IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case No: JR1721/2021

In the matter between:

NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA obo VUKHUTHU THABO **Applicant**

and

BOSS SCAFFOLDING AND ACCESS SOLUTIONS **First Respondent**

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION **Second Respondent**

VUSUMUZI EUGENE MOYO *N.O* **Third Respondent**

Delivered: **This judgment was handed down electronically by circulation to the parties' legal representatives by email and publication on the Labour Court's website. The date for hand-down is deemed to be on 12 August 2022**

JUDGMENT

TLHOTLHALEMAJE, J

Introduction and background:

[1] NUMSA acting on behalf of its member, Mr Thabo Vukhuthu (The Employee), approached the Court seeking an order reviewing and setting aside the arbitration award issued by the third respondent (Commissioner), acting under the auspices of the Commission for Conciliation Mediation and Arbitration (CCMA). In the award, the Commissioner had found that the dismissal of the

Employee by the first respondent (Employer) was procedurally and substantively fair.

[2] The Employer is in the business of supplying access scaffolding to construction and industrial industries, and the Employee was in its employ as a Supervisor with effect from February 2015. The Employee was dismissed on 4 March 2021 following a disciplinary enquiry after having failed a breathalyser test on 15 February 2021.

The arbitration proceedings:

[3] After the Employee referred a dispute to the CCMA, attempts at conciliation failed and the matter came before the Commissioner for arbitration. The parties' representatives upon a narrowing of issues before the Commissioner agreed that it was common cause that the Employee had pleaded guilty to the misconduct at the disciplinary enquiry. The parties had identified three main issues for determination by the Commissioner which were; the harshness of the sanction; whether the Employee was allowed representation at the disciplinary enquiry; and dispute surrounding the existence of the rule allegedly breached.

[4] The parties further agreed that oral evidence was only to be led in regards to the issue of representation at the disciplinary enquiry, whilst oral submissions were to be made in respect of the two other issues for determination.

Evidence in regard to representation at the disciplinary enquiry:

[5] In regards to the issue of representation, evidence on behalf of the Employer was led by its General Manager, Mr Tyrone Cogill, who was also its representative at the arbitration proceedings. Gogill had confirmed that he was not present when the notice of the disciplinary enquiry was issued to the Employee, nor was he also present at that enquiry. His evidence was based on the agreed bundle of documents discovered by the Employer. Cogill in reference to that bundle contended that the Employee's rights including the right to representation at the disciplinary enquiry were read to him and that he had signed a separate form at the hearing indicating that he understood his

rights. He further testified that from clause 6.1.2.8.2.1 of the Disciplinary Code and Procedure, the Employee was also aware of his right to representation by a fellow employee or representative of a trade union.

[6] In his testimony, the Employee conceded that he failed the breathalyser test on 15 February 2021 as the results showed a 'red sign'. He further confirmed that he was issued with the notice to attend the disciplinary enquiry, but that this was not explained nor read to him. He conceded that he did not inform the Employer that he needed a representative at the time that he was issued with the notice, nor did he inform his shop steward of his hearing. He testified that he did not know that he had to make prior arrangements for his representative to be released from his normal duties in order to assist him at the hearing.

[7] He testified that at the hearing, he informed the chairperson, Ms Natasha Schwartz-Ebersohn that he needed a shop steward to represent him. The Chairperson's response was that the shop steward that he wanted to represent him was paid to perform his normal duties, and that he (Employee), needed to first have made an appointment to have the shop steward released from his duties. The Chairperson however said nothing further in that regard and proceeded with the hearing after reading out his rights and securing an interpreter.

[8] Under cross-examination and upon being asked as to the reason he had not informed a shop steward after he had received a notice on 15 February 2021, his response was that he expected the employer to inform the shop steward of the need to represent him. He further confirmed that when the hearing started, he had requested an interpreter and the proceedings were adjourned whilst an interpreter was called.

Submissions in regards to the existence of the rule and appropriateness of sanction:

[9] In regard to the existence of a company rule, the submissions made on behalf of the Employee by his representative (Mr Madwabe) before the Commissioner was that failing a breathalyser test was not a breach of any

company rule necessitating a dismissal. He submitted that the only known rule in existence related to instances where an employee was found to be under the influence of alcohol, which was a dismissible offence.

[10] The submissions made on behalf of the Employer were that it did not require a specific rule that an employee should not be under the influence of alcohol as it was a breathalyser test results that confirmed any such conduct. To the extent that the Employee had pleaded guilty, it was submitted that he had admitted that he was under the influence of alcohol.

[11] In regards to the appropriateness of the sanction, it was submitted on behalf of the Employee that the sanction of a dismissal was harsh in that four other employees had failed the breathalyser test at the time and were not dismissed but were merely issued with final written warnings. It was disputed that the senior position that the Employee occupied ought to have been a distinguishing factor in that all employees were bound by the disciplinary code. It was further submitted that the dismissal was harsh in that at the disciplinary enquiry, the Employee had pleaded guilty, shown remorse, apologised and requested a second opportunity in order to correct his behaviour.

[12] In regards to the appropriateness of the sanction, it was submitted on behalf of the Employer that the other employees that were issued with final written warnings were junior to the Employee. As a Supervisor, it was submitted that his presence was critical to the operations as work such as the building and certification of a scaffold could not proceed without him. It was submitted that an aggravating factor was the Employee's senior position and his responsibilities. This was also because of the level of trust the Employer had in him that the work under his supervision would be done. It was submitted that through his conduct, the Employee had broken a trust relationship between him and the Employer.

The Commissioner's award:

[13] In deciding that the dismissal of the Employee was procedurally fair, the Commissioner concluded that ordinarily, the responsibility was on the

Employee to make prior arrangements to secure his representative, and he had ample opportunity prior to the hearing to do so. The Commissioner held that the Employee had always known as a NUMSA member and Supervisor, that he was entitled to a representative in the event that he was called to appear at a disciplinary enquiry. To this end, the Commissioner concluded that the Employee was duly granted the right to be represented but failed to utilise that right. The Commissioner rejected the submission that the Employer's evidence based on the documents was mere hearsay evidence on the basis that those documents were signed by the Employee at the disciplinary enquiry and were not disputed at the arbitration proceedings.

[14] The Commissioner then addressed the allegation of inconsistent application of discipline to the extent that other employees who were guilty of the same transgression were only issued with final written warnings. He had upon a consideration of various authorities and item 7(b)(iii) of the Code of Good Practice, concluded that based on the Employee's senior status as a Supervisor and his responsibilities, including being the only team member entitled to certify and approve the scaffolds, the sanction of dismissal was appropriate. This was so in that as a consequence of his conduct of having failed the breathalyser test, he was denied entry into the premises. This had impacted on the work of his team for the day, and had resulted in loss of production as no scaffolding could be approved or certified in his absence.

The grounds for review:

[15] The Employee raised three main grounds of review. These were that the Commissioner committed an error of law and the facts when dealing with the aspect of procedural fairness by allowing inadmissible hearsay evidence of Cogill; committed a reviewable irregularity as he misconceived the nature of the enquiry regarding the existence of the rule; and failed to deal with the Employee's mitigating circumstances and only focused on whether he had committed the offence. It was submitted in this regard that the law required of the Commissioner to in addition, have investigated whether the sanction of dismissal was appropriate taking into account the totality of the circumstances.

[16] The Employer in opposing the review application contended that upon the test to be met in such applications, the Employee in the light of the grounds of review relied upon, embarked on a cherry-picking exercise, and in the course of doing so, treated the application as if it was an appeal rather than a review. The Commissioner's decision was said to be one that fell within a band of reasonableness.

The test on review and evaluation:

[17] The test remains whether the decision reached by the commissioner is one that a reasonable decision-maker could not reach based on the available material and evidence[1]. In order to maintain the distinction between review and appeal, the Labour Appeal Court in *South African Municipal Workers Union obo Mosomo v Greater Tubatse Local Municipality*[2] held that 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, this Court must broadly evaluate the merits of the dispute 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[3].

[18] In further determining whether the commissioner's award falls within a band of reasonableness, the applicant's grounds of review ought to be analysed within the context of the approach set out in *Goldfields*[4], which is that the review 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 which was reasonable to justify the decisions he or she arrived at[5].

---

[1] *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others* 2008 (2) SA 24 (CC); [2007] 28 ILJ 2405 (CC) at para 110

[2] [2020] ZALAC 53; [2021] 5 BLLR 494 (LAC); (2021) 42 ILJ 1047 (LAC)

[3] *Ibid*at para 27

[4] *Goldfields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA and others* (JA 2/2012) [2013] ZALAC 28; [2014] 1 BLLR 20 (LAC); (2014) 35 ILJ 943 (LAC)

[5] At para 16; See also at para 20 where it was held that;

> 'Failing to consider a gross irregularity in the above context would mean that an award is open to be set aside where an arbitrator (i) fails to mention a material fact in his award; or (ii)

[19] In this case, to the extent that the Employee alleged that the Commissioner committed gross irregularities in the conduct of proceedings, it was held in *Herholdt*[6] that a 'gross irregularity' concerns the conduct of the proceedings rather than the merits of the decision. The Supreme Court of Appeal added that a qualification to that principle is that a 'gross irregularity' is committed where decision-makers misconceive the whole nature of the enquiry and as a result misconceive their mandate or their duties in conducting the enquiry.

Evaluation:

(i) Findings on procedural fairness and the question of hearsay evidence:

[20] Section 188(1)(a) and (b) of the LRA provides that to be fair, a dismissal that is not automatically unfair must be for a fair reason *and* in accordance with a fair procedure. Under Schedule 8, item 4(1) of the Code of Good Practice, it is provided *inter alia* that the employee should be allowed the opportunity to state a case in response to the allegations, and be entitled to a reasonable time to prepare the response, and be assisted by a trade union representative or fellow employee at a hearing.

[21] It was not in dispute that the Employee was properly and timeously notified of the charges of misconduct and was clearly given a period of about 8 days within which to prepare for his hearing. It is equally apparent that despite the timeous notice, the Employee had not made arrangements to secure a representative. The only issue that arises is whether in the circumstances, it can be said that the Employee was denied the right to representation.

---

fails to deal in his/her award in some way with an issue which has some material bearing on the issue in dispute; and/or (iii) commits an error in respect of the evaluation or considerations of facts presented at the arbitration. The questions to ask are these: (i) In terms of his or her duty to deal with the matter with the minimum of legal formalities, did the process that the arbitrator employed give the parties a full opportunity to have their say in respect of the dispute? (ii) Did the arbitrator identify the dispute he was required to arbitrate(this may in certain cases only become clear after both parties have led their evidence)? (iii) Did the arbitrator understand the nature of the dispute he or she was required to arbitrate?(iv) Did he or she deal with the substantial merits of the dispute? and (v) Is the arbitrator's decision one that another decision-maker could reasonably have arrived at based on the evidence?'

[6] *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae*) [2013] ZASCA 97; 2013 (6) SA 224 (SCA); [2013] 11 BLLR 1074 (SCA); (2013) 34 ILJ 2795 (SCA) at para 10

[22] The Employee's primary attack on the Commissioner's findings on procedural fairness was that the latter had allowed and relied on inadmissible hearsay evidence in drawing therefrom in reaching his conclusion that he was not denied representation at the hearing.

[23] The Employer on the other hand contended that the Commissioner's conclusions were unassailable in the light of his reliance on the documents which were agreed by the parties to be what they purported to be, and that the probative value thereof was not dependent on any specific person. The Employer had submitted that in the light of the notice of the disciplinary enquiry issued to the Employee, read in conjunction with the documents completed at the enquiry pertaining to the process adopted by the Chairperson, there was no rational objective basis to impugn the Commissioner's finding that the Employee's version at the hearing reasonably possibly lacked credibility. It was contended that in the light of the concessions made by the Employee at the disciplinary hearing as reflected in the agreed documents, the Commissioner had properly found that his version that he had requested to be represented by a shop steward which request was denied by the Chairperson was illogical, implausible and ludicrous. The Employer further supported the Commissioner's findings that no reasonable person in the position of the Chairperson would have stood down proceedings to allow for an interpreter to be called yet deny the Employee the right to call or find a representative. To this end, it was submitted that there was no basis on which to allege that the Commissioner placed reliance on hearsay evidence.

[24] It was submitted that even if the documents were to be considered as hearsay, then in terms of section 3(1) of the Law of Evidence Amendment Act (LEAE)[7], same was admissible in the arbitration proceedings since the parties had agreed to the admission of the bundle.

[7]Act 45 of 1988 which reads;

3. Hearsay evidence

(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless-

(a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;

[25] The import of section 3 of the LEAE within the context of the Commissioner's duties under section 138(1) of the LRA was examined in *Exxaro Coal (Pty(Ltd v Chipana and Others (Exxaro)*[8], which was also referred to on behalf of the Employee. The LAC confirmed that under the provisions of section 138 of the LRA a commissioner enjoyed a discretion to conduct an arbitration in a manner that she/he considered appropriate to determine a dispute fairly and quickly, and to do so with a minimum of legal formalities. It was however added that this did not imply that the commissioner may arbitrarily receive or exclude hearsay evidence, or for that matter any other kind of evidence[9].

(b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or

(c) the court, having regard to-

(i) the nature of the proceedings,

(ii) the nature of the evidence;

(iii) the purpose for which the evidence is tendered;

(iv) the probative value of the evidence;

(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;

(vi) any prejudice to a party which the admission of such evidence might entail; and

(vii) any other factor which should in the opinion of the court be taken into account,

is of the opinion that such evidence should be admitted in the interests of justice.

(2) The provisions of subsection (1) shall not render admissible any evidence which is inadmissible on any ground other than that such evidence is hearsay evidence.

(3) Hearsay evidence may be provisionally admitted in terms of subsection (1)(b) if the court is informed that the person upon whose credibility the probative value of such evidence depends, will himself testify in such proceedings: Provided that if such person does not later testify in such proceedings, the hearsay evidence shall be left out of the account unless the hearsay evidence is admitted in terms of paragraph (a) of subsection (1) or is admitted by the court in terms of paragraph (c) of that subsection.

(4) For the purpose of this section—

'hearsay evidence' means evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence;

'party' means the accused or a party against whom hearsay evidence is to be adduced, including the prosecution."

[8] [2019] ZALAC 52; [2019] 10 BLLR 991 (LAC); (2019) 40 ILJ 2485 (LAC)

[9] At para 21. See also at para 24 where it was held;

'…(1) Section 3(1)(c) of the LEAA is not a licence for the wholesale admission of hearsay evidence in the proceedings; (2) in applying the section the commissioner must be careful to ensure that fairness is not compromised; (3) a commissioner is to be alert to the introduction of hearsay evidence and ought not to remain passive in that regard; (4) a party must as early as possible in the proceedings make known its intention to rely on hearsay evidence so that the other party is able to reasonably appreciate the evidentiary ambit, or challenge, that he/she or it is facing. To ensure compliance, a commissioner should at the outset

[26] In this case, the Commissioner dismissed the Employee's contentions that Gogill's evidence was hearsay, and proceeded to make his findings on procedural fairness based on the documents simply because they were agreed to and signed by the Employee. This was notwithstanding the fact that Gogill was not present at the hearing. Cogill upon it being put to him that his version was hearsay, confirmed that the Employer would not be calling upon any other witness.

[27] The Court accepts that the difficulty with the cross-examination of Cogill was that at no point was it put to him that the Employee would either deny that he was afforded representation, let alone it being put to him that he (Employee) had requested that he needed representation, which was denied after he was told that shop stewards were paid to be at their work-stations, or that he ought to have made prior arrangements for a representative to be released from his duties. All that was put to him was that his evidence was hearsay. This point is raised in the light of the principle reiterated in *Rautini v Passenger Rail Agency of South Africa*[10], that it is essential for the purposes of cross-

require parties to indicate such an intention; (5) the commissioner must explain to the parties the significance of the provisions of section 3 of the LEAA, or of the alternative, fair standard and procedure adopted by the commissioner to consider the admission of the evidence; (6) the commissioner must timeously rule on the admission of the hearsay evidence and the ruling on admissibility should not be made for the first time at the end of the arbitration, or in the closing argument, or in the award. The point at which a ruling on the admissibility of evidence is made is crucial to ensure fairness in a criminal trial. The same ought to be true for an arbitration conducted in an adversarial fashion because fairness to both parties is paramount'

[10] [2021] ZASCA 158 (8 November 2021), where it was held;

"[14] The facts of this case fall squarely within those in *President of the Republic of South Africa vs South African Rugby Football Union (SARFU),*where the Constitutional Court held as follows:

'The institution of cross-examination not only constitutes a right, it also imposes certain obligations. As a general rule, it is essential when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness's attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness box, of giving any explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct. This rule was enunciated by the House of Lords in *Browne v Dunn* and has been adopted and consistently followed by our courts.'

[15] The reason for this rule is clear. As was stated in *S v Boesak* the rule, which is part of the practice of our courts, is followed to ensure that trials are conducted fairly, and a witness is afforded the opportunity to answer challenges to his or her evidence and is not ambushed. The appellant in *casu* gave his version of events under oath. The respondent

examination, for it to be put to a witness when it is intended to suggest that he/she is not speaking the truth on a particular point and to give that witness, an opportunity to give any explanation.

[28] In his analysis, the Commissioner had accepted the Employee's evidence that he had requested from the Chairperson that he needed a representative, which request was not addressed. The Commissioner however cast doubt on the overall version that the Employee was denied representation, based on the documentary evidence that Cogill had relied on.

[29] The Court accepts that inferences may be drawn from undisputed documents, but as was re-stated in *Rautini*[11], the general rule regarding the drawing of inferences is that a court may only draw inferences that are consistent with all the proven facts. Where one or more inferences are possible the court must satisfy itself that the inference sought to be drawn is the most probable inference.

[30] In this case, and to the extent that the parties had agreed that evidence which would only be led was in regard to procedural fairness, it is not correct for the Employer to suggest that a mere reliance on the documents as agreed was sufficient to draw inferences that the Employee was allowed the right to representation despite the factual dispute which he had raised and which the Commissioner had acknowledged. This much is clear from *Rautini* where it was held that the failure to put a version even where it should not have been put, does not necessarily warrant an inference that the witness's version is a recent fabrication, as this would be unfair to the witness and may lead to an incorrect finding[12].

[31] In my view, even though the Commissioner may have been entitled to draw inferences from the documents for the proposition that the Employee was not denied the right of representation, the issue is that inferences drawn from those documents cannot be said to be consistent with all the proven facts. In

---

adduced no direct evidence to contradict the appellant's version. The trial court accepted the appellant's evidence and his version of events."

[11] At para 24.

[12] At para 23.

this regard, the minutes of the disciplinary hearing are not *verbatim*[13], and are merely notes scribbled by the Chairperson. There is nothing in those notes that indicate the Employee had refused an opportunity to get a representative. All that is indicated is that the Employee had requested an interpreter. Even when his rights were explained, there is nothing from the notes that indicated that he had unequivocally said that he did not need a representative. Equally so, a form in which the particulars of the hearing and which the Employee had signed merely indicated that the Employee did not have a representative. Nothing is said about why he did not have one. Equally so, the Chairperson in her findings does not indicate why the Employee did not have a representative.

[32] In the end, the mere fact that the Employee was timeously notified of the hearing and had failed to make arrangements to secure a representative cannot in my view lead to a conclusion that he elected not to have a representative. His unchallenged evidence which the Commissioner had accepted, was that even at a belated stage and before the enquiry commenced, he had made a request to get a representative, which the chairperson had ignored.

[33] It was unreasonable for the Commissioner in the light of the oral evidence led, and where it was on no less than two occasions put to Coghill that his version was hearsay, to have simply ignored that objection in the light of what was stated in *Exxaro*[14]. The Commissioner had despite those objections proceeded to reject the contention that Cogill's version was hearsay, and made inferences which were inconsistent with the documentary evidence relied upon or the proven facts as accepted by the Commissioner that indeed a request was made at the disciplinary hearing. Against these observations, it ought to be concluded that the Employee was denied a right of representation at the disciplinary hearing, which made his dismissal procedurally unfair.

(ii) The question of existence of the rule and appropriateness of the sanction:

[13] At page 47 – 49 of the Record.
[14] *supra*

[34] It was submitted on behalf of the Employee that the Commissioner failed to determine whether a rule existed at the workplace or not, and whether if it existed, whether it was breached by the Employee. The question was related to the provisions of item 7 of Schedule 8 of the Code of Good Practice, which required the Commissioner to determine whether the rule or standard existed, which the employee was aware of and had breached. In this regard, the submissions were that failing a breathalyser test was the rule breached, and not being under the influence of alcohol. This was so in that the Disciplinary Code only specified that it was a dismissible offence if an employee was found to be under the influence of alcohol. It was further submitted that the Employee had pleaded guilty to having failed the alcohol test *albeit* he attributed that to having drank an energy drink. It was however submitted that in the face of that version not being disputed, the Commissioner failed to determine whether consuming an energy drink and subsequently failing an alcohol test was an offence or not.

[35] The submissions made on behalf of the Employer were that there was no basis for the Employee to challenge the existence of the rule where it was agreed as common cause that he tested positive and pleaded guilty at the internal hearing. Reliance was further placed on the Employer's Disciplinary Code and Procedure, which amongst the offences listed was that of '*Being under the influence of alcohol or intoxicating drugs at work'.* It was submitted that since the breathalyser test indicated 'Red', this meant that the Employee was under the influence of alcohol. It was submitted that the Commissioner correctly drew inferences that the Employee was under the influence of alcohol from failing the breathalyser test, his concessions that he consumed alcohol the previous day, that there was no evidence to suggest that the breathalyser was defective, and that in any event, the parties had agreed not to lead evidence in that regard.

[36] Whether a dismissal is justifiable simply on the basis of an employee having failed a breathalyser test is a topic that has been before the Court on several occasions. In determining this issue, the starting point would be to reiterate the principle set out in *Shoprite Checkers (Pty) Limited v Tokiso Dispute*

Settlement and Others[15] *(Shoprite)*, which is that in such instances, even if an employer had adopted a zero-tolerance policy towards alcohol or drug related offences, there is an obligation on a commissioner as the initial and primary judge of whether a decision is fair, to 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.

[37] Against the above principle, it is accepted that workplace policies against drug and alcohol use are standard and are aimed at complying with section 8(1) of the Occupational Health and Safety Act (OSHA)[16], which places an obligation on every employer to provide and maintain, as far as is reasonably practicable, a working environment that is safe and without risk to the health of his employees. Aligned to section 8(1) of OSHA is Regulation 2A, which places an obligation on the employer not to permit any person who is or who appears to be under the influence of intoxicating liquor or drugs, to enter or remain at a workplace.

[38] In this case, it was common cause that after the Employee had failed the breathalyser test, he was not permitted to enter the workplace. The question that arises however according to the Employee is that there is no rule that he had breached. 'Annexure A' to the Disciplinary Code of Conduct lists a number of offences, and it only makes reference to *'Being under the influence of alcohol or intoxicating drugs at work'*. There is no reference to an offence related to *'failing a breathalyser test'.*

[39] From the principles set out in *Samancor Chrome Ltd (Western Chrome Mines) v Willemse and Others (Samancor)*[17], it is apparent that a clear distinction is made between failing a breathalyser test and being under the influence of alcohol. The Court had accepted that whilst a breathalyser test is a useful screening tool for access to the workplace and generally a reliable and easy method for employers to determine whether employees are under

[15] [2015] ZALAC 23; [2015] 9 BLLR 887 (LAC) ; (2015) 36 ILJ 2273 (LAC).
[16] Act 85 of 1993.
[17] [2023] ZALCJHB 150; (2023) 44 ILJ 2013 (LC).

the influence of alcohol, it does not however permit an employer from disregarding any other evidence that may point to whether an employee is under the influence of alcohol . It was further held in *Samancor* that breathalyser tests are permissible as evidence in disciplinary hearings and arbitration proceedings, but their evidentiary value depends on corroborative evidence (e.g. blood test, or physical observation) to prove that someone is under the influence of alcohol or has a certain percentage of alcohol in their system. From these principles, it cannot therefore be correct as submitted on behalf of the Employer, that a positive breathalyser test for alcohol axiomatically means that one is under the influence of alcohol.

[40] The Commissioner had despite recording the parties' submissions in regards to the existence of the rule, failed to made any determination in that regard. From his analysis, the Commissioner opined that arguments on the existence of the rule and the harshness of sanction related to the inconsistency of application of discipline. Clearly the Commissioner in his approach conflated these factors.

[41] Item 7 of Schedule 8 of the Code of Good Practice provides that in determining whether a dismissal for misconduct is unfair, the Commissioner *should* consider *inter alia*, whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the work-place. If a rule or standard was contravened, whether or not, (i) the rule was a valid or reasonable rule or standard; (ii) whether the employee was aware, or could reasonably be expected to have been aware, of the rule or standard; (iii) the rule or standard has been consistently applied by the employer; and (iv) whether a dismissal was the appropriate sanction for the contravention of the rule or standard.

[42] The above factors may be interlinked but in my view, an employer must first pass the hurdle of demonstrating that an employee contravened an existing and known rule or standard. If the employer fails to discharge its onus in this regard, there would be no basis to even consider the other factors under Item 7.

[43] Inasmuch as it is trite that it is not necessary for an employer in its code to outline each and every form of disciplinary offences, not much turns on the Employer's contentions in this case that the rule as established in its Code of Conduct was admitted by the Employee. This submission, to the extent that reference is made to page 22 of the record in its support, is not correct. That portion of the record reflects that the Employee's representative was making closing arguments before the Commissioner, and had persistently submitted that there was no rule in the company that stated that an employee would be subjected to a disciplinary enquiry if he/she failed an alcohol test.

[44] It is accepted that the Employee had pleaded guilty to the charge of failing the alcohol (breathalyser) test. Even if the test results indicated 'red', it did not follow without more on the test set out in *Samancor*, that a conclusion ought to be reached that the Employee was under the influence of alcohol. Since the Commissioner did not deal with the issue of whether the rule existed or not, it is not even clear from his analysis as to how he could have determined the issue of consistent application of discipline or the appropriateness of the sanction.

[45] It is apparent that the Commissioner had merely accepted the guilty plea without interrogating what it was that the Employee had pleaded guilty to for the purposes of determining other factors under Item 7 of the Code of Good Practice. It appears that the Commissioner like the Employer did, merely accepted that since the Employee failed the breathalyser test, that was the end of the matter, and that a conclusion ought to be reached that he was under the influence of alcohol. This approach is what *Samancor* cautioned against. It equally goes against the principle set out in *Shoprite*[18] that in order to ensure the Employee's constitutional right to fair labour practices, he (Commissioner), must be vigilant and examine the circumstances of each case.

[46] It is accepted that a Commissioner under section 138(1) of the LRA has discretion in the manner and conduct of arbitration proceedings. Even if the parties had in this case agreed that no evidence in regard to the existence of

[18] supra

the rule would be led, this did not mean that the Commissioner was absolved from further interrogating the real nature of the rule alleged to have been breached.

[47] The Employer sought to draw an inference from the failure of the breathalyser test and other factors that the Employee was under the influence of alcohol. This was for the purposes of justifying the fairness of a dismissal in accordance with the sanction for offences outlined under the Code of Conduct. The Commissioner however misconceived the nature of the enquiry he ought to have undertaken in establishing whether the Employer had discharged its onus in proving that a failure of a breathalyser test, was sufficient for a dismissal under the rule and offences related to being under the influence of alcohol.

Summary:

[48] In *Mofokeng*[19], it was reiterated that a commissioner must not misconceive the inquiry or undertake the inquiry in a misconceived manner, as this would not lead to a fair trial of the issues. In this case, the Commissioner by failing to consider whether the failure of the breathalyser test led to a conclusion that a rule related to being under the influence of alcohol was breached, effectively misconceived the nature of the enquiry and failed to determine the real issue, thus resulting in an irregularity. Because the irregularity revealed a misconception of the true enquiry, this had also resulted in an unreasonable outcome. In the end, on an assessment of all of the evidence, the outcome of the arbitration proceedings, cannot be said to fall within a range of decisions to which a reasonable decision-maker could come on the available evidence.

[49] In the light of the above conclusions, and to the extent that there was no basis for a conclusion to be reached that the Employee was under the influence of alcohol, it does not follow that he ought to be exonerated from any wrongdoing. This is so in that it was common cause that the Employee had tested positive for alcohol and pleaded guilty in that regard. The Court accepts

[19] *Head of the Department of Education v Mofokeng and Others* (JA14/2014) [2014] ZALAC 50; [2015] 1 BLLR 50 (LAC); (2015) 36 ILJ 2802 (LAC) at paras 30 - 31

that even if there is no specific rule pertaining to the failure of a breathalyser test, the fact that the Employee was barred from entering the premises on that particular day and that his other colleagues were issued with final written warnings on account of failing the breathalyser test clearly demonstrates that he had committed a disciplinary offence. The only issue is whether a dismissal was appropriate under the circumstances.

[50] It would be recalled that the appropriateness of the sanction was challenged primarily based on its allege inconsistent application in the light of other employees having been issued with final written warnings for the same conduct. The Employer had justified the distinction on the basis that the Employee was a supervisor. Even if this might have been so, that distinction was however premised on the approach that he was under the influence of alcohol, when this was not the case. Very little weight was attached by the Employer to other mitigating factors inclusive of his guilty plea and outright show of contrition. In the circumstances it is found that the sanction of a dismissal was not appropriate.

[51] Notwithstanding these findings, and even though it is accepted that an employee should ordinarily be entitled to retrospective reinstatement, it is my view that such an order should be pared down and exclude entitlement to remuneration and benefits he would ordinarily have been entitled to as a result of the findings made in relation to his conduct.

[52] I have further had regard to the requirements of law and fairness in regards to an award of costs. Given the facts and circumstances of this case, I am of the view that each party must be burdened with its costs.

[53] Accordingly, the following order is made;

Order:

1. The arbitration award issued by the Third Respondent is reviewed, set aside and substituted with an order that;

1.1 The dismissal of Mr Vukhuthu Thabo was procedurally and substantively unfair.

1.2 The First Respondent is ordered to reinstate Mr Vukhuthu Thabo in its employ, retrospective from the date of his dismissal, and on the same terms and conditions of employment as applicable to his employ prior to the dismissal.

1.3 Mr Vukhuthu Thabo is not entitled to any form of back-pay in the form of remuneration or benefits as a result of his retrospective reinstatement.

2. Each party is to pay its own costs.

_____

Edwin Tlhotlhalemaje

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicants:	Adv K. Manthe, instructed by S. Mabaso Incorporated Attorneys.
For the First Respondent:	Adv. B.D. Stevens, Morgan Law Incorporated.