THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JR 1826 /2020

In the matter between:

NUMSA obo NHLABATHI AND 1 OTHER **Applicant**

and

PFG BUILDING GLASS (PTY) LTD **First Respondent**

NATIONAL BARGAINING COUNCIL FOR THE CHEMICAL INDUSTRY **Second Respondent**

DAISY MANZANA N.O. **Third Respondent**

Enrolled: 22 November 2022

Delivered: 01 December 2022

This judgment was handed down electronically, with consent of the parties' representatives, by circulation to them by email. The date for hand-down is deemed to be 01 December 2022.

JUDGMENT

PRINSLOO, J

Introduction

[1] The Applicant seeks to review and set aside an arbitration award dated 15 October 2020 and issued under case number GPCHEM 351-19-20, wherein the Third Respondent (arbitrator) found that the individual applicants' dismissal was substantively fair.

[2] The First Respondent (Respondent) opposed the application for review.

The evidence adduced

[3] The individual applicants (applicants) were employed by the Respondent as manufacturing operators and they were dismissed on 29 May 2020, after a disciplinary hearing was held and they were found guilty of misconduct.

[4] The charge levelled against the applicants, and for which they were dismissed was that:

> 'On 18 March 2020 you tested positive for dagga in your system whilst within (inside) the workplace (on duty).'

[5] It is evident from the transcribed record that procedural fairness was not in dispute. In respect of substantive fairness, the Applicant's case was premised on the averment that there was no valid reason for dismissal as the Respondent does not have a rule or policy that states that *"once one tested positive for dagga that will warrant dismissal"* and that the Constitutional Court has decriminalised dagga because dagga *"is not a drug, it is just a plant, it is a herb".*

[6] The arbitrator found the applicants' dismissal substantively unfair.

[7] 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 charge of misconduct the applicants faced and were dismissed for.

The Respondent's case

[8] The Respondent's first witness, Mr Scrivens, testified that he is the national sales manager and he chaired the applicants' disciplinary hearing. He testified that both applicants pleaded guilty at the internal disciplinary hearing.

[9] Mr Scrivens testified about the Respondent's disciplinary code, which is a formal policy and the fact that being "*under the influence of alcohol or drugs within the workplace*" is an offence for which dismissal is the prescribed sanction for the first offence. He explained that employees may not be under the influence of alcohol or drugs or anything that could alter their minds for a number of reasons. First, it was because of safety considerations. Mr Scrivens testified that the workplace is a dangerous or hazardous environment. Secondly, it was to prevent employees who are being influenced by alcohol and drugs from negatively affecting their co-workers and damaging equipment. He explained that the Respondent takes workplace safety very seriously because it has a moral, civil and legal duty to ensure that the working environment was safe. On the site, there is a high proportion of gas, large forklifts, extremely hot processes and dangerous chemicals. The product the Respondent manufacture is also dangerous as it is very heavy glass, which could potentially cut or crush a person.

[10] Mr Scrivens testified that the Respondent has to follow the regulations to the Occupational Health and Safety Act[1] and that they are very serious about safety and ensuring that the workplace is safe. The Respondent has a zero-tolerance in terms of testing for alcohol or drugs. He explained that when employees are under the influence of alcohol or a drug at work, there is a high risk that they cannot perform their jobs to the required standard and within the required safety regulations, in that they might not realise what danger they are exposing themselves or their colleagues or the plant to.

[1] Act 85 of 1993.

[11] Mr Scrivens testified that both applicants confirmed during the disciplinary hearing that they had a training session on alcohol and drug dependency and that they had attended the policy training.

[12] In cross-examination, Mr Scrivens confirmed that the applicants were dismissed because they were tested and they had dagga in their system and for being under the influence and having drugs in their system in the workplace, the prescribed sanction is dismissal.

[13] In cross-examination, Mr Scrivens was referred to the judgments of the Western Cape High Court[2] and the Constitutional Court[3] wherein cannabis (or dagga) was called a plant and not a drug. It was put to Mr Scrivens that he had dismissed the applicants because he wanted to *"stick to the old stigmatisation of the cannabis, contrary to the Drug Act"* which proposition Mr Scrivens disputed.

[14] It was put to Mr Scrivens that in terms of the Constitutional Court judgment, dagga is a plant, it is no longer stigmatised as a drug and it can legally be used in one's private space for consumption and it is not illegal to possess or consume cannabis. Mr Scrivens agreed that it was not illegal to possess or consume cannabis in one's private space. He explained that although it was allowed to consume cannabis in one's private space, in terms of the Respondent's disciplinary code, an employee was not permitted to be on-site under the influence of alcohol or drugs.

[15] It was put to Mr Scrivens that the applicants did not plead guilty to the charge or the contravention of the Respondent's policy, but they merely confirmed that they used dagga, but not at the workplace. Mr Scrivens disputed that and testified that both applicants pleaded guilty to the charge, as it was read out to them during the disciplinary hearing. Mr Scrivens made it clear that cannabis is recognised as a drug and that is how it was implemented in the Respondent's disciplinary code. He confirmed that any substance that has a mind-altering effect cannot be allowed in the workplace due to the dangerous nature of the

[2] *Prince v Minister of Justice and others* 2017 (4) SA 299 (WCC).
[3] *Minister of Justice and Constitutional Development and others v Prince and others* 2018 (6) SA 393 (CC).

workplace and the provisions of the Occupational Health and Safety Act, which the Respondent has to comply with.

[16] The Respondent's second witness was Mr Klaas Ramaboea, the production manager for laminates. He confirmed that the applicants pleaded guilty at the disciplinary enquiry. He testified about the respondent's disciplinary code and the fact that an employee will be dismissed if he/she is under the influence of alcohol or drugs inside the workplace. The reason is because they work with a dangerous product and if an employee is not in the right state of mind or under the influence of mind-altering substances, it will hinder performance and impact on the safety of the employee and others.

[17] Mr Ramaboea stressed that the Occupational Health and Safety Act is very important and that the Respondent has a zero-tolerance approach insofar as safety in the workplace is concerned.

[18] In cross-examination, Mr Ramaboea was confronted with the proposition that the Respondent's disciplinary code was not in line with the Constitutional Court judgment on the legal use of cannabis. Mr Ramaboea testified that the use of cannabis was allowed in a private place, not in a public place and therefore it is not allowed in the workplace and the Respondent is entitled to say that it is not allowed on its premises.

[19] On 18 March 2020, the applicants attended training and Mr Ramaboea explained that they received training on the cranes or forklifts, which would require them to attend a classroom type of training as well as physically moving a crane or forklift. He testified that on the day the applicants would not have endangered anyone.

[20] The last witness for the Respondent was Ms Samson, an occupational health nurse. Ms Samson performed the drug test on the applicants and she explained the procedure followed and that the outcome was that both tested positive for tetrahydrocannabinol (THC), which is a derivative of dagga, or as Ms Samson explained, the scientific name for it.

[21] Ms Samson testified that the test conducted is a multi-drug test. In cross-examination, the Constitutional Court judgment was canvassed with Ms Samson and she was asked whether she still regarded dagga as a drug. Ms Samson explained that dagga was a mind-altering substance.

[22] It was put to Ms Samson that the reason why she had told the Respondent that the applicants tested positive for the drug was because the Respondent's system was not changed from where it stigmatised dagga to be a drug to what it is according to the Constitutional Court, a plant. She disputed the applicants' version.

[23] Ms Samson confirmed that dagga can be used in a private space, but at the Respondent's workplace, the Occupational Health and Safety Act applies and it clearly states that an employee cannot be under the influence of alcohol or a substance. The workplace is dangerous and if employees are under the influence of a substance that alters their minds, it is even more dangerous and it poses a safety risk.

The Applicants' case

[24] Mr Nhlabathi testified that he was aware of the Respondent's policy on alcohol and drugs, but stated that he was not aware that if he was found to have dagga in his system, it would constitute misconduct. He disputed that he contravened the policy because he did not use drugs, but had used dagga three days before he reported for work. According to Mr Nhlabathi, dagga is not a drug and he explained that he was employed in 2016 and since he was employed, he had been smoking dagga and had been doing his job properly. Whatever he did with dagga, he did it at home and not when he was at work.

[25] Mr Nhlabati testified that the Respondent was wrong to dismiss him because dagga is *"lawful and it is right for someone to smoke it in a private space because I was also smoking dagga in a private space".* He testified that he did not have a dependency problem.

[26] During cross-examination, Mr Nhlabathi agreed that he attended the training on the alcohol and drug policy and that the Occupational Health and Safety Act

was very important in the workplace. Mr Nhlabathi testified that safety in the workplace was important because *"we work with glass and glass can cut. We use forklift and we also use furnace which can burn".* He disputed that the Respondent's alcohol and drug policy related to dagga, as it is one *"of alcohol and substance, not of dagga"* and testified that he was never told that he was not allowed to have dagga in his system.

[27] Mr Nhlabathi conceded that the Respondent has a zero-tolerance for alcohol and any substance. He insisted that the training related to drugs and alcohol, but not dagga.

[28] Mr Mthimkhulu testified that he was aware of the Respondent's alcohol and substance policy, but stated that the policy was silent on dagga and he did not know that if he tested positive for dagga, it would lead to his dismissal and that was only the case in respect of other substances.

[29] Mr Mthimkhulu relied on the Constitutional Court judgment and testified that the said Court found that dagga was a herb and not a substance.

[30] He conceded that he attended training on the Respondent's alcohol and drug policy but insisted that it was not a 'dagga policy' but an alcohol and substance policy.

[31] In cross-examination, Mr Mthimkhulu conceded that he attended the training presented by Elim, an institution for alcohol and substance abuse and that all substances, including dagga, were discussed during the training. He subsequently testified that he was not told that he could face dismissal for having dagga in his system and testing positively for it in the workplace. In re-examination, Mr Mthimkhulu's version was that he could not remember whether it was said during the training that it would be misconduct for an employee to have dagga in his or her system.

[32] Mr Mthimkhulu testified that the Occupational Health and Safety Act was important as it was to protect the health and safety at the workplace and to ensure that he did not endanger or injure the people he worked with.

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

The test on review

[33] 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*[4] (*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.

[34] The Labour Appeal Court (LAC) in *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and others*[5] 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.'

[35] 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 to 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 adduced[6].

[36] In *Herholdt v Nedbank Limited (Congress of South African Trade Unions as amicus curiae),*[7] the Supreme Court of Appeal held that:

> '…the test "is a stringent [one] that will ensure that… awards are not lightly interfered with"… the *Sidumo* test will, however, justify setting aside an award

[4] (2007) 28 ILJ 2405 (CC) at para 110.
[5] (2014) 35 ILJ 943 (LAC) at para 16.
[6] Ibid at paras 18 and 19.
[7] [2013] 11 BLLR 1074 (SCA) at para 13.

> on review if the decision is "entirely disconnected with the evidence" or is "unsupported by any evidence" and involves speculation by the Commissioner.'

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

[38] It is within the context of this test that this application for review is to be decided.

The grounds for review

[39] In her analysis of the evidence, the arbitrator referred to Schedule 8 of the Code of Good Practice[8] and listed the issues she was required to decide.

[40] Regarding the existence of the rule, the arbitrator accepted that the Respondent has a zero-tolerance for testing positive for drugs and alcohol in the workplace, due to the nature of the workplace. The Respondent treated dagga as a drug as it is a mind-altering substance.

[41] The applicants conceded during their testimony that they were aware of the Respondent's policy on drugs and alcohol and that they were told during their training that dagga is regarded as a drug and that they are not allowed to test positive for dagga at work. Their case however was that the Respondent did not have a policy which forbid the use of dagga, as dagga is not a drug or substance.

[42] The arbitrator considered the Applicant's challenge to the fairness of the dismissal based on the fact that the Constitutional Court legalised the use of dagga. The arbitrator accepted that the Constitutional Court judgment legalised the use of dagga in a private space, but it did not overrule the provisions of the Occupational Health and Safety Act, and that the Respondent was by law required to provide a safe working place, which is in any event not the applicants' private space.

[43] The arbitrator found that there was a rule, that the applicants were aware of the rule and that, notwithstanding the fact that the use of dagga was decriminalised

[8] Schedule 8 of the Labour Relations Act 66 of 1995, as amended.

for use in private, the rule was valid and reasonable due to the hazardous nature of the Respondent's business.

[44] The arbitrator found that it was common cause that the applicants tested positive for dagga in the workplace and that the Respondent's evidence that dagga was regarded as a drug, was not challenged. The arbitrator further accepted that the applicants were informed that they could use dagga in their private space but should not test positive for it at work, they tested positive and on a balance of probabilities they breached the rule.

[45] On the appropriateness of the sanction, the arbitrator considered the fact that the Respondent has a zero-tolerance to the breach of the rule, due to the hazardous nature of the business and therefore dismissal was an appropriate sanction.

[46] In argument, Ms Masondo for the Applicant persisted with three grounds for review.

[47] Before I deal with the specific grounds for review, there are a few general observations to be made in respect of the Applicant's case. It is evident from the transcribed record and the grounds for review raised by the Applicant that the Applicant's challenge to the fairness of the applicants' dismissal was premised on their understanding and interpretation of the Constitutional Court's judgment in *Minister of Justice and Constitutional Development and others v Prince and others*[9] (the Constitutional Court judgment). The Applicant's approach was that dagga was not a drug, that it is no longer illegal to use dagga and therefore the use of dagga cannot find its way into an employer's disciplinary code, as it was legal and cannot constitute misconduct. In its opening statement, the Applicant made specific reference to the case law and submitted that *"dagga is not a drug, it is just a plant, it is a herb".*

[48] In the Applicant's closing argument, reference was made once again to the Constitutional Court judgment and it was submitted that it would be irregular for any company to try and change the said judgment and even if there was a policy

[9] supra fn 3.

against dagga, it was invalidated by the judgments handed down in respect of the decriminalisation of dagga. It was argued that the Respondent was wrong by still regarding dagga as a drug and that it was misconduct to have dagga in one's system as *"the long and the short is we are saying there is no policy that could have dismissed the applicants because there is nothing talking to the issue of the dagga, simply because today dagga in South Africa in 2020 is legalised. It is legalised for an individual to use for personal consumption in his private space and there is nothing that forbids the individual to come and work..."*

[49] During the arbitration proceedings, the applicants' representative cross-examined the Respondent's witnesses with specific reference to the judgments of the Western Cape High Court and the Constitutional Court. The propositions put to the Respondent's witnesses are indicative of the Applicant's understanding of their unfair dismissal case and the basis on which the fairness of their dismissal was challenged. It was *inter alia* put to Mr Scrivens that the Respondent has taken a decision *"of dismissing [the] applicants simply because you wanted to stick to the old stigmatisation of the cannabis, contrary to the Drug Act? Because the drug is still there…"* and *"the Western Cape judgment and the Constitutional Court judgment, they do talk on the same thing in terms of the plants, not calling it a drug, but calling it a plant?"*

[50] In response, Mr Scrivens disagreed and testified that dagga was indeed recognised as a drug. The Applicant's representative, Mr Mkoko, insisted that the two judgments he relied on *"have taken away the stigmatisation of calling a plant a drug, but they say it is a plant..."* Mr Mkoko went as far as to state that *"I am not going to waste time with the person who is still uptight in calling a plant a drug…"*

[51] In the cross-examination of Mr Ramaboea, it was put to him that *"…if in 2017, if in 2020 after the judgment again, the Constitutional Court judgment which followed that one, would you, Klaas, choose the company policy to be superior than the Constitutional Court?"* and *"[w]ould it have been constitutional for the company to go contrary to the Constitutional judgment in stigmatising and criminalising anybody who would, or even criminalising the plant?"*

[52] It was put to Ms Samson that *"the reason that you had told management that they had tested positive for a drug is simply because yes, your system has not been changed from where it stigmatised the plant to have been the drug into what it is now, meaning it is a plant according to the Western Cape and the Constitutional Court judgment".*

[53] In my view, it is evident that the Applicant confused issues relating to the decriminalisation of the use of dagga in private and the right to institute criminal proceedings and to prosecute an individual who uses dagga with an employer's right to take disciplinary action against an employee who contravened a disciplinary code.

[54] Mr Mkoko was fixated on the fact that it was no longer a crime to use dagga and in the process of posing questions, he made several misleading statements and propositions, which are not to be found in the cases he relied upon. Effectively, the Applicant's case was that since the Constitutional Court had legalised the consumption of dagga in private, dagga was no longer a drug, as contemplated in the Respondent's alcohol and drug policy.

[55] The Constitutional Court held that the case which was before court, as decided by the High Court, was whether the prohibition by the impugned provisions of the mere possession, use or cultivation of cannabis by an adult in private for his or her personal consumption in private is inconsistent with the right to privacy provided for in section 14 of the Constitution[10] and, therefore, invalid.

[56] The Constitutional Court held that the right to privacy entitles an adult person to use or cultivate or possess cannabis in private for his or her personal consumption. Therefore, to the extent that the impugned provisions criminalise such cultivation, possession or use of cannabis, they limit the right to privacy.

[57] The essence of the Constitutional Court judgment is that it declared specific provisions and sections of the Drugs and Drug Trafficking Act[11] and the Medicines and Related Substances Control Act[12] to be inconsistent with the

[10] Constitution of the Republic of South Africa, 1996.
[11] Act 140 of 1992.
[12] Act 101 of 1965.

right to privacy entrenched in section 14 of the Constitution and, therefore, invalid to the extent that they make the use or possession of cannabis in private by an adult person for his or her own consumption in private a criminal offence and to the extent that they prohibit the cultivation of cannabis by an adult in a private place for his or her personal consumption in private.

[58] In *Prince v President of the Law Society of the Cape of Good Hope*[13] the Constitutional Court held that:

> 'The government objective in prohibiting the use and possession of cannabis arises from the belief that its abuse may cause psychological and physical harm. On the evidence of the experts on both sides, it is common cause that cannabis is a harmful drug.'

[59] The Drugs and Drug Trafficking Act defines a "drug" as "*any dependence-producing substance, any dangerous dependence producing substance or any undesirable dependence-producing substance"*.

[60] The definition of 'drug' refers to three types of substances, being:

1. dangerous dependence-producing substance – "*means any substance or any plant from which a substance can be manufactured included in Part II of Schedule 2*";

2. dependence-producing substance – "*means any substance or any plant from which a substance can be manufactured included in Part I of Schedule 2*"; and

3. undesirable dependence-producing substance – "*means any substance or any plant from which a substance can be manufactured included in Part III of Schedule 2*".

[61] The Constitutional Court declared that, the provisions of sections 4(b), read with Part III of Schedule 2; the provisions of section 5(b) of the Drugs and Drug Trafficking Act ,read with Part III of Schedule 2 and with the definition of the phrase "deal in" in section 1 of the Drugs and Drug Trafficking Act, are

[13] 2002 (2) SA 794 (CC) at para 53.

inconsistent with the right to privacy entrenched in section 14 of the Constitution and, are, therefore, constitutionally invalid to the extent that they make the use or possession of cannabis a criminal offence or prohibit the cultivation of cannabis by an adult, in a private place for his or her personal consumption in private.

[62] The Constitutional Court did not interfere with the definition of a 'drug' nor did it declare dagga or cannabis to be a plant or a herb, as alleged by Mr Mkoko.

[63] It is also evident from the Constitutional Court judgment that it does not offer any protection to employees against disciplinary action should they act in contravention of company policies or disciplinary codes.

[64] The first ground for review is that the arbitrator committed a gross irregularity in reaching a conclusion that there was a rule which was breached. The Applicant's case is that the arbitrator failed to take into account that Ms Samson, during cross-examination, testified that the Respondent did not have a rule which states that if one tested positive for dagga in his system, it would warrant dismissal and that the policy, at the time, had not been finalised.

[65] Furthermore, the Respondent's policy deals with drugs and alcohol, not dagga, which is classified as a plant. The applicants did not use dagga in the course of duty but used it for medical reasons in their private spaces, which is in line with the Constitutional Court judgment that legalised the private use of dagga.

[66] There is no merit in this ground for review. The Applicant's understanding of the evidence is distorted and incorrect. Ms Samson testified that, at the time of the test, the policy was not yet finalised, but was in progress. In re-examination, Ms Samson clarified which policy she referred to and that she indeed referred to the policy on how the tests for drugs or alcohol are to be conducted.

[67] Her evidence was that there is a drug and alcohol policy in place, but the policy on how to do the testing, was still in progress. To state that Ms Samson testified that the policy was not finalised and therefore there was not a rule in place, is opportunistic.

[68] It is evident from the transcribed record that the existence of the alcohol and drug policy was not disputed. The applicants were aware of the policy and they conceded that they were trained on the policy. The issue was rather whether the alcohol and drug policy applied to dagga. In my view, the arbitrator's finding that there was a rule is a reasonable one that is based on the evidence before her. The applicants' attempt to introduce evidence to the effect that the policy did not provide for testing positive for cannabis, that dagga was a plant and not a drug and that cannabis could stay in one's system for a long time, was nothing but opportunistic.

[69] The second ground for review is that the arbitrator's finding that the rule was valid and reasonable is unreasonable in that she failed to consider that the private use of dagga was allowed in South Africa and that she failed to consider the reasonableness of the rule. The Applicant's case is that the rule is vague in that it does not specify what a drug is. Furthermore, Ms Samson conceded that dagga was not a drug and the test she administered was for five different drugs, but not dagga.

[70] This ground for review has no merit and is once again premised on a distorted understanding of the evidence.

[71] Ms Samson explained that the test kit she used, was not a test kit specifically for dagga, but was a multi-drug test kit, which tested for five different types of drugs, namely opiates, cocaine, methamphetamine, THC and amphetamines. She explained that THC was the scientific name for dagga and on the multi-drug test kit, that was the test for dagga. Ms Samson testified that dagga was a mind-altering substance.

[72] It was common cause that the applicants were trained on the alcohol and drug policy and on the evidence presented, it was on a balance of probabilities established that the applicants were informed during the training that dagga was still regarded as a drug and that they should not test positive for it. The arbitrator was satisfied that the applicants knew or ought reasonably to have known that the policy applied to dagga and this finding is not disconnected from the evidence presented and is not unreasonable.

[73] Furthermore, the arbitrator specifically considered the fact that the Constitutional Court legalised the use of dagga in private, but found that it did not overrule the provisions of the Occupational Health and Safety Act and that the Respondent was by law required to provide a safe working place, wherefore the rule was valid and reasonable, considering the hazardous nature of the Respondent's business.

[74] In any event, it is evident from what I alluded to *supra* that the Constitutional Court did not make any declaration on the status of dagga as a 'plant' or 'herb' and did not interfere with the definition of a 'drug'. The applicants' understanding of the judgments they relied upon was either very limited or totally wrong and they moved from a wrong premise when they approached their case as one where dagga was no longer to be regarded as a drug and thus automatically excluded from the Respondent's alcohol and drug policy.

[75] The last ground for review is that the arbitrator failed to consider the appropriateness of the sanction of dismissal.

[76] The Applicant's case is that the arbitrator accepted that dismissal was an appropriate sanction because the Respondent has a zero-tolerance approach, due to the hazardous nature of the business. The arbitrator failed to consider that on the date in question, the applicants were not stationed at any machines, but were attending training, they were not in danger, nor did they pose a danger to other employees, the trust relationship was not broken down, the period of employment and the applicants' clean disciplinary record were not considered as well as the fact that the misconduct caused no harm to the Respondent and progressive discipline was possible.

[77] There is no merit in this ground for review.

[78] In *SGB Cape Octorex (Pty) Ltd v Metal and Engineering Industries Bargaining Council and Others*[14] (*SGB*), the employee tested positive for THC and was subsequently dismissed. He referred an unfair dismissal dispute to the bargaining council where the arbitrator found that his dismissal was

[14] Unreported judgment under case no JA90/2021, delivered 18 October 2022.

substantively unfair on the grounds that *inter alia* he had pleaded guilty after the tests were conducted, he was employed for more than four years, the employer suffered no prejudice, that he had a clean disciplinary record, that the employee occupied a supervisory position and that the employment relationship could be restored. The LAC disagreed with the arbitration award and found that, taking into account the nature of the appellant's business, its zero-tolerance policy on the use of substances in the workplace and that it had imposed similar sanctions on former employees, the review ought to have succeeded.

[79] In *Enever v Barloworld Equipment, a division of Barloworld South Africa (Pty) Ltd,*[15] the employee was using cannabis in order to improve her health and decrease her dependence on prescribed medications. The employee occupied a desk position and she was not required to operate heavy machinery or to drive any of the employer's vehicles and she had a clean disciplinary record. The employer has an alcohol and substance policy of which the employee was aware. At the time the employee was tested for dagga, she was not impaired in the performance of her duties, nor was she performing any duties for which the use of cannabis would be said to be a risk to her own safety or that of her colleagues. The employee was dismissed for repeatedly testing positive for cannabis and breaching the employer's alcohol and substance abuse policy. She referred an unfair discrimination dispute and an automatically unfair dismissal dispute to the Labour Court. in discussing the employer's alcohol and substance policy, the Court held that everyone is entitled to use cannabis in their own space and for recreational or medicinal purposes. Similarly, everyone is entitled to consume alcohol in their own private space and time. This however does not mean that if an employee consumed alcohol the previous night and happens to test positive, the employer would have to take cognisance of the fact that such alcohol was consumed in the employee's private space and time. The respondent's policy will be applicable across the board. The Court further held that:

[15] [2022] 10 BLLR 962 (LC).

'[22] It also does not matter whether the applicant did not smoke or consume the cannabis at work or during office hours but that the consumption occurs after hours and outside the respondent's premises. The respondent led evidence that, owing to the highly dangerous operations in its premises, it had a zero tolerance approach to working under the influence of alcohol or drugs. The employees were aware of this and all (alcohol and substance) employees are being treated the same way in line with the respondent's policy. I concur with the respondent that if the applicant's argument is anything to go by then this means the respondent should create a policy dealing with alcohol and then another one dealing with substances, alternatively each policy for each employee's situation. This will create a rather cumbersome working environment for the respondent and its employees.

[23] Whilst the applicant raises the Constitutional Court case which decriminalised/legalised the use of cannabis in private space, which case law I am aware of but I am not going to get into that fray at this stage, I am however strongly of the view that the respondent, in light of its dangerous environment, is entitled to discipline and dismiss any employee who uses cannabis or is under the influence whilst at work in contravention of its policy. Unfortunately, the Constitutional Court judgment does not offer any protection to employees against disciplinary action should they act in contravention of company policies. While I note that the applicant herself did not engage in such dangerous services, there is nonetheless no question that the respondent has a workplace that is fraught with danger. The applicant tested positive for cannabis and continued to test positive simply on her perpetuated act of consumption of the substance which she made it rather clear that she will not refrain from.'

[80] The court noted a difference between the effects of alcohol and cannabis and held that there is no question that, unlike alcohol which leaves an individual's bloodstream within a few hours after consumption, cannabis may remain present in an individual's system for a number of days or up to weeks and that tests for cannabis do not demonstrate the degree of impairment of the employee's ability to perform her or his duties. Unlike alcohol, one cannot determine a level of impairment based on test results. Proof of impairment is

therefore not required as with alcohol, it is automatically assumed that one is under the influence of cannabis due to its intoxicating nature.

[81] In *SGB,* the LAC confirmed that an employer is entitled to set its own standards to enforce discipline in its workplace. In *Rustenburg Platinum Mines Ltd (Rustenburg Section) v Commission for Conciliation, Mediation and Arbitration and others*[16]*,* the court referred with approval to Myburgh and Van Niekerk[17] where they suggested that:

> 'The first step in the reasoning process of the commissioner should be to recognise that, within limits, the employer is entitled to set its own standards of conduct in the workplace having regard to the exigencies of the business. That much is trite. The employer is entitled to set the standard and to determine the sanction with which non-compliance with the standard will be visited.'

[82] The Respondent is entitled to set its own standards of conduct. Considering the hazardous workplace where employees work with glass, chemicals, furnaces and operate cranes and forklifts and the provisions of the Occupational Health and Safety Act, which are applicable and enforced as a matter of importance, the Respondent has a zero-tolerance in respect of contraventions of its alcohol and drug policy.

[83] The Applicant did not dispute at any point that the workplace was hazardous and that the zero-tolerance application of the policy was necessary and justified.

[84] The mitigating factors raised by the Applicant in this review application are of no relevance where the employer consistently applied its policy with zero-tolerance. In my view, it matters not that the applicants used dagga in private, that they posed no danger on the day they tested positive for dagga, that their period of employment was not insignificant or that they had a clean disciplinary record. It was undisputed that the Respondent applied the alcohol and drug

[16] (2006) 27 ILJ 2076 (SCA) at para 46.
[17] J Myburgh and A Van Niekerk '*Dismissal as a Penalty for Misconduct: The Reasonable Employer and Other Approaches*' (2000) 21 ILJ 2145.

policy with zero-tolerance for contravention thereof, due to its hazardous workplace and its duty to provide a safe working environment.

[85] Zero-tolerance means that a particular type of behaviour or activity will not be tolerated at all and a zero-tolerance policy is one that does not allow any violations of a rule. How many dependants an individual has or how many years of unblemished service he or she has rendered, or any other mitigating factor for that matter plays no role where a zero-tolerance policy is followed and consistently applied. The only factors that are to be considered are whether the employee was aware of the zero-tolerance policy, whether it was consistently applied and whether it is justified in the workplace. *In casu,* the applicants were aware of the zero-tolerance policy, it was applied consistently and it was justified due to the hazardous nature of the workplace and the Respondent's duty to provide a safe working environment.

[86] Dismissal was an appropriate sanction and the arbitrator's findings in this regard are reasonable.

Conclusion

[87] I considered 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 him.

[88] In *Quest Flexible Staffing Solutions (Pty) Ltd (A division of Adcorp Fulfilment Services (Pty) Ltd) v Lebogate,*[18] the LAC confirmed the test to be applied on review:

> '[12] 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

[18] (2015) 36 ILJ 968 (LAC) **at para**s **12 and 13.**

whether the result of an arbitrator's award is unreasonable, the Labour 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.

[13] 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.'

[89] The review test to be applied is a stringent and conservative test.

[90] *In casu,* I am satisfied that the arbitrator's findings fall within a band of reasonableness based on the evidence that was placed before her and there is no basis for this Court to interfere with it on review.

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

Order

1. The application for review is dismissed;
2. There is no order as to costs.

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Connie Prinsloo

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Ms N Masondo from Mabaso Inc Attorneys

For the First Respondent: Mr C Kirchmann of Kirchmanns Inc Attorneys