

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

**Not reportable
Case No: JR 2118/2021**

In the matter between:

PENBRO KELNICK (PTY) LTD

Applicant

and

**COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION**

First

Respondent

DIALE NTSOANE N.O

Second Respondent

VHUTSHILO EPHRAIM RAMPHABANA

Third Respondent

Heard: 31 August 2023

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email and publication on the Labour Court's website. The date and time for hand-down is deemed to be on 10 April 2024

JUDGMENT

TLHOTLHALEMAJE, J

Introduction:

- [1] Before the Court are two applications. The first is an application by the applicant ('Penbro') in which it seeks an order reviewing and setting aside the arbitration award issued by the second respondent (Commissioner), acting under the auspices of the second respondent, the Commission for Conciliation Mediation and Arbitration (CCMA). In the award, the Commissioner had found that the dismissal of the third

respondent (Mr Ramphabana), was substantively unfair, and had ordered his retrospective reinstatement, together with back-pay in the amount of R284 569.68.

- [2] In the second application, Ramphabana seeks an order in terms of Rule 11 of the Rules of the Court, dismissing Penbro's review application on account of lack of timeous prosecution. Both applications are opposed.

Background:

- [3] Ramphabana was employed by Penbro as a Stock Controller since January 2018. He was dismissed on 18 June 2020 following a disciplinary enquiry into allegations of misconduct. The allegations arose at the height of the Covid-19 pandemic in June 2020. It was common cause that Ramphabana was issued with a final written warning on 8 June 2020 for failing to wear his face mask at the workplace. He was again charged with *'Dishonesty in that he lied to a Senior Manager, namely the Production Manager regarding the wearing of Covid-19 PPE'*.
- [4] Having referred an alleged unfair dismissal dispute to the CCMA, and when attempts at conciliation failed, the matter came before the Commissioner, resulting with the arbitration award which is the subject of review.

The Rule 11 application:

- [5] Ramphabana launched the Rule 11 application on 20 February 2023. The basis of the application was that Penbro failed to request a set-down date from the Registrar once the pleadings were closed. Penbro submitted that the Rule 11 application lacked merit in that the index and Rule 22B notice in terms of which a set-down date was requested was served on 22 April 2022.
- [6] I agree with the submissions made on behalf of Penbro that the Rule 11 application lacks merit. Once a party has filed a Notice in terms of Rule 22B of the Court's rules and had in that notice requested a set-down date, that party cannot be accused of not acting on its review application thereafter. Matters are allocated set-down dates by the office of the Registrar once all the requirements under the rules of the Court are met. Thus, nothing more could have been required of Penbro, particularly since there were no other issues raised regarding its compliance with any time frames set out in Rule 7A read with the provisions of paragraphs 11 and 16 of the Practice Manual of this Court.
- [7] To the extent that Ramphabana complained about the delays in the filing of the replying affidavit in the review, Penbro is correct in reference to paragraph 11.4.2 of

the Practice Manual¹, that in the absence of a Notice of Objection within ten days of receipt of the replying affidavit, Ramphabana lost the right to object to the late filing of the replying affidavit. It follows that the Rule 11 application ought to be dismissed.

The merits of the review application:

(i) *The evidence before the Commissioner:*

- [8] The background leading to the dismissal of Ramphabana is largely uncomplicated. Evidence on behalf of Penbro was presented by its Industrial Relations Officer, Mr Gerrie van Rensburg; its Operations Manager, Mr Chris Helberg; and Mr Sydwell Ramothwala. Ramphabana was the only witness in his case.
- [9] The incident leading to Ramphabana's dismissal took place on the Friday of 5 June 2020 during the height of Covid-19 pandemic. Helberg was performing his rounds in the factory and had noticed Ramphabana at his desk in the company of Ramothwala and another employee, Marima. Ramphabana did not have his face mask on.
- [10] Helberg confronted Ramphabana and asked him why he did not have his face mask on. Helberg's contention was that Ramphabana lied to him in front of subordinates, as he told him that he was eating because he had a chronic illness, and yet there was no food in front of him. Helberg then told him to clock out and go home. Helberg conceded that in his exchange with Ramphabana, he told him that he (Ramphabana) was 'talking shit'. He however alleged that Ramphabana came back to the factory at some point during that day to request his letter of dismissal and had also insulted him.
- [11] At the time of the incident, Van Rensburg was not at the factory. Ramphabana had sent him an email in which he complained that Helberg had insulted him and ordered him to leave the workplace and not to return. Van Rensburg's response was to tell Ramphabana that he was not dismissed and must return to work. He further advised him that he should lodge a formal grievance against Helberg.
- [12] At some point on the date of the incident, van Rensburg was then contacted by an official from the Human Resources Department who informed him that Ramphabana was seen not wearing a mask at work. Van Rensburg had then informed the official

¹ Paragraph 11.4.2 of the Practice manual reads;

'Where the respondent or the applicant has filed its opposing or replying affidavits outside the time period set out in the rules, there is no need to apply for condonation for the late filing of such affidavits unless the party upon whom the affidavits are served files and serves a Notice of Objection to the late filing of the affidavits. The Notice of Objection must be served and filed within 10 days of the receipt of the affidavits after which time the right to object shall lapse.'

that other employees were issued with final written warnings for similar infractions, and that the same warning should be issued to Ramphabana.

- [13] On 8 June 2020, van Rensburg was contacted by the HR Manager and informed that Helberg had complained that Ramphabana had lied to him about why he was not wearing a mask, and that this happened in front of his subordinates. Van Rensburg's response was that in that case, a disciplinary enquiry should be instituted against Ramphabana. Ramphabana reported for duty on 8 June 2020 and was promptly issued with a copy of a final written warning. A copy of a notice to attend a disciplinary enquiry also followed.
- [14] Van Rensburg further testified that Helberg was upset with Ramphabana for not wearing his mask especially since other employees who had tested positive for Covid-19 were being sent home. Van Rensburg accepted that Helberg in his exchange with Ramphabana, had said something to the effect like 'shit' to him. In the same exchange, Ramphabana had allegedly lied to Helberg about the reason why he was not wearing his mask and said something to the effect that he made a 'mistake'. According to van Rensburg, the offence of not wearing a mask was serious, but was compounded by Ramphabana's lies about why he did not wear a mask. He contended that although Ramphabana had said he was eating when confronted by Helberg, this was not the case.
- [15] Ramothwala confirmed that Helberg had approached Ramphabana in their presence when they were at his desk. Helberg had asked Ramphabana the reason he did not have his mask on and the latter's response was that he was eating. Ramothwala however testified that there was no food on the desk at the time, and it is at that point an exchange took place between Ramphabana and Helberg.
- [16] Ramphabana's evidence was that prior to the incident, he had heard from his co-employees that Helberg had informed them that he (Ramphabana) had tested positive for Covid-19 when that was not true. He then sent an email to van Rensburg to complain about Helberg. Van Rensburg informed him that he should refer the matter to the CCMA if he was aggrieved.
- [17] Ramphabana confirmed that Helberg had approached him at his desk when he did not have his mask on. When Helberg enquired why he did not have his mask on, he had explained to him that he was taking his medication for an injury he sustained on duty and having his meals. Helberg's response was to ask him why he was 'doing the nonsense' of not wearing a mask. He had then put back his mask, and Helberg

further told him that he was 'talking nonsense and doing shit', and that he should take his things and leave the factory and not to come back.

- [18] He confirmed that he sent van Rensburg an email about what Helberg had said to him and was issued with a final written warning on 8 June 2020, and a copy of a notice to attend a disciplinary enquiry on 9 June 2020.
- [19] He had denied that he had refused to put on his mask when Helberg told him to do so and testified that when he did not have his mask on, he had taken his medication and was eating his food which he had in his drawer. He had denied having lied to Helberg or insulted him, and that the latter had instead used the 'f word' when addressing him. He contended that if he had indeed insulted him, he (Helberg) would have laid another charge against him.

(ii) *Commissioner's findings:*

- [20] The Commissioner accepted as being common cause that Helberg found Ramphabana on his desk without a face mask. At the time, there were the latter's subordinates with him. The Commissioner accepted that during the exchange, Helberg told Ramphabana that he was causing 'shit' and had ordered him to go home.
- [21] The Commissioner concluded that Penbro failed to prove that Ramphabana was dishonest when he told Helberg that at the time he was found without a mask, he had just finished eating and taken his tablets, and it was irrelevant whether there was no food visible on Ramphabana's desk at the time. Against these and other considerations, the Commissioner concluded that Ramphabana ought to be reinstated.

(iii) *Grounds of review and evaluation:*

- [22] Amongst the grounds of review raised was that the Commissioner did not apply his mind to the provisions of Rule 25(6)² of the CCMA Rules when granting

² Which provides;

'Despite the provisions of this Rule, but subject to the provisions of sub-rule (1)(f), the commissioner may, on application brought in accordance with rule 31, allow a person not contemplated in sub-rule (1) to represent a party at arbitration proceedings before the commission, after considering-

- (a) whether it is unreasonable to expect the applicant party to deal with the dispute without representation, after considering the factors set out in sub-rule 1(c)(ii)(a) to (d);
- (b) the reason why a person contemplated in Rule 25(1)(b) cannot represent the applicant party, which includes affordability, if applicable;
- (c) the ability of the proposed representative to meaningfully represent the applicant;
- (d) whether the proposed representative is subject to the oversight and discipline of a professional or statutory body;

Ramphabana the right to be represented by a person not contemplated under Rule 25(1)(b). An application in terms of Rule 31 was filed by a Mr Llala Phoshoko, a chairperson of a non-profit organisation (Thusanang Education and Legal Centre), to represent Ramphabana, which application Penbro had opposed.

[23] It is apparent that the Commissioner had regard to the provisions of Rule 25(6), which allowed representation by persons other than those contemplated in Rule 25(1)(b). The Commissioner further had regard to the parties' comparative abilities and the prejudice to them should the application not be granted. He concluded that Ramphabana was a lay person, whilst Penbro was represented by van Rensburg, who was a seasoned industrial relations officer. The Commissioner further accepted that Phoshoko belonged to a registered NGO which fell under the oversight of government. He concluded that it would thus be fair to allow Phoshoko to represent Ramphabana.

[24] Penbro contends that the Commissioner failed to apply his mind to the requirements to be met, and also failed in his duties by assessing only two factors in allowing representation. It was further contended that Phoshoko was disqualified as he had admitted that he was remunerated 'in some fashion by Ramphabana'. It is not clear where the latter contention arises from, as it is not evident from the Rule 31 application and answering affidavit that were before the Commissioner.

[25] Regarding the ruling, it is my view that there is no basis for a finding that by allowing Phoshoko to represent Ramphabana, this had rendered the award reviewable or that the ruling was wrong. The mere fact that the Commissioner did not address all the requirements under Rule 25(6) does not render the ruling wrong. Rule 25(6)(a) in any event enjoins a commissioner to also consider whether it is unreasonable to expect the applicant party to deal with the dispute without representation, after considering the factors set out in rule 25(1)(c)(ii)(a) to (d). There is no requirement that all these factors must be considered. Penbro does not indicate why in view of the conclusions made regarding the comparative abilities of the parties and any prejudice to them, the Commissioner could have been wrong. It follows that there is no merit that the Commissioner's ruling on representation was wrong or that he had exceeded his powers.

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- (e) whether the proposed representative will contribute to the fairness of the proceedings and the expeditious resolution of the dispute;
 - (f) prejudice to the other party; and
 - (g) any other relevant factors.'

- [26] Regarding the merits, the gist of the matter according to the submissions made on behalf of Penbro, was whether Ramphabana had lied to Helberg when he was questioned as to the reason, he did not have his mask on. To the extent that the Commissioner had found in the negative, it was submitted that this made the award reviewable, as no reasonable decision maker in his position would have come to that conclusion.
- [27] The test on review is well-known as buttressed in *Duncanmec (Pty) Limited v Gaylard NO and Others*³. The enquiry into the reasonableness of a decision involves consideration of the merits, and it has been said that unreasonableness would warrant interference only if the impugned decision is of the kind that could not be made by a reasonable decision-maker. It was added that is not the task of reviewing Court to evaluate the reasons provided by the arbitrator with a view of determining whether it agrees with them. The principal enquiry is whether the award itself meets the requirement of reasonableness, in the sense that there are reasons supporting its conclusions.
- [28] In *Makuleni v Standard Bank of South Africa Ltd and Others*⁴, it was further reiterated that;
- ‘The court asked to review a decision of commissioner must not yield to the seductive power of a lucid argument that the result could be different. The luxury of indulging in that temptation i.e. reserved for the court of appeal. At the heart of the exercise is a fair reading of the award, in the context of the body of evidence adduced and an even-handed assessment of whether such conclusions are untenable. Only the conclusion is untenable is a review and setting aside warranted’.
- [29] Having had regard to the evidence presented before the Commissioner and his conclusions in that regard, it is my view that Penbro has in the light of the grounds upon which a review is sought, clearly blurred the distinction between an appeal and a review, as it is apparent that it seeks that the Court should make a finding that the Commissioner ought to have come to a different conclusion, because it does not agree with the conclusions reached in the award. Penbro went at length in dissecting each of the witnesses’ evidence in finding fault with the conclusions made by the Commissioner, and why it ought to be said that his conclusions are unreasonable.

³ [2018] ZACC 29; 2018 (11) BCLR 1335 (CC); [2018] 12 BLLR 1137 (CC); 2018 (6) SA 335 (CC); (2018) 39 ILJ 2633 (CC) at paras 41 – 43.

⁴ [2023] ZALAC 4; (2023) 44 ILJ 1005 (LAC); [2023] 4 BLLR 283 (LAC) at para 4.

This approach is untenable in that the review Court is not required to take into account every factor individually, consider how the arbitrator treated and dealt with each of those factors, and determine whether a failure by the arbitrator to deal with it is sufficient to set the award aside. This piecemeal approach is improper in that the task of the reviewing Court is to consider the totality of the evidence and decide whether the decision made by the arbitrator is one that a reasonable decision maker could make, based on the evidence adduced⁵.

- [30] The facts of this case as I have already indicated, are largely uncomplicated to the extent that it was common cause that Ramphabana was found without a mask. The real issue contrary to Penbro's contentions, is not simply whether Ramphabana had lied when asked the reason why he did not have his mask on. The principal enquiry is whether from an assessment of the facts as a whole, it can be said that there was a fair reason to dismiss him, and whether on those facts, it can be said that the Commissioner's conclusions fall outside a band of reasonableness⁶.
- [31] In this case, and without being bogged down by a conflation of issues as both the Commissioner and Penbro had done, it was common cause that Ramphabana was seen without a face mask at the workplace on 5 June 2020. For these types of transgressions, it was common cause from the evidence that the offender would be issued with a final written warning. A final written warning was indeed issued to Ramphabana on 8 June 2020.
- [32] To the extent that Ramphabana was issued with a final written warning for that transgression, it is accepted from a long line of authorities as referred to *SAMWU obo A N Malatsi v South African Local Government Bargaining Council and Others*⁷, that if an employee has already been disciplined for an offence, it does not preclude an employer from holding another disciplinary enquiry and imposing a more severe sanction or dismissing the employee for the same offence, arising from the same set

⁵ *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and others* [2013] ZALAC 28; [2014] 1 BLLR 20 (LAC); (2014) 35 ILJ 943 (LAC) at para 13

⁶ See *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] ZACC 22; [2007] 12 BLLR 1097 (CC); 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 (CC); 2008 (2) BCLR 158 (CC) at para 79, where it was held;

'...a commissioner has to determine whether a dismissal is fair or not. A commissioner is not given the power to consider afresh what he or she would do, but simply to decide whether what the employer did was fair. In arriving at a decision a commissioner is not required to defer to the decision of the employer. What is required is that he or she must consider all relevant circumstances.'

⁷ [2023] ZALCJHB 63; [2023] 6 BLLR 581 (LC),

of circumstances. In the end however, it is fairness that will determine whether the employer is justified in instituting a second hearing on the same set of facts⁸.

- [33] From the facts, the Court will accept that when Van Rensburg on 5 June 2020 instructed an official in the HR section to issue a final written warning to Ramphabana for not wearing his face mask, it must have been Helberg that had laid a complaint. At that stage Helberg must have known of the details of the offence when he reported it to HR. As to the reason he did not disclose the details at that time in view of the fact that he considered the offence serious because Ramphabana allegedly lied to him is not clear.
- [34] However, even if after the final written warning was issued, Helberg had suddenly felt compelled to seek a harsher penalty against Ramphabana on the basis that the latter's explanation for not wearing his face mask was untruthful, the question is whether upon a consideration of fairness, a second hearing was justified. The enquiry however does not end at that point, but is extended to whether arising from the second enquiry where it was justified, a sanction of dismissal was appropriate.
- [35] It is further apparent from the facts that during Helberg's exchange with Ramphabana, he was clearly upset as attested to by Van Rensburg. It is indeed understandable that going back in time at the height of the pandemic, any person would have been upset with anyone without a face mask at the workplace or any public places. What is however not acceptable was for a senior manager in the position of Helberg to express that anger to any employee in unsavoury terms accompanied by invectives as he had done. Equally so, if indeed Ramphabana had insulted Helberg as he had alleged, it is inexplicable as to the reason he had not laid a further charge, as this was even more serious.
- [36] Against the above observations, and as I understood the overall evidence from the record, even if the Court were to accept that Ramphabana had admitted that he made a mistake in not having his face mask on, or had proffered an explanation which was considered as false and necessitating a further enquiry, this on its own did not justify a harsher sanction than he had already received.
- [37] It has long been stated in *De Beers Consolidated Mines Ltd v CCMA & others*⁹, that a dismissal should not be an expression of moral outrage or an act of vengeance, but rather should be a sensible operational response to risk management in the

⁸ At para 32.

⁹[2000] 9 BLLR 995 (LAC) at para 22.

enterprise. Furthermore, inasmuch as Ramphabana was charged for dishonesty in that he lied to Helberg, it has also been said in *De Beers* that the seriousness of dishonesty, and whether it can be classified as gross or not, depends not only or even mainly on the act of dishonesty itself, but on the way in which it impacts on the employer's business. In other words, it does not imply that every act or misconduct involving dishonesty will lead to a dismissal. Worst still, a misconduct cannot be gross simply based on the subjective opinion or feelings of a manager. The gross nature of misconduct necessitating a dismissal can only be gleaned from the objective facts.

- [38] In the present instance, even if the Court were to accept that Ramphabana had lied about the reason why he did not have his face mask on and that this justified a second enquiry, it is my view that a sanction of a dismissal was clearly an expression of moral outrage and vengeance, rather than a sensible operational response to risk management at the workplace. This was so on the basis of the common cause facts that Helberg was upset at Ramphabana to the extent that not only did he address him in unsavoury language, but he also told him that he should leave the workplace and not to come back.
- [39] Penbro's initial response to the offence was to issue a final written warning for the offence, which appeared to be its consistent approach for such offences at the workplace. The mere fact that Helberg was upset at the time and unhappy with the sanction for whatever reason, could not have made the alleged misconduct of dishonesty gross, to attract the ultimate sanction. Equally so, the misconduct in question cannot be said to have harmed Penbro in any manner since employees were issued with final written warnings and permitted to return to work, notwithstanding the dangers of Covid-19 pandemic at the time. One cannot speak of Penbro's decision to dismiss being an appropriate response to an operational risk posed by Ramphabana.
- [40] Penbro might be aggrieved with the reasoning of the Commissioner and the manner with which he had treated the evidence. However, in the context of the body of evidence and an even-handed assessment of the award, the Court is satisfied that the ultimate outcome reached by the Commissioner falls within a band of reasonable decisions that another commissioner would have arrived at. It follows that the review application ought to be dismissed.

[41] In regard to costs, the parties sought costs orders against each other. In the light of the conclusions reached in this judgment and further having had regard to the requirements of law and fairness, it is my view that each party must be burdened with its own costs.

[42] Accordingly, the following order is made:

Order:

1. The third respondent's Rule 11 application is dismissed.
2. The application to review and set aside the arbitration issued by the second respondent under case number GATW7036 – 20 is dismissed.
3. Each party is to pay its own costs in respect of both the Rule 11 and review applications.

Edwin Tlhotlhemaje
Judge of the Labour Court of South Africa

REPRESENTATION:

Adv. W.P. Bekker, instructed by Da Silva Attorneys

For the Third Respondent:

Adv. G.N. Nsele, instructed by
Ernest Nemusimbori Attorneys Inc