IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not reportable

Case No: C 734/2016

In the matter between

CHEVRON SOUTH AFRICA (PROPRIETARY) LIMITED **Applicant**

and

CHEMICAL ENERGY PAPER PRINTING WOOD AND ALLIED WORKERS UNION on behalf of BONGANI VOYIYA **First Respondent**

RETIEF OLIVIER, *N.O* **Second Respondent**

NATIONAL BARGAINING COUNCIL FOR THE CHEMICAL INDUSTRY **Third Respondent**

Heard: **15 June 2017**

Delivered: **15 December 2017**

Summary: **[Test for review restated-application partly granted-No order as to costs]**

JUDGMENT

MABASO, AJ:

Introduction

[1] The applicant is Chevron South Africa (Proprietary) Limited (the applicant), the first respondent is the Chemical Energy Paper Printing Wood and Allied Workers Union on behalf of Bongani Voyiya (the employee), the second respondent is Retief Olivier, *N.O* (the arbitrator), and the third respondent is the National Bargaining Council for the Chemical Industry (the Bargaining Council). The employee is the only party that is opposing this application.

[2] The applicant approached this Court by way of a review application, to review and set aside the arbitration award issued by the arbitrator under the Bargaining Council case number WCCHEM219-15/16 wherein he found that the employee's dismissal was both procedurally and substantively unfair, and to substitute such an award with an order that the dismissal of the employee was substantively and procedurally fair, alternatively to direct that the unfair dismissal dispute be remitted to the Bargaining Council for arbitration *de novo* before any commissioner other than the arbitrator.[1]

Grounds for the review

[3] The applicant in its founding affidavit asserted that the arbitrator failed to apply his mind to the material evidence before him, and he did not attach sufficient weight to the material and/or did not have regard to the totality of the evidence before him. In its supplementary affidavit, the applicant said that the arbitrator misconceived the nature of the enquiry, alternatively made an error of law. In support of the latter, *inter alia*, it asserted that,

> *"even if the second respondent was required to determine the fairness of the dismissal strictly according to whether it was for misconduct or incapacity, if he had properly assessed the evidence before him he would have determined that [the employee's] dismissal was based on misconduct. That was the true dispute before him and if he had applied to the standards applicable to such dismissals he was bound to conclude that the dismissal was fair"*

[1] Notice of motion, pages 1 and 2.

[4] The applicant further asserted that the arbitrator, **"… misconceived the nature of the inquiry he was required to embark on, alternatively committed a material error of law,** because: he failed to realise that he was required determine whether the applicant had a fair reason (in all circumstances) to dismiss [the employee] …He was not required to determine whether there was a fair reason relating strictly to incapacity or misconduct *per se*".

[5] The applicant submitted that the arbitrator came to a conclusion which a reasonable decision-maker could not have arrived at taking into account the evidence that was presented before him. One of the examples that were provided was that the employee refused or failed to participate in the incapacity enquiry which had been arranged by the applicant, therefore, the performance improvement plan process (PIP) was made impossible by the conduct of the employee and this evidence was not challenged.[2]

[6] That the arbitrator made an error of law in that he did not realise that employers are not prohibited from using disciplinary and incapacity processes simultaneously.[3]

[7] That in finding that the employee's dismissal was substantively unfair the arbitrator failed to take into account the totality of the circumstances and balance the interests of all parties,[4] for example, that the employee continued to perform poorly after the inquiry that had found him guilty .[5]

Relevant background/ the arbitration:

[8] The employee worked for the applicant from 1995 until dismissed in 2015. Following his dismissal, he declared an unfair dismissal dispute to the Bargaining Council and one of the reliefs sought was that of reinstatement.

[9] The parties before the arbitrator submitted pre-arbitration minutes wherein they agreed that the arbitrator is required to decide, under facts in dispute, the

[2] Founding affidavit, at para 29.
[3] Ibid, at para 5.3.
[4] Ibid, para 6.2.
[5] Ibid, at page 31.

following issues:

> *"3.1 whether the applicant's dismissal was for a fair reason*
> *3.2 whether the sanction imposed on the applicant was appropriate/inconsistent application of discipline*
> *3.3 procedural unfairness in relation to state of health at the time of enquiry"* [6]

[10] Mr Njomane on behalf of the applicant advised the arbitrator that the reason for the dismissal of the employee was that,

> *"the employee failed to make the required performance standards and his failure to do so dates back to at least 2009 the applicant was on a final written warning for failing to meet performance standards and the respondent followed its performance improvement plan policy and attempts to assist the applicant to meet the performance standards. The applicant did not co-operate with the respondent in this regard and at the end of the performance improvement plan. There was no improvement in his performance was accordingly terminated."*

[11] The issue of dismissal was not in dispute, therefore, the applicant as an employer had an onus of proof to show that the dismissal of the employee was fair, based on poor performance, taking into account that the applicant in its opening statement as mentioned above said that its case was about performance.

[12] The first witness for the applicant was Mr Thebe, his evidence can be summarised as follows: the employee was placed under PIP from 22 June 2015 until the end of October 2015. He indicated that the employee did not indicate any type of assistance needed. Within this period, the employee was summoned before the disciplinary hearing for failure to attend PIP reviews, and subsequently, he was found guilty. Some of the unchallenged evidence of the applicant was as follows,

> *"MR THEBE: … The requirement of being punctual at work. Secondly, it was the area where I put a weekly meeting and the weekly meeting was to help him improve on the performance and not just that, but be able to direct him*

[6] Page 482, at para 3.

and coach him and make sure that, you know, he understands exactly what the requirements are and executive accordingly…And he failed to attend those particular meetings, and he was even given during disciplinary enquiry found guilty of that."

[13] Mr Thebe further stated that, the applicant was his subordinate, working as an incident investigation reporter and analyser.[7] The employee's duties involved reporting incidents, and matrix in terms of safety and to assist individuals in the refinery.[8] As Mr Thebe joined the department in April 2014, the employee was already an underperformer.[9] There was a process of addressing his performance and this had to be done within a particular timeframe and then assessed as to whether his performance improved or not.[10]

[14] Mr Thebe mentioned two areas of concern about the employee, namely: some incidents were not investigated in time based on what was required, and late arrival at work without notifying his supervisor .[11] He then decided to put in weekly meetings with the employee in order to discuss this and other areas of focus whereby the employee can be assisted to improve.[12] There were supposed to be monthly reviews, the first one was supposed to take place on 24 July 2015 but it did not take place and according to this witness the reason for such was that "*Because there wasn't any improvement in terms of the performance*".[13] He then proceeded to construct the charge of non-performance to some issues that were in the PIP.

[15] Before the date of 24 July 2015, the employee was issued with a notice to attend a disciplinary hearing which subsequently took place on 24 July 2015 (the date of the monthly review) and was found guilty of misconduct for not attending weekly meetings.[14] He was issued with a final written warning following this finding. Due to the employee's non-performance, this witness

[7] Ibid, page 13.
[8] Ibid, page 17.
[9] Ibid, page 18.
[10] Ibid, page 20, also page 31 -32, 47.
[11] Ibid, page 29.
[12] Ibid, page 22.
[13] Ibid, page 25.
[14] Ibid, page 27.

had to do his work,[15] as some of the employees were sending complaints to him and he had to communicate this to the employee.[16] In one of the emails that were sent to the employee this witness said "*Please note, this is an Essential Suite item that is overdue, this is the second Essential Suite action item that you have not addressed* ***in time.***"[17] And it meant that he had "*not met the agreement as per [his] PIP*"[18] instead of improving the employee kept on saying to this witness "*it seems like [Mr Thebe] seeking to fire him*".[19] This evidence, again, was never disputed during cross-examination.

[16] Mr Thebe stated that when the applicant wanted to hold an enquiry for the employee, they received a medical certificate dated November 2015.[20] Following a couple of postponements of the poor performance enquiry, it finally took place on 26 November 2015, and the employee was in attendance.[21]

[17] During cross-examination, Mr Thebe's evidence was as follows: as the PIP was for the period of June 2015 to October 2015, and between this period there were no reviews which were done.[22] The reason proffered was that there was an enquiry in July 2015 which was supposed to take place, and further stated that "*so we did not even have the review and then after that there was another charge for incapacity*"[23] and that a month before the end of the review period, in September 2015, the decision had already been taken that the incapacity hearing should be initiated.[24] Mr Thebe did not dispute the fact that because a decision had been taken in July 2015 to proceed with the hearing, there was no need for a performance review.[25] In respect of Essential Suite; Mr Thebe confirmed that the employee closed it off eventually.[26] When he was asked as to whether he had concerns about the veracity of the

[15] Ibid, pages 31, 32, and 462.
[16] Ibid, page 34.
[17] Own emphasis.
[18] Records, page 35.
[19] Ibid,page 37.
[20] Ibid,page 38-40.
[21] Ibid,page 41.
[22] Ibid,page 47.
[23] Ibid, page 48.
[24] Ibid, page 48.
[25] Ibid, page 53. 60, 62, 63, 101
[26] Ibid, page 87.

medical certificates, responded by saying no.[27]

[18] Ms Cornelissen's evidence was as follows: she confirmed that she received the sick note from one doctor Williams that the employee should not work from 17 to 23 November 2015, the recommendation was further that the hearing scheduled for the 26 November 2015 be postponed as the employee was not emotionally stable and that the hearing could be detrimental to his mental health and the doctor further recommended that he should be given the period of 3 to 4 weeks if possible .[28] Further, she confirmed that on the second sitting of the hearing the employee was not himself meaning he was "*unwell*".[29]

[19] Mr Mitchell testified that another disciplinary hearing was held where a recommendation was made after the employee had been found guilty, that *" let's give the PIP a chance and see whether the employee performance will not improve after the plan B has been concluded"*.[30] It is important to mention that this outcome was issued in September 2015,the charges were related to the employee's poor performance, specifically for dates of 18 March 2015, 30 March 2015, between 20 April and 07 May 2015, and 11 May 2015. The employee pleaded guilty to four of those charges.[31] This evidence was also not disputed during cross-examination. Clearly, this demonstrates that the employee failed to meet the performance standard and he was aware of such required performance standard and this happened before he was contracted to PIP.

[20] The arbitrator looked at the finding by the first chairperson (Ms Cornelissen) of the incapacity enquiry and concluded that the chairperson's finding showed a sign of not understanding the nature of the incapacity enquiry.

[21] The arbitrator further found that the incapacity enquiry held on 26 November 2015 should have been postponed because the employee had delivered a medical report from a psychiatrist that he was not emotionally and

[27] Ibid,page 88 to 89.
[28] Ibid, page 115 to 119, 131.
[29] Ibid, page 120.
[30] Ibid, page 162
[31] Ibid, page 171.

mentally fit to work, taking into account that the chairperson had no medical experience and to insist that the employee should proceed with the hearing denied him an opportunity to present his case, therefore it was procedurally unfair. I agree with the arbitrator in this regard.

[22] The arbitrator further states that the second chairperson (Mr Mitchell) of the enquiry made recommendations for the determination of employment of the employee because the employee underwent disciplinary hearings without any change to his behaviour, therefore according to him the cause of this was that the supervisor would have diverted the PIP process into the disciplinary procedure, meaning the hearing and the performance enquiry were used interchangeably and according to him Mr Mitchell was the only person who understood the process. The employee was called before a hearing for the issues related to poor performance, and Mr Mitchell made no finding in respect of that instead he made a recommendation that the employee should be referred to the poor performance enquiry, as stated in paragraph 19 above. It is important to mention that the arbitrator, after ruling in respect of Mr Mitchell's finding (of 23 September 2015) he says:

> *"However, there was no evidence that following [Mitchell's finding] that there was any further opportunity provided to the applicant to improve and to meet the required performance standard."*

[23] The arbitrator further says that the applicant did not consider any alternatives to dismissal which is a key issue in consideration of poor perfomance dismissal. In conclusion, the arbitrator indeed ruled in favour of the employee and ordered the applicant to reinstate him with back pay.

The law and application thereof

[24] Both the applicant's and the employee's representatives, in their heads of argument, refer this Court to the matter of *Goldfields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA and Others*[32] as part of the yardsticks in deciding this review application. In the same judgment, I propose to deal with

[32] [2014] 1 BLLR 20 (LAC).

what I prefer to refer to as the six pillar requirements[33], which read as follows,

> *"(i) In terms of his or her duty to deal with the matter **with the minimum of legal formalities**, did the process that the arbitrator employ give the parties a **full opportunity to have their say** in respect of the dispute?*
>
> *(ii) Did the arbitrator **identify** the dispute he or she was required to arbitrate …?*
>
> *(iii) Did the arbitrator **understand the nature of the dispute** he or she was required to arbitrate?*
>
> *(iv) Did he or she **deal with the substantial merits** of the dispute? and*
>
> *(v) Is the arbitrator's decision one that another **decision maker could reasonably have arrived at based on the evidence?**"(Emphasis added.)*

[25] The SCA in *Shoprite Checkers (Pty) Ltd v CCMA and others*[34] discussing a review application held as follows,

> *"There may well be a fine line between a review and an appeal, particularly where – as here – the standard of review almost inevitably involves a consideration of the merits. However, whilst at times it may be difficult to draw the line, the distinction must not be blurred. The drafters of the LRA were clearly alive to the distinction".*

[26] The applicant is not challenging the award on the basis that the arbitrator did not give the parties an opportunity to have their say (pillar 2).It is also not alleged that he did not deal with minimum formalities (pillar 1) nor identify the dispute(pillar 3).Its bone of contention is that the arbitrator misconstrued the case before him, meaning that he did not understand the dispute, therefore, he failed to deal with the substantial merits of the dispute between the parties; in a sense he committed an error of law as his award is one that a reasonable decision-maker could not have reached taking into account the totality of evidence before him(pillars 4 to 6).

[27] In answering this question one has to determine as to what was the case before the arbitrator. Advocate Bosch for the applicant refered this Court to

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[33] The underlined.
[34] [2009] 3 All SA 466 (SCA).

the case of *DENOSA obo Du Toit v Western Cape Department of Health*[35] which confirms that an error of law maybe be a ground for review. This paragraph amongst other things provides that "*it would appear that the concept of error of law is relevant to the review of an arbitrator's decision within the context of the* ***factual matrix as presented in the present dispute****".*

[28] *In casu*, as indicated above, the applicant stated in the opening statement that the case was about poor performance due to the fact that the employee did not cooperate which led to him not meeting the required standard and therefore his contract was terminated. The evidence of the three witnesses for the applicant clearly shows that the issue was about the poor performance enquiry as Mr Mitchell held that despite finding the employee guilty he must be given an opportunity in respect of the poor performance enquiry. The chairperson who presided over the poor performance enquiry confirmed this. Under the circumstances, I conclude that the arbitrator understood *part* of the enquiry before him.

[29] I agree with the applicant that the poor performance and misconduct inquiries may intertwine especially if the misconduct emanated from the process of poor performance. However, in this case, one has to take into account that the employee was not dismissed after being found guilty of misconduct instead a recommendation was made that there must be a poor performance enquiry which subsequently took place. What created the problem for the applicant was to abandon the performance reviews as Mr Thebe confirmed this by saying *"So there wasn't any reviews done on the PIP..."*.

[30] As the applicant asserted that the arbitrator misconstrued the nature of the enquiry, I need to look at what was required of the arbitrator which among other things was that "whether the applicant's dismissal was for a fair reason". In order to decide on this, I need to look at what is the law in respect of dismissal based on poor performance. The code of good practice in the LRA, in respect of poor performance enquiry, provides that:

[35] (2016) 37 ILJ 1819 (LAC), at para 22.

"9. Guidelines in cases of dismissal for poor work performance. Any person determining whether a dismissal for poor work performance is unfair should consider—

(a) whether or not the employee failed to meet a performance standard; ***and***

(b) ***if the employee did not meet a required performance standard whether or not****—*

(i) the employee was aware, or could reasonably be expected to have been aware, of the required performance standard;

(ii) the employee was given a fair opportunity to meet the required performance standard; and

(iii) ***dismissal was an appropriate sanction for not meeting the required performance standard****."(*Own emphasis)

This part is classified as substantive criteria. The first question that has to be asked is whether the employee concerned met the required standard, thereafter ask as to whether he was aware of the required standard. The issues of whether the employee was given a fair opportunity and appropriateness of sanction are the latter part of the enquiry.

[31] In this matter, the arbitrator was required to decide as to whether the employee's dismissal was for a fair reason, which is part of the substantive criteria, as agreed between the parties. The applicant as mentioned above complains among other things that the arbitrator did not decide as to whether the dismissal was for a fair reason. Mr Thebe presented evidence that the employee did not meet the required standard (a period before PIP-between March 2015 and May 2015), and the employee pleaded guilty. A period of PIP(June 2015 to October 2015), the employee was not cooperating which led to disciplinary hearing being held against him, because he was not attending weekly meetings between June and July 2015,[36] by 22 August 2015 the employee failed to submit slides as required which led to Mr Thebe to submit them on his behalf.[37]

[32] There was also undisputed evidence by Mr Thebe that the employee did not indicate as to how he could be assisted, as Mr Thebe testified as follows:

[36] Pages 26 and 240
[37] Page 31, 223 and 462-3.

"there was never any forthcoming of the particular assistance in terms of any of these areas to say that, you know, this issue specifically that needed to be resolved before for him to be able to make this areas of concern". [38]

[33] Taking into account all of the above, and that the employee was not cooperating with the applicant in order to be assisted to improve his performance, I am of the view that a reasonable decision-maker could not have concluded that the applicant did not give the employee a proper opportunity to improve and that there was no proper assessment in the PIP process, as the applicant could only assess a person willing to be assisted. I therefore conclude that the arbitrator did not deal with the substantial merits of the dispute, therefore his award, except his conclusion in respect of procedural aspect of dismissal, is one that another reasonable decision-maker could not have arrived at taking into account the totality of evidence that was presented before him.

Substitute the award or remit to the Bargaining Council?

[34] Considering my conclusion above, as parties agreed in the pre-arbitration minutes that one of the issues that the arbitrator was required to decide was the issue of appropriateness of sanction, I am of the view that the matter should be remitted to the Bargaining Council to appoint a commissioner to decide only on this issue.

Order

1. The arbitration award issued under the third respondent case number WCCHEM219-15/16 is reviewed and set aside and substituted with the following order.

   "(i) The dismissal of Mr Bongani Voyiya was procedurally unfair, therefore, the applicant is ordered to pay him a compensation equivalent to 3 months of his salary;

   (ii) the matter is remitted to the third respondent to be decided *de novo*, before any commissioner, on the following terms: (a) the only issue to be decided is whether or not the dismissal was an

[38] Page 23.

appropriate sanction, and if not, substitute it with an appropriate sanction, (b) both parties be allowed to lead evidence only in respect of this issue”

2. There is no order as to costs.

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S. Mabaso

Acting Judge of the Labour Court of South Africa

APPEARANCES

For the Applicant:	Advocate C Bosch
Instructed by:	Cliffe Dekker Hofmeyr Inc
For the Respondent:	Advocate M Garces
Instructed by:	Simons Van Staden Attorneys