



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR1546/22

In the matter between:

SIMBA (PTY) LTD

Applicant

and

**COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION**

First Respondent

SIMON MAKHUBELA N.O.

Second Respondent

**AGRICULTURAL FOOD AND ALLIED
DEMOCRATIC WORKERS UNION**

Third Respondent

FIGHT SIHLANGU

Fourth Respondent

Heard: 07 May 2025

Delivered: 28 May 2025

JUDGMENT

ASMALL, AJIntroduction

- [1] This is an application in terms of section 145 of the Labour Relations Act¹ (LRA) to review and set aside the arbitration award issued by the second respondent under case no: GAEK2954-22, dated 16 June 2022.
- [2] The second respondent (arbitrator) found that the dismissal of the fourth respondent (Sihlangu) was substantively unfair and ordered his reinstatement and a sum of R 88 774.00, equivalent to seven months' remuneration as retrospective compensation.
- [3] The review application is opposed.
- [4] The unfair dismissal dispute was arbitrated on 19 May 2022 and finalised on 9 June 2022, and the transcribed record comprises 175 pages. The second respondent was employed as a driver of the applicant on 1 December 2018 and was dismissed on 8 December 2021.
- [5] The applicant called two witnesses to testify, and the fourth respondent also called two witnesses to testify, including the fourth respondent.
- [6] The applicant takes issue with the arbitrator's findings, and I will deal with the evidence to the extent that is necessary to consider the grounds for review.

Background facts

- [7] The second respondent was charged with gross misconduct:

¹ Act 66 of 1995, as amended.

‘Unauthorised removal of Company Property: In that on 25 October 2021, you reported 52 cases of different SKUs short on order number S001688883 for Shoprite Daveyton. However, it is confirmed that the vehicle registration CY41TZ-GP was fully loaded on Friday, 22 October 2021. This resulted in a loss of stock to the value of approximately R 11 654.4 which is unaccounted for.’

- [8] The second respondent pleaded not guilty to the charge and was found guilty and dismissed after a disciplinary enquiry was held.
- [9] An appeal was lodged on 14 December 2021, and on 28 February 2022, the appeal outcome upheld the guilty finding.
- [10] The applicant submits that it experiences massive losses annually due to shrinkage. The applicant has found that there has been collusion between the loaders and drivers within its distribution centres (DCs).
- [11] The DCs use advanced warehousing systems to keep track of stock. It has rigorous stock control systems in place. Picking, packing and loading are highly regulated. The applicant has also installed cameras that capture the packing and loading process.
- [12] The applicant has outsourced the loading activities at the DC to a company called Programmed Process Outsourcing (PPO), which is responsible for the loading of the applicant's trucks at the DC.
- [13] Once the truck is loaded, the truck doors will be locked and secured through the placement of two seals on the truck doors, to ensure the integrity of the load and that the stock is not removed after loading and before delivery of the stock.
- [14] The applicant operates its own fleet of trucks at PepsiCo Park DC, where the incident occurred. On 25 October 2021, the fourth respondent reported a shortage of 52 boxes that were to be delivered to Shoprite Daveyton. The truck was pre-loaded on the morning of 23 October 2021, was loaded at gate 32, and the camera footage

was checked. The shipping note for that order clearly shows that 52 cases were picked and delivered to gate 32.

- [15] The PPO case count load control form shows that truck CY41TZ-GP was loaded at gate 32 on 23 October 2021. The route number is the same as the picking order. The load was completed at 06:51, and the truck was sealed with numbers 0245829 and 0245830. Purportedly, 197 boxes were loaded on seven pallets.
- [16] The pallet control note records that seven pallets were issued and seven pallets were returned. However, the video footage shows that eight pallets were loaded onto the truck.
- [17] The gate pass indicated that the fourth respondent was the driver of CY41TZ-GP, the truck was sealed, and the truck left the DC at 06:45.
- [18] The fourth respondent made the delivery on 25 October 2021.
- [19] The video footage shows that eight pallets and 235 boxes were loaded onto the truck contrary to the control form.
- [20] The applicant's witness testified that the truck was not sealed immediately after loading. This witness, Mr Jawahir (Jawahir), also conceded that drivers may not know which truck they will be driving, they do not load the trucks, and they would not know what is loaded onto the truck until they receive invoices. Drivers would also not know when the truck would be loaded and by whom.
- [21] The witness could not identify the specific truck in question from the video, as four trucks were loaded on that specific day. The registration number of the truck could not be identified.
- [22] The witness testified on discrepancies between the documentation and the video footage, in the order for ShopRite Daveyton. He investigated the shortage of the 52 boxes. The video footage showed eight pallets being loaded, but the documents confirmed seven pallets were recorded.

- [23] The witness could not rule out possible tampering of the stock before the truck was sealed, and the possibility of syndicates being involved. The video footage could not confirm whether the truck was sealed when it left the loading bay, leaving room for the possibility of tampering with stock after loading.
- [24] He also testified that three people signed that they had loaded seven pallets. The checker, the loader and the supervisor and they are known to the fourth respondent. He stated that they do experience shortages and extra stock which is common. The applicant submits that the PPO staff were complicit in serious misconduct. They loaded excess stock into the truck. The loader and cage controller resigned when confronted with the allegations while the supervisor was dismissed for his part in the incident. The applicants version is that the disposal of the boxes could only have taken place by the fourth respondent once the seals were broken and that the only plausible explanation is that the fourth respondent colluded to misappropriate the stock.
- [25] Mr Moalosi, the second witness of the applicant, testified that there were eight pallets loaded whilst documentation showed seven. The discrepancy became important during the arbitration.
- [26] He testified that the loaders and supervisors could not explain the discrepancy. They were no longer employed by the applicant. He testified that shortages are experienced daily, and extra stock is loaded as a result of human error. He further testified that he does not know why the fourth respondent was charged.
- [27] In fact, he testified that it was impossible to tamper with the seal of a truck.
- [28] Mr Moalosi admitted that shortages and surpluses in loaded trucks were common occurrences, happening almost daily.
- [29] The fourth respondent testified in summary that he was presented with the keys of the truck and the documents. He did not know the route that specific day, or who loaded the truck. He testified that when offloading at Shoprite Daveyton, he

discovered that 52 boxes were short, and he reported the shortage. He testified that he came back with seven pallets and stated that the seal was not tampered with.

- [30] Mr Kabelo Mapulane was the second witness for the fourth respondent. He was the assistant with the fourth respondent on the day of the delivery. He testified that he was dismissed as a result of this incident and that he could not recall the exact number of boxes loaded and suggested that the shortage could have been as a result of cross loads which usually happen.

The test on review

- [31] I must deal with the grounds for review within the context of the test that 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*² (*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.
- [32] The Labour Appeal Court (LAC) in *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation & Arbitration and Others*³ 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.'
- [33] 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

² (2007) 28 ILJ 2405 (CC) at para 110.

³ (2014) 35 ILJ 943 (LAC) at para 16.

decision made by the arbitrator is one that a reasonable decision maker could make, based on the evidence adduced.⁴

[34] In *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as amicus curiae)*⁵, 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 on review if the decision is “entirely disconnected with the evidence” or is “unsupported by any evidence” and involves speculation by the commissioner.’

[35] In *Quest Flexible Staffing Solutions (Pty) Ltd (A Division of Adcorp Fulfilment Services (Pty) Ltd) v Legobate*⁶, 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 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.’

⁴ (2014) 35 ILJ 943 (LAC) at paras 18 and 19.

⁵ (2013) 34 ILJ 2795 (SCA)

⁶ (2015) 36 ILJ 968 (LAC), [2015] 2 BLLR 105 (LAC) at para 12 and 13.

[36] 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.

[37] It is within the context of this test that I have to decide this application for review.

The arbitrator's analysis of evidence/findings and the grounds for review

[38] The applicant raises four grounds of review:

38.1. The arbitrator applied a piecemeal approach to the evidence and failed to take into account material evidence;

38.2. The arbitrator applied the incorrect burden of proof;

38.3. The arbitrator failed to make proper credibility findings in assessing evidence; and

38.4. There is a reasonable apprehension of bias on behalf of the arbitrator.

[39] With regards to the first ground of review, the applicant submits that the arbitrator focuses on whether the fourth respondent was present when the truck was loaded, whether the 52 boxes were loaded onto the truck, whether the truck was loaded was the fourth respondent's truck and whether the truck was sealed. It is submitted that the arbitrator failed to consider the loading process and procedures, the documents presented, and the video footage to show that the extra boxes were loaded onto the truck and sealed.

[40] The applicant submits that the arbitrator failed to take into account the material evidence of Jawahir that there is collusion between the loaders and drivers, the shipping note and invoice was correct for the 52 boxes, the correct truck, loading bay, the seal numbers and time of loading was identified, no pallets came back on other trucks and no tampering was identified after the truck was loaded.

[41] The applicant submits that the arbitrator ignored the video evidence and accepted the documentary evidence piecemeal and ignored the shipping note, which showed that the order was loaded.

- [42] It is further submitted that the evidence of Moalosi was ignored, that there is no way to tamper with the seals, and that there could be no discrepancy in the stock loaded. The inference that can be drawn is that 52 cases were loaded onto the truck that the fourth respondent was driving. The fourth respondent's version was that the evidence by the applicant did not conclusively prove that the 52 boxes were loaded onto his truck, and even if it was, it could have been removed before the truck was sealed.
- [43] It is evident from the award that the arbitrator summarised the evidence of Jahawir and Moalosi concisely and also recorded the evidence from the video footage in his award. The arbitrator states that he has considered all submissions and arguments presented and considered pertinent submissions and arguments for the sake of the award, which I find that he has done in relation to the issue to be determined, which is, whether the dismissal of the fourth respondent was substantively fair.
- [44] From the summary of all the witnesses' testimonies, in the award, I find that the arbitrator considered the loading process, the documentary evidence, the video footage and asked the correct questions to test the probability of versions. The arbitrator asked about the sealing of the truck before it left the loading bay and the tampering of the truck outside the loading bays, which the witness clarified that their own employees seal the truck, and the video could not confirm whether the truck was sealed.
- [45] The witness further could not rule out the possibility of a syndicate tampering with stock before the truck was sealed.
- [46] I must find whether the decision reached by the arbitrator is capable of justification, and I find that it is, and there is a material connection between the evidence and the result.
- [47] The analysis by the arbitrator in paragraphs 26 to 29 of the award deals with the crux of the evidence and the charge, and there is no indication that the arbitrator adopted a piecemeal approach, and more importantly, came to a different conclusion based on the evidence that was before the arbitration.

- [48] The fourth respondent was dismissed for unauthorised removal of company property, and there was no evidence to prove this charge by the applicant on a balance of probabilities.
- [49] The applicant is asking this Court to draw an inference from the documentary evidence and video footage to find that the truck that the fourth respondent was driving had eight pallets and the extra 52 boxes, but there is no evidence to support the version that the fourth respondent removed the boxes.
- [50] The questions that the arbitrator asked and were answered go to the crux of the charge and the summary of the evidence presented by the applicant's two witnesses, which indicates a consideration of and evaluation of the pertinent evidence.
- [51] The alleged collusion between the fourth respondent and the loaders was denied by the fourth respondent, and there was no evidence before the arbitrator to persuade him differently. In any event, the fourth respondent was not charged with collusion.
- [52] There are conflicting versions in terms of the evidence, but the arbitrator has dealt with them in the analysis of the evidence and arguments and found the fourth respondent's version more probable.
- [53] The arbitrator states in his award:
- '27. The applicant (fourth respondent) was dismissed for unauthorised removal of company property. The question is which property did he remove as there is no proof that the 52 allegedly missing boxes were loaded in the truck or not, all documentary evidence presented confirms that seven pallets were loaded and there is no evidence to the contrary except for the video footage showing 8 pallets loaded to an unidentified truck also not showing whether the truck was sealed or not.
28. The above makes me believe the applicant (fourth respondent) and accept his version when saying he had a shortage of 52 boxes which was immediately reported through a group WhatsApp. The evidence by the respondents

witnesses is rejected as it is based on what they saw in the video footage which does not place the applicant (fourth respondent) in any wrong doing.'

- [54] The applicant is not taking into account the discrepancies, administrative errors and reporting of stock shortages, which were common and often reported. The fact is that there is no evidence before this Court to indicate that the fourth respondent removed the boxes as charged.
- [55] There is no merit in this ground of review. It is evident that the arbitrator did consider the evidence and gave reasons why he rejected it.
- [56] The second ground of review is that the arbitrator applied the incorrect burden of proof. It is accepted by our Courts that the balance of probabilities is discharged if the employer can show credible evidence that its version is more probable.
- [57] The applicant has failed to prove this. The line of questioning from the arbitrator does not indicate that he required the applicant to prove its case beyond a reasonable doubt. The applicant submits that the arbitrator asked the wrong question about the 'possibility' rather than the 'probability' that boxes could be loaded in the wrong truck, and further, whether the persons loading the truck could remove the boxes or generate an incorrect invoice. These questions evidence that the arbitrator tested the version of the applicant in assessing the evidence. This is not incorrect and does not indicate that the burden of proof is incorrect. In any event, the decision reached by the arbitrator is not disconnected from the evidence he considered and assessed.
- [58] The burden of proof rests with the applicant on the balance of probabilities to evidence that the fourth respondent's version was improbable and that there was evidence to show that the fourth respondent was guilty of removing the boxes or was involved in the shortage of the boxes. This was not evidenced from the applicant's evidence presented, which rendered the fourth respondent's version more probable. The applicant's own version is that the fourth respondent was not involved in the loading of the truck or the sealing of the truck. Thus, this ground of review is without merit.

- [59] The third ground of review is that the arbitrator failed to conduct a proper credibility assessment of the fourth respondent's testimony, and the applicant submitted contradictions in the fourth respondent's testimony between the disciplinary hearing and the arbitration. The test before me is whether the arbitrator considered the principal issues before him, evaluated the facts presented at the hearing and came to a conclusion that was reasonable. I find that he did.
- [60] The fourth respondent testified that he was not responsible for the loading and was not aware of who loaded the truck in question. He could not confirm whether the 52 boxes were loaded or not, and that there is common practice of stock shortages and cross-loading, which was also confirmed by the applicant's witnesses. On this basis, this ground of review lacks merit.
- [61] The fourth ground of review is that the arbitrator was biased, and this is founded on the questions he put to the applicant's witnesses and how he treated them. I don't find any evidence of bias. The questions asked tested the probabilities of versions which relate directly to the issues to be decided before the arbitration, and that was whether the dismissal of the fourth respondent was substantively fair. I find no indication of bias and no undue interference. There is no merit in this ground of review.
- [62] The applicant has failed to sustain that the arbitration award and the outcome are unreasonable and reviewable.

Conclusion

- [63] There is no basis for this Court to interfere with the findings of the arbitrator.
- [64] The arbitrator considered the principal issue before him, evaluated the evidence and the versions, and came to a conclusion that is reasonable.
- [65] The applicant has failed to establish that the arbitrator's findings was a decision that a reasonable decision maker could not reach on the totality of evidence.

[66] In determining whether the result of the arbitrators award is unreasonable, the Labour Court must broadly evaluate the merits of the dispute and consider whether the arbitrator's reasoning is capable of justification other than those given by the arbitrator. The result will be unreasonable if it is entirely disconnected from the evidence and involves speculation by the arbitrator. I have considered the award and the evidence and find that the arbitrator's decision is reasonable.

[67] In light of the consideration of the review application and the findings by the arbitrator, the dismissal of the fourth respondent was substantively unfair.

Costs

[68] It is trite that costs do not follow the result in this Court.

[69] This is a matter where the interests of justice will be best served by making no order as to costs.

[70] In the premises, I make the following order:

Order

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

Asmall, AJ

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Adv Máiréad Edwards

Instructed by: Thomson Wilks Inc

For the Fourth Respondent: Mr C G Grove

Instructed by: CGG Inc Attorneys