(1) Reportable: No
(2) Of interest to other Judges: Yes
(3) Revised

Signature: _____
Date: _____

IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

CASE NO.: D33/2024

In the matter between:

ABERDARE CABLES (PTY) LTD Applicant

and

NUMSA obo MERVIN FIRST RESPONDENT First Respondent

J. KIRBY N.O. Second Respondent

THE METAL AND ENGINEERING INDUSTRIES BARGAINING COUNCIL Third Respondent

Heard: 28 January 2026
Delivered: 29 May 2026

JUDGMENT

GOVENDER AJ

A. Introduction

[1] This is an opposed review application, wherein the Applicant seeks the setting aside of the arbitration award, issued by the Second Respondent ("the Arbitrator"), acting under the auspices of the Third Respondent ("the MEIBC") under case number, MEKN 12161. The impugned award was handed down, on 26

September 2023, and found that the First Respondent's dismissal was substantively unfair and he was re-instated.

B. Arbitration Award

[2] The First Respondent was employed by the Applicant from March 2018, until his dismissal on 23 February 2023.

[3] Relevant to this application, the First Respondent was charged with , (amongst other charges), the following at his disciplinary hearing:

3.1 ***Charge 1****:* ***Gross misconduct*** *– consuming and dealing with illegal narcotics in that on 12 January 2023 between 00h58 and 01h03 you consumed cocaine with a civilian who came to the entrance of the company premises;*

3.2 ***Charge 2: Gross misconduct*** *– failed drug test on 12 January 2023 at 18h00. A drug test was administered by the occupational health practitioner, 18 hours after the incident you tested positive for cocaine in your system.*

[4] The First Respondent was found guilty at the disciplinary hearing and was dismissed. He was not satisfied with the outcome and referred an unfair dismissal dispute to the Third Respondent.

[5] At the arbitration, the Applicant, (employer), was represented by Bridgette Mary Van Niekerk ("Van Niekerk"), who also testified during the arbitration proceedings. The Applicant led the evidence of David Matthew Coutt(Coutts), who is the Applicant's health and safety officer, Mdu Mkhize ("Mkhize"), who is the occupational health practitioner based at the Applicant's clinic and Douglas Maphail (Maphail), who is the Applicant's group engineer.

[6] The First Respondent, testified on his own behalf and called a further witness, a shop steward, Moses Khulani Cele.

[7] The Arbitrator found the dismissal to be unfair and issued the following

award:

7.1 "The dismissal of the Applicant, Mervin First Respondent, by the Respondent, Aberdare Cables, was substantively unfair";

7.2 "The Respondent is ordered to:

7.2.1 reinstate the Applicant retrospectively and pay him backpay with effect from 1 April 2023; and

7.2.2 pay the Applicant backpay totalling R94,032.56, which amount must be paid to the Applicant within ten (10) days of the Council having issued this award."

7.3 "The Applicant is ordered to report for duty at his workplace no later than three (3) days after the Council has issued this award".

[8] The Applicant was not satisfied with Award and hence launched this Review.

C. Evidence

I will only deal with the salient aspects of the evidence.

VAN NIEKERK

[9] Van Niekerk testified, that based on the evidence of CCTV footage, the Applicant got into this motor vehicle belonging to his friend, handed a cellular telephone from the backseat to the driver, who snorted a white substance.

[10] Van Niekerk testified that if one looked at the footage, when Employee jumped into the motor vehicle, he had on a balance of probability, snorted the first hit of cocaine, before he handed the cellular telephone to the driver and the driver went ahead and snorted the second hit of cocaine. Hence, she concluded that was the reason why the First Respondent when tested by Mkhize, the health officer, tested positive for cocaine, an illicit substance in his system. Van Niekerk maintained that there was evidence to prove that he was associating himself with somebody who had snorted cocaine and on the balance of probability, he also snorted.[1] She further

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[1] Transcribed Record: Page 26, lines 8 – 10.

testified that there was no evidence that the phone was on the seat of the backseat and that contended that , that was just a defence that the First Respondent was putting forward.[2]

COUTTS

[11] Coutts testified that he was the Applicant's group health and safety officer, and that he was employed to oversee all health and safety functionalities within the group and compliance thereof to the promulgated legislation. He testified that the policy of the Applicant in respect to intoxicating liquor and drugs was as follows:

> "… Aberdare Cables has adopted a stance of zero tolerance regarding substance abuse and thus no employee, visitor, or contractor may/shall/have intoxicating liquor or illicit drugs in their system, be under the influence of illicit drugs, consume, have in his possession or partake or offer any other person intoxicating liquor, illicit drugs within the boundary of any of the companies operations and/or whilst operating any company [inaudible 0:04:46] or provided by the vehicle …".[3]

[12] He testified that illicit drugs include the following: "*… cannabis, cocaine, hashish, heroin, opium, amphetamines, meta-amphetamines, tik, MVMA, ketamine, PCP, analogues, mescaline, sycamine, myope and mandrax …*"

[13] Coutts further testified that the general safety regulations on the Occupational Health and Safety Act states that: "*2(a) No person is allowed to have intoxicating liquor and/or substances, illicit substances, within their possession, be under the influence of such and/or partake on the company's premises of these substances*". The regulations bind the company to ensure that we proactively ensure that we take a zero stance when it comes to people making use of these substances.[4]

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2 Transcribed Record: Page 27, lines 14 – 21.

3 Transcribed Record: Page 39, lines 7 – 19.

4 Transcribed Record: Page 40, lines 16 – 24.

[14] He testified that according to the Occupational Health and Safety Act (85 of 1993), in particular section 8, the employer must maintain a workplace that is a safe and particularly safe, that does not harm anyone in his employment. Further that section 14 , (OHS Act) , states that the employers also have a duty towards his/her own health and safety as well as the health and safety around his/her employees and his/her peers that may be working with him/her and that guides us to state that we need to provide a working environment that is safe as possible. Bringing in drugs or alcohol into the working environment, is thus opening the employer and the employee to possibly being injured, even fatally injured if they are under the influence while working with machines.[5]

[15] He further testified that the biggest problem is the revolving equipment and that the Applicant's nature of business includes maintaining an environment that is as safe as reasonably practical. Further, that given the nature of the Applicant's business , safety is important as employees can become trapped in machinery and potentially lose a limb or loss of a life.[6] Further , if such a scenario occurred , investigations into such events can even result , in the factory being physically shut down from a week to a couple of months depending on the seriousness of the injuries sustained

[16] When questioned about the company's stance, in regard criminals and criminal activity within the organisation or even around any place surrounding it, he replied that that such activities are viewed as " **a total break in trust relationship between the employee and employer. It is frowned upon. We do not accept it and it will never be accepted"**.[7]

MHKIZE

[17] Mkhize, testified that he is the Applicant's occupational health practitioner, who takes care of the Applicant's occupational clinic that is on site. His role at Aberdare, is the wellbeing of the employees, so that they can perform their duties

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5 Transcribed Record: Page 41, lines 6 – 20.

6 Transcribed Record Page 44 , lines 1 to 12.

7 Transcribed Record: Page 46, lines 3 – 9.

when they are physically well and mentally stable.

[18] He confirmed that he had tested the First Respondent for drugs on the Applicant's premises. Further, that the First Respondent understood the test as it was explained to him and he had consented to giving Mkhize a urine specimen. He conducted the test around 17h30 to after 18h00.

[19] He testified that according to his knowledge, a urine sample testing for cocaine, would present a positive outcome as cocaine stayed in a user's system for 72-hours / 3 days. With a blood specimen it lasted 24-hours. A simple understanding of his evidence, is that if cocaine, had been consumed within three days of the date of test of the urine sample, it would yield a positive result and if it was consumed prior to three days of date of urine test, it would not yield positive result.

[20] He confirmed that the result of the urine test of the First Respondent was positive for the use of cocaine. He further testified under re-examination, that it would not have been possible for the Applicant to have consumed cocaine on Sunday morning, as put to him by Mr Labajwa , as that would have fell outside of the 72-hour window period. [8]

LUTCHMAN

[21] Mr Lutchman, testified about his cannabis use on the property of the Applicant and the damage that has resulted. He confirmed that he used the drug for medicinal purposes after suffering loss of his dad and father-in-law [9]. He tested negative on the second test. He was not a direct employee of the Applicant, but his services were utilised via labour broker.

MACPHAIL

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[8] Transcribe Record Page 158, lines 10 -14.

[9] Transcribed Record, Page 175, lines 24 to page 176

[22] Macphail testified that he is an engineer, employed by Aberdare Cables and that his main role was to ensure that the safety protocols in place were adhered to at all times. He had a government certificate of competency, and he was the competent person for the factory, and he was the GMR 2.1 appointee, in terms of the Occupational Health and Safety Act. He confirmed that he is responsible for everybody's safety at Aberdare Cables. This included ensuring that everybody works in a safe working environment. He was the head of engineering of the Pietermaritzburg plant, and his evidence in large was relevant to the issues pertaining to Mr Luchtman and his cannabis consumption, for which he was given a final written warning.

[23] Macphail testified, the First Respondent's case was handled differently from that of Lucthman, because he had left the premises and then came back to work. The First Respondent had put everybody else's life at risk, including his own, by engaging in "those activities that he did in the car", (allegations pertaining to cocaine) as non-control of oneself can lead to accidents to one person and others as well as to the machinery. He further commented, under cross examination, that when one comes to the gate of the premises there is a disclaimer that says, "No Alcohol, No Drugs" .

D. <u>Evidence of M. Pillay</u>

[24] The First Respondent testified that he did go to his friend's vehicle, where three of his friends were seated. The friends were actually drinking and taking a "whole lot of substances", in the motor vehicle. He jumped into the car "*moved it out of his way*"[10], meaning the phone with cocaine on it. He spoke to his friends for about a minute or a minute and a half, handed over the money to the driver and then exited the car and went back to work.

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[25] His testified that the phone was closer to the middle of the back seat, and there was a white substance on the phone when he had already got into the car. He testified that he was later told that the white substance was cocaine and it is quite

[10] Transcribed Record: Page 207, Line 20 to 24

clear that he accepted that the white substance was cocaine[11] . He did not dispute that it was cocaine. Hence, it is significant to point out that at this juncture, that it was common cause from all evidence led, that the white substance, on the phone as handed by the First Respondent to the driver of the motor vehicle, which driver then consumed, was cocaine.

[26] He confirmed that the video footage as shown to him was correct and that the incident occurred as depicted in the video. He said that the driver took a straw and he continued to partake in the white substance, the driver thereafter passed the phone back to the First Respondent, who then passed the phone to the friend who was seated next to him in the backseat of the car. The First Respondent then handed over the money, which was R50.00 and then left the vehicle. He confirmed that next day when he reported for work , he was tested for narcotics, a test he agreed to do , and that the test revealed that he had cocaine in his system, which he did not dispute.

[27] The explanation tendered by the First Respondent for the presence of cocaine in his urine sample , was that he had consumed cocaine with his friends from Cape Town and Johannesburg , and that this was around the 5th / 6th, towards the 9th, when his friends were down and it was his 40th birthday .[12] He testified that he knows that the use of cocaine is illegal and further that he used cocaine a few times during the period of shutdown .[13]

[28] It also appears common cause, that the First Respondent handed a “a bag “to the driver. The First Respondent contended that there was money in the bag and the Applicant on the other hand, disputed that it was money, or loose notes as alleged by the First Respondent.[14]

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11 Transcribed Record: Page 209 lines 1 to 3

12 Transcribed Record: Page, 212, lines 20 to 25 and 219, lines 6 – 10.

13 Transcribed Record Page 218: lines 219, lines 16 to 25

1414 Transcribed Record Page 222 to page 225

The Test on Review

[29] The test for a review is well settled and derived from the seminal judgement of *Sidumo*[15] , where the Constitutional held that question to be answered, is, "*Is the decision reached by the Commissioner one that a reasonable decision maker could not reach?*"

[30] Our Courts have repeatedly stated, that in order to maintain the distinction between a review and an appeal, an award of an Arbitrator will only be set aside if both the reasons and the result are unreasonable.

[31] It is trite, that in determining whether the result of an Arbitrator's award is unreasonable, the Labour Court must broadly evaluate the merits of the dispute and consider whether, if the Arbitrator's reasoning is found to be unreasonable, the result is nevertheless, capable of justification for reasons other than those given by the Arbitrator. The result will however be unreasonable if it is entirely disconnected with the evidence, unsupported by any evidence and involve speculation by the Arbitrator.[16] Unreasonableness is thus the threshold for interference with an Arbitrator's award on review.

[32] In short, the reviewing Court must ascertain whether the Arbitrator considered the principal issue before him or her; evaluated the facts and evidence presented at the hearing and came to a conclusion that is reasonable, irrespective of the reasons tendered for the finding.[17]

[33] A Review Court is not required to take into account every factor individually, consider how the Arbitrator treated and dealt with each of those factors and determine whether a failure by the Arbitrator to deal with it is sufficient to set the award aside. Courts have cautioned against this piecemeal approach in dealing with an award. The Review Court must consider the totality of evidence and decide whether the decision made by the Arbitrator is one that a reasonable decision maker could make based on the evidence adduced.

[34] Whilst the *Sidumo* test is a stringent one and ensures that awards are not

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15 Sidumo and Another v Rsutenburg Platinum Mines Ltd [2007]ZACC 22; 2008(2) SA 24 (CC)

16 *Herholdt v Nedbank Limited* [2013] 11 BLLR 1074 (SCA).

17 Goldfields Mining SA (Pty) Ltd (Kloof Goldmine) v CCMA & Others [2014] 35 ILJ 943 (LAC) at para 16.

likely interfered with it, however, justifies the setting aside an award on review, if the decision is entirely disconnected with the evidence, or is unsupported by any evidence and involves speculation by the Commissioner. Hence, Applicant must demonstrate that the Arbitrator ultimately arrived at an unreasonable result.

[35] The court can only interfere with an award, if the Applicant has shown a defect in the award, as contemplated in Section 145 Labour Relations Act 66, 1995, that renders the award so unreasonable that no reasonable decision- maker could have reached the same conclusion.

Analysis

[36] The Applicant contended that the Arbitrator, *inter alia*, misconceived the nature of the issue that arose for determination, committed material errors of law, failed to apply his mind to gravity of Employee's misconduct and consequently arrived at an outcome that no reasonable arbitrator could have reached on the evidentiary material properly before him. The Applicant also contended that the Arbitrator disregarded relevant and material evidence, failed to apply the pertinent legal principles, abrogated his fundamental responsibility to assess the totality of the evidence in a fair and balanced fashion and ultimately denied the Applicant its right to a fair hearing.

[37] It was submitted, that the Arbitrator's conclusion that Employee's guilt had only been established in respect of the second charge and the further finding that the sanction of dismissal was too harsh, illustrates that the Arbitrator arrived at an outcome that no reasonable Arbitrator could have reached on the evidentiary material before him.

[38] In particular, with respect to the finding on the first count, the Applicant averred that the Arbitrator materially erred when he found as follows:

> "With regards to Count 1, the Applicant had been charged with having used and dealt in cocaine. He was not charged with, and the evidence does not establish, that on the night in question, he was under the influence of an intoxicating substance, cocaine or otherwise. As such and essential element of this misconduct that needs to be established by the Respondent is that the substance used or dealt with on the night in question was cocaine. This would require the chemical qualities of the substance to be proven. In that this essential element was not proven, the Respondent failed to prove that the

Applicant used or dealt in cocaine on the night in question."[18]

[39] It was argued that the Arbitrator's findings in this regard is wrong in two fundamental respects. Firstly, it conflicts with the common cause facts, and secondly, it is irreconcilable with aspects of the Arbitrator's decision and the totality of the record.

[40] It is overtly evident, *ex facie* the Award, that the arbitrator's finding of substantive unfairness on charge 1, was based on his conclusions that:

i) *that evidence led did not establish that the First Respondent was under the influence of an intoxicating substance*, *nor was he charged with such offence and*

ii*) and the employer did not prove that the substance used or dealt with on night in question was cocaine.*

[41] In assessing the grounds of review in respect of charge 1, the critical question to answer, is did the evidence reasonably establish a finding of wrongdoing on the part of the First Respondent. It was common cause that the First Respondent, conceded that the white substance , used in the motor vehicle was cocaine.[19] Despite this concession on evidence before him , the Arbitrator specifically recorded that , " As such an essential element of this misconduct that **needs to be established by the Respondent is that the substance used or dealt with on the night in question was cocaine"** and finds that since the chemical qualities of the substance was not proven , the employer failed to prove that the First Respondent had used or dealt in cocaine .

[42] This is most perplexing, as the First Respondent had confirmed under oath that the white substance used in the car, was cocaine, [20]. Hence, if it was not

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[18] Applicant's Heads of Argument, Page 12 @ Para 29

[19] Transcribed Record: Page 209 Lines 1-3

[20] Transcribed Record: Page 208, line 25, page 209, lines 1 – 3.

"*Mr Labajwa: Do you have any idea what was that white substance?*

First Respondent: I was told later on that it was cocaine. I do not know that they partake in a lot of things. **But it was cocaine."**(my emphasis)

disputed and in fact accepted, by the First Respondent that the white substance "used or dealt "with on the night/early parts of the morning was cocaine, there was no need for any further proof on the chemical composition. Whether the First Respondent consumed any cocaine, at the specified time in the car or at some other time, is an entirely different consideration.

[43] The Applicant further raised that had the Arbitrator found that the chemical composition of the substance was not a contentious issue ,(given the fact that the First Respondent had in fact admitted that it was cocaine, further volunteered evidence to the effect that he is familiar with his friends and the substances used by them), then a different outcome would have resulted and that this misstep by the Arbitrator constitutes a reviewable irregularity, is agreed with by the Court. Afterall, the arbitrator very clearly states that …. "***in that this essential element was not proven,*** the Applicant had ***therefore failed to prove that the employee had used or dealt in cocaine.*** The inference being that if the employee had proven that the white substance was cocaine, then the employee would have proven that the First respondent had used or dealt with cocaine.

[44] The court finds that the materiality of the Arbitrator's error as to the fact that the substance on the day in question was cocaine , had a distorted impact upon the Arbitrator's reasoning.

[45] On a conspectus of all the evidence before the Arbitrator , the Arbitrator's finding that the Applicant did not prove that the white substance used or dealt with on night in question was cocaine (,through evidence of chemical qualities of the white substance) , is a clear misnomer and reflects a misinterpretation of the evidence before him . The court, therefore, finds that there is indeed merit in the first ground of review , that the Arbitrator's conclusion that the Applicant ought to have proved the chemical qualities of the substance to prove that the substance was in fact cocaine, is manifestly unsound , as it is clearly not supported by the evidence .

[46] It was argued on behalf First Respondent, that there was simply no direct evidence that First Respondent had consumed cocaine and therefore charge 1 must

fail. It was further averred that the Applicant needed to adduce evidence to convince the Arbitrator that there was consumption of cocaine and a nexus existed between the consumption and the positive result[21] . The court agrees that there was no direct evidence on record as transcribed, that the First Respondent had used cocaine. However, the court nonetheless finds that Arbitrator misdirected himself and committed an irregularity, by failing to consider the totality of the evidence and the circumstances of the alleged misconduct of charge 1 and 2 through a process of inferential reasoning.

[47] The Arbitrator was faced with contradictory versions. One version that the First Respondent had consumed cocaine in the car together with his friends and hence he tested positive for cocaine on the next work shift, being Thursday, the 12th of January 2023. The other version presented, was that he did not consume cocaine in the car, only the driver consumed cocaine and the reason he tested positive for cocaine was because he had tried it recreationally, around the 5th/6th to 9th of January 2023, (which date fell on a Monday).

[48] Despite the contradictory versions, the Arbitrator did not make any credibility findings on the witnesses, nor did he determine the dispute on a preponderance of the probabilities.

[49] Van Niekerk version as testified was that based on the video footage, the Applicant held the view that the First Respondent had consumed cocaine with his friends as he tested positive a few hours later. This was the inference that the Applicant sought to draw from video clips viewed. First Respondent, point blank denied using cocaine in respect of count 1.

[50] What the arbitrator ought to have done, which he failed to do, was to consider the inherent probabilities of the evidence. The determination of probabilities entails an inference to be drawn from the evidence as a whole. The process of inferential reasoning calls for an evaluation of all the evidence and not merely

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[21] First Respondent's Heads of Argument , Page 8 @para 19

selected parts. The inference that is sought to be drawn must be consistent with all the proved facts. If it is not, then the inference cannot be drawn and it must be the more natural or plausible conclusion from among all conceivable ones, when measured against the probabilities[22].The arbitrator failed to make such determination, as he had misdirected himself by finding that since the chemical qualities of the white substance (cocaine) was not proved , then that was dispositive of the matter as the Applicant had not proven an essential element of the charge sheet .

[51] Further Mkhize's evidence was that, if one tests positive for cocaine via a urine test, this will mean that cocaine was used in a 72-hour window period prior to the test. Under cross examination, he steadfastly maintained his version. The Arbitrator accepted his evidence and did not state any reasons to reject his evidence as untrue or unreliable.

[52] The First Respondent's version was that the last time that he consumed cocaine was during the period 6 to the 9th of January 2023. I pause to mention, that his evidence does not align with the version put to Mkhize. Mr Labanjwa put to Mr Mkhize, that the First Respondent last used cocaine in the early parts of Sunday morning, which would have been the 08th of January 2023 and not the 09th of January. The 09th of January 2023 fell on a Monday. At no stage did the first respondent correct Mr Labanjwa. The problem with the version that was put to Applicant's witness, is that it excludes the possibility of consumption during the 72-hour period before the test was conducted. This begs the question; how then did the First Respondent test positive for cocaine on 13 January 2023, if he had last consumed more than 72 hours earlier.

[53] The arbitrator committed a gross irregularity when he failed to decide the matter on probabilities and arrive at a conclusion as to which outcome , was most logical , natural and plausible in the circumstances .The Arbitrator ought to have provided reasons as to why he preferred one version over the other, but there is no

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[22] SA Post Office v De Lacy and Another See SFW Group Ltd and Another v Martell et Cie and Others 2003(1)SA 11 (SCA) at para 5

such reasoning . Instead, he rather over simplistically stated, that since the chemical qualities was not proved, charge 1 was not proven. In Rex v Bloom, [23] reference was made to two cardinal rules of logic which cannot be argued. These are firstly that the inference sought to drawn must be consistent with all the proved facts and secondly, the proved facts should be such that they exclude every reasonable inference from them save the one to be drawn.

[54] The First Respondent's entire defence in respect of the first charge rested upon his claim that his positive result for cocaine on 12 January 2023, stemmed from his consumption of the drug between the period 6 to 9 January 2023. It is common cause that the First Respondent's test for cocaine was administered shortly after the First Respondent commenced his nightshift on Thursday, 12 January 2023. The version put to the Applicant witnesses was that he had consumed it in the early parts of Sunday morning. This would indicate a timelapse of Monday, Tuesday and Wednesday, which is a period greater than 72-hours.

[55] Hence, the lapse period between the date and time upon which the First Respondent contended to have consumed cocaine, Sunday, 8 January 2023, and the date and time when the drug test was administered, Thursday, 12 January 2023 at or around 18h00 was well in excess of the 72-hour period. Therefore, on a balance of probabilities it seems more probable than not that the First Respondent had indeed consumed cocaine in the early hours of 12 January 2023 with his friends in their car. Afterall, the first respondent's version that he tested positive because of consumption prior to 72-hour period, seems highly improbable as his urine would not have tested positive and therefore his version ought to have been rejected as false.

[56] The undisputed facts were that he was in car with cocaine, together with people using cocaine, he handled the cocaine by passing it, all within the 72-hour period of the test, which yielded a positive result. The only logical inference to be drawn from the facts was that he in all probability used the cocaine as alleged by the Applicant. There is no other plausible explanation for cocaine being in his system based on the evidence that was led. His version had to be rejected as highly

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[23] 1939 AD 188 at 202-203

improbable against the evidence of Mkhize. He did not corroborate his version that his consumed cocaine with his friends at a party by calling any other witnesses.

[57] In causa, either, the evidence of Mkhize had to be rejected that cocaine would test positive only if consumed within 72 hours maximum and therefore the First Respondent version was more probable that he tested positive, because he has last consumed cocaine on Sunday the 09th of January. Alternatively, the evidence of Mkhize is accepted, and then version of the First Respondent has to be rejected that he had not consumed cocaine since the 09th of January.

[58] If the Arbitrator accepted the evidence of Mkhize, that the Applicant had to have consumed cocaine within 72 hours of date of test, in order to yield a positive result as he did, then on a balance of probability he consumed cocaine with his friends and therefore tested positive later the same day. Both versions were mutually destructive, and the Arbitrator failed in his duty to provide reasons as to which version was more probable than not and the reasons for such rejection. I am not going to labour the point any further, other that this was a clear misdirection on his part.

[59] I agree with the Applicant's contention that the Arbitrator by concluding that the First Respondent was not guilty of the first charge, but guilty of the second charge, contradicted himself to an irrational extent , when he had accepted the evidence of Mhkize as satisfactory, after having found that Mkhize had properly followed procedures and allowed for an accurate determination of the presence of cocaine . Further when he found that the First Respondents reason for entering the car not very plausible.

[60] Further First Respondent was rather evasive in his answers, in respect of when he used cocaine. His answer was "*it was around the 5th / 6th, towards the 9th when friends were down*". There was no clear recollection in this regard. Apart from evasive answers, which was not consistent with the version put to the witnesses that he last used cocaine early Sunday, he also appeared to be changing his version as he testified.

[61] When questioned about what his friends were doing and what did he see them do, he replied that they were drinking and taking a whole of substances and that he jumped into the car and "moved it (phone with cocaine) away"[24]. He testified that he spoke to his friends for about a minute and half, handed the driver the money and exited the car and went back to work. He significantly does not mention handing over the phone to driver.

[62] Then when questioned that there was CCTV footage showing him handing over a phone with white substance to driver, he then changed his evidence to, "all I did was jump in and move the phone over and was told to hand it to the driver". [25] A fact he left out of earlier evidence when questioned.

[63] Then his evidence changes once again on further questioning. When asked why the person in the back seat didn't hand over the phone to the driver and why did he have to do it and not the other person, his reply was," It was just because I was jumping in, so I moved it … It was not like I was thinking about it. I just handed it over". Thus, implying he handed it over out of his own volition, and this is a change from the version that he was told to hand it over. This version also raises the question why the cocaine was just lying on the phone on the back seat, clearly ready to be consumed because according the First Respondent, he simply picked it up and handed it over to the driver. He did this knowing full well that it was an illicit substance, even if he had not known at the time it was cocaine, which is highly improbable in the circumstance, considering he handed the driver money rolled up to use to snort the substance. Surely if the person in the back seat and prepared these lines of cocaine on the phone for the drivers consumption, then that passenger logically would have handed it over to the driver, why would he just leave the phone with lines of cocaine on it in the back seat , into a space that the First Respondent would later occupy .

[64] Despite evasive answers on material issues and contradictions in evidence, the Arbitrator did not make any pronunciation on the credibility of the First

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[24] Transcribed Record Page 207, Lines 21 to 25

[25] Transcribed Record Page 208 Lines 9 -12

Respondent as a witness, when it trite that the evidentiary burden shifts to an employee to provide a reasonable explanation, once an employer establishes a prima facie case of gross misconduct , as was undeniably done *in causa* , given the common cause drug test result . The Arbitrator had found that the version of the First Respondent that he entered the car to simply hand over the money "not to be very plausible ", this finding brings the credibility of his evidence into serious doubt but despite this finding the arbitrator dismally fails to make his determination on the creditability, reliability and probabilities of the evidence led before him, and thereby committed and irregularity in the proceedings.

[65] By the Arbitrator, failing to properly weigh the evidence on a preponderance of probabilities, this resulted in an unnecessary evidentiary burden being placed on the Applicant, despite material facts, such as the nature of the drug being common cause amongst the parties.

[66] Having established that there are defects in the award, the second leg of the enquiry is whether despite the defects, the outcome of award is nonetheless an outcome that a reasonable decision maker could have reached based on the evidence led at the hearing.

[67] On a full conspectus of all the issues raised herein and after having carefully assessed the totality of the evidence led before the Arbitrator, as well as the scant reasons underpinning his conclusions, the court finds that the Arbitrator committed a gross and reviewable irregularity in failing to properly assess the evidence before him. He misconceived material aspects of the evidence, and his findings are not rationally supported by the evidence, resulting in an award that is fundamentally flawed.

[68] The defects in the award are materially unreasonable, and the fundamental flaws in reasoning and evidentiary assessment are beyond any salvage, resulting in the award not meeting the standard of reasonableness required for the award to stand, as it falls outside the bounds of decisions that a reasonable decision maker could reach.

Sanction

[69] The Arbitrator found, in respect of charge 2, that a sanction of dismissal was not fair in the circumstances [26].

[70] The Applicant contended that, the Arbitrator's finding that the First Respondent was not guilty in respect of the first charge, unreasonably diluted the gravity of the First Respondent's multiple and serious disciplinary transgressions, thus unavoidably distorting the Arbitrator's conclusions in respect of sanction. The Applicant further maintains that the dismissal was commensurate with the gravity of the First Respondent's wrongdoing and it warranted a dismissal. Further that the Arbitrator failed to take into account the flagrant extent that the First Respondent had breached the Applicant's disciplinary code.

[71] First Respondent on the other hand, averred that just because the First Respondent had tested positive for cocaine, did not mean that the dismissal was the only appropriate sanction. His legal representative contended that intoxication is a matter of degree and the employer must show that the employee's intoxication rendered him unable to perform his duties. He contended that no objective evidence was placed before the Arbitrator on the zero-tolerance policy and argued that the case of SGB Octorex and Nhlabathi, referred to by the Applicant's legal representative was distinguishable.

[72] The Applicant referred the Court to the case of ***SGB Cape Octorex (Pty) Ltd v Metal and Engineering Industries Bargaining Council*** [27] **("*SGB Cape Octorex*"),** where the LAC emphasised that employees are vested with the prerogative to determine their own disciplinary rules. *SGB Cape Octorex* made it abundantly clear that an employer may delineate disciplinary parameters that are suitable to its organisation, provided that those parameters are objectively reasonable.

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[26] Index to Pleadings : Page 35 paragraph 47

[27] 2023 (2) BLLR 125 (LAC)

[73] The Court was also referred to the case of *Nhlabathi*[28], where the *Nhlabathi* decision turned on the same central axis as that of the SGB Cape Octorex, where it was held "*the employer's prerogative to determine the standards of conduct and safety rules whereby its employees are bound*". The evidence led, supported this contention, given the nature of the Applicant's business and the statutory obligations in respect of safety to all persons employed by the applicant. The evidence was also canvassed that the First Respondent was aware of the rules and policies of the Applicant, having attended the relevant workshops.

[74] The Arbitrator appears to have adopted the oversimplistic and mechanistic approach, that since he found that no evidence had been led that the continued employment of the Applicant was intolerable or not practical, then he was obliged to re-instate the First Respondent. Firstly, there was evidence on record that this kind of conduct is not tolerated, clearly implying termination of the working relationships.

[75] Even if there was no direct evidence was led, the arbitrator misdirected himself by not deciding whether the breakdown in the relationship could be inferred[29]. It is trite that where no direct evidence of a breakdown of trust in the employment relationship has been led , the enquiry into the fairness of the dismissal includes a determination of whether a breakdown can be inferred from the nature of the offence and , it's the court view that given the common cause facts leading to charge 2 , as set out by the Arbitrator , clearly demonstrate how a future working relationship would be intolerable . There was no accountability or remorse on the part of the First Respondent at all. His behaviour as pointed by the Arbitrator caused serious reputational risk to his employer. A failure to lead evidence of a breakdown of a trust relationship does not in itself render the dismissal unfair nor does it mean that the trust relationship has not broken down.

[76] However, the Arbitrator failed to take into consideration the evidence led before him that the company has a zero-tolerance policy on drug and alcohol abuse or usage. He failed to take into consideration or comment on the evidence of Coutts

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28 44ILJ 231 (LC)

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and Macphail that, the Applicant adopted a stance of zero-tolerance regarding substance abuse and thus no employee or contractor may or shall have intoxicating **or illicit drugs in their system.**

[77] The Applicant had led evidence that established that zero-tolerance policy was justified and necessary, and there was no objective evidence led by the First Respondent to proof that the policy was unreasonable. In causa, it appears to be a sensible operational response to risk management considering the nature of the business. In Air products SA (Pty) Ltd v Matee and Others[30] , the court upheld the validity of a zero-tolerance policy, which was deemed just given the operation requirements and the health and safety of employees. It also found that the employee had not presented any evidence to challenge the fact that the workplace was dangerous, as *in causa*.

[78] Arbitrator did not consider that the Applicant's policy was firmly entrenched in order to meet the legitimate imperative of the safety and management and compliance with the health and safety regulations of the Occupational Health and Safety Act. The arbitrator omitted to make any reference to the applicant's obligations contained in legislation to ensure a safe workplace and to ensure that employees do not enter the workplace under the influence of narcotics, despite this evidence being led by Coutts.

[79] He also failed to consider and or attach due weight, to the evidence of Coutts in respect of clause 9.1. Coutts was very clear in his testimony that "*The regulations bind the company to ensure that we proactively ensure that we take a zero stance when it comes to people making use of these substances*". The arbitrator misdirected himself when he failed to consider any of the evidence of the safety aspects in respect of the workplace and that it could be a statutory offence to have employees on the premises who consumed illicit substances such cocaine. It is untenable that despite the evidence of the risks of safety and the operations of the Applicant's business, that the arbitrator could have formed the view that the conduct,

[30] (2021) ZALCJHB 332

holistically, was less serious and a dismissal was an unfair sanction. This is a conclusion that no reasonable person could have reached.

[80] The arbitrator committed a reviewable irregularity, by considering "intoxication" as a benchmark to justify a dismissal and since he found the was no evidence of intoxication/influence, this proved then a dismissal was appropriate. He completely missed the evidence that having an illicit drug in your system was not tolerated by the Applicant at all, and it is common cause that the Applicant had an illicit substance in his system.

[81] The arbitrator finds, "*This conduct of the Applicant caused great reputational risk to the Respondent. What customer for engineering services would want to refer work to a service provider whose employees are associating with drug users whilst on duty. This would quite likely implore that the same employees would also partake in drug use whilst on duty. Their trust in the work of the Respondent would be greatly diminished*". Despite this finding he finds that the working relationship would be tolerable in the future, when the First Respondent, entertained and facilitated the consumption of illicit drugs during his lunch break by passing the phone to the driver, metres away from the entrance. He acted in direct contravention of good faith towards his employer. The First Respondent sought to escape responsibility based on contrived and false defences and explanations that were not corroborated or borne out by the facts.

[82] The Arbitrator committed a further material irregularity when he found that there had been no evidence led that the continued employment would be intolerable or not practical and as such, he was required to re-instate the First Respondent. He ignored the material evidence of Coutts that criminals and criminal activity lead to a total breakdown between the employer and employee.[31] Coutts evidence was that company does not accept such conduct, and it will never be accepted. The evidence of Van Niekerk, the evidence of Macphail and the evidence of Coutts in respect of

[31] Transcribed Record Page 46 Line 6-8

the Applicant's zero tolerance policy was largely ignored, resulting a rather academic approach to the evidence, resulting in decision that is not reasonable.

[83] It is the Court's considered view, the Applicant's decision to dismiss the First Respondent was neither harsh or unreasonable in the circumstances, given the zero-tolerance of the Applicant's policy on intoxicating substances in the workplace and further considering the nature of the business of the Applicant. The First Respondent was not remorseful of his actions. He facilitated the use of cocaine, an illicit and illegal drug at the company's premises, during his lunch break. The Applicants policy, clause 9,1 makes it very clear that no employee shall have any illicit drug in his/her system. Clause 9.1 mentions "intoxication" or being under the influence separately from having illicit drugs in the system , which leaves no doubt in the court 's mind that even having the illicit drug in your system will not be tolerated due to the company's zero-tolerance policy as set out in the Group Safety Rules and Prohibition Procedure[32]. The disciplinary code sets out serious misconduct and the evidence led was that actions of the First Respondent was viewed as serious gross misconduct, and the charge sheet reads so as well.

[84] In light of all of the above, the courts finds that the Arbitrator's award is entirely disconnected from the material evidence led before him. The evidence led at the arbitration clearly bears out the fairness and reasonableness of the dismissal imposed at the disciplinary hearing.

[85] The issue of costs was not vigorously pursued by any party.

Conclusion

[86] Having due regard to all of the above, I am satisfied that the award is not one that a reasonable decision maker would make and the award stands to be reviewed and set aside.

[87] In the result, the award is reviewed and set aside.

[88] I make the following finding:

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[32] Documentary record, Page 31 Para 9.1

1) The award is reviewed and set aside;

2) The Award is substituted with an order that the dismissal of the First Respondent is substantively fair;

3) No order as to costs.

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N. Govender

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant:	Adv. Michelle Jacobs
Instructed by:	Chris Baker and Associates, Gqeberha
For the First Respondent:	MC Luthuli
Instructed by:	MC Luthuli Attorneys, Durban