IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT CAPE TOWN)

Not Reportable

Case no: **C120/2019**

In the matter between:

ROUTE MANAGEMENT (PTY) LTD Applicant

and

GOLDSCHMIDT, SEAN *N.O.* First Respondent

DISPUTE RESOLUTION CENTER: A DIVISION OF

THE MOTOR INDUSTRY BARGAINING COUNCIL Second Respondent

NATIONAL UNION OF METALWORKERS

OF SOUTH AFRICA Third Respondent

DOUW, LLEWELLYN Fourth Respondent

Date heard: 1 July 2021

Date of Judgment: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing down judgment is deemed to be 12:00pm on the 8 April 2022.

Summary: Review – Dismissal after failing breathalyser test. Zero-tolerance policy to alcohol and drug-related offences. Commissioner's decision that dismissal unfair not decision that a reasonable decision-maker could not make.

JUDGMENT

HAFFEGEE AJ

Introduction

1. This is an application to review and set aside the award of the first respondent ("the Commissioner) dated 18 February 2019.

2. The Commissioner concluded that the Applicant's (the Company) dismissal of the Fourth Respondent (Mr Douw) was substantively unfair, required the Company to reinstate Mr Douw and pay him three months' retrospective pay.

3. The Company had dismissed the employee on 1 March 2018 for misconduct in that he had had traces of alcohol in his blood system when he reported for work on 29 January 2018.

Background

4. The Company designs and manufactures "truck-mounted or towing equipment for handling and storing bulk products on trucks, aluminium tankers, truck trailers and waste handling equipment". This entails manufacturing hundreds of metal components that may weigh from a few grams to many tons using cutting equipment such as large saws, highly flammable torch cutters, welding equipment, and large machines that press parts and mould metal.

5. The Company employs hundreds of employees who operate the manufacturing equipment close to each other. Mr Douw's main job was to

operate a band saw. Amongst other things, he had to operate the machine safely and neatly, replace or adjust saw blades, and ensure that he always used sharp saw blades. He also had to maintain the equipment.

6. It is apparent from the above that Mr Douw's job and the Company's working environment is dangerous and, according to the Company, requires employees to have their faculties intact to prevent damage to property, injury, or death. During 2016 the Company had 150 injuries on duty; during 2017, 130 injuries on duty; and by November 2018, 83 injuries on duty – a downward trend because, according to the Company, its zero tolerance to safety protocols and measures and in particular to alcohol and drug-related offences.

7. When the Company re-introduced the zero-tolerance policy in 2016, employees were required to be aware of the policy. Mr Douw signed such acknowledgement. As a result, the Company has dismissed seventeen employees, including Mr Douw, for reporting for duty in contravention of the policy.

8. Employees who declare being alcohol dependent are screened from time to time to ensure that they do not work under the influence of alcohol whilst undergoing rehabilitation.

9. Mr Angelo Sas was one such employee. When he approached the Company on 27 June 2018, believing he had an alcohol dependency problem, the Company arranged for the South African Council of Alcohol Abuse (SANCA) to determine the extent of his situation and provide him with structured assistance. Mr Sas failed a breathalyser test on 2 July 2018, but the Company

did not dismiss him because of his alcohol dependency problem. Instead, it recognised the alcohol dependency as a form of incapacity and felt obliged to give him reasonable opportunity and assistance to rehabilitate.

10. Despite follow-up assistance from SANCA on 3 July 2018, Mr Sas again failed a breathalyser test in December 2018 and did not attend a disciplinary hearing scheduled for 14 December 2018. However, when he returned to work in January 2019 (after the annual end-of-year shut down), the Company consented to his request to be given time to attend rehabilitation full time.

11. The employee failed a breathalyser test on 29 January 2018. The Company contends that Mr Douw initially tried to frustrate the testing process but that the test eventually showed that he had traces of alcohol in his bloodstream. Subsequently, in response to a colleague's Facebook message that the employee was "wee gesyp", Mr Douw responded, "..ja rooi geblaas". The Company argues that this meant that the employee confirmed that he had failed the breathalyser test.

12. Following a disciplinary hearing convened during February 2019, the Company dismissed Mr Douw on 1 March 2019. Mr Douw had pleaded not guilty and was a shop steward at the time of the alleged misconduct.

The award

13. The Commissioner summarised the cases of both parties. On a balance of probabilities, he found that Mr Douw had tested positive for traces of alcohol in his bloodstream. Mr Douw had conceded that he had consumed alcohol the day before, and it seemed that he had admitted on his Facebook page that he

had tested positive. Thus, the Commissioner focused on whether dismissal was an appropriate sanction.

14. While the Commissioner recognised the Company's zero-tolerance policy as a crucial disciplinary tool and had consistently applied the policy, he considered that it was still necessary for chairpersons of disciplinary hearings to apply their minds to the circumstances of each case rather than using a blanket rule that every transgression must result in dismissal. In addition to the circumstances of each case, the background to the matter, an employee's disciplinary record and whether the conduct had rendered the trust relationship beyond repair had to be considered.

15. Even though several Company witnesses testified that they could no longer trust Mr Douw, the Company did not persuade the Commissioner that the trust relationship was irretrievably broken. Despite the traces of alcohol in Mr Douw's bloodstream, his behaviour was normal, his movements steady, and his reaction normal. He was not involved in hazardous tasks on the day in question, but the Commissioner acknowledged the Company's need to prioritise a safe working environment. However, the Commissioner observed that the Company had given Mr Sas another chance despite him contravening the policy more than once because the policy allowed for employees who admitted having alcohol dependably problems. The Commissioner concluded that this showed that "although contravention of the policy was a serious matter, employees can still continue to work for the [Company] after contravening the policy. Thus, importantly, contravention of the policy does

not necessarily equate to rendering the employment relationship beyond repair."

16. The Commissioner referred to and relied on the Labour Appeal Court (LAC) case of *Shoprite Checkers (Pty) Limited v Tokiso Dispute Settlement and Others.*[1] The LAC considered that even in light of a zero-tolerance policy, a CCMA Commissioner or other arbitrator "is the initial and primary judge of whether a decision is fair" and that "Commissioners should be vigilant and examine the circumstances of each case to ensure that the constitutional right to fair labour practices, more particularly to a dismissal that is fair, is afforded to employees."[2]

17. The Commissioner noted that while the Company's policy said that progressive discipline would not apply for contravention of its zero-tolerance policy relating to alcohol, the policy states that employees *may* be summarily dismissed for transgressions and not that employees *will* be dismissed.

18. Finally, the Commissioner concluded that dismissal was an inappropriate sanction. Still, even though Mr Douw was to be reinstated, he was only to receive three months' retrospective pay despite being unemployed for just over a year.

Grounds of review

19. There are essentially two grounds of review. First, the Company contends that the Commissioner committed misconduct because he was biased. Second, the Company argues that even if the Commissioner was impartial, his decision

[1] JA49/14 [2015] ZALAC
[2] At paragraph 18

is not rationally connected to the evidence or that he had not applied his mind to the law and evidence before him.

Commissioner's alleged misconduct

20. Relying on *Naraindath v Commission for Conciliation, Mediation & Arbitration & others*[3], the Company submits that for a review to succeed on the grounds of misconduct, it must first be determined if the Commissioner had conducted himself in a manner that could be considered unfair. If the Commissioner had indeed done so, a second part of the inquiry is to consider whether the conduct had the effect of depriving a party of a fair hearing. The Commissioner would have committed misconduct if both these queries were answered in the affirmative.

21. The Company alleges that the Commissioner committed misconduct because he was biased or because the Company had formed a reasonable apprehension of bias.[4] The allegation relies on the following sequence of events: Whilst arbitrating a dispute between the Company and the Union during 2014, the Commissioner ruled that the Company may be legally represented. The Union took issue with this and reported its discontent to the Senior Convening Commissioner or Director of the CCMA. When the Company subsequently appeared before the Commissioner (as a conciliator) in three different matters, he mentioned to the Company representative on each occasion that the CCMA had suspended him as a commissioner for three months because he had allowed the Company legal representation. Thus, the Company submits, the Commissioner displayed a fixation in

[3] (D890/98) [2000] ZALC 15

[4] The Company did not take a clear stance in this regard

reminding the Company representative of his suspension leading it reasonably to believe that the Commissioner would favour the Union because he is fearful that an adverse finding against the Union could lead to adverse consequences for him if the Union took issue with his finding. The Company further argues that Mr Douw and the Union have not disputed the veracity of these events.

22. As the Commissioner found that Mr Douw's dismissal was not appropriate, the Company reasons, is proof that he was biased against it. The Commissioner should have found, according to the Company, that dismissing Mr Douw was an appropriate sanction. The Company lists numerous reasons why dismissal was an appropriate sanction.

Irrational finding not reasonably connected to evidence

23. The Company's submissions challenge the Commissioner's reasoning for finding dismissal an inappropriate sanction in almost all respects. It contends that the Commissioner had misinterpreted *Shoprite Checkers* because he did not consider the circumstances that justified the Company adopting a zero tolerance policy. The very purpose of the policy was for the Company not to have to determine in each case whether an employee's faculties were impaired. And, the Company argues, Mr Douw had admitted on Facebook that he was drunk (“gesuip”).

24. As for his conclusion that he was not convinced, based on the evidence before him, that the trust relationship had broken down irretrievably, the Company says that the Commissioner had failed to apply his mind to the evidence or displayed "an over eagerness to reject the evidence of the [Company] based on his bias in favour of the [Union]."

25. The Company attacks the Commissioner's finding that there was no evidence that Mr Douw was performing dangerous duties on the day in question. It says that it established a *prima facie* case by leading evidence that Mr Douw's duties as per his contract of employment were dangerous and that Mr Douw performs dangerous duties as a matter of course. Consequently, Mr Douw bore an evidentiary burden to show that he had not performed dangerous duties on the day.

26. According to the Company, the Commissioner had failed to distinguish Mr Douw's case from that of Mr Sas. Mr Sas had an alcohol dependency problem, declared the problem because he realises that alcohol is dangerous, the Company put in place measures for employees such as Mr Sas, and alcohol dependency was a form of incapacity.

27. Due to the above, the Company argues, the Commissioner's decision that dismissal was not an appropriate sanction is a decision that no reasonable Commissioner could have made.

Analysis and evaluation

28. The Company has not said whether it relies on actual or perceived bias. It seems to hedge its bets on both forms of bias. It says that it was the Commissioner's "fixation" to remind the Company representative of his suspension that led it to reasonably believe that the Commissioner would be biased. This alleged fixation existed before the arbitration and, if it had led the Company to hold a reasonable belief that the Commissioner would be biased, it should have raised this at the outset and applied for the Commissioner's

recusal. Yet, the Company also says that the perception of bias "matured to something reasonable" after it received the award.

29. The usual approach for a party that has a reasonable apprehension of bias against an adjudicator is for that party to apply for the recusal of the adjudicator. The Company had not asked that the Commissioner recuse himself because, according to the Company, the bias manifested later —only after the Company received the Commissioner's award. The Company chose to "wait and see what the award was" and, upon receipt of the award, its perception of bias "matured to something reasonable." Thus, even though the Company knew all the facts during the arbitration that would form the basis of the Commissioner's bias, it did nothing to have the Commissioner removed. It waited to see whether the Commissioner would rule in its favour. Belatedly, it relies on the "ridiculously flawed" reasoning in the award that, it says, amounts to new information leading to a reasonable perception of bias.

30. In *Mbana v Shepstone & Wylie*[5], the Constitutional Court (CC) distinguished between actual and perceived bias as follows:

> "…courts must treat differently allegations of actual or perceived bias, based on the conduct of a judge during the trial, and actual or perceived bias owing to a judge's associations. When considering the issue of bias in a trial court, there is a difference between grounding a complaint of bias on the conduct of the judge in hearing the case, and grounding such a complaint on the relationship between the judge and one of the parties or witnesses. 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

[5] 2015 (6) BCLR 693 (CC)

> facts, reasonably apprehend bias". In other words, a litigant must show a reasonable apprehension of bias to succeed." (Footnotes omitted)

31. As mentioned above, it is unclear whether the Company relies on actual or perceived bias. Where it relies on the conduct of the Commissioner, namely, in him mentioning the adverse consequences of him previously ruling in favour of the Company, the Company seems to allege actual bias. But it also does not wish to abandon its reliance on perceived bias by claiming that its perception of bias became reasonable only after it received the Commissioner's award. However, even if this is still to be a form of actual bias, and not perceived bias, then the Company ought to have timeously raised the issue of bias and asked for the Commissioner to recuse himself from the arbitration proceedings.

32. I am not swayed by the Company's reasoning. On its own account, it took a "wait-and-see" approach. It had all along known the facts that it now claims forms the basis of its perception of bias. Besides not applying for the Commissioner's recusal, the Company did not disclose these facts at the onset of the arbitration. Had it done so, it would have given the Union an opportunity to object to the Commissioner arbitrating the dispute by applying for him to recuse himself.

33. While fully aware of the facts upon which the Company relies for its allegation of bias before the arbitration, the Company raised the issue of bias for the first time during these proceedings. Had the Company formed an apprehension of bias due to the Commissioner's conduct, it should have raised its concerns at the arbitration. In *Mbana* the CC referred to its judgment in *Bernert v ABSA*

Bank[6] wherein it "noted that a litigant who did not raise an allegation of bias timeously does not display conduct consistent with a reasonable apprehension of bias."

34. It follows that the application to review and set aside the award because the Commissioner committed misconduct by being biased must fail.

35. Turning to the question whether the Commissioner's conclusion that dismissal was not an appropriate sanction to be a decision that a reasonable decision maker could not make. In other words, is the Commissioner's decision rationally connected to the evidence that served before him?

36. The Commissioner clearly applied his mind to the Company's reason for adopting a zero-tolerance policy. He appreciated that the Company operated in a risky environment and therefore had adopted a zero-tolerance policy on alcohol consumption. The Company is therefore incorrect in asserting that the Commissioner had not applied his mind to the Company's need to appoint adopt such a policy.

37. However, the Commissioner reasoned, that even if an employer adopts such a policy (and the Commissioner accepted that it was reasonable for the Company to adopt such a policy), it does not necessarily follow that every employee must be dismissed for contravening the zero-tolerance policy. In that regard, he relied on the *Shoprite Checkers* case mentioned above. The LAC in *Shoprite Checkers* clearly pointed out that each case had to be considered on its own merits. I am satisfied that the Commissioner did exactly that. Even though he accepted that Mr Douw had failed the breathalyser test

[6] 2011 (3) SA 92 (CC)

and tested positive for having traces of alcohol in his blood stream, he also applied his mind to various other factors. These include, for instance, whether Mr Douw had showed any other signs that he had been intoxicated or whether he was in control of his faculties. However, he did not consider these to be sufficient to show that there were other signs that his faculties were affected. Similarly, the Company had not placed any evidence before him that Mr Douw was doing any risky work on the day in question to the extent that the traces of alcohol in his blood stream would have affected his ability to come perform his work or caused any risk.[7]

38. Moreover, in comparing this case to that of Mr Sas, (albeit who had declared that he had an alcohol dependency problem), the Commissioner reasoned that this proved that the zero-tolerance policy did not mean that all employees who contravened the policy would result, *per se,* to a breakdown in the relationship and inevitably lead to dismissal.

39. As mentioned above, the Commissioner relied on *Shoprite Checkers* to consider whether the facts of this case justified dismissal to be an appropriate sanction even though the Company had adopted a zero-tolerance policy regarding alcohol. The Company referred to the LAC case of *Duncanmec (Pty) Ltd v Itumeleng NO & Others*[8] where the Court said that the employer in that case (incidentally, according to Company, a sister company conducting the same activities as the Company) has a zero-tolerance policy for good

[7] The Company's assertion that an evidentiary burden shifted to Mr Douw is not correct and it ought to have raised this with the Commissioner during the arbitration. In any case, if Mr Douw indicated that he was not performing any risky duties on the day, the Company would have had to show the contrary. And,.

reason and that an “employee under the influence in this environment is not only a danger to himself but also to others and the business itself.”

40. Again, as also mentioned above, the Commissioner accepted as reasonable the Company’s decision to adopt a zero-tolerance policy. The focus of the case in *Duncanmec* was not about adoption or application of a zero-tolerance policy. Instead, one of the main issues in that case concerned whether the employee was under the influence of alcohol given that several witnesses had testified that he had bloodshot eyes, smelt of alcohol, his speech was incoherent, and he was aggressive. Despite such evidence, the commissioner in that case relied on the failure of the employer’s representative to cross-examine the employee on such aspects to conclude in favour of the employee. The LAC found that the failure to cross-examine was not detrimental to the employer’s case as the employee had prior notice of the employer’s version (having heard the testimony of the employer’s witnesses).

41. The facts of this case are markedly distinguishable from *Duncanmec,* and *Shoprite Checkers* is more on point. While Mr Douw had initially taken the breathalyser test incorrectly, he nevertheless took the test, and the Commissioner accepted the Company’s version that he had failed the test. did not show

42. I agree with the Commissioner's reasoning that the Company was understandably disappointed that Mr Douw had had contravened the policy. However, the Commissioner applied his mind to the relevant factors and made decisions that a reasonable decision-maker could make in finding that the relationship had not broken irretrievably. Accordingly, the conclusion of the

Commissioner that dismissal was not an appropriate sanction is a decision that a reasonable decision maker could make and, therefore, there is no reason to review and set aside the Commissioner's award.

Conclusion

43. Accordingly, the conclusion of the Commissioner that dismissal was not an appropriate sanction is indeed a decision that a reasonable decision-maker could make and, therefore, find no reason to review and set aside the Commissioners award.

44. There are no compelling reasons to award costs in this matter and doing so might contribute towards straining that relationship unnecessarily.

45. Accordingly, I make the following order:

1. The application to review and set aside the award is dismissed.

2. There is no order as to.

Haffegee, AJ
Acting Judge of the Labour Court

APPEARANCES

For the Applicant: Mr RJC Orten

	Snyman Attorneys
For the Third and Fourth Respondents:	Mr G Shiba NUMSA