



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR2457/18

In the matter between:

WOOLWORTHS (PTY) LTD

Applicant

and

**COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION**

First Respondent

DONALD KGALAKE NKADIMENG N.O.

Second Respondent

ABRAM DIKHOELE RAMABOKA

Third Respondent

Heard: 14 May 2025

Summary: The Applicant seeks to review and set aside an arbitration award dated 24 September 2018 issued under case number: LP 4966-18.

JUDGMENT

MARQUES, AJ

Introduction

[1] The Applicant seeks to review and set aside an arbitration award dated 24 September 2018 issued under case number: LP 4966-18 wherein the Second Respondent in his capacity as an arbitrator of the Commission for Conciliation, Mediation and Arbitration (CCMA), being the First Respondent found that the Third Respondent's dismissal relating to misconduct was substantively unfair (the award).

[2] Dissatisfied with the award, the Applicant launched its current review application on 26 November 2018. The application has been brought in terms of Section 145 of the Labour Relations Act, Act 66 of 1995, as amended (the LRA).

[3] The Third Respondent opposed the application for review.

[4] The Applicant filed an application for condonation for the late filing of the review application, which was not opposed by the Third Respondent. I have considered the merits of the application for condonation and applying the applicable principles, I am satisfied that a proper case has been made out to condone the late filing of the review application. I intend to deal with the merits of this application for review.

Evidence Adduced

[5] The Third Respondent was employed by the Applicant on 1 June 2015 as a Stock Assistant. He was dismissed on 12 June 2018 after a disciplinary enquiry where he was charged with gross misconduct in that:

'24 to 26 March 2018 you breached the Company Policies and Procedures when you were absent from your workstation for an extended period and left the store without authorisation. In addition, you threatened to assault or harm your line manager when they questioned you about the incident. Your action impacted negatively on the workplace relationship and could have resulted in claiming wages not due.'

[6] The Third Respondent was found guilty following a disciplinary enquiry and dismissed. The Third Respondent subsequently referred an unfair dismissal dispute to the CCMA, where he only challenged the substantive fairness of his dismissal. The award was rendered on 24 September 2019, which award is the subject of the review application.

[7] In order to assess the arbitrator's findings and the grounds for review raised by the Applicant, it is necessary to consider the evidence adduced at the arbitration proceedings as well as the charges that the Third Respondent was found guilty of and dismissed for. As set out above, the charges were as follows:

'24 to 26 March 2018 you breached the Company Policies and Procedures when you were absent from your workstation for an extended period and left the store without authorisation. In addition, you threatened to assault or harm your line manager when they questioned you about the incident. Your action impacted negatively on the workplace relationship and could have resulted in claiming wages not due.'

The Applicant's Case

[8] The Applicant alleged that the Second Respondent incorrectly found that the Third Respondent was "*wrongly convicted*" in that the Third Respondent had produced a document which showed that the Store Administrator had confirmed in writing that the Third Respondent sought permission to visit his family at the hospital on the morning of 24 March 2018. The author of the statement upon which the Second Respondent sought to rely on in his findings was not that of any of the Applicant's witnesses at the arbitration, but of the stores' SAT, Ms Mmakoma Tsebe (Ms Tsebe).

[9] It is common cause that Ms Tsebe was not the Store Manager and was not authorised to grant leave. She was also not a witness at the arbitration proceedings. On perusal of Ms Tsebe's statement, it appears that the Third Respondent approached her on the morning of 24 March 2018, asking for family responsibility or non-stat leave (unpaid leave) in order to visit his child at the hospital. Ms Tsebe then advised him to speak with the Store Admin and Finance Manager, Mr Mixo Mabaso

(Mr Mabaso), who would give her authorisation to capture the leave on the system. Following this interaction, it appears that the Third Respondent approached Mr Mabaso. The contents of this discussion are disputed.

[10] The Applicant's first witness, Mr Mabaso, testified that he was the Applicant's Store Administration and Finance Manager at the Paledi Mall Branch. Mr Mabaso read his statement into evidence, which reflected the following:

'On the 24 March 2018 in the morning Abram came to me when I was opening the doors at the sales floor and told me that he wants to talk to me about his non stat leave, I told him he must come to me during the day, he said "ok" then asked the security to be searched and he left the store.

He later came back to the store to purchase an item from the sales floor and left the store. He came during the day while I was working in the store manager's office and told me he is back to talk to me about his non-stat leave, I asked him why did he leave the store since morning as I do not know his whereabouts, he said he spoke to me about the non-stat leave that he took on the same day I was very surprised and asked him what is the procedure for non-stat leave he said all he knows is that I told him he can leave. I explained to him that non-stat leave is a planned leave and as an admin manager I cannot grant such leave without planning that is why I told him to come to the office during the day to discuss it, he said he had an emergency that he wanted to attend to and I asked him why he did not ask for an emergency leave such as family responsibility and he answered me saying now he does not know what to do because I said yes which I did not say.

After I told him that he left the store without my authorisation and I did not grant him any leave as he did not sign any legal form as per the leave procedure, he then closed the door and came closer to me and told me that it seems like I do not know him very well he will deal with me outside the store, as I felt threatened I went out of the office telling him that we can stop the conversation because I will not answer to his threats then he left the store saying that I must prepare for what he's going to do to me.'

[11] Mr Mabaso corroborated his statement and further testified that as the Store Admin Manager, he was responsible for issues relating to Human Resources and

had the Third Respondent advised him of his emergency he would have told him to take emergency leave. He also testified that the Third Respondent returned to the store shortly before its closing time, and when he approached the Third Respondent to discuss the matter, the Third Respondent closed the door and threatened him. The Applicant argued that at no stage during 24 March 2018 did the Third Respondent advise Mr Mabaso of his personal circumstances and the reason why he required leave, nor was there any evidence of Ms Tsebe having communicated the content of her conversation with the Third Respondent to Mr Mabaso or anyone else. It was common cause that when the Third Respondent arrived for duty on the morning of 24 March 2018, he was wearing his uniform. The undisputed evidence of Mr Mabaso was that he had asked the Third Respondent to come back to him during the course of the day to resolve his request for unpaid leave. The issue of leave was canvassed comprehensively during the arbitration proceedings as reflected in the transcripts. The evidence given during the arbitration was also that during the course of the day, Mr Mabaso had gone to the stockroom to look for the Third Respondent and noticed he was not there. He then enquired from the security whether they had seen him, to which their response was that he had not been back since they had last searched him in the morning.

[12] In essence, he confirmed that he never gave the Third Respondent permission to leave the store on 24 March 2018, he was not aware of the Third Respondent's emergency and that the Third Respondent had threatened him. Mr Mabaso also gave evidence about the Applicant's clock in system. In relation to the charge of the Third Respondent attempting to defraud the company by claiming wages not due, the Applicant argued that the Second Respondent erred in finding that he did not think that the Third Respondent at any time intended to claim wages for which he did not work. The facts placed before the Second Respondent were that every employee of the Applicant is paid through a clocking system. If one were on leave, one would not clock in.

[13] In the case of the Third Respondent, he clocked in notwithstanding that he left work and did not work on the day. No leave forms were signed, and the Third Respondent did not clock out. The Applicant's witnesses also stated that if the Third Respondent had decided, after clocking in, to leave, he ought to have clocked out,

which would have served as an indication to all that he was not in the store. His failure to clock out amounts to dishonest conduct and could have result in him claiming monies that were not due to him which constituted a dismissible offence in terms of the Applicant's Disciplinary Code.

[14] During the arbitration proceedings, the Third Respondent did not offer any explanation for not having clocked out.

[15] The Applicant's second witness, Mr Moses Ngobeni (Mr Ngobeni), testified and indicated that he is the Applicant's Caretaker Store Manager at the Paledi Mall. He was not on duty on 24 March 2018, but Mr Mabaso had briefed him about the Third Respondent's unauthorised absence from work on the day. When Mr Ngobeni called the Third Respondent to his office to find out what had transpired, the Third Respondent closed the door and threatened to deal with him outside. He felt afraid and opened the door so that other people could see if the Third Respondent had assaulted him. He then suspended the Third Respondent as a result of his misconduct.

[16] The Applicant also argued that the transcript of the proceedings reveals a certain level of bias by the Second Respondent against the Applicant during the cross-examination of the Third Respondent. Examples of this contention are set out in the Applicant's heads of argument.

[17] The Applicant contended that the sanction of dismissal was appropriate and that the Second Respondent failed to take into account the previous transgressions of the Third Respondent and the progressive discipline followed by the Applicant. This evidence was submitted during the arbitration proceedings.

[18] Furthermore, it was contended that the Second Respondent failed to take into account the evidence given by Mr Ngobeni that the trust relationship had broken down in light of the threats and intimidation. This evidence was not disputed by the Third Respondent.

The Third Respondent's Case

[19] The Third Respondent argued that the threats of intimidation made against him were a fabrication and that he never intimidated Mr Mabaso or Mr Ngobeni. On this issue, he denied that the words that he uttered to Mr Mabaso were threats of assault, and he denied that he intimidated or threatened Mr Ngobeni in any respect.

[20] The Third Respondent argued that on 24 March 2018, his girlfriend had given birth prematurely and at first, he thought he could work, but before the store was opened, he changed his mind and thought better of it as his girlfriend and baby would need him more.

[21] Therefore, after he had clocked into work, he approached Ms Tsebe, the Store Administrator, about taking leave. She told him to go to Mr Mabaso to obtain permission to leave the store. The Third Respondent alleges that he then approached Mr Mabaso for permission to leave the store. He contended that he was told by Mr Mabaso to go and return later to sign the relevant leave forms. When he returned to the store, Mr Mabaso was a 'different man' and denied that he had authorised his absence from the store. The Third Respondent argued that if Mr Mabaso had refused to grant him permission to leave the store, he would have approached his seniors for permission.

[22] The Third Respondent argued that Mr Mabaso had given him permission in front of a security officer named Zondi. The Third Respondent alleged that Zondi was not called as a witness during the arbitration proceedings as her services had been terminated.

[23] The Third Respondent also argued that the evidence of the Applicant's witnesses was fabricated and insinuated that the Applicant had colluded to have his services terminated and had even "*hacked*" his emails.

[24] The Third Respondent argued that the award is reasonable, the Second Respondent considered all of the evidence and came to a rational finding based on the evidence placed before him and therefore, the award should not be reviewed.

Analysis of the Arbitrator's Finding and the Test on Review

[25] I have to 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 in *Sidumo & another v Rustenberg Platinum Mines Ltd & others (Sidumo)*.¹ The Constitutional Court held that the arbitrator's conclusion must fall within a range of decisions that a reasonable decision maker could make. The test is therefore whether the decision reached by the Commissioner is one that a reasonable decision maker could reach, having regard to the evidence before him/her.

[26] The Labour Appeal Court (LAC) in *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation & Arbitration & others*² affirmed the test to be applied to 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.'

[27] The Applicant in a review application is not to take a microscopic view and dissect every finding of the arbitrator. One has to show that, holistically, the award is unreasonable or that the arbitrator's findings led to an unreasonable outcome.

[28] In considering the Applicant's grounds for review, this Court should not lose sight of the limited scope within which a review application is to be decided.

[29] The LAC authoritatively considered the *Sidumo* review test in *Fidelity Cash Management Service v Commission for Conciliation, Mediation & Arbitration & others*³, (*Fidelity Cash*) and stated the following –

'The Constitutional Court has decided in *Sidumo* that the grounds of review set out in s 145 of the Act are suffused by reasonableness because a CCMA

¹ (2007) 28 ILJ 2405 (CC); [2007] 12 BLLR 1097 (CC) at para 110.

² (2014) 35 ILJ 943 (LAC); [2014] 1 BLLR 20 (LAC) (*Goldfields*) at para 16.

³ (2008) 29 ILJ 964 (LAC); [2008] 3 BLLR 197 (LAC) at para 96.

arbitration award, as an administrative action, is required by the Constitution to be lawful, reasonable and procedurally fair. The court further held that such an award must be reasonable and if it is not reasonable, it can be reviewed and set aside.'

[30] As to what would be considered to be unreasonable, the LAC in *Fidelity Cash* held as follows⁴ -

'The Constitutional Court further held that to determine whether a CCMA commissioner's arbitration award is reasonable or unreasonable, the question that must be asked is whether or not the decision or finding reached by the commissioner 'is one that a reasonable decision maker could not reach' (para 110 of the *Sidumo* case). If it is an award or decision that a reasonable decision maker could not reach, then the decision or award of the CCMA is unreasonable, and, therefore, reviewable and could be set aside. If it is a decision that a reasonable decision maker could reach, the decision or award is reasonable and must stand. It is important to bear in mind that the question is not whether the arbitration award or decision of the commissioner is one that a reasonable decision maker *would* not reach but one that a reasonable decision maker *could* not reach...'

[31] The LAC in *Fidelity Cash* formulated the "*outcome based review test*" which, the LAC held, is what the *Sidumo* review test envisaged. The LAC held⁵ -

'It seems to me that... there can be no doubt now under *Sidumo* that the reasonableness or otherwise of a commissioner's decision does not depend - at least not solely - upon the reasons that the commissioner gives for the decision. In many cases the reasons which the commissioner gives for his decision, finding or award will play a role in the subsequent assessment of whether or not such decision or finding is one that a reasonable decision maker could or could not reach. However, other reasons upon which the commissioner did not rely to support his or her decision or finding but which can render the decision reasonable or unreasonable can be taken into

⁴ Ibid at para 97.

⁵ Ibid at para 102.

account. This would clearly be the case where the commissioner gives reasons A, B and C in his or her award but, when one looks at the evidence and other material that was legitimately before him or her, one finds that there were reasons D, E and F upon which he did not rely but could have relied which are enough to sustain the decision.'

[32] The LAC in *Fidelity Cash* concluded⁶ -

'... Whether or not an arbitration award or decision or finding of a CCMA commissioner is reasonable must be determined objectively with due regard to all the evidence that was before the commissioner and what the issues were before him or her. There is no reason why an arbitration award or a finding or decision that, viewed objectively, is reasonable should be held to be unreasonable and set aside simply because the commissioner failed to identify good reasons that existed which could demonstrate the reasonableness of the decision or finding or arbitration award.'

The Arbitrator's Findings

[33] The Arbitrator had to determine whether the Third Respondent's dismissal was substantively fair, and he ultimately found that the Applicant had failed to discharge the onus to show that the dismissal was indeed fair.

[34] To come to such a conclusion, the arbitrator found that it was not true that Mr Mabaso had heard about the Third Respondent's baby being born prematurely on 24 March 2018 for the first time at the disciplinary hearing. To reach this outcome, the arbitrator relied on a document of a witness statement prepared by the store's SAT, Ms Tsebe. It is common cause that Ms Tsebe was not the Store Manager and was not authorised to grant leave, and most importantly she was not called as a witness during the arbitration proceedings.

⁶ Ibid at para 103.

[35] The arbitrator found at clause 6.9 of the award that the Third Respondent had been “*wrongly convicted*” of the accusation that he left his workstation without permission.

[36] In clause 6.10 of the award, the arbitrator found that the threatening words uttered to Mr Mabaso were too vague to constitute a crime of assault and therefore found that there was no threat of assault on Mr Mabaso by the Third Respondent. He further found that this accusation could not be supported by the evidence tendered during the arbitration.

[37] In terms of clauses 6.11 and 6.12 of the award, the arbitrator found that the alleged intimidation or assault against Mr Ngobeni was bizarre and that the Third Respondent did not threaten Mr Ngobeni despite the evidence given by Mr Ngobeni.

[38] In terms of clause 6.13 of the award, the arbitrator found that he does not think that the Third Respondent at any time intended to claim wages for which he did not work. The arbitrator found that it was common knowledge that on the morning of 24 March 2018, the Third Respondent came to work but decided to go and visit his family after clocking in. The Applicant’s administration was aware that he was not working on that day, and the Third Respondent explained that due to the circumstances prevailing at the time, he forgot to clock out, which explanation he found to be probable.

[39] Based on these findings, the Second Respondent found that the Applicant failed to prove that the dismissal of the Third Respondent was substantively fair and ordered reinstatement notwithstanding his finding in clause 6.17 of the award, where he found that during the arbitration it was clear that there was no love lost between the Third Respondent and the two witnesses of the Applicant but that this alone did not make continued employment intolerable.

The Grounds for Review

[40] The question this Court must ask on review is whether the way the arbitrator dealt with the evidence constituted an irregularity or error which was material and

whether it impacted in the determination of the question of whether the Applicant's dismissal was fair and whether this distorted the arbitrator's ultimate decision. The ultimate question is whether, holistically viewed, the decision taken by the arbitrator was reasonable based on the evidence placed before him. The Applicant, in my view, has raised a number of cogent grounds of review which I will deal with below.

[41] The findings at clauses 6.7 and 6.8 of the Second Respondent contained in the award are not supported by the evidence. The evidence before the arbitrator was that Mr Mabaso, the Store and Admin Manager of the Applicant, was required to grant permission to the Third Respondent to leave the store, and he was not aware of the fact that the Third Respondent's girlfriend had prematurely given birth to his baby or that he wanted to visit her and the baby in hospital on 24 March 2018.

[42] The evidence given by Mr Mabaso was that he had only heard about the Third Respondent's baby and his mother for the first time at the disciplinary enquiry. There is, in my view, nothing to suggest that this version was not true. The Second Respondent misconstrued the evidence submitted and incorrectly based this finding on a statement produced by Ms Tsebe, the store's SAT. This Second Respondent failed to take into account that, as this was not the statement of Mr Mabaso, it was not unlikely that he had not had sight of the statement until the disciplinary proceedings. It was also common cause that Ms Tsebe could not authorise the Third Respondent's leave and had told the Third Respondent to seek permission from Mr Mabaso.

[43] In fact, Mr Mabaso testified that if he had been made aware of the emergency, he would have advised the Third Respondent to apply for emergency leave, such as family responsibility leave. Mr Mabaso also testified that the Third Respondent only came to him and asked him if they could discuss his unpaid leave, to which he told him that it would be "okay". Mr Mabaso confirmed that the Third Respondent was supposed to be on duty on 24 March 2018 and that unpaid leave is planned leave which cannot just be taken. This is borne out by the transcripts.

[44] When one considers the evidence tendered during the arbitration, it appears that there was no evidence to support the finding that the Third Respondent was

allowed to leave the store and then complete the necessary forms at a later stage. Mr Mabaso testified that when he realised that the Third Respondent was not at work, he began questioning his whereabouts with other employees and was then told that the Third Respondent had left the store. It is improbable that Mr Mabaso would have been looking for the Third Respondent if he had authorised his leave. Accordingly, the finding that the Third Respondent had been wrongly convicted of having left his workstation without permission is clearly unreasonable.

[45] In terms of the charge relating to the threat to Mr Mabaso, the uncontested evidence of Mr Mabaso was that when he started questioning the Third Respondent about his whereabouts, the Third Respondent became agitated and showed anger.

‘He told me that - he closed the door - as we were in the office he told me that I did not know who he is. If I want to see his true colors maybe he will show me outside. So that is when I started saying, no, let me open the door, go outside so that I don’t want to fight with him. Maybe if he wants to hit me, fine, there should be witnesses to see (inaudible). Thats when he left and said, “No, I will deal with on my own way.’ So, he left the store.

[46] Mr Mabaso also testified that:

‘Look from the way he was saying it I was frightened because he closed the door so that when I stood up wanting to go out, because he seemed physical I was terrified because I was scared at the time.’

[47] It is evident from the transcript that the Third Respondent did not challenge this evidence. Therefore, the arbitrator committed a gross irregularity in coming to the conclusion that the words uttered by the Third Respondent were too vague to constitute a crime of assault and that there was no threat on Mr Mabaso by the Third Respondent which accusation was unsupported by the evidence. Quite the contrary. In my view the evidence led by the Applicant’s witness was very clear in that he felt scared and frightened by the Third Respondent’s conduct which in his view constituted a real threat.

[48] It is important to note that a threat of assault can constitute assault in that a mere threat of assault, if it creates the reasonable apprehension of imminent harm,

can be considered assault. From the evidence of Mr Mabaso, he clearly felt that he was being threatened. The conduct of the Third Respondent, which was uncontested, toward his supervisor was unacceptable and should not be condoned under any circumstances.

[49] The findings of the Second Respondent at paragraphs 6.11 and 6.12 of the award, to the effect that the Third Respondent did not threaten Mr Ngobeni, also appear to be at odds with the evidence. Mr Ngobeni testified to the effect that on the morning of 26 March 2028, he called the Third Respondent to his office to enquire from him his version of what had transpired on 24 March 2018 and had called a fellow employee, Andries Botha, to witness the conversation. Unbeknownst to the parties, Mr Botha had recorded the conversation. Mr Ngobeni testified that, when Mr Botha went out, the Third Respondent closed the door and he stood and then said to him, *“Who do you think you are?” and “I will sort you outside. He even said to me I must prepare for my resignation. So, I was shocked and then I had to stand up on my feet and go and fight with him to open the door, actually just to push him to open the door because he closed the door, okay, anything can happen (inaudible) threatening me. And then I opened the door so that people that can come in from the passage they can actually see us”*.

[50] It is evident from the award that the Second Respondent did not properly consider this evidence and unreasonably rejected the evidence given by the Applicant's witnesses. Instead, the arbitrator finds that Mr Ngobeni was not threatened, as it was not recorded. He fails to consider that Mr Botha was recording the conversation, unbeknownst to the other parties, and the threat only took place when he stepped out and therefore would not have been recorded. The Second Respondent also failed to consider that it was not the first allegation of threatening behaviour of the Third Respondent towards his seniors. In my view, the Second Respondent did not place enough weight on this evidence before him and therefore came to an unreasonable conclusion in light of the evidence produced during the arbitration.

[51] Accordingly, the finding that the Third Respondent did not threaten Mr Ngobeni is disconnected from the evidence tendered during the arbitration, and he arrived at a conclusion which no reasonable decision maker could have reached.

[52] At clause 6.13 of the award, the Second Respondent found that the Third Respondent did not intend to claim wages for which he did not work, and the explanation that he failed to clock out was probable given the circumstances prevailing at the time.

[53] The Applicant argued that the Third Respondent did not provide any explanation for why he did not clock out. The uncontested evidence of Mr Mabaso was that every employee of the Applicant is paid through a clock-in system. If one were on leave, one would not clock in. In this case, the Third Respondent clocked in to work notwithstanding that he was not present at work and no leave forms had been signed. The Third Respondent also confirmed that he never clocked out. It therefore follows that on a factual basis, the Third Respondent's failure to clock out could have resulted in him claiming monies that were not due to him.

[54] The Second Respondent, therefore, failed to take into account the fact that the Third Respondent had clocked in to work for the day, and after giving this decision some consideration, he thought better of it and sought permission to leave. Mr Mabaso was clear that the permission was not granted. Therefore, the only reasonable conclusion would be that the Third Respondent left work without permission.

[55] Although I am sympathetic to the Third Respondent and what transpired on that day of the incident, the conclusions reached by the Second Respondent are unsupported by the evidence and there is absolutely no reason why the Second Respondent should have after considering the evidence, reasonably concluded that the Third Respondent's version was more probable than that of the Applicant's.

Conclusion

[56] In *Quest Flexible Staffing Solutions (Pty) Ltd (A Division of Adcorp Fulfilment Services (Pty) Ltd) vs Legobate*⁷ the LAC confirmed the test to be applied on review:

‘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?”.’

[57] Our courts have repeatedly stated that in order to maintain the distinction between review and appeal, an award of the arbitrator will only be set aside if both the reasons and the results 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 reason 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 from the evidence, unsupported by any evidence and involves speculation by the arbitrator.

[58] Unreasonableness is thus the threshold for interference with an arbitrator’s award on the review.

[59] Furthermore, when an arbitrator makes a credibility finding, he/she is required to consider a combination of factors, i.e. the credibility of the witnesses, the reliability of the testimony and the probabilities. The case of *Stellenbosch Farmers’ Winery Group Ltd and Another v Martell Et Cie and Others*⁸ outlines the test for credibility and how credibility, reliability and probabilities must be weighed together.

[60] The case of *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Kapp & Others*⁹, the court found that the award of an arbitrator must not be arbitrary, must be arrived at by a reasoning process as opposed to conjecture, fantasy, guesswork or hallucination, must have applied his mind seriously to the issues at hand and must have conclusions that are justifiable and defensible and logical.

⁷ (2015) 36 ILJ 968 (LAC); [2015] 2 BLLR 105 (LAC) at paras 12 and 13.

⁸ 2003 (1) SA 11 (SCA); [2002] ZASCA 98.

⁹ [2002] JOL 9633 (LAC); [2002] 6 BLLR 493 (LAC).

[61] It is evident from the arbitration award that the Second Respondent preferred the Third Respondent's version over that of the Applicant. The Second Respondent, however, did not give any cogent reasons why he found the Third Respondent's version to be more credible than the Applicant's. This is yet another reason why the award rendered is clearly unreasonable and should be reviewed and set aside.

[62] I have also considered the appropriateness of the sanction in the particular circumstances of this matter. In light of the findings that I have made hereinabove and the nature of the transgressions committed by the Third Respondent, the sanction of dismissal, in my view, was appropriate, and the Second Respondent reached conclusions which were unreasonable and unsupported by the evidence tendered during the arbitration.

[63] Accordingly, I have considered the record of proceedings, the award and the grounds of review raised by the Applicant. Considering the evidence, from a holistic perspective, which was placed before the arbitrator, I find the arbitrator's finding that the Third Respondent was wrongfully accused was unreasonable. The findings of the Second Respondent are disconnected and unsupported by the overwhelming evidence to the contrary presented during the arbitration.

Costs

[64] This Court has a discretion in terms of Section 162 of the LRA to order costs in accordance with the requirements of the law and fairness. Furthermore, in the *Union for Police Security and Corrections Organisation v South African Custodial Management (Pty) Limited and others*¹⁰, the Constitutional Court has made it clear that costs should only be awarded by this Court in exceptional circumstances. In the present instance, there are no exceptional circumstances, and I am of the view that this is a matter that, in the interests of fairness and equity, does not warrant a cost order being made.

¹⁰ 2021 (11) BCLR 1249 (CC); 2021 (11) BCLR 1249 (CC) at para 40.

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

Order

1. The late filing of the Applicant's review application is condoned.
2. The Second Respondent's award under case number LP4966/18 dated 24 September 2018 is reviewed and set aside, and substituted with the order that the dismissal of the Third Respondent by the Applicant was substantively fair.
3. There is no order as to costs.

B. Marques
Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Qudsiyyah Mojom
Instructed by:	Macgregor Erasmus Attorneys Inc.
For the Respondent:	Dikhoele Abram Ramaboka