

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable
Case No: C 160/2024

In the matter between:

CHILL BEVERAGES INTERNATIONAL (PTY) LTD

Applicant

and

**COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION**

First Respondent

P SACKS N.O.

Second Respondent

AMCU obo TSAMSE

Third Respondent

Heard: 25 June 2025

Delivered: 14 July 2025

JUDGMENT

VENTER AJ

Introduction

[1] In this opposed application, the Applicant approached this court seeking an order reviewing and setting aside the arbitration award, dated 10 April 2024, issued

by the Second Respondent, acting under the auspices of the First Respondent, the Commission for Conciliation, Mediation and Arbitration (CCMA).

[2] In the award, the Second Respondent had found that the dismissal of the Third Respondent was substantively unfair.

Background and evidence before the Second Respondent

[3] The Third Respondent was employed by the Applicant during June 2017 and served as a Warehouse Controller at the time of his dismissal. The Applicant was dismissed for alleged gross misconduct after failing a breathalyser test on 20 May 2023.

[4] The Applicant manufactures and distributes various beverages, some containing alcohol. The Applicant was appointed as a forklift driver and had to transport raw materials. The items lifted included bags weighing up to one tonne of sugar or containers of up to 1000 litres of liquid ingredients.

[5] Aggrieved by his dismissal, the Applicant referred a dispute to the First Respondent in terms of section 188 read with section 191 of the Labour Relations Act, 66 of 1995 (the LRA). The arbitration hearing was held on 23 January 2024 and 27 March 2024. The arbitration award central to the current application was issued on 10 April 2024.

[6] The Second Respondent found that the dismissal was substantively unfair (procedural fairness was not disputed) and ordered the reinstatement of the Third Respondent along with payment of R 24 600 in lieu of arrear salary.

[7] During the arbitration proceedings, it was undisputed that the Applicant had an Alcohol, Drug and Substance Abuse Policy in place and that the Third Respondent was aware of the policy. The policy prohibits employees from having any intoxicating substances in their bloodstream during working hours, and they are

forbidden from using any alcohol during work or within 6 hours before the start of their shift.

[8] The policy includes a zero-tolerance clause regarding alcohol and states that no alcohol in an employee's blood is permitted. Higher levels of alcohol would automatically lead to a disciplinary hearing and possible dismissal.

[9] On the day in question, 20 May 2023, the Third Respondent was an hour late for work. All employees are subjected to a breathalyser test when entering or exiting the factory. The Third Respondent tested positive and had to undergo the test several times. The Applicant also used different devices to ensure that the initial device was not faulty. The Third Respondent was required to wait in the canteen, where he could eat and drink before being re-tested. He was tested again and failed once more.

[10] Subsequently, the Third Respondent wrote a statement and submitted that he had used medication and was unaware that it contained alcohol. Crucially, the Third Respondent did not smell of alcohol and displayed no visible signs of being intoxicated. It should also be noted that he was a first offender with six years of service at the time of his dismissal.

[11] The Third Respondent's case during the arbitration a quo was, in essence, that he did not consume any alcohol the day before his shift or on the morning of his shift. He was unwell the day before and obtained a cough mixture from a neighbour. He took some cough mixture on the evening prior to his shift and two teaspoonfuls of the same mixture before walking to work on the morning of his shift. The Third Respondent explained that he was unaware that the cough mixture contained any alcohol and did not read the label.

[12] The Third Respondent did not contest the validity or accuracy of the various breathalyser tests that were conducted, but he explained that he unknowingly contravened the Applicant's policy and that dismissal was not an appropriate

sanction.

[13] The Third Respondent called a witness regarding consistency issues (Mr Ngwevela), but the Second Respondent found that the Applicant acted consistently and nothing turned on this issue.

[14] The Applicant's first witness (Ms Bensch) presented evidence regarding consistency and the reasons why two other employees were not dismissed for seemingly similar offences.

[15] The second witness (Mr Zimri) explained that an employee working on machinery whilst under the influence posed a serious occupational and health risk, and that the Applicant had to adopt a zero-tolerance approach. Evidence was also presented regarding the relevant policy of the Applicant.

Findings by the Second Respondent

[16] The Second Respondent accepted that the Third Respondent tested positive and that this was not in dispute.

[17] The Second Respondent considered the Applicant's policy that each case must be considered on its own merits, taking into account the nature of the employee's role, the risk to the work environment, and the employee's service record. Furthermore, the Second Respondent was aware that, despite a zero-tolerance rule, the sanction of dismissal must be appropriate.

[18] The Second Respondent found no evidence to suggest that the Third Respondent had consumed alcohol the evening before or on the morning of his shift. He also agreed that the Third Respondent was not intoxicated and showed no signs of drunkenness. The Third Respondent's clean disciplinary record and the absence of any evidence of alcohol misuse also support his case.

[19] The Second Respondent further accepted that the Third Respondent was a credible witness and agreed that the alcohol was present in the cough mixture. It was also established that no evidence was provided to dispute the Third Respondent's claim that he was unaware that the cough mixture he consumed contained alcohol.

[20] The Third Respondent furthermore determined that there needs to be independent evidence of an employee being under the influence of alcohol or intoxicated and that the Third Respondent was clearly not intoxicated. Moreover, the Second Respondent referred to *Samancor Chrome Ltd (Western Chrome Mines) v Willemse and Others (Samancor)* where it was established that numerous factors can lead to a positive breathalyser test result, such as yeast in food or even not eating for several hours.

Grounds for review

[21] The Applicant disputes the finding that the Third Respondent did not violate the relevant policy despite testing positive (which was not disputed). Furthermore, the Applicant questions the conclusion that the independent evidence suggested that the Third Respondent was not under the influence of alcohol or that he breached the policy.

[22] The Applicant also contended that the ruling, which determined that the Third Respondent was negligent but that the policy had not been breached, was unreasonable.

[23] The Applicant also submitted that the Second Respondent failed to recognise that the nature of the work was of high risk.

[24] It was submitted that the findings were therefore unreasonable given the presented evidence and that a reasonable decision-maker would have concluded that the Applicant acted fairly.

Test on review

[25] The appropriate test for review has been settled. In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*, the Constitutional Court held that ‘the reasonableness standard should now suffuse section 145 of the LRA’. The Court further held that the threshold test for the reasonableness of an award was whether “...Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?”

[26] A review application consists of two phases and the review applicant must prove that there was a failure or error committed by the arbitrator. If this cannot be demonstrated, the matter need not go further. If such a failure or error is shown, the applicant must then prove that the arbitrator's outcome was unreasonable. If the outcome remains reasonable despite the error or failure, the review also need not go further. For the review to succeed, the error or failure must impact the reasonableness of the outcome enough to make it unreasonable. In *Herholdt v Nedbank Ltd and Another (Herholdt)*, the Court stated:

“A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to the particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of consequence if their effect is to render the outcome unreasonable.’

[27] The reasonableness consideration described in *Herholdt* supra was then applied by the Labour Appeal Court in *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others* as follows:

“... in a case such as the present, where a gross irregularity in the proceedings is alleged, the enquiry is not confined to whether the arbitrator misconceived the nature of the proceedings, but extends to whether the

result was unreasonable, or put another way, whether the decision that the arbitrator arrived at is one that falls in a band of decisions a reasonable decision maker could come to on the available material.”

[28] Against the above principles and test, the court must now consider the Applicant’s application to review and set aside the arbitration award of the Second Respondent.

Analysis and evaluation of review grounds

[29] The material facts in the matter are common cause, and it is undisputed that the Applicant has a policy concerning alcohol, drugs, and substance abuse. It is also not contested that the Third Respondent was aware of the policy. The Third Respondent never denied that he failed the breathalyser test and that there was alcohol in his blood.

[30] The Third Respondent did not contest the validity or accuracy of the various breathalyser tests that were conducted, but he explained that he unknowingly contravened the Applicant’s policy and that dismissal was not an appropriate sanction.

[31] It was also agreed that the Third Respondent displayed no signs of intoxication and therefore did not work whilst being intoxicated. He was also a first offender after six years of employment.

[32] The Third Respondent’s fault was that he failed the breathalyser test and had alcohol in his blood when he arrived at work. This was made worse by the fact that he was a forklift driver.

[33] The Second Respondent’s conclusions were primarily that he accepted the Third Respondent’s account that he used cough mixture without knowing it contained alcohol. He also accepted that the Third Respondent was a credible witness and that

the Applicant provided no evidence to demonstrate that the Third Respondent was aware that the cough mixture contained alcohol.

[34] There are several decided cases concerning the issue at hand, and the court is therefore required to consider relevant case law.

[35] In *Air Products SA (Pty) Ltd v Matee and Others* the court upheld the validity of a zero-tolerance policy, which was deemed just given the operational requirements and the health and safety of employees. It was also found that the employee presented no evidence to challenge the fact that the workplace was dangerous. Therefore, the policy was considered reasonable. It should be remembered that the working environment was highly hazardous to employees, contractors, and the community, which is not the case in the matter on hand.

[36] It was also held that it was clear that the zero-tolerance policy will be fair where the circumstances necessitate such a policy. The employer therefore has a duty to show that dismissal is suitable and proportionate to the offence.

[37] In *Samancor Chrome Ltd v Willese and Others* the court also considered a zero-tolerance stipulation in an instance where an employee failed a breathalyser test but subsequently tested negative by means of a blood test. The employee's reinstatement was ordered, and the court held that the arbitrator was aware that the employee had been dismissed for having alcohol in his blood and not for intoxication. The court found no evidence of misdirection by the commissioner in considering the evidence. The commissioner had not misunderstood the nature of the enquiry, and the employer was required to prove that alcohol was present in the employee's blood. However, it should be noted that, in the current case, there is no dispute that the Third Respondent had alcohol in his blood.

[38] The dismissal of a forklift driver was considered in *Imperial Dedicated Contracts (Pty) Ltd v Mpshe and Others*. The employee testified that he was not feeling well during his shift and that he went to his vehicle where he used Benylin

(cough mixture). He was subsequently dismissed for gross misconduct in that he consumed an intoxicating substance whilst on duty. The court emphasised that having alcohol in your blood and consuming alcohol at work are different things and certain medications will reflect alcohol in the bloodstream. The court accepted that there was no shred of any impairment and that the employee failed to perform his duties.

[39] In *Tanker Services (Pty) Ltd v Magudulela* the Labour Appeal Court confirmed that it must be demonstrated that a person's abilities are impaired and that they were unable to perform their assigned duties. The employee was unable to carry out the responsibilities of operating a heavy vehicle transporting a hazardous substance, and the dismissal was found to be fair. In the matter on hand the Third Respondent did not use any equipment as he was not allowed to enter the workplace.

[40] In *National Union of Metal Workers (NUMSA) obo Cloete v Trentyre (Pty) Ltd and Others* the Labour Appeal Court indicated that the fact that an employee is under the influence of alcohol does not always mean that dismissal was warranted.

[41] Although the Labour Appeal Court was called upon to determine whether dismissal was fair for the private use of cannabis in the matter of *Enever v Barloworld Equipment South Africa (Pty) Ltd*, it also considered the issue of a zero-tolerance policy. It was emphasised that a zero-tolerance rule was not acceptable merely because there was a general dangerous working environment.

[42] The Labour Appeal Court also considered a zero-tolerance policy relating to the failure to declare goods in the matter of *Shoprite Checkers (Pty) Ltd Tokiso Dispute Settlement and Others*. The court held that:

“But the law does not allow an employer to adopt a zero-tolerance approach for all infractions, regardless of its appropriateness or proportionality to the offence, and then expect a commissioner to fall in line with such an approach. The touchstone of the law of dismissal is fairness and an

employer cannot contract out of it or fashion, as if it were, a “no go area” for commissioners.”

[43] The court has provided important guidelines in *Builders Trade Depot v CCMA and Others* and held that commissioners must consider and weigh whether there was a workplace rule, if the employee was aware of it and whether the rule was wilfully broken. Additionally, a commissioner is required to evaluate the nature and responsibilities of the job, the significance of the rule, the employee’s disciplinary record, the process of progressive discipline, and the potential harm caused by the misconduct.

[44] It is abundantly clear from the above authority that any zero-tolerance policy will only be accepted where the circumstances necessitate its implementation by the employer. The employer is therefore obligated to show that dismissal is appropriate and proportional to the offence that was committed.

[45] To determine whether a decision is unreasonable requires various considerations. Examples of unreasonableness would be where an arbitrator fails to apply their mind, considering irrelevant evidence, ignoring relevant evidence, acting for an ulterior purpose, in bad faith, arbitrarily or capriciously. The court must therefore consider whether the result could be reasonably reached after considering all the issues and the evidence. The arbitrator must also not misconceive the issue or undertake the inquiry in a flawed manner.

[46] It is by now trite that the court may review an award if the outcome is unreasonable and does not fall within the band of reasonableness.

[47] The scope of review is therefore restricted within the ambit of section 145 of the LRA and judicial interferences should be limited.

[48] Applying the abovementioned test, it cannot be held that the award of the Second Respondent falls outside the band of reasonableness.

[49] The Second Respondent had a clear understanding of the issue that he had to determine and presented an elaborate award. He was alive to the fact that the Third Respondent failed the breathalyser test and that there was a policy in place, which policy contained a zero-tolerance clause.

[50] The Second Respondent considered that the Applicant's policy stipulated that each case must be considered on its own merits, taking into account the nature of the employee's role, the risk to the work environment, and the employee's service record. Furthermore, the Second Respondent was aware that, despite a zero-tolerance rule, the sanction of dismissal must be appropriate. This court cannot blame the Second Respondent in this regard.

[51] The award also clearly shows that the Second Respondent considered the fact that there were no signs of intoxication and that the Third Respondent had an impeccable record.

[52] This court also cannot blame the Second Respondent for his finding that the Third Respondent was a credible witness. The Applicant presented a *prima facie* case of misconduct, and the Second Respondent accepted that the reason provided by the Third Respondent was reasonable. He was therefore satisfied that the Third Respondent presented a holistic, reasonable explanation. See *University of Witwatersrand v VVMA and Others* in this regard.

[53] For these reasons, this court concludes that the award issued by the Second Respondent is reasonable. It clearly falls within reasonable bounds and can be justified by the facts and evidence presented. The award is fair, and there are no material errors of law or misconduct by the Second Respondent.

[54] Regarding costs, it is trite that the courts should be cautious when considering costs orders, as this might discourage parties who seek in good faith to have their disputes decided by the court. Although the Applicant has not succeeded

in the present application, the court accepts that it was bona fide aggrieved by the outcome of the arbitration proceedings and that it has sought to review that outcome in good faith. In these circumstances, the court does not intend to make any costs order.

[55] This court makes the following order:

Order:

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

VENTER AJ
ACTING JUDGE OF THE LABOUR COURT

APPEARANCES

For the Applicant: Adv Harvey, instructed by Marieke van Rooyen Attorneys

For the First Respondent: Adv Cook, instructed by LDA Incorporated