

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR 1725 / 2021

In the matter between:

VUSI ZIBULA

Applicant

And

CHROM-TECH HOLDINGS (PTY) LTD

First Respondent

SEBAKO A N.O.

Second Respondent

CCMA

Third Respondent

Heard: 13 March 2024

Delivered: 13 March 2024

EX – TEMPORE JUDGMENT

NORTON AJ

Introduction

1. The Applicant seeks to review and set aside the Second Respondent's Arbitration Award, dated 28 July 2021, issued under the auspices of the CCMA, under case number NWRB 844-21.

2. The arbitrator found that the dismissal of the employee was substantively fair.

3. The arbitrator found that the employee had breached a rule by embarking on leave which was unauthorised. The employee was absent without permission from 26 January 2021 to 19 February 2021.

4. In the award he writes,

“There is only one issue that is placed in dispute which is whether there has been any breach of the rule. Regrettably the Applicant did not submit anything to rescue his case. What is fatal to his case is that he is the supervisor and disputed the policy of the Respondent...(The policy) clearly states that leave must be approved. The Applicant conceded that he went on leave without being approved. I find the Applicant breached the rule...”¹

5. The arbitrator then refers to the oft cited *De Beer Consolidated Mines Limited v CCMA and others*, where Judge Conradie says,

“it would be in my view difficult for an employer to re-employ an employee who has shown no remorse, Acknowledgement of wrong doing is the first step towards rehabilitation. In the absence of a recommitment to employer’s workplace values, an employee cannot hope to re-establish the trust which he himself has broken ...”

The review challenge

6. The Applicant argues that the award should be reviewed and set aside because the arbitrator was biased, interfered with cross examination, rushed the legal representative, and was generally rude during the proceedings.²

7. Furthermore the Applicant states that the arbitrators misconstrued the task before him, and that was not only to ask whether there had been a breach of a workplace rule, but also whether a breach warranted dismissal.³

¹ Paragraph 20 (1)

² Heads of Argument, paragraphs 21. To 2.4

³ Paragraph 2.7

8. The Applicant then points to ten years of service, that he had applied for leave and was told the day before he was to depart that it was not granted. He also points to the Covid context in which it was important to see his wife and family, as he himself had just come out of isolation.

9. Finally the Applicant argues that he was entitled to annual leave as per the Basic Conditions of Employment Act, 1997 (the “BCEA”).⁴ Let me simply put that point to bed by confirming that according to section 20(10) of the BCEA, annual leave may be taken by agreement between the employee and the employer, and if not agreement at a time convenient to the employer. The time the employee wanted to embark on leave was not convenient to the employer.

10. Moving to the other grounds of review I must mention that whilst I agree with the Applicant that the arbitrator did descend into the arena and was abrasive, I do not think that compromised the overall ventilation of the facts – which were mainly common cause between the parties. I too am sympathetic to the Applicant’s personal family demands.

11. Ultimately though the facts which clearly showed that the employee had breached a workplace rule. The enquiry doesn’t however end there. The issue then becomes whether dismissal was a fair sanction for this transgression.

12. In the hearing before me, the legal representative argued that the sanction of dismissal was too harsh noting the mitigatory elements summarised above. He pointed me to the case of *Pick n Pay Retailers v SACCAWU obo Mzazi*⁵ in which the Labour Appeal Court found that the dismissal of an employee for unauthorised absence was unfair and ordered reinstatement.

⁴ Paragraph 2.19

⁵ Case no. ca 19 / 2015

13. I have considered that case, and as compelling as it may appear to be, find the facts in the case before me distinguishable in that the employee was a supervisor, and knew that there had to be a replacement to replace him whilst he was on leave. That was a standard practice, noting his seniority. He was informed that the two potential replacements had become infected with Covid and that his leave had not been approved.⁶ Despite this reasonable justification for refusing him leave, he left anyway for 13 days.

14. The arbitrator was alive to this evidence, and writes in his award, “...on the 25 January 2021 the teams arrived from isolation and phoned the Applicant while at the hospital doing the test and told him his leave is not yet approved and the person who was supposed to replace him while on leave is still in isolation.”⁷

Analysis

15. The Applicant breached a workplace rule – he went on leave without permission. He did so knowingly. The rule is a reasonable one, and in any event accords with the BCEA. In aggravation is the fact that no replacement could be arranged because two of his colleagues had covid and were in isolation.

16. I find that the arbitrator’s reasoning and ultimate decision lies within the spectrum of reasonableness. It is trite that the Constitutional Court has postulated the overarching reasonableness test when assessing whether an award is vulnerable to review. In *Sidumo & another v Rustenburg Platinum Mines Ltd & others*⁸ the test is expressed as follows, “Is the decision reached by the commissioner one that a reasonable commissioner could not reach?”

17. In my mind the decision reached by the arbitrator is not one that a reasonable commissioner could not reach, for the reasons expressed above. I therefore find that

⁶ Transcript pg 24 onwards.

⁷ Paragraph 10

⁸ 2007 12 BLLR 1097 (CC)

the arbitrator did not commit a reviewable defect as contemplated in section 145 of the LRA. In the circumstances I make the following order:

Order

18. The review application is dismissed.

19. No order as to costs.

D. NORTON

Acting Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant:	Adv Ramcharethar
Instructed by:	Nishlan Moodley Attorneys
For the Respondent:	Adv Lennox
Instructed by	Beech Veltman Inc