THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR 312/2020

In the matter between:

SAMANCOR CHROME LTD (WESTERN CHROME MINES)	Applicant
and	
RICKUS ERNST WILLEMSE	First Respondent
COMMISSIONER DADDY MOLETSANE *NO.*	Second Respondent
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	Third Respondent

Heard: 10 May 2023

Delivered: 29 May 2023

(This judgment was handed down electronically by circulation to the parties' legal representatives, by email, publication on the Labour Court's website and released to SAFLI. The date on which the judgment is delivered is deemed to be 29 May 2023.)

JUDGMENT

VAN NIEKERK, J

Introduction

[1] The applicant applies to review and set aside an arbitration award issued by the second respondent (the arbitrator) on 6 February 2020 under case number NWRB 1725-19. In his award, the arbitrator held that the dismissal of the first respondent (the employee) was substantively unfair, and ordered his reinstatement with retrospective effect.

Factual background

[2] The material facts are not in dispute. The applicant's alcohol and drugs procedure contains the following policy statement:

> This procedure applies to all employees at all levels. Western Chrome Mines subscribe to a policy of Zero Tolerance alcohol and drugs.
>
> A person shall be deemed unfit to enter the premises in the event that their breath alcohol level exceeds 0.000 percent and if the drug test indicates any illegal substances…
>
> 3.5 The company shall take disciplinary action in all cases where an employee have (sic) tested positive for alcohol and/or drugs, this offense is viewed as gross misconduct and may lead to summary dismissal on the first offence.

[3] Clause 6.11 of the applicant's disciplinary code provides the following:

> Employees are implored to refrain from influence of drugs including alcohol. The company has a zero-tolerance approach towards drug/alcohol use in its workplace and will not hesitate to dismiss any employee who:
>
> - has a positive drug (including alcohol) tested reading; or
> - refuses to undergo a drug (including alcohol) test.

[4] The employee was engaged in September 2000. He was dismissed on 25 March 2019 after being charged with having tested positive for alcohol on 22 February 2019. At the arbitration hearing, a Ms Phumla Ngemntu, a security officer, testified that on 22 February 2019, the employee arrived at work and was asked to take a breathalyzer test on an Alcoblow Rapid machine. The

breathalyzer indicated a green light, meaning a positive result. The employee questioned this result and Ngemntu tested him again on the same breathalyzer, with the same result. The employee denied that he had consumed any alcohol either that day or on the previous evening. The employee was then breathalysed on another machine, the Lion Alcometer 500 by one of Ngemntu's colleagues, Ms Lonia Mabesele. The result was again positive, and indicated an alcohol content of 0.013%. Ngetmtu testified that the applicant had a zero tolerance rule for the use of drugs and alcohol in the workplace and that in terms of the policy, and any employee testing positive for alcohol offer and obligatory test was liable to be dismissed.

[5] Mabesele testified that she administered the Lion Alcometer breathalyzer test and that it indicated a positive result, with a blood alcohol content being 0.013%. The applicant then led the evidence of a chemical pathologist, a Dr Jaco Broodryk. He testified that a blood sample drawn from the employee was sent to Ampath Laboratory to test for the presence of alcohol in the employee's blood. The method used to determine the blood alcohol content in the sample was a plasma ethanol test, which cannot test for alcohol below 0.010g/dl. The report issued by the laboratory was negative i.e. it indicated that the employees blood sample had less than 0.010 g/dl alcohol content. Broodryk testified that the blood test was more accurate than a breathalyzer test, and that breathalyzer tests may be false in certain circumstances, for example, when the person tested had not eaten for more than eight hours, or eaten any substance with a yeast content. In his opinion, the result of the test performed did not mean that the employee did not have any alcohol at all in his blood, it simply meant that there was no blood alcohol content exceeding 0.010 g/dl, but for all clinical purposes, the result was negative.

[6] The applicant called his family medical practitioner, Dr. Koekemoer. Koekemoer testified that the employee consulted him after he had been accused of consuming alcohol, that he took a blood sample from the employee and sent to Ampath Laboratory. The results came back negative.

[7] The employee testified that he was fully aware of the applicant's policy, that he was subjected to the breathalyzer tests as described by the applicant's

witnesses, that he did not consume alcohol on the day in question or on the evening before, and that the consulted Koekemoer who drew a blood sample for analysis.

The award

[8] The arbitrator summarized the evidence and recorded the issue that he was required to decide whether the employee had committed any act of misconduct, and whether the dismissal was the appropriate sanction.

[9] The arbitrator made reference to Broodryk's evidence that a breathalyzer test may in certain circumstances produce false positive results, that the more reliable test is that of a blood sample tested in laboratory conditions. The arbitrator concluded that he fully understood that the applicant is using a method that is convenient for safety reasons to check if employees are intoxicated but that the chairperson of the disciplinary hearing ought to have taken the laboratory results into consideration since those have more accurate and reliable results. It is largely on this basis that the arbitrator concluded that there was no breach of the rule by the employee as the laboratory results, coupled with the expert testimony, confirmed that the employee did not have alcohol in his blood.

Grounds for review

[10] The applicant contends that the arbitrator's award stands to be reviewed and set aside because the arbitrator committed a gross irregularity's in the conduct of the arbitration proceedings, that he committed misconduct in relation to his duties as an arbitrator by ignoring and/or misconstruing relevant evidence, and that as a result, he reached a decision that a reasonable commissioner could not reach. In particular, the applicant submits that the arbitrator misconstrued the nature of the inquiry and thus committed a gross irregularity. In support of this contention, the applicant submits that the arbitrator based his findings on a consideration of whether the employee was intoxicated or not.

[11] The applicant submits that the applicable policy, being one of zero tolerance, did not mean that it was necessary for the employee to be intoxicated for there to be a breach of the workplace rule. Further, the applicant submits that the nature of the applicant's business justifies the zero tolerance rule, and that it is not incumbent on the applicant to demonstrate that the employee was intoxicated or that he was unable to perform his contractual duties at the time. That was not the allegation for which the employee was dismissed; he was dismissed for contravening the zero tolerance rule. Further, the applicant submits that the arbitrator misdirected himself in regard to the expert evidence that was led. In the award, the arbitrator found that there was no alcohol in the employee's system, based on his reference to the word "negative" indicated on the pathologist's report. However, Broodryk had testified that the word "negative" did not mean that the employee did not have alcohol in his blood; it meant no more than that the extraction procedure conducted on the blood sample could not indicate whether there was an alcohol level below 0.010g/dl. This meant that the employee could have had a blood alcohol level of anything between 0.000 g/dl and 0.009g/dl.

[12] Finally, the applicant submits that the arbitrator failed to consider the totality of the evidence and that had he done so, he would have arrived at a different decision. In particular, the applicant submits that it was required to do no more than proven the balance of probabilities that the employee committed the misconduct of which he was accused, namely, that he had a positive alcohol test result. Put another way, the applicant submits that if a trier of fact finds it more likely than not that something did take place, it is treated as having taken place and that on the relevant evidence that served before the arbitrator, the employee tested positive twice for alcohol presence when he blew into the first breathalyzer, he tested positive when he blew into the second breathalyzer and that the pathologist's report was not conclusive proof that there was no alcohol content in the employees blood. The pathologists report was thus irrelevant for the purposes of determining whether the employee committed the misconduct for which he was dismissed, the only conclusive evidence in this regard being the result of the first and second breathalyzer tests. In submission, the applicant avers that on the balance of

probabilities, it is highly improbable that two breathalyzer devices gave a total of three false positive results and only in respect of the employee. In respect of the pre-existing conditions that may influence false results as testified to by Broodryk, it is highly improbable that on that morning, of a total of some 1000 employees were tested, it was only the employee who would have eaten bread containing yeast, or would not have eaten that morning.

Analysis

[13] I deal first with the applicant's contention that the impugned award stands to be reviewed and set aside on the basis of the arbitrator's misconception of the nature of the enquiry.

[14] The principles to be applied are well-established. In *Head of the Department of Education v Mofokeng & others* [2015] 1 BLLR 50 (LAC), Murphy AJA said the following:

> The determination of whether a decision is unreasonable in its result is an exercise inherently dependent on variable considerations and circumstantial factors. A finding of unreasonableness usually implies that some other ground is present, either latently or comprising manifest unlawfulness. Accordingly, the process of judicial review on grounds of unreasonableness often entails examination of interrelated questions of rationality, lawfulness and proportionality, pertaining to the purpose, basis, reasoning or effect of the decision, corresponding to the scrutiny envisaged in the distinctive review grounds developed at common law, now codified and mostly specified in section 6 of the Promotion of Administrative Justice Act ("PAJA"); such as failing to apply the mind, taking into account irrelevant considerations, ignoring relevant considerations, acting for an ulterior purpose, in bad faith arbitrarily or capriciously etc. . The Court must nonetheless still consider with apart from the flawed reasons of or any irregularity by the arbitrator, the result could be reasonably reached in light of the issues and the evidence (at paragraph 31)

Further:

> 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 enquiry. 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 on the arbitrator's conception of the enquiry, the determination 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. The 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 objects of the LRA. Provided the right question was asked and answered by the arbitrator, a wrong answer will not necessarily be unreasonable. By the same token, and irregularity or error material to the determination of the dispute may constitute a misconception of the nature of the inquiry 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.

[15] As Myburgh and Bosch in Reviews in the Labour Courts (LexisNexis) 2016 at 77 suggest:

> This passage makes it clear that errors of fact and law may translate into a commissioner dismiss conceiving the inquiry, and that this leads to the losing parties being deprived of its right to a fair trial, which constitutes in itself a basis for review (without the reasonableness of the outcome having to be assailed). But in order for it to be held that the Commissioner misconceived the inquiry, it must be established that the errors of fact or law committed by him or her course the commissioner to divergent from the correct path and failed to address the question raised for determination.

[16] The references by the arbitrator to 'intoxication' aside, and appreciating the award as a whole, it does not seem to me that the arbitrator misconceived the nature of the enquiry that he was obliged to undertake. He states in paragraph 4 of the award that he is required to decide whether 'the employee breached

the rule or standard'. In his analysis of the evidence, the arbitrator records, at paragraph 29 of the award that the employee '*was charged and dismissed for having tested positive for alcohol on the 22nd February 2019 at the workplace'*. The arbitrator's finding, at paragraph 31 of the award, is stated in the following terms: '*It is my finding that there was no breach of the rule by the Applicant, as the laboratory results coupled with the expert testimony, confirm that he did not have alcohol in his blood*. All of these passages suggest that the arbitrator was fully aware that the employee had been dismissed for having alcohol in his blood, and not for intoxication, and that he was required to determine whether the employer had established this fact. The only finding made by the arbitrator is one that the employee did not have alcohol in his blood; there is no finding regarding intoxication. It cannot be said therefore that the arbitrator misconceived the nature of the enquiry, or that the applicant was denied a fair trial.

[17] Turning then to the applicant's submissions in regard to what it contends are reviewable irregularities on the part of the arbitrator and the unreasonableness of the result, I am unable to find any misdirection by the arbitrator in his assessment of the evidence. The evidence discloses that after the breathalyzer tests, the employee's blood sample, analysed by the Ampath Laboratory, produced a negative result. Broodryk, the applicant's expert witness, confirmed that the blood test was more reliable than any breathalyzer test and that the negative result of the blood test was correct. Broodryk also confirmed that a breathalyzer test is prone to producing false positive results. To the extent that the applicant challenges the arbitrator's interpretation of the evidence relating to the inability of any blood test to measure any reading below 0.009 g/dl, it does not necessarily follow, as the applicant submits, that the arbitrator misdirected himself in determining the balance of probability. It is not in dispute that Broodryk testified that the employees blood alcohol content could have been between 0.000 g/dl and 0.009 g/dl, given that a blood test could not test for blood alcohol content below 0.010 g/dl. On Broodryk's evidence, it was possible that the employee's blood alcohol level could have been 0.000 g/dl. The applicant bore the onus of establishing that there was alcohol in the employee's blood stream. The employee himself did not

contend that Broodryk's evidence definitively established that there was no alcohol in his bloodstream, but, by the same token, that evidence did not serve to prove that there was any alcohol in the employee's bloodstream. This evidence, coupled with the evidence by Broodryk that the sample provided by the employee produced a negative result, for any medical purposes, and that breathalyzer tests were capable of producing false positive results in specified circumstances, supports the arbitrator's assessment of the probabilities and also his finding. To the extent that the applicant now seeks to contend that it was improbable that the two breathalyzer devices would give three false breathalyzer results on the same date, there is no evidence that was presented by the applicant to show how many other employees were tested on that day, and how many positive or negative results were generated. The evidence that breathalyzer tests were prone to give false positive results was corroborated by Koekemoer, who confirmed that breathalyzer tests were less reliable than blood tests and substantiated the evidence that a false positive test might be generated under certain conditions. Specifically, there was no evidential basis to reject the evidence of Broodryk who stated that 'in my honest opinion, I think that the breathalyzer was false/positive'.

[18] In the absence of any reviewable irregularity in the arbitrator's assessment of the evidence, that ground for review stands to be dismissed. Further, on an assessment of all of the evidence, the outcome of the arbitration proceeding, i.e. that the applicant had failed to establish the misconduct for which the employee was dismissed, falls within a range of decisions to which a reasonable decision-maker could come on the available evidence. The application thus stands to be dismissed.

[19] In so far as costs are concerned, the court has a discretion to order costs according to the requirements of the law and fairness. The employee has been obliged to incur legal costs in his opposition to the present application in circumstances where he has been unemployed since his dismissal. The requirements of the law and fairness are best served by an order that will indemnify him against those costs, at least to the extent that an order for costs can do so.

I make the following order:

1. The application is dismissed, with costs.

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André van Niekerk

Judge of the Labour Court of South Africa

Appearances:

For the applicant: Mr M Khoza, ENS Africa Inc.

For the respondent: Mr H Wissing, Henk Wissing Attorneys