



Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA,

HELD AT CAPE TOWN

Case no: C839/15

In the matter between:

**PTAWU obo MANTSHI & 86
OTHERS**

Applicant

and

**COMMISSIONER FOR
CONCILIATION, MEDIATION &
ARBITRATION**

First Respondent

**COMMISSIONER DANIEL PLESSIS
(N.O.)**

Second Respondent

**PIONEER FOODS (PTY) LTD T/A
ESSENTIAL FOODS**

Third Respondent

Heard: 3 May 2018

Delivered: 17 October 2018

Summary: (Review – condonation of late filing of review – late filing of transcript not condoned – standard expected of unions and employer organisations who litigate regularly – lower than that of professionals, but higher

than that of laypersons who do not regularly engage in proceedings under the LRA – reckless imputations of corruption made in the course of review application against various parties – review application pursued notwithstanding poor prospects – circumstances warranting cost award)

JUDGMENT

LAGRANGE J

Introduction

- [1] This is an application to review an arbitration award in which the arbitrator found that the dismissal of 87 employees for refusing to work on various Saturdays was substantively fair. The arbitrator also found that the dismissal of shop stewards for the same misconduct was procedurally fair.
- [2] The award was handed down on 3 August 2015 and an attempted review application was filed on 25 September 2015. Accordingly, assuming it was a proper review application, it was eleven days late. The applicant union ('PTAWU') only applied for condonation for the delay after being ordered to do so by Tlhotlhemaje J on 17 May 2017.
- [3] The record was available for uplifting on 11 November 2015 and ought to have been transcribed by 9 February 2016 in terms of clause 11.2.2 of the Labour Court Practice Manual. However, it was only nearly five months later, on 4 July 2016, that the applicant requested a 30 day extension to file the record allegedly owing to the need to obtain funds to do so, having also blamed the Labour Court for not notifying it that the record was available for transcribing. In October 2016, the union wrote a further letter saying that it could not commit the resources to the transcription without the court granting it the extension.
- [4] Initially, the matter came before the court on 17 May 2017 as a result of an interlocutory application brought by the third respondent to dismiss the review. The court found that the matter had been withdrawn on account of failing to file the record timeously and gave the union leave to have matter re-enrolled once it corrected the defects in the application and filed

condonation applications for the late filing of the review application and the late filing of the record of the proceedings. It was only as a result of this intervention that a supporting affidavit was eventually filed in June 2017 together with two condonation applications for the initial

Condonation applications

- [5] Strictly speaking, review application was only properly launched when the union filed its founding affidavit in July 2017. However, if I accept that the statement of case which it filed about a fortnight after the expiry of the six week period for filing the condonation application was a *bona fide* attempt to launch the review application, I am inclined to excuse the delay on the basis that PTAWU had genuinely attempted to initiate the review proceedings within a relatively short time after the expiry of the six week period, *albeit* using the incorrect procedure, though the poor merits of the review, are a weighty consideration against granting condonation. On balance, the time delay is decisive and I am willing to condone the late referral of the review.
- [6] The justification for a nine month delay in filing the record is much more difficult to accept. Firstly, it is a very long delay. The union appears to fail to appreciate this, as it refers to it as a delay of 'only' nine months.
- [7] Secondly, the explanation is not satisfactory given the length of time which elapsed. Mr Mgidi claims to have visited the court 'on many occasions' to find out if the CCMA had delivered the records, only to be told that nothing had been received. This is offered as an explanation for a delay between October 2015 and the end of June 2016. It is vague and wholly inadequate to explain such a long period. It was only in July 2016, nearly a year after filing the review application, that an unnamed clerk of the court allegedly checked the court file and told him the records had in fact been received. It was then that the union supposedly discovered that the registrar had sent a fax notifying the union that the record had been lodged by the CCMA to the wrong fax number, but the union provides no details of the incorrect number or the correct number. Evidence of the allegedly erroneous transmission sheet or the fax itself does not appear in the record.

- [8] Mr Mgidi claims also that the clerk refused to allow him to make a copy of this letter. However, nowhere does he attempt to identify any of the clerical staff he supposedly interacted with. Quite extraordinarily, he never complained to the registrar or the Judge President about the alleged refusal to allow him to copy the erroneous fax transmission. Inexplicably, he also failed to mention this alleged improper conduct when the union eventually filed a request for an extension of time to file the record as part of the explanation for the delay on 4 July 2016. It took three months before the allegation about the incorrect number was recorded by the union, for the first time, in a letter to Premier's attorneys on 3 October 2016. PTAWU also does not deal with whether or not it received a CCMA filing notice in respect of the delivery of the record under Rule 7A(2)(b). The only notice of this kind in the record is for the abandoned review application.
- [9] Even, if a request for extension of time was filed in July 2016 and if I accept that it was reasonable for PTAWU to wait for response from the court before proceeding with the transcription, the delay between October 2015 and July 2016 is wholly unsatisfactory for such a long period of time.
- [10] In ***Toyota SA Motors (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others*** the Constitutional Court stated:
- [34] Toyota did not challenge the proposition that the Labour Court had the power to dismiss its review application if it unreasonably delayed in pursuing the review. It needs to be stressed that when assessing the reasonableness of a delay, sight must not be lost of the purpose of the LRA. 30 This purpose was articulated by Ngcobo J in CUSA:
- 'The LRA introduces a simple, quick, cheap and informal approach to the adjudication of labour disputes. This alternative process is intended to bring about the expeditious resolution of labour disputes. These disputes, by their very nature, require speedy resolution. Any delay in resolving a labour dispute could be detrimental not only to the workers who may be without a source of income pending the resolution of the dispute, but it may, in the long run, have a detrimental effect on an employer who may have to

reinstate workers after a number of years. The benefit of arbitration over court adjudication has been shown in a number of international studies.'¹

- [11] When weighed together with merits, which are discussed below, I am satisfied the review application should be dismissed on account of the applicant's failure to prosecute the review by transcribing and filing the record timeously, which unreasonably delayed the finalisation of the review application in the absence of an adequate explanation for the whole period of that delay. Even if I am wrong in this regard, the application stands to be dismissed on the merits of the review application in any event.

Background to the dispute and arbitration

- [12] In the course of substantive wage negotiations in 2014, the respondent company ('Premier') proposed restructuring its working week, in order to meet the market demand for bread on Mondays and to avoid the problem of workers who did not want to work more than five hours on a Sunday. Previously, the working week began on Sunday and ended on Friday. The new working week would begin on Monday and end on Saturday. The union had proposed a five-day working week comprising of five, nine-hour days with no work on Saturdays or Sundays.
- [13] According to the un-contradicted evidence of the bakery manager, Mr Jordaan, the union eventually accepted the company proposal of the working week running from Monday to Saturday.
- [14] Nevertheless, the applicant union, PTAWU, declared a dispute of mutual interest over the change in the working week. Ultimately, a settlement agreement was concluded at the CCMA on 8 August 2014.
- [15] The essential terms of that agreement were:
- 15.1 an across-the-board increase of R 502.28 effective on 1 August and payable on 25 August 2014;

¹(2016) 37 *ILJ* 313 (CC) at 326-7

15.2 a once-off payment of R 430.00 at the end of August, and

15.3 an agreement that:

“The working week will commence on Monday at 6h00 and will be completed after 45 hours of work. Any additional hours will be paid as overtime as per BCEA”.

[16] The parties also agreed that no changes to the agreement would be binding unless reduced to writing and signed by both parties. They also consented to the agreement being made an arbitration award under section 142A of the Labour Relations Act, 66 of 1995 (‘the LRA’).

[17] It must be mentioned that the normal working week was a 48 hour working week, of which three hours were overtime work.

[18] The ink on the agreement was barely dry when the union started to articulate concerns about whether it was been implemented properly. The implementation of the agreement was then delayed until the week ending Saturday 13 September 2014. According to Jordaan, this request by shop stewards was made because they wanted more time to discuss the agreement as they were unable to get employees to accept the rescheduled working week which had been previously agreed upon. This was also confirmed in a communication from the union, which referred to maintaining the old system until the new system was phased in. However, until Mr Mgidi sent an email to Premier on 20 August 2014, the union never suggested that there was a dispute about the new working week schedule.

[19] At a meeting between the company and the union on 4 September, the union announced that it had a “new mandate” to revert back to the old work schedule in terms of which Sunday was the first working day of the week. On 8 September the union notified the company that

“All members of PTAWU demanding the work schedule to be designed as the previous one till such time union and the company reach agreement. The previous schedule was designed in such a way that workers off on the Saturday and on Sunday work to top up the 40 hours including the three hours of overtime.

This arrangement will start this coming week Saturday of 13 September 2014, going forward and the company will utilise the casuals or the volunteers on the Saturday as before.”

[20] Evidence was led that the company policy on general conditions of service stated that:

“The employees’ hours of work are determined by the operating unit where he or she ordinarily reports for duty. Hours of work may change in the future depending on the demands of the company business as working hours, times and days differ from one operating area to another.”

[21] The company then issued a notice to all employees reaffirming terms of the original agreement and pointing out that the new work schedule was part of a package deal and should be adhered to by workers.

[22] As noted in paragraph 5 of the arbitration award, union members did not report for work on Saturday 13 September, which resulted in them receiving written warnings. They also did not attend work on 20 September for which a second warning was issued. Thereafter, a general memorandum was issued on Monday 22 September demanding that they abide by the settlement agreement in the CCMA. In addition, on Wednesday 24 September, a final notice was issued to warn them that if they did not report for duty the following Saturday (27 September) they would face disciplinary steps. When they did not comply with that notice, disciplinary hearings were held and they were ultimately dismissed for their refusal to work on Saturdays.

The arbitrator’s findings

[23] In summary, the key findings of the arbitrator were that:

23.1 Although the real reason for the employees not working on Saturdays appeared to be in order to persuade the employer to revert to the previous working week and therefore might have been construed as strike action, the employer treated it as misconduct for failing to report on duty. The union did not argue that their conduct amounted

to an unprotected strike, even though it did refer a mutual interest dispute to the CCMA on 29 September 2014 over the issue.

23.2 None of the employees who testified linked their absence from work to a demand not to work on Saturdays. Consequently, the arbitrator could not conclude that their absence amounted to a strike. He further noted that it was only in the union's closing arguments that certain reasons for their absence were advanced, but these had not been mentioned at the commencement of the arbitration and were not put to any of the employer's witnesses. Accordingly, he disregarded them. He emphasised the importance of not putting versions to Premier's witnesses.

23.3 He found that the applicant's witnesses were unreliable. Mr Dwebe changed his version more than twice. Whereas, he had no difficulty answering questions in examination-in-chief, he repeatedly asked for questions to be repeated under cross-examination. Nevertheless, in the course of his evidence, he did confirm that according to his understanding of the settlement agreement of 08 August, it had been agreed that the working week would start on Monday and end on Saturday. Another of the applicant's witnesses, Mr Mtholo, was unable to explain why attendance records showed him being absent on 13 and 20 September if he was at work. He also failed to put his version to employer's witnesses and the medical certificates he tendered were insufficient. The credibility of Mr Kwananzi's version was tainted by his dishonesty about his ability to understand English. Mr Mlotya was unable to prove that he was on leave on 20 September as he claimed. He also corroborated the employer's version of Saturdays being a normal working day. On the record, it appears that his version was never put to any of the employer's witnesses and that in any event he could not explain his absence on 13 and 27 September.

23.4 Despite the defects in their testimony, three of the union's witnesses confirmed that they were aware of the Saturday shift. Accordingly,

the arbitrator found the claim that there was uncertainty about it was without merit.

23.5 The appeal submitted by the union simply requested an appeal and contained a list of names without stating grounds for appeal. In the arbitrator's view, this was not a proper appeal. Thus a failure by Premier to consider it was not unfair.

23.6 In relation to the procedural challenge pertaining to the disciplinary proceedings of the shop stewards, PTAWU claimed there was no consultation with the union about the disciplining of shop stewards prior to them being advised to attend disciplinary enquiries as there should have been. The arbitrator found there nonetheless was consultation on the issue and it was the shop stewards' choice not to attend their enquiries. In circumstances where they were not been singled out for discipline and were disciplined for the same misconduct as all the other members, the arbitrator found that they were not subjected to an unfair procedure despite the procedural irregularity regarding consultation over impending disciplinary action against them.

23.7 In relation to PTAWU's submission that, it was not proven workers had refused to work on Saturdays, they did not deny that they had refused to work and did not provide any reasonable explanation for not doing so. Accordingly, he could not infer that their absence was not wilful or authorised and therefore it amounted to misconduct. He found that not only did they not want to work on Saturdays, but were probably told by shop stewards that they should not.

23.8 The arbitrator concluded that it was more probable that PTAWU's members understood the agreement of 8 August 2014 and decided not to comply with it. He noted in that regard that shop stewards were present at the CCMA proceedings where the agreement was concluded and, whatever doubts may have existed initially, by Saturday 27 September, they could have been no doubt the consequences of not attending work that day would be. Their absence amounted to a clear challenge to Premier's authority.

23.9 Further, he concluded that given the warnings issued and the lack of acceptable explanation for their absence on the Saturdays in question, there could be little doubt that their absence constituted a challenge to the employer's authority and was contrary to the agreement and the obligation to work the new normal hours.

[24] The union's main contention concerning the substantive fairness of the dismissals was that, the agreement concluded in the CCMA did not include an agreement on work schedules, namely *when* the 45 hours ordinary working time would be performed. It is important to mention though that, by the time the arbitration got underway, there had already been a determination on the interpretation of the agreement by another Commissioner. The upshot of that interpretation dispute was that the Commissioner found that the working week ran from Monday to Saturday, on a proper interpretation of the agreement. In March 2015, the union launched a review of the award, but never pursued that application further. Accordingly, that review application had the status of a dispute which has been withdrawn at the time this review application was heard.

[25] It is worth noting, that in the previous review application PTAWU accused the Commissioner of bias, corruption and impartiality. The Commissioner remarked that these accusations amounted to contempt, though she did not pursue a contempt application in the Labour Court. I also note that in its heads of argument in this matter the applicant hints at a possible tampering with the record by the arbitrator. In keeping with PTAWU's approach of attributing malicious intent to third parties, PTAWU recklessly suggests that the alleged failure to send notice of the delivery of the record by the CCMA to the registrar was a possible act of corruption on the part of a clerk at the court, without a shred of evidence to support such an allegation, other than its own claim, the notice was not sent to the right fax number.

[26] While PTAWU was quick to find fault with the court administration, its own efforts in pursuing the review application left much to be desired. This led to Thlotlhemaje J postponing the review so the union could get its application in order. Once it had remedied all the shortcomings, it made

no effort to get the voluminous papers in the application in order, and it was the third respondent's attorneys who eventually did this. Such a casual approach to providing orderly papers is not only disrespectful to the court, but simply adds to the time the court needs to spend assimilating the material to be considered, apart from constituting non-compliance with the rules. Further, because of PTAWU's delays, two condonation applications had to be brought. I return to this issue when dealing with costs.

- [27] A degree of latitude in drafting pleadings or heads of argument, is obviously allowed to laypersons who litigate in person. They will usually have no previous experience of review proceedings and may also be hampered by language and literacy problems. However, unions and employer organisations who engage in this type of proceeding regularly are less easily excused when they conduct litigation in a haphazard or ramshackle manner with scant regards to the rules of court which are designed to make litigation an orderly process. Employer organisation and unions hold themselves out as able to represent their members and should at least try to ensure they follow the rules of court and the practice manual in the conduct of litigation. Members are entitled to expect their representatives to have a basic level of competence in such matters. The court does not expect them to conduct themselves like attorneys or counsel, of whom normal professional standards are expected, but it is reasonable to require them to conduct matters in accordance with a minimum standard one can expect of parties who regularly use certain procedures in the Labour Court and arbitration forums: that is, the representatives charged with such work will have read the court rules and practice manual, familiarised themselves with time limits and the requirements of proper service of court process and acted promptly in prosecuting their members' claims. Such matters only require some basic time management and case file administration competency: advanced legal skills are not needed to act in accordance with those procedures. Officials and organisers also should acquire a basic knowledge of the essential elements of a particular cause of action before attempting to draft papers for court, whether those are affidavits or statements of claim.

Even in the absence of having a basic textbook there are numerous judgments online that can be accessed free of charge, which set out key issues and principles applicable to adjudication of different types of disputes. The LRA itself also sets out principles of fairness governing the most common disputes which provide a basic framework for setting out a case. When rules are not complied with the work of other affected parties, including the court, is increased and, in the case of opposing parties, so are the costs.

Grounds of review and evaluation

The correct approach to review applications

- [28] Before addressing the grounds of review, some observations on the union's drafting and preparation of the review application need to be mentioned. For the most part, the founding affidavit in the review application does not identify or articulate clearly any recognisable grounds of review under section 145 or a review based on the tenets of reasonableness. At best it articulates grounds of appeal. In addition, the review application was accompanied by swathes of affidavits by dismissed employees attesting to their attendance at work on the Saturdays in question, or trying to explain their absence. These affidavits were not part of the evidence before the arbitrator. The union does its members a disservice by filing such affidavits, as it might give the members a false and misleading impression that the court is allowed to consider additional evidence which was not before the arbitrator.
- [29] Further, the union's heads of argument appear to add grounds of complaint which are not contained in the affidavits and which do not emanate from any grounds of review, in so far as those can be clearly identified. It is not permissible to add grounds of review to the grounds pleaded in the affidavits once pleadings have closed², except with special leave of the court.

² **Comtech (Pty) Ltd v Molony NO and Others (DA12/05) [2007] ZALAC 40 (21 December 2007)** at paragraphs [15] to [19], in which the LAC emphasised the importance of complying with Rule 7A(2)(c) and the principle that a party must lay the factual basis for a review in their affidavits.

[30] I am inclined to dismiss the review application simply on the basis that the grounds of review are insufficiently pleaded to make out a competent case of review on PTAWU's own papers alone. Since the inception of the LRA, it has never been enough for an applicant in review proceedings to simply set out a list of complaints about an arbitrator's handling of evidence and then claim on the basis of those alleged flaws that an award is reviewable on grounds of reasonableness. It is even less appropriate now in the light of the current jurisprudence which requires an applicant on review to overcome significant hurdles. A review application is not simply an opportunity to rehash or supplement the case which was before the arbitrator, as the union appears to have tried to do on this occasion. The key judgments setting out the test of review are not recent and by now should have been assimilated by union and employer organisation fully agree with the representatives.

[31] In this case, the following comments by Van Niekerk J in ***Mooki v CCMA and Others* (JR772/15) [2017] ZALCJHB 173 (3 February 2017)** are apposite:

[9] In the present instance, the applicant's grounds for review are not cast in terms that reflect the enquiry that the court must undertake. In particular, the grounds articulated both in the founding and supplementary affidavits do not make out a case to the effect that the outcome of the proceedings under review was one that fell outside of the band of decisions to which a reasonable decision-maker could come on the available material. It is not sufficient, as the applicant has done, to record a litany of complaints that amount to no more than assertions that the commissioner came to conclusions that were wrong. Commissioners are allowed to be wrong; the review test affords them this latitude, provided that the outcome is not compromised in the sense that is an unreasonable one. The two-stage test referred to above preserves the all-important distinction between appeals and reviews. Further, in an application such as the present, the basis on which the outcome of arbitration proceedings subject to review is alleged to be unreasonable must be specifically pleaded - a failure to do so reflects a failure to establish a cause of action. The applicant's failure to frame his grounds for review on the proper basis and to rely in piecemeal fashion on

a series of alleged misdirections, in my view, is in itself a reason to dismiss the present application.

(emphasis added)

[32] The two stage test referred to in that judgment should be familiar to anyone who regularly deals with reviews of arbitration awards. It is summarised in the LAC judgment of ***Head of Dept. of Education v Mofokeng***³:

[30] The failure by an arbitrator to apply his or her mind to issues which are material to the determination of a case will usually be an irregularity. However, the Supreme Court of Appeal (the SCA) in *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)* and this court in *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation & Arbitration & others* have held that before such an irregularity will result in the setting aside of the award, it must in addition reveal a misconception of the true enquiry or result in an unreasonable outcome.

...

[33] Irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide a compelling indication that the arbitrator misconceived the 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. The reviewing judge must then have regard to the general nature of the decision in issue; the range of relevant factors informing the decision; the nature of the competing interests impacted upon by the decision; and then ask whether a reasonable equilibrium has been struck in accordance with the objects of the LRA. Provided the right question was asked and answered by the arbitrator, a wrong answer will not necessarily be unreasonable. By the same token, an irregularity or error material to the determination of the

³ (2015) 36 ILJ 2802 (LAC)

dispute may constitute a misconception of the nature of the enquiry so as to lead to no fair trial of the issues, with the result that the award may be set aside on that ground alone. The arbitrator however must be shown to have diverted from the correct path in the conduct of the arbitration and as a result failed to address the question raised for determination.⁴

Merits of the application

[33] For the most part, the complaints raised by the union in its founding document are an attempt to argue the merits of the case afresh and do not deal with the arbitrator's alleged failings. Nonetheless, there are a couple of instances where the arbitrator's own alleged shortcomings are stated. I will deal with these first. These are the closest the union comes to articulating identifiable grounds of review. It should also be mentioned that some complaints advanced in the original 'statement of case' were not included in the founding affidavit that was eventually filed on 15 June 2017. Accordingly, those do not have to be addressed.

Complaints about the conduct of the arbitrator in the course of arbitration proceedings

Aggressive behaviour towards the applicant during the arbitration

[34] The union claims that the arbitrator "became aggressive towards the applicant while in the middle of the arbitration proceedings giving the impression of favouring the third respondent", which it claims amounted to misconduct. The applicant goes further and contends that this alleged misconduct "may give an impression that she received a bribe from the third respondent which the applicant know it is very hard to prove bribe all over the world." The applicant did not cite any references to the transcript in support of the alleged aggressive behaviour either in its affidavit or in the heads of argument it submitted. Having read the transcript of the record, it is not at all obvious what the applicant might have been referring to, but in any event, it is the applicant's responsibility to identify those parts

⁴ At 2810-3

of the record which support its contentions.⁵ It is not for the court to try and guess what a party might be relying on to support its claim. Accordingly, the union has failed to substantiate this ground.

[35] Just as allegations of bribery are hard to prove, they should also not be lightly made. One cannot help but notice that the applicant appears inclined to freely cast aspersions against the character of a number of unconnected individuals (the arbitrator in this matter, the arbitrator in the interpretation dispute and an unnamed clerk of the court) in the course of its litigation in this dispute. Other than the applicant's own suspicions, there is absolutely no evidence advanced to support these serious allegations of misconduct. In relation to the arbitrator, no court is going to seriously entertain subjective speculations in place of a reasonable apprehension of bias based on evidence.⁶ In the circumstances, advancing such a ground is nothing short of vexatious conduct on the part of the union.

[36] All the other discernible complaints about the award concern the arbitrator's alleged shortcomings in evaluating the evidence. These are discussed below.

⁵ See Rule 18(2)(b) of the Labour Court rules dealing with heads of argument which states:

(2) The heads of argument must-

(a) ...;

(b) in its first reference to a factual allegation contain a page and paragraph or line reference to the record or bundle of documents;

⁶ In *Mbana v Shepstone & Wylie* (2015) 36 ILJ 1805 (CC), the constitutional court described the threshold for establishing bias as follows , at 1815-6:

The test, however, in claims of actual or perceived bias arising from both trial court conduct and judicial association is the same: a litigant must show that 'a reasonable, objective and informed person would, on the correct facts, reasonably apprehend bias'. In other words, a litigant must show a reasonable apprehension of bias to succeed.

Analysis of reasoning of the arbitrator on procedural and substantive merits

Failure to consider the collective agreement

[37] The union's first complaint in this regard is that, the arbitrator failed to appreciate that Premier was obliged to consult over the new work schedule before imposing it in terms of the collective agreement. Clause 6.1.7 of the recognition agreement between PTAWU and Premier stated that the parties would engage with each other in consultation on the scheduling of working hours, shifts, mealtimes and rest periods. The arbitrator found that the union had in fact *agreed* on the new working arrangement with Premier. There is ample evidence on the record to support such a conclusion, which also necessarily provide support for an inference to be drawn that in fact Premier had gone further than merely consulting on the issue. The arbitrator's conclusion on the evidence in this regard cannot be said to be one that no reasonable arbitrator could have reached.

[38] Secondly, PTAWU contends the arbitrator ignored that clause 8.16 of the agreement provides that there should be consultation before charges are laid against a shop steward. In his award, the arbitrator noted that there was a dispute about whether or not the respondent had consulted with the union regarding its intention to take disciplinary action against the shop stewards. He noted also that it was common cause that a separate hearing was organized for the shop stewards and they did not attend. In his finding on this issue, the arbitrator accepted that there had not been consultation with the union prior to informing the shop stewards of the disciplinary hearing. On the other hand, he balanced this irregularity against the fact that the evidence showed that they did not attend the hearing despite knowing that a request for respondent had been refused and there was no reason for treating the shop stewards differently from the other employees as they were not been singled out for disciplinary action as shop stewards but as part of the entire group which did not report for work on Saturdays. In light of that, he decided that compensation of the shop stewards for any procedural irregularity would not be appropriate.

[39] I agree, it is possible that another arbitrator might have come to a different conclusion, but that does not mean that the arbitrator's findings are one that no reasonable arbitrator could have made on the same evidence. Accordingly, his findings in respect of this issue must stand.

Failure to consider the Union was engaged in a protected strike on the issue of the work schedule

[40] The only mutual interest dispute that could possibly have provided the basis for this contention was referred for conciliation on 29 September 2014 after the dismissals had taken place. Accordingly, as a matter of logic, that dispute referral could not have served to convert the prior failure to attend work on Saturdays in early September into protected strike action. Moreover, the very contention that the dismissed members were engaged in protected strike action is completely at odds with their own justification that they failed to attend work on most days for a variety of different personal reasons. There is simply no factual basis for the arbitrator to have concluded that a protected strike was in progress. Moreover, if the workers believed that was the reason they were dismissed they should not have submitted their dismissal dispute to arbitration, but should have referred it to the Labour Court.

The arbitrator failed to consider the sanctions recommended in the disciplinary code

[41] The disciplinary code recommended three written warnings prior to dismissal for a refusal to carry out a reasonable instruction. The evidence was that the workers were issued with written warnings for the first two Saturdays that they did not report for work and were warned in advance before the third Saturday that they would face disciplinary action if they did not attend. Consequently, their non-attendance on the subsequent Saturday was despite prior warning of disciplinary consequences. The disciplinary code itself provided that sanctions could be varied according to extenuating and mitigating factors and the merits of each particular case. The fact that the workers were given prior warning of the intention to take disciplinary action if they again refused to comply with the

requirement to work Saturday prominently emphasized the defiant character nature of their non-compliance and provides support for a justifiable departure from the code on the basis of that being an aggravating factor. In a situation where two warnings had already been issued and employees were warned in advance of disciplinary action if they failed to comply with the same instruction again, I cannot say that it was unreasonable of the arbitrator not to apply the disciplinary code rigidly.

Failure to consider the description of the previous warnings

[42] The union seems to argue that the arbitrator failed to appreciate that the two previous written warnings were for 'short time' work, and not for a refusal to obey a lawful instruction. It is true that the warnings were not identical to the reason for dismissal, but the substance of the warnings was that, the workers had not worked the hours they were supposed to work. Moreover, there was ample evidence that they could have been in no doubt what was expected of them when they were warned that disciplinary steps would be taken if they failed to report for work on the third successive Saturday. As mentioned above, their failure to report for work in the face of advance warning of disciplinary action, having already received two previous warnings for not working on Saturdays as they were supposed to provides more than sufficient support for an inference that further attempts at corrective disciplinary action would serve little purpose. Under such circumstances, the arbitrator cannot be criticized for treating their failure to report for work on the third Saturday as yet another instance of the same misconduct, which further corrective measures were unlikely to reverse. As such, the outcome is one that was rationally justified on the evidence before him.

Costs

[43] The union has conducted this review application with limited regard to the rules of court and has rectified matters only when the court has ordered it to do so. I accept, it does not have the same resources to pay legal professionals as Premier does, but as mentioned above, it is at least

expected to follow the essential procedural steps for conducting litigation of this nature as set out in the Labour Court Rules and the Practice Manual. It should not wait until ordered to do so by the court. It also made reckless and serious allegations, of corruption, based solely on its own suspicions and in so doing added a vexatious element to its prosecution of this review.

- [44] Secondly, despite a settlement of the dispute about the rearrangement of the working week, PTAWU and its members did all they could to try and stop its implementation, which ultimately led to the dismissals in this matter. Despite the poor merits of the review they persisted with it, *albeit* in a ramshackle way. The third respondent was compelled to resist this review application and the review of the interpretation and application award. The review application would never have been concluded if Premier had not launched the Rule 11 application.
- [45] Although this court frequently accepts that because parties are in an ongoing relationship, a cost award ought not to be made, that is not the only consideration. A party that has a very poor case but still pursues it and puts the other side to considerable expense, in my view cannot expect to fall back on a lack of resources and an ongoing relationship to avoid having to make any payment for the unnecessary costs it has caused the other side to incur.⁷ Just because a party can pursue a matter beyond the arbitration stage in a case like this by commencing review proceedings, does not mean it should do so irrespective of the merits of the review.
- [46] As a mark of the court's disapproval of the manner in which it has conducted this matter and the poor merits of the application, which PTAWU should have seriously considered before embarking on this review, in my view the union should at least pay a significant portion of the respondent's costs as matter of law and fairness. .

⁷ See e.g. **Makuse v Commission for Conciliation, Mediation & Arbitration & others** (2016) 37 ILJ 163 (LC) and **Beaurain v Martin NO & others** (2) (2014) 35 ILJ 2454 (LC)

Order

- [1] The late filling of the review application is condoned.
- [2] The condonation application for the late filing of the record of the arbitration proceedings is dismissed.
- [3] The review application is dismissed on account of the applicant's unreasonable delay in prosecuting the review application.
- [4] The applicant must pay half the third respondent's costs of opposing the review application and the condonation applications.

Lagrange J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:

A T Mgidi of PTAWU

RESPONDENT:

J Whyte of Norton Rose
Fulbright