



Not Reportable

**THE LABOUR COURT OF SOUTH AFRICA,
HELD AT CAPE TOWN**

Case no:C103/2023

In the matter between:

PSA obo RANDOLPH VAN WYK

Applicant

and

**DEPARTMENT OF SOCIAL
DEVELOPMENT: WESTERN CAPE
PROVINCIAL GOVERNMENT**

First Respondent

**PUBLIC HEALTH AND SOCIAL
DEVELOPMENT SECTORAL
BARGAINING COUNCIL**

Second Respondent

COMMISSIONER JP HANEKOM

Third Respondent

Date of Hearing: 27 June 2025

Date of Judgment: 29 September 2025

This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing down judgment is deemed to be 10h00 on 30 September 2025.

JUDGMENT

BARTHUS AJ

Introduction

The Applicant launched this review application in terms of s145 of the Labour Relations Act 66 of 1995 (LRA) to set aside the award issued by the Third Respondent ("the Arbitrator") under the auspices of the Second Respondent. The Applicant is seeking retrospective reinstatement.

Nothing more than a Notice to Oppose the review application and a Postponement Application was filed by the First Respondent.

Preliminary issues

- [1] The First Respondent sought a postponement on the day of the hearing despite conceding that the Applicant has waited a significant time to obtain a hearing date in this matter since the review application was launched in March 2023. The notice of set down was served on the First Respondent on 22 April 2025.
- [2] It was submitted on behalf of the First Respondent that there would be no significant prejudice to the Applicant if the matter were postponed. The reason for the request to postpone is that Counsel had become

unavailable due to a vacation for which travel arrangements were made on 6 May 2025.

- [3] The Applicant opposed the application to postpone the matter, noting that there has been a 2-year and 3-month waiting period to have the matter heard. The First Respondent did not tender costs and attended Court without a mandate to tender such costs.
- [4] The First Respondent did not file any opposing papers in the review, nor were heads of argument filed. The First Respondent's attitude clearly was that if there was no counsel present to argue the matter on the day, then the matter would be hamstrung, and a postponement would have to be granted.
- [5] The First Respondent is essentially seeking a postponement to file answering papers in the review, which is outrageous. That the Applicant would suffer prejudice if the postponement were granted is self-evident.
- [6] The review application was filed 56 days late. The condonation application is unopposed. The Applicant tendered a detailed explanation for the late filing of the review application, which was satisfactory. The Applicant demonstrated that there are reasonable prospects of success and has shown that it is in the interests of justice to grant the condonation.
- [7] I now turn to deal with the review application.

Contextual Background

- [8] The Applicant was employed as a senior Administration Clerk with the First Respondent since December 2008 and was promoted in 2014 to the position of Administrative Officer.
- [9] Due to alcohol dependency, a major depressive disorder ("MDD") and physical health issues, the Applicant was absent from work for various periods between 2018 and 2021.
- [10] The Applicant voluntarily admitted himself for rehabilitation at Crescent Clinic in April 2018 and received psychiatric treatment from Dr Paul Vos since 2018. In his 2022 Report, Dr Vos confirmed that the Applicant

suffered Deep Vein Thrombosis and pulmonary embolism in 2019, which resulted in a relapse of his MDD. Increased dosages of medication were administered, and the Applicant achieved partial remission until he relapsed in 2021.

- [11] On 18 March 2021, the First Respondent conducted an informal disciplinary inquiry and issued a final written warning for unauthorised absenteeism during November 2020 and March 2021.
- [12] On 23 March 2021, the Applicant's supervisor referred the Applicant to the Employment Wellness Programme (EWP). The EWP report revealed that the Applicant attended 4 counselling sessions during April and May 2022. Before the EWP report was released, the Applicant was absent from work from 19 May 2021 to 28 May 2021, and a formal disciplinary process was instituted.
- [13] The Applicant was dismissed for unauthorised absenteeism. The Applicant challenged the substantive and procedural fairness of the dismissal, citing his alcohol addiction and the First Respondent's election to follow the misconduct route instead of the incapacity route.

Grounds of Review

a) Gross irregularity by mischaracterising the dispute

- [14] The Applicant asserts that the Arbitrator committed a gross irregularity by treating the dispute as one of misconduct rather than one of incapacity arising from alcoholism.
- [15] The Applicant argued that the Arbitrator was required to assess the fairness of the dismissal under the guidance of Items 10 and 11 of the Code of Good Practice: Dismissal Schedule 8 of the LRA, which provides the following:

“10. Incapacity: Ill health and injury.—

(1) Incapacity on the grounds of ill health or injury may be temporary or permanent. If an employee is temporarily unable to work in these circumstances, the employer should investigate the extent of the

incapacity or the injury. If the employee is likely to be absent for a time that is unreasonably long in the circumstances, the employer should investigate all the possible alternatives short of dismissal. When alternatives are considered, relevant factors might include the nature of the job, the period of absence, the seriousness of the illness or injury and the possibility of securing a temporary replacement for the ill or injured employee. In cases of permanent incapacity, the employer should ascertain the possibility of securing alternative employment or adapting the duties or work circumstances of the employee to accommodate the employee's disability. (2) In the process of the investigation referred to in subsection (1) the employee should be allowed the opportunity to state a case in response and to be assisted by a trade union representative or fellow employee. (3) The degree of incapacity is relevant to the fairness of any dismissal. The cause of the incapacity may also be relevant. In the case of certain kinds of incapacity, for example alcoholism or drug abuse, counselling and rehabilitation may be appropriate steps for an employer to consider. (4) Particular consideration should be given to employees who are injured at work or who are incapacitated by work-related illness. The courts have indicated that the duty on the employer to accommodate the incapacity of the employee is more onerous in these circumstances.

11. Guidelines in cases of dismissal arising from ill health or injury. —

Any person determining whether a dismissal arising from ill health or injury is unfair should consider— (a) whether or not the employee is capable of performing the work; and (b) if the employee is not capable— (i) the extent to which the employee is able to perform the work; (ii) the extent to which the employee's work circumstances might be adapted to accommodate disability, or, where this is not possible, the extent to which the employee's duties might be adapted; and (iii) the availability of any suitable alternative work."

- [16] No consideration was given to whether the First Respondent had complied with the procedural and substantive obligations that arise in incapacity matters, including whether any form of counselling, rehabilitation or reasonable accommodation had been explored before dismissal.

b) Failure to consider material evidence

[17] The Applicant asserts that the Arbitrator failed to apply his mind to material evidence that was central to the dispute namely:

- a) The Applicant's voluntary admission to a rehabilitation facility;
- b) The Applicant's supervisor's evidence confirming the applicant's struggle with alcoholism since 2017;
- c) The Applicant's engagement with the EWP, attendance at counselling sessions and demonstrated insight into his condition;
- d) The Applicant's mental health issues (major depressive disorder), which influenced his relapse.

[18] The Applicant argued that the Arbitrator's failure to deal with this evidence rendered the proceedings unfair and materially impacted the outcome.

c) Misconduct/Gross Irregularity: Misrepresentation of Evidence

[19] The Arbitrator misinterpreted the EWP report by inferring from it that the Applicant was "in denial" and had "refused rehabilitation", despite:

- a) The EWP report stating only that the Applicant no longer used alcohol as a coping mechanism and not that he had refused treatment ;
- b) The report being authored by an individual lacking qualifications in addiction treatment;
- c) The Applicant never being afforded an opportunity to respond or engage with the contents of the report.

[20] The EWP report did not conclude that the Applicant no was no longer an alcoholic or was in remission.

d) Irrational and Unreasonable findings

- [21] The Arbitrator's conclusion that the Applicant had refused rehabilitation and therefore a dismissal sanction was fair, was not supported by the evidence.
- [22] The evidence shows that the Applicant had voluntarily undergone rehabilitation; had acknowledged his alcoholism during internal processes and had requested further assistance through EWP.
- [23] The Applicant argued that this evidence is incompatible with a finding of denial or non-cooperation.

Analysis

- [24] The Arbitrator, while finding that *"the employer in this instance should've followed the incapacity route back in March 2021, instead of issuing the Applicant with a final written warning"*, nevertheless concluded that a dismissal for unauthorised absenteeism was fair.
- [25] Section 10 (3) of the Code of Good Practice: Dismissal specifically includes alcoholism as a form of incapacity and suggests that counselling and rehabilitation may be appropriate measures to be undertaken by a company in assisting such employees. In fact, the requirement to assist such employees by providing them with treatment has been widely accepted. The distinction between incapacity and misconduct is a direct result of the fact that it is now accepted in scientific and medical circles that alcoholism is a disease and that it should be treated as such¹.
- [26] Where an employee is suffering under incapacity because of their alcoholism, the employer is under an obligation to counsel and assist the employee in accessing treatment for their disease. The purpose of placing such a duty on an employer is based on the current medical understanding of alcoholism – that it is a diagnosable and treatable disease. This disease results in the employee's incapacity.

¹ Transnet Freight Rail v Transnet Bargaining Council and Others (C644/2009) [2011] ZALCJHB 15 (4 March 2011)

- [27] The offence of absenteeism requires fault on the part of the employee. In this case, the First Respondent was aware of the Applicant's alcohol addiction.
- [28] In *Naik v Telkom SA (2000) 21 ILJ 1266 (CCMA)* the facts of the case were that the employee with 17 years' service was dismissed for being under the influence of alcohol while on duty and challenged the fairness of the sanction of dismissal. A year before the incident leading to his dismissal, he had himself admitted to a rehabilitation centre and benefited from the programme, despite relapses. The incident which led to his dismissal was that he was found in his car after he had passed out when he should have been at an important meeting. The CCMA held that alcoholism is a form of incapacity and that reinstatement was fair.
- [29] In terms of how to deal with the employee, the distinguishing feature in such cases of alcoholism appears to be, as with all instances of incapacity, that the employee is not at fault for their behaviour – the employee cannot be blamed for their disease, and its impact on their behaviour and dismissal for absenteeism simply cannot be justified.
- [30] The test to be applied in review applications is clear. This court may intervene if and only if the applicant establishes that the decision to which the arbitrator came was so unreasonable that no reasonable decision-maker could come to it.
- [31] In the present matter, where the Applicant relies on some reviewable irregularities in the assessment of the evidence, the court must be cautious to ensure that the line between an appeal and a review is not crossed. In *Gold Fields Mining SA (Pty) Ltd v CCMA*² The Labour Appeal Court noted that a review court is not required to consider every factor individually; instead, it should examine how the arbitrator treated and dealt with each factor and then determine whether a failure by the arbitrator to address one or more factors constitutes a process-related irregularity sufficient to set aside the award. The court cautioned against adopting a piecemeal approach since a review court must necessarily consider the totality of the available evidence. Specifically, the questions for a review

² [2014] 1 BLLR 20 (LAC)

court to ask are whether the arbitrator gave the parties a full opportunity to have their say in respect of the dispute, whether the arbitrator identified the issue in dispute that he or she was required to arbitrate, whether the arbitrator understood the nature of the dispute, whether he or she dealt with substantial merits of the dispute and whether the decision is one that another decision maker could reasonably have arrived at based on the evidence.

- [32] In short, when an arbitrator fails to have regard to the material facts, he or she will likely arrive at an unreasonable decision. Similarly, where an arbitrator fails to follow proper process, he or she will arrive at an unreasonable outcome. But, as the court emphasised, this is to be considered on a totality of the evidence and not on a fragmented, piecemeal analysis.
- [33] The Arbitrator in the present matter disregarded the Applicant's medical condition despite the overwhelming evidence and his diagnosis of alcoholism and depression. The Applicant was in remission and had relapsed. This was not in dispute.
- [34] The Arbitrator's finding that the Applicant was guilty of unauthorised absenteeism was not reasonable, given that absenteeism requires fault on the part of the employee, and the Applicant, in this instance, was absent from work due to incapacity. It is trite that the legal distinction between incapacity and misconduct lies in the presence or absence of fault.
- [35] The Arbitrator's failure to make this distinction is the basis of his misdirection, and the consequence of this misdirection is that his award falls outside of a band of decisions to which a reasonable decision-maker could come on the available material. That being so, the award stands to be reviewed and set aside.
- [36] At the arbitration hearing, the Applicant submitted that he was recovering under rehabilitation with Alcoholics Anonymous and has been sober since November 2021. The applicant seeks to be reinstated, the primary remedy to which he is entitled, and there is no medical bar to the Applicant's reinstatement.

I therefore make the following order:

1. The First Respondent's postponement application is dismissed.
 2. Condonation for the late filing of the review application is granted.
 3. The arbitration award issued by the Third Respondent is reviewed and set aside.
 4. The award is substituted by the following:
 - a) The Applicant's dismissal is substantively and procedurally unfair.
 - b) The Applicant is reinstated into the First Respondent's employ with effect from the date of his dismissal.
- [3] There is no order as to costs.

Barthus AJ
Judge of the Labour Court of South Africa

Representatives:

For the Applicant: Tzvi Brivik
Instructed Malcolm Lyons & Brivik Inc.

For the Respondent: M Dyalwane
Instructed by the State Attorney