



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JR 2166/22

In the matter between:

**SOUTH AFRICAN CLOTHING
AND TEXTILE WORKERS' UNION**

First Applicant

KHOZA, CEDRICK

Second Applicant

and

**COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION**

First Respondent

LUNGI LUCWABA N.O

Second Respondent

A.P.VOS AND SONS (PTY) LTD

Third Respondent

Heard: 10 December 2024

Delivered: 26 March 2025

Summary: Review of arbitration award – misconduct dismissal – review application dismissed – decision reached by the commissioner was reasonable given the conflicting versions of the evidence, the commissioner correctly evaluated the probabilities of the two irreconcilable versions.

JUDGMENT

SWARTZ, AJ

Introduction

[1] This is an application to review and set aside the arbitration award dated 29 August 2022, issued under the first respondent's case number MPEM1052-22 (the award), by the second respondent (the commissioner), in terms of section 145 of the Labour Relations Act (LRA).¹

[2] The commissioner found the dismissal of the second respondent (Cedrick Khoza – “Cedrick”) and Excellent Lubisi (Excellent) substantively fair and as such, no compensation was awarded. Only Cedrick is challenging the award.

[3] Cedrick is a member of the first applicant. The applicants seek to review, set aside, and substitute the award with an order declaring that Cedrick's dismissal was substantively unfair, and directing the third respondent, A.P Vos and Sons (Pty) Ltd (hereinafter referred to as “A.P Vos”), to reinstate Cedrick with effect from the date of dismissal alternatively, that the matter be referred back to the first respondent for a hearing *de novo*.

Factual background

[4] Cedrick was employed by A.P Vos on 5 April 2019 as a boilermaker. On 2 February 2022, he was charged with assault and subsequently dismissed on 10 February 2022. He was charged with the following:

‘Disrupting work activities on the morning of 02/02/2022, and assaulting 2 supervisors, Andries Mabaso and Bethuel Mabaso.

¹ Act 66 of 1995, as amended.

Because of this disruption, both the Mac-shed and the irrigation team could not continue working because they did not have their supervisors attending to daily matters.'

[5] On the day of the assault (2 February 2022) and prior to it, a meeting was convened by Pieter Vos, one of the owners of A.P. Vos, to discuss employees joining the first respondent (the union). All employees attended the meeting, where Excellent and Cedrick spoke on behalf of the union.

[6] Excellent spoke to the employees first, followed by Cedrick, who addressed them in English. Bethuel Mabaso (Bethuel), a manager at A.P. Vos, interrupted Cedrick, instructing him to speak Shangaan/Tsonga instead, so the employees could understand. While witnesses recalled the exact wording differently, it was common cause that Cedrick responded to Bethuel. The majority of witnesses, including Bethuel himself, testified that Cedrick told him to 'voertsek'. It was also common cause that Bethuel and Cedrick were well known to each other as they had grown up in the same area.

[7] After the meeting concluded, Cedrick, Excellent, Bethuel, and Andries Mabaso (Andries) went to the workshop, where altercations ensued. Bethuel and Andries were both assaulted by Excellent. Bethuel's shoulder was dislocated, and Andries's lip was cut. No charges were filed with the police.

[8] On 8 February 2022, a disciplinary hearing was held and Cedrick and Excellent were found guilty of assault and dismissed.

[9] The transcript clearly establishes that, although Cedrick was not responsible for the injuries sustained by Bethuel and Andries. The key issue remains whether he nonetheless assaulted Bethuel and, if so, whether his actions were the result of self-defence and/or provocation, and whether they were sufficiently serious to warrant dismissal.

The Applicant's Submissions

[10] Bethuel had provoked Cedrick at the meeting by interrupting him. After the meeting, Cedrick and Excellent went to the workshop and Bethuel stopped Cedrick to talk to him. Excellent continued into the workshop to change. Cedrick smelt alcohol on Bethuel's breath and as a result, did not speak to him and continued to walk towards the workshop.

[11] Cedrick proceeded to carry out his duties when Andries grabbed his jacket and pulled him up, leading to a physical struggle between the two. Both Andries and Cedrick picked up iron rods. Excellent then intervened and asked Cedrick to put down the iron rod he was holding.

[12] Bethuel's injury may have been as a result of falling to the floor because he was having an epileptic fit.

[13] Thereafter Willie Vos approached Excellent and punched him on the chin whereafter Cedrick and Excellent walked into the workshop and locked themselves in. The police came to the scene and no charges were made.

[14] Cedrick denies that he displayed any anger towards Bethuel and that he pushed Bethuel.

[15] The applicants seek their relief based on grounds of review as articulated in their founding affidavit and in their supplementary affidavit. The grounds of review have been concisely summarised in paragraph 15 of the applicants' heads of argument as:

The commissioner:

15.1 failed to consider and apply her mind to material evidence before the arbitration regarding Cedrick's role in the incident;

15.2 failed to consider whether the dismissal was an appropriate sanction in light of the inconsistent application of discipline;

15.3 committed material errors of law and fact, in respect of the weight attributed to the A.P Vos's witnesses' evidence.

A.P Vos's Submissions

[16] Bethuel went to the workshop to collect his motorcycle, which he uses for work, and not to confront Cedrick. Andries went to the workshop to fetch a pump. Bethuel did not provoke Cedrick, nor had he consumed any alcohol on the day in question. It was never put to Bethuel during cross-examination that Cedrick had detected the smell of alcohol on his breath. Both Bethuel and Andries testified that Bethuel had not been drinking on the day in question.

[17] While Bethuel was speaking to Cedrick, Cedrick pushed him, although he did not fall. Excellent then pushed Bethuel, causing him to fall. Andries witnessed the struggle between Bethuel and Cedrick and approached them to calm the situation, whereafter Cedrick attempted to punch him but did not make contact. Andries was then struck in the mouth by Excellent, who approached from behind. When Andries turned around, both Excellent and Cedrick were holding iron rods, prompting him to fetch an iron rod as well.

[18] Excellent and Cedrick were the aggressors. Willie Vos was not involved in any altercation and did not assault Excellent. This version of events was not put to A.P Vos's witnesses during the arbitration. Similarly, the claim that Andries pulled Cedrick from behind was also not put to Vos's witnesses.

[19] The testimony of the applicants' witnesses was inconsistent and contradictory. The commissioner was correct in her credibility findings regarding these witnesses, and her award was reasonable, as she based her conclusions on an assessment of the balance of probabilities rather than on speculation or conjecture. Although the award contains some errors in the recording of names, this does not render it reviewable.

[20] The issues of inconsistency and the appropriateness of the sanction were not canvassed during the arbitration. The only issue was whether Cedrick was acting in self-defence.

The Test for review

[21] The commissioner based her finding primarily on the lack of credibility of the applicants' witnesses and on the fact that neither Cedrick nor Excellent sustained any injuries.

[22] From the analysis of the transcript, it is evident that Cedrick did not cause Bethuel and Andries any injuries. It is also evident from paragraphs 50 and 51 of the award that the commissioner confused the names of the individuals. However, despite the abovementioned errors by the commissioner, this court must determine whether the award stands to be set aside and reviewed based on the review test.

[23] It is trite that the reviewing court will be justified to interfere with the outcome of an arbitration award in an instance where the commissioner failed to identify the real issue(s) between the parties or mischaracterised the nature of the dispute between them. A failure to properly characterise the nature of the dispute between the parties is regarded as gross irregularity.

[24] In other words, the test for review is this: *"Is the decision reached by the arbitrator one that a reasonable decision-maker could not reach?"*² To maintain the distinction between review and appeal, an award of a commissioner will only be set aside if both the reasons and the result are unreasonable. In determining whether the result of a commissioner's award is unreasonable, this court must broadly evaluate the merits of the dispute and consider whether, if the commissioner's reasoning is found to be unreasonable, the result is, nevertheless, capable of justification for reasons other than those given by the commissioner. The result will be unreasonable if it is entirely disconnected from the evidence, unsupported by any evidence and involves speculation by the commissioner.³

[25] The Labour Appeal Court has eschewed a piecemeal approach to review applications. The proper approach is for this court to consider the totality of the

² *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 (CC) at para 110.

³ *Herholdt v Nedbank Ltd (Congress of South African Trade Unions as amicus curiae)* [2013] BLLR 1074 (SCA); (2013) 34 ILJ 2795 (LAC) at paras 12 and 13.

evidence in deciding “*whether the decision made by the arbitrator is one that a reasonable decision-maker could make*”.⁴

Analysis

Ground: The commissioner failed to consider and apply her mind to material evidence before the arbitration regarding Cedrick's role in the incident

[26] According to the transcript, the material evidence presented by the following witnesses for A.P. Vos testified that:

- 26.1 Bethuel: Cedrick pushed him but he did not fall;
- 26.2 Andries: Cedrick and Bethuel were pushing each other. Cedrick threatened to punch him (Andries) and then threw his fist, but he did not make contact. Excellent came from his behind, hit his upper lip and he almost lost consciousness;
- 26.3 Nhlanhla Ntonga (Nhlanhla) a foreman: Cedrick made the first move and pushed Bethuel. Excellent hit Andries; and
- 26.4 Voko Mabaso (Voko) a driver: saw Bethuel and Andries's injuries but did not see the fight.

[27] According to the transcript, the following witnesses provided material evidence in support of respondents, testifying that:

- 27.1 Cedrick: he never pushed Bethuel. Andries pulled him up and wrestled with him then people separated them. Andries went to get an iron bar and he also took one. Excellent told Cedrick to put down the iron bar and Willie Vos hit Excellent on his chin with his fist;
- 27.2 Excellent: he did not assault Bethuel nor Andries. He was assaulted by Willie Vos;
- 27.3 Lungile Lubisi (Lungile): Andries grabbed Cedrick by the collar. Cedrick and Andries had iron bars. Excellent pulled Cedrick away and Willie Vos hit Cedrick; and

⁴ *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and others* [2014] 1 BLLR 20 (LAC); (2014) 35 ILJ 943 (LAC) at paras 17 and 18.

28.4 Lindiwe Mboweni (Lindiwe): Andries grabbed Cedrick by the collar. They both grabbed iron bars. Excellent intervened and told Cedrick to put down the iron bar. Willie Vos punched Excellent.

[28] From the transcript, it is evident that:

28.1 it was not put in cross-examination that Bethuel smelled of alcohol;

28.2 it was not put in cross-examination that Andries grabbed Cedrick first;

28.3 it was not put in cross-examination that Willie Vos assaulted Excellent;

28.4 it was not put in cross-examination that Bethuel may have been lying on the floor because of an epileptic fit;

28.4 Lungile's testimony differed from her testimony at the disciplinary hearing. At the disciplinary hearing, she testified that Excellent pushed Bethuel but changed her version at the arbitration;

28.5 Lindiwe's testimony differed from her testimony at the disciplinary hearing. At the disciplinary hearing, she did not testify that Andries grabbed Cedrick.

[29] It is evident from the transcript that the parties' versions differed substantially from each other. When a court or a commissioner in an arbitration is faced with conflicting versions, the appropriate test to evaluate the probabilities of the two irreconcilable versions has been set out by the Supreme Court of Appeal in *Stellenbosch Farmers' Winery Group Ltd and Another v Martell Et Cie and Others* in which it was stated:⁵

'[5] On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So, too, on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a

⁵ 2003 (1) SA 11 (SCA); [2002] ZASCA 98.

variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness's reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail.'

[30] In the Labour Appeal Court in *Bidserv Industrial Products (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and others*⁶ the court referenced the *Stellenbosch Farmers' Winery* test and held:

'[21] During the course of the arbitration the commissioner summarised the key issue in dispute as being "whether or not Ramapuputla submitted a fraudulent (inflated) quotation to his employer". On this issue, Bidserv and Ramapuputla's versions were diametrically opposed. The approach to resolving mutually destructive versions was aptly summarised as follows. To come to a conclusion on the disputed issues a court must make some findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. The latter involves an analysis and evaluation of the

⁶ (2017) 38 ILJ 860 (LAC); [2017] ZALAC 4.

probability or improbability of each party's version on each of the disputed issues. The court will, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. I am referring to this synopsis bearing in mind that s 138 of the Labour Relations Act 66 of 1995 (LRA), enjoins commissioners to conduct the arbitration in a manner that they consider appropriate in order to determine the dispute fairly and quickly, but must deal with the substantial merits of the dispute with the minimum of legal formalities. To this end, they have a discretion as regards the appropriate form of the proceedings.'

[31] In *Marapula and Others v Consteen (Pty) Limited*⁷ this court held:

'[33] Insofar as the evidence is concerned, the upshot is that I am faced with two conflicting versions, only one of which can be correct. The onus is on the employer to prove that the dismissal was fair (Section 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 inquiries 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 are 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. It is on the basis of this test that I have set out, that I accept the version of the employer as the more probable one, and accordingly should be accepted.'

⁷ [1999] ZALC 63; [1999] 8 BLLR 829 (LC).

[32] Although the commissioner did not explicitly reference the *Stellenbosch Farmers' Winery* test, it is evident from paragraph 52 of the award that she applied its principles.

[33] As detailed above, the transcript highlights that certain aspects of Cedrick and Excellent's version were not put to A.P. Vos's witnesses. It further reveals that Cedrick's version, as presented during the disciplinary hearing or in his statement,⁸ changed with regard to pushing Bethuel, an act he later denied during the arbitration.

[34] While Bethuel and Andries's accounts were not entirely clear when considered in the context of the evidence on record, I believe the commissioner, despite confusing the parties' names, including in paragraphs 50 and 51 of the award, conducted a thorough evaluation of the facts before her and correctly applied the relevant test, carefully assessing the probabilities, the credibility of the witnesses, and their reliability. Moreover, she took into account the totality of the evidence presented.

[35] Furthermore, after thoroughly reviewing the transcript and carefully considering all the evidence of this matter, I find no fault in the commissioner's assessment of the witnesses' evidence. The commissioner had the distinct advantage of observing the witnesses as they testified and responded to cross-examination, an opportunity that this court, as a court of review, does not have.

[36] In paragraph 52 of the award, the commissioner found A.P. Vos's witnesses to be credible, whereas the respondents' witnesses presented evidence fraught with contradictions. Such credibility findings are not easily overturned on review.⁹

Ground: The commissioner failed to consider whether the dismissal was an appropriate sanction in light of the inconsistent application of discipline

⁸ It is unclear where this evidence came from - Transcript p 101, 102.

⁹ *Standerton Mills (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and others* [2012] 1 BLLR 84 (LC); [2011] ZALCJHB 79 at para 18. See: *National Union of Mineworkers and another v Commission for Conciliation, Mediation and Arbitration and others* (2013) 34 ILJ 945 (LC) at para 30.

[37] Although I agree with Mr Phillips, representing the applicant, that the commissioner placed undue weight on the fact that neither Cedrick nor Excellent sustained injuries - which does not, in itself, indicate their guilt, this was not the sole basis for her finding that Cedrick's dismissal was substantively fair.

[38] Cedrick does not claim self-defence in his testimony. He denies pushing Bethuel, asserting instead that he only wrestled with Andries. However, as noted earlier, his evidence contained inconsistencies between his arbitration testimony and his testimony during the disciplinary hearing or in his written statement.¹⁰

[39] Bethuel testified that Cedrick pushed him, a claim that Nhlanhla corroborated twice, further asserting that Cedrick initiated the altercation. Andries stated that he saw Cedrick and Bethuel wrestling and when he attempted to intervene, whereafter Cedrick grabbed him, threatened to punch him, and then swung but missed. In contrast, Cedrick denied pushing Bethuel and claimed that Andries was the one who grabbed him. Notably, self-defence was never explicitly raised, and the testimonies regarding the altercations conflicted. Applying the *Stellenbosch Farmers' Winery* test, the commissioner's finding was reasonable, rendering this ground unsustainable.

[40] Ms Moyo submitted that the appropriate sanction and inconsistency were not raised at the arbitration. These are two separate issues.

Inconsistency

[41] Inconsistency pertains to the substantive fairness of a matter. While the commissioner does not explicitly state that Cedrick and Excellent were the aggressors, she implies this in paragraph 52 of the award when discussing who sustained injuries and in paragraph 49 finds "*It makes no sense on a balance of probabilities that Andries and Bethuel would attack the applicants after the meeting instead of it being the other way round*".

¹⁰ Transcript p 101, 102.

[42] This finding also aligns with the testimony of A.P. Vos's witnesses. Applying the *Stellenbosch Farmers' Winery* test once more, the commissioner concluded that, on a balance of probabilities, the versions presented by A.P. Vos's witnesses were more credible and therefore should be preferred.

[43] Inconsistency was not raised as a defence during the arbitration. The real issue the applicant appears to have intended to raise is that the commissioner failed to consider the question of inconsistency *mero motu*, despite its potential relevance to the fairness of the dismissal.

[44] As the balance of probabilities indicated that Cedrick and Excellent were the aggressors, the issue of inconsistency was neither material nor reasonably apparent from the evidence. Accordingly, the commissioner's failure to raise or consider inconsistency does not render the award unreasonable.

Appropriate sanction

[45] The appropriate sanction was also not raised during the arbitration but the submissions for the applicants were that the commissioner should have considered this issue in any event.

[46] During argument and on this ground, Mr Phillips for the applicants, referred this court to *ASA Metals (Pty) Ltd (Dilokong Chrome) v Commission for Conciliation, Mediation and Arbitration and others*¹¹ (*ASA Metals*) and the unreported judgment of *Engen Petroleum Ltd v Chemical, Energy, Paper, Printing, Wood and Allied Workers' Union and others (Engen Petroleum)*.¹² As these judgments were not included in the applicant's heads of argument and only raised during argument, I granted Ms Moyo, the attorney for A.P. Vos, an opportunity to file supplementary heads of argument limited to this narrow issue.

¹¹ (2013) 34 ILJ 350 (LC); [2014] ZALCJHB 307 at para 27.

¹² [2023] 1 BLLR 18 (LAC) at para 27.

[47] In the *ASA Metals* matter, the commissioner found that dismissal was too harsh a sanction and that the employee's actions were somehow justified as the employee was provoked. Paragraph 27 of this judgment states:

'In my view, a clear distinction must be drawn between a deliberate act of assault where one employee sets about assaulting another and an assault which is brought about by a scuffle between two or more employees. Surrounding circumstances must never be ignored. For me the circumstances surrounding the assault on Madutlela may very well dictate that progressive discipline in the form of a severe reprimand be invoked instead of dismissal where, as in this case, the employee had a clean record.'

[48] In this judgment, the review court ultimately found that nothing in the record suggested any provocation but nevertheless found that "*For me even if one were to remove provocation and private defence, the remaining factors in the commissioner's reasoning still render his award reasonable*".¹³

[49] Paragraph 27 of the *Engen Petroleum* states:

'The employee's conduct was unacceptable and such censure was appropriate in the circumstances. Dismissal, as found by the arbitrator, was however, an inappropriate sanction. Decisively, in this regard, despite the egregious conduct of the employee, subsequent to the incident in question Mr Nkwane, the security manager, allowed the employee to enter the employer's premises and proceed with his business there. On the probabilities, had the actions of the employee been so egregious as warranting the sanction of dismissal, it is inconceivable why both Mr Nkwane and Mr Mudau would have compromised the safety of the employer's premises by permitting the employee to enter and go about his business unhindered. The only reasonable inference is that his conduct was not as aggressive as the employer sought to make it out to be and that he was provoked into behaving as he did.'

¹³ *Engen Petroleum* at para 31.

[50] In this matter, while the transcript clearly indicates that Cedrick did not cause the actual injuries sustained by Bethuel and Andries, the commissioner, for all the reasons set out above, found A.P. Vos's version to be more credible on a balance of probabilities and found that Cedrick and Excellent to be the aggravators. The testimony of Bethuel and Ntonga that Cedrick pushed Bethuel and the evidence of Andries that Cedrick grabbed his clothing, threatened to punch him, and attempted to strike him, collectively amount to assault.

[51] In the *ASA Metals* matter the dismissed employee was not found by the commissioner to be the aggravator and the victim (Mr Madutlela) was found to be the aggravator¹⁴ making the facts of this matter distinguishable from the present matter.

[52] In the *Engen Petroleum* judgment, the employer's review application was dismissed on the grounds that the commissioner's finding that dismissal was an inappropriate sanction was reasonable. This decision was subsequently upheld on appeal. As outlined in paragraph 28 of the judgment, the employees had resolved their differences, and, as indicated in paragraph 27 (quoted above) the conduct was not considered as aggressive at the time. These factors, among others, appear to have led the commissioner to conclude that dismissal was an unduly harsh sanction. The facts of the *Engen Petroleum* judgment are clearly distinguishable from those in the present matter.

[53] In the Labour Appeal Court judgment of *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and others*¹⁵ found:

‘... there can be no doubt now under *Sidumo* that the reasonableness or otherwise of a commissioner's decision does not depend – at least not solely – upon the reasons that the commissioner gives for the decision. In many cases the reasons which the commissioner gives for his decision, finding or award will play a role in the subsequent assessment of whether or not such decision or finding is one that a reasonable decision maker could or could not reach. However, other reasons upon which the commissioner did not rely to support

¹⁴ *ASA Metals* at para 7.

¹⁵ (2008) 29 ILJ 964 (LAC); [2007] ZALAC 12.

his or her decision or finding but which can render the decision reasonable or unreasonable can be taken into account. This would clearly be the case where the commissioner gives reasons A, B and C in his or her award but, when one looks at the evidence and other material that was legitimately before him or her, one finds that there were reasons D, E and F upon which he did not rely but could have relied which are enough to sustain the decision.’¹⁶

[54] Ultimately, whether an arbitration award or finding of the commissioner is reasonable must be determined objectively with due regard to all the evidence that was before the commissioner. Having regard to A.P Vos’s disciplinary code,¹⁷ Cedrick’s conduct amounted to both threatening behaviour and assault, which provides for dismissal for the first offence.

Ground: The commissioner committed material errors of law and fact in respect of the weight attributed to the company’s witnesses’ evidence

[55] The review test is result based. This means that in deciding whether an arbitration award is reviewable, the Labour Court must consider the reasonableness of the outcome of the award in relation to all the evidence that was presented to the commissioner during the arbitration hearing.

[56] In the applicants’ heads of argument, it is contended that it was the witnesses for A.P. Vos who contradicted one another, not those of the applicants. This ground is linked to the commissioner’s credibility findings. While there were inconsistencies in the evidence presented by witnesses for both parties, the transcript reveals that the applicants’ witnesses materially altered their versions during arbitration, compared to their accounts given at the disciplinary hearing or in their written statements. It was on this basis that the commissioner made credibility findings against the applicants.¹⁸ In paragraph 38 in *Allie v Foodworld Stores Distribution Centre (Pty) Ltd and Others*¹⁹ the Supreme Court of Appeal stated:

¹⁶ Ibid at para 102.

¹⁷ Arbitration bundle p 5.

¹⁸ Award at para 52.

¹⁹ 2004 (2) SA 433 (SCA); [2003] ZASCA 151 at para 38.

'Of course, the judicial officer, who has sight of the witnesses and is able to assess their evidence from nearby, is the best person to gauge their demeanour. The record of such evidence, however, speaks for itself. If a witness is mendacious, contradictory or evasive, this will appear from the record. And if a judicial officer has justified criticism of a witness or of his or her evidence, the justification for such criticism will normally also appear from the record. Even more so will this be the case when a credibility finding is made against a particular witness. Although a Court of appeal is reluctant to interfere with credibility findings made by the court of first instance, it is not obliged to accept such findings if they should not appear to be justified.'

[57] In this matter, the commissioner's findings are supported by the contents of the transcript.

[58] It is correct that some answers were elicited through leading questions. However, as a review court, this does not detract from the reasonableness of the outcome of the award, when considered in light of all the evidence presented to the commissioner during the arbitration hearing.

Conclusion

[59] The Supreme Court of Appeal in *Herholdt v Nedbank Ltd (COSATU as amicus curiae)*²⁰ held that the result of an arbitration is unreasonable if it is entirely disconnected from the evidence presented. For all the reasons this court has stated above I do not find that the result was disconnected from the evidence.

[60] *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and others*²¹ the *Sidumo* test was refined by introducing a two-stage enquiry. This requires the court to consider (i) whether the applicant has established an irregularity in the conduct of the proceedings (this irregularity could encompass a material error of fact or law, the failure to apply the

²⁰ (2013) (6) SA 224 (SCA); [2013] 11 BLLR 1074 (SCA).

²¹ (2014) 35 ILJ 943 (LAC); [2014] 1 BLLR 20 (LAC).

arbitrator's mind to relevant evidence presented or the misconceiving of the factual dispute in an arbitrary fashion) and (ii) whether the applicant has established that the regularity is material to the outcome of the matter by illustrating that the outcome would have been different having regard to the evidence before the arbitrator.

[61] The commissioner did make certain errors, such as confusing names in paragraphs 50 and 51, and drawing a questionable inference that the absence of injuries to Cedrick and Excellent indicated they were the perpetrators. However, when considering the transcript as a whole and applying the test set out in *Stellenbosch Farmers' Winery*, the applicants have not demonstrated that these irregularities are material to the outcome or that the result would have been different had they not occurred.

[62] As such, the review application falls to be dismissed.

Costs

[63] The last issue to be decided is the issue of costs. This Court has a broad discretion in terms of section 162 of the LRA to make orders for costs according to the requirements of the law and fairness.

[64] Mr Phillips, appearing for the applicants, submitted that, in terms of Rule 40(5), this Court may issue a punitive costs order against a party that neglects, fails, or refuses to file heads of argument timeously. As A.P. Vos filed its heads of argument on 8 November 2024, Mr Phillips contends that the matter was removed from the roll in 14 November 2024 due to the late filing of the aforementioned heads of argument.

[65] While Rule 40(4) prescribes that the respondent must file heads of argument 15 days prior to the hearing, paragraph 2.1.2 of the notice of set down for the hearing of the matter on 14 November 2024 directs the respondent to file its heads of argument 5 days before the hearing. This would have been by 7 November 2025. Ms Moyo for A.P Vos submitted that the applicants raised further issues in its heads

of argument implying that A.P Vos's heads of argument took longer to draft than anticipated.

[66] Despite, Mr Phillips's submission that the late filing of A.P Vos's heads of argument caused prejudice, I am also mindful that the review application falls to be dismissed and of the Constitutional Court's pronouncement regarding the awarding of costs in labour matters.²²

[67] Accordingly, and in my discretion there is no order as to costs.

[68] In the circumstances, the following order is made:

Order

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

S. Swartz

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicants: Mr J Phillips

Instructed by: Cheadle Thompson & Hayson Inc.

For the Third Respondent: Ms T Moyo

Instructed by: Snyman Attorneys

²² *Zungu v Premier of the Province of KwaZulu-Natal and others* (2018) 39 ILJ 523 (CC); [2018] 4 BLLR 323 (CC); *Long v SA Breweries (Pty) Ltd and others* (2019) 40 ILJ 965 (CC); [2019] 6 BLLR 515 (CC) and *Union for Police Security and Corrections Organisation v SA Custodial Management (Pty) Ltd and others* (2021) 42 ILJ 2371 (CC); [2021] ZACC 41.