

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR 2987/2019

In the matter between:

**SOUTH AFRICAN CONTAINER DEPOTS (PTY) LT
t/a BIDVEST SACD**

Applicant

and

**THE COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

First Respondent

BELLA GOLDMAN N.O

Second Respondent

SATAWU obo NDWANDWE & OTHERS

Third Respondent

Heard: 13 March 2024

Delivered: 03 May 2024

Summary: The commissioner's award, finding the dismissal of four SATAWU members substantively unfair, is reasonable and confirmed – commissioner's award finding that the members be reinstated retrospectively with backpay is an irregularity and unreasonable, thus reviewed and set aside – All relevant parts of the record to be availed to a reviewing Court.

REASONS FOR ORDER

SHABA, AJ

Introduction

[1] This is a review application that was heard unopposed on 13 March 2024.

- [2] The Court reserved its order on 13 March 2024 and handed it down on 14 March 2024 instead. Notwithstanding the date of the order having been stated as the former date, it has to be deemed to be on the latter date.
- [3] The order relevant herein, is quoted and referred to in paragraph 20 hereunder.
- [4] Subsequent to the aforementioned order, the Applicant requested reasons for such order, which reasons follow, after outlining the brief and relevant background.

Background

- [5] SATAWU's (Second Respondent) members embarked on a protected strike on 1, 2 and 3 November 2017.
- [6] There were no picketing rules agreed to at the commencement of the protected strike on 1 and 2 November 2017. Such rules were agreed to and became operational only on 3 November 2017.
- [7] Several employees of the South African Container Depots (Pty) Ltd t/a Bidvest SACD (Applicant) were charged *inter alia* with the common charge of unlawful blockage (blocking) of the main gate of the Applicant's premises during the protected strike aforementioned.
- [8] In the event that any of the Applicant's employees was found guilty of only the common charge, such employee would be dismissed if they had previously received a final warning as a result of participation in an unprotected go-slow in August 2017.
- [9] 12 of the Applicant's employees were charged with misconduct relating to the protected strike of 1 to 3 November 2017 and subjected to an internal disciplinary hearing. These employees included: Eric Mostert; Alfred Mukheli; Lucas Malope; Thokozane Ndwandwe; David Ndwandwe; Elias Ravele;

Henry Moshato Simphiwe Masinga, Paulos Koboka, Dan Shabangu, Bheki Msimango and Nkosinathi Cele.

- [10] Three of the twelve employees, Elias Ravele, Henry Moshato and Simphiwe Masinga were found guilty in the disciplinary hearing of the common charge of blocking and dismissed as they already had a final written warning for embarking on an unprotected go-slow during August 2017. Employees who were found guilty of only blocking, were given a final written warning during the disciplinary hearing.
- [11] Four other employees, Eric Mostert, Lucas Malope, Thokozane Ndwandwe and David Ndwandwe, were found guilty of the common charge of blocking and the charge of intimidation and were dismissed.
- [12] The remaining four other employees, the subject matter of these review proceedings, were subjected to a disciplinary hearing as hereunder and dismissed.
 - 12.1 Paulos Koboka (Koboka) was charged with blocking the main gate and for gross insubordination in that he disrespected an instruction of a senior manager of the Applicant's management. He was found guilty in the disciplinary hearing and dismissed.
 - 12.2 Nkosinathi Cele (Cele) was charged with blocking the main gate, intimidation and attempting to block a fellow colleague from entering the Applicant's workplace. He was found guilty in the disciplinary hearing and dismissed.
 - 12.3 Bheki Msimango (Msimango) was charged with blocking the main gate, intimidation and attempting to block a fellow colleague from entering the Applicant's workplace. He was found guilty in the disciplinary hearing and dismissed.

12.4 Dan Shabangu (Shabangu) was charged with blocking the main gate, intimidation and attempting to block a fellow colleague from entering the Applicant's workplace. He was found guilty in the disciplinary hearing and dismissed.

[13] The Third Respondent referred an unfair dismissal dispute to the First Respondent (CCMA) on behalf of its twelve members for conciliation.

[14] Failing conciliation, the unfair dismissal dispute was referred to the CCMA for arbitration, which commenced in July 2018 and concluded in November 2019.

[15] The Second Respondent issued an award dated 4 December 2019, which is a subject matter of these review proceedings.

[16] The Second Respondent found the dismissal of Thokozane Ndwandwe, David Ndwandwe, Eric Mostert and Lucas Malope to be substantively fair. Nothing turns on this finding as these persons do not form the subject matter of these review proceedings.

[17] The Second Respondent further found that the dismissal of the four employees (i.e. Koboka, Cele, Msimango and Shabangu), who form the subject matter of these review proceedings, was substantively unfair.

[18] Although the Third Respondent filed its notice of the intention to oppose this review application, no answering affidavit to the Applicant's review application was filed in this Court up to 13 March 2024, when this matter was heard unopposed.

[19] Given the aforementioned unopposed phenomenon, nothing turns on the change of both parties' legal representatives before the unopposed hearing of this review application on 13 March 2024.

[20] It was against the above relevant and brief background that the Court, after having reserved its order on 13 March 2024, delivered such order on 14

March 2024 with an errata date of the order being 13 March 2024, which is quoted and referred to hereunder, and for which reasons have since been requested by the Applicant:

- ‘1. The findings by commissioner Bella Goldman in the matter between SATAWU obo Ndwandwe Thokozane and 7 others v Bidvest SACD (Pty) Ltd issued on 4 December 2019 under case no GAJB 3887-18 that the dismissals of Dan Shabangu, Nkosinathi Cele, Bheki Msimango and Paulos Koboka are substantively unfair, are confirmed, but commissioner’s orders in respect of the retrospective reinstatement and the payment of backpay from the dates of the dismissal of these persons are reviewed and set aside and substituted with the following order:

“Dan Shabangu, Nkosinathi Cele, Bheki Msimango and Paulos Koboka are reinstated in their former positions held with Bidvest SACD (Pty) Ltd (“Bidvest”) from the date of court order without backpay and must report for duty with Bidvest within (7) days from the date of this court order.”

2. No order as to costs’

[21] I now turn to the reasons for the aforementioned order as further hereunder.

Reasons for upholding the finding that the dismissal is substantively unfair

[22] During the unopposed review proceedings of 13 March 2024, the Applicant handed over a draft order, which contained *inter alia*, an alternative to paragraph 1 contained therein, with a minor typo of the word “fair” which was amended by the Court to “unfair” contained therein, and which has since been made the Court order, relevant herein.

[23] With or without the Applicant’s draft order aforementioned, my order remains the same for reasons advanced further hereunder.

[24] The guidelines for the determination of substantive fairness by Commissioners/arbitrators who deal with arbitrations in terms of the Labour Relations Act¹ (LRA) are clearly outlined in the Code of Good Practice contained in schedule 8 of the LRA. Which states that:

‘7. Guidelines in cases of dismissal for misconduct. —Any person who is determining whether a dismissal for misconduct is unfair should consider—

- (a) whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the workplace; and
- (b) if a rule or standard was contravened, whether or not—
 - (i) the rule was a valid or reasonable rule or standard.
 - (ii) the employee was aware, or could reasonably be expected to have been aware, of the rule or standard;
 - (iii) the rule or standard has been consistently applied by the employer; and
 - (iv) dismissal with (sic) an appropriate sanction for the contravention of the rule or standard.’

[25] There is a rational connection between the evidence that was before the Second Respondent and her finding that the dismissal of Cele, Shabangu, Msimango and Koboka was substantively unfair, as such reasonable finding,

¹ Act 66 of 1995, as amended.

is anchored in the guidelines set out in the Code of Good Practice aforementioned.

- [26] That the above is the case, is *inter alia* bore, by paragraph 62 of the Second Respondent's award, wherein it is stated that:

'In order for dismissal for misconduct to be substantively fair the respondent must prove that: there was a rule; the rule was reasonable: the rule was known to the applicant or should have been known. The rule was broken by the applicant and that dismissal was appropriate sanction for the breach of the rule.'

- [27] Based on the above, the Second Respondent did not misconceive the nature of the enquiry that was before her, as she dealt with the determination of the substantive fairness of the four employees aforementioned, within the four corners of the substantive fairness guidelines.

- [28] In line with these guidelines, the Second Respondent made a reasonable finding *inter alia* that the Applicant's had a rule in place, that the employees that appeared before her were aware of the rule or could have reasonably been expected to have been aware of the rule and that such fact was not in dispute.

- [29] The Second Respondent's finding, relating to the need to attach weight to the fact that at the time of the commencement of the protected strike, on 1 and 2 November 2017 there were no picketing rules agreed to, that the employees were aware of or ought to have been aware of as such picketing rules were only in place on 3 November 2017, is reasonable, in line with the guidelines in the Code of Good Practice. Moreover, that the Second Respondent's further finding in this regard is that there were no further acts of misconduct after 3 November 2017 by the employees that were before her.

- [30] The Second Respondent's finding that all the employees that appeared before her, including the four that are the subject matter of these review proceedings,

were guilty of blocking as charged, based on the video footage that she had seen (and had described as clear) and the total evidence before her, is one that any reasonable decision maker would have arrived at.

- [31] The Second Respondent's finding that the dismissal of the Applicant's employees, Simphiwe Masinga, Elias Ravele and Henry Moshato for blocking only, was substantively fair because, they had a prior final written warning for partaking in a go-slow in August 2017, is also that of a reasonable decision maker.
- [32] The Second Respondent's finding that the employees, Thokozane Ndwandwe, David Ndwandwe, Eric Mostert and Lucas Malope, were guilty of intimidation in addition to blocking and that their dismissal was substantively fair, is equally that of a reasonable decision maker.
- [33] The Second Respondent's findings, that the three employees Shabangu, Msimango and Cele contravened the Applicant's rule for blocking only and not the rule in respect of intimidation, is in line with the guidelines as it was based on the video footage that she saw and the evidence before her, and that their dismissal is substantively unfair because, they ought not to have been dismissed for intimidation, is one that a reasonable decision maker could have reached.
- [34] As set out *supra*, the Second Respondent found that the dismissal of Shabangu was substantively unfair. There is a rational connection between the above finding and the fact that Shabangu, who was alleged to have intimidated Victor Mapongo, could not be found guilty of any such intimidation as the latter did not refer in his evidence to being intimidated by the former in the arbitration proceedings. Curiously, such aspect was not even addressed in closing arguments.
- [35] The Second Respondent's further finding that, notwithstanding the fact that arbitration proceedings are a hearing *de novo*, and that the new evidence that the Applicant adduced against Shabangu at arbitration proceedings about

intimidation was not the reason why such employee was dismissed, and could therefore not be taken into account at such arbitration proceedings, is one that a reasonable decision maker would have reached as it is in line with section 188(1) of the LRA, which is dealt with infra

[36] In arriving at the finding that the new evidence against Shabangu was not the reasons why the employee was dismissed, so much so that the procedural and substantive fairness of such dismissal, could be determined at the arbitration stage, this finding is in line with section 188(1) of the LRA which states that:

‘188. Other unfair dismissals

(1) A dismissal that is not automatically unfair, is unfair if the employer fails to prove –

(a) that the reason for dismissal is a fair reason –

(i) related to the employee's conduct or capacity; or

(ii) based on the employer's operational requirements; and

(b) that the dismissal was effected in accordance with a fair procedure.’

[37] In keeping with the principle that arbitration proceedings are hearings *de novo*, the Second Respondent permitted the Applicant to adduce new evidence about the alleged intimidation despite same not being adduced at the internal disciplinary hearing against Shabangu. The Second Respondent's decision, after listening to the new evidence was that such evidence “*would be new charges*”, instead of stopping at having stated that “*the Applicant was not, as stated above, dismissed for intimidating those employees*”, such

decision may well be an error. However, such error does not vitiate the award if the full conspectus of the total evidence, that was before her, is taken into account.

[38] In *NUM and another v Samancor Ltd (Tubatse Ferrochrome) and others*², it was held that an error by an arbitrator, is not in itself, a proper basis for reconsidering an award.

[39] In *Francis Baard Municipality v Rex and others*³, It was held that:

‘[24] The grounds of review are, *inter alia*, that the factual findings of the Commissioner did not correspond with the evidence and documents placed before the Commissioner, and that he did not apply his mind properly and rationally to the fact and the law.

[25] The court should ideally see all the material that was before the decision-maker so that it can fully and fairly deal with the grounds of review especially when the grounds of review are dependant [sic] on the factual findings of the Commissioner. It goes without saying that there can, in some cases, be no full and fair review if all the evidence is not before the court.’

[40] Shabangu’s disciplinary notice (or charge sheet) is not attached to the record to enable this Court on review to determine what precisely Shabangu was charged with. Further, the handwritten notes of the Second Respondent, which are not that much legible and helpful, have not been transcribed. Needless to say that this Court is not privy to the video footage, that the Second Respondent saw and relied on as part of the evidence for her findings.

[41] In *Liwambano v Department of Land Affairs and others*⁴, the Labour Court had earlier held that:

² (2011) 11 BLLR 1041 (SCA) at paras 9 – 12.

³ [2016] ZALAC 33; [2016] 10 BLLR 1009 (LAC) at paras 24 – 25.

‘In the case of *JDG Trading (Pty) Ltd t/a Russells v Whitcher NO & others*, the Labour Appeal Court made it clear that an applicant who seeks relief in a review on the basis of a defective record runs the risk that it will be unsuccessful on that ground alone. This must be based on the simple principle that “evidence at the heart of the attack on the decision of a Commissioner must be ‘properly available’ to the reviewing Court.” [Footnote omitted]

- [42] The benefit of a complete record is key to review proceedings as was further held in *EBS Security Admin Pty (Ltd) v Commission for Conciliation, Mediation and Arbitration and Others*⁵ wherein it was held *inter alia* that:

‘In sum, the Applicant’s review application required a complete record. In the absence of a complete record, a determination on whether a gross irregularity (that was material to the outcome) was committed and a finding on whether the arbitrator produced an unreasonable outcome cannot be made.’

- [43] In *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and others*⁶, it was held that:

‘[18] In a review conducted under section 145(2)(a)(c)(ii) of the LRA, the reviewing court is not required to take into account every factor individually, consider how the arbitrator treated and dealt with each of those factors and then determine whether a failure by the arbitrator to deal with one or some of the factors amounts to process-related irregularity sufficient to set aside the award. This piecemeal approach of dealing with the arbitrator’s award is improper as the reviewing court must necessarily consider the totality of the evidence and then decide whether the decision

⁴ [2012] ZALCJHB 14; [2012] 6 BLLR 571 (LC) at para 30.

⁵ (JR1314/13) [2015] ZALCJHB 347 (6 October 2015) at para 19.

⁶ [2013] ZALAC 28; [2014] 1 BLLR 20 (LAC) (*Gold Fields*) at paras 18 – 20.

made by the arbitrator is one that a reasonable decision-maker could make.

[19] To do it differently or to evaluate every factor individually and independently is to defeat the very requirement set out in section 138 of the LRA which requires the arbitrator to deal with the substantial merits of the dispute between the parties with the minimum of legal formalities and do so expeditiously and fairly. This is also confirmed in the decision of *CUSA v Tao Ying Metal Industries*.

[20] An application of the piecemeal approach would mean that an award is open to be set aside where an arbitrator (i) fails to mention a material fact in his or her award; or (ii) fails to deal in his/her award in some way with an issue which has some material bearing on the issue in dispute; and/or (iii) commits an error in respect of the evaluation or considerations of facts presented at the arbitration. The questions to ask are these: (i) In terms of his or her duty to deal with the matter with the minimum of legal formalities, did the process that the arbitrator employed give the parties a full opportunity to have their say in respect of the dispute? (ii) Did the arbitrator identify the dispute he or she was required to arbitrate? (This may in certain cases only become clear after both parties have led their evidence) (iii) Did the arbitrator understand the nature of the dispute he or she was required to arbitrate? (iv) Did he or she deal with the substantial merits of the dispute? (v) Is the arbitrator's decision one that another decision-maker could reasonably have arrived at based on the evidence?' [Footnotes omitted]

[44] In *Quest Flexible Staffing Solutions (Pty) Ltd (a division of Adcorp Fulfilment Services (Pty) Ltd) v Legobate*⁷, it was held *inter alia* that:

⁷ [2014] ZALAC 55; (2015) 2 BLLR 105 (LAC) at para 16.

'In *Gold Fields*, this Court rejected the piecemeal or fragmented approach to reviews, where each factor that the Commissioner failed to consider is analysed individually and independently, for principally two reasons. The first is that it "assumes the form of an appeal" and not a review, and the second is that it is mandatory for the reviewing Court to consider the totality of the evidence and then decide whether the decision made by the arbitrator is one that a reasonable decision-maker could make. To evaluate every factor individually and independently, it observed, is to defeat the requirements in section 138 of the LRA in terms of which the arbitrator is required to deal with the substantial merits of the dispute between the parties with the minimum of legal formalities, albeit expeditiously and fairly. On this approach, therefore, the failure of a Commissioner "to mention a material fact in his or her award", or "to deal in his/her award in some way with an issue which has some material bearing on the issue in dispute", or "commits an error in respect of the evaluation or consideration of facts presented at the arbitration" would not, in itself, render the award reviewable.'

- [45] The Second Respondent's finding that Shabangu, Msimango and Cele, could not have been found guilty of intimidation as the evidence in support of such charge was based on the videotape that she saw and mainly on the evidence of Victor Mapongo which she found to be incredible and for the reasons that she advanced, is that of a reasonable decision maker.
- [46] The Second Respondent found that, based on the video, it was in fact Victor Mapongo who intimidated Shabangu and Cele and that she did not find Victor Mapongo's evidence credible enough to prove intimidation against Msimango. This finding ought to be regarded as reasonable in the absence of the video footage which this Court was not privy to on 13 March 2024.
- [47] Where this Court cannot make a decision based on the same missing and relevant parts of the record relied on, it may ordinarily strike the matter off the

roll or direct that the record be reconstructed. I did not choose either of these options on the hearing date as I held the view that there are some parts of the record that enabled me to arrive at the order I made. The four employee's dismissal dates back to 2017 and it can only be in the interest of all parties that this matter be speedily resolved.

[48] The Second Respondent had the opportunity in the arbitration proceedings to observe the demeanour of the witnesses and evaluate their evidence against the video footage that she saw, especially, that of Victor Mapongo, on whose evidence the Applicant heavily relied to prove the charges of intimidation against Shabangu, Cele and Msimango. Her credibility finding against Victor Mapongo was based on the video footage that she had seen and it cannot be said that her decision was that of an unreasonable decision-maker in concluding that the three employees did not contravene the Applicant's workplace rule on intimidation.

[49] In *Scopeful 21 (Pty) Ltd t/a Maluti bus Services v SATAWU obo Mosia and Others*⁸ (*Scopeful 21*), it was held *inter alia* that:

'The arbitrator, who was steeped in the atmosphere of hearing the witnesses in a hearing de novo, made a credibility finding, having observed and listened to the witnesses. A review court should be very cautious before it interferes with a finding of that nature. Paramount in such an evaluation is the reminder that a review court is not a court of appeal. However, the distinction between a review and an appeal may have blurred over the years in which the Labour Court and Labour Appeal Court have grappled over and developed the test on review.'

[50] Further, in finding that the three employees did not contravene the Applicant's workplace rule in terms of clause 7(a) of the Code of Good Practice with regard to the charge of intimidation, the Second Respondent's decision was one of a reasonable decision maker especially as it had been guided by the

⁸ [2005] ZALC 61; [2005] 11 BLLR 1138 (LC) at para 14.

credibility finding that she had made in the circumstances. *Scopeful 21* cautions review courts from readily interfering with a credibility assessment as the court did not have the benefit of sitting in the arbitration and observing the witnesses, hearing their evidence and how they came across.⁹

- [51] The Second Respondent's finding that Shabangu, Msimango and Cele have to be treated the same way as all other employees who were found guilty of blocking only and did not have a final written warning relating to any blocking before, is not only in line with Clause 7(b)(iii) of the Code of Good Practice on consistency but, a finding that could equally be made by any reasonable decision maker.
- [52] The Court is not persuaded by the Applicant's argument that Shabangu, Cele and Msimango, based on the Second Respondent's findings including the credibility finding against Victor Mapongo, contravened the Applicant's workplace rule of intimidation.
- [53] To the extent that the Second Respondent may have committed some errors in not having considered certain factual evidence, such errors are equally not sufficient, in my view, to vitiate the award and render the Second Respondent's findings that the dismissal of the three employees was substantively unfair and unreasonable as borne by the authorities referred to hereunder.
- [54] In *Department of Health (Western Cape) v DENOSA obo Cloete and others*¹⁰ it was *inter alia* held that:

'It bears emphasis that "errors of fact by an arbitrator, particularly in respect of facts that he or she is empowered to determine (such as findings on the probabilities), will not usually give rise to a valid ground of review"; and "the fact that an arbitrator commits a process related

⁹ See: *Air Liquide (Pty) Ltd v Nkgoeng NNO and others* [2022] 7 BLLR 636 (LAC) at para 15.

¹⁰ [2016] ZALCCT 8; (2016) 9 BLLR 923 (LC) at para 33.

irregularity is not in itself a sufficient ground for interference by the reviewing court.”

[55] In *Ethekwini Municipality v Hadebe and others*¹¹ (*Ethekwini Municipality*) it was held *inter alia* that:

‘After an initial period of uncertainty as a result of the emergence of the "process-related irregularities" jurisprudence, the proper application of the test was neatly summarised by the Supreme Court of Appeal in the path-finding judgment of *Herholdt v Nedbank* ("*Herholdt*") as follows:

"[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.”

[56] With regard to the Second Respondent’s finding that Koboka, although having been found guilty of both blocking the entrance and gross insubordination or gross disrespect as he did not obey Luvuyo’s instruction to allow the trucks to enter the Applicant’s premises and refused to move, I find that her reasoning in finding that such employee’s dismissal was substantively unfair to be reasonable and in line with Clause 7(b) of the Code of Good Practice as she

¹¹ [2016] ZALAC 14; (2016) 8 BLLR 745 LAC at para 23.

qualified such finding by stating *inter alia* that “*This was a strike situation and all the Applicant were refusing to allow the trucks in and should have been charged with gross insubordination/gross disrespect. None of them were acting respectfully towards management*”.

[57] In arriving at the finding that dismissal was too harsh a sanction for Koboka because he had 30 years of service with the Applicant that had not been taken into account at the internal disciplinary hearing, I find the Second Respondent’s finding in this regard, not to be any substitution of the Applicant’s sanction for Koboka but, to be a reasonable determination that such Respondent made in line with Clause 7(iv) of the Code of Good Practice as, commissioners are empowered in terms of this Clause, to pronounce themselves on the appropriateness of dismissal for misconduct, under the circumstances.

[58] In *Ethekwini Municipality*, it was further held that:¹²

‘With regard to the practical approach to be adopted by Commissioners and Arbitrators in considering the sanction of dismissal, the Court laid down the following guidelines:

"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

¹² *Ethekwini Municipality* at para 21.

employee and his or her long-service record. This is not an exhaustive list... To sum up. In terms of the LRA, 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." [Own emphasis]

[59] Based on all the reasons above, the Court is persuaded by the Applicant that in arriving at the aforementioned finding, the Second Respondent's decision was irrational, that she committed gross irregularities and misconduct and that she exceeded her powers. The Second Respondent arrived at a reasonable finding that the dismissal of Shabangu, Cele, Msimango and Koboka was substantively unfair under the circumstances.

[60] In the premise and for all the above reasons, this Court is not persuaded that the Second Respondent committed an irregularity that vitiates her finding that the dismissal of Shabangu, Msimango, Cele and Koboka was substantively unfair and that her finding in this regard, is unreasonable, to warrant interference, under the circumstances.

[61] I have dealt with some of the authorities on the test for review of arbitration awards above, which informs my reasons for my order herein not to review the Second Respondent's finding that the dismissal of the aforementioned four employees, was substantively unfair. I will deal further with other authorities on the review test, including those about irregularities, under the next heading hereafter.

Reasons for upholding the finding of reinstatement but not with retrospective backpay

[62] In *Ethekwini Municipality*, on what the test for review, the Labour Appeal Court (LAC) held that:¹³

‘The test for review of arbitration awards finds jurisprudential expression in a number of judgments, in particular the seminal judgment of the Constitutional Court in *Sidumo and another v Rustenburg Platinum Mines and others* (Sidumo) in which, the court held that section 145 is now suffused by the constitutional standard of reasonableness. The question therefore is whether the decision reached by the Commissioner is one that a reasonable decision-maker could not reach. Applying this test, the Court explained, will give effect not only to the constitutional right to fair labour practices, but also to the right to administrative action which is lawful, reasonable and procedurally fair.’

[63] Based on the above authorities, there is a plethora of authorities on the test for the review of arbitration awards by commissioners in terms of the LRA, which must be read together in order to review an award and to determine whether the decision reached is one that a reasonable decision maker could have reached and whether such decision-maker committed any irregularity.¹⁴

[64] This Court’s reasons for confirming the Second Respondent’s finding that the dismissal of Shabangu, Msimango and Koboka was substantively unfair and reasonable is based on the aforementioned jurisprudence for the test for the

¹³ Ibid at para 20.

¹⁴ See: *Sidumo and another v Rustenburg Platinum Mines Ltd and others* [2007] ZACC 22; [2007] 12 BLLR 1097 (CC) at para 110; *Super Group Autoparts t/a AutoZone v Hlongwane NO and others* [2009] ZALCJHB 68; [2010] 4 BLLR 458 (LC) at 461 8E; *Manana v Department of Labour and others* [2010] ZALAC 26; [2010] 6 BLLR 664 at 668 20F; *NUM and another v Samancor Ltd (Tubatse Ferrochrome) and others supra*, *Afrox Healthcare Ltd v Commission for Conciliation Mediation and Arbitration and others* [2012] ZALAC 2; [2012] 7 BLLR 649 (LAC) at 657 21D-I; *Herholdt v Nedbank Ltd (Congress of South African Trade Unions as “amicus curiae”)* [2013] ZASCA 97; [2013] 11 BLLR 1074 (SCA) at 1084 24C-D; *Goldfields supra*; *Derivco (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration* [2014] ZALCJHB 257; [2014] 10 BLLR 1000 (LC) at 1007 37B; *Shoprite Checkers v CCMA* [2015] 10 BLLR 1052 (LC) at 1056E-H 9-10; *Mbatha v Safety and Security Sectoral Bargaining Council JR372/13* [2015] ZALCJHB 332 (30 September 2015) at para 25; *Head of the Department of Education v Mofokeng and others* [2014] ZALAC 50; [2015] 1 BLLR 50 (LAC) at paras 60 – 61; *Kock v Commission for Conciliation, Mediation and Arbitration and Others* (2019) 40 ILJ 1625 (LC) at para 27; and *Ethekwini Municipality supra*.

review of arbitration awards in terms of the LRA by commissioners like the Second Respondent.

[65] It is further for the abovementioned reasons and authorities that the Court is not persuaded by the Applicant's contention that the Second Respondent's finding, that the four aforementioned employees be reinstated with backpay, is an irregularity and not a finding which a reasonable decision-maker could have arrived at, as explained further hereunder.

[66] The Second Respondent has ordered the reinstatement of Shabangu, Msimango, Cele and Koboka. I find that the reasons for the Second Respondent's reinstatement of these employees because *inter alia*, that they did not find alternative employment and that they sought reinstatement at the time of the arbitration proceedings relevant herein, to be that which any reasonable decision maker would make under the circumstances. I further find that there is no irregularity with such decision of reinstatement that vitiates the award.

[67] I find no trace of any misconduct, as contemplated in section 145(2)(a)(i) of the LRA, committed by the Second Respondent in reinstating the employees Shabangu, Cele, Msimango and Koboka as misconduct by commissioners/arbitrators, has since been qualified in *inter alia County Fair Foods (Pty) Ltd v Theron NO & others*¹⁵, wherein it was held that:

'For there to be misconduct, it has been held that there must be some 'wrongful or improper conduct' on the part of the decision maker, in this instance the Commissioner. (See *Dickinson and Brown v Fisher's Executors* 1915 AD 166 at 176.) Misconduct has also been described as requiring some 'personal turpitude' on the part of the decision maker. (See *Reunert Industries (Pty) Ltd t/a Reutech Defence Industries v Naicker and others* (1997) 18 ILJ 1393 (LC) at 1395H–I.) The basic standards of proper conduct for an arbitrator are to be found

¹⁵ (2000) 21 ILJ 2649 (LC) at para 7. See also: *BAUR Research CC v Commission for Conciliation, Mediation and Arbitration and others* [2013] ZALCJHB 338; (2014) 35 ILJ 1528 (LC) at para 35.

in the principles of natural justice, and in particular the obligation to afford the parties a fair and unbiased hearing. (See Baxter Administrative Law at 536.) These principles have been reinforced by the constitutional imperatives regarding fair administrative action. (See Carephone (Pty) Ltd v Marcus NO (1998) 19 ILJ 1425 (LAC) at 1431I–1432A.) The core requirements of natural justice are the need to hear both sides (*audi alteram partem*) and the impartiality of the decision maker (*nemo iudex in sua causa*). (See Baxter at 536.)'

[68] It is well within the Second Respondent's powers, in terms of sections 145 and 193(1) of the LRA, to have reinstated the four employees.

[69] The Court is not persuaded by the Applicant's submission that it was incompetent for the Second Respondent to reinstate these employees based on section 193(2)(a) to (d) of the LRA, as it will be further explained hereunder.

[70] The three employees, Shabangu, Msimango and Cele, have not been found guilty of serious misconduct contemplated in the Code of Good Practice¹⁶ and neither is there any trace, at least, in the arbitration proceedings, that any such evidence on the irretrievable breakdown of the employment relationship of trust between these employees and Applicant was tendered.

[71] The above goes for Koboka, save for the fact that he was in addition to being charged for blocking, also found to have been insubordinate and/or disrespectful. The Second Respondent's finding that Koboka committed insubordination and/or disrespect in relation to a single instruction, in the context of a strike for that matter, and under circumstances where the rest of the employees were not charged for any such insubordination and/or disrespect, is that of a reasonable decision-maker. I am, accordingly, not even persuaded that such a nature of insubordination and/or disrespect was gross.

¹⁶ Clause 4 and 5 of the Code of Good Practice in Schedule 8 of the LRA.

- [72] The Court is not persuaded by the Applicant's submissions and the authority referred to in the Second Respondent's decision to reinstate the Applicants is not reasonable because she did not consider the "non-reinstatable conditions" in respect of any of the employees. I find the contrary to be the case instead.
- [73] The above notwithstanding, I am however persuaded by the Applicant's submissions that a court or arbitrator has a discretion in determining the extent of backpay and that backpay is a consequence of retrospective reinstatement. I further agree with the Applicant that these four employees, are partly to blame for circumstances that led to their dismissal and accordingly, not entitled to full retrospective reinstatement with backpay.
- [74] I further agree with the Applicant's submissions that courts and arbitrators must take a number of factors into consideration when determining the period for which reinstatement should be made (because the LRA is silent on this aspect). I am persuaded to agree with these factors as listed in the Applicant's submissions.
- [75] This Court is not persuaded however that, in having reinstated the employees, the Second Respondent had misdirected herself in respect of all the relevant facts and principles and that she has not exercised her discretion judicially as submitted in the applicant's heads of argument. I have already found that the Second Respondent's decision to reinstate these employees is that of a reasonable decision-maker under the circumstances and that she exercised her discretion judicially in line with section 193 (1)(a) to (c) in reinstating these four employees.
- [76] I have since made an order relevant herein dated 13 (read 14 March 2024) that the reinstatement of these four employees must only be with effect from the date of such order, without backpay and thereby agree with the Applicant that the retrospective reinstatement of these four employees with backpay by the Second Respondent is unreasonable and an irregularity, as submitted in Applicant's heads, with respect to all four employees.

- [77] The order that these four applicants be reinstated from the date of the order of 14 March 2024 and not retrospectively, with backpay, is reason enough to concur with the Applicant's submissions that the Second Respondent committed an irregularity and arrived at an unreasonable conclusion in finding that they be reinstated retrospectively with backpay.
- [78] I further agree with the Applicant that the calculations of retrospective reinstatement of Cele, Msimango and Koboka with backpay are incorrect as submitted by the Applicant. In any event, nothing turns on any of these calculations, including those of Shabangu, as I have already found that all four employees are not entitled to retrospective reinstatement with backpay, under the circumstances.
- [79] For all the above reasons, the Second Respondent's finding that Koboka, Shabangu, Msimango and Cele must be retrospectively reinstated with back pay is reviewed and set aside as per this Court's order of 14 March 2024 on the basis that such findings are unreasonable and irregular.
- [80] The Second Respondent's finding referred to in paragraph 79 above, has since been substituted with the order that the four employees are reinstated only from the date of the Court's order being 14 March 2024, issued and stamped by the Registrar on 20 March 2024 and that they must report for duty at the Applicant's workplace, within seven days from the date of such Court order, being 14 March 2024.

Costs

- [81] There is no cost order as the matter served before me unanswered and unopposed on 13 March 2024. The Applicant did not pursue any such costs either.

Conclusion

- [82] In the premises, and after considering the Applicant's papers and submissions, it is for aforesaid reasons that the order dated 14 March 2024 was issued.

SM Shaba

Acting Judge of the Labour Court of South Africa