



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

CASE NO: C615 /2021

In the matter between:

SASBO THE FINANCE UNION OBO

ALISTAIR STEENKAMP

Applicant

AND

AFRICAN BANK LTD

1ST Respondent

COMMISSIONER ORLANDO MOSES N.O

2ND Respondent

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

3RD Respondent

Heard: 21 June 2023

Delivered: 30 May 2025

JUDGMENT

DUBA AJ

Introduction

- [1] This is an application in terms of section 145 of the Labour Relations Act 66 of 1995 as amended, to review and set aside the arbitration award issued by the Second Respondent (Commissioner) under the auspices of the Third Respondent (CCMA) on 23 September 2021.
- [2] In terms of the award¹ the Commissioner found that the dismissal of the Applicant, Mr. Alistair Steenkamp, was procedurally and substantively fair.
- [3] The Applicant is seeking to review and set aside the arbitration award, which application is duly opposed by the First Respondent.

Background

- [4] The Applicant (Employee) commenced employment on 21 May 2018 holding a position of Customer Relations Consultant. At the time of his termination of employment he held a position as a Driver, earning an amount of R11 140. 74.
- [5] On 23 February 2021, the Applicant received a notice² to attend disciplinary hearing to be conducted on 2 March 2021. The allegations against the Applicant are the following:

¹ Pleadings bundle P.21

² Additional documents P 63 - 64

First charge: Negligence

During the period 25 to 26 October 2019, you allegedly acted in a negligent manner when you left the company speakers, used for marketing, overnight in the vehicle when it was raining, while you were aware of the leaking roof. The speakers got damaged due to your negligence.

On the 28 November 2019, you allegedly acted in a negligent manner by not keeping the company laptop safe whilst it was in your possession, and you lost the laptop due to your negligence.

On 27 November 2020, you allegedly left the company cell phone in an unlocked vehicle without taking proper care, the cell phone was stolen, resulting in loss of R3 899.00

Second charge: Using of vehicle for private use.

During the period January to December 2019, it is alleged that you parked the company bus at times at the residence of a relative without overnight authority. This is in breach with the Bank's rules and policy.

[6] The Employee pleaded guilty on charge one. The chairperson of the inquiry found him guilty on the first charge and not guilty on the second charge.³

[7] Subsequently, the employment service of the employee was terminated on 31 March 2021⁴. A dispute was declared the CCMA for unfair dismissal and the matter was arbitrated, which award is before court.

³ Additional documents bundle P 204 - 215

⁴ Pleading bundle P 10, founding affidavit Par 14

Overview of the analysis

- [8] Before the commissioner, the parties agreed that the central issue for determination was the harshness of the sanction, and consequently whether the dismissal was appropriate under the circumstances.
- [9] On the analysis of evidence and argument the commissioner made the following findings⁵:

38. The Applicant was charged with three allegations of negligence. The Applicant admitted guilty to the allegations. Documents were submitted of the Applicant's statements regarding the allegations wherein the Applicant admitted in the case of the damaged speakers that he was aware of the leaking roof, but he left the speakers overnight in the vehicle. The Applicant's statement regarding the laptop that went missing shows that he kept the laptop between the two seats in the vehicle, which is against the policy, which the forensic report, submitted as evidence, indicates that the laptop must be carried in the vehicle boot. The laptop was stolen out of the vehicle. The Applicant furthermore confirms in his statement that on the day that the cell phone was stolen from the vehicle on 28 November 2020, that the vehicle was unlocked and his statement indicates that he was away from the vehicle for a long period of time. The facts leading to the damaged of the speakers differed in relation to the missing laptop and cell phone. In the case of the laptop and the cell phone the facts were very similar in that company property was stolen, whilst it was in possession of the Applicant. In both circumstances property was removed from the vehicle and no proof of force entry was found. In the incident where the cell phone was stolen, the Applicant admitted that he failed to lock the vehicle. The

⁵ Pleadings P 28

forensic report indicated that in the incident of the stolen laptop, it could not find proof of force entry, which makes it more probable that the Applicant in that instance, also failed to lock the vehicle. Taking into consideration the evidence submitted, I find that the Applicant was indeed negligent when the speakers were damaged and when the laptop and cell phone were stolen.

39. Evidence was tendered that the incidents of negligence did not take place at the same time, with the first incident taking place on 25 and 26 November 2019, the incident of the stolen laptop taking place on 28 November 2019. The cell phone being stolen on 20 November 2020. The Applicant argued that dismissal was inappropriate as a first offence. It was submitted that the Applicant pleaded guilty and showed remorse. Schedule 8 of the Good Practice dismissal provides for progressive discipline, where there exists a good possibility of rehabilitation of the employee. The Applicant may not have had other warnings for similar conduct, however the Applicant in three separate incidents acted in a negligent manner failing to safeguard the equipment entrusted to him. It may have been the first disciplinary process that he was subjected to, but this does not diminish the fact that he was negligent on three separate occasions and failed to learn from earlier incidences of negligence which led to damage to or loss of the employer's property. A period of approximately 11 months elapsed between the laptop and cell phone going missing from the vehicle, which indicates that the Applicant failed to take the necessary precautions to care after the respondent property and no rehabilitation is evident. Taking into consideration the evidence I cannot find the chairperson's considerations were unreasonable and find the dismissal was fair in the circumstances.

The Review.

[10] It is trite that the grounds for review must be supported by totality of the evidence presented during arbitration proceedings. The primary duties of the commissioners were mentioned in *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA and Others*⁶ where the court stated that

“in short, a review court must ascertain whether the arbitrator considered the principal issue before him/her, evaluate the facts presented at the hearing and came to a conclusion which was reasonable to justify the decision he or she arrived at”

[11] The following are grounds which the Applicant relied upon to set aside the Commissioner's award:

- That the Commissioner committed a gross irregularity in excluding relevant information and preventing the Applicant to testify on the seriousness of the misconduct,
- That the misclassification of the nature of misconduct and the finding that the conduct of the Applicant was dismissible
- Failure by the commissioner to have regard to the collective agreement and its objectives to apply corrective and progressive discipline

⁶ [2014] 1 BLLR 20 (LAC)

- Failure by the commissioner to apply his mind to material facts before him pertaining to the trust relationship
- Gross irregularity in that he misconceived the true nature of the misconduct which misinformed his assessment on the appropriateness of the sanction of dismissal.

[12] The court have considered the grounds for review and gave more attention to those that the arbitration award adjudicated upon.

[13] According to the Applicant the principle and primary issue placed before the Commissioner for determination, was whether the sanction of dismissal, within the totality of facts and circumstances on the matter, was too harsh and consequently unfair.

[14] The Applicant further submit that the circumstances and context of a material delay to institute the disciplinary process, the Commissioner's finding of a dismissal being a fair penalty or sanction amounts to a finding, that no Commissioner acting reasonably could have reached. Also considering the potential recommended or prescribed penalties for negligence in terms of the First Respondent disciplinary code under item 38⁷ that:

⁷ Additional documents bundle P 130

Negligence, which may or may not be gross and which may or may not result in a loss to the bank:

Possible sanction:

Written / final written warning - Dismissal

[15] The Applicant averred that the Commissioner prevented him to testify on the seriousness of the misconduct and the incorrect classification of the misconduct. The Commissioner allowed the witness of the First Respondent to infuse evidence that the offence has an element of dishonesty while the Applicant was dismissed for negligent, which had an effect on the conclusion to justify the dismissal.

[16] The First Respondent averred that the Commissioner allowed the parties to present evidence on all the factors and merely directed the parties to reserve some issues for argument. Therefore, an alleged failure to consider the circumstances surrounding the misconduct is not, on its own a fatality as evidence was common cause and the Applicant had already pleaded guilty to the charges, the commissioner was correct in his approach on the dispute.

[17] In my view the Commissioner misdirected and misconceived the issues placed before him as the record indicates otherwise. At the commencement of the

hearing specifically interjected⁸ the parties during the hearing alleging that the issues are not in dispute the evidence already exist and the incidents are not in dispute. As a result, the Commissioner misconceive the nature of the inquiry which lead to no fair trial of issues with the result that the award stand to be set aside on that ground alone.

[18] In the matter of Head of Department of Education v Mofokeng and Others⁹ the LAC held that:

[30] the failure by an arbitrator to apply his or her mind to issues which are material to the determination of a case will usually be an irregularity.

However, the Supreme Court of Appeal in Herold v Nedbank this court in Goldfields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA and Others have that before such an irregularity will result in the setting aside of the award, it must in addition reveal a misconception of the true enquiry or result in an unreasonable outcome.

[31] the determination of whether a decision is unreasonable in its result is in an exercise inherently dependent on variable considerations and circumstantial factors. A finding of unreasonableness usually implies that some other grounds is present, either latently or comprising manifest unlawfulness. Accordingly, the process of judicial review on grounds of unreasonableness often entails examination of inter related questions of

⁸ Transcribe record P 77 – 78 & P 85 - 86

⁹ (2015) 36 ILJ 28002 (LAC)

rationality, lawfulness and proportionality, pertaining to the purpose, basis reasoning or effect of the decision, corresponding to the scrutiny envisioned in the distinctive review grounds developed casuistically at common law, now codified and mostly specified in section 6 of the Promotional of Administrative Justice Act (PAJA), such as failing to apply the mind, taking into account irrelevant considerations, ignoring relevant considerations, acting for an ulterior purpose, bad faith, arbitrary or capriciously etc. The court must nonetheless still consider whether, apart from the flawed reasons of or any irregularity by the arbitrator, the result could be reasonably reached in light of the issues and the evidence.

Moreover, judges of the labour court should keep in mind that it is not only the reasonableness of the outcome which is subjected to scrutiny. As the SCA held in Herold, the arbitrator must not misconceive the inquiry or undertake the inquiry in a misconceived manner. There must be a fair trial of the issues.

[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 inquiry. 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 inquiry, the delimitation of

the issues to be determined and the ultimate outcome. If the 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. The reviewing judge must then have regard to the general nature of the decision, in issue, the range of relevant factors informing the decision, the nature of the competing interest impacted upon by the decision, and then ask whether a reasonable equilibrium has been struck in accordance with the objects of the LRA. Provided the right question was asked and answered by the arbitrator, a wrong answer will not necessarily be unreasonable. By the same token, an irregularity or error material to the determination of the dispute may constitute a misconception of the nature of the inquiry so as to lead to no fair trial of the issues, with the result that the award may be set aside on that ground alone.

[19] Another ground which the Applicant wants to rely upon, that the Commissioner committed a reviewable irregularity in not making a finding on a material issue, being whether it was fair for the First Respondent to rely on the Applicant's actions in October and November 2019, in support of its justification for the fairness of his dismissal, which was clump with the actions of November 2020 to justify the dismissal.

[20] Immediately after the incident of October and November 2019 occurred the First Respondent effectively had a knowledge of the damage and loss of the its

property, and the Applicant reported the incidents with South African Police Service.

[21] The extensive delay in instituting the disciplinary action against the Applicant, was raised during the arbitration proceedings specifically at cross-examination¹⁰ of the First Respondent's witnesses.

[22] In response the First Respondent testified about the investigation which the investigator fell and sick and hospitalized, but failed to provide proof to that effect or to call the investigator and his absence was not explained.

[23] The allegedly details about the illness of the investigator, when he became ill and hospitalized, when he discharged remain unexplained.

[24] In addition, the failure of the First Respondent to transfer the investigation to another investigator, when it became apparent that the investigator is unable to complete the investigation within a reasonable time in accordance with their disciplinary code was unexplained.

[25] The fact that the First Respondent ultimately dismissed the Applicant for repeated acts of negligence by clumping the separate incidence together in one charge which occurred in October and November 2019 and November 2020.

The First Respondent was required to explain why it would be fair to combine

¹⁰ Transcribe record P 12

the three incidents, occurred over a period of 13 months, and in doing so that dismissal was a fair penalty in the circumstances.

[26] In terms of the award the Commissioner accepted that the First Respondent was entitled to have regard to all the incidents to be clump together and the decision to dismiss the Applicant for negligence on three separate occasion being fair.

[27] The First Respondent argue that the Applicant seeks to draw connection between the passage of time between the various incidence and the decision to charge the Applicant with the misconduct. The waiver was not argued before the commissioner. It is not open to the Applicant to introduce waiver on review. This ground for review should be dismissed for this reason alone.

[28] The Commissioner's assessment of the seriousness of the misconduct was therefore reasonable in the circumstances.

[29] It is readily apparent from the evidence on the record that the First Respondent disciplinary code¹¹ states that:

- Administering of discipline in the workplace is the duty of management, which will be administered in a fair, just, consistent and equitable manner.

¹¹ Additional documents bundle P 117 - 122

- The disciplinary code is necessary for the effective operations of the bank and the fair treatment of employees, and ensures that employees:
 - Have a fair hearing in a formal or informal setting
 - Are timeously informed of allegations of misconduct
- Management and/or Group Forensic Services should initiate a compliant within a period of thirty days or within a reasonable time, after management has become aware of such an allege or compliant subject to the following conditions:
 - The bank however reserves the right to initiate disciplinary hearings outside the 30 day period in circumstances where an investigation takes longer than anticipated and or the compliant or allege offence is complex in nature, or for any other reason, and
 - The bank hereby undertakes not to unreasonably delay the initiation of the proceedings.
- The bank should endeavor to expeditiously conduct the factfinding investigation and proceed with a disciplinary enquiry.

[30] The Applicant submit that the First Respondent Disciplinary Code confers a general intention to initiate disciplinary action within 30 days after the relevant events has come to their knowledge. At the same time reserves its right to

institute such proceedings outside the 30-day period within a reasonable time and not to unreasonable delay the initiation of the proceedings

[31] Under the circumstances, it is the Court finding that the Commissioner failed to consider the delay which is in contravention with the First Respondent disciplinary code to institute the disciplinary action within a reasonable time, while the First Respondent relied on all three incidents of negligence to justify the decision to dismiss the Applicant. Considering the fact that the Applicant extensively challenged the delay, the First Respondent was required to explain that the delay to institute the disciplinary action was reasonable and fair. Even the Labour Relations Act one of its fundamental purpose was to establish a system for the quick adjudication of labour dispute.

[32] The Applicant argued that the Commissioner concluded that the penalty of dismissal was fair in this matter because the Applicant was guilty of negligence and no rehabilitation is evident.

[33] The Applicant referred to the First Respondent disciplinary code dealing with the manner of approach and possible penalties for the offence of negligence, specifically that disciplinary ought to be approached in the first instance and in a progressive manner.

- [34] It is common cause that the Applicant pleaded guilty to the charges of negligence, the Applicant submit that was indication of being remorseful and did not wasted time of the First the Respondent.
- [35] The Applicant even sign a salary deduction form as per the policy to pay the cell phone back, in evidence he testified that if he was given the opportunity to reimburse the laptop and the speakers he would have done so.
- [36] During cross examination the Applicant undertook not to allow the incidents happen again under his supervision. The Applicant accepted his wrong doing and genuine remorse. The commissioner failed to consider such a mitigating factor for the Applicant.
- [37] The Commissioner accepted the fairness of the First Respondent reliance on all three incidents, effectively held the overring factor for consideration herein is the that the Applicant failed to learn from earlier instances of negligence and that no rehabilitation is evident.
- [38] Further the Commissioner should have decided why, it was fair to opt for the most severe of the three possible prescribed penalties herein being dismissal.
- [39] The First Respondent argued that the Commissioner was obligated to implement progressive discipline, which is incorrect. In fact, the Commissioner's award proves that he considered progressive discipline and found that the Applicant was not a suitable candidate for progressive discipline.

[40] The Commissioner applied his mind to the fact that the Applicant was persistently negligent. Each time he either cause damage to company property and or lost it causing the employer financial loss. Progressive corrective discipline would therefore have not befitted the Applicant considering the repeated negligent conduct by the Applicant.

[41] In the matter of Nemadzivhanani v University of Venda and Others it was held that:

31 "it is so, as was stated in Toyota SA Motors (Pty) Ltd v Radebe and Others that certain acts of misconduct are of such a serious nature that no length of service can save an employee who is guilty of them, from dismissal. This is not one of those matters. There is no indication that the principle of progressive discipline would not assist to adjust any future conduct. A plausible and reasonable justification for the sanction imposed was not shown to exist and dismissal was not shown to be the appropriate sanction"

[42] I agree this is not the matter that progressive discipline cannot assist, as the employee was never disciplined prior the 02 March 2021. Further that future employment exist as the employee was not suspended and the First Respondent trusted him with its similar properties until his dismissal, considering the fact that the First Respondent took more than a year to institute the disciplinary action against the Applicant.

[43] The First Respondent also submitted the Applicant had an obligation to act in the best interest of the First Respondent and specifically to safeguard its assets. He demonstrated by his own conduct that he was an operational risk, and the First Respondent's property was not safe with him. It would be untenable for the First Respondent to retain the service of the Applicant despite continued evidence of gross negligence. The breakdown of employment relationship was therefore self-evident. The Court is referred to the matter of *AutoZone v Dispute Resolution Centre of Motor Industry and Others* where the LAC held that if the nature of the offence is such that it would lead to breakdown in trust, no further evidence would be required.

[44] The Applicant argue that he was permitted to continue with his tasks and in fact, trusted by the First Respondent and he was never suspended at any stage. It was confirmed by the First Respondent in its own version that no disciplinary action, of any kind, was instituted against the Applicant for over a period of 16 months. Submitting that the findings of the Commissioner are unreasonable under the circumstance.

[45] In the matter of *Magumeni Philemon Mathebula v Provincial Department of Agriculture & Rural Development & Land Administration*¹² it was held that:

"The burden is on the employer to provide the reason and evidence to show that it would be intolerable to grant the reinstatement to an employee. In *Booyesen v Safety and Security Sectoral Bargaining*

¹² (2024) 45 ILJ (LAC)

Council and Others, the Labour Appeal Court (LAC) held that the threshold to show intolerability is high and cannot be satisfied by the employer simply reproducing the evidence that was rejected as insufficient at the point of seeking to justify the dismissal. “

“The required high threshold in showing intolerability has to be understood in the context of the value which, as stated in *Equity Aviation Services (Pty) Ltd v Commissioner of Conciliation, Mediation and Arbitration and Other* is to protect the security of employment as envisaged by the section 23 of the Constitution of the Republic of South Africa, 1996.”

[46] In all the circumstances I am persuaded that the Commissioner's award is not one that can be reached by a reasonable decision maker and progressive discipline should have prevailed, as a result the award stand to be reviewed and set aside.

[47] For the reasons given I make the following order:

Order:

1. The arbitration award dated 23 September 2021 under case number WECT5506-21 is reviewed and set aside.
2. The arbitration award is substituted with an order that the Applicant is reinstated from the date of this order and be given a final written warning.
3. The First Respondent to pay the Applicant six months remuneration as back pay.

4. There is no order as to costs.



J Duba

Acting Judge of the Labour Court

Appearances:

For the Applicant:

Adv. C. Goosen

Instructed by:

BJ Erasmus Pieterse Attorneys

For the Respondent:

J. Foster

Instructed by:

Cliff Dekker Hofmeyer Inc