

SOUTH AFRICA / JUDGMENT

**Association of Mineworkers and Construction
Union obo Dube v Commission for
Conciliation,
Mediation and Arbitration and Others (JR
1436 /
2020) [2022] ZALCJHB 156 (14 June 2022)**
[2022] ZALCJHB 156

COURT

Labour Court Johannesburg

BEFORE

Prinsloo

CASE / FILE NUMBER

JR 1436 / 2020

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Source record**THE****LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG****Not****Reportable****Case****no: JR 1436 / 2020****In**

the matter between:

ASSOCIATION
OF MINEWORKERS AND
CONSTRUCTION
UNION obo DUBE
Applicant
and
COMMISSION
FOR CONCILIATION,
MEDIATION
AND ARBITRATION
First Respondent
HENDRIK
OLIPHANT N.O
Second Respondent
MURRAY

AND ROBERTS
CEMENTATION
(PTY) LTD
Third Respondent

Heard: 26 May 2022

Delivered: 14 June 2022
(In view of the measures implemented as a result of the Covid-19 outbreak, this judgment was handed down electronically by circulation to the parties' representatives by email. The date for hand-down is deemed to be on 14 June 2022.)

JUDGMENT

PRINSLOO, J

Introduction

[1] The Applicant seeks to review and set aside an arbitration award dated 22 July 2020 and issued under case number NC3746-19 wherein the Second Respondent (arbitrator) found that Mr Dube's dismissal

was substantively and procedurally fair and that he was not entitled to any relief.

[2] The application for review was filed outside the prescribed 6-week period and the Applicant seeks condonation for the late filing of the application. The application for condonation is not opposed. I have

considered the explanation tendered and in my view, on a conspectus of all the facts and the requirements, the Applicant has shown good cause and condonation for the late filing of the review application is to be granted.

[3] The Third Respondent (Respondent) opposed the application for review.

The evidence adduced

[4] The Respondent employed Mr Dube as an artisan assistant electrician on 17 January 2018. He was dismissed on 7 November 2019, following a disciplinary hearing where he was found guilty of misconduct.

[5] The issue to be decided by the arbitrator was whether Mr Dube's dismissal was substantively and procedurally fair. The arbitrator found his dismissal fair in all respects. It appears from the grounds for review that the arbitrator's finding in respect of procedural fairness is not subject to review.

- [6] In order to assess the arbitrator's findings and the grounds for review raised by the Applicant, it is necessary to consider the evidence adduced at the arbitration proceedings as well as the charge

Mr Dube faced and was dismissed for.

- [7] Mr Dube faced the following charge of misconduct:

'Poor work attendance

Allegedly were absent without permission from 29/10/2019 and 4/11/2019;

Allegedly continuously misuse sick leave and your conduct has demonstrated a pattern that you habitually book sick leave before and after weekends/rest period a conduct that is not acceptable.'

- [8] It is evident from the transcribed record that the Respondent made an opening statement, stating that when Mr Dube was recruited, the occupational medical practitioner declared him fit for his job and

that his attendance for the entire 2018 was very good. As from January 2019, Mr Dube's work attendance started to change and he submitted sick leave applications regularly on Fridays or Mondays, before or after weekends and after holidays. It became a pattern at month-end and in June 2019, the occupational medical practitioner declared him fit again. Thereafter Mr Dube was counselled and issued with a written warning and told to improve his attendance. On 28 September 2019, Mr Dube was absent without permission and he was issued with a written warning. In October 2019, Mr Dube was once again absent without permission, for a period of five days, without notifying his supervisor and subsequently, a formal disciplinary hearing was held on 7 November 2019.

- [9] The Applicant's opening statement made specific reference to the charges, as per the charge sheet and the fact that Mr Dube was charged for being absent on 29 October and 4 November 2019. Mr Dube

was at work on 29 October 2019 and the only relevant date would be 4 November 2019. The Applicant indicated that the challenge was that Mr Dube did not breach a rule and that the sanction of dismissal was too harsh.

- [10] After the opening statements were made, the arbitrator indicated to the Respondent's representative that he had to prove that Mr Dube indeed absented himself as per the charge.

The Respondent's case

- [11] The Respondent's witness, Mr Johannes Chueu, testified that he is a human resources officer and his duties include discipline and absenteeism. He testified that Mr Dube worked for the Respondent for a period of one year and nine months. In 2018 he was a very good worker, but from January to July 2019 he was always absent due to sick leave. Mr Dube was sent for a review with the occupational medical practitioner, but he was declared fit for work. Mr Dube was subsequently charged with abuse of sick leave and he was given a written warning

for that. After that, Mr Dube started to be absent without permission. Mr Chueu testified that due to the fact that Mr Dube was previously charged for abuse of sick leave, he was scared to

submit sick notes and absented himself without permission.

- [12] Mr Dube was charged for being absent without permission for one day and he was issued with a written warning, which was valid for six months. Mr Dube committed a similar offence by being absent without notifying anyone for a period of five days. After this, a formal disciplinary hearing was held and Mr Dube was subsequently dismissed.
- [13] Mr Chueu explained that the charge related to poor work performance and that there were five days without any proof of absence, for which Mr Dube was dismissed. Mr Chueu referred to Mr Dube's clocking in history to show that he was absent for five days, to wit on 14, 21, 28 and 30 October and 4 November 2019. No sick note or any other justification for Mr Dube's absence on these dates were provided.
- [14] Mr Chueu explained that the Respondent's disciplinary code provides for dismissal as an appropriate sanction where an employee was absent, without authorisation, for a period of five working days or longer. Although Mr Dube reported for work in between his days of absence, he was still absent for five working days and he did not bring anything to explain his whereabouts on the days he was absent, notwithstanding the fact that he was told to do so during the disciplinary hearing.
- [15] Mr Chueu confirmed that Mr Dube was issued with a written warning because of his abuse of sick leave. He testified that Mr Dube could not be re-instated because the disciplinary code and procedure stipulate that if a person is absent for five days without notifying his supervisor, it is a dismissible offence.
- [16] In cross-examination, Mr Chueu confirmed that he was not involved in the disciplinary enquiry for Mr Dube, but he was told about the allegations and the charges as being the person in charge of industrial relations. He explained that his evidence was to be believed as he relied on the charge sheet and the clocking in report of Mr Dube. Mr Chueu conceded that there was no evidence regarding abuse of sick leave during the period he had testified about.
- [17] Mr Chueu was asked about his understanding of 'five days' as provided for in the disciplinary code and whether it referred to consecutive days. Mr Chueu testified that it did not refer to consecutive days, but merely to absence for five days without notifying anyone.
- [18] Mr Chueu conceded that Mr Dube was at work on 29 October 2019 and explained that the charge should have been in respect of 28 October
2019. He explained that at the time of Mr Dube's disciplinary hearing, the employer requested his clocking in reports and that is when it was picked up that Mr Dube was absent without permission on more dates than what is reflected in the charge. He insisted that Mr Dube

was charged with the dates on which he was absent without permission and testified that if an employee is not at work without authorisation, there must be a charge for that particular date. Mr Chueu conceded that the dates on which Mr Dube was not at work without permission, should have been included in the charge sheet.

- [19] It was put to Mr Chueu that the dates that appeared on the charge sheet were only for two days and that Mr Dube could not have been dismissed for that. Mr Chueu responded that the clocking in record reflected five days and as such, the disciplinary code prescribed dismissal as a sanction.
- [20] It is evident from cross-examination that Mr Chueu was unable to justify the charge or adduce any evidence to support the charge that there was a pattern of abuse of sick leave. He conceded that Mr Dube was involved in a car accident, which could have impacted his health and that the sick leave days he took, were approved by the employer.

The Applicant's case

- [21] Mr Dube testified that he was at work on 29 October 2019 and not absent, as per the charge sheet. In respect of the abuse of sick leave, he testified that he had been involved in a car accident and as a result, he had an operation on his forehead and on the left side of his upper body. He suffers from headaches and other side effects, which cause him to consult a doctor and to be absent from work, for which he submitted medical certificates.
- [22] Mr Dube testified that he was never absent without authorisation for a consecutive period of five days and indicated that the charge levelled against him also did not mention the absence of five days, but only two days.
- [23] Mr Kedirileng testified that he was employed by the Respondent for a period of ten years and that the 'five days' referred to in the disciplinary code, was interpreted to mean five consecutive days or longer. It did not refer to five days over any period, but must be consecutive to warrant dismissal.

Analysis

of the arbitrator's findings and the grounds for review

The test on review

- [24] I have to deal with the grounds for review within the context of the test this Court must apply in deciding whether the arbitrator's decision is reviewable. The test has been set out in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[1] (*Sidumo*) as whether the decision reached by the commissioner is one that a reasonable decision maker could not reach. The Constitutional Court held that the arbitrator's conclusion must fall within a range of decisions that a reasonable decision maker could make.

[25] The Labour Appeal Court (LAC) in *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA*[2] (Gold Fields) affirmed the test to be applied in review proceedings and held that:

‘In short: A reviewing court must ascertain whether the arbitrator considered the principal issue before him/her; evaluated the facts presented at the hearing and came to a conclusion that is reasonable.’

[26] The 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. This piecemeal approach of dealing with the award is improper as the reviewing Court must consider the totality of the evidence and decide whether the decision made by the arbitrator is one that a reasonable decision maker could make, based on the evidence adduced[3].

[27] In *Heroldt v Nedbank Limited (Congress of South African Trade Unions as amicus curiae)*[4] the Supreme Court of Appeal held that:

‘...the test “is a stringent [one] that will ensure that... awards are not being lightly interfered with” ... The Sidumo test will, however, justify setting aside an award on review if a decision is ‘entirely disconnected with the evidence’ or is ‘unsupported by any evidence’ and involves speculation by the commissioner.’

[28] The review test to be applied is a stringent and conservative test of reasonableness. The Applicant has to show that the arbitrator ultimately arrived at an unreasonable result.

[29] It is within the context of this test that I have to decide this application for review.

The arbitrator’s findings

[30] In his analysis of the evidence, the arbitrator recorded that the charge levelled against Mr Dube was unclear, and remained unclear even after his attempts to solicit clarity from the employer.

[31] The arbitrator recorded that to make a finding on the wording of the charge would be overly technical and that he cannot hold the employer to the wording of the charge, but rather to its reasons for dismissal. He found that Mr Chueu’s evidence made it clear that Mr Dube was dismissed for being absent from work on 14, 21, 28 and 30 October and 4 November 2019 and he accepted that Mr Dube knew the charge he had to answer to.

[32] Turning to the issue of Mr Dube’s guilt, the arbitrator found that Mr Chueu adduced mostly hearsay evidence and he accepted that Mr Chueu was not at the disciplinary hearing. Mr Chueu pointed out on the time sheet for Mr Dube that he was absent on 14, 21, 28 and 30 October and 4 November 2019. Mr Chueu conceded that the date of 29 October 2019 on the charge sheet was a mistake, as it should have been 28 October 2019. The arbitrator found that this was not an issue

as he had to decide the fairness of the dismissal on the reasons given by the employer and in casu, Mr Dube was dismissed for being absent without permission for five days and the cumulative effect of a repeated offence.

- [33] The arbitrator rejected Mr Dube's defence that he was at work on 29 October 2019 and found that Mr Dube was not dismissed for this date, according to the reasons given by the Respondent. He found that Mr Dube was an unreliable witness as he could not remember the days of 14, 21, 28 and 30 October and 4 November 2019, but denied in cross-examination that he was absent on the said dates.
- [34] The arbitrator found that the Respondent's reason for dismissal was that Mr Dube was absent without permission for a period of five days and that the Respondent was able to prove the charge. He rejected the Applicant's argument that it had to be five consecutive days.
- [35] The arbitrator found that Mr Dube confirmed his pattern of absenteeism, without a hint of remorse and that he was not appreciating his wrongdoing. He ultimately found Mr Dube's dismissal fair as there was no chance of rehabilitation, he already had two prior written warnings for sick leave abuse and absence without permission for five days was dismissible. The Respondent's reason for dismissal included Mr Dube's previous repeated offences and based on all the aforesaid factors and the cumulative effect of his misconduct, dismissal was an appropriate sanction.

The grounds for review

- [36] The Applicant's review application is premised on two main grounds for review, which I will deal with in turn. The gist of the review is to be found in the manner in which the arbitrator dealt with the evidence.
- [37] In *Head of the Department of Education v Mofokeng*[5] the Labour Appeal Court provided the following exposition of the review test:

'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 inquiry. 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 upon the arbitrator's conception of the inquiry, the delimitation 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. A material error of this order would point to at least a prima facie unreasonable result.' (My emphasis)

[38] The question this Court must ask on review is whether the way the arbitrator dealt with the evidence, constituted an irregularity or error which was material, whether it impacted the determination of the question of whether Mr Dube's dismissal was fair and whether it distorted the arbitrator's ultimate decision.

Hearsay evidence

[39] The one main ground for review relates to the fact that the arbitrator relied on hearsay evidence of the Respondent's only witness.

[40] In my view, there is merit in this ground for review, for reasons I will deal with *infra*.

[41] It is evident from the transcribed record that Mr Chueu conceded that he was not involved in Mr Dube's disciplinary hearing and that what he knew, was what he was told. In his award, the arbitrator recorded specifically that "[t]urning to the issue of Mr Dube's guilt, Chueu submitted mostly hearsay evidence. This was pointed out to him during cross-examination. Chueu conceded that he was not at the hearing".

[42] It is evident from what the arbitrator recorded, that in considering the question of whether Mr Dube was guilty of the misconduct that he was dismissed for, he was alive to the fact that Mr Chueu's evidence was hearsay evidence.

[43] The Respondent submitted that the mere fact that Mr Chueu was not present at the disciplinary hearing, does not automatically exclude his evidence as being inadmissible and no case is made out as to why the evidence adduced by a human resources official should be rejected. Furthermore, the clocking history report of Mr Dube is objective evidence and it does not constitute hearsay evidence. The said report proved Mr Dube's absence from work.

[44] In my view, the Respondent misses the point: Mr Dube was charged with absenteeism on two specified dates and when he was confronted with different dates at the disciplinary hearing, for which he had no opportunity to prepare as he was not aware of the case he had to meet, he referred an unfair dismissal dispute as it was not reasonable or fair to expect of him to answer to additional dates, for which he was not charged. The fact that the clocking history report of Mr Dube is objective evidence and showed his absence from work, is neither here nor there.

[45] Hearsay evidence is defined^[6] as evidence, whether oral or in writing, the probative value of which depends on the credibility of any person other than the person giving such evidence.

[46] In terms of section 3(1) of the Law of Evidence Amendment Act,^[7] hearsay evidence shall not be admitted as evidence unless the parties agreed to the admission thereof as evidence, or the person upon whose credibility the probative value of such evidence depends testifies at the proceedings or where the evidence is admitted in the interest of justice, having regard to seven specified factors.

- [47] In casu, there was no agreement between the parties that hearsay evidence be admitted.
- [48] The arbitrator found Mr Chueu's, and effectively the Respondent's evidence, to be hearsay. For the hearsay evidence to carry weight and be admitted as such, it had to be corroborated by the testimony of a primary witness. Section 3(3) of the Law of Evidence Amendment Act provides that hearsay evidence may be provisionally admitted if the court or tribunal is informed that the person upon whose credibility the probative value of such evidence depends, will testify later in the proceedings. Provided that if such person does not later testify in the proceedings, the hearsay evidence should be left out of account, unless the hearsay evidence is admitted by agreement or is admitted in terms of section 3(1)(c) in the interest of justice.
- [49] The Respondent submitted that the arbitrator could receive hearsay evidence if the interests of justice require it to be admitted. This is indeed so. The difficulty however is that the arbitrator never considered the interest of justice and made a finding that hearsay evidence was to be admitted for reasons relating to the interest of justice.
- [50] Notwithstanding the finding that the Respondent's evidence was hearsay, the arbitrator found that Mr Chueu's evidence made it clear that Mr Dube was dismissed for being absent from work on 14, 21, 28 and 30 October and 4 November 2019 and that the Respondent proved on a balance of probabilities that Mr Dube's dismissal was fair. On the strength of nothing more than hearsay evidence, the arbitrator made a finding in favour of the Respondent.
- [51] Effectively the arbitrator found that what Mr Chueu was told by others, which constituted nothing more than hearsay evidence, was more probable and coherent than the direct evidence presented by Mr Dube. Mr Chueu was not the initiator at the disciplinary hearing, nor was he the chairperson or Mr Dube's supervisor who would have knowledge of Mr Dube's absence, whether it was without permission and what evidence was presented at the time Mr Dube had to answer to the charges levelled against him.
- [52] The arbitrator had failed to properly assess the evidence placed before him and to reasonably determine the issues. The arbitrator made no assessment of the probative value of the evidence presented. He attached no weight to Mr Dube's evidence and made no finding on what weight should be attached to the Respondent's hearsay evidence.
- [53] Hearsay evidence should be left out of account unless the hearsay evidence was admitted by agreement, which it was not, or was admitted in terms of section 3(1)(c) in the interest of justice. Before hearsay evidence could be admitted as evidence, because the interests of justice demand its reception, all the factors listed in section 3(1)(c) must be assessed according to the circumstances of the case. It is the combined assessment of all the factors that will result in a proper application of section 3(1)(c)[8].

- [54] It is evident from the arbitration award that the arbitrator had no regard to the provisions of the Law of Evidence Amendment Act, let alone an assessment of the factors listed in section 3(1)(c) and that the interest of justice was not his justification for accepting hearsay evidence. The arbitrator accepted hearsay evidence without any consideration of the applicable principles and the law of evidence.
- [55] The arbitrator either had no proper understanding of the law of evidence, or he was wholly incapable of applying the applicable principles to the evidence that was adduced. The arbitrator committed a gross misdirection in this regard.
- [56] A reasonable decision maker with a sound understanding of the law of evidence, would not have permitted hearsay evidence without justification, would have and should have alerted the parties to the fact that it was hearsay evidence and the consequences of adducing such evidence and would have applied the principles applicable to hearsay evidence when assessing the evidence and making a finding. The arbitrator did none of that, but blindly accepted the hearsay evidence and based his findings on such evidence, which was unreasonable.

The charge

- [57] The other main ground for review is that the arbitrator found that the Respondent produced sufficient evidence to justify the reason why Mr Dube was dismissed. The gist of the Applicant's case is that the arbitrator failed to apply his mind to the evidence and made findings a reasonable decision maker would not have made.
- [58] The starting point for the arbitrator in the assessment of the question regarding the substantive fairness of Mr Dube's dismissal was the charge he was found guilty of and dismissed for.
- [59] The Applicant's issue is that the charge referred to two dates, namely 29 October and 4 November 2019, yet the arbitrator accepted that it was clear that Mr Dube was dismissed for being absent on 14, 21, 28, 30 October and 4 November 2019.
- [60] It is trite and has been accepted by this Court that an employer has the right to discipline its employees, of course in a lawful and fair manner. In fact, the disciplining of employees is the duty and the prerogative of the employer and an employer remains dominus litis in deciding whether an employee is to be charged for misconduct and if so, what the nature of the charges would be.
- [61] The point of departure is the charge of misconduct Mr Dube was found guilty of and dismissed for.
- [62] It is evident from the arbitration award that the arbitrator recorded that the charge levelled against Mr Dube was unclear, and remained unclear even after his attempts to solicit clarity from the employer. It is apparent from the transcript that at the onset of the proceedings, the arbitrator indicated that the Respondent must prove that Mr Dube absented himself as

per the charge. The arbitrator clarified with Mr Motlathledi, the Respondent's representative, what it was that Mr Dube was dismissed for. Mr Motlathledi indicated that it was charge 1, being poor work attendance and being absent on 29 October and 4 November 2019.

[63] It is apparent from the 'disciplinary case docket' that the chairperson recorded that Mr Dube was found guilty of charge

1. There is no indication that the dates as per the charge were incorrect or that they were amended during the disciplinary hearing, or that the finding of guilt was based on anything but charge 1 nor that it was based on an amended charge 1.

[64] The charge levelled against Mr Dube related to his absence without permission from 29 October 2019 and 4 November 2019 and to support this charge as a fair reason to dismiss Mr Dube, the Respondent had to adduce evidence to show that Mr Dube was absent without permission on the said dates. It became common cause that Mr Dube was indeed at work on 29 October 2019.

[65] Mr Chueu, who was not part of the disciplinary hearing, testified in the arbitration proceedings that the date of 29 October 2019 was incorrect, as Mr Dube was indeed at work on that date. He relied on a clocking report for Mr Dube to show the dates he was not at work, which differed from the dates on the charge sheet and he did so without any substantiating evidence that the dates he had referred to, were indeed the dates on which Mr Dube had been absent without permission.

[66] The question which leaps out is whether the Respondent produced evidence to support the charge of misconduct for which Mr Dube was dismissed and whether the arbitrator made an unreasonable finding when he found that the Respondent had done so.

[67] When formulating charge sheets, employers must advise the accused employee of the precise charge he or she is required to answer to in the disciplinary hearing. In *EOH Abantu (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and others*[9] the LAC stated that it is best for the charges to be precisely formulated and be specific enough for the employee to answer to them. The LAC went on to say that is it normally sufficient if the employee has adequate notice and information to ascertain what act of misconduct he or she is alleged to have committed. It was held that:

'Employers embarking on disciplinary proceedings, not being skilled legal practitioners, sometimes define or restrict the alleged misconduct too narrowly or incorrectly. For example, it is not uncommon for an employee to be charged with theft and for the evidence at the disciplinary enquiry or arbitration to establish the offence of unauthorised possession or use of company property. The principle in such cases is that provided a workplace standard has been contravened, which the employee knew (or reasonably should have known) could form the basis for discipline, and no significant prejudice flowed from the incorrect characterisation, an appropriate

disciplinary sanction may be imposed. It will be enough if the employee is informed that the disciplinary enquiry arose out of the fact that on a certain date, time and place he is alleged to have acted wrongfully or in breach of applicable rules or standards.’

[68] In the event that an employee is dismissed for reasons related to misconduct, the employer is bound by the election it has made, as was confirmed in *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and others*[10] where the LAC held that:

‘It is an elementary principle of not only our labour law in this country but also of labour law in many other countries that the fairness or otherwise of the dismissal of an employee must be determined on the basis of the reasons for dismissal which the employer gave at the time of the dismissal.’

[69] In *Palluci Home Depot (Pty) Ltd v Herskowitz and others*[11] (*Palluci*), the LAC dealt with inter alia the question of whether the arbitrator had erred by making determinations on aspects of the charges on which the chairperson of the disciplinary hearing or the employer had not relied on. The LAC held that by making a determination on aspects of the charges which neither the chairperson nor employer relied upon at the time of the employee’s dismissal, the arbitrator had misconstrued the true nature of the enquiry and his mandate. It was held that:

‘[45] The chairperson of the disciplinary hearing, accordingly, refrained from enquiring into, and finding the first respondent guilty of the sub-charges relating to her purported refusal to carry out instructions as described in Charge “C”. He furthermore did not recommend to the appellant that she be dismissed on the basis of a guilty finding on this charge, and nor did the employer rely upon a finding on this charge as a basis for dismissing the first respondent. Although the chairperson of the disciplinary hearing touched briefly upon sub-charge “C2” relating to the removal of a cell phone from the control of the first respondent’s office, he did not find the first respondent guilty of this charge. What he did find, however, is that the first respondent failed to carry out the instruction “to determine which calls made from the phone were personal in nature in order to ensure that the responsible person was held accountable for incurring these costs”. It must be pointed out, however, that the appellant had never charged the first respondent with failing to carry out any such instruction.

[46] This finding by the chairperson was, in any event, made in the context of the poor work performance/incapacity charge (Charge “B”), and not the failure to carry out reasonable instructions (Charge “C”). This notwithstanding, the Commissioner in his award went beyond the findings of the chairperson in his recommendation, and dealt with all the sub-charges under Charge “C” and arrived at a finding that the first respondent had failed to carry out instructions as described in that charge. In *Fidelity Cash Management Service v CCMA and others*, this Court held that:

“It is an elementary principle of not only our labour law in this country, but also of labour law in many other countries that the

fairness or otherwise of the dismissal of an employee must be determined on the basis of the reasons for the dismissal which the

employer gave at the time of the dismissal. The exception to this general rule is where, at the time of the dismissal, the employer

gave a particular reason as the reason for the dismissal in order to hide the true reason such as union membership. In such a case, the court or tribunal dealing with the matter can decide the fairness or validity of the dismissal not on the basis of the reason that an employer gave for the dismissal but on the basis of the true reason for the dismissal.”

Accordingly, the Commissioner undertook the enquiry in a misconceived manner by determining the fairness of the first respondent’s dismissal on the basis of reasons for the dismissal, which the appellant did not rely upon at the time of dismissing the first respondent. But for this error, I believe that the Commissioner would have arrived at a different result in the award.’

[70] There was no evidence adduced to support the Respondent’s case that, at the time of Mr Dube’s dismissal, the reason for his dismissal was his unauthorised absenteeism on dates that did not appear in the charge sheet. The chairperson was not called as a witness, nor was the charge sheet ever amended.

[71] In *SA Municipal Workers Union and another v Ngaka Modiri Molema District Municipality and others*,^[12] the Court held that:

‘a commissioner must determine amongst others whether the misconduct for which an employee has been dismissed attracts dismissal as a sanction. So if a commissioner is at large to formulate a charge for another party to the dispute, he or she would not be in a position to determine whether dismissal was appropriate. I say so because if an employee is charged and dismissed for charge X, a commissioner may and in fact is entitled to find that charge X cannot lead to a dismissal. To allow a commissioner at the altar of s138(1) to formulate a charge that will attract dismissal as a sanction would be unfair in my mind. The other party, in particular the employee, will prepare his or her case around the misconduct that led to his or her dismissal...’

[72] It is not open to the arbitrator to formulate a charge, different to the charge the employee had faced during the disciplinary hearing and to find that the newly formulated charge constitutes a dismissible offence.

[73] In my view, when the arbitrator accepted that Mr Dube was charged with absenteeism on dates not reflected in the charge sheet and absent any evidence around the amendment of the charges, he misconstrued the law, misconceived the nature of the enquiry he was mandated to conduct and it was at this point where he had lost his way. It is evident from the findings made by the arbitrator that after he had lost his way, he was wholly incapable of

finding his way back. This distorted the outcome and the result was an irrational and unreasonable outcome.

[74] The wording of the charges and the dates reflected therein, was an issue from the onset and it was a material aspect in Mr Dube's challenge to the fairness of his dismissal. Instead of considering this material fact and resolving the issue, the arbitrator found that this was not an issue as he had to decide the fairness of the dismissal on the reasons given by the employer and in casu, Mr Dube was dismissed for being absent without permission for five days and the cumulative effect of a repeated offence.

[75] The arbitrator accepted that Mr Chueu pointed out on the time sheet for Mr Dube that he was absent on 14, 21, 28 and 30 October and 4 November 2019, and this pointing out automatically converted to a charge in the mind of the arbitrator. When confronted with the fact that Mr Dube was at work on 29 October 2019, Mr Chueu conceded that the date of 29 October 2019 on the charge sheet was a mistake, as it should have been 28 October 2019. In my view the Respondent cannot escape the consequences of the way it decided to word the charge sheet and the charge on which it proceeded to discipline and dismiss Mr Dube. If different dates were intended, the charge sheet should have reflected those, alternatively should have been amended to reflect the correct dates.

[76] The arbitrator's finding that Mr Chueu's evidence made it clear that Mr Dube was dismissed for being absent from work

on 14, 21, 28 and 30 October and 4 November 2019 and that Mr Dube knew the charge he had to answer to finding is not supported by the evidence or the wording of the charges.

[77] Ultimately, the arbitrator's finding that the Respondent's reasons for dismissal, namely that Mr Dube was absent for five days without permission, was proven and that the sanction of dismissal was fair, is unreasonable. The arbitrator had no independent consideration of the appropriateness of the sanction but merely accepted that the disciplinary code provided for dismissal when an employee was absent for five days. The Applicant disputed the interpretation of the 'five day' period, another issue the arbitrator failed to consider. Be that as it may, as Mr Dube was at work on 29 October 2019, dismissal is not appropriate for his absence on 4 November 2019, more so where he tendered an explanation in respect of the said date.

[78] In Sidumo,[13] it was held that :

'...[W]here a commissioner fails to have regard to the material facts, the arbitration proceedings cannot, in principle, be said to be fair because the commissioner fails to perform his or her mandate. In so doing, in the words of Ellis, the commissioner's action prevents the aggrieved party from having its case fully and fairly determined. This constitutes a gross irregularity in the conduct of the arbitration proceedings, as contemplated by section 145(2)(a) (ii) of the LRA. And the ensuing award falls to be set aside not because the result is wrong but because the commissioner has committed a gross irregularity in the conduct of the arbitration proceedings.'

Conclusion

[79] I have to consider the grounds for review within the context of the test this Court must apply in deciding whether the arbitrator's decision is reviewable. The ultimate question is whether holistically viewed, the decision taken by the arbitrator was reasonable based on the evidence placed before her.

[80] In *Bestel v Astral Operations Ltd and others*,^[14] the LAC considered the limited scope possessed by this Court to review an arbitration award and accepted that an arbitrator's

finding will be unreasonable if the finding is unsupported by any evidence, if it is based on speculation by the arbitrator, if it is disconnected from the evidence, if it is supported by evidence that is insufficiently reasonable to justify the decision or if it was made in ignorance of evidence that was not contradicted.

[81] I must ascertain whether the arbitrator considered the principal issue before him, evaluated the facts presented and came to a conclusion that is reasonable. I have considered this question after perusal of the transcribed record, the arbitration award and the grounds for review raised by the Applicant.

[82] On a holistic consideration of the facts before the arbitrator, his finding that Mr Dube's dismissal was fair, is disconnected from the evidence and is not reasonable. It follows that the arbitration award is to be interfered with on review.

Relief

[83] This leaves the issue of relief.

[84] The Applicant seeks for the arbitration award to be reviewed and set aside and to be substituted with an order that Mr Dube's dismissal was substantively unfair, alternatively for the matter to be remitted for a determination de novo.

[85] In the event that the arbitration award is set aside on review, this Court has a discretion whether or not to finally determine the matter. The matter could be finally determined where there is a full record of the proceedings before Court and where it would be in the interest of justice to do so.

[86] The principles had been set out by the LAC in *Palluci*^[15] as follows:

'Where all the facts required to make a determination on the disputed issues are before a reviewing court in an unfair dismissal or unfair labour practice dispute such that the court "is in as good a position" as the administrative tribunal to make the determination, I see no reason why a reviewing court should not decide the matter itself. Such an approach is consistent with the powers of the Labour Court under section 158 of the LRA, which are primarily directed at remedying a wrong, and providing the effective and speedy resolution of disputes. The need for bringing a speedy finality to a labour dispute is thus an important consideration in the determination, by a court of review, of whether to remit the matter to the CCMA for

reconsideration, or substitute its own decision for that of the commissioner.’

[87] Mr Hollander for the Applicant submitted that the matter should not be remitted for a hearing de novo as the charge and the facts will not change.

[88] In casu, the Court has the entire record before it and is well-placed to make a decision on the merits and to decide and finally determine the matter on the record as it is before me and where the parties’ cases were fully ventilated.

[89] On a consideration of all the facts before the arbitrator at the time, it is evident that the most reasonable finding would have been that Mr Dube’s dismissal was substantively unfair.

[90] In the circumstances, it follows that the arbitration award ought to be set aside, and I am satisfied that upon the material that was placed before the arbitrator, this Court is in a position to substitute that award. No purpose would be served by remitting the matter back to the CCMA for reconsideration. It is also in the interest of justice to determine the matter finally and not to order a re-hearing of the matter as that would undermine one of the key objects of the Labour Relations Act[16] namely expeditious dispute resolution, as this dispute dates back to 2019.

Costs

[91] This Court has a wide discretion in respect of costs.

[92] This is a matter where ultimately the arbitrator got it wrong and the Respondent was entitled to defend an award issued in its favour by opposing the application and should not be punished for doing so. In my view, the interest of justice will be best served by making no order as to cost.

[93] In the premises I make the following order:

Order

1. The late filing of the Applicant’s review application is condoned;
2. The arbitration award dated 22 July 2020 and issued under case number NC3746-19 is reviewed and set aside;
3. The arbitration award is substituted with the following:
 - ‘i. The Applicant’s (Mr Dube) dismissal is substantively unfair;
 - ii. The Applicant is reinstated retrospectively from the date of dismissal and without loss of benefits.’
4. There is no order as to costs.

Connie Prinsloo

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

Advocate L Hollander

Instructed by:

Larry Dave Attorneys

For the Third Respondent: Ms L Kok from Van Zyl Inc Attorneys

- [1] 2007 28 ILJ 2405 (CC) at para 110.
- [2] (2014) 35 ILJ 943 (LAC) at para 16.
- [3] Gold Fields at paras 18 and 19.
- [4] [2013] 11 BLLR 1074 (SCA) at para 13.
- [5] [2015] 1 BLLR 50 (LAC) at para 33.
- [6] Section 3(4) of the Law of Evidence Amendment Act 45 of 1988.
- [7] Act 45 of 1988.
- [8] A. Bellengere et al, 'The Law of Evidence in South Africa', Oxford University Press Southern Africa, 2nd edition, pp 297 – 300.
- [9] (2019) 40 ILJ 2477 (LAC) at para 16.
- [10] (2008) 29 ILJ 964 (LAC) at para 32.
- [11] [2015] 5 BLLR 484 (LAC) at paras 45 – 46.
- [12] (2016) 37 ILJ 2430 (LC) at para 12.
- [13] Sidumo supra at para 268.
- [14] [2011] 2 BLLR 129 (LAC) at para 18.
- [15] Palluci supra at para 58
- [16] Act 66 of 1995.

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