



**THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

Not reportable

Case no. JR2096/21

In the matter between:

**PIONEER FOODS (PTY) LTD t/a  
AEROTON BAKERY**

**Applicant**

and

**COMMISSION FOR CONCILIATION,  
MEDIATION AND ARBITRATION**

**First Respondent**

**COMMISSIONER NZWISISAL L DANDADZI**

**Second Respondent**

**THABANI SIBUSISO KHUMALO**

**Third Respondent**

**Date heard: 03 September 2024**

**Date delivered: 13 February 2025**

**This judgment is handed down electronically by circulation to the parties through their legal representatives' email addresses. The date for the hand-down is deemed to be 13 February 2025.**

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**JUDGMENT**

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**BALOYI, AJ**Introduction

[1] The second respondent's finding that the dismissal of the third respondent is substantively unfair coupled with an order for the third respondent's retrospective reinstatement is the source of the applicant's discontent with the second respondent's arbitration award. The applicant is thus seeking its review and setting aside based on the grounds set out in its papers. The third respondent opposes the application and maintains that there is no basis for the review and setting aside of the arbitration award.

Background

[2] The applicant dismissed the third respondent on 29 December 2020 following a guilty finding on charges of :

“Gross negligence, in that on Thursday 15<sup>th</sup> October 2020 your actions of deliberately not manually blending brown bread flour with white bread flour, resulted in the business incurring losses of at least R39 853.00 (@R3.60 average revenue/loaf).

Failure to follow a reasonable instruction, in that on 16<sup>th</sup> of October 2020 you did not follow instructions to manually blend white bread flour with brown bread flour in order to prevent throughput losses, which resulted in massive losses being incurred.

Gross insubordination in that on Friday 15<sup>th</sup> October 2020 you ignored/failed to follow an instruction that was issued to all supervisors to blend white flour with brown flour.”

[3] The third respondent referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) to challenge the

termination of a 16 year employment relationship between himself and the applicant. He was at the time of his dismissal a Production Supervisor stationed at the applicant's Aeroton Bakery. The circumstances that led to the institution of disciplinary action against the applicant arose out of the poor quality of the brown bread flour which compromised the final product at the end of the baking process. The problem was discovered on 12 October 2020.

[4] The applicant operated on a three-shift system and each shift had its own Production Supervisor. The two other Production Supervisors were Robert Sekomane and Ben Nxumalo. They all reported to the Production Manager. Mr David Madimatswana was at all material times to the dispute an Acting Production Manager. He was reporting to Mr Joshua Mphahlele, who was the Operations Manager. The brown bread flour problem came to the attention of the Acting Production Manager and this resulted in a management meeting being held on 14 October 2020. Mr. Mphahlele, Mr. Madimatswana, and the applicant's Regional Technical Manager, Ms. Thoko Radebe were part of the meeting.

[5] At the end of the meeting, it was resolved that in order to restore the quality of the brown bread flour, certain amount of the white bread flour should be added to the brown bread flower. The blending should be conducted manually as the automatic mixing would cause a drop to the throughput. Mr. Mphahlele directed Mr. Madimatswana to instruct all the Production Supervisors to get the white bread flour from the old production plant and act accordingly. The primary reason behind the applicant taking disciplinary steps against the third respondent is the failure to carry out the instruction. According to the applicant, the third respondent's failure resulted in the applicant incurring a loss of R39 853-00 due to the poor production of 11070 loaves.

[6] Evidence adduced by both parties' witnesses during arbitration proceedings was largely common cause, most particularly on the events that unfolded between 12 and 15 October 2020. The dispute between the parties is centered not only around the instruction being issued to the Production Supervisors to whether it was fully communicated as such. The evidence revealed that there were two legs to the instruction. Firstly, that the white flour must be blended with the brown bread flour to

restore the quality of the brown bread they were baking at that point. Secondly, that blending should be done manually instead of using the machine.

[7] The third respondent and Ben Nxumalo blended the brown bread flour with the white flour, but did that automatically. Mr. Sekolone carried out the very blending but manually. The essence of the applicant's case throughout the arbitration proceedings, the reason for the third respondent's dismissal was that he failed to follow a reasonable instruction by not blending the white flour with brown flour manually. It appears that by default charges two and three were somehow presented as one during the arbitration proceedings before the second respondent. The first charge of negligence that resulted in a loss of R39 853-00 is actually a consequence of the alleged third respondent's failure to follow a reasonable instruction and gross insubordination.

[8] Following the meeting of 14 October 2020, the Acting Production Manager had to convey the instruction to the three Production Supervisors who were rostered to head three different shifts. Mr Madimatswana conveyed the instruction to Mr Sekomane after bumping into him within the workplace. Mr Sekomane indicated that he did not know how to get the flour from the old factory. Mr Ramadimatswana assisted him in that regard and the mixing of the two flours manually in the buckets and pots was carried out.

[9] Relevant to this dispute is that he conveyed the instruction to the third respondent on 15 October 2020 around 10h00 whilst the third respondent started his shift at 6h00. When he arrived at the third respondent's point of production in the plant, he found the third respondent having already moved to the baking of white bread which was not subject of the instruction. Since Mr Sekomane did the correct blending in manual format, according to the applicant it means that all the Production Supervisors were correctly instructed by Mr Madimatswana. The Production Supervisors had at all times obeyed the instructions from management. The third respondent disputed the existence of the instruction to mix manually being received from Mr Maditswana. He only learnt about it later from his fellow Productive Supervisor, Mr Sekomane.

[10] During the evidence in chief of Mr Madimatswana the following came to record regarding the communication of the instruction to the third respondent:

“MR MADIMATSWANA: Yes, prover. I instructed him to go collect the flour in the old factory so that they will be able to come mix it in the new factory. Mr Khumalo had reported for duty in the morning and the other supervisor reported around 2, so the afternoon. I had spoken to him as well ... [intervenes]”

[11] It appeared that the applicant’s representative was not satisfied with the above piece of evidence and took this direction:

“MR MORAPELI: Okay. So what was the actual instruction that you gave to your supervisors, let’s just focus on that.

MR MADIMATSWANA: I instructed them to go get the flour at the old plant, the factory, so that we can be able to come mix it in the new factory to be able to save time.

MR MORAPELI: Okay, so you used the word “mix” it, how was the mixing going to happen?

MR MADIMATSWANA: So we pour it into the buckets and then into the pot then there’s water. So there are small buckets so we put -we pour the flour into the small bucket, oh manual mixing, it’s called manual mixing.”

[12] During cross-examination, this unfolded:

“MR RAKHOMA: And you didn’t call him either before the shift telling him that no, move manual – when you entered the shift, when you started the shift.

MR MADIMATSWANA: No, I didn’t call him.”

[13] The second respondent after having considered various aspects of evidence placed before her came to a conclusion that the applicant’s witnesses gave conflicting versions. She noted the absence of an explanation on why the third respondent was only informed of the manual mixing at 10h00 on an issue which the

applicant views as critical. It was probable that Mr Madimatswana did not convey such instruction in view of his failure to make a follow-up on the implementation of the manual mixing as he was aware that same was not carried out on 15 October 2020. She found the allegations against the third respondent not satisfying the elements of the offence of insubordination.

#### The review application

[14] Now before this Court, the applicant's grounds for the review of the arbitration award are heavily rested on the award not been reasonable. Firstly, the second respondent ought to have found that the dismissal was fair in view of the existence of a reasonable instruction which the third respondent had failed to follow and this resulted in an undisputed loss. Secondly, she misinterpreted and or misconceived the legal principles and tests related to the determination of the conflicting versions and relied on *Stellenbosch Farmers Winery Group Ltd and Another v Martell et cie and Others*<sup>1</sup> in support of its argument. Thirdly, the third respondent pleaded guilty at the disciplinary hearing where his version was different to that presented at arbitration and he has admitted that he started mixing manually on 17 October 2020.

#### Evaluation

[15] Given that the instruction to a certain extent was placed in dispute, the nub of the issue for determination is firstly, what constitutes failure to follow a reasonable instruction to blend white bread flour with brown bread flour manually on 16 October 2020. Secondly, what constitutes insubordination for having ignored/failed to follow an instruction issued to all supervisors to blend white bread flour with brown bread flour on 15 October 2020. Two charges came out of this even though the material placed before the second respondent reveals that Mr Madimatswana conveyed instruction only once, that is, on 15 October 2020 at about 10h00. The applicant's crafting of the charges creates an impression that at least two instructions were issued over a two-day period whilst the evidence suggests otherwise. *Palluci Home*

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<sup>1</sup> 2003 (1) SA 11 SCA.

*Depot v Herskowitz and others*<sup>2</sup> is the leading decision in which insubordination was unpacked and expanded to include other forms of misconduct in addition to the refusal to obey an instruction. The Labour Appeal Court held as follows at paragraph 19:

“[19] It is clear from this finding that the Labour Court failed to appreciate that the refusal to carry out an instruction is not the only basis upon which to found a charge of insubordination. The offence of insubordination in the workplace has, in this regard, been described by our courts as a wilful and serious refusal by an employee to obey a lawful and reasonable instruction or where the conduct of an employee poses a deliberate (wilful) and serious challenge to the employer’s authority.<sup>9</sup> Whereas in some cases defiance of an instruction may indicate a challenge to the authority of the employer, this is not so in every case. Insubordination may also be found to be present where disrespectful conduct poses a deliberate (wilful) and serious challenge to, or defiance of the employer’s authority, even where there is no indication of the giving of an instruction or defiance of an instruction. It is, therefore, not essential for an instruction to be given or disobeyed to found a challenge to the employer’s authority.”

[16] Based on the applicant’s own case as extracted from the part of the relevant part of the record above, the applicant failed to prove the issuing of the latter part of the instruction. To mix the white bread flour with the white bread flour manually a critical step to restore the quality of the brown bread.

[17] It deserves to be stressed that the test for review does not entail the rehearing of the matter by the review Court as if it was tasked with the role of determining the fairness of the dismissal. The test is well settled, hence the Labour Appeal Court in *Fidelity Cash Management services v CCMA and Others*<sup>3</sup> following

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<sup>2</sup> (2015) 36 ILJ 1511 (LAC).

<sup>3</sup> (2008) 29 ILJ 964 (LAC).

the decision in *Sidumo and Another v Rustenburg Platinum Mines Ltd and others*<sup>4</sup> had this to say at para 98:

“[98] It will often happen that, in assessing the reasonableness or otherwise of an arbitration award or other decision of a CCMA commissioner, the Court feels that it would have arrived at a different decision or finding to that reached by the commissioner. When that happens, the Court will need to remind itself that the task of determining the fairness or otherwise of such a dismissal is in terms of the Act primarily given to the commissioner and that the system would never work if the Court would interfere with every decision or arbitration award of the CCMA simply because it, that is the Court, would have dealt with the matter differently. Obviously, this does not in any way mean that decisions or arbitration awards of the CCMA are shielded from the legitimate scrutiny of the Labour Court on review.”

[18] In *Bestel v Astral Operations Ltd*<sup>5</sup> the Labour Appeal Court went further regarding the test for review and held as follows at paragraph 18:

“[18] It is important to emphasise, as is exemplified from *Carephone*, and in **Schwartz**, *supra*, that the ultimate principle upon which a review is based is justification for the decision as opposed to it being considered to be correct by the reviewing court; that is whatever this Court might consider to be a better decision is irrelevant to review proceedings as opposed to an appeal. Thus, great care must be taken to ensure that this distinction, however difficult it is to always maintain, is respected.”

[19] The evidence of Mr Madimatswana revealed that he communicated the first part of the instruction, which was communicated some four hours after the third respondent commenced his shift. In the midst of the crisis, he saw it necessary to

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<sup>4</sup> [2007] 12 BLLR 1097 (CC) at paragraph 110 the Constitutional Court confirmed the reasonableness test as the most acceptable approach in the review of arbitration awards as the review court has to consider whether the decision reached by the commissioner one that a reasonable decision maker could not reach?

<sup>5</sup> [2011] 2 BLLR 129 (LAC).



focus on compiling his reports whilst the losses were happening in the plant and later attributed the losses to the third respondent. After becoming aware that the other Production Supervisor, Mr Nxumalo, was not mixing manually, he did not take steps to correct the situation and allowed same to happen in the third respondent's case.

[20] That the second respondent failed to deal with mutually destructive versions is immaterial in view of the limited scope of insubordination which relates to failure to do manual mixing. Based on the material placed before the second respondent, the existence of the latter point of the instruction could not be proved. Mr Madimatswana conceded to this in respect of the third respondent.

[21] It does not appear that the applicant accepted that communication went wrong this time around as Mr Madimatswana had clearly pointed out that the Production Supervisors were always following the instructions. It only came out during cross-examination of Mr Madimatswana that he was more focused on less pressing issues on the morning of 15 October 2020 and only gave the instruction some four hours after the shift. Even after getting to know that his instruction was not fully complied with, he did not make an effort to intervene and emphasize the missing part of the communication of the instruction.

[22] That the third respondent pleaded guilty at the disciplinary hearing as alluded to in the applicant's grounds of review, seem to be a newly introduced issue at the level of the review application as none of the applicant's witnesses had testified on this. The disciplinary hearing chairperson notes are inscribed on the template which required the chairperson to complete by making a mark on whether the third respondent pleaded "guilty" or "innocent". The chairperson placed an "X" next to "innocent". This certainly takes the applicant's review of the arbitration award nowhere as the third respondent was not afforded an opportunity to challenge this and the second respondent was not called upon to determine the dispute on this footing.

[23] It is of utmost importance that in terms of section 192(2) of the Labour Relations Act<sup>6</sup> (LRA) the employer must prove the fairness of the dismissal once the existence of dismissal is established. The long-standing principle in interpretation of this piece of legislation in *Marapula v Consteen (Pty) Ltd*<sup>7</sup> still serves as a helpful instrument when coming to the employer's discharge of its onus to establish the fairness of the dismissal. The Court held as follows at paragraph 33:

“The onus is on the employer to prove that the dismissal was fair (s 192 of the LRA) on a preponderance of probability. In my opinion, the onus is discharged if the employer can show by credible evidence that its version is the more probable and acceptable version. 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”.

[24] I find it difficult not to align myself with the above *dicta*. With the totality of factors placed before the second respondent being taken into account, the second respondent cannot be seen as having committed an error of fact or law that calls for the review of the arbitration award. The applicant has failed to discharge its onus as set out in section 192(2) of the LRA. The arbitrator's finding based on variety of factors including the incoherent statements from the applicant's witnesses cannot be faulted. The decision made in her award is within the standards of reasonableness. On this note, the application for the review of the arbitration award is bound to fail.

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<sup>6</sup> No. 66 of 1995, as amended.

<sup>7</sup> (1999) 20 ILJ 1837 (LC).

[25] Regarding costs, it will not be in the interest of law and fairness to make a cost order in circumstances where the employment relationship is facing restoration in view of a reinstatement order.

[26] In the premise the following order is therefore made:

Order

1. The application for review of the arbitration award under case number GAJB1565-21 is dismissed.
2. There is no order as to costs.

MM Baloyi

Acting Judge of the Labour Court of South Africa

Appearances:

For the applicant: Ms L Macfarlane of Norton Rose Fullbright SA Inc

For the third respondent: Mr S Khanya of Ismael and Dahya Attorneys