



IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable

CASE NO: C220/2021

In the matter between:

JS MARQUES

Applicant

and

DEPARTMENT OF CORRECTIONAL SERVICES

GENERAL PUBLIC SERVICE SECTOR

First Respondent

BARGAINING COUNCIL

Second Respondent

SHIRAZ MOHAMED OSMAN

Third Respondent

Heard: 23 October 2025

Delivered: This judgment was handed down electronically by circulation to the Applicant's and the First Respondent's Legal Representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing - down is deemed to be 11H00 on 26 February 2026.

JUDGMENT

LALLIE J

- [1] The applicant launched this application seeking an order reviewing and setting aside an arbitration award of the third respondent who will be referred to as the arbitrator in this judgment. The application is opposed by the first respondent hereinafter referred to as the department.
- [2] The applicant was employed by the department as a correctional officer in 1994. He was dismissed on 22 January 2020 for absence from work for 8 days without valid reason between January and May 2018. He challenged the fairness of the dismissal by referring an unfair dismissal dispute to the second respondent. In an attempt to resolve the dispute the second respondent appointed the arbitrator to arbitrate it. Having discharged the mandate the arbitrator issued an arbitration award in which he found the applicant's dismissal substantively fair. It is that decision the applicant seeks this court to review and set aside.
- [3] The applicant's main grounds for review are that the arbitrator committed gross irregularities in the conduct of the arbitration which resulted in him reaching an unreasonable decision. The irregularities include his failure to apply his mind to material facts and errors of law.
- [4] The test for review based on the grounds the applicant sought to rely on is stated as follows in *Herholdt v Nedbank Ltd*¹:

"[25] In summary, the position regarding the review of CCMA awards is this: A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in s 145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by

¹ (2013) 34 ILJ 2795 (SCA) at para 25.

s 145(2)(a)(ii), the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.”

- [5] An arbitrator misconceives the nature of the enquiry when he or she conducts an incorrect enquiry or the correct one incorrectly. It is common cause that the arbitrator conducted the correct enquiry in that he enquired into the fairness of the applicant's dismissal for being absent from work for no valid reason. The totality of the evidence tendered at arbitration reveals that he conducted the enquiry correctly. The arbitrator considered the evidence before him in detail. His conclusion that at the time of the dismissal the applicant had not given the department the reason for this absence for the 8 days' absence is based on undisputed evidence. The absence of the reasons on dismissal justifies the arbitrator's decision that the department's decision to dismiss the applicant was substantively fair.
- [6] Other factors supporting the department's version that the applicant did not establish valid grounds for review are that in addition to finding that the applicant had made himself guilty of the misconduct he was dismissed for are that the arbitrator considered whether corrective measures were taken. The applicant did not refute that his absence was discussed with him in counselling sessions. He only attacked the quality of the counselling and denied its validity based on the absence of witnesses. The arbitrator considered the applicant's

version and reasonably concluded that the presence of witnesses at the counselling was not necessary.

[7] The applicant bases his attack on the reasonableness of the award also on the arbitrator's view on his disclosing for the first time at arbitration the reasons for his absence. I accept the applicant's submission that arbitrations are hearings *de novo* and that nothing precluded him from disclosing the reasons for his absence at arbitration. I further accept the applicant's version that the arbitrator erred in finding that he failed to give the reasons for his absence in his evidence in chief but disclosed them under cross-examination. Not every error the arbitrator makes renders an award susceptible to review. It is the distorting effect of the error on the arbitrator's decision that justifies the review court's intervention².

[8] The arbitrator considered the applicant's evidence that his absence was occasioned by his need to take his mother and his child to hospital. He also had to be in court. He, however, rejected his evidence because the applicant tendered no proof in support of the reasons. He added his belief that had the applicant had the proof of the reasons for his absence he would have completed leave form on his return to work. The arbitrator's comment that even if the applicant had provided at arbitration proof of the reasons for his absence he would have accepted it and probably returned him to work shows that he applied his mind to the evidence of his explanation for the absence but rejected it. I could find no fault in the finding because hospitals, clinics and courts provide proof of attendance on request and the applicant provided no reason for not

² Head of the Department of Education v Mofokeng.

tendering the proof at arbitration. It is the applicant's omission to provide proof for his absence when he could that led the arbitrator to reject his evidence that he had valid reasons for his absence from work.

- [9] The applicant submitted that the arbitrator erred in taking into account his expired final written warning which had been issued in 2015. He relied on clause 5.4.4 of Regulation 1 of 2006 which provides that a final written warning shall be valid for a period of 6 months whereafter it shall be removed from the employee's personal file and destroyed. He submitted that the error of law had a material effect on the arbitrator's final decision. The applicant expressed the view that the arbitrator should have treated him as an employee with a clean disciplinary record. The arbitrator considered various factors in addition to the applicant's expired final written warning in reaching the conclusion that the sanction of dismissal was appropriate. The facts include interruption of proper planning, informal sessions the supervisor held with him and the serious consequences of absenteeism. The consequences incorporate breach of security, burnout which results from compelling other employees to work extra hours to cover for the absent employee. Offenders in prison take advantage of insufficient staff. The arbitrator further considered that the applicant refused to attend the Employee Assistance Programme (EAP) the department offered him and opted for his own which, in the arbitrator's view did not yield the desired results. He expressed the applicant's dishonesty and lack of remorse. He took into account the guidelines in *Sidumo & Another v Rustenburg Platinum Mines*

*Ltd and Others*³ and concluded that no further training or instruction would change the applicant's attitude towards his work.

[10] I accept the applicant's submission that in terms of clause 5.4.4 of Regulation 1 of 2006 the applicant's final written warning should have been removed from his file and destroyed when it expired. I, however, am not convinced that its removal meant that he had a clean disciplinary record as he alleged. When an employee's disciplinary record has been tarnished by a warning it cannot be clean in the same way as that of an employee who has not committed an act of misconduct. An expired warning forms part of an employee's disciplinary record. It reveals the way an employee responds to disciplinary action. Its materiality depends on the way in which it is used as it may benefit or prejudice an employee. The totality of the factors the arbitrator took into account in reaching the decision on the appropriateness of the sanction of dismissal does not support the applicant's contention that the error of considering the expired final written warning had a distorting effect on the arbitrator's decision. The argument that the arbitrator placed significant weight on the expired final written warning is inconsistent with the award. In the absence of proof that the error directed the arbitrator to reach the decision that dismissal was the appropriate sanction, the error does not vitiate the award.

[11] I have considered the gratuitous comments the arbitrator made about the applicant which he alleged rendered the award reviewable. The decision to review an award is based on the totality of the evidence that was tendered at arbitration. It is the effect of the arbitrator's conduct on his or her decision that

³ (2007) 28 ILJ (2405) (CC).

matters in the determination of a review application. In the absence of evidence that the gratuitous comments resulted in the arbitrator reaching an unreasonable decision they do not constitute valid grounds for review.

[12] The applicant did not demonstrate that the arbitration award under review has a defect as envisaged in section 145(1) of the Labour Relation Act⁴ (the LRA). His application cannot succeed.

[13] The department provided no reason in fairness for a costs order against the applicant.

[14] In the premises, the following order is made:

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



MZN Lallie

Judge of the Labour Court of South Africa

⁴ Act 66 of 1995, as amended.

Appearances

For the Applicant: Advocate T du Preez

Instructed by Kramer Weihmann Inc

For the First Respondent: Ms P Zilwa of The State Attorney

LABOUR COURT