



- (1) Reportable: Yes
(2) Of interest to other Judges: Yes
(3) Revised

Signature

Date

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Case No. C424/24

In the matter between:

CIPLA DISTRIBUTION GATEWAY (PTY) LTD

Applicant

and

MIKE MWALE

First Respondent

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

Second Respondent

MILES CHENNELS N.O.

Third Respondent

Heard: 27 January 2026

Delivered: 10 February 2026

Review Application – Arbitration Award - Alcohol misconduct – Zero-tolerance policy – Mechanistic approach incompatible with fairness enquiry - Positive breathalyser test result – Absence of impairment – Reliability of breathalyser test – calibration of device and confirmatory test - Sanction – Proportionality – Award reasonable – Review application dismissed

JUDGMENT

MAKHURA, J

Introduction

- [1] The first respondent (employee) was employed by the applicant (company) as a warehouse operator from October 2013. His duties included picking, checking, counting and movement of stock. He was dismissed after a breathalyser test returned a positive result for alcohol, allegedly in breach of the company's zero-tolerance policy.
- [2] The employee challenged his dismissal at the Commission for Conciliation, Mediation and Arbitration (CCMA), cited as the second respondent in these proceedings. The third respondent, acting as the commissioner, arbitrated the dispute and found that although the dismissal was procedurally fair, it was substantively unfair. The commissioner accordingly ordered the company to reinstate the employee with limited backpay.
- [3] The company now seeks to review and set aside the arbitration award and to substitute it with a finding that the dismissal was substantively fair. The review application is unopposed. The review application was accompanied by an application for its late filing. I have decided to grant the condonation application in the interest of justice.

Material facts

- [4] On 26 June 2023, the employee tested positive for alcohol following a breathalyser test, which recorded a reading of 0.019%. He was subsequently charged and dismissed on 7 July 2023 for *"[t]esting positive for alcohol/drugs or being in possession of alcohol during working hours or whilst on duty or whilst working with customers"*.
- [5] After receiving the positive test result, the employee submitted a written statement in which he explained that he had consumed a *Bioplus* energy drink earlier that morning on his way to work and believed this may have caused the

positive reading. It is common cause that, at the time of the dismissal, the employee was subject to a final written warning for testing positive for alcohol. Although the documents relating to that warning were not included in the record before this Court, it is undisputed that on that occasion the employee recorded an alcohol reading of 0.068% and admitted to having consumed alcohol into the early hours of the morning. A final written warning, valid for 12 months, was issued. The company relies on this warning in support of the sanction of dismissal.

[6] Although the company contended that the employee ought to have requested a blood test in accordance with its policy, it failed to place the relevant policy before this Court as part of the record. More generally, the company did not produce the documentary bundle that had served before the commissioner at arbitration. As a result, the review application falls to be determined on the basis of the pleadings and the transcript of the oral evidence. The documents attached to the founding affidavit comprise the award, the Employee Relations Codes and Procedures (disciplinary code), the employee's post-test statement, and the alcohol checklist completed and signed by both the company representative and the employee.

[7] It was only after the Court specifically enquired about the existence of a zero-tolerance policy that Mr Mulaudzi, who appeared on behalf of the company, requested an adjournment and thereafter produced the Alcohol and Drug Policy (zero-tolerance policy). He sought its admission into evidence notwithstanding its absence from the record. The policy was accepted provisionally, and Mr Mulaudzi was invited to make submissions regarding its relevance and admissibility, which he did. Having considered those submissions, and mindful of the importance of a proper ventilation of the issues, I have decided to finally admit the zero-tolerance policy into evidence in the interests of justice.

The zero-tolerance policy

[8] Clause 1 of the company's zero-tolerance policy records that its objectives are to prevent the risk of alcohol and drug use contributing to workplace injuries, to

safeguard the health and safety of employees, to assist employees suffering from alcohol or drug dependency, and to ensure compliance with the Occupational Health and Safety Act¹ (OHSA). To this end, the policy places an obligation on the company to maintain strict controls relating to alcohol and drug use in the workplace. It provides that employees who appear to be under the influence of intoxicating substances are not permitted to enter or remain at the workplace and prohibits employees from being under the influence of or offering alcohol or drugs to other employees. It also prohibits employees from possessing or consuming alcohol or drugs while at work.

- [9] Clause 5 confirms that the company adopts a zero-tolerance approach to testing positive for alcohol and/or drugs. It provides further that:

‘Zero tolerance means testing positive for alcohol and/or drugs irrespective of whether the alcohol concentration level is below the legal driving limit or whether or not the employee is under the influence of alcohol/drugs.

Cipla does not consider whether or not a person is “intoxicated” or “under the influence” in deciding whether an employee is guilty of misconduct or not. Attention is focused whether or not the person has consumed alcohol/drugs prior to or during working hours or and tests positive.

Cipla’s zero tolerance extends to employees reporting to work smelling of alcohol consumed a night before...’ (Emphasis added)

- [10] Employees who test positive are not allowed to carry out their duties and do not receive any remuneration until they test negative. Those who are sent home would therefore not be remunerated for the day. Clause 9 deals with the testing methods and procedures. It provides, inter *alia* that:

‘Written consent must be obtained from the employee where urine or blood test need to be obtained. These tests will be performed by a medical practitioner when necessary.’

¹ Act 85 of 1993.

- [11] In the event the employee *“wishes to dispute the findings of an examination based on physical observation or alcohol/drug test”*, he or she may request to be subjected to medical examination with the taking of biological samples and the costs of that examination would be that of the company only in the event it is negative.
- [12] Clause 15 provides for support-oriented interventions, including the offering of counselling to employees who test positive for alcohol or drugs, and the encouragement of participation in a rehabilitation programme where dependency is identified. These measures underscore that the policy is not directed solely at punishment, but also at employee assistance and risk management. At the same time, however, clause 17 expressly provides that disciplinary action will be instituted where an employee tests positive for alcohol, drugs, or a related substance.

The disciplinary code

- [13] Clause 2.1.2(l) of the disciplinary code provides that:

‘ALCOHOL

A zero-tolerance approach to alcohol/drugs applies. Testing positive for alcohol/drugs when reporting for work or during working hours is considered a serious offence. No employee may have in his possession or consume any alcohol on the company’s premises or during working hours. Alcohol may only be consumed on the company premises with the prior permission of the Chief Executive Director or Executive Director.’

- [14] The disciplinary code sets out the list of offences that are regarded as serious misconduct, which may lead to dismissal for a first offence. One such misconduct is *“[t]esting positive for alcohol/drugs or being in possession of alcohol during working hours or whilst on duty or whilst working with customers”*. However, the disciplinary code makes it clear that each matter should be determined on its own merits.

Documentary and oral evidence

- [15] As part of the company's procedures, an alcohol checklist is required to be completed when an employee tests positive for alcohol, recording amongst others the observations made on the employee. In this instance, the checklist was completed by Mark van Schalkwyk. It records that the employee smelled of alcohol and was argumentative. However, the remaining observations reflect that the employee did not have red or swollen eyes, was not unsteady on his feet, did not behave erratically, did not display mood swings, did not have slurred speech, and was neither aggressive nor incoherent. His general appearance and attitude were recorded as not being out of character. Van Schalkwyk did not however testify at the arbitration.
- [16] The introductory portion of the checklist states that it is to be completed where there is a suspicion that an employee is under the influence of alcohol. It further records that breathalyser testing is not the sole method of determining whether an employee is under the influence, and that observational factors are to be considered.
- [17] As already indicated above, following the positive breathalyser result, the employee was required to provide a written statement. He recorded that he had consumed a *Bioplus* energy drink and had not drunk water and expressed the belief that this may have caused the positive reading. This explanation formed the cornerstone of his defence at arbitration, which was that his explanation amounted to a dispute of the breathalyser result and that, in those circumstances, the company ought to have advised him of his right to request confirmatory blood testing.
- [18] The material facts and evidence led at arbitration concerning the substance of the dismissal were largely common cause. It was not disputed that the employee tested positive for alcohol on the breathalyser, with a recorded reading of 0.019%, that he was not permitted to commence work and was sent home, and that he was subsequently charged and dismissed on 7 July 2023. The company

led the evidence of Nomzamo Hlwele (Hlwele), the Human Resource Business Partner, and Julian Swartz (Swartz), the Outbound Manager. Neither of these witnesses were present when the breathalyser test was administered or when the alcohol checklist was completed and signed.

- [19] Hlwele testified that, in terms of the zero-tolerance policy, where an employee disputes the outcome of a breathalyser test and requests further testing by way of a biological or blood sample, the company would make that option available and arrange for the necessary testing. She confirmed that the rule the employee was found to have breached was simply that he tested positive for alcohol. The company's case was that dismissal was warranted because the employee was on a final written warning for the same or similar misconduct and that the warning had not expired at the time of the incident. Hlwele further testified that the employee did not exercise his right to request medical testing after the positive breathalyser result. When it was put to her that fairness required the company to advise the employee of this right, particularly in circumstances where his employment was at risk, she accepted that it would have been fair and "ethical" for the employee to have been informed but maintained that the company reasonably expected him to be aware of the option.
- [20] Swartz, on the other hand, sought to give evidence to the effect that the consumption of a *Bioplus* energy drink could not have resulted in a positive alcohol reading. He relied on what he described as "extensive case studies" allegedly conducted by the company, which, according to him, demonstrated that *Bioplus* does not remain in the system for longer than ten minutes. He was, however, not qualified to give expert evidence, and no such studies were produced or placed before the commissioner. When questioned during cross-examination as to why employees who dispute breathalyser results are not routinely reminded of their right to request confirmatory testing, Swartz responded that:

'Firstly, like I say, I was not present here, I am not even sure and neither can you be, Sir, that this question was not raised because it is common practice for us to

take you through everything and to ultimately give you that choice and opportunity to go [to] PathCare as well; that is common practice... we cannot insist that you, you go and, and do blood tests or whatever or ... but we will give you the option to do so and then you will be explained how it is going to work and what the charges are and who is going to pay for it and all of that because as a common courtesy, the company picks up the bill unless you are found to be positive, then the bill comes to you.' (Emphasis added)

- [21] The employee testified that he was employed as a warehouse operator and that his duties included picking, checking, moving and counting stock. He did not dispute that the breathalyser test returned a positive result for alcohol. His explanation, consistent with his written statement, was that on the morning of 26 June 2023, at approximately 08h00, he purchased and consumed a *Bioplus* energy drink on his way to work. He explained that his place of work was approximately 1.5 kilometres from his home and stated that he believed the consumption of the energy drink may have caused the positive alcohol reading.
- [22] The employee, through his representative, had requested the calibration certificate and was provided with a certificate relating to a single machine. However, no evidence was led to establish that this certificate related to the breathalyser device used to test the employee on 26 June 2023, nor that the device which recorded the positive reading of 0.019% was properly calibrated at the relevant time.

The arbitration award

- [23] The commissioner noted that the company applied a zero-tolerance policy to second offenders who test positive for and/or are under the influence of alcohol. The company prohibited any employee from entering the premises if the breathalyser test result returned positive for any alcohol level.
- [24] The commissioner considered the charge and dealt with it in two parts. First, he considered whether the employee was under the influence of alcohol. As I have already indicated above, he found that the employee was not under the influence

of alcohol and this finding is not challenged. The commissioner then considered whether the employee tested positive. The commissioner said that the question is whether the employee's dismissal was fair in circumstances where he tested positive for alcohol and was on a final written warning for a similar misconduct. The fact that the employee tested positive was not in dispute. The commissioner found that the company should reasonably have informed the employee of his right to request blood tests to ensure that a fair procedure is followed, particularly because it knew that the matter "*would end up in a hearing and possibly even in an unfair dismissal dispute*". The commissioner observed that:

'The [employee] did not dispute that there were numerous positive readings on the breathalyser or that the final reading, conducted at 9h20, showed 0.019%, while he effectively disputed that he drank alcohol, i.e., alcoholic drinks or liquor, or that he was under the influence thereof. His defence is that he drank Bioplus, which impliedly may have caused the positive results, and that there were false positive results, with the breathalyser testing process and results being called into question. The [employee's] case implies that Bioplus can result in positive results (or false positive results, perhaps depending on one's interpretation thereof).'

[25] Then, there was an issue with the calibration of the device used to conduct the test. The commissioner found that from the various tests conducted, it was unclear from the company's evidence that the calibration certificate was for the device used to test the employee. There was no clear evidence from which device the reading of 0.019% was taken.

[26] The commissioner rejected the company's version that the employee was argumentative but accepted its version that he smelled of alcohol. The commissioner concluded that:

'While the evidence *prima facie* indicates the [employee] had alcohol in his breath, as Grogan states in Dismissal ... "A charge that an employee has alcohol in his bloodstream that exceeds a certain level must be proved by scientific means".

While I find on the probabilities that the [employee] tested positive for alcohol, I must treat the [company's] evidence on the breathalyser tests and the results thereof, including the reading, with an appropriate level of circumspection informed by the above-discussed unanswered questions it leaves us with. The [company] had due warning of the [employee's] arguments in his defence and had the opportunity to present evidence to dispel these areas of dispute.' (Emphasis added)

- [27] The areas of disputes referred to by the commissioner above relate to the calibration certificate and whether *Bioplus* could cause a false positive test result for alcohol. The commissioner then considered whether dismissal was appropriate. He found that in a case of this nature, the question whether the employee is guilty of misconduct overlaps with the enquiry into the appropriateness of the sanction. The commissioner reasoned as follows:

'While I accept that the [employee] had alcohol on his breath and while he has not shown the result of the tests were caused by drinking Bioplus, laboratory testing would have determined more precisely the level of alcohol in his system. In my view, this is important in this matter considering the questions which surround the testing and the accuracy of the reading, as discussed above, and considering there was on the probabilities a departure from what Hlwele agrees was a standard requirement, i.e., that the [employee] be reminded of his right to request further testing.

As regards the need for further testing, it is important, too, that there was no indication of impairment, and one cannot ignore that the breathalyser reading (0.019%) is below the legal limit for driving in South Africa in terms of s 65 of the National Road Traffic Act 93 of 1998 (0.05%) and below that for professional drivers (0.02%)...

I accept that the workplace is unquestionably safety critical. However, the question remains whether dismissal was fair and appropriate and whether there were alternatives which the [company] may have implemented. As the *Shoprite* case enjoins me to do, I must consider appropriateness and proportionality to the

'offence' in determining whether the enforcement of the [company's] policy is fair.' (Emphasis added)

[28] The commissioner found that there was no evidence that the employee was impaired and that the alcohol reading on his breath was notably low. He observed that the final written warning issued against the employee followed a reading of 0.068% and that in that case, the employee had consumed alcohol into the early hours of the morning. The commissioner concluded that:

'it is contrary to the interests of justice and fairness to dismiss the [employee] based on breathalyser testing and a reading of 0.019%, the only reading we have and with certain questions surrounding its accuracy, without any confirmatory test and absent any evidence of impairment, where it is probable on the evidence that he was not reminded of his right to further testing. For these reasons, I find that the applicant's dismissal is, substantively unfair.'

The grounds for review

[29] The company contends that the commissioner committed gross irregularities, misdirected himself and issued an unreasonable decision for various reasons. First, the company contends that the commissioner should have, following his finding that it has a zero-tolerance policy for employees testing positive and/or being under the influence of alcohol, found in its favour that the dismissal was substantively fair. Second, the company contends that the commissioner found that the employee was not under the influence of alcohol despite the employee's plea of guilty to the charge.

[30] Third, the company criticised the commissioner's finding that there was no proof of impairment in contrast with its evidence that the employee was argumentative. It argued that impairment was an irrelevant factor because the matter turned on whether the employee's dismissal was fair based on a positive result for alcohol and considering that he was on a final written warning. Fourth, the company contends that the employee was aware that he could have requested biological testing and criticised the commissioner for his finding that the company deviated

from a standard practice of requiring laboratory testing per Hlwele's evidence. The company contends that this should not have been determinative in the commissioner's finding of unfairness.

- [31] Fifth, the commissioner's consideration of the National Road Traffic Management Act² which permits an alcohol reading of 0.05% for driving on the public roads is criticised as misguided because the company's policy is zero-tolerance and because it deals with medical equipment, pharmaceutical products, hazardous chemicals and hazardous machinery such as forklifts and pallet racking systems that are more than 10 metres high, which all require extreme caution.
- [32] Sixth, the company submitted that the commissioner made contradictory findings in that while he accepted that the company's workplace is unquestionably safety critical, he found that there was no rational link between the zero-tolerance policy and the need to maintain safety at the workplace. Seventh, the finding that the employee could have been sent home was criticised on the basis that the company was obliged to take disciplinary action.
- [33] Eighth, the company contends that the commissioner failed to consider that the employee was a repeat offender who was on a final written warning. Finally, the company argued that the commissioner committed misconduct by inviting Hlwele for further cross-examination after she was re-examined. This last ground was, however abandoned at the start of the hearing when the Court pointed out to Mr Mudau that the cross-examination was on a specific point raised during re-examination, which was not covered before and that the further cross-examination was after discussion between the parties and the commissioner and after the company confirmed that it had no objection.

The legal principles: zero-tolerance policy

- [34] The present case concerns a positive alcohol test result, not an allegation that the employee was under the influence of alcohol, and accordingly did not require

² Act 93 of 1996.

the commissioner to determine whether the employee's faculties were impaired to the extent that he could not properly perform his duties as a warehouse operator.³

[35] The Labour Appeal Court (LAC) in *Shoprite Checkers (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & Others*⁴ considered the application of the zero-tolerance policy. The LAC held that the zero-tolerance approach will be accepted if the circumstances of the case warrant the employer adopting such an approach.⁵ The LAC emphasised:

'[18] But the law does not allow an employer to adopt a zero tolerance approach for all infractions, regardless of its appropriateness or proportionality to the offence, and then expect a commissioner to fall in line with such an approach. The touchstone of the law of dismissal is fairness and an employer cannot contract out of it or fashion, as it were, a 'no-go area' for commissioners. A zero tolerance policy would be appropriate where, for example, the stock is gold but it would not necessarily be appropriate where an employee of the same employer removes a crust of bread otherwise assigned for the refuse bin. See the incisive contribution by André van Niekerk 'Dismissal for Misconduct - Ghosts of Justice, Past, Present and Future' in R le Roux & A J Rycroft (eds) *Reinventing Labour Law: Reflecting on the First 15 Years of the Labour Relations Act and Future Challenges* (Juta 2012) at 102-19. Commissioners should be vigilant and examine the circumstances of each case to ensure that the constitutional right to fair labour practices, more particularly to a dismissal that is fair, is afforded to employees...

[22] Even assuming that the appellant was pursuing a zero tolerance policy, it was not one that is appropriate for an infringement of this rule without further evidence from appellant for the justification of such an inflexible policy. In any event, the commissioner is required to consider whether the circumstances of the case warrant dismissal. If it does not, then

³ cf *Tanker Services (Pty) Ltd v Magudulela* [1997] 12 BLLR 1552 (LAC).

⁴ (2015) 36 ILJ 2273 (LAC).

⁵ Ibid at para 17.

irrespective of the company's policy, the commissioner is at large to set the dismissal aside and replace it with an appropriate sanction.' (Emphasis added)

[36] In *Imperial Dedicated Contracts (Pty) Ltd operating as Imperial Dedicated Contracts v Mpshe and Others*⁶ (*Mpshe*), this Court found that it cannot be an offence to consume alcohol because alcohol could be found in various substances, including medicine. The Court continued that:

'On a daily basis, through medication, employees consume alcohol at the workplace. The issue is intoxication or being under the influence as was aptly put by the LAC in *Tanker Services (Pty) Ltd v Magudulela*⁷. The LAC confirmed that in all probabilities it must be shown that the person's faculties are impaired to the extent that he or she could no longer perform the skills technically complex and highly responsible task.'⁸

[37] In *Samancor Chrome Ltd (Western Chrie Mines) v Willemse & others*⁹, this Court dealt with a matter where the employee was dismissed for breaching the zero-tolerance policy because he tested positive on two breathalyser devices. The employee disputed that he consumed alcohol and went for a laboratory blood test, which detected no alcohol in his bloodstream. He called an expert witness who testified that the laboratory testing could not detect alcohol levels below 0.010g/dl and that breathalyser tests are less reliable compared to laboratory blood tests and are prone to producing false positive test results.

[38] This Court, on review after the commissioner found the dismissal to be substantively unfair, accepted the evidence by an expert witness that the breathalyser tests were capable and prone of producing false positive results. The Court held that:

⁶ [2021] ZALCJHB 198.

⁷ [1997] 12 BLLR 1552 (LAC).

⁸ *Mpshe*, at para 10.

⁹ [2023] ZALCJHB 150; (2023) 44 ILJ 2013 (LC).

'The applicant bore the onus of establishing that there was alcohol in the employee's blood stream. The employee himself did not contend that Broodryk's evidence definitively established that there was no alcohol in his bloodstream, but, by the same token, that evidence did not serve to prove that there was any alcohol in the employee's bloodstream. This evidence, coupled with the evidence by Broodryk that the sample provided by the employee produced a negative result, for any medical purposes, and that breathalyser tests were capable of producing false positive results in specified circumstances, supports the arbitrator's assessment of the probabilities and also his finding. To the extent that the applicant now seeks to contend that it was improbable that the two breathalyser devices would give three false breathalyser results on the same date, there is no evidence that was presented by the applicant to show how many other employees were tested on that day, and how many positive or negative results were generated. The evidence that breathalyser tests were prone to give false positive results was corroborated by Koekemoer, who confirmed that breathalyser tests were less reliable than blood tests and substantiated the evidence that a false positive test might be generated under certain conditions. Specifically, there was no evidential basis to reject the evidence of Broodryk who stated that "in my honest opinion, I think that the breathalyser was false positive".¹⁰

[39] The most recent decision on the zero-tolerance policy from the LAC is *Enever v Barloworld Equipment, A Division of Barloworld SA (Pty) Ltd*¹¹. The LAC embarked extensively on an assessment of its previous judgments and the judgment of this Court on this topic. It held that:

[40] In *National Union of Metalworkers of SA on behalf of Cloete v Trentyre (Pty) Ltd & others*, Zondo JP (as he then was) said the following of zero-tolerance policies:

'In this regard it needs to be pointed out that it is not our law that the mere fact that an employee is found to be under the influence of liquor in

¹⁰ Ibid at para 17.

¹¹ [2024] ZALAC 12; (2024) 45 ILJ 1554 (LAC).

the workplace on a particular day means that the only appropriate sanction in every case is dismissal.'

While I accept that the respondent requested a final written warning from the chairperson of the disciplinary enquiry, the effect of their policy is that their employees have to pick between cannabis or their jobs because the appellant would continuously test positive.

[41] In *Transnet Freight Rail v Transnet Bargaining Council & others*, the dismissal of a yard official, who marshalled and coupled trains was found to be fair after he tested positive for alcohol. Of importance in that case is that safety was a critical consideration and the employee was already on a written warning. In *Taxi-Trucks Parcel Express (Pty) Ltd v National Bargaining Council for the Road Freight Industry & others*, it was found in favour of the employee that dismissal was harsh and unfair. In this case, the employee was a general worker who was loading tyres onto trucks. After being suspected of being intoxicated, a blood test confirmed the presence of alcohol in his blood. In *Tosca Labs v Commission for Conciliation, Mediation & Arbitration & others*, the Labour Court upheld a decision by the CCMA which found the dismissal of a concrete technician for testing positive for alcohol to be unfair. The employee in question was breathalysed after an altercation with a member of the public, and the test came back positive even though there was no evidence of intoxication. The CCMA and Labour Court upheld the unfairness of the decision to dismiss solely based on a breathalyser test.

[42] Underpinning these decisions is the principle that intoxication is a matter of degree, which this court explained in *Shoprite Checkers (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others...*

[43] This matter could well have been different for an employee who was found to be 'stoned', intoxicated or impaired during work hours on the premises or if it was an employee who operates or works with heavy and dangerous machinery. Indeed in *Marasi v Petroleum, Oil & Gas Corporation of SA (SOC) Ltd*, the Labour Court dismissed an unfair discrimination claim against an employee working as a rock drill operator

at a petro-chemical plant who tested positive for cannabis that he had smoked outside the workplace. While in *SGB Cape Octorex (Pty) Ltd v Metal & Engineering Industries Bargaining Council & others*, this court upheld the dismissal of an employee who was smoking cannabis while on duty.

[44] Although no medical evidence was led, the respondent conceded that, unlike alcohol, cannabis stays in the blood system for longer than is the case with alcohol. This underscores the point that a mere positive test for cannabis does not address the sobriety of the user or indicate whether they are impaired from carrying out their duties. A further consideration, as pointed out above, is that the appellant does not operate or work with any heavy or dangerous machinery. Her job is plainly an office desk job. I do not accept that because the respondent has a generally dangerous workplace the rule is justified or that that is an inherent requirement of the job.¹² (Emphasis added)

[40] In this Court, one of the recent decisions is the judgment of *Chill Beverages International (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*¹³ where the employee, a forklift driver, was dismissed after the breathalyser test returned positive results for alcohol. The employee did not dispute the result but stated that he used a cough mixture, which could have contained alcohol. The commissioner found the dismissal to be substantively unfair. The Court dismissed the review application and found that any zero-tolerance policy would be accepted if the implementation necessitated the same and that the onus is on the employer to show that the dismissal was appropriate and proportional to the transgression.

Evaluation

[41] The commissioner found that there was no evidence establishing that the employee's faculties were impaired and consequently concluded that he was not

¹² Ibid at paras 40 – 44.

¹³ [2025] ZALCJHB 298; [2025] 11 BLLR 1203 (LC).

under the influence of alcohol. That finding was not challenged on review. Indeed, counsel for the company, Mr Mulaudzi, correctly conceded that there was no evidence that the employee was intoxicated or that his ability to perform his duties was compromised. There was similarly no evidence that, by reason of the alcohol detected in his breath, the employee was unable to execute his functions as a warehouse operator or posed an operational risk at the workplace.

- [42] The employee only accepted that the breathalyser test returned a positive reading of alcohol. That the employee may have been argumentative, which the commissioner rejected in any event, does not prove that he was under the influence of alcohol or that his faculties were impaired, as the company seeks to suggest.
- [43] The company's principal contention, properly construed, is that, once it was established that the employee tested positive for alcohol, the commissioner was bound to apply the zero-tolerance policy and uphold the dismissal, particularly given that the employee was on a final written warning for similar misconduct. On this basis, once again, on a proper construction of its papers and the submissions by Mr Mulaudzi, the other factors, such as the impairment, proportionality, or workplace context, were irrelevant. In my view, this argument misconceives the nature of the commissioner's enquiry. Such a mechanistic approach, as suggested by the company, is incompatible with a proper enquiry into the fairness of the dismissal, and must be rejected. The commissioner was, as he has done, required to consider the totality of the evidence and the circumstances of the alleged misconduct.
- [44] The company bore the onus of proving that the employee's dismissal was substantively fair. The commissioner properly considered various relevant and material factors, including the low alcohol reading, the absence of impairment, the known fallibility of breathalyser testing and the absence of confirmatory result, and the company's own evidence that it was common practice to inform

employees of the option of confirmatory testing, an option that was not afforded to the employee in this instance.

- [45] To place the burden on an employee to disprove the accuracy of a breathalyser result by requesting further testing, which is what the company's policy suggests, though contradicted by its witnesses' oral evidence, particularly of Swartz, who said that the practice was to advise the employee, is effectively to reverse the onus of proof in dismissal disputes.
- [46] Fairness requires more, especially where the employer, as in this case, accepts that the employee exhibited no signs of intoxication or impairment and where the alcohol reading was notably low, and the employee's explanation was known to the company from the outset. It requires that the employer establish, on reliable evidence, both the misconduct relied upon and that dismissal was an appropriate and proportionate response to the alleged transgression, particularly because dismissal in this case was a reasonably foreseeable outcome. The company's failure to produce reliable evidence in the form of laboratory tests was indeed a material and relevant consideration in the commissioner's assessment of the fairness of the dismissal, but not the determinative factor.
- [47] The company further criticised the commissioner for having regard to the permissible alcohol limits in terms of the National Road Traffic Act, contending that such considerations were irrelevant in the face of a zero-tolerance policy and the allegedly hazardous nature of the workplace. This criticism is misplaced. First, the commissioner did not equate the statutory driving limits with the employer's policy, nor did he substitute one for the other. Rather, the reference served as a contextual indicator in assessing proportionality, particularly in circumstances where the alcohol reading was low, there was no evidence of impairment, and the company relied exclusively on a breathalyser result without confirmatory testing. Second, the evidentiary foundation for the company's reliance on a safety-critical work environment was tenuous. No meaningful evidence was presented regarding the specific nature of the employee's duties,

the degree of risk associated with those duties, or how the employee, in an unimpaired state, posed a threat to health and safety, per the zero-tolerance policy. The limited evidence elicited from Swartz emerged only in response to questions from the commissioner and was directed primarily at the risks posed by intoxicated or impaired employees. That evidence did not advance the company's case, as the company failed to prove that the employee was under the influence of alcohol and/or that his faculties were impaired.

- [48] The company's reliance on the existence of a final written warning similarly does not advance its case. While progressive discipline and prior warnings are relevant considerations, they do not displace the commissioner's obligation to assess whether dismissal is fair in all the circumstances. A final written warning is not a license for the automatic or mechanical imposition of dismissal. The commissioner correctly appreciated that he was required to weigh the employee's disciplinary record together with the nature of the misconduct proved, the reliability of the evidence, the degree of risk posed, and the proportionality of the sanction imposed. Having done so, he found the dismissal to be inappropriate and disproportionate in the circumstances.
- [49] The company's primary contention that testing positive per se constitutes serious misconduct, regardless of the degree or context, illustrates the difficulty with a mechanical application of the zero-tolerance policy. Properly construed, and having regard specifically to the provisions referenced above, the company's zero-tolerance policy is directed at preventing safety risks arising from alcohol or drug impairment in the workplace. Absent evidence that the employee's conduct undermined that objective, the policy cannot be applied in a manner divorced from its purpose or from the factual matrix of the case.
- [50] Finally, there was no evidence or credible evidence presented that identified the specific device used to test the employee or that established that the device had been properly calibrated. In the absence of such proof, and without confirmatory

testing, the commissioner was entitled to approach the breathalyser result with caution, as he has done.

- [51] Viewed holistically, the commissioner's approach reflects a proper appreciation of the enquiry into the fairness of the dismissal. He assessed the company's zero-tolerance policy, as he was required to, against the factual matrix before him and the overarching requirement of fairness. In circumstances where the employer failed to establish impairment, failed to lead reliable evidence confirming the breathalyser result, and failed to demonstrate that dismissal was a proportionate response to the misconduct proved, the conclusion that the dismissal was substantively unfair in my view falls well within the bounds of reasonableness.

Conclusion

- [52] Applying the review test¹⁴, it cannot be said that the decision reached by the commissioner is one that a reasonable decision-maker could not reach. The commissioner correctly identified the nature of the enquiry, engaged with the evidence placed before him, applied the relevant legal principles, and reached a conclusion that is rationally connected to the material before him. Whether this Court might have reached a different conclusion is immaterial.¹⁵ The award falls within the band of decisions to which a reasonable commissioner could come, and it therefore withstands scrutiny on review. Accordingly, the review application falls to be dismissed.

- [53] In the premises, the following order is made:

Order

1. The late delivery of the review application is condoned.

¹⁴ *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others (Sidumo)* [2007] ZACC 22; (2007) 28 ILJ 2405 (CC) at para 110; *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and others* (2008) 29 ILJ 964 (LAC); [2008] 3 BLLR 197 (LAC) at para 100.

¹⁵ *Duncanmec (Pty) Ltd v Gaylard NO and others* (2018) 39 ILJ 2633 (CC); [2018] 12 BLLR 1137 (CC) at paras 42 - 43.

2. The review application is dismissed.

M. Makhura

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr O. Mulaudzi

Instructed by: Senyema Gwangwa Inc

LABOUR COURT