IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR2737/16

In the matter between:

CREST CHEMICALS (PTY) LTD **Applicant**

and

THABISO PETE **First Respondent**

GENERAL INDUSTRIES WORKERS UNION OF SOUTH AFRICA ("GIWUSA") **Second Respondent**

EVAH T NGAOBENI *N.O* **Third Respondent**

NATIONAL BARGAINING COUNCIL FOR THE CHEMICAL INDUSTRY ("THE NBCCI") **Fourth Respondent**

Heard: **3 August 2023**

Delivered: **8 September 2023**

Summary: **Review application – gross insubordination – appropriateness of dismissal – no evidence that insubordination was wilful.**

JUDGMENT

NKUTHA-NKONTWANA, J

Introduction

[1] In this review application, the applicant (Crest Chemicals), is challenging the arbitration award dated 24 November 2016 which was issued by the third respondent (Arbitrator) under the auspices of the fourth respondent (NBCCI)

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and under case number LP7200-18. The arbitrator found the first respondent (Mr Pete) guilty of insubordination. However, she found the sanction of dismissal unfair and reinstated Mr Pete with a final written warning.

[2] Crest Chemicals' main ground of review is that the arbitrator arrived at an unreasonable decision. The second respondent (GIWUSA) and Mr Pete oppose this application.

Factual background

[3] Mr Pete was employed as the Debtors' Clerk with effect from 1 March 2010. He was reporting to Ms Brenda Kee (Ms Kee), the Accounts Payable Manager, who in turn reported to Ms Jane Livingston (Ms Livingston), the Operations Financial Manager. Mr Pete was performing the functions of, *inter alia*, loading payments and receipts onto Crest Chemicals' system. However, it is common cause that this function was removed from Mr Pete following a restructuring process section 189A of the Labour Relations Act[1] (LRA) and was allocated to another employee.

[4] Ms Livingston testified that, on 16 November 2015, she had a meeting with Mr Pete to discuss the reallocation back to him the functions of loading payments and receipts onto Crest Chemicals' system. To effect the reallocation on the system, she had to obtain Mr Pete's identity document. Mr Pete blatantly refused and walked out even before she could finish talking to him. She felt undermined by Mr Pete's conduct hence he was charged and dismissed for gross insubordination.

[5] Disgruntled about his dismissal, Mr Pete referred a dispute to the NBCCI. The dispute was arbitrated following a failed conciliation. The arbitrator found Mr Pete guilty as charged. However, she was not persuaded that the offence was serious enough to warrant a sanction of dismissal. She also found that there was no evidence presented to show that the trust relationship had broken down. Moreover, Mr Pete had a clean disciplinary record and given the nature

[1] Act 66 of 1995, as amended.

of the misconduct, he had a chance to be rehabilitated. She reinstated Mr Pete retrospectively with a final written warning valid for 12 months.

[6] In these proceedings, Crest Chemicals is challenging the award as it relates to the sanction.

Legal principles and application

[7] In *Palluci Home Depot (Pty) Ltd v Herskowitz and Others*[2] (*Palluci*), the Labour Appeal Court (LAC) succinctly articulated the review test as follows:

> '[15] …the Labour Court's approach to the review of the Arbitrator's award transcends the mere identification of process related errors to reveal the Arbitrator's basic failure to apply his mind to considerations that were material to the outcome of the dispute, resulting in a misconceived hearing or a decision which no reasonable decision maker could reach on all the evidence that was before him or her.
>
> [16] Significantly, as was held by the SCA in *Herholdt* and endorsed recently by this Court *in Head of the Department of Education v Mofokeng & others*, 'for a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2)(a)(ii) of the LRA, the arbitrator must have misconceived the nature of the enquiry or arrived at an unreasonable result'. Thus, as recognised in Mofokeng, it is not only the unreasonableness of the outcome of an arbitrator's award which is subject to scrutiny, the arbitrator 'must not misconceive the enquiry or undertake the enquiry in a misconceived manner', as this would not lead to a fair trial of the

[2] [2014] ZALAC 81; (2015) 36 ILJ 1511 (LAC) at paras 15 -16; see also *Sidumo and another v Rustenburg Platinum Mines Ltd and others* [2007] ZACC 22, (2007) 28 ILJ 2405 (CC); *Head of the Department of Education v Mofokeng and others* [2014] ZALAC 50, [2015] 1 BLLR 50 (LAC); *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and others* [2013] ZALAC 28, (2014) 35 ILJ 943 (LAC); *Herholdt v Nedbank Ltd (Congress of South African Trade Unions as amicus curia)* [2013] ZASCA 97, [2013] 11 BLLR 1074 (SCA).

issues. In further approval of *Herholdt*, this Court in *Mofokeng* stated that:

> "Mere errors of fact or law may not be enough to vitiate the award. Something more is required. To repeat: flaws in the reasoning of the arbitrator, evidence in the failure to apply the mind, reliance on irrelevant considerations or the ignoring of material factors etc, must be assessed with the purpose of establishing whether the arbitrator has undertaken the wrong enquiry, undertaken the enquiry in the wrong manner or arrived at an unreasonable result. Lapses in lawfulness, latent or patent irregularities and instances of dialectical unreasonableness should be of such an order (singularly or cumulatively) as to result in a misconceived enquiry or a decision which no reasonable decision-maker could reach on all the material that was before him or her."' [Own Emphasis] [Footnotes omitted]

[8] Penitently, in *Palluci*[3], the LAC also shed some light on how to deal with the issue of the appropriate sanction in relation to insubordination and insolence transgressions. It was observed that:

> '[22] As demonstrated, there is a fine line between insubordination and insolence, and insolence may very well become insubordination where there is an outright challenge to the employer's authority. However acts of mere insolence and insubordination do not justify dismissal unless they are serious and wilful. A failure of an employee to comply with a reasonable and lawful instruction of an employer or an employee's challenge to, or defiance of the authority of the employer may

[3] Id at paras 22 and 33.

justify a dismissal, provided that it is wilful (deliberate) and serious. Likewise, insolent or disrespectful conduct towards an employer will only justify dismissal if it is wilful and serious. The sanction of dismissal should be reserved for instances of gross insolence and gross insubordination as respect and obedience are implied duties of an employee under contract law, and any repudiation thereof will constitute a fundamental and calculated breach by the employee to obey and respect the employer's lawful authority over him or her. Thus, unless the insolence or insubordination is of a particularly gross nature, an employer must issue a prior warning before having recourse to the final act of dismissal.

…

[33] Whether misconduct amounts to insubordination depends on a number of factors including the wilfulness of the employee's defiance, the reasonableness of the order that was defied and the actions of the employer prior to the purported act of insubordination. Provocation by an employer prior to the act of insubordination by an employee, is thus an important factor that must be considered in assessing its gravity. The same principle in my view would apply to the act of insolence or gross insolence. If the employee was provoked into insolence or insubordination, it may have a considerable mitigating effect on the seriousness of the offence and may render the dismissal inappropriate.' [Own emphasis]

[9] Turning to the present instance, Crest Chemicals is accusing the arbitrator of failing to consider its evidence on the seriousness of the insubordination and its effect on the trust relationship. Ms Livingston testified that she felt undermined by the conduct of Mr Pete when he left her office while she was still talking to him, a fact vehemently denied by Mr Pete. In his defence, Mr Pete testified that he only left when the conversation had finished.

[10] Much was said about the form of the meeting. Mr Pete testified that he was expecting to be consulted about reallocated function before an instruction could be issued. He was adamant that his expectation was informed by the fact that the relocated functions were going to change his Key Performance Indicators (KPI) and he had to agree to such a change. That led to a suggestion by Crest Chemicals' representative during his cross-examination that the very meeting was a consultation meeting. Hence, the Arbitrator concluded that the meeting took a form of a consultation which could have given Mr Pete an impression that he had a latitude to refuse the instruction. However, nothing much turns on this finding as the Arbitrator conclusively found that Mr Pete was directed to accepted the reallocated functions and he refused.

[11] Mr Pete's expectation and the finding that the meeting was consultative in nature is only relevant when it comes to the sanction. Mr Pete could not be criticised for expecting to be consulted and seeking to consult his union as the function had been taken away from him previously and consequent to a restructuring process in terms of section 189A of the LRA.

[12] Ms Livingston conceded, also, that the reallocation of the functions could have led to the change of Mr Pete's job title, depending on how well he could have performed. It is within this context that the issue of consultation features prominently during Ms Livingston's cross-examination.

[13] It is also clear from the evidence the Mr Pete and Ms Livingston enjoyed a cordial relationship. In fact, Ms Livingston conceded during her cross-examination that she never experienced any misdemeanour on the part of Mr Pete prior to the incident in question. Mr Pete's conduct was spontaneous as there was no prior notice for the meeting. It was also not disputed that Ms Kee never had a discussion with Mr Pete about the reallocation of the functions prior to the meeting with Livingston.

[14] The conduct of Mr Pete may have been ill-considered and based on an incorrect understanding that he had a right to be consulted prior to the reallocation of the functions in question. However, it was not premeditated and wilful so as to violate the trust relationship as reasonably found by the Arbitrator. In fact, Ms Livingston conceded during her cross-examinations that Mr Pete had never behaved like this before, she trusted him and that he would not lie to her.[4] Besides, the act of insubordination did not take place in front of other employees.

[15] Even though the act of insubordination did not take place in front of other employees. The Disciplinary Code provides that gross insubordination is a dismissible offence, it clearly states that the sanction is determined on the basis of the gravity and seriousness of the misconduct.[5] Thus, Crest Chemicals' contention that the Arbitrator ignored the Disciplinary Code is untenable.

[16] Overall, the Arbitrator cannot be faulted in her conclusion, if regard is had to the totality of evidence that was before her. In *Anglo Platinum (Pty) Ltd (Bafokeng Rasemone Mine) v De Beer and Others,*[6] it was held:

> '…. the reviewing court must consider the totality of evidence with a view to determining whether the result is capable of justification. Unless the evidence viewed as a whole causes the result to be unreasonable, errors of fact and the like are of no consequence and do not serve as a basis for a review.'

[17] As a final point, I reckon that the impugn against the award is flawed as it is premised on the cherry-picked evidence that support Crest Chemicals' case contrary to the caveat expressed by the LAC in *SA Rugby Union v Watson*

[4] See: Transcript p 208, lines 13- 21.
[5] See: Record p 129.
[6] (2015) 36 ILJ 1453 (LAC) at para 12.

and Others,[7] that a fragmented piecemeal analysis of evidence cannot be countenanced as it conflates review with appeal.[8]

Conclusion

[18] In the circumstances, I am satisfied that the award is beyond reproach as it falls within the band of reasonable decisions. For that reason, the review application cannot succeed.

Costs

[19] I am disinclined to award costs against Crest Chemicals as it would seem that the it has a collective bargaining relationship with GIWUSA. Otherwise, this is one of those matters that a costs order would have sufficed in order to weed out the appeals that are camouflaged as reviews, as typified in the present matter, which are inundating this Court.

[20] In the circumstances, I make the following order:

Order

1. The review application is dismissed.

2. There is no order as to costs.

P Nkutha-Nkontwana
Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Mervyn Taback Inc
For the First and Second Respondents:	GIWUSA

[7] (2019) 40 ILJ 1052 (LAC) at paras 25-26.
[8] See: *Booi v Amathole District Municipality and others* (2022) 43 ILJ 91 (CC) paras 50-51.