

SOUTH AFRICA / JUDGMENT

South African Breweries (Pty) Ltd v Commission For Conciliation, Mediation and Arbitration and Others (JR1584/21) [2024] ZALCJHB 383; (2025) 46 ILJ 184 (LC) (4 October 2024)

[2024] ZALCJHB 383

COURT

Labour Court Johannesburg

BEFORE

Y Peer

CASE / FILE NUMBER

JR1584/21

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FLYNOTES:

LABOUR – Dismissal – Driving
under influence of alcohol –
Collision
with company issued vehicle – Blood alcohol content four
times over limit – Finding that dismissal was
an
inappropriate sanction – Review – Investigation
withdrawn due to employee's dishonesty – Reflects
lack
of remorse and trustworthiness – Commissioner erred in
assessment of nature of information before employer –
Failed
to consider seriousness of the misconduct – Decision on
sanction unreasonable – Reviewed and set aside
–
Applicant's dismissal was fair.
THE
LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG
Not
Reportable
Case
no: JR 1584/21
In

the matter between:	SOUTH AFRICAN BREWERIES (PTY) LTD Applicant and COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION First Respondent MXOLISI NDUZULWANA N.O Second Respondent FOOD AND ALLIED WORKERS UNION Third Respondent APHELE MAHO Fourth Respondent
Heard:	30 May 2024
Delivered:	[04 October 2024 (This judgement was handed down electronically by circulation to the party’s legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing down is deemed to be 10:00 on 04 October 2024)

JUDGMENT

PEER, AJ

Introduction

- [1]

This is a review application instituted by the applicant, South African Breweries (Pty) Ltd (SAB), seeking to review and set aside, alternatively review and correct an award issued under the auspices of the CCMA on 5 July 2021.
- [2]

The review application is opposed by the third respondent being the Food and Allied Workers Union (FAWU), on behalf of the fourth respondent, Aphele Maho, a former employee of SAB.

Background

facts

- [3] The fourth respondent commenced employment with SAB around 22 June 2015 and was dismissed on 12 August 2019. He internally appealed his dismissal which appeal was dismissed in October 2019. At the time of his dismissal, the fourth respondent was an Accounts Manager at SAB.
- [4] The fourth respondent was provided with a company vehicle to use in the course of his duties.
- [5] On 16 June 2017, the fourth respondent was in a collision with the company-issued vehicle resulting in the vehicle being written off.
- [6] Shortly after the incident, the fourth respondent provided a statement on the events that led to the accident stating that:

‘On the 15th of June 2017 I spent the evening at Southbourne Suburb here in Queenstown, during the night I proceeded to Yolo Lounge in town. At Yolo Lounge I had an alcoholic drink at arrival but I did not drink alcohol throughout the rest of the night while I was there of 16/06/2017.

...

I take responsibility for my actions, I was inducted and informed not to drive while under the influence of alcohol. I am willing to reach an agreement with the company to pay for the damage costs caused to vehicle.’ (sic)

- [7] According to SAB, on account of the fourth respondent’s version that he had only one alcoholic drink, SAB believed that this would not have caused the fourth respondent to be over the legal blood alcohol limit of 0.05 per 100 millilitres. Therefore, according to SAB, it concluded at that stage that there was no prima facie evidence of misconduct by the fourth respondent and it closed its investigation against him in relation to the collision. Shortly

thereafter, on 19 July 2017, the fourth respondent was issued with a letter wherein he was advised that the investigation was concluded

and there were insufficient grounds to proceed with disciplinary action against him. Further, SAB recorded that should tangible

evidence come to its attention concerning the incident, SAB’s rights were reserved.

- [8] In March 2019, SAB was provided with a report from the South African Police Service (SAPS) which indicated that the fourth respondent’s blood alcohol content at the time of the accident on 16 June 2017 was at 0.23 grams per 100 millilitres. This was approximately four times the limit of 0.05 grams per 100 millilitres.

[9] Upon receiving this information, the fourth respondent was called to a disciplinary hearing to answer to allegations of misconduct as follows:

‘1. Driving whilst under the influence of alcohol – in that on 16 June 2017, you were under the influence of alcohol when driving a company vehicle (HJB 731 EC) resulting in an accident.

2. Wilful damage of company property – in that on the 16 June 2017 you wilfully damaged vehicle (HJB 731 EC) when you were driving the vehicle, while being under the influence of alcohol, thereby resulting in the damage to the vehicle.’

[10] The fourth respondent was found guilty of both charges and dismissed. He subsequently appealed his dismissal internally at SAB, but his appeal was unsuccessful and his dismissal was upheld on 9 October 2019.

[11] Following the fourth respondent’s dismissal, FAWU on his behalf referred an unfair dismissal dispute to the CCMA.

[12] The Commissioner issued an award where he found that the fourth respondent was guilty of the charges, but that dismissal was an inappropriate sanction. The dismissal was accordingly found to be unfair.

[13] In arriving at this conclusion, the Commissioner’s reasoning was as follows:

13.1 The Commissioner indicated that if one had regard to the employee’s statement on the incident, SAB was aware of all the elements of the charge save for the fourth respondent’s blood alcohol level.

13.2 SAB was aware that the employee had a collision with the company vehicle while under the influence of alcohol on 25 June 2017. SAB still withdrew the allegation of misconduct and gave the fourth respondent another vehicle to drive while doing his work. The fourth respondent was allowed to work for another 22 months (25 July 2017 to 23 May 2019). The Commissioner was accordingly of the view that SAB failed to prove that the employee’s misconduct rendered the continued employment relationship intolerable.

13.3 On this basis, the Commissioner was of the view that the dismissal of the employee was not the appropriate sanction as the “rupture in employment relations caused by the employee’s misconduct could be resolved by progressive discipline”.

13.4 A final written warning was found to be the appropriate sanction.

[14] The Commissioner accordingly ordered that the fourth respondent be reinstated, but without retrospective pay, as he was found not to have approached the CCMA with clean hands. SAB was accordingly ordered to reinstate the fourth applicant with effect from 12 August 2019.

Review application

[15] SAB subsequently instituted a review application to review and set aside, alternatively, review and correct the arbitration award.

[16] SAB relied on the following grounds of review:

16.1 The Commissioner failed to consider and/or properly consider the relevant evidence, and/or failed to attach due weight to the evidence presented before the arbitrator during the arbitration proceedings (first ground); and

16.2 The arbitrator ignored or failed to assess the evidence before him on a balance of probabilities (second ground).

[17] SAB contends that the Commissioner arrived at an unreasonable finding that the fourth respondent's dismissal was substantively unfair. SAB contends that it did not have a fair trial of the issues.

Submissions

by parties

[18] In respect of the first ground, SAB submitted and argued that the Commissioner failed to consider factual evidence pertaining to the fourth respondent's level of intoxication and that his written statement after the incident was at odds with the factually

established level of his intoxication.

[19] Further, SAB argued that the Commissioner failed to take into account evidence relating to the seriousness and effect of the fourth respondent's level of intoxication, including the effect that it had on his body (causing him to black out), it being the actual cause of the accident and that the fourth respondent's version of being fatigued was not correct. SAB also relied on the fact that such a level of intoxication was a risk to the safety of other road users. SAB's expert witness also testified at the arbitration that a single drink would not have resulted in a blood alcohol level of 0.23 grams. This would have been reached only through excessive alcohol consumption. Further, such excessive consumption would have likely caused the fourth respondent to black out.

[20] Finally, SAB contends that the Commissioner failed to properly consider evidence pertaining to the sanction. This includes that the consumption of alcohol in excess of the limit before driving is considered a serious offence in terms of SAB's policy and attracts the sanction of dismissal. Additionally, there was a failure by the Commissioner to consider that while SAB withdrew the investigation against the fourth respondent in part due to the fourth respondent's dishonesty, the applicant reserved the right to investigate the matter further and to pursue disciplinary action. Further, such withdrawal was not an indication of the withdrawal of charges or that SAB had forgiven or had reconciled with the fourth respondent in relation to his misconduct.

- [21] In relation to the second ground of review, SAB contends that the Commissioner failed to understand and/or fully appreciate the nature of the enquiry and as a consequence, he failed to appreciate the significance of the relevant evidence presented before him and the appropriate weight to attach to such evidence .
- [22] In this regard, SAB contends that the Commissioner failed to consider and appreciate the fourth respondent's contradictory evidence during the arbitration as well as between the internal disciplinary enquiry and the arbitration. The Commissioner also failed to consider that the fourth respondent, in the face of unequivocal evidence regarding his level of intoxication, persisted with his denial that he was under the influence of alcohol when he drove the vehicle.
- [23] Further, SAB contends that the Commissioner ignored or failed to properly consider that the fourth respondent was dishonest in his dealings with SAB and this would have eroded the trust relationship between himself as a senior employee and SAB. The Commissioner, as a result, ignored and/or failed to consider that the dishonesty which resulted in the investigation being withdrawn, contributed to the irretrievable breakdown of the trust relationship and the intolerability of the continued employment relationship.
- [24] As a result of the aforesaid, SAB contends that the Commissioner's finding that the fourth respondent's dismissal was substantively unfair was to be reviewed and set aside, and replaced with a finding that the dismissal was substantively fair.
- [25] In response, FAWU on behalf of the employee contends that the review application is without merit and the Commissioner duly considered all evidence before arriving at his conclusion, which conclusion was correct.
- [26] Further, FAWU contends that when SAB withdrew the investigation it reconciled itself with the fourth respondent's conduct and forgave him. Therefore, it could not contend that the relationship of trust had irretrievably broken down.
- [27] In such circumstances, FAWU contends that dismissal was not the appropriate sanction, the review application is without merit and should be dismissed.

Legal principles

- [28] The established and now trite test for review applications is whether the arbitrator's conclusion is one that falls within a range of decisions that a reasonable decision maker could make.[1]
- [29] It has been held that the review court must ascertain whether the arbitrator considered the issue in dispute, evaluated the facts presented at the hearing, and came to a conclusion that is reasonable.[2]
- [30] In *Securitas Specialised Services (Pty) Ltd v Commission for Conciliation Mediation and Arbitration and Others*[3] it was restated that the test for review is as follows:

[19] “Is the decision reached by the arbitrator one that a reasonable decision maker could not reach?” To maintain the distinction between review and appeal, an award of an arbitrator will only be set aside if both the reasons and the result are unreasonable. In determining whether the result of an arbitrator’s award is unreasonable, the Labour Court must broadly evaluate the merits of the dispute and consider whether, if the arbitrator’s reasoning is found to be unreasonable, the result is, nevertheless, capable of justification for reasons other than those given by the arbitrator. The result will be unreasonable if it is entirely disconnected with the evidence, unsupported by any evidence and involves speculation by the arbitrator.

[20] This court has eschewed a piecemeal approach to a review application by the Labour Court. The proper approach is for the Labour Court to consider the totality of the evidence in deciding “whether the decision made by the arbitrator is one that a reasonable decision-maker could make”.

[31] This court has said that it is not for the review court to intervene only because it would have come to a different conclusion on the same evidence. The additional requirements of unreasonableness of the decision set out above must be met.[4]

Analysis

[32] In considering this matter, I limit myself only to those aspects that constitute proper grounds of review and which are directed at the Commissioner’s finding on sanction.

[33] The Commissioner’s primary basis for finding that dismissal was not an appropriate sanction was that the investigation was withdrawn against the fourth respondent at a particular point in time, and the fourth respondent was dismissed only 22 months later when the charges were instituted. During this period, the Commissioner found that bar the level of intoxication, SAB was aware of all of the other elements of the offence but was perfectly comfortable with continuing with the employment relationship with the fourth respondent and even issuing him with a new vehicle to continue using.

[34] The Commissioner found that this was indicative primarily of a relationship that had not irretrievably broken down and would not be intolerable.

[35] FAWU on behalf of the fourth respondent agreed with the Commissioner and indicated that the withdrawal of the investigation signified a sense of forgiveness and conciliation between SAB and the fourth respondent.

[36] SAB on the other hand argued that the Commissioner failed to take into account that the reason the investigation was withdrawn at the time was not because of any sense of forgiveness or condoning of the fourth respondent’s conduct, but rather because of the fourth respondent’s dishonesty in his written statement which did not shed light as to the true nature of the misconduct as well as the seriousness thereof. Therefore, the Commissioner ought not to have relied on the passing of time between the incident and the dismissal.

- [37] I am inclined to agree with SAB in this regard and have difficulty with the Commissioner's reasoning and assessment of the appropriateness of dismissal as a sanction for a number of reasons.
- [38] Firstly, there is a fundamental issue which seems to have escaped the Commissioner. The Commissioner appears to accept that the fourth respondent was dishonest in his written statement regarding his level of intoxication (and accepted the version of SAB's expert) Such dishonesty by the fourth respondent earned him a further 22 months of employment until SAPS made the report available to SAB. Consequentially, before this Court, the same dishonesty earned the fourth respondent an arbitration award in his favour.
- [39] Had the fourth respondent been honest in his written response, he would not have continued with his employment for a further 22 months, and such lapse in time would not have been a factor before the subsequent arbitration. Therefore, ultimately the Commissioner appears to have inadvertently rewarded the fourth respondent for dishonest and deviant behaviour in the workplace. This can never be reasonable in my view.
- [40] Secondly and flowing from the issue discussed above, while this was not a charge on its own, the fact that the fourth respondent was deviant and dishonest in his explanation to SAB regarding his level of intoxication, certainly reflects the fourth respondent's lack of remorse and trustworthiness and is indicative of the fact that progressive discipline would unlikely be successful. This seems to have been overlooked by the Commissioner. In relation to trustworthiness, how does SAB trust the fourth respondent henceforth to be open and honest in his dealings with SAB?
- [41] Thirdly, SAB clearly did not have an appreciation as to the true nature and extent of the misconduct when it closed the investigation in 2017. In fact, it relied on the bona fides of the fourth respondent's explanation.
- [42] The fourth respondent misled SAB by creating an impression that his alcohol consumption was inconsequential and was not the cause of the collision.
- [43] At that stage, SAB would not have thought that there was any material transgression at the time, nor was there knowledge of a breach of the policy in relation to the level of consumption being well above the legal limit. The fourth respondent also created the impression that the collision was not caused by any alcohol consumption, but rather as a result of him being fatigued.
- [44] However, based on the true and actual facts as set out in the SAPS report and supported by expert evidence at the arbitration, the fourth respondent did not merely consume an insignificant cup or tot of alcohol but clearly consumed a significant amount causing his blood alcohol level to be four times the legal limit. It was so excessive that it caused him to black out. To then get into a vehicle after this and drive was extremely irresponsible, wilful and unacceptable, and cannot be compared to the initial version given by the fourth respondent.

- [45] Therefore, there was a material disconnect between what SAB knew at the time of closing the investigation (and dropping any disciplinary process at that stage) and what SAB subsequently became aware of at the time of the disciplinary enquiry and dismissal.
- [46] The Commissioner accordingly clearly erred in his assessment of the nature of the information before SAB at the time of closing the investigation compared to when the disciplinary proceedings were instituted.
- [47] It is clear that, had SAB known the true and full facts at the time of the investigation, it would certainly have pursued the disciplinary process at that stage, and would have likely dismissed the fourth respondent shortly after the incident.
- [48] The lack of appreciation and knowledge of the fourth respondent's true state of intoxication was clearly a material factor that influenced SAB's decision not to pursue disciplinary proceedings and dismiss the fourth respondent at the time immediately following the incident.
- [49] Finally, the Commissioner clearly failed to take into account the seriousness of the misconduct in question which was a breach of the legal alcohol consumption limit while driving, a disregard for the life and safety of both the fourth respondent and other road users, and the fact that the recommended sanction under SAB's policy for such misconduct was a dismissal.
- [50] In such circumstances, I find the Commissioner's decision on sanction to be unreasonable. It warrants interference by this Court.
- [51] Accordingly, the finding that the fourth respondent's dismissal was substantively unfair on the basis of an inappropriate sanction is unreasonable and is reviewed and set aside. I replace it with a finding that the dismissal was fair and the sanction of dismissal was appropriate in the circumstances.

Costs

- [52] In relation to costs, this is a court of equity and fairness and it is now trite that the principle of the costs following the result does not necessarily apply to matters in this Court. In exercising my discretion, I am of the view that there should be no order as to costs.
- [53] In the premises, the following order is made:

Order

1. The arbitration award issued by the second respondent on 5 July 2021 under case number ECEL 5859-19 is reviewed and set aside.
2. The award is substituted by the following:

'The applicant's dismissal was fair'.

3. There is no order as to costs.

Y. Peer

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Attorney: Ms Amandla Makhongwana, Bowmans

For the Respondent: Union Representative: Mr Sello Kuane, FAWU

[1] Sidumo and Another v Rustenburg Platinum Mines Ltd and Others

[2007] ZACC 22; (2007) 28 ILJ 2405 (CC) at para 110.

[2] Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and others [2013] ZALAC 28; (2014) 35 ILJ 943 (LAC).

[3]

[2021] ZALAC 5; [2021] 5 BLLR 475 (LAC) at paras 19 – 20.

[4] Tactical Reaction Services v Thompson Colleen Clevis and others (JR 1054/2018)

[2023] ZALCJHB 187 19 June 2023 at para 7.

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Prepared on 11 October 2026 · Esheria