



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no: J 1136 /16

In the matter between:

THE SISONKE PARTNERSHIP t/a DSV

HEALTH CARE (Formerly UTI PHARMA)

Applicant

and

GIWUSA obo STHEMBISO ZWANE

First Respondent

QUEENDY GUNGUBELE N.O

Second Respondent

NATIONAL BARGAINING COUNCIL FOR

THE CHEMICAL INDUSTRY

Third Respondent

Enrolled: 7 October 2021

Arguments presented via Zoom on 7 October 2021

Delivered: 08 December 2021

In view of the measures implemented as a result of the Covid-19 outbreak, this judgment was handed down electronically by circulation to the parties' representatives by email. The date for hand-down is deemed to be on 08 December 2021.

JUDGMENT

PRINSLOO, J

Introduction

- [1] The Applicant seeks to review and set aside an arbitration award dated 28 April 2016 and issued under case number GPCHEM100-14/15, wherein the Second Respondent (the arbitrator) found that Mr Zwane's dismissal was substantively and procedurally unfair and ordered that he be reinstated retrospectively and that he be paid 20 months' salary in the amount of R 250 000.
- [2] The First Respondent, GIWUSA (Respondent), acting on behalf of Mr Zwane, opposed the application for review.
- [3] The matter was enrolled for hearing on 7 October 2021. In accordance with the provisions of the directive issued in respect of access to the Labour Court and the conduct of proceedings during the Covid-19 pandemic, the parties agreed to present arguments virtually via Zoom.

The evidence adduced:

- [4] Mr Zwane was employed by the Applicant on 1 May 2006 as a pharmacist assistant. On 18 September 2014 Mr Zwane was issued with a notice to attend a disciplinary enquiry, scheduled for 23 September 2014. He was dismissed on 2 October 2014, after the disciplinary hearing was held and he was found guilty of misconduct.
- [5] In order to assess the arbitrator's findings and the grounds for review raised by the Applicant, it is necessary to consider the evidence adduced at the arbitration proceedings as well as the charges of misconduct Mr Zwane faced and was dismissed for.
- [6] The charges levelled against Mr Zwane, were as follows:
 - 1. *Breach of the Company's Code of Conduct – offences relating to control at work and dereliction of duty – 1.2 "Negligence";*
 - 2. *Breach of the Company's Code of Conduct – offences relating to theft or fraud or dishonesty or misappropriation or misrepresentation – 3.7 "Actions or behavior which results in the loss, misappropriation, damage or misrouting of company /customer / supplier/ client's property";*

In that on 7 August 2014 you were working un the schedule 6 fine picking cage and you picked and packed a parcel for a customer who required 100 units of Cialis 5mg Tabs 28.

When the parcel was delivered to the customer, the customer found that they had short received 1 unit of Cialis 5mg Tabs 28.

When questioned, you could not explain the whereabouts of the missing unit of Cialis 5mg Tabs 28.

- [7] It is evident from the transcribed record that at the onset of the arbitration proceedings, procedural fairness was challenged on two grounds, namely Mr Zwane's rights regarding his suspension and his rights regarding the polygraph test. In respect of substantive fairness, it was disputed that Mr Zwane had committed misconduct and that the sanction of dismissal was fair and appropriate.

The Applicant's case

- [8] The Applicant's first witness, Mr Momberg, testified that he is the Applicant's risk supervisor and his duties include the investigation of any damage or missing parcels in the warehouse or on the road, monitoring the tracking of vehicles and overseeing the staff in the control room.
- [9] Mr Momberg explained the procedures for the packing of medicine and stated that there is a logistics side of the warehouse and the side where the parcels are packed and delivered to customers. Mr Zwane in the main worked in the receiving area but when one of the pharmacists was not available in the schedule 6 cage (the cage), he would assist there to pick and pack the schedule 6 parcels.
- [10] Mr Momberg explained that the schedule 6 area is a caged off area with a biometric reader with a limited number of people having access to it. In the cage is a table with computers and a conveyor belt and one has to log into the SSI Schaefer system in order to pick orders. The orders waiting will be displayed on the computer screen and the pharmacist will select the order. Once the order is placed, it arrives in a tub by conveyor belt and the system will inform the pharmacist how many items (pills or tablets or the like) are to be taken out of the tub and how many is to be left in the tub. The system indicates the product quantity and the pharmacist will pick the quantity and once that is done, the pharmacist will acknowledge it on the system and the tub will go back to the storage area.

- [11] The pharmacist will pick and pack the products. The product is placed in a parcel with bubble wrap, which is sealed by the pharmacist, and thereafter placed on a trolley. The pharmacist has to take the trolley to the distribution division, where he or she would meet the responsible checker, who will check the parcels, scan them into a system as 'received' and they are locked up in another cage. The pharmacist will be present until the parcels are locked in the cage.
- [12] On 7 August 2014 the responsible pharmacist was on leave and Mr Zwane was working in the schedule 6 cage.
- [13] The order for Cialis 5mg Tabs 28 was a single order for 100 units, which was picked, packed and sealed by Mr Zwane. Mr Momberg explained that the moment from which Mr Zwane had received the Cialis until the time the parcel was made up, sealed and locked into the cage, it was under his control and no one else could get access to the cage.
- [14] Mr Momberg testified that he had looked at the CCTV footage and it showed that during the time the order for Cialis was processed, Mr Zwane was alone in the schedule 6 cage. He testified that he could see on the footage that Mr Zwane opened the shrink wrap of the Cialis and that he took one unit of Cialis and placed it into the dustbin.
- [15] Mr Momberg watch the footage of the following day and he noticed that Mr Zwane went down under the desk, just before he knocked off, he came out with something which looked like a white box, put it under his jersey and left. Mr Zwane did not leave the premises via the logistics turnstile, where he entered and exited every day and where he normally clocked in, but he went out through the distribution turnstiles and he was not searched by the security officer. The security officer was subsequently disciplined and he no longer works for the Applicant.
- [16] The issue was investigated after the customer, C J Pharmaceuticals, who the order was picked and packed for, reported that they had received one unit of Cialis short. Mr Momberg explained that a box of the product is referred to as a unit. The package received by the customer was still sealed and it was only when it was opened, that they noticed that one unit was missing. There was no evidence that the parcel or the seal was tampered with and everything was

intact when the customer opened the parcel. Mr Momberg explained that Cialis is a controlled, schedule 6 substance and if it goes missing, the Applicant has to report it to the medical control council and must open a case if a unit is missing.

- [17] The drivers were investigated, but excluded as there was no evidence that the seal of the parcel was tampered with. The stock count of Cialis also balanced, which means that there was no shortage or over supply, yet the product which reached the customer, was short. This meant that something happened between the packing and the delivery of the product to the customer. The investigation showed that the Cialis unit went missing at the point of picking and packing and on the day it went missing, Mr Zwane was on duty.
- [18] In cross-examination it was put to Mr Momberg that it was evident from the video footage that what Mr Zwane placed into the dustbin was the shrink wrap and that the product was left in the box. He disagreed with the proposition.
- [19] It was also put to Mr Momberg that Mr Zwane was not in total control of the process as the parcel is handed over to the checker, who takes over control of the parcel. In re-examination he explained that after the parcel is handed over to the checker in the presence of Mr Zwane and locked in a cage, it goes to the vehicle for delivery. The policy is that if a parcel is tampered with, it must be reported and in this instance, there was no report that the parcel was tampered with. Mr Momberg confirmed that at the time the parcel was handed over to the checker, it was only Mr Zwane who knew what the content of the parcel was. Mr Momberg testified that the drivers were investigated, but the investigation cleared the drivers from any involvement.
- [20] Mr Momberg testified that he had looked at the video footage when he did his investigation and compiled his report and that he had no reason to fabricate any evidence against Mr Zwane and he just did his job. He got on well with Mr Zwane and he had no reason to implicate him in any misconduct. He made his findings based on the evidence he found during his investigation.
- [21] The Applicant's second witness, Ms Timol, testified that she is employed by the Applicant as a pharmacist and in August 2014 she was employed as a returns pharmacist. The customer contacted the Applicant's customer service centre

and a ticket was logged, which was forwarded to her in the returns department. She ran a trace report on the system, which would indicate if there were any adjustments of the particular stock and after she found nothing, she escalated it to the responsible pharmacist, Ms Adams.

- [22] She explained that if there were no stock adjustments, it means that the stock balanced and she did a full cycle count of the stock. There was no discrepancy between what the system indicated the stock count should be and what the actual quantity was. If there is a complaint from a customer, the first thing to determine is whether there is a discrepancy in the system and in this instance, if the stock was counted and there was one unit surplus, it would mean that the picker made a picking error and that would explain why the customer would complain that there was one unit short and why the Applicant would have one unit in surplus. If the stock balances, it means that there were no picking errors made.
- [23] Ms Timol explained that the Applicant has a warehouse control system, Schaefer, and that the person picking in the control substance cage, will log in with a unique user name and password. Only the pharmacist and post basic pharmacist assistants have access to the system. Once the pharmacist logs into the system, clicks on an order, the conveyor belt will bring the order in tubs from the storage to the picking station. The system would inform the pharmacist of the item to be picked, the batch number, the quantity and the milligrams. *In casu* the order was for Cialis 5mg Tabs 28. Mr Zwane had to pick it from the grey tub, using the barcode scanner and the system would tell him whether he has picked the correct quantity.
- [24] Ms Timol explained that Cialis comes in a shrink wrap of 12 and in this case Mr Zwane would have picked 8 x 12 and three more to make it 100 units. After picking the tub goes back to the storage and Mr Zwane had to seal the product in a box with white tape and moved the parcel to the distribution area where it would have been locked in a cage, awaiting delivery. She explained that the checker locks the cage, after the parcel brought is recorded and that Mr Zwane would only leave once the parcel is locked in the cage. Ms Timol explained that the checker would not know what the content of the parcel is as it is not indicated anywhere.

- [25] In this instance the customer reported that there was a shortage of one unit, thus one box of Cialis 5mg Tabs 28. Ms Timol testified that only the picker in the control substances cage has control of the goods while they are being packed and retains such control until the point that the parcel is handed over to the distribution division.
- [26] Ms Timol testified that she had viewed the video footage and according to her it looked like Mr Zwane had put a box with the shrink wrap into the rubbish bin in the cage. According to her, the customer reported that the delivery was one unit short, but there was no tampering with the box, the drivers were subjected to polygraph tests, which they have passed. If the product did not go missing whilst delivered, the only other possibility was that it went missing in the control substance cage during the picking. As there was no tampering with the box, it could have only happened during the picking process, for which Mr Zwane was responsible.
- [27] Ms Timol testified that she had a good relationship with Mr Zwane.
- [28] Ms Timol explained that Cialis is regarded as a controlled substance, due to the high risk and the demand for it on the black market. It is treated as a controlled substance and therefore the controlled substance cage is restricted with biometric access only to the pharmacist and post basic pharmacist assistant.
- [29] In cross-examination Ms Timol conceded that there are three possible points where the product can go missing – the picker, the checker and the driver. She explained that if the checker had opened the parcel and took out anything, the box would have been tampered with and the customer would have complained about the fact that a tampered with box was delivered. The parcel was not tampered with.
- [30] It was put to Ms Timol that Mr Zwane never put a Cialis unit in the dustbin, but it was only the shrink wrap. Ms Timol conceded that from the footage it was not clear what he was putting into the dustbin. She explained that it could have been the box or the shrink wrap.
- [31] Ms Timol was asked about the cleaning of the dust bin and she testified that it is cleaned daily. It was put to her that if Mr Zwane had put the Cialis unit in the dust bin, it would have been picked up by the cleaners. Ms Timol explained that

that was not necessarily the case as she did not know when the dust bin was cleaned on the day in question.

- [32] The Applicant's third witness was Mr Tredoux, an independent polygraph examiner. He explained the process he had followed in conducting the polygraph tests. Mr Tredoux testified that he had conducted polygraph tests for Japhta Mazibuko and Andries Nkosi, the driver and assistant who had delivered the parcel to the customer and the issue he had to determine, related to a unit that was missing from the parcel. They were asked whether they had removed one unit of Cialis tablets from the box, whether they took the missing unit of Cialis and whether they assisted anyone to take the missing unit of Cialis tablets. Messrs Mazibuko and Nkosi both passed the polygraph test and according to Mr Tredoux, that was indicative of the fact that they were truthful and that they did not take the missing unit.
- [33] Mr Tredoux testified that he also conducted a polygraph test for Mr Zwane. He explained the process that he had followed, starting from when he had introduced himself to Mr Zwane, that he explained the reason for the test and that Mr Zwane had to give his permission for the test as he could not be forced to do the test. Mr Zwane read and signed the consent form, meaning that he gave Mr Tredoux permission to continue with the polygraph test.
- [34] Mr Tredoux explained that Mr Zwane's rights were explained to him, also the fact that he could not be forced to do the test and that he could stop with the test at any time. He further explained that he went through medical questions with Mr Zwane, for example heart or blood pressure problems, as that could have an influence on the test. The test was repeated three times, Mr Zwane was informed about the results and the outcome was discussed, where after Mr Zwane signed the post examination statement, confirming that everything was explained to him and that the questions were reviewed before the test was conducted.
- [35] The incident in respect of which the polygraph test was conducted, was the picking of Cialis tablets on 7 August 2014 and the purpose of the test was to determine Mr Zwane's truthfulness regarding the picking of the Cialis units, of which one unit went missing on 7 August 2014.

- [36] The questions posed to Mr Zwane were whether he had put any units of Cialis in the dustbin on 7 August 2014, whether he had taken the missing unit of Cialis tablets and whether he knowingly packed one unit of Cialis tablets short and the answer to all the questions was 'no'. Mr Tredoux explained that on the first question, the outcome was 'inconclusive', meaning that there were not sufficient points to say that Mr Zwane had passed or failed on the question. On questions two and three the outcome was 'deception indicated', meaning that Mr Zwane was not telling the truth. According to Mr Tredoux it was indicative of the fact that Mr Zwane took the Cialis tablets and he knew that he had taken it.
- [37] In cross-examination Mr Tredoux was referred to the comment written by Mr Zwane that he *'was upset before taking the test by the way it was handled. I feel like I am being suspected of stealing.'* Mr Tredoux explained that it was written after everything was done and after Mr Zwane had signed the post statement. He testified that he had not detected that Mr Zwane was upset prior to taking the test, which he could have detected in the stimulation test, which is conducted before the actual test. Mr Tredoux made it clear that the comment was written only after the test was done and the results were given to Mr Zwane, not before the test was taken.
- [38] It was put to Mr Tredoux that he had conducted a test on a person who was upset, emotionally in a different state and who felt dehumanised, in short not a normal person who a test could have been conducted on. Mr Tredoux disputed this and testified that from the introduction phase there were no signs to detect any of that and the allegation that he was upset, was only made after Mr Zwane was given the result of the test. He testified that Mr Zwane was stable and calm and understood everything that was explained to him prior to the outcome of the test and before the results were made available to him.
- [39] The fourth witness called by the Applicant was Ms Lalla, the Applicant's human resources manager. She testified about Mr Zwane's suspension and she was cross-examined extensively on that. Ms Lalla's evidence was irrelevant to the unfair dismissal dispute the arbitrator had to decide.
- [40] The Applicant's next witness was Mr Nkosi, a driver. He is not employed by the Applicant. He explained the process of delivering a parcel from the warehouse to the client. Mr Nkosi testified that the parcels are checked to make sure that

they are not tampered with and if any tampering is detected, it will be reported and the security will call the floor supervisor or another senior manager to verify if there is any damage.

- [41] Mr Nkosi explained that if the white tape that is wrapped around the box is pulled off, it will peel off the first layer of the box and it is not possible not to notice if the tape was pulled off. The drivers do not know what is in the boxes, all they know is the number of packages and where they are to be delivered to.
- [42] Mr Nkosi testified that he had made the delivery to CJ Pharmaceutical on 8 August 2014, where the parcels were once again checked for damages or tampering. When the parcels were delivered, there were no damages or tampering. He explained that if the parcel was not tampered with but the product was short, the shortage has to be from the packing of the product.
- [43] Mr Nkosi confirmed that he went for a polygraph test and that he was told that he had passed the test.
- [44] In cross-examination Mr Nkosi was asked a range of irrelevant questions that took Mr Zwane's case nowhere.
- [45] The last witness called by the Applicant was Mr Mazibuko, a driver. Mr Mazibuko is not employed by the Applicant. He explained the process of collecting and delivering scheduled medication and confirmed that the delivery that was made to CJ Pharmaceuticals was checked and there were no damaged or tampered with boxes.

The Respondent's case

- [46] Mr Zwane testified that he was employed by the Applicant as a pharmacist assistant in the receiving department and he assisted in the cage when the responsible pharmacist was absent. He confirmed that he assisted in the cage on 7 August 2014. On the said day he had to make up an order for 100 units of Cialis, which is shrink wrapped in units of 12. To make up the order for 100 units, he had to break the shrink wrap to add another four units. The remaining units were placed in the tub and went back to the storage.
- [47] Mr Zwane explained that what he had put in the dustbin, as could be seen from the video footage, was the shrink wrap, as it was part of the procedure that it

had to be thrown away. He testified that he was searched before going to the change room, where all his stuff was left, and nothing was found on him. From the change room, he went home. He was not searched again as he was searched prior to entering the change room. Mr Zwane denied that he packed the Cialis short of one unit on 7 August 2014.

- [48] In his evidence in chief, Mr Zwane raised the issue that he was not shown the video footage at his disciplinary hearing and that no evidence was presented at his internal disciplinary hearing.
- [49] Regarding the polygraph test, Mr Zwane testified that he had signed the consent form prior to taking the test and he had written the comments at the bottom of the page only after the test was done and Mr Tredoux had asked him how he felt with regard to taking the test.
- [50] Mr Zwane confirmed that Mr Tredoux explained to him that he had the right to refuse to take the test and he decided to take the test to assist the Applicant in its investigation.
- [51] A substantial portion of cross-examination was dedicated to questions relating to whether or not Mr Zwane was shown the video footage in the disciplinary enquiry or not. These questions were of no assistance to the issue the arbitrator had to decide.
- [52] Mr Zwane conceded that on 7 August 2014 he packed and sealed the parcel for CJ Pharmaceuticals and that it was sealed in the normal manner. He further conceded that if the tape is ripped off, it will be visible on the box. Mr Zwane agreed that the parcel was locked in the cage at the distribution department.
- [53] It was put to Mr Zwane that the parcel was delivered at CJ Distribution and that it was not damaged or tampered with at the time of its delivery, therefore it had to be accepted that whatever Mr Zwane had packed into the box, arrived at the client.
- [54] The evidence of Mr Momberg, Ms Timol and Messrs Nkosi and Mazibuko was put to Mr Zwane and he was asked to explain what else could have happened to cause the shortage of the unit of Cialis, as their evidence pointed in the direction of Mr Zwane. It is evident from the transcript that Mr Zwane never gave

an answer to the question. He was afforded another opportunity to explain what could have happened to the Cialis and his only response was “*No I wouldn’t know.*”

- [55] It was put to Mr Zwane that all the evidence, including the polygraph test, the video footage and the evidence presented by the Applicant’s witnesses showed that the only person who could have taken the unit of Cialis, was Mr Zwane. In response he provided a bare denial of “*No I didn’t*”.
- [56] Mr Zwane called Mr Venter as a witness. Mr Venter was a pharmacist employed by the Applicant and he was Mr Zwane’s representative at his disciplinary hearing. He testified that Mr Zwane was a very good and trustworthy employee and that there was no evidence that justified his dismissal. Mr Venter testified that his memory regarding the facts of the matter was affected as it had happened two years ago.
- [57] The representative for Mr Zwane confirmed that Mr Zwane was called as a witness to give evidence regarding the fact that the video footage was not shown during the internal disciplinary hearing.
- [58] It is evident from the transcribed record that a material portion of Mr Zwane’s evidence was not put to the Applicant’s witnesses (for example his use of the turnstile or his personal laptop) during their cross-examination.

Analysis of the arbitrator’s findings and the grounds for review

The test on review

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

¹ 2007 28 ILJ 2405 (CC) at para 110.

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

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

- [61] The review Court is not required to take into account every factor individually, consider how the arbitrator treated and dealt with each of those factors and determine whether a failure by the arbitrator to deal with it is sufficient to set the award aside. This piecemeal approach of dealing with the award is improper as the reviewing Court must consider the totality of the evidence and decide whether the decision made by the arbitrator is one that a reasonable decision maker could make, based on the evidence adduced³.

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

Although, on the basis of the *Sidumo* test being stringent, and awards not being lightly interfered with, an award will be set aside if a decision is entirely disconnected with the evidence or is unsupported by any evidence and involves speculation by the commissioner.

- [63] In *Quest Flexible Staffing Solutions v Lebogate*⁵ the LAC confirmed the test to be applied on review:

The test that the Labour Court is required to apply in a review of an arbitrator's award is this: "Is the decision reached by the commissioner one that a reasonable decision-maker could not reach? "Our courts have repeatedly stated that in order 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

² (2014) 35 ILJ 943 (LAC).

³ (2014) 35 ILJ 943 (LAC) at paras 18 and 19.

⁴ [2013] 11 BLLR 1074 (SCA).

⁵ (2015) 36 ILJ 968 (LAC), [2015] 2 BLLR 105 (LAC) at para 12 and 13.

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, however, be unreasonable if it is entirely disconnected with the evidence, unsupported by any evidence and involves speculation by the arbitrator.

An award will no doubt be considered to be reasonable when there is a material connection between the evidence and the result or, put differently, when the result is reasonably supported by some evidence. Unreasonableness is, thus, the threshold for interference with an arbitrator's award on review.

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

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

The arbitrator's findings and the grounds for review

[66] The arbitrator recorded that she had to decide whether Mr Zwane's dismissal was substantively and procedurally fair.

Procedural fairness

[67] On procedural fairness the arbitrator recorded that the issues were that Mr Zwane was subjected to a polygraph test when he was emotionally disturbed and that his suspension was unnecessary.

[68] In my view the issue of suspension could at best be dealt with as an unfair labour practice dispute, which was not the dispute to be determined by the arbitrator. Mr Zwane's suspension was irrelevant for purposes of determining the procedural fairness of his dismissal. Be that as it may, the arbitrator found that the Applicant had reasonable grounds to conduct an investigation around the missing product, that it was within its right to do a polygraph test, which Mr Zwane voluntarily agreed to do. She further found that the Applicant was entitled to suspend Mr Zwane.

[69] This should have been the end of the arbitrator's findings regarding procedural fairness, considering the issues that were raised by Mr Zwane at the onset of the arbitration proceedings and the issues that were raised as challenges in

respect of procedural unfairness. The two issues referred to *supra*, were the challenges raised in respect of procedural fairness and they were considered and decided by the arbitrator.

- [70] However, the arbitrator went further to consider the conduct of the chairperson of the internal disciplinary hearing regarding the admission of video evidence that was only shown to the Respondent party after Mr Zwane's dismissal. She found that the chairperson committed gross irregularities by refusing to play the video footage and by allowing misleading minutes of the disciplinary hearing to be compiled, knowing that the content thereof was fallacious. The arbitrator found that the chairperson's role was questionable and that he was incapable of being impartial. Ultimately the dismissal of Mr Zwane was found to be procedurally unfair for the aforesaid reasons.
- [71] The Applicant took issue with the finding of procedural unfairness.
- [72] The Applicant's case is that the arbitrator committed a gross irregularity in the conduct of the proceedings and that she exceeded her powers when she considered the procedural fairness of Mr Zwane's dismissal in the manner she did.
- [73] In my view there is merit in this ground for review.
- [74] It is evident from the transcribed record that at the commencement of the arbitration proceedings, the Respondent raised two issues regarding procedural fairness. The conduct of the chairperson of the disciplinary hearing was never raised, nor was the issue regarding the video footage and the minutes of the disciplinary hearing raised. The Applicant was not warned about the issues, there was no indication that there would be a need to call the chairperson or that the attack on procedural fairness was aimed at the conduct of the chairperson. The attack was aimed at the suspension of Mr Zwane and the polygraph test.
- [75] It is evident from the transcribed record that after the Applicant's case was closed and during the cross-examination of Mr Zwane the arbitrator's position was this:

Commissioner: Can I refresh my memory. Is the procedure in dispute?

Respondent representative: Not that I am aware of no.

Commissioner: It is only the substance.

[76] How the arbitrator made a leap from being under the impression that procedural fairness was not in dispute to making the findings on procedural fairness as she did, is astonishing. The arbitrator clearly decided issues she was not called on to decide and she went beyond the scope of what the Respondent challenged in respect of procedural fairness and what the Applicant was called upon to present evidence on. In doing so, the arbitrator committed a gross irregularity and her conduct in this regard, is unreasonable and reviewable.

[77] In short: the arbitrator's findings on procedural fairness are unreasonable and disconnected from the evidence presented and cannot survive on review.

Substantive fairness

[78] The arbitrator found that the Applicant had failed to discharge its onus to prove that it had a fair reason to dismiss Mr Zwane.

[79] The Applicant raised a number of grounds for review relating to the arbitrator's findings on substantive fairness.

[80] This Court, sitting as a review Court, has no intention to deal with each and every allegation raised by the Applicant in support of these grounds for review. The ultimate question is whether holistically viewed, the decision taken by the arbitrator was reasonable based on the evidence placed before her. The grounds for review raised, will be considered in broad terms and by taking a holistic view of the issues raised and the attack on the findings made by the arbitrator.

[81] The gist of the Applicant's complaint is the manner in which the arbitrator dealt with the evidence presented. The grounds for review are in summary that the arbitrator failed to apply her mind to the evidence, attached excessive weight to the evidence of Mr Venter, she favoured uncorroborated evidence and attached no weight to reliable evidence. The Applicant's case is that the conclusion

reached by the arbitrator was not connected to the overall assessment of all the evidence, oral and documentary.

- [82] In my view there is merit in this ground for review.
- [83] Considering the arbitrator's findings on substantive fairness in the arbitration award, it is evident that she made a number of findings, under the heading of substantive fairness, which related to the procedural aspects of Mr Zwane's dismissal and which were irrelevant to determining the issue of substantive fairness. Furthermore, it is evident that instead of deciding the issue on substantive fairness, the arbitrator went on a tangent of her own and made findings she was never mandated to make.
- [84] Stripped to the actual findings on substantive fairness, it is evident that the arbitrator accepted that it was common cause that Mr Zwane was seen throwing something in the dustbin. Mr Zwane's version was that he threw a plastic shrink wrap into the dustbin, whereas the Applicant's witnesses testified that it was a box of Cialis.
- [85] The arbitrator found that none of the Applicant's witnesses could convince her that it was indeed a box of Cialis as Ms Timol conceded that she could not from the video footage clearly see what was thrown into the dustbin.
- [86] The arbitrator was clearly faced with two conflicting versions on a material aspect she had to decide. On the one hand the Applicant's witnesses testified that Mr Zwane threw the unit of Cialis in the dustbin, later removed it and that caused the client to report that the product that was delivered, was short. Mr Zwane on the other hand denied that.
- [87] The approach to be adopted by arbitrators when faced with two disputing versions was set out in *Sasol Mining (Pty) Ltd v Ngeleni NO and Others*⁶(*Sasol Mining*), where it was held that the arbitrator must conduct an

‘. . . assessment of the credibility of the witnesses, a consideration of the inherent probability or improbability of the version that is proffered by the witnesses, and an assessment of the probabilities of the irreconcilable versions before the commissioner. As Cele AJ (as he then was) observed in Lukhnaji

⁶ (2011) 32 ILJ 723 (LC) at 727C-F.

Municipality v Nonxuba NO & others [2007] 2 BLLR 130 (LC), while the LRA requires a commissioner to conduct an arbitration hearing in a manner that the commissioner deems appropriate in order to determine the dispute fairly and quickly, this does not exempt the commissioner from properly resolving disputes of fact when they arise.'

[88] The arbitrator, faced with two conflicting versions, had to follow the approach as set out by this Court and she had to conduct an assessment of the credibility of the factual witnesses, their reliability and overall assessment of the inherent probabilities of the irreconcilable versions before her.

[89] In *Sasol Mining* the Court held that it was one of the prime functions of a commissioner to ascertain the truth as to the conflicting versions before him. The Court held that:

What he manifestly lacked was any sense of how to accomplish this task, or which tools were at his disposal to do so. The commissioner was obliged at least to make some attempt to assess the credibility of each of the witnesses and to make some observation on their demeanour. He ought also to have considered the prospects of any partiality, prejudice or self-interest on their part, and determined the credit to be given to the testimony of each witness by reason of its inherent probability or improbability. He ought then to have considered the probability or improbability of each party's version. The commissioner manifestly failed to resolve the factual dispute before him on that basis. Instead, he summarily rejected the evidence of each of the applicant's witnesses on grounds that defy comprehension.

[90] It is within this context that the evidence presented and the arbitrator's assessment of the evidence placed before her, should be considered. The transcribed record shows that the Applicant presented evidence to support its case, which evidence was significant as it related to an issue central to the dispute the arbitrator had to adjudicate. Mr Zwane on the other hand presented no more than a bare denial and he called a witness who was of no assistance to the actual issues to be decided by the arbitrator.

[91] Glaringly absent from the arbitration award is an assessment of the conflicting versions, of the credibility of the witnesses and the inherent probabilities of the versions presented. In fact, there is no consideration of any of the factors set out in *Sasol Mining*.

- [92] The arbitrator merely recorded that none of the Applicant's witnesses could convince her that they were certain that Mr Zwane had thrown a box of Cialis into the dustbin.
- [93] Evidently the arbitrator failed to take cognisance of the material evidence placed before her and she had failed to assess the totality of the evidence presented. The arbitrator's findings contain no assessment of the probabilities, more so where she was faced with conflicting versions.
- [94] It was incumbent upon the arbitrator to make credibility findings and to state why she accepted one version and rejected another, which she dismally failed to do. The arbitrator had no sense of how to accomplish this task and she failed in her duties as arbitrator.
- [95] It is further evident that the arbitrator jumped to a conclusion that the Applicant failed to discharge its onus to show that it had a fair reason to dismiss Mr Zwane. In doing so the arbitrator had no regard to the circumstantial evidence through which the Applicant sought to prove its case.
- [96] It is trite law that circumstantial evidence is permissible. In assessing circumstantial evidence the arbitrator should consider the cumulative effect of all the evidence before her and weigh it on a balance of probabilities.
- [97] In *Komape v Spoornet (Pty) Ltd and others*⁷ the Court held in respect of circumstantial evidence that:

In assessing circumstantial evidence the arbitrator should always consider the cumulative effect of all the items of the evidence before him or her. In this regard the commissioner should look at the totality of the evidence and weigh it on a balance of probabilities⁸.

The inference must be drawn through a careful survey of the connection between the facts and their relationship to the offence alleged to have been committed by the employee. To this extent the court in *Smit v Arthur* 1976 (3) SA 378 (A), when dealing with circumstantial evidence held:

⁷ 2008 29 ILJ 2967 (LC).

⁸ See *NUMSA v Kia Motors*(2007) 28 ILJ 2283 (LC) and *SA Nylon Printers (Pty) Ltd v Davids* [1998] 2 BLLR 135 (LAC) at 1369.

'All the relevant facts must necessarily go into the melting pot and the essence must finally be extracted therefrom.'

.....The onus in civil cases is discharged if the inference advanced is the most readily apparent and acceptable from a number of other possible inferences.

- [98] The evidence adduced by the Applicant was that two witnesses testified as to the video footage where they saw Mr Zwane throwing something in the dustbin, which they believed to be a box of Cialis. Mr Zwane denied that and submitted that it was shrink wrap that he threw into the dustbin. That was however not the totality of evidence and the end of the matter. The evidence further was that the parcel was sealed, that it was taken to the distribution division where it was locked into a cage, in the presence of Mr Zwane. This was not disputed. The evidence further was that the drivers who collected the parcel saw no tampering and that when it was delivered at CJ Pharmaceuticals, the parcel was not tampered with. It was common cause that the goods delivered to CJ Pharmaceuticals were short. It was undisputed that if the tape with which the parcel was sealed, was broken or tampered with, it would have damaged the box and it would have been visible to either Mr Zwane, the checker, the drivers or CJ Pharmaceuticals. No one saw any tampering. It was common cause that the Cialis delivered was one unit short. Mr Zwane failed his polygraph test.
- [99] To all this *viva voce* and documentary evidence, Mr Zwane offered no more than a bare denial.
- [100] The evidence of Mr Momberg, Ms Timol and Messrs Nkosi and Mazibuko was put to Mr Zwane in cross-examination and he was asked to explain what else could have happened to cause the shortage of the unit of Cialis. Mr Zwane was once again invited and afforded an opportunity to explain what could have happened to the Cialis and his only response was "*No I wouldn't know.*"
- [101] The Applicant presented direct evidence of witnesses, documentary evidence and circumstantial evidence in support of its case. The arbitrator had to consider the the cumulative effect of all the evidence before her and weigh it on a balance of probabilities. She did none of that.
- [102] Evidently the cumulative effect of all the evidence is that on a balance of probabilities, there is no other explanation as to what could have happened to

the missing unit of Cialis as that it went missing at the time it was packed by Mr Zwane. The evidence showed that the Applicant indeed discharged its onus to prove that Mr Zwane was dismissed for a fair reason. The arbitrator failed to draw the obvious inferences from the evidence presented. In fact, it is evident that the arbitrator had no idea of how to deal with the evidence and how to make findings based on what was placed before her. She ignored material evidence and failed to consider the facts placed before her holistically, which ultimately distorted the outcome of the proceedings.

Conclusion

- [103] I have to consider the grounds for review within the context of the test this Court must apply in deciding whether the arbitrator's decision is reviewable. The ultimate question is whether holistically viewed, the decision taken by the arbitrator was reasonable based on the evidence placed before her.
- [104] In *Bestel v Astral Operations Ltd and others*⁹ the Labour Appeal Court considered the limited scope possessed by this Court to review an arbitration award and accepted that an arbitrator's finding will be unreasonable if the finding is unsupported by any evidence, if it is based on speculation by the arbitrator, if it is disconnected from the evidence, if it is supported by evidence that is insufficiently reasonable to justify the decision or if it was made in ignorance of evidence that was not contradicted.
- [105] I must ascertain whether the arbitrator considered the principal issue before her, evaluated the facts presented and came to a conclusion that is reasonable. I have considered this question after perusal of the transcribed record, the arbitration award and the grounds for review raised by the Applicant.
- [106] I am convinced that the arbitrator ignored evidence or failed to apply her mind to the facts, the evidence, the probabilities and the issues that were material in determining the dispute she had to adjudicate. On a holistic consideration of the facts before the arbitrator, her finding that Mr Zwane's dismissal was procedurally and substantively unfair, is disconnected from the evidence and is not reasonable.

⁹ [2011] 2 BLLR 129 (LAC) at par 18.

[107] It follows that the arbitration award is to be interfered with on review.

Relief

[108] This leaves the issue of relief.

[109] The Applicant seeks for the arbitration award to be reviewed and set aside and to be substituted with an order that Mr Zwane's dismissal was fair in all respects, alternatively for the matter to be remitted for a determination *de novo*.

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

[111] The principles had been set out by the LAC in *Palluci Home Depot (Pty) Ltd v Herskowitz*¹⁰ as follows:

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

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

[113] On a consideration of all the facts before the arbitrator at the time, it is evident that the most reasonable finding would have been that Mr Zwane's dismissal was substantively and procedurally fair.

¹⁰ (2015) 36 ILJ 1511 (LAC) para 58

[114] In the circumstances, it follows that the arbitration award ought to be set aside, and I am satisfied that upon the material that was placed before the arbitrator, this Court is in a position to substitute that award. No purpose would be served by remitting the matter back to the Third Respondent for reconsideration. It is also in the interest of justice to determine the matter finally and not to order a re-hearing of the matter as that would undermine one of the key objects of the LRA namely expeditious dispute resolution. This is so as the dismissal, which was the subject of the review application, took place as far back as 2014 and the parties are entitled to finality in 2021.

Costs

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

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

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

Order

1. The arbitration award dated 28 April 2016 and issued under case number GPCHEM100-14/15 is reviewed and set aside;

2. The arbitration award is substituted with the following:
 - i. The Applicant's (First Respondent in the review) dismissal is substantively and procedurally fair;
 - ii. The Applicant's case is dismissed.'
3. There is no order as to costs.

Connie Prinsloo

Judge of the Labour Court of South Africa

Representatives:

For the Applicant: Advocate A J Nel

Instructed by: Darran Ledden Inc Attorneys

For the First Respondent: Mr M Bayi of Bayi Attorneys

LABOUR COURT