Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA,

HELD AT CAPE TOWN

Case No's. C999/2014
C1000/2014
C1001/2014
C1002/2014
C1003/2014

In the matter between:

PATRICK PRINS Applicant

and

THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION (CCMA) First Respondent

HOWARD ADAMS N.O. Second Respondent

SCHOONIES FAMILY TRUST t/a OP DIE TRADOUW PLAAS Third Respondent

and in the matter between:

CHRISTINE RABIE Applicant

and

THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION (CCMA) First Respondent

HOWARD ADAMS *N.O.* Second Respondent

SCHOONIES FAMILY TRUST t/a OP DIE TRADOUW PLAAS Third Respondent

and in the matter between:

DARIUS OKTOBER Applicant

and

THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION (CCMA) First Respondent

HOWARD ADAMS *N.O.* Second Respondent

SCHOONIES FAMILY TRUST t/a OP DIE TRADOUW PLAAS Third Respondent

and in the matter between:

JOSEPH OKTOBER Applicant

and

THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION (CCMA) First Respondent

HOWARD ADAMS *N.O.* Second Respondent

SCHOONIES FAMILY TRUST t/a OP DIE TRADOUW PLAAS Third Respondent

and in the matter between:

ISAK RABIE Applicant

and

THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION (CCMA) First Respondent

HOWARD ADAMS *N.O.* Second Respondent

SCHOONIES FAMILY TRUST t/a OP DIE TRADOUW PLAAS Third Respondent

Heard: 24 March 2017

Delivered: 26 April 2018

Summary: (Review – dismissal for intoxication and other misconduct – sufficient basis in the main for findings of procedural and substantive fairness – limitations in arbitrator's reasoning or handling of enquiry unlikely to have materially affected outcome if corrected – application dismissed – launching of separate review applications in respect of a single award an abuse of process)

JUDGMENT

LAGRANGE J

Background

[1] There are five individual applicants in this matter, namely Mr P Prins ('Prins'), Ms C Rabie ('Ms Rabie), Mr D Oktober ('D Oktober'), Mr J Oktober ('J Oktober') and Mr I Rabie ('Mr Rabie'). The applicants launched five separate review applications in respect of a single award issued by the Second Respondent under CCMA case number WECT 9346-14, dated 19 August 2014. The separate applications were consolidated and heard together. The applicants were all permanent employees residing on a fruit farm of the third respondent ('Schoonies'). In essence, the applicants had all been dismissed for being under the influence of alcohol and other misconduct on 2 June 2014, with the exception of Ms Rabie who was only charged with being under the influence of alcohol. The additional misconduct the remaining four applicants were charged with, related to

driving a crop spraying tractor whilst intoxicated, and, in the case of D Oktober, threatening behaviour.

[2] More specifically, Prins, Mr Rabie and J Oktober were all charged with being under the influence of alcohol whilst on duty and driving a vehicle in that state. D Oktober was also charged with the same misconduct and in addition was charged with aggressive behaviour towards another employee. Ms Rabie was charged with being under the influence of alcohol whilst on duty. At the disciplinary enquiry, Prins, J Oktober and Mr Rabie pleaded guilty to the charges against them. D Oktober pleaded guilty to the charges of being under the influence of alcohol at work, and driving a company tractor, whilst under the influence, but denied threatening a fellow employee. Ms Rabie pleaded not guilty.

[3] The arbitration proceedings were conducted in Afrikaans with the arbitrator offering to translate anything addressed to him in English. The arbitrator upheld the substantive and procedural fairness of all the applicants' dismissal.

Grounds of review

[4] The grounds of review are similar and are summarised below.

Reasonableness

[5] Firstly, the applicants contended that the arbitrator's findings are ones that are unreasonable in the sense that no reasonable arbitrator could have reached those findings on the evidence before him.

[6] Their specific criticism in regard to his finding that the dismissals were procedurally fair is that the arbitrator failed to consider that:

6.1 the chairperson had already made up his mind on the applicants' guilt and after the enquiry, they were given forms to sign indicating that they were guilty of the alleged offences;

6.2 in accepting guilty pleas, he did not clarify whether they understood what they had pleaded to;

6.3 somebody else should have chaired the enquiry, and

6.4 the applicants' appeal was never considered by the employer and even though they specifically raised this as an issue in the arbitration the arbitrator failed to deal with the fact that the appeal was still outstanding.

[7] In relation to the arbitrator's findings on the substantive fairness of the dismissals, the applicants complain that the arbitrator:

7.1 failed to consider the credibility of the applicants version and only dealt with the credibility of the employer's witnesses;

7.2 found that they were under the influence of alcohol based on insufficient evidence, in the absence of evidence of a breathalyser test being provided, and

7.3 there was no evidence to gainsay their evidence that they completed their work without hindrance, despite being under the influence of alcohol.

Irregularities in the conduct of the arbitration proceedings

[8] The applicants contend that the arbitrator committed a fatal reviewable irregularity in failing to appoint an interpreter on the first day of the hearing instead of offering to interpret anything said in English himself. At the start of the arbitration proceedings, the arbitrator said:

> "I will conduct the proceedings as far as possible in Afrikaans, that the employer's representative will address me in mission and where there is a need will try and translate what he says to the applicants."

In particular, the applicants complain that the evidence of Mr E De Flemingh ('De Flamingh') pertaining to the procedural fairness of the enquiry was given in Afrikaans but the questions put to him by the employer were in English and were not translated. They claim they were severely prejudiced by this particularly because they were unfamiliar with issues pertaining to procedural fairness

[9] Secondly, the applicants claim that the arbitrator failed to properly assist them as unrepresented parties. The basis for this claim is the arbitrator saying on the second day of the hearing that the enquiry must finish on

that day despite the fact that the employer still had to lead evidence of four witnesses and the applicants still had to conduct their own case. This placed them under undue pressure and prejudiced the conduct of their case.

Evaluation

Procedural findings challenged on grounds of unreasonableness

[10] Firstly, it is trite law that the failure of an employer to conduct or conclude an appeal hearing is not something which renders a dismissal procedurally unfair. The LRA does not require an employer to hold an appeal hearing, and an employee is entitled to refer an unfair dismissal dispute to the CCMA without lodging an appeal or waiting for the outcome thereof. All that Item 4 of Schedule 8 to the Labour Relations Act, 66 of 1995 ('the LRA') requires is a right to an enquiry, save in exceptional circumstances. The necessary procedural components of that process are limited. See ***Avril Elizabeth Home for the Mentally Handicapped v CCMA***[1]. Further, no evidence was advanced of any particular prejudice the applicants had suffered as a result of their appeal not having been considered.

[11] In relation to the complaint that the arbitrator apparently ignored evidence that the chairperson had already made up his mind on the applicants' guilt, that complaint is based on the following portion of De Flamingh's evidence:

> "… Ek het elke een apart gedoen en gese luister, nee okay, jy verstaan waarvoor jy hier is en jy is skuldig nog, ons het jou skuldig – nog geteken daarvoor. Daar was nog 'n (tussenbuide)
>
> Employer's Rep: So they pleaded guilty to these charges.
>
> Mnr De Flamingh: Korrek
>
> Employer Rep: okay so there was no-did they understand what they were pleading guilty to?
>
> Mnr De Flamingh: Ek vertrou so ja"

[1] [2006] 9 BLLR 833 (LC) at 838–839

Apart from the fact that this evidence is not altogether coherent in all respects, it appears that De Flamingh was making reference to the fact that, most of the applicants had signed admitting their guilt, which is not the same as pre-determining the outcome of the enquiry. De Flamingh's last comment, and evidence bearing on the applicants knowledge of the charges they were facing is discussed below. The applicants also appear to base their claim that De Flamingh should not have chaired the enquiry on his alleged conduct of the enquiry, not on the basis of any prior knowledge or other predisposition he might have displayed before the enquiry. It is difficult to see how his conduct of the enquiry could have been foreseen by Schoonies, assuming it had been improper. The applicants did not advance in the separate ground why De Flamingh should not have been entrusted with conducting the enquiries in the first place, so I am at loss to understand why the arbitrator was unreasonable to in not finding he should never have been appointed as chairperson.

[12] On the question of whether they could have understood what they were pleading guilty to, there was no evidence to the effect that they did not understand the nature of the charges and that they had pleaded guilty in error because of such a misunderstanding. In fact, at one stage during De Flamingh's evidence, the Commissioner clarified with the applicants if they had got notice of the enquiry, knew what the charges were and had enough time to prepare for the enquiry. Two of the applicants positively confirmed this and none of the other applicants disputed that. Although the disciplinary procedure forms were in English, the charges were expressed in Afrikaans in plain language. At the start of the arbitration in opening statements, the applicants who spoke on behalf of all of them made it clear that they all disputed being under the influence on the day in question and that they had signed the disciplinary enquiry documents, presumably including the admission of guilt, without having time to consider them. However, De Flamingh was not specifically challenged on his testimony that they all confirmed their guilty pleas when he went through the document with them individually during their hearings. On what was before the arbitrator his conclusion that they understood the charges was not unreasonable. Whether the arbitrator committed a

reviewable irregularity in not advising the applicants how to conduct their cross-examination and whether this might have affected the arbitrator's findings is dealt with later

Substantive findings challenged on grounds of unreasonableness

[13] The applicants complain that the arbitrator made credibility findings about the employer's witnesses without considering the credibility of their evidence. It is true that on more than one occasion, the arbitrator commented that the evidence of employer witnesses was forthright and direct, but it is also clear that the arbitrator considered the general probabilities taking into account the fact that the employer witnesses in many instances corroborated each other's testimony. He also considered whether they had an improper motive to implicate the applicants. It is true that some of the applicants in their evidence in chief offered possible explanations why one or two of the witnesses might have had some negative feelings towards them, but none of them offered an explanation why all the witnesses would be trying to implicate them, apart from their suspicions never being tested with a witness whose motives they sought to impugn. The arbitrator provided a relatively detailed account of each witness's evidence pertaining to the alleged misconduct and conducted a separate analysis of the evidence relating to each applicant. It is apparent that even though credibility featured in his findings, it was by no means the only factor he considered and also considered the plausibility of the applicants' versions.

[14] Ms Rabie:

14.1 In relation to Ms Rabie, it is true that the arbitrator found that Ms F de Waal ('de Waal') was direct, clear and confident in the way she testified and did not give the impression of been untruthful. He did not specifically comment on the credibility of Ms Rabie but dealt with the fact that it appeared to be common cause that she had been observed to be verbally abusive and had explained her behaviour on

the basis that she was angry without providing any explanation for her anger. de Waal's evidence had been that, Ms Rabie was not performing her work and was sitting on a crate in the middle of the morning and her manner of speech was not characteristic of her when she was sober. The arbitrator was incorrect in finding that Ms Rabie provided no alternative explanation for her anger. However, Mr D Hess ('Hess') also heard her abusive speech and deduced she was under the influence of liquor because was standing next to a tree and could not stand up straight. On the other hand, she did not challenge de Waal's evidence that both before and after the lunch break she sat on a crate and did no work. Only when she gave her evidence in chief that she insist that she was working the whole day and suggested that de Waal might have misinterpreted her causing the collapse of a tree stump owing to being under the influence. She had previously been sawing the tree and it broke when she sat on it as she was a heavy person.

14.2 On Sunday, she had been celebrating the birthday of her grandchild. Though she readily admitted to drinking beer and strong liquor from approximately 13h00 on Sunday until 01h00 that night, she vehemently denied she was under the influence of alcohol on Monday. It was common cause she had a previous warning in March for being drunk on duty. Irrespective of whether credibility findings affected the arbitrator's evaluation of the case against Ms Rabie, it was perfectly competent for him to have reached those findings on an assessment of the evidence and the inherent probabilities of the contrary versions.

[15] D Oktober:

15.1 In the case of D Oktober, no less than three witnesses gave evidence of their observations of him which pointed to him being under the influence of alcohol in varying degrees and driving the tractor after being confronted about his condition. De Waal testified that she saw D Oktober also driving the tractor under the influence and could tell he was drunk from the look of his eyes. Mr J Joubert

('Joubert') testified that D Oktober had threatened to stab anyone who entered a store he was sitting in even if it meant he would be jailed. D Oktober did not directly challenge Joubert's evidence about his threatening behaviour, nor did he challenge his evidence that he appeared to be drunk at the time, but later when he gave his own testimony, he agreed he drove the tractor to the store when his supervisor came and told them they must clock out because he heard they were drunk. However, he denied threatening Joubert or anyone else with the sheep shears.

15.2 Hess testified that he found D Oktober lying on the tractor and when he tapped him on the shoulder he opened his eyes slightly and then his head fell down again. D Oktober put it to him that he was simply tired but Hess said then he would have sat up when he tapped him on the shoulder and not simply let his head fall again which showed that he was drunk. D Oktober admitted lying on the tractor and claimed it was during his break and that he did acknowledge Hess when he greeted him. D Oktober volunteered that he had been drinking from approximately mid-day on Sunday to about 01h00 on Monday morning during which four of them had consumed 7 litres of wine, of which he estimated he drank 3 litres,L but the next morning he got up and was perfectly sober. He also suggested that Hess had a motive to lie because he had once complained to him that he was working alone without any assistance and they had a disagreement about that. However, Hess was never confronted with this under cross-examination.

[16] Mr Rabie:

16.1 Mr M Plaatjies ('Plaatjies') confirmed that when Mr Rabie clocked in on that Monday morning he was alerted by Mr H Afrika ('Afrika') to Mr Rabie's condition and accused him of being drunk but Mr Rabie simply looked at him and was unable to even respond. Afrika testified that he saw that Mr Rabie did not look right. He he told him this and said he should go home and clock out. According to him, he could see from his face that he was drunk. He was swaying and could not

stand properly on his feet. He also heard Plaatjies telling Mr Rabie to leave, but he did not respond and did not clock out. He did not do anything further because there had been previously been an incident where someone had threatened to stab him with screwdriver and he was not prepared to endanger himself again. Hess saw Mr Rabie on the tractor entering the orchard as he was leaving and that he could not sit up straight and he warned him that he had fallen into the same condition as the others. De Waal claimed that during the same day she noticed that Ms Rabie, J October and Prins were drunk and she advised them to go home. However, she did not do anything further when they did not because she was not their supervisor. She also saw Mr Rabie on the tractor at a certain stage.

16.2 Mr Rabie said he worked a normal day spraying the orchard and it was only in the afternoon and they were approached by the supervisor, Mr A Pienaar, who said he'd heard that they were drunk and they should go home. When Mr Rabie disputed this with the supervisor, the supervisor simply said he was carrying out instructions conveyed to him by Hess. He admitted drinking from about midday on Sunday but claimed to have been in bed by approximately 20H30. Ms Botha, his wife, who also worked on the farm, confirmed that they arrived home about that time and that he was not drunk, though she agreed that they had both been sharing a 2 litre bottle of wine around midday on Sunday. She admitted they had been at Ms Rabie's house that evening but that there had been no party in progress there when they at the house that evening. However, she did confirm that Ms Rabie was drinking from a 5L bottle of wine and was drinking beer. She further testified that when she saw her husband later the next day in the orchard he was not under the influence.

16.3 Mr Rabie also said he was sober the next morning. He did not know why de Waal would say he was drunk, except that she had previously said she would help De Flamingh get rid of all of "us Dysseldorp people". Like most of the other imputations of bad faith on the part of employer witnesses, this was never tested with de

Waal when she testified. Somewhat implausibly, Mr Rabie claims he never questioned de Waal about this when she testified because he had told her he was not drunk at the time she confronted them. However, in any event, he could offer no explanation why Plaatjies and Afrika would dishonestly give the testimony they did about his condition that Monday. He flatly denied playing the fool on the tractor.

[17] J Oktober:

17.1 Hess testified that he saw J Oktober sitting under a tree with a two litre flagon of wine next to him. J Oktober did not dispute the fact that there was a bottle of wine next to him, but emphasised that was not drinking from it. De Waal also witnessed Prins and J Oktober swapping as drivers on the tractor while it was in motion and spraying the orchard. Earlier she had advised him and others to go home because of their condition. J Oktober contended that he was operating a petrol saw and was not on the tractor, but de Waal said that the trees in that orchard had already been pruned and only stumps remained giving her a clear view of what they were doing on the tractor. J Oktober conceded that he had been drinking with his aunt Ms Rabie and Mr Rabie until late on Sunday but could not recall when he stopped. He recalled they drank 10L of wine but could not recall if other hard liquor or beer was drunk by others. He believed Hess had wrongly associated him with the workers who were sitting next to the bottle of wine and had been presumed to be under the influence on that account. He insisted he had been sober when he arrived at work on Monday. When pressed why Hess or de Waal would have lied about their observations, he could not attributed any ill motives to them. He simply denied playing the fool on the tractor.

[18] Prins:

18.1 De Waal claims she had told him and others to go home because they were drunk. When Prins challenged her evidence that she saw him swapping places with J Oktober on the tractor, she described

how he lifted his leg over the steering wheel for his companion to take over the driving.Their antics caused her to remark on it to another worker alongside her. If his leg had got caught or he had fallen off, the rear wheel of the tractor could have driven over him. J Oktober could not think of any reason why Hess and de Waal would falsely implicate him. According to him, he had not participated in any of the drinking the previous day.

[19] The second complaint of the applicants is that, there was insufficient evidence of their being under the influence of alcohol on the Monday in question, particularly in the absence of evidence of a breathalyser test being provided. The proof of intoxication or of being under the influence of alcohol is not only established through evidence of a breathalyser test. Commonplace observations of how people behave when intoxicated are also relevant. In this instance, there was testimony of more than one witness about the condition or behaviour of the applicants at various stages of the Monday in question. Moreover, except for Prins, all the applicants admitted to copious drinking, though in differing quantities, the previous Sunday. Further, in most cases, they did so until late in the night. Without exception they all somewhat implausibly claimed to have been unimpaired when they stood up for work the next morning. The various observations about their appearance and behaviour from glazed and uncomprehending looks to horseplay on a moving tractor, or sitting immobilised on a crate during working time, or swaying while standing, apart from aggressive forms of behaviour such as in the case of Ms Rabie and D Oktober were consistent with varying degrees of intoxication. The evidence that more than one of them were in this condition was also consistent with their own evidence of most of them being participants in one of two groups of drinkers the previous night and afternoon. In the circumstances, it is difficult to say that there was insufficient evidence for a reasonable arbitrator to find that they were under the influence of alcohol that Monday.

[20] The applicants also argue that there was no evidence that they failed to complete their work tasks that day. From this, they seek to suggest that the arbitrator unreasonably failed to consider if their condition was such

that their work was negatively affected. In turn, if it was not affected, this would suggest they could not have been impaired by alcohol abuse. It would also mitigate the seriousness of any intoxication even if it was found that they were intoxicated. The arbitrator never expressly dealt with this in general terms, except with reference to certain individuals. On the other hand other than evidence that the applicants were in various locations in the orchard, there was little concrete evidence of what they had done or did not do.

[21] To some extent, the applicants' criticism in this respect misses the point. Most of them were involved in spraying poison. Some were on a moving tractor with a tank of poison spray. At least one of them was handling a tree saw. Essentially, it was not disputed that early in the morning before they even began work it was suggested that some of them should go home. There was also undisputed evidence that when the news of their apparent state reached the level of the senior supervisor an instruction was issued that they should clock out and go home. It is apparent from the nature of their work and from management's response that the employer was of the view that it would be better if they were not at work at all either because they posed a risk to themselves or others or because nothing would be achieved by them being on duty. Either way it would not be unreasonable to conclude that the employer's assessment at the time was that there was no value in them continuing to work, which is unlikely if they had been in a competent state to perform their duties safely.

[22] In conclusion, if one has regard to the evidence as a whole the overall probabilities tend to support the conclusions reached by the arbitrator even if he did not expressly evaluate all the evidence in his award. This is not a case where it can easily be said that no reasonable arbitrator could have arrived at the findings he did on the evidence before him.

Alleged irregularities in the conduct of the proceedings

[23] The applicants contend that the arbitrator committed a fatal reviewable irregularity in failing to appoint an interpreter on the first day of the hearing instead of offering to interpret anything said in English himself. Firstly, it was only for a portion of De Flamingh's evidence that no interpreter was

present. Once he had given his evidence in relation to the procedure adopted that the inquiries of D Oktober and Mr Rabie, the record shows that an interpreter was present, though the interpreter's role was limited. The interpreter played a much more active role when translating the evidence of the applicants into English. It is evident from a reading of the transcript that the applicants never complained that they did not understand the evidence that was being given or the questions which were asked. If any party was adversely affected by the absence of interpretation, it was the employer representative who was clearly more comfortable with English and sometimes did not understand answers given in Afrikaans even by the employer's witnesses. All the witnesses testified in Afrikaans which was the preferred language of the applicants as well. On the record of the arbitration, I am satisfied that no demonstrable prejudice was suffered by the applicants in the conduct of their case by gaps in interpretation.

[24] Some further points needs to be made to contextualise that the significance of the temporary gap in interpretation from Afrikaans into English. The period when the interpreter was not available was during part of De Flamingh's evidence. His evidence focused exclusively on the conduct of the proceedings and was as repetitive as the pro forma hearing forms which he adduced in relation to each individual applicant. There was little that was unique about his evidence in relation to different applicants. Moreover, apart from some challenges to the signature of the various hearing documents by the applicants, the applicants appear to be more concerned with the substantive merits of their cases when cross-examining De Flamingh.

[25] To the extent that they did challenge the procedure of the disciplinary inquiries, that challenge related primarily to whether or not some of them and acknowledged their guilt or not. That challenge would only materially affect the outcome of the review if those apparent admissions of guilt were critical in proving the substantive cases against them. Although the arbitrator took them into account, even on his own reasoning they do not appear to have been decisive. Moreover, even if those ostensible admissions are excluded, the arbitrator's findings can still reasonably be

sustained on the remaining evidence. Consequently, I am not persuaded that the applicants were materially prejudiced by a partial limitation of the services of an interpreter on the transcript of the arbitration and the significance attributable to the particular procedural issues in contention during De Flamingh's evidence for that limited portion of his testimony.

[26] The second ground of complaint about the arbitrator's conduct of the proceedings was that on the second day of the hearing he indicated that the hearing had to finish on that day. This comment they raise as evidence of his failure to properly assist them as laypersons. The first point of need to be made is that except in one of two isolated instances where the relevance of one of the applicants' evidence or cross examination to the issues in dispute was difficult to discern, the arbitrator made no attempt to curtail their evidence in chief or cross examination. The arbitrator's express wish to conclude the proceedings, if anything only curtailed the length of breaks during the proceedings. At no stage did anyone complain that they needed more time to prepare questions or indicate that there was still more questions they wished to ask, but were prevented from doing so. It is noteworthy in this regard that the applicants do not make any allegations about issues they were prevented from canvassing at the arbitration by the arbitrator.

[27] It might be argued that the arbitrator was remiss in not advising the applicants what they needed to canvass with De Flamingh, who was the first employer witness to be cross-examined. The main consequence of this is that, there might be reason to believe that, in the absence of such advice, it is possible they did not adequately canvass with De Flamingh their case concerning the signature of the forms or whether they genuinely pleaded guilty to charges at the disciplinary enquiry.

[28] However, at best for the applicants this means the evidence of their 'guilty pleas' at the enquiry stage ought reasonably to have carried little weight in the de novo arbitration hearing. Further, the employer did lead other evidence of their alleged misconduct and the disputed guilty pleas were

not primary evidence implicating them. Moreover, the common explanation given by the applicants for apparently pleading guilty to the charges because their signature appeared on the disciplinary enquiry form was that either the signature was not theirs or they signed it because they were told that Hess would sign the form if they did not. None of them advanced the defence that they pleaded guilty in ignorance of what the charges actually meant. On the basis of the applicant's core defence and the evidence before the arbitrator, it seems unlikely that if the applicants had tested De Flaming more thoroughly about their purported guilty pleas that it would probably have changed the outcome of the arbitration. Accordingly, I am satisfied that any failure of the arbitrator to remind them of the need to do so was not a material irregularity that warrants setting aside the award.

[29] More generally, I have already commented about on the fact that before De Flamingh testified, the arbitrator could and should have been more helpful in advising applicants in general terms what type of issues they needed to canvass with witnesses. However, after De Flamingh's testimony that he did give them reasonable guidance on how to approach cross examination. However, he could never anticipate what issues they might only raise in their own evidence in chief which ought to have been put to the employer's witnesses. When it came to substantive issues concerning whether or not the applicants were guilty of the misconduct they were charged with, for the most part they did put their versions to the employer's witnesses. Their claim that they were not guilty as charged was their fundamental defence.

[30] Consequently, I am satisfied they were able to canvass their essential defence to the employer's case in the arbitration proceedings. They might have done a better job if they had been represented, but it cannot be said that the fact that they did not do a better job is attributable to lack of assistance by the arbitrator. The principal weakness in their conduct of their case was the fact that their version of events was often incoherent or patchy. They also decided, for better or worse, to try and establish a

defence based on a complete denial of intoxication and associated misconduct, which was insubstantial.

Conclusion

[31] In light of the above, I am satisfied that the grounds of review raised by the applicants are either not substantiated by the record, or to the extent that they have some merit, they are not grounds that would have materially altered the outcome of the arbitration, once any probable distorting effect they might have had is corrected. The applicable principle was stated in ***Head of Department of Education v Mofokeng & Others*** :

> [33] Irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide a compelling indication that the arbitrator misconceived the enquiry. In the final analysis, it will depend on the materiality of the error or irregularity and its relation to the result. Whether the irregularity or error is material must be assessed and determined with reference to the distorting effect it may or may not have had upon the arbitrator's conception of the enquiry, the delimitation of the issues to be determined and the ultimate outcome. If but for an error or irregularity a different outcome would have resulted, it will ex hypothesi be material to the determination of the dispute. A material error of this order would point to at least a prima facie unreasonable result.[2]

[32] In passing, it must be said that the employer's categorisation of the applicants' behaviour as misconduct was never in issue and the applicants defended themselves accordingly. Because they did not concede intoxication, the issue of alcohol dependency did not arise in their defence or in argument in mitigation. The facts of the case are a distressing reminder that alcohol abuse remains a social scourge in certain farming communities.

Costs

[33] It was unnecessary for the applicants to launch separate review applications and ordinarily this would warrant an adverse cost award, but I am confident that decision was not one they would have knowingly made

[2] (2015) 36 *ILJ* 2802 (LAC) at 2813

and it would be unfair for them to bear the costs given their circumstances. Had the respondent warned the applicant's attorneys in advance that they were seeking an order *de bonis propris* against the applicants' attorneys for the unnecessary duplication of applications which amounts to an abuse of process, I would almost certainly have been amenable to making such an order, but the respondent did not press for a punitive order.

Order

[1] The consolidated review applications are dismissed.

[2] No order is made as to costs.

Lagrange J
Judge of the Labour Court of South Africa

APPEARANCES

APPLICANTS:	C Carollissen instructed by Regan Brown Attorneys Inc.
THIRD RESPONDENT:	J Forster of Forster Attorneys