THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR 1832/20

In the matter between:

TSHEPO MOTSHWAIWA **Applicant**

and

PIONEER FOODS (PTY) LTD T/A SASKO QWAQWA **First Respondent**

CCMA **Second Respondent**

MTHUMZI NDULAMA *N.O* **Third Respondent**

Heard: **23 April 2024**

Delivered: **07 May 2024**

JUDGMENT

NTSOANE, AJ

Introduction

[1] This is an application for review in terms of section 145 and/or section 158(1)(g) of the Labour Relations Act[1] (LRA) brought on 10 December 2020. In this application, the Applicant seeks to review and set aside the arbitration award issued on 2 November 2020, which was handed down by the Third Respondent (Commissioner) under the auspices of the Second Respondent, under case number FSBF 1752/20.

[1] Act 66 of 1995, as amended.

[2] In terms of the said award, the Commissioner found the dismissal of the Applicant to be both procedurally and substantively fair and accordingly dismissed the Applicant's claim.

[3] At arbitration level, the simple nub of the dispute that had to be determined by the Commissioner was whether the dismissal sanction endured by the Applicant, occasioned by reporting for duty under the influence of alcohol justified his dismissal, both procedurally and substantively.

<u>Synopsis of the case</u>

[4] The Applicant was employed by the First Respondent on 1 October 2018 and at the time of his dismissal, he occupied a position of a Depot Manager at a salary of R42,358.33 per month. The Third Respondent, on the other hand, as its name symbolizes, is in the retail business of a bakery.

[5] The First Respondent has an alcohol testing policy whereby every employee entering the company premises must be subjected to a mandatory breathalyser test each time without exception. Those employees who test positive are not permitted onto the company premises instead are sent home for the day and will be subjected to disciplinary action in accordance with the company's disciplinary code. Evidence was led through the First Respondent's witness Lebohang Letsoho that the Applicant was aware of this policy and this pertinent piece of evidence was not challenged. In any case, the Applicant occupied a position of a senior role and he was reasonably expected to be aware of the policy. It appears that on 2 March 2020, the Applicant reported for work however, he did not enter through the main gate but rather via the dispatch gate. The First Respondent has only one breathalysing device which is located at the main gate and there is none at the dispatch gate. This meant that the Applicant was not subjected to the breathalysing test when he entered on 2 March 2020.

[6] This incident came to the attention of the shop stewards Mr Pule (Pule) and Mr Tapore Johnny Motaung (Motaung) that the Applicant had entered the premises through the dispatch gate and that it was suspected that he was under the influence of alcohol. It was at that stage that Motaung contacted Lucy Mofokeng (Mofokeng) of the company's security to enquire if the Applicant had been subjected to the breathalyser test, and on discovering that, in fact, the Applicant had not been breathalysed, Motaung requested the Applicant to immediately attend to the main gate so that a breathalyser could be administered on him. The Applicant test came out as 0,085% positive results to the test and the second test which was done twenty minutes later, also reflected a positive result. The Applicant was immediately sent home.

[7] This incident was reported to company managers Mr Johan Booysen (Booysen) and Mr Nelson Dlamini (Dlamini) as well as the Safety Health and Environment Specialist, Mr Weyland Niemach (Niemach). The Applicant had, at the time of the incident, held a final written warning which was issued to him on 5 August 2019 valid for 12 months for "*Not taking the breathalyser test each time when entering the company premises at numerous instances as per his own admittance*".

[8] The Applicant was ultimately charged and subjected to a disciplinary hearing. The following charges were proffered against him:

> '1. Reporting for duty or being under the influence of alcohol when reporting for duty and testing positive for alcohol on the 2nd March 2020
>
> 2. Not entering the breathalyser test upon entering the company premises on the 2nd March 2020 after being progressively disciplined on the issue.'

[9] Dlamini investigated the matter and also represented the First Respondent at the disciplinary hearing whilst Niemach served as the chairperson of the disciplinary hearing. Following the ventilation of the charges, the chairperson imposed the sanction of a dismissal. The Applicant's final written warning also played a major role in arriving at the said dismissal decision.

[10] The Applicant simply argued that he did nothing wrong.

[11] Aggrieved by the dismissal imposed on him, the Applicant then referred an unfair dismissal dispute to the Second Respondent claiming the dismissal to be both substantively and procedurally unfair. At the arbitration proceedings and in support of its case, the First Respondent called numerous witnesses, five to be precise, including the chairperson of the disciplinary hearing, to support its own case. The Applicant on the other hand testified for himself and did not call any witness to corroborate his version.

[12] The Applicant averred that his dismissal was procedurally unfair as the chairperson, who was his junior, was also an investigator in his case. He also submitted that the company policy prohibited a junior employee from chairing a disciplinary hearing against a senior. The Applicant also contended that he observed the chairperson travelling to the hearing, in the same vehicle with the initiator, therefore his impartiality was compromised. The Applicant claimed that he had taken headache medication hence he tested positive and that the employer did not provide him with any reason for his dismissal. He also argued inconsistency as this was his first offence and that the company had failed to offer him the necessary support.

<u>Determination and grounds for review</u>

[13] Section 145(1) of the LRA deals with the review of arbitration awards and prescribes that:

‘Any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award –

> (a) within six weeks of the date that the award was served on the applicant…’
>
> Subsection (2) states that:

'A defect referred to in subsection (1), means –

(a) that the commissioner –

(i) committed misconduct in relation to the duties of the commissioner as an arbitrator;

(ii) committed a gross irregularity in the conduct of the arbitration proceedings; or

(iii) exceeded the commissioner's powers.'

Section 158 (1)(g) states that:

'The Labour Court may –

(g) subject to section 145, review the performance or purported performance of any function provided for in this Act on any grounds that are permissible in law.'

[14] In assessing whether an arbitration award may be reviewed, it is important to note the precedent that set out the test herein. In the case of *Sidumo and Another v Rustenburg Platinum Mines Ltd and others*[2], the Constitutional Court made the following determination on review applications and these were the key issues they had to determine in making a finding on the review applications:

'[1] In deciding dismissal disputes in terms of the compulsory arbitration provisions of the Labour Relations Act 66 of 1995 (LRA), commissioners acting under the auspices of the Commission for Conciliation, Mediation and Arbitration (CCMA), should approach a dismissal with "a measure of deference" because "it is primarily the function of the employer" to decide on a proper sanction. In deciding whether a dismissal is fair a commissioner need not be persuaded that dismissal is the only fair sanction - it is sufficient that the employer establishes that it is a fair sanction.

[2] Compulsory statutory arbitration in terms of the LRA undertaken by the second respondent, the CCMA, constitutes "administrative action" as defined in s 1 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) and is

[2] [2007] ZACC 22; 2007 (28) ILJ 2405 (CC) at para 1.

therefore subject to the standard of review set under that Act rather than that provided for in the LRA - the review criterion is whether the decision is rationally connected with the information before the commissioner and the reasons for it.'

[15] In making its determination, the Constitutional Court found the following:

'[75] It is a practical reality that in the first place it is the employer who hires and fires. The act of dismissal forms the jurisdictional basis for a commissioner, in the event of an unresolved dismissal dispute, to conduct an arbitration in terms of the LRA. The commissioner determines whether the dismissal is fair. There are therefore no competing 'discretions'. Employer and commissioner each play a different part. The CCMA correctly submitted that the decision to dismiss belongs to the employer but the determination of its fairness does not. Ultimately, the commissioner's sense of fairness is what must prevail and not the employer's view. An impartial third party determination on whether or not a dismissal was fair is likely to promote labour peace.

[158] In my view, then, the key to the present case is to interpret and apply section 145 in a manner that is compatible with the values of reasonableness and fair dealing that an open and democratic society demands. What is largely implicit in the judgments of my colleagues should, I believe, be the centrepiece of the analysis. I agree with what appear to be the underlying premises of the two judgments: in an open and democratic society based on human dignity, equality and freedom, it would be inappropriate to restrict review of the commissioner's decision to the very narrow grounds of procedural misconduct that a first reading of section 145(2) would suggest; at the same time, the labour law setting, requiring a speedy resolution of the dispute with the outcome basically limited to dismissal or reinstatement, makes it inappropriate to apply the full PAJA type administrative review on substantive as well as procedural grounds; and to the extent that the right to just administrative action is involved, the values of fair dealing that underlie section 33 of the Constitution must be respected. I accept that inasmuch as the right to a fair labour practice is at the centre of the analysis, the outcome of the arbitration process must not fall outside the bounds of reason; to accept it doing so would hardly represent a fair outcome.

Finally, acknowledging the adjudicatory element that implicates the right to a fair hearing under section 34, I would hold that a fair hearing demands that at the very least there be some reasonably sustainable fit between the evidence and the outcome.

[159] To my mind, acknowledging hybridity and permeability leads to direct and unstrained engagement with the particular constitutional interests and values at stake. I weigh the facts in the same way according to the same basic criteria, and arrive at the same conclusion as they do…

[164] The ultimate question in determining whether to interfere with a commissioner's award in an arbitral proceeding is whether the conduct of the commissioner falls into any of the grounds of review set forth in section 145(2) of the LRA, namely, misconduct in relation to his or her duties, gross irregularity in the conduct of the arbitration proceedings, or acting in excess of his or her powers. These grounds of review must be interpreted in the light of the constitutional constraints referred to above and the primary objective of the LRA. This is the interpretive injunction contained both in section 39(2) of the Constitution and section 174 in the LRA.

[165] Thus construed, the commissioners are required to act fairly in the determination of unfair dismissal disputes. If a commissioner fails to do so he or she commits a gross irregularity in the conduct of the arbitration proceedings and the ensuing arbitral award falls to be reviewed and set aside. Similarly, if a commissioner makes an award which is inconsistent with his or her obligations under the LRA, he or she acts in excess of the powers conferred by the LRA and the award falls to be reviewed and set aside.

[266] The requirement of fairness in the conduct of arbitration proceedings is consistent with the LRA and the Constitution. First, a CCMA commissioner is required by section 138(1) of the LRA 'to determine the dispute fairly and quickly'. Second, in terms of section 34 of the Constitution, everyone has the right to have any dispute that can be resolved by the application of the law decided in a fair public

hearing before a court of law or an independent and impartial tribunal. The CCMA and Labour Courts were established to resolve labour disputes. CCMA arbitrations provide independent and impartial tribunals contemplated in section 34 of the Constitution. The right to a fair hearing before a tribunal lies at the heart of the rule of law. And a fair hearing before a tribunal is a prerequisite for an order against an individual and this is fundamental to a just and credible legal order. A tribunal like the CCMA is obliged to ensure that the proceedings before it are always fair. And finally, section 23 of the Constitution guarantees to everyone the right to fair labour practices.

[267] It is plain from these constitutional and statutory provisions that CCMA arbitration proceedings should be conducted in a fair manner. The parties to a CCMA arbitration must be afforded a fair trial. Parties to the CCMA arbitrations have a right to have their cases fully and fairly determined. Fairness in the conduct of the proceedings requires a commissioner to apply his or her mind to the issues that are material to the determination of the dispute. One of the duties of a commissioner in conducting an arbitration is to determine the material facts and then to apply the provisions of the LRA to those facts in answering the question whether the dismissal was for a fair reason. In my judgment where a commissioner fails to apply his or her mind to a matter which is material to the determination of the fairness of the sanction, it can hardly be said that there was a fair trial of issues.

[268] It follows therefore that where a commissioner fails to have regard to material facts, the arbitration proceedings cannot in principle be said to be fair because the commissioner fails to perform his or her mandate. In so doing, in the words of *Ellis*, the commissioner's action prevents the aggrieved party from having its case fully and fairly determined. This constitutes a gross irregularity in the conduct of the arbitration proceedings as contemplated in s 145(2) (a) (ii) of the LRA. And the ensuing award falls to be set aside not because the result is wrong but because the commissioner has committed a gross irregularity in the conduct of the arbitration proceedings.’

[16] In *Shoprite Checkers (Pty) Ltd v Ramdaw NO & Others*[3], it was held as follows:

'In considering whether or not the first respondent's award falls to be set aside on the ground that it is not justifiable in relation to the reasons given for it, I consider that one must have regard to the material that was properly available to the first respondent, the decision he took and the reasons that he gave for such decision. As one does this, one must bear in mind what Chaskalson P said in the *Pharmaceutical Manufacturers*'[4] case, namely that a decision that is objectively irrational is likely to be made only rarely. Of course, I am saying this insofar as it seems that there is much commonality between justifiability and rationality. One must also bear in mind the importance of maintaining the distinction between appeals and reviews. It must also be borne in mind that the Act contemplates that the disputes that it requires to be referred to arbitration are meant to be put to an end by way of arbitration and that the dispute-resolution dispensation of the Act – which is meant to be expeditious – would collapse if every arbitration award could be taken on review and set aside.'

And:

'In the light of what has been said above in regard to *Carephone*[5] and the *Pharmaceutical Manufacturers*' case and what was said by the Constitutional Court in the latter case, and in the light of the possibility that the PAJA may well be applicable to arbitration awards issued by the CCMA, I am of the view that it would not serve much purpose for this court to consider whether or not its decision in *Carephone* was correct and whether or not such decision should be departed from. In those circumstances *Carephone* stays. This appeal can, therefore, be considered on the basis that, as was decided by this court in Carephone, CCMA awards can be reviewed and set aside if they are not justifiable in relation to the reasons given for them…'

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[3] [2000] ZALAC 5; (2001) 22 ILJ 1603 (LAC) at paras 82 and 33.

[4] *Pharmaceutical Manufacturers Association of SA and another: In Re Ex Parte President of the Republic of South Africa and others* [2000] ZACC 1; (2000) 3 BCLR 241 (CC).

[5] *Carephone (Pty) Ltd v Marcus NO & others* [1998] ZALAC 11; (1998) 19 ILJ 1425 (LAC) at 1103C.

[17] The Applicant raised several grounds of review. These challenge the findings of the Commissioner regarding both the substantive fairness and the procedural fairness. The test on review is well established, and it is whether the decision under review is one that a reasonable decision-maker could not reach on the evidential material available. In *South African Breweries (Pty) Ltd v Hansen and others*[6], the review test was summarised as follows:

'[10] The test that the Labour Court is required to apply in a review of an arbitrator's award was settled by the Constitutional Court in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (*Sidumo*). It is that an arbitration award is reviewable if the decision reached by the arbitrator was one that a reasonable decision maker could not reach. Essentially, this test requires the Labour Court, sitting as a court of review, to enquire whether the decision under review is one that a reasonable decision maker could not reach on the evidential material available. On this test, an arbitration award based on defective reasoning by an arbitrator may still pass the muster required in reviews, provided that the result is one that a reasonable decision maker could have reached. This was clarified by the Supreme Court of Appeal in *Herholdt v Nedbank Limited (Congress of South African Trade Unions as amicus curiae)* as follows:

"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 enquiry 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, 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."

[11] In *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others (Gold Fields),* this court refined the Sidumo test by introducing a two-stage enquiry. In short, this requires the Labour Court to consider two issues: The first is whether the applicant has established an

[6] [2017] ZALAC 29; (2017) 38 ILJ 1766 (LAC)

irregularity. This irregularity could be a material error of fact or law, the failure to apply one's mind to relevant evidence, or misconceiving of the enquiry or assessing factual disputes in an arbitrary fashion. The second is whether the applicant has established that the irregularity is material to the outcome by demonstrating that the outcome would have been different having regard to the evidence before the arbitrator. An arbitration award will, therefore, be considered to be reasonable when there is a material connection between the evidence and the result.'

Procedural fairness

[18] The first point of departure in this matter is the issue of procedural fairness. In terms of Item 4(1) of the Code of Good Practice[7], an employer should normally conduct an investigation to determine whether grounds for the dismissal exist. On the evidence presented on an unchallenged basis, this was done by Dlamini. The Code recognises that it need not be a formal enquiry but the employee needs to be notified and should be permitted to state their case in response to the allegation. This too was done. The Code stipulates that the employee must be given a reasonable time to prepare his or her response and must be allowed the assistance of a trade union representative or fellow employee. This does not seem to be one of the issues raised by the Applicant. The Court in *Avril Elizabeth Home for the Mentally Handicapped v CCMA and others*[8] confirmed this by holding that the employer was merely required to conduct an investigation, give the employee or his/her representative an opportunity to respond to allegations after a reasonable period and thereafter to take a decision and give the employee notice thereof.

[19] The Applicant argues that his dismissal was procedurally unfair as the chairperson of the disciplinary hearing, Niemach was tainted with biasness and that Niemach had investigated the incident when he testified that Motaung called him on the day of the incident to furnish him (Niemach) with the statements and reports thereof. The Commissioner dismissed this aspect of the argument and found that:

[7] Schedule 8 to the LRA – Code of Good Practice: Dismissal.

[8] [2006] ZALC 44; (2006) 27 ILJ 1644 (LC).

'The testimony submitted in these proceedings does not seem to support the Applicant's claims. The Respondent's first witness testified that he was the one who investigated the case and none of his testimony was disputed. He also failed to dispute the version of the HR Manager, who testified why he sent an email explaining why the Chairperson should not chair disciplinary hearing. The Applicant went to great lengths in explaining how incompetent and bias the Chairperson was but strangely enough, indicated that he had no problem with him at the commencement of the hearing. This behaviour does not seem to suggest of someone who had an issue with the chairperson and his issue only came after he was dismissed. Therefore I could not support his version that the Chairperson was biased.'

[20] I must state in rather unequivocal terms that I am not persuaded by the Applicant's argument. The Applicant simply raises the issue of procedural unfairness purely on the basis that Niemach was an investigator in the matter and as a result Niemach was biased. The Commissioner was persuaded and found that Dlamini had testified that he was the one who had investigated the matter and this was not challenged. I fully concur with this determination. There is simply nowhere in the transcript where this version is opposed by the Applicant; it remains unchallenged and any reasonable presiding officer in the shoes of the Third Respondent was inclined to accept and determine as he correctly did. Niemach also stated during the arbitration when asked if he had investigated the matter by stating that "*no, investigations are left to the HODs and Line Managers*". If the Applicant's ground for review is premised on the alleged bias of the chairperson for having investigated the matter, then this stands to fail.

[21] The result of this is that the evidence of the First Respondent is left uncontradicted, and the Commissioner was thus inclined to accept it on its unopposed basis. There are a few judgements which settle this issue of failing to call a direct and crucial witness in the proceedings. In *New Way Motor and Diesel Engineering (Pty) Ltd v Marsland*[9], the Court dealt with very similar circumstances and said the following:

[9] [2009] ZALAC 27; (2009) 30 ILJ 2875 (LAC) at para 23.

‘That conclusion is the following: the evidence of respondent constitutes the uncontradicted factual matrix. Mr Freed or any other member of appellant could have testified and placed in issue the employment conditions described by respondent as he had set them out in his evidence. This was never done and therefore the evidence of respondent pertaining to his illness and the actions of appellant's employees and directors remains uncontradicted…’

[22] In *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*[10]*,* the Constitutional Court held that –

‘If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct. This rule was enunciated by the House of Lords in *Browne v Dunn* and has been adopted and consistently followed by our courts.’

[23] It may be so that Niemach may have been furnished with the breathalyser test results, calibration certificate and statements, however, this does not in any way affect Niemach’s ability to preside over the matter impartially, at least there is no evidence to suggest otherwise. The evidence is simply that Niemach had received the information as part of his responsibilities as the SHE Specialist and nothing more. Following the submission of the information, the investigation was done and such was solely executed by Dlamini and Niemach did not involve himself in the said investigation. I am thus not persuaded that the Commissioner misconstrued the evidence herein in finding as he did. A pertinent question that should perhaps follow in determining if Niemach was biased or not is whether the information, even at the disciplinary hearing and arbitration stage, was disputed and that Niemach had concocted such in order to reach the guilty verdict. The answer is in the negative. The Applicant does not dispute any of the evidence led, none whatsoever. The Applicant in fact accepts that he was tested on the day in question and that he tested positive due to the “headache medication” he had taken. It is on this basis that the Applicant’s ground for review stands to fail. The question remains, what did Niemach

[10] [1999] ZACC 11; 2000 (1) SA 1 (CC) at para 61.

do to uphold the notion that he was biased in his chairing of the Applicant’s case? Niemach was met with straightforward and undisputed issues and his ultimate role was to simply apply the prescripts of the employer’s policy.

Substantive fairness

[24] The Applicant was indeed issued with a final written warning which he was aware of. The final written warning was current and binding at the time of the disciplinary proceedings that led to the Applicant’s dismissal. In fact, the Applicant does not deny this, instead, he tried to distinguish the final written warning from the current misconduct and argued that the misconduct which gave rise to his dismissal is for a different misconduct and not as presented by the First Respondent. This argument is superficial in my view. In fact, in terms of the evidence led at the arbitration, the Applicant was asked why he accepted the final written warning of 5 August 2019 disclosing misconduct as “*not taking the breathalyser test each time when entering company premises at numerous instances as per your own admission*” and he inadvertently sought to be evasive. This is in any case reflected in the Applicant’s founding affidavit that this is the basis for his final written warning. The Applicant’s final written warning needs no interpretation that it was for a similar misconduct. I also fully concur with the submission of the First Respondent that both charges carry the assumption that the Applicant was under the influence of alcohol whilst on duty and this is, in any case, in line with the First Respondent’s policy.

[25] On his own terms, the Applicant is of the view that the final written warning should be ignored and he should be issued with a further final written warning in line with the employer’s policy. The Code of Good Practice holds as follows:[11]

‘When deciding whether or not to impose the penalty of dismissal, the employer should in addition to the gravity of the misconduct consider factors such as the employee’s circumstances (including length of service, previous disciplinary record and personal circumstances), the nature of the job and the circumstances of the infringement itself.’

[11] Item 3(5).

[26] The purpose of the final written warning is, in essence, to place the employee on final terms. As a matter of general principle, a final written warning is exactly what it says, being that a repeat of the transgression in a specified period will result in dismissal. It is a last chance. In the circumstances, the Third Respondent simply cannot be faulted for his reasoning that it was not open for him to consider the validity or fairness of the final written warning and in fact, he was entitled to accept, and then apply, which he duly did, the final written warning as it stood, in deciding the issue of a fair sanction. The Court in *Transnet Freight Rail v Transnet Bargaining Council and Others*[12] specifically dealt with the very issue of the consequences of a final written warning and said:

'[42] Usually, the presence of a valid final written warning at the time of the commission of the same or similar form of misconduct should be properly interpreted as aggravating in nature. The principles of progressive discipline require such a re-offending employee usually to be considered irredeemable.

[43] ….

"I accept that the purpose of a warning is to impress upon the employee the seriousness of his actions as well as the possible future consequences which might ensue if he misbehaves again, namely that a repetition of misconduct could lead to his dismissal."'

And in *Gcwensha v Commission for Conciliation, Mediation and Arbitration and Others*[13], the Court held:

'I accept that the purpose of a warning is to impress upon the employee the seriousness of his actions as well as the possible future consequences which might ensue if he misbehaves again, namely that a repetition of misconduct could lead to his dismissal…'

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[12] [2011] ZALCJHB 15; (2011) 32 ILJ 1766 (LC) at para 42 - 43. See also *Builders Trade Depot v Commission for Conciliation, Mediation and Arbitration and Others* [2011] ZALCD 8; (2012) 33 ILJ 1154 (LC) at paras 45 – 46.

[13] (2006) 27 ILJ 927 (LAC) at para 32.

[27] The Applicant is a senior employee whose transgression should be viewed in a serious light and repetition of similar misconduct could result in dismissal. Even if I were to accept that the final written warning was issued for a different misconduct, which I don't, the Courts have recognised that a final written warning for a different form of misconduct may aggravate the misconduct in question where it demonstrates a propensity on the part of the accused employee to behave in a certain manner. The Labour Appeal Court in the case of *NUM and another v Amcoal Colliery t/a Arnot Colliery and another*[14], considered the question of whether previous misconduct should be taken into account in imposing a penalty on unrelated misconduct. Specifically, the Court held that:

'Even on the assumption that the present offence is unrelated to the previous misconduct, I still do not think the second appellant's disciplinary record should have been disregarded. The first respondent's disciplinary code provides for a progression of penalties. The rationale behind it must have been that there would come a stage beyond which the accumulated penalties cannot be allowed to progress further. Their cumulative effect would then provide clear evidence of ill-discipline which would render a continued employer-employee relationship intolerable.'

[28] This ground for review also stands to fail.

[29] The Applicant's third ground for review, factually and lawfully, also stands to fail. In terms of the transcript presented to this Court, it is rather undeniable that the First Respondent had the onus to prove that the Applicant's dismissal was fair and in fact executed this responsibility exceptionally. There was therefore no shift of burden as alleged by the Applicant. When the Commissioner made a determination in terms of the headache medication excuse presented by the Applicant, he did so in his quest to determine the valueless and inadmissible explanation presented by the Applicant that he tested positive due to his headache medication. The First Respondent had already levelled the playing field and the Commissioner was satisfied. I too am satisfied that enough evidence was presented by the First Respondent to qualify the dismissal imposed against the Applicant.

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[14] [2000] 8 BLLR 869 (LAC) at para 21.

[30] The Applicant's submission that the Commissioner was persuaded by irrelevant evidence and failed to consider relevant evidence adduced by the Applicant, as such the Commissioner has failed to apply his mind to the evidence that was presented before his, is a misplaced submission. The Third Respondent was called to determine whether the decision of the First Respondent to dismiss the Applicant was based on the facts presented before him and whether such dismissal was justifiable. The First Respondent submitted that the Commissioner executed his duties properly as such no reviewable irregularity was committed. I fully agree. The judgement in *S v Civa*[15] is particularly apposite. It was held as follows:

'The evidence must be weighed as a whole, taking account of the probabilities, the reliability and opportunity for observation of the respective witnesses, the absence of interest or bias, the intrinsic merits or demerits of the testimony itself, any inconsistencies or contradictions, corroboration, and all other relevant factors. It is in the context of this overall scrutiny of the evidence that demeanour, if there are sufficient indications thereof to be significant, must be assessed.'

[31] As a general proposition, it is submitted that the Commissioner, in declaring the Applicant's dismissal procedurally and substantively fair, properly determined the evidence before him, and the finding which is fully supported by the evidence. There is simply no reason to interfere with his arbitration award. Reference is made to the following extract from *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Kapp & Others*[16]:

'[19] Arbitration awards issued by the CCMA may be reviewed on any of the grounds set out in section 145 of the Act more especially where the commissioner had committed a gross irregularity in the conduct of the arbitration proceedings. The decision of the arbitrator can also be set aside if it is not rationally related to the purpose for which the power was given from an objective view (*Shoprite Checkers (Pty) Ltd v Ramdaw NO & others* (2001) 22 ILJ 1603 (LAC) para [26],

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[15] (1974) 3 SA 844 (T) 846H – 847A.

[16] (2002) 23 ILJ 863 (LAC) at paras 19 – 20.

Pharmaceutical Manufacturers' Association of SA & others: in re Ex Parte Application of the President of the RSA & others 2000 (3) BCLR 241 (CC)) or if it is not justifiable as to the reasons given. See *Carephone (Pty) Ltd v Marcus NO & others* (1998) 19 ILJ 1425 (LAC); (1998) 11 BLLR 1093 (LAC) at 1103C. By rational I understand that the award of an arbitrator must not be arbitrary and must have been arrived at by a reasoning process as opposed to conjecture, fantasy, guesswork or hallucination. Put differently the arbitrator must have applied his mind seriously to the issues at hand and reasoned his way to the conclusion. Such conclusion must be justifiable as to the reasons given in the sense that it is defensible, not necessarily in every respect, but as regards the important logical steps on the road to his order.

[20] A gross irregularity can occur patently where for example the right to cross-examination is denied or latently where the reasoning is so flawed that one must conclude that there has not been a fair trial of the issues. See Toyota SA Motors (Pty) Ltd v Radebe & others (2000) 21 ILJ 340 (LAC).'

[32] Perhaps for completeness sake, the fact that the Applicant sought to evade the main gate and accessed the premises through the back doors says a lot about the Applicant and his mischievousness. I accept that this issue was not vigorously dealt with at arbitration but I am seamlessly attracted to it in order to determine that the Applicant knew that he was in fact under the influence of alcohol and did everything possible to evade being tested. The evasion on its own is misconduct. As already indicated, the Applicant is a senior employee of the First Respondent who was at all material times aware and appreciated the prescripts of the First Respondent's policy and whom can be reasonably been regarded as a caretaker of such policy. He was in a better position to judge for himself the unfortunate consequence of reporting under the influence of alcohol especially with a final written warning in place and did everything in his power to evade being subjected to the breathalyser test. This, in my vehement opinion, works against the Applicant; in fact, it portrays someone who had unscrupulous intentions over and above the fact that he was under the influence of alcohol.

[33] The Commissioner properly applied his mind to the evidence that was presented before him. In this regard, it is respectfully submitted that the Commissioner was persuaded by relevant evidence and properly considered the relevant evidence adduced before him. There are therefore no acts of gross irregularity on the part of the Commissioner rendering his award reviewable. The Third Respondent committed no reviewable irregularity at all in his award. The Third Respondent thoroughly interrogated the versions of the respective parties and their witnesses and reached a reasonable conclusion that any commissioner would have arrived at. The Third Respondent's primary duty was to resolve the factual controversy between the parties, as the Third Respondent was faced with mutually destructive versions tendered by the Applicant and the First Respondent. The Commissioner properly assessed the credibility of both the First Respondent's witnesses and the Applicant himself in the arbitration hearing. Evidently, the Third Respondent rejected evidence adduced by the Applicant on grounds that are comprehensible. In the case of *Marapula & Others v Consteen (Pty) Ltd*[17], it was held as follows:

'The credibility of witnesses and the probability or improbability of what they say should not be regarded as separate enquiries to be considered piecemeal. They are part of a single investigation into the acceptability or otherwise of the employer's version, an investigation where questions of demeanour and impression are measured against the content of the witnesses' evidence, where the importance of any discrepancies or contradictions is assessed and where a particular story is tested against facts which cannot be disputed and against the inherent probabilities, so that at the end of the day one can say with conviction that one version is more probable and should be accepted, and that therefore the other version is false and may be rejected with safety.'

[34] In the premise I make the following order:

<u>Order</u>

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[17] (1999) 20 ILJ 1837 (LC) at para 33.

1. The review application is dismissed.
2. There is no order as to costs.

M.M Ntsoane

Acting Judge of the Labour Court of South Africa

<u>Appearances:</u>

For the Applicant: Mr Mduduzi Junior Mngomezulu

Instructed by: Wright Rose Innes Attorneys

For the Respondent: Ms Laura Macfarlane

Instructed by: Norton Rose Fulbright