



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

Signature

8 June 2026
Date

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

CASE NO: JR2232/23

In the matter between:

LIZELLE LEHMANN

Applicant

and

SYLVANIA METALS (PTY) LTD

First Respondent

COMMISSION FOR CONCILIATION MEDIATION

AND ARBITRATION

Second Respondent

COMMISSIONER KENNETH DLAMINI N.O

Third Respondent

Heard: 12 November 2025

Delivered: 8 June 2026

Summary: An application to review a ruling issued during the arbitration proceedings, and an award which found the dismissal of an employee for being under the influence of alcohol and testing positive for alcohol was substantively fair. The review succeeds because the commissioner denied the applicant the opportunity to call an expert witness.

JUDGMENT

GANDIDZE, J

Introduction

[1] Ms Lizelle Lehmann, the applicant, was employed by Sylvania Metals (Pty) Ltd (Sylvania or the employer) as a Planning Administrator. On 7 October 2022, she arrived at the Lesedi Plant (Plant), a client site, and was subjected to a mandatory breathalyser test. The first test at 05H30 returned a reading of 0.11%. She took a second test at 05H45 using the same equipment, which recorded 0.06%. A third test was conducted an hour and a half later, using a different machine, yielding a result of 0.00%. Sylvania does not recognise this third test. Nevertheless, the applicant proceeded onto the site, and Sylvania disputes that she was authorised to do so. Weeks later, the applicant was suspended and subsequently subjected to a disciplinary hearing to answer a charge of:

‘Reporting to work under the influence of alcohol in that, on the 7 October 2022, you reported that Lesedi plant and tested positive from a mandatory alcohol testing at the entrance gate. The following readings were recorded from 0.11% BAC (first test) and 0.06% (second test).’ (sic)

[2] She was found guilty and dismissed. An internal appeal failed, and the dispute was referred to the Commission for Conciliation, Mediation and Arbitration (CCMA).

[3] It is common cause that Sylvania employees, as contractors for Samancor Chrome Mines working on Samancor Plants, including the Lesedi Plant, are subject to Samancor's Drug and Alcohol Procedure (Policy). The stated purpose of the Policy is, inter alia, to ensure workplace safety by enforcing a zero-tolerance policy.

[4] During the arbitration proceedings, the commissioner issued a ruling on 11 July 2023, ordering Sylvania to furnish the applicant with certain documentation she had requested, as discussed later. The documents were not provided. At a subsequent sitting on 7 August 2023, the applicant sought

an order holding Sylvania in contempt for failing to provide the documents. At the same sitting, Sylvania objected to the expert notice and the supplementary expert notice served by the applicant on 24 May and 28 July 2023, respectively.

[5] On 17 August 2023, the commissioner issued a ruling dismissing the application to hold Sylvania in contempt and upholding Sylvania's objection to the expert notices. Thereafter, the arbitration proceedings continued to finalisation, and in an award dated 22 October 2023, the commissioner dismissed the applicant's unfair dismissal claim.

[6] This application, brought in terms of sections 145 and 158(1)(g) of the Labour Relations Act¹ (LRA), seeks to review and set aside the ruling dated 17 August 2023 and the award dated 22 October 2023. The applicant seeks the substitution of the award with an order that her dismissal was substantively unfair, alternatively, an order remitting the matter to the CCMA for a fresh hearing before a different commissioner.

[7] Sylvania opposed the review application. In oral argument, Mr Makka, for Sylvania, submitted that several pages were missing from the pleadings bundle and that the supplementary affidavit need not be considered because it was not included in that bundle.

[8] The preliminary points need not detain the court. It is true that a page or two are missing from the award annexed to the founding affidavit, but a complete copy of the award forms part of the review record.

[9] As regards the supplementary affidavit, it formed part of the pleadings, even though it is titled 'Founding Affidavit'. This second 'founding affidavit' contains the following paragraph:

'1.4 I have read my answering affidavit and the subsequent record filed, and now elect to supplement my founding affidavit and Notice of Motion in the paragraphs below.'

[10] Accordingly, the supplementary affidavit is properly before the court.

¹ Act 66 of 1995, as amended.

[11] In any event, the only additional issues raised in the supplementary affidavit are that the applicant sought retrospective reinstatement and that the same machine could not be used to validate the result of a second test. Sylvania addressed both contentions.

The arbitration proceedings

[12] The pre-arbitration minute was read into the record at the start of the arbitration proceedings, and both substantive and procedural fairness were disputed.

[13] The arbitration proceedings commenced on 13 April 2023. The next hearing dates were set for June 2023, but Sylvania's legal representative fell ill. When the proceedings resumed on 7 August 2023, two issues arose, and the commissioner postponed the matter to rule on them. The ruling was issued on 17 August 2023, and the matter was scheduled for a hearing on 3 and 4 October 2023 and was finalised.

[14] In relation to the evidence, Sylvania called Mr Kevin Pabst (Pabst) as its witness, and the applicant gave evidence in her own case.

Pabst's evidence and rulings issued

[15] Pabst testified that he was employed by Sylvania as the Group Safety, Health, Environmental, and Security Manager (the SHES Manager). Following rumours of alcohol-related cases at the Lesedi Plant that had not been escalated, he was tasked by the Executive Committee to investigate. He learnt of the incident on 7 October 2022 involving the applicant, which was recorded in the security occurrence book but had not been escalated.

[16] Mandatory testing was conducted by security personnel at the main access security entrance. The security personnel received training. The Policy refers to an additional device because Samancor does not have an iBlow10 machine, which Sylvania has. It is a two-in-one device that scans for alcohol and, if it detects alcohol, displays a red light (scanner). It then measures the alcohol content (meter) and returns a reading above 0.00%.

[17] The third test administered to the applicant was not in accordance with the Policy, was not authorised by the Chief Safety Officer, Mr Eugene (Eugene),

and was not recorded in the security occurrence book. The applicant drank water between the first and second tests, allowing time for the alcohol to leave her system.

- [18] On 7 October 2022, the iBlow10 machine was operational, and of all the employees tested, only the applicant tested positive for alcohol. The applicant was aware that being under the influence of alcohol is a dismissible offence. This was in line with the zero-tolerance policy on alcohol. Eugene was the only person authorised to allow the applicant to enter the site on 7 October 2022, and he had not done so. He also did not authorise a third test for the applicant.
- [19] The iBlow machine had last been calibrated on 19 May 2022, and the Calibration Certificate was valid for 12 months.
- [20] During Pabst's cross-examination, the applicant filed an application for certain documents, which was granted 'in the interests of fairness and justice.' However, when the arbitration proceedings resumed on 7 August 2023, Sylvania had not provided the applicant with the requested documents, prompting the applicant to seek to have Sylvania held in contempt. Sylvania disputed that it was in wilful disregard of the 11 July 2023 ruling, as it was not in possession of the documents it had been ordered to discover.
- [21] On 28 July 2023, the week before the set-down date of 7 August 2023, the applicant served a supplementary expert notice. The initial notice had been filed on 24 May 2023. At the hearing on 7 August 2023, Sylvania objected to the expert notice, contending that the pre-arbitration minute does not indicate that the applicant will call an expert witness; that the expert notice ought to have been served before 13 April 2023, when the arbitration proceedings commenced; that at the start of the proceedings the applicant did not indicate that she would call an expert witness; and that, if the expert notices were admitted, Sylvania would be prejudiced, as its witness was already under cross-examination and could not be consulted on their content. The commissioner postponed the matter to consider and rule on the contempt application and the objection to the applicant's expert notice.

[22] In a ruling dated 17 August 2023, the commissioner disallowed the expert notices. He reasoned that the issue was 'never mentioned' in the pre-trial minute and that 'the above authority is very clear on the issue of bringing an expert witness'.²

[23] The commissioner also held that Sylvania was not in wilful disregard of the ruling of 11 July 2023, as it was not in possession of the documents sought, and that Samancor ought to have been joined to the proceedings.

[24] The arbitration proceedings continued on 3 and 4 October 2023, with the conclusion of Pabst's cross-examination and re-examination, and the applicant taking the stand.

Applicant's evidence

[25] As a Planning Administrator, her duties included overseeing the rollout of Sylvania's computerised maintenance management system at the Millsell, Mooinooi and Lesedi Plants.

[26] On 7 October 2022, she was subjected to a mandatory breathalyser test and tested positive twice, first 0.11% and then 0.06%. Mr Louw, the Plant Manager, and the Site Safety Officer were called to the scene. Louw gave her a bottle of water. Louw telephoned Eugene, who instructed that a third test be conducted using an A500 machine. When tested on the A500 machine, the result was 0.00%. Her demeanour was not recorded. She remained on site, then left to collect blood results from her doctor, and went to the Mooinooi Plant to hand them in. She had consumed two glasses the previous night, as she regularly did. In cross-examination, she stated that she had been employed by Segment Earth as a Planner since 18 June 2023, at a salary of R40 000.³

Parties closing arguments

[27] Sylvania submitted that the applicant took the second test after Mr Louw gave her water to allow the alcohol to leave her system. Therefore, the applicant was an equal participant in concealing the incident. The applicant was

² The statement was made after referring to Rule 37A of the CCMA Rules.

³ At Sylvania she earned R43 957.99.

required to report the incident to her Engineer at Millsell, where she was predominantly based, but failed to do so. Sylvania could not take her back, as the trust relationship had broken down. She conceded that she regularly consumed glasses of wine in the evenings, showed no remorse, and failed to disclose that, at the time of the arbitration proceedings, she had secured other employment.

- [28] On behalf of the applicant, it was submitted that she did not fail the breathalyser test. The additional equipment, which is mandatory under the Policy, returned a negative result. The iBlow10 machine measures alcohol content in mg/l, whereas the Policy requires the alcohol percentage. The Policy distinguishes between testing positive for alcohol and being under the influence of alcohol, and Sylvania did not clarify what the applicant was charged with. No evidence was led to show that the applicant was unable to perform her duties on the day in question. Wright, who signed the Calibration Certificate, was not called as a witness, nor were his qualifications presented. The Calibration Certificate states that measurements are only valid at the time of calibration and therefore cannot guarantee results for 12 months. It also states that accuracy depends on factors such as care exercised in handling the instrument and frequency of use, and no evidence was led on these issues. No evidence was presented that the security officers who conducted the first two tests on the applicant were trained as required. A breathalyser is not a calculator, and therefore its results are not conclusive. Although she had commenced employment elsewhere effective 18 June 2023, the applicant sought retrospective reinstatement with Sylvania. She also sought costs.

The award

- [29] After referring to several case authorities dealing with specific legal issues, the commissioner recorded that what happened on 7 October 2022 was common cause, followed by a charge that the applicant reported for work under the influence of alcohol and tested positive for alcohol during a mandatory alcohol test.
- [30] The commissioner recorded that it was common cause that the Calibration Certificate issued on 19 May 2022 was valid until 19 May 2023; that it was

undisputed that the Policy did not provide for a third test; that the Policy adopted a zero-tolerance approach; and that the applicant had been trained on the Policy.

[31] Applying the test set out in Item 7 of Schedule 8 of the Code of Good Practice Dismissal, the commissioner held that there was no reason not to accept Pabst's version and that the applicant was not a credible witness. He found that the rule was not disputed, was valid and reasonable, that the applicant was aware of it, and that the Policy did not provide for a third test. He also found that it was within Sylvania's purview to set standards or rules of conduct and to decide on sanctions for non-compliance. Therefore, the applicant was guilty, and the dismissal was substantively fair.

[32] As regards procedural fairness, the commissioner recorded that it was disputed. However, later in the award, he stated that the procedure was undisputed and that the parties were bound by the pre-arbitration minutes, a claim not supported by those minutes.⁴ Be that as it may, the issue is academic, as the review application raises no issues regarding procedural unfairness.

Grounds for review

[33] The founding affidavit raised three grounds of review. The applicant's heads of argument raised two grounds of review. The third ground, relating to alleged misconduct by the commissioner in discussing and obtaining matrimonial maintenance advice from Sylvania's legal representative, was not pursued in the applicant's heads of argument. However, in oral argument, Mr Geldenhuys pursued it, and Mr Makka responded to the submissions. Accordingly, the matter is approached based on three grounds for review.

First ground

[34] The applicant submits that the commissioner committed gross irregularities.

⁴ The pre-arbitration minute reflects that both substance and procedure were placed in dispute.

[35] The first is that during the arbitration proceedings, the applicant moved an application in terms of Rule 29 of the Rules for the Conduct of Proceedings before the CCMA⁵ (CCMA Rules) to be provided with:

35.1 The sobriety evaluations performed on her,⁶ as provided in clause 5.4 of the Policy;

35.2 The quality assurance procedures and protocols used by Alcohol Breathalysers in accordance with ISO quality control standards;⁷

35.3 The qualifications of Mr Ashley Wright (Wright), the Technical Signatory⁸ of the Certificate of Calibration for the breathalyser tests conducted on the applicant, and

35.4 The service logbook for the iBlow10 Breathalyser machine, as it is required to be calibrated every 12 months or every 65 000 tests, and the history of the machine's use and care.

[36] In response, Sylvania submitted that Alcohol Breathalyser's (Pty) Ltd (regarding the ISO quality standards), Mr Ashley Wright (Wright) (regarding his qualifications), and the Samancor Occupational Medical Practitioner (the only person authorised to conduct the sobriety evaluations) ought to have been joined as interested parties but were not.

[37] On 11 July 2023, the commissioner issued a ruling requiring Sylvania to disclose the requested documents by 28 July 2023. Sylvania failed to provide the applicant with the documents as ordered. The arbitration proceedings were scheduled to resume on 7 August 2023. On 4 August 2023, Sylvania's attorneys sent a letter to the applicant's attorneys raising two issues. The first was that Sylvania did not possess the documents sought and proposed that the parties jointly approach the third parties in possession of them. The second was that the expert notices were belated.

⁵ GNR.3318 of 21 April 2023.

⁶ Which includes observational assessments.

⁷ To determine whether the iBlow10 machine was calibrated in accordance with the standards.

⁸ Who must be qualified and authorized to sign the Certificate of Calibration.

- [38] At the resumption of the hearing on 7 August 2023, Sylvania persisted with the issues it had raised in its letter to the applicant's attorney. It submitted that it had failed to provide the applicant with the requested documents for the same reasons it had given before the ruling was issued, viz that it was not in possession of the documents. The applicant applied to have Sylvania held in contempt for failing to comply with the ruling of 11 July 2023.
- [39] Secondly, Sylvania also took issue with the applicant's expert notice and supplementary expert notice, served on 24 May 2023 and 28 July 2023, respectively. Its objections to the expert notices were threefold. First, it submitted that the pre-arbitration minute did not provide for the filing of expert notices. Secondly, any expert notices ought to have been served before 13 April 2023, when the arbitration proceedings commenced, and could not be filed halfway through the proceedings. Lastly, it submitted that it would be prejudiced if the applicant called expert witnesses while its first witness was already under cross-examination, and that it could not consult this first witness about the expert notices.
- [40] The arbitration proceedings were adjourned to allow the commissioner to consider the issues.
- [41] The applicant submits that, in a ruling dated 17 August 2023, the commissioner held that Sylvania need not provide the requested documents on the ground of non-joinder of interested parties.⁹ The applicant contends that the commissioner could not revisit the ruling of 11 July 2023 because the disclosure of the documents was *res judicata* and the commissioner was *functus officio*. The applicant further submits that Sylvania was required to file an application to rescind or review the ruling, and it did neither. Therefore, the commissioner committed a gross irregularity by revisiting his ruling of 11 July 2023.
- [42] Regarding the expert notices, the commissioner ruled that the applicant could not call an expert witness because the pre-arbitration minutes did not permit it. The applicant submits that the ruling constitutes a gross irregularity, as the

⁹ As will be discussed later on, this is a misinterpretation of the ruling by the applicant.

pre-arbitration minutes do not preclude calling expert witnesses, as they record that:

‘the Applicant does not intend to call any expert witness at this stage. Should this position change, the Applicant will comply with the Rules relating to Expert Witnesses.’

- [43] The applicant also submits that her representative advised, on the first day of the arbitration proceedings and during the cross-examination of Sylvania’s first witness, that an expert witness would be called. Sylvania’s representative did not object to the applicant calling an expert witness.
- [44] The applicant also submits that Rule 37A¹⁰ of the CCMA Rules, which requires seven days’ notice before calling an expert witness, was adopted to prevent postponements by giving the other side an opportunity to consider its position considering the expert notice. It was submitted that in this case the expert notices were served in May and July 2023, respectively, well before the arbitration set-down date of 7 August 2023, thereby giving Sylvania sufficient time to consider its position. Reference was made to *Thorne v Commission for Conciliation Mediation and Arbitration and Others*¹¹, in which the court refused to review a ruling that postponed a matter to allow the other party to consider an expert notice filed on short notice.
- [45] It was further submitted that a notice to call an expert can be served at any time, even when the arbitration proceedings are part-heard, provided it is served at least 7 days before the next sitting.
- [46] It was also submitted that the fact that Sylvania’s first witness was being cross-examined did not prejudice Sylvania, as that witness was not an expert and could not rebut the evidence of Dr Laurens, the expert the applicant

¹⁰ The rule provides as follows:

‘A party intending to call an expert witness shall give seven (7) days, prior to the hearing, notice thereof to the Commission and the other party to the dispute together with a summary of the proposed evidence of such witness, any document on which the witness will rely during evidence and the basis on which the witness is regarded to be an expert to enable the other party to consider the summary and obviate the need for any postponement.’

¹¹ (C832/08) [2014] ZALCCT 59 (3 November 2014).

intended to call. The applicant submits that Dr Laurens would have given evidence about the breathalyser test results.

- [47] Issues were raised about the reliability of the applicant's breathalyser test results. It was submitted that, without the breathalyser machine's logbook, it was impossible to determine whether it had conducted 65 000 tests. The Certificate of Calibration records that 'accuracy will depend on factors such as care exercised in handling the instrument and frequency', yet Sylvania led no evidence on how the machine had been handled or how frequently it was used. The Certificate of Calibration also records that 'It is a correct record of the measurements made at the time of calibration', yet the signatory, Wright, was not called as a witness. It was also submitted that the South African National Accreditation System requires the Technical Signatories of the Certificate of Calibration to be metrologists or expert metrologists, and that, in the absence of Wright's qualifications, it was not possible to determine whether he was qualified to sign the Certificate of Calibration, and that he was not called to confirm his qualifications. Therefore, as the submission went, it was irregular for the commissioner to accept the Certificate of Calibration as conclusive proof that the applicant was under the influence of alcohol.
- [48] The applicant relied on *Samancor Chrome Ltd (Western Chrome Mines) v Willemse and Others*¹² (*Samancor Chrome*), which held that breathalyser tests are prone to false positive results, and takes issue with Sylvania's failure to adduce evidence that the person who conducted the test was trained, as required by the Policy. It is also said that the person or persons who conducted the tests were 'unspecified'.
- [49] The submission was further that since Pabst conceded that he was not a technical expert, his evidence that the iBlow10 was a two-in-one machine should not have been accepted.

Second ground or review

¹² (2023) 44 ILJ 2013 (LC) at para 17.

[50] The applicant contends that Sylvania did not comply with the Policy, which was part of her contract and states that:

‘everyone entering the site will be subjected to a breathalyser test (Alco-scanner) at the access control points. The outcome of a positive breathalyser test must be confirmed by means of another test by security staff by using additional equipment (Alco-meter).

[51] The non-compliance was that Sylvania used the same machine for both tests, whereas Policy requires a different machine for the second test. The submission further is that it is absurd for the same machine used to conduct the first test to validate its own results in a second test.

[52] Yet a further issue raised is that the machine measured the alcohol content in mg/l, whereas Policy provides for alcohol percentages.

[53] The applicant also submits that the Policy distinguishes between ‘reporting for work under the influence of alcohol’ and ‘testing positive for alcohol’. Sylvania’s witness clarified that the applicant was charged with being under the influence of alcohol, and that the applicable stringent test was whether an employee was capable of performing her work-related tasks, as held in *Transnet Freight Rail v Transnet Bargaining Council and Others*¹³, and *Tosca Labs v CCMA*¹⁴ (*Tosca*). It was submitted that, in this case, the applicant entered the workplace and performed all her work without any reported incidents, therefore, her competency to work was never impaired.

[54] The further submission was that the Policy requires the demeanour of the person being tested to be recorded on the Alco test result, and that, in this case, it was not recorded.

[55] The applicant also takes issue with the fact that, after the breathalyser test, she was allowed to enter the site and was not immediately suspended with pay, pending the outcome of the disciplinary hearing, as required by the Policy.

¹³ [2011] 6 BLLR 594 (LC); (2011) 32 ILJ 1766 (LC) para 24

¹⁴ (2012) 33 ILJ 1738 (LC) at para 11.

[56] Taking all of the above into account, it is submitted that the commissioner committed gross misconduct by accepting Sylvania's version and finding the applicant's dismissal substantively fair.

Third ground of review

[57] The third ground of review is that the commissioner committed misconduct by obtaining legal advice on matrimonial maintenance from Sylvania's legal representative, a conversation said to have taken place in the absence of the applicant and her representative.

Sylvania's contentions

[58] Sylvania contends that the commissioner was correct not to hold Samancor in contempt for failing to disclose documents not in its possession. A related submission is that, despite lacking the documents, the applicant, who was legally represented, chose to continue the arbitration proceedings without them rather than accept Sylvania's offer to jointly approach the custodians of those documents.

[59] As regards the applicant's expert witness, Sylvania submits that the commissioner acted reasonably in disallowing the expert notices, as the applicant sought to recalibrate her case after hearing Sylvania's first witness, thereby materially prejudicing Sylvania's case. Sylvania further submits that the expert notices addressed Pabst's evidence and could not be consulted, as he was under cross-examination.

[60] It was also submitted that the applicant had not given seven days' notice before the commencement of the arbitration proceedings, as required by CCMA Rule 37A. To support its contention, Sylvania submitted that the rule is not, and cannot be, premised on the assumption that there will be a postponement. The second point is that, as one of the LRA's objectives is the speedy resolution of disputes, the rule must be interpreted to require that the notice be given before the commencement of the arbitration proceedings, as allowing the notice to be served halfway through the arbitration proceedings would defeat this objective. The third point is that allowing a party to serve the

notice at any time could mean the notice is served after a party has closed its case, and postponing the matter to allow a party to reopen its case would defeat the objective of the speedy resolution of labour disputes. The fourth point is that if the expert notice is accepted halfway through the proceedings, Sylvania could not simply decide to call its own expert, ignoring the fact that its witness had already been under cross-examination after having testified, as this would lead to the postponement of the matter, which runs counter to the objective of Rule 37A.

- [61] Sylvania submits that the decision in *Thorne*, relied upon by the applicant, is distinguishable because there was no objection to non-compliance with the seven-day notice period, and the affected party simply requested a postponement of the matter.
- [62] Regarding the finding that the applicant's dismissal was substantively fair, Sylvania submitted that the applicant was charged with reporting to work under the influence and with testing positive on a mandatory alcohol test at the entrance gate, with readings of 0.11% BAC (first test) and 0.06% (second test). Therefore, the applicant was charged under the zero-tolerance policy, which requires that an employee not have a reading above 0.00%, and that the applicant was aware of the Policy.
- [63] Sylvania relies on several case authorities addressing an employer's zero-tolerance approach.
- [64] First is the decision in *Xstrata Coal South Africa v CCMA*¹⁵ (*Xstrata*), where the court held that the commissioner misconceived the issue he was tasked to determine by confusing the charge of being under the influence of alcohol with the charge of being unable to perform duties, when the issue was that the employer had a zero tolerance policy regarding alcohol.
- [65] Reliance was also placed on *Sasol Mining (Pty) Ltd v CCMA and others*¹⁶ (*Sasol Mining*), which held that employee safety in the workplace is

¹⁵ (JR 90/2012) [2014] ZALCJHB 14 (7 February 2014).

¹⁶ [2015] 36 ILJ 2359 (LC) at para 6.

paramount and that an employer need not wait for a disaster before taking action against an employee who exposes fellow employees to danger.

- [66] The third decision relied upon is *Shoprite Checkers v Tokiso Dispute Settlement*¹⁷ (*Shoprite Checkers*), which held that a commissioner will accept zero tolerance where the circumstances of the case warrant the employer adopting such an approach. In this case, the applicant did not challenge the reasonableness of the zero-tolerance policy, and safety in the mining industry is important, as recognised in the Mine Health and Safety Act.¹⁸
- [67] Yet another decision relied upon is *KWS Carries v National Council for the Road Freight and Logistics Industry and Others*¹⁹ (*KWS Carries*), in which the court held that the zero-tolerance alcohol policy was reasonable for safety reasons and that the dismissal of an employee was for a fair reason.
- [68] The last decision referred to is *Air Products South Africa (Pty) Ltd v Matee and others*²⁰ (*Air Products*), which held that a commissioner committed an error and misconstrued the enquiry by inquiring whether an employee was capable of performing his duties, when the issue was whether the employer's circumstances necessitated the adoption of the zero-tolerance policy.
- [69] Sylvania submits that the applicant incorrectly relied on the decisions in *Tosca and Tanker Services (Pty) Ltd v Magudulela*²¹, because the applicant was not charged with being unable to perform her duties due to alcohol.
- [70] Further submissions were that the iBlow10 machine used to test the applicant was used to test other employees before and after the applicant's tests, and that all tested negative except the applicant. Therefore, Sylvania submits that the machine was functioning properly on the morning of 7 October 2022, and

¹⁷ [2015] 9 BLLR 887 (LAC) at para 17.

¹⁸ Act 29 of 1996, as amended.

¹⁹ (JR1261/16) [2019] ZALCJHB 295 (17 October 2019) at para 14.

²⁰ [2021] JOL 53666 (LC) at para 31 and 39-41.

²¹ [1997] 12 BLLR 1552 (LAC).

that *Samancor Chrome* does not assist the applicant's case. It was also submitted that *Samancor Chrome* is distinguishable.

[71] The iBlow10 is a modern, dual two-in-one machine. It checks for alcohol (Alco scanner), and if none is detected, a green light switches on. However, if alcohol is detected, a red light comes on, and a further test is conducted to obtain a reading (Alco meter). Therefore, according to Sylvania, an additional test on separate equipment is unnecessary.

[72] The applicant consumed alcohol the night before, and between the time the Alco scanner test was conducted and the time the Alco meter test reading was obtained, the applicant had been drinking water, which explains the reduction in the reading from 0.11% to 0.06%.

[73] The security officer who conducted the test was, according to Pabst's evidence, trained, and there was no dispute about the security officer's training. The issue of the security officer's training was raised for the first time in the heads of argument, not in the founding or supplementary affidavits.

[74] As regards the third ground of review, namely that the commissioner sought legal advice, it was submitted that this ground was highly mischievous, as Mr Geldenhuys was not even present, and that there is no allegation that the applicant's representative at the time was also present. The submission is that there was a casual discussion about maintenance in the applicant's presence, and that if she felt the commissioner was biased, she could have applied for the commissioner to recuse himself.

[75] Ultimately, it was submitted that the award is reasonable and should stand.

Legal principles

[76] Sylvania's heads of argument addressed the test in review applications such as the present and cited the relevant case authorities. The court agrees that those are the relevant authorities.

- [77] *Sidumo and another v Rustenburg Platinum Mines Ltd and others*²² (*Sidumo*), held that the question or test is whether the decision reached by the commissioner is one that no reasonable decision maker could reach. If the question is answered in the affirmative, the award cannot stand and must be set aside.
- [78] In determining whether an award meets the reasonableness test, the court is not confined to the reasons given by the commissioner for the decision. The court can also consider other reasons that render the award reasonable or unreasonable, even if the commissioner did not refer to them.²³
- [79] In *Herholdt v Nedbank Ltd and another*²⁴, the court held that an award is reviewable if a defect in the proceedings falls within one of the grounds in section 145(2)(a)²⁵ of the LRA. One of those grounds is gross irregularity, and in *Herholdt*²⁶, the court clarified that gross irregularity occurs where a commissioner misconceives the nature of the inquiry or reaches an unreasonable result.
- [80] In *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA and Others*²⁷, the court further clarified that gross irregularity is not a stand-alone ground and that the correct approach is to consider the alleged gross irregularity committed by the commissioner and then determine whether the outcome is reasonable.

²² [2007] 28 ILJ 2405 (CC).

²³ See *Fidelity Cash Management Service v CCMA and others* (2008) 29 ILJ 964 (LAC) at para 97 and *Head of the Department of Education v Mofokeng & others* [2015] 1 BLLR 50 (LAC) at para 31.

²⁴ 2013 (6) SA 224 (SCA).

²⁵ Which provides as follows:

- (2) A defect referred to in subsection (1), means-
- (a) that the commissioner-
- (i) committed misconduct in relation to the duties of the commissioner as an arbitrator;
- (ii) committed a gross irregularity in the conduct of the arbitration proceedings; or
- (iii) exceeded the commissioner's powers; or

²⁶ *Ibid* para 25. See also *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA and Others* [2014] 1 BLLR 20 (LAC) at para 14.

²⁷ [2014] 1 BLLR 20 (LAC) at para 15 and 16.

[81] In *Head of the Department of Education v Mofokeng & others*²⁸, the court stated the following regarding, *inter alia*, irregularities:

[33] Irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide a compelling indication that the arbitrator misconceived the enquiry. In the final analysis, it will depend on the materiality of the error or irregularity and its relation to the result. Whether the irregularity or error is material must be assessed and determined with reference to the distorting effect it may or may not have had on the arbitrator's conception of the enquiry, the determination of the issues to be determined and the ultimate outcome. If but for an error or irregularity a different outcome would have resulted, it will *ex hypothesi* be material to the determination of the dispute. The material error of this order would point to at least a prima facie unreasonable result. The reviewing judge must then have regard to the general nature of the decision in issue; the range of relevant factors informing the decision; the nature of the competing interests impacted upon by the decision; and then ask whether a reasonable equilibrium has been struck in accordance with the objects of the LRA. Provided the right question was asked and answered by the arbitrator, a wrong answer will not necessarily be unreasonable. By the same token, an irregularity or error material to the determination of the dispute may constitute a misconception of the nature of the inquiry so as to lead to no fair trial of the issues, with the result that the award may be set aside on that ground alone. The arbitrator however must be shown to have diverted from the correct path in the conduct of the arbitration and as a result failed to address the question raised for determination.'

[82] In *CUSA v Tao Ying Metal Industries and others*²⁹, the court held that commissioners are obliged to apply their minds to the issues in a case, failing which they will be acting unlawfully and/or unreasonably, and their decisions will constitute a breach of the right to administrative justice.

Evaluation

²⁸ [2015] 1 BLLR 50 (LAC).

²⁹ (2008) 29 ILJ 2461 (CC) at para 34.

Did the commissioner revisit the 11 July 2023 ruling?

[83] The applicant contends that, in his 17 August 2023 ruling, the commissioner revisited his 11 July 2023 ruling, which ordered Sylvania to produce the documents the applicant had requested.

[84] On 7 August 2023, the issue before the commissioner was whether to hold Sylvania in contempt for failing to produce the requested documents. A failure to comply with a ruling, on its own, does not suffice to obtain an order that a party is in contempt. The application could succeed only if Sylvania, as the contemnor, failed to prove the absence of wilfulness and mala fides. In this case, Sylvania persisted in contending that it did not possess the documents it was ordered to discover. Therefore, it demonstrated that non-compliance with the ruling was not wilful, and thus it could not be held in contempt of the proceedings. Accordingly, the ruling finding that Sylvania was not in contempt of the proceedings was correct in law, and the only issue the commissioner was required to determine was not whether Sylvania was required to discover the documents.

[85] The applicant contends that she was prejudiced by being required to proceed with the arbitration without the documents she needed. The submission is unpersuasive, as the applicant had options. The first and obvious option was to agree to Sylvania's proposal that the parties jointly approach the third parties in possession of the documents and request them. It is unclear why the applicant did not accept Sylvania's proposal. The applicant could also subpoena the documents she required, but opted not to do so.

[86] Therefore, there is no merit to the ground of review.

The refusal to allow the applicant to call an expert witness

[87] The commissioner ruled that the expert notices would be 'disallowed' because the pre-trial minute does not mention them. This is incorrect.

[88] The pre-arbitration minutes record that, at the time of signing, the applicant did not intend to call any expert witnesses. They also state that, should this

position change, the applicant will comply with the rules governing expert witnesses. The contents of the pre-arbitration minutes were read into the record at the commencement of the proceedings, and it is unclear what the commissioner had regard to in finding that they did not permit the applicant to serve expert notices. The only condition was that, should the applicant resolve to serve expert notices, she was required to comply with the rules relating to expert witnesses. CCMA Rule provides as follows:

‘A party intending to call an expert witness shall give seven (7) days, prior to the hearing, notice thereof to the Commission and the other party to the dispute together with a summary of the proposed evidence of such witness, any document on which the witness will rely during evidence and the basis on which the witness is regarded to be an expert to enable the other party to consider the summary and obviate the need for any postponement.’

- [89] The arbitration proceedings commenced on 13 April 2023 and adjourned during Pabst’s cross-examination. On 24 May 2023, the applicant served the expert notice. The matter, scheduled to continue on 6 June 2023, was postponed because Sylvania’s legal representative fell ill. The next hearing was set for 7 August 2023. In the meantime, on 28 July 2023, the applicant served the supplementary notice. Accordingly, both the expert notice and the supplementary expert notices were served seven days before the 7 August 2023 hearing.
- [90] Sylvania’s contention that CCMA Rule 37A requires the expert notice to be served before the commencement of the arbitration is an attempt to rewrite the rule and is rejected. An expert notice is required only if the need arises, and it is not unusual for this to occur during the arbitration proceedings. In fact, insufficient notice of the expert notice is not a ground for disallowing it. Instead, the proper course of action is to postpone the matter.
- [91] The contention that the expert notices were served after hearing Pabst’s evidence and that this prejudiced Sylvania has no merit. As Sylvania bore the onus of proving that the applicant’s dismissal was fair, there was nothing unfair about the applicant hearing Sylvania’s case against her first and then deciding to call an expert witness to challenge that evidence.

- [92] Similarly, the fact that Pabst was under cross-examination did not prejudice Sylvania, contrary to Sylvania's submission. On Pabst's own version, he was not an expert in breathalyser tests, and would not have been able to counter the evidence of Dr Laurens. The applicant's expert notices were served before Sylvania closed its case, and Sylvania would have been at liberty to call its own expert witness to counter the contents of Dr Laurens' expert report if it felt Dr Laurens' contentions needed to be contested.
- [93] Additionally, at the commencement of the proceedings, Sylvania's legal representative informed the hearing that the number of witnesses would depend on how the cross-examination went. Therefore, Sylvania was aware that it could elect to call additional witnesses depending on how Pabst fared during his cross-examination.
- [94] The issue of expert witnesses also arose during Pabst's cross-examination. The applicant's representative indicated that, if the need arose to call an expert witness, the rules would be complied with. Sylvania's legal representative indicated that they would have to wait until the expert witness was called. Its stance on 7 August 2023, which marked a complete change of approach, was disingenuous, and the commissioner ought to have rejected it.
- [95] It is also worth noting that after Pabst finished his evidence, Sylvania's legal representative sought clarification on the issues the applicant had with the Calibration Certificate, so that, if necessary, Sylvania could bring a Rule 37A application. Hence, Sylvania knew that a Rule 37A application could be brought midway through arbitration proceedings.
- [96] It follows that the commissioner misconceived the nature of the inquiry by disallowing the applicant's expert notices on the basis he gave. The commissioner's decision also denied the applicant the opportunity to challenge the breathalyser test results, which were her primary defence to the claim of misconduct. Thus, she was denied a fair trial. Accordingly, the ruling of 17 August 2023 will be reviewed and set aside to the extent that it disallowed the applicant's expert notices.

- [97] The award of 23 October 2023 also falls to be set aside because the applicant was denied a fair trial.
- [98] Pabst was unable to explain the Certificate of Calibration, which recorded that 'the iBlow10 breathalyser has been calibrated to 0.05 milligram per litre at 0.24 accuracy', or to explain why the Calibration Certificate started with a reading of 0.18 and ended with a reading of 0.26. Only an expert witness, whether called by the applicant or by Sylvania, could provide clarity on the issue.
- [99] The commissioner's decision to prevent the applicant from calling an expert witness in her defence was a gross irregularity that distorted the outcome, rendering the ruling and the award reviewable.
- [100] Accordingly, the matter will be remitted to the CCMA for a fresh hearing before a different commissioner to properly ventilate the dispute between the parties.

Alleged misconduct in relation to the discussion about matrimonial maintenance

- [101] This ground of review was raised in the founding affidavit, and Sylvania addressed it in its answering affidavit, conceding that the discussion about matrimonial maintenance took place but strenuously disputing that the commissioner was seeking legal advice. It is also pleaded that the applicant and her representative were informed of the subject of the discussion and that the discussion continued in their presence. In oral argument, it was also submitted that the applicant could have applied for the commissioner's recusal. According to Sylvania, the ground of review was highly opportunistic, misplaced, mischievous, an afterthought, disingenuous, unfair to Sylvania, amounted to clutching at straws, and constituted an abuse of the review process.
- [102] That a conversation about matrimonial maintenance took place is not disputed. It is also undisputed that the conversation commenced in the absence of the applicant and her representative, but it is alleged that it continued even after they re-entered the room. The commissioner was best

placed to address the allegation, yet for inexplicable reasons, he chose not to put a version before the court. If the conversation indeed amounted to legal advice to the commissioner by Sylvania's legal representative, it is understandable that the applicant bore a reasonable apprehension of bias, namely that the commissioner would not be impartial.

[103] The fact that she did not apply for the commissioner to recuse himself does not prevent the applicant from raising the ground of review that the commissioner committed misconduct, as she has done. Section 145 of the LRA expressly provides that misconduct by a commissioner is a ground for review.

[104] Additionally, refusing, on review, to consider a bias claim against a commissioner would encourage litigants before the CCMA to lodge recusal applications, even if without merit, and would delay the resolution of disputes through the arbitration process. This would contradict one of the LRA's objectives, namely the swift resolution of disputes.

[105] In *Satani v Department of Education, Western Cape & Others*³⁰, (*Satani*), the court stated the following regarding failure to apply for the commissioner's recusal:

[35] The Labour Court held that appellant's attorney neither objected to the style with which the arbitrator conducted the arbitration nor did he ask for her recusal. Failure to object by a party or its legal representative cannot render an unfair process or conduct fair or acceptable. The test for reasonable apprehension of bias is not premised on whether the representative objected to the process or not. It is an objective test which is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the commissioner has not brought an impartial mind to bear in the adjudication of the dispute...'

[106] Also, in *Bernert v ABSA Bank Limited*³¹, the court stated that whether a litigant should be allowed to raise the issue of recusal at a later stage, despite

³⁰ (2016) 37 ILJ 2298 (LAC).

an earlier opportunity to do so, implicates the interests of justice, and not waiver.³² Therefore, the applicant did not waive the right to raise the issue of perceived bias by the commissioner and was well within her rights to do so in these proceedings.

[107] The court intends to remit the matter to the CCMA for a fresh hearing before a different commissioner, and therefore it is unnecessary to make a firm finding on this ground for review, save to state that it was not 'highly opportunistic, misplaced, mischievous, an afterthought, disingenuous, unfair to Sylvania, amounted to clutching at straws, and constituted an abuse of the review process' as submitted by Sylvania.

Costs

[108] The parties sought costs against each other, contending that the review application or the opposition was frivolous. The applicant was successful, and Sylvania's opposition to the review application was not frivolous. A costs order in accordance with the requirements of law and fairness is that each party pay its own costs.

[109] In the premise, I make the following order:

Order

1. The ruling dated 17 August 2023, issued under the auspices of the Commission for Conciliation, Mediation and Arbitration in case number NWRB4011-22, is hereby reviewed and set aside, but only to the extent that the applicant's expert notices were disallowed.
2. The arbitration award dated 23 October 2023, issued under the auspices of the Commission for Conciliation, Mediation and Arbitration in the same case number, is hereby reviewed and set aside.
3. The matter is remitted to the Commission for Conciliation, Mediation and Arbitration for a fresh hearing before a different commissioner.

³¹ 2011 (3) SA 92 (CC) para 71 and 75.

³² *Bernert* at paras 74 and 75.

4. There is no order as to costs.

T. Gandidze

Judge of the Labour Court of South Africa

Appearances

For the Applicant: Mr CJ Geldenhuys

Instructed by: CJ Geldenhuys Attorneys

For the Respondent: A Makka

Instructed by: Cliffe Dekker Hofmeyr Inc