, as amended.

[5] The application was opposed by the applicant and it was argued that the third respondent failed to comply with time lines and correspondence. The set-down notice was timeously sent to parties and save for filing an intention to oppose, the application, the third respondent did nothing over a protracted period.

[6] I did not grant postponement and issued an ex tempore ruling. The application for review was filed on 18 December 2020 and the third respondent filed a notice of intention to oppose on 9 February 2021 (some 28 months ago). The notice in terms of Rule 7A(8) was filed on 7 June 2021 and the third respondent failed to file opposing papers over a period of two years. The third respondent furthermore failed to answer correspondence that was sent by the applicant's attorney of record and made no attempt to secure a postponement prior to these proceedings. It is trite that review applications should be determined in a prompt manner and that the LRA requires a speedy resolution of disputes.

[7] The third respondent's representative was allowed to argue its case relating to the merits of the review application.

The relevant background

[8] The third respondent's member was employed by the applicant as an Operator. He served the applicant in a temporary capacity for approximately ten years and was employed in a permanent position with effect from 4 April 2018. The applicant is in the food industry and is a manufacturer of dried fruit and by-products.

[9] The applicant introduced a policy dealing with, *inter alia*, the use of alcohol at the workplace. It was not in dispute that a transgression would result in disciplinary action or that the member was aware of the policy. The member tested positive during the trial period of the breathalyzer testing on 4 March 2019. He tested positive again on 1 April 2019 and was issued with a final written warning. On 19 August 2019 he tested positive again, was issued with another final written warning and agreed to a period of counselling. The incident that gave rise to this application occurred when the member tested positive again on 28 October 2019, an incident that led to an internal inquiry, where he pleaded guilty and was subsequently dismissed.

[10] The evidence that was led during the arbitration proceedings demonstrated that the applicant implemented a breathalyzer test that consists of a two-staged test. An employee would complete the initial (screening) test and the device would only indicate a positive or negative reading. An employee would then wait for 30 minutes where after a second test would follow (a percentage of alcohol in the body would show).

[11] On 28 October 2019 the member failed the first test (screening) and the security staff went to him in order to undergo the second test. The member subsequently indicated that there was an emergency at his wife's residence (a house break) and he left the premises without undergoing the second test.

[12] The evidence that was led during the arbitration proceedings showed that the member left at the "side" of the security office and that he did not wait for the second test.

[13] None of the above was placed in dispute and the member pleaded guilty during the internal disciplinary inquiry. It was however his case that he was supposed to be charged for non-compliance of procedures and that the disciplinary code made provision for this type of incident. He would then have been issued with a final written warning and a dismissal was therefore not appropriate.

[14] Significantly, the member never disputed that he has been tested as aforesaid and tested positive during the screening process for being under the influence of alcohol. He offered the explanation that he had an emergency at home and could therefore not remain at work to undergo the further test.

[15] Unconvinced by the explanation presented by the member, he was dismissed. This dismissal was then referred as an unfair dismissal dispute to the first respondent, and this then came before the second respondent for arbitration.

[16] The second respondent was ultimately persuaded by the case of the applicant. She accepted that on a balance of probabilities, the applicant indeed reported for work under the influence of alcohol, but that the sanction of dismissal was inappropriate for this misconduct as he should not have been charged for this specific type of offence. The second respondent determined that the dismissal of

the member by the applicant was thus substantively unfair and she order re-employment.

Test for review

[17] The appropriate test for review is now settled. In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others,*[2] the Court held that 'the reasonableness standard should now suffuse s 145 of the LRA'. The Court further held that the threshold test for the reasonableness of an award was: '*...Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?...*'[3]

[18] What this means is a two-stage review enquiry. Firstly, the review applicant must establish that there exists a failure or error on the part of the arbitrator. If this cannot be shown to exist, that is the end of the matter. Secondly, if this failure or error is shown to exist, the review applicant must then further show that the outcome arrived at by the arbitrator was unreasonable. If the outcome arrived at is nonetheless reasonable, despite the error or failure that is equally the end of the review application. In short, in order for the review to succeed, the error of failure must affect the reasonableness of the outcome to the extent of rendering it unreasonable. In *Herholdt v Nedbank Ltd and Another*[4] the Court said:

> '... 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 the particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of consequence if their effect is to render the outcome unreasonable.'

[19] The reasonableness consideration as articulated in *Herholdt* was then applied by the Labour Appeal Court (LAC) in *Gold Fields Mining South Africa (Pty) Ltd (Kloof*

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[2] (2007) 28 ILJ 2405 (CC).
[3] Id at para 110. See also *CUSA v Tao Ying Metal Industries and Others* (2008) 29 ILJ 2461 (CC) at para 134; *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others* (2008) 29 *ILJ* 964 (LAC) at para 96.
[4] (2013) 34 *ILJ* 2795 (SCA) at para 25.

Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others[5] as follows:

> '... in a case such as the present, where a gross irregularity in the proceedings is alleged, the enquiry is not confined to whether the arbitrator misconceived the nature of the proceedings, but extends to whether the result was unreasonable, or put another way, whether the decision that the arbitrator arrived at is one that falls in a band of decisions a reasonable decision maker could come to on the available material.'

[20] Accordingly, the reasonableness consideration envisages a determination, based on all the evidence and issues before the arbitrator, as to whether the outcome the arbitrator arrived at can nonetheless be sustained as a reasonable outcome, even if it may be for different reasons or on different grounds.[6] This necessitates a consideration by the review court of the entire record of the proceedings before the arbitrator, as well as the issues raised by the parties before the arbitrator, with the view to establish whether this material can, or cannot, sustain the outcome arrived at by the arbitrator. In the end, it would only be if the outcome arrived at by the arbitrator cannot be sustained on any grounds, based on that material, and the irregularity, failure or error concerned is the only basis to sustain the outcome the arbitrator arrived at, then the review application would succeed.[7] In *Anglo Platinum (Pty) Ltd (Bafokeng Rasemone Mine) v De Beer and Others*[8] it was said:

> '... the reviewing court must consider the totality of evidence with a view to determining whether the result is capable of justification. Unless the evidence viewed as a whole causes the result to be unreasonable, errors of fact and the like are of no consequence and do not serve as a basis for a review.'

[21] Against the above principles and test, I will now proceed to consider the applicant's application to review and set aside the arbitration award of the second respondent.

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[5] (2014) 35 ILJ 943 (LAC) at para 14. The *Gold Fields* judgment was followed by the LAC itself in *Monare v SA Tourism and Others* (2016) 37 ILJ 394 (LAC) at para 59; *Quest Flexible Staffing Solutions (Pty) Ltd (A Division of Adcorp Fulfilment Services (Pty) Ltd) v Legobate* (2015) 36 ILJ 968 (LAC) at paras 15 – 17; *National Union of Mineworkers and Another v Commission for Conciliation, Mediation and Arbitration and Others* (2015) 36 ILJ 2038 (LAC) at para 16.

[6] *Fidelity Cash Management* (*supra*) at para 102.

[7] See *Campbell Scientific Africa (Pty) Ltd v Simmers and Others* (2016) 37 ILJ 116 (LAC) at para 32.

[8] (2015) 36 ILJ 1453 (LAC) at para 12.

Grounds of review

[22] Next, and in order to properly decide a review application, it is also important to identify the grounds of review upon which the application is founded. These grounds must be properly set out and identified in the founding affidavit. As was said in *Northam Platinum Ltd v Fganyago NO and Others*[9]:

> '... The basic principle is that a litigant is required to set out all the material facts on which he or she relies in challenging the reasonableness or otherwise of the commissioner's award in his or her founding affidavit'

[23] However, and in the case of review applications, these grounds of review may be supplemented, after the filing of the record, by way of a supplementary affidavit.[10]

[24] The main ground of review advanced in the founding affidavit of the applicant is that the second respondent committed a gross and reviewable irregularity by failing to properly and reasonably consider that the member tested positive during the screening test and this aspect was never disputed during the arbitration proceedings a quo. The second respondent furthermore found that the member left the premises with the sound intention to avoid the second test and it was unreasonable to expect evidence that he was incapacitated and could not perform his duties.

Analysis

[25] The typed transcript of the arbitration proceedings shows that the member arrived late for work (approximately 11h00) and that he tested for alcohol when he entered the premises. The member tested positive and he left the premises in a hurry. The second respondent rejected his explanation and found this was done with the intention to avoid the second test.

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[9] (2010) 31 ILJ 713 (LC) at para 27.
[10] See Rule 7A(8) of the Labour Court Rules; *Brodie v Commission for Conciliation, Mediation and Arbitration and Others* (2013) 34 ILJ 608 (LC) at para 33; *Sonqoba Security Services MP (Pty) Ltd v Motor Transport Workers Union* (2011) 32 ILJ 730 (LC) at para 9; *De Beer v Minister of Safety and Security and Another* (2011) 32 ILJ 2506 (LC) at para 27.

[26] The member was previously issued with two final written warnings for the same offence (April- and August 2019). It was not in dispute that that the applicant had a workplace rule in place and that the member was aware of this rule (he received previous warnings). It was also not placed in dispute that the member did in fact test positive on the day in question albeit that it was a screening test.

[27] The third respondent argued that the member should not have been dismissed as he was incorrectly charged i.e. the applicant should have charged him for not following procedures when he left the premises of the applicant.

[28] I am satisfied that the member arrived on duty whist being under the influence of liquor. This aspect was in fact never dispute nor was it ever raised that the first test (screening) was inaccurate. It should also be borne in mind that the member admitted this during the internal disciplinary inquiry.

[29] Important evidence that was led during the arbitration proceedings were not duly considered by the second respondent. It is, for example, clear that the member was in fact intoxicated on the day in question and it is unclear why the applicant had to present evidence that the member was unable to fulfil his duties. This was never the allegation or charge against him and he was blamed for arriving at work whilst being under the influence of liquor. The finding that the member contravened no rule is simply not in line with the evidence that was presented.

[30] I fail to understand the third respondent's argument, and subsequent finding of the second respondent, that the member had to be charged for the non-adherence of a policy. The evidence suggest that he failed the breathalyzer test and all that was in fact required was the second test that would have provided a percentage of alcohol in his system.

[31] The second respondent also failed to consider the history of offences and previous progressive steps taken by the applicant.

[32] The second respondent also found that the member intentionally left the workplace, but she failed to apply the necessary evidentiary value to this aspect. It is clear that the member was in fact intoxicated and that he fled the workplace as he knew he was likely to also fail the second test.

[33] Applying the above *dicta* to the matter *in casu*, the outcome is not reasonable. The second respondent failed to consider crucial evidence and/or failed to attach the necessary evidentiary value to some evidence. If the totality of evidence is considered, the presented facts do not match the outcome of the arbitration proceedings.

Conclusion

[34] Therefore, and based on all the reasons set out above, it is my view that the second respondent's arbitration award is reviewable. The member contravened a workplace rule and he was warned on two previous occasions. He chose to ignore these warnings and did so at his own peril.

[35] Parties did not seek an order of costs.

[36] The arbitration award, (incorrectly) dated 18 November 2018, should therefore be set aside and the following order is issued:

Order

1. The arbitration award in case number WECT23665-19 (incorrectly dated 18 November 2019) is reviewed and set aside.

2. The dismissal of the second respondent's member was substantively fair.

3. There is no order as to costs.

P Venter

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Adv Kahanovitz SC (instructed by Norton Rose Fulbright SA Inc).
For the Third Respondent:	S Mhlahle (FAWU official)