



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JR 305/23

In the matter between:

GOLDFIELDS LOGISTICS (PTY) LTD

Applicant

and

LIVHUANI MULIBANA

First Respondent

COMMISSIONER N.A. MNISI N.O.

Second Respondent

**THE NATIONAL BARGAINING COUNCIL FOR
THE ROAD FREIGHT AND LOGISTICS INDUSTRY**

Third Respondent

Heard: 6 May 2025

Delivered: 28 May 2025

JUDGMENT

ASMALL, AJ

Introduction

[1] The applicant seeks to review and set aside an arbitration award dated 18 December 2022, under case no: RFBC 66 059, wherein the second respondent, under the auspices of the third respondent, found the dismissal of the first respondent to be procedurally fair but substantively unfair. The applicant asks for the substitution of the award with an order that the dismissal of the first respondent was substantively fair and in the alternative, that the matter be referred back to the third respondent for an arbitration afresh.

[2] The applicant was ordered to reinstate the first respondent with effect from 2 January 2022 on the same terms and conditions which applied to his previous position. The applicant was further ordered to pay five months' salary as backpay to the first respondent, and such amount was to be paid into the first respondent's bank account on or before 2 January 2022.

[3] The unfair dismissal dispute was arbitrated over a period of three days, and the completed transcribed record was filed.

Background facts

[4] The first respondent was employed by the applicant as a Code 14 driver since 2 August 2013 and was employed for a period of nine years at the time of his dismissal. The first respondent was dismissed on 14 December 2021 following a disciplinary enquiry into an allegation of misconduct. The first respondent was charged with *'poor workmanship/negligence in that you have not debriefed any of your eight PODs (proof of delivery) between the 23 November 2021 and the 29th November 2021, you additionally debriefed these PODs once requested to do so as the client requested PODs'*.

[5] The applicant had a standard operating procedure (SOP) in place that applied to drivers, which required drivers to debrief after completing a delivery and handing in proof of deliveries (PODs) to the fleet controller.

[6] Local drivers were required to debrief on a daily basis after the trip, whilst long-distance drivers could do so at various branches depending on the routes travelled.

[7] At the time of the incident between 23 and 29 November 2021, for which the first respondent was charged with poor workmanship/negligence, he was driving local trips, which required him to debrief daily. He was previously doing trips under the Simba contract, where he did both long-distance and local trips, and he testified that he always handed in his PODs when convenient to do so and was unaware of the rule that he had to debrief daily for local trips.

[8] Around 15 October 2021, the truck the first respondent was driving caught fire and he was moved to driving locally, around November 2021, shortly before the dates of the incident for which he was charged for.

[9] On 5 November 2021, he was issued with a final written warning for '*harsh braking*'.

[10] The applicant submits that the handing in of the PODs enabled them to invoice clients, which was important to the applicant's core business.

[11] A number of fleet controllers are employed by the applicant to ensure that they are available to assist drivers in debriefing.

[12] The first respondent failed to debrief from 23 November to 29 November 2021 and was charged accordingly and dismissed.

[13] The first respondent's defence at the arbitration was that none of the fleet controllers were willing to debrief him during the relevant period and that he was not aware that he had to debrief daily. He only became aware of the SOP when he was charged.

[14] The applicant became aware of the first respondent's misconduct on 29 November 2021 when the client enquired about the PODs. This is when the first respondent was charged, a disciplinary hearing was held, and because of a final

written warning issued to him for 'harsh braking', he was dismissed. An unfair dismissal was then referred to the second and third respondents.

[15] The arbitrator found the dismissal of the first respondent to be substantively unfair which is the subject of this review.

Test on review

[16] The test on review is set out in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*¹ (*Sidumo*) as whether the decision reached by the commissioner is one that a reasonable decision maker would have reached. The test, therefore, is not whether the commissioner made a correct decision but rather whether the commissioner made a reasonable one. The Constitutional Court held that the arbitrator's conclusion must fall within a range of decisions that a reasonable decision maker could make.

[17] The Labour Appeal Court (LAC) in *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others*² 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.'

[18] 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 of 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.³

¹ (2007) 28 ILJ 2405 (CC) at para 110.

² (2014) 35 ILJ 943 (LAC) at para 16.

³ Ibid at paras 18 and 19.

[19] In *Herholdt v Nedbank Ltd (Congress of South African Trade Unions as amicus curiae)*⁴, the Supreme Court of Appeal, in discussing the test expounded in *Sidumo*, 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.’

[20] In *Quest Flexible Staffing Solutions (Pty) Ltd (A Division of Adcorp Fulfilment Services (Pty) Ltd) v Legobate*⁵, 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.

[21] 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.

⁴ [2013] 11 BLLR 1074 (SCA) at para 13.

⁵ (2015) 36 ILJ 968 (LAC) at paras 12 - 13.

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

The arbitrator's findings and the grounds for review

[23] One of the grounds for review, is that the arbitrator failed to properly record the evidence of Mr Dladla (Dladla), the first respondents manager and Ms Molaka (Molaka), the fleet controller. With regards to Dladla's evidence, the number of fleet controllers that were present on the day, was crucial and it rendered the evidence of Mulibana unreliable.

[24] It was Dladla's evidence that that he could not remember whether the fleet controllers refused to assist the first respondent to debrief or not. Dladla testified that he was unaware of the incident until he went to the hearing. The first respondent testified that there was no one else to assist him and that he was unaware that Dladla could assist with debriefing. This does not render the first respondents version unreliable.

[25] The applicant submits that the arbitrator misinterpreted the evidence of Molaka with regard to whether the first respondent approached her to assist with debriefing. The evidence of Molaka was that she had no recollection of the first respondent approaching her to debrief and this did not amount to her refusing to debrief him. The arbitrator acknowledges the evidence to have been that she denied that she refused to debrief Mulibana and rejected her evidence. The arbitrators conclusion that Molaka's evidence was evasive is based on her evidence that she had no recollection as to whether the first respondent approached her or not and this led to the arbitrator finding her evidence to be improbable.

[26] The crux of Molakas evidence was whether the first respondent approached her in an attempt to debrief and she testified that she had no recollection having any interaction or conversation with the first respondent on the days in question. The arbitrator did not misinterpret the evidence of Molaka. The arbitrator considered her testimony and summarised it in the award. The arbitrator found the first respondents version more plausible. This is not a misinterpretation of the evidence of the witness by the arbitrator. This ground of review lacks merit.

[27] The arbitrator records the first respondent's evidence as being consistent in terms of debriefing since he moved from long distance to local. His defence was that he attempted to debrief on the morning of the 24 and 25 November 2021 but that was in vain because the fleet controllers refused to assist him.

[28] The applicant submits that despite this evidence, the arbitrator found that the first respondent was unaware of the rule to debrief and hand in POD's as he was not driving long enough on local trips to be familiar with the process and that he was not afforded adequate opportunity to get accustomed to the change from long distance to local trips. This is after the evidence of Dladla remain unchallenged that he did local trips at Simba previously.

[29] The attempt by the first respondent to debrief on the 24 and 25 November 2021, does not evidence that the first respondent was aware that he had to debrief daily. The arbitrator found no evidence to support that the first respondent was aware that he had to debrief daily on local trips. The first respondent's version was consistent in that he always debriefed when he had the opportunity to do so and this was confirmed by Dladla in his testimony when he was asked in cross examination, whether the first respondent used to debrief every day in 2013 and 2014 when he worked with the first respondent and he said, "Yes, whenever he's on site". This was the version of the first respondent that he debriefed whenever he had the opportunity to do so whether it was long distance or local. Dladla could not comment that debriefing for the periods between 4 to 6 November 2021, 11 to 12 November 2021 and 17 to 19 November 2021 was only done on the 8,15 and 22 November 2021, respectively. This ground of review lacks merit.

[30] The further ground of review was that the arbitrator accepted the first respondent's version with regard to problems he experienced with fleet controllers, and the applicant submits that this was unreliable evidence relied upon by the arbitrator. The applicant submits that the arbitrator did not approach this new evidence to "*rebut the testimony that he used to debrief daily in the past*" with caution. The POD's of 2013/2014 had no signatures, was not tested in cross examination and should not have been taken into account. This ground of review also lacks merit, as the totality of the evidence before the arbitrator was that the first

respondent was not aware that he had to debrief daily. In fact, the arbitrator found that the issue with the fleet controllers was addressed and resolved and could not find any material factors to dissuade her from reinstating the first respondent.

[31] The further ground of review was that the arbitrator commits gross irregularity by not properly weighing up the evidence in relation to the importance of the PODs. The arbitrator found that the applicant did not suffer any detrimental effect as a result of not handing in the POD's daily. In fact, Dladla testified that the applicant "*did not lose anything, but the POD's were delayed.*" This ground has no merit.

[32] The further ground of review was that the arbitrator found that the applicant relied on unsubstantiated verbal averments relating to historical practices, which were contested, to assert that debriefing daily after every trip had always been a standard norm since the first respondent started driving in 2013. She found that the documentary evidence, the SOP, contradicted this version as it was only disseminated in 2020 when the first respondent was a long-distance driver and in terms of which exception to the general rule was created. It emerged as common cause that the first respondent only drove local distance around 2013/2014. The first respondent was charged shortly after moving to local driving in November 2021. The arbitrator even went as far to say that even if she accepts the version that the rule was well known, the fact that the applicant had just been transferred from long distance driving which he was doing for seven years, he was not given the opportunity to get accustomed to the changes. He was not even reminded of the changing circumstances to ensure that he was fully apprised with the seriousness and importance of the rule as well as the consequences for failure to comply. This ground of review lacks merit.

[33] The arbitrator dealt with the test for negligence for which the first respondent was charged and found that the applicant did not provide evidence that the first respondent knew about the rule to debrief daily and conformed to this standard in the past. It was thus unreasonable to expect that the first respondent, in the absence of evidence, to know that non-compliance with the rule would constitute serious neglect of his duties.

[34] In *National Union of Metalworkers of South Africa and another v CCMA and others*⁶ (NUMSA), this Court dealt with the issue of negligence, and it was held that:

[32] Negligence, in short, is the failure to comply with the standard of care that would be exercised in the circumstances by a reasonable person and in the employment context, the employee's conduct is compared with the standard of skill and care that would have been expected of a reasonable employee in the same circumstances. The reasonable employee with whom the employee is compared must have experience and skill comparable with that of the employee charged. In labour law, negligence is not applied 'in vacuo' or against the general standard of a 'reasonable person', but it is applied in the context of the particular workplace or industry, considering the performance standards and procedures set by the employer. Negligence is usually established with reference to workplace rules or procedures applicable in the workplace.

...

[35] The test for negligence remains the same — whether negligence, once established, is gross, is a matter of degree, to be determined considering a number of relevant factors. Those factors are inter alia whether the employee is persistently negligent; the seriousness of the act or omission; whether the act or omission is inexcusable; the employee's awareness of the performance standard required or the procedure to be complied with; the seriousness of the consequences of the act or omission; damages caused and the skills and experience of the employee or the position held by the employee.

[35] A further ground of review was that the arbitrator was misdirected in finding that the final written warning for *harsh braking* was the cause of the sanction of dismissal. On the applicant's own version, the sanction of dismissal was imposed because of the final written warning. In fact, the applicant's version was that the first respondent would not have been dismissed had it not been for the final written warning. This ground of review lacks merit.

[36] The applicant further submits that the arbitrator's finding that the first respondent '*was subjected to a series of enquiries within the same period*' was devoid of any basis as to the evidence led in this regard. This ground of review lacks

⁶ (2023) 44 ILJ 1575 (LC) at paras 32 and 35.

merit as the evidence supports this conclusion by the arbitrator. The arbitrator did not find sufficient basis to justify the dismissal.

[37] The arbitrator did not misconstrue the facts. She considered all the evidence before her, the appropriate sanction, including the mitigating and aggravating factors, in reaching her decision.

[38] It is one of the prime functions of an arbitrator to consider all material evidence, to assess the credibility of the witnesses and the inherent probability or improbability of the versions proffered by the witnesses and to make findings based on all the relevant evidence presented. The arbitrator found that the applicant failed to prove on a balance of probabilities that the dismissal of the applicant was substantively unfair.

[39] In *casu*, the arbitrator carried out her prime functions. She considered the evidence before her and made an assessment and findings on the facts. She assessed the versions of the witnesses and the probabilities of the versions presented. She assessed the totality of the evidence before her and on this basis, the review application stands to be dismissed.

[40] The decision reached by the arbitrator is one that a reasonable decision maker could make, given all the evidence before the arbitrator.

Costs

[41] In turning to the question of costs, it is by now trite that in this Court, costs do not follow the result, save in exceptional circumstances. I do not deem the present case worthy of deviation from this general rule, and therefore, I do not make an order as to costs. The first respondent is being represented *pro bono*.

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

Order

1. The review application is dismissed.

2. There is no order as to costs.

F Asmall

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Advocate Mpakanyane

Instructed by: Thomson Wilks

For the First Respondent: Attorney Mazibuko

Instructed by: S Mabaso Inc Attorneys