



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JR2409/21

In the matter between:

OUTDOOR INVESTMENT HOLDINGS (PTY) LTD

Applicant

and

**THE COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION (CCMA)**

First Respondent

COMMISSIONER DIALE NTSOANE, N.O.

Second Respondent

NEVER CHIRASHANYE

Third Respondent

Heard: 23 May 2024

Delivered: 03 September 2025

JUDGMENT

ERASMUS, AJ

Introduction

[1] This application was heard by Makose AJ, on 23 May 2024, but due to her having become unavailable to render judgment in the matter for an extended period of time, the parties requested that the matter be placed before another judge for determination. As a result, the matter came before me for consideration.

[2] The complete file in this matter, including the pleadings, documentary record, transcripts, notices and heads of arguments, were placed before me on 19 August 2025. On 26 August 2025, the recordings of the oral arguments presented on behalf of the parties in Court on 23 May 2024 were also placed before me.

[3] This is an application for the review and setting aside of an arbitration award issued by the Second Respondent (Commissioner) under case number GATW15092/20 dated 11 October 2021, in terms of which the Commissioner found that the dismissal of the Third Respondent (Respondent) was substantively unfair and awarded him reinstatement with full backpay.

[4] The application is in terms of section 145 of the Labour Relations Act¹ (LRA) and initially came before this Court on an unopposed basis on 18 August 2022, at which time it was removed from the roll due to the Respondent having filed an answering affidavit and condonation application on 12 August 2022. The Applicant filed an affidavit in opposition to the condonation application, with the Respondent filing a replying affidavit.

Factual background

[5] The Respondent commenced working for the Applicant as a stock assistant on 11 April 2012. On 1 October 2020, the Respondent was issued with a final written warning valid for 12 months for gross negligence due to *“not applying the reasonable/necessary care and attention that may result in potential damage/loss harm or leads to actual damage/loss/harm”* (sic), after he had attached an incorrect

¹ Act 66 of 1995, as amended.

tag to an item of stock, with an incorrect price on the tag, which could have resulted in a loss to the Applicant, had a customer insisted on paying such lower price as per the tag on the item. There was a major difference in price between the two items. The Respondent did not lodge an appeal against the final warning, and he did not refer a dispute relating thereto to the First Respondent (CCMA).

[6] The Respondent was subsequently called to a disciplinary hearing to be held on 6 November 2020, after an incident on 2 and 3 November 2020. The Respondent faced two charges, namely unauthorised removal of company property, alternatively, gross negligence insofar as it related to the Respondent having opened a box and having left three taser cartridges (meant for a taser gun) in circumstances where he should have removed all the stock from the box before discarding the box.

[7] The Respondent pleaded not guilty in the disciplinary hearing, which was conducted on 6 and 9 November 2020. The Respondent was found guilty of gross negligence and summarily dismissed. He referred an unfair dismissal dispute to the CCMA, where the dispute was arbitrated. Only substantive fairness remained an issue before the Commissioner, and he found the dismissal to have been substantively unfair due to the Applicant having failed to prove that it had acted consistently.

Condonation

[8] The Respondent applied for condonation in respect of the late filing of his answering affidavit, which application was opposed on paper. The Applicant did not pursue this in argument before the Court and indicated that it will abide by the decision of this Court.

[9] The Applicant's review application was lodged on 19 November 2021. On 25 January 2022, the Applicant lodged the notice and record in terms of the then Rule 7A(6) and on 9 February 2022, it lodged the notice in terms of the then Rule 7A(8), which triggered the Respondent's 10-day period within which to lodge his answering affidavit. A notice to oppose the review application was lodged on 1

March 2022, followed by the answering affidavit and condonation application on 12 August 2022. The delay is therefore extensive.

[10] The Respondent explained the dire financial situation he was faced with, being a foreign national from Zimbabwe, battling to find employment and earn a living, let alone being able to afford data to download documents or airtime to make or receive calls. He made attempts to seek assistance from the SASLAW offices as well as from Legal Aid, without success. He was at one stage assisted by a person who is not a legal representative. He travelled between provinces in search of employment, which in turn left him out of reach of assistance to pursue opposition to the review application.

[11] In view of the explanation provided and attempts made by the Respondent to seek assistance with his matter, the Court deems it appropriate to grant condonation.

Grounds of review

[12] The Applicant raised several grounds of review, contending in essence that the Commissioner's finding that the Respondent's dismissal was unfair due to inconsistency was unreasonable. It also contended that the award may have been a result of gross irregularities. The Applicant sought that the award be set aside and be substituted with an award that the Respondent's dismissal is fair.

[13] The Respondent contended that the award should be upheld, but agreed with the Applicant that the employment relationship had broken down irretrievably and asked that the Court substitute the award of reinstatement and backpay with an award of compensation. No cross-review had been brought in this regard, and this was not pleaded on the papers.

[14] The distinction between a right of review and a right of appeal was reiterated by the Labour Appeal Court in *Makuleni v Standard Bank of South Africa Ltd and Others*² where Sutherland AJA held as follows:

² [2023] 4 BLLR 283 (LAC); (2023) 44 ILJ 1005 (LAC) at paras 4 and 13.

‘... The court asked to review a decision of commissioner must not yield to the seductive power of a lucid argument that the result could be different. The luxury of indulging in that temptation is reserved for the court of appeal. At the heart of the exercise is a fair reading of the award, in the context of the body of evidence adduced and an even-handed assessment of whether such conclusions are untenable. Only if the conclusion is untenable is a review and setting aside warranted.’

and

‘To meet the review test, the result of the award has to be so egregious that, as the test requires, no reasonable person could reach such a result.’

[15] In his award, the Commissioner found the following to have been common cause:

15.1 The Respondent was found guilty and dismissed for gross negligence.

15.2 The Respondent did not flatten a box in which three cartridges were found.

15.3 On another occasion, before the Respondent committed the offence which led to his dismissal, some employees failed to flatten a box wherein six flasks were found. Nobody was held accountable for this incident.

[16] The Commissioner then correctly referenced Item 7 of Schedule 8 of the Code of Good Practice: Dismissals as follows:

‘7. **Guidelines in cases of dismissal for misconduct.**—Any person who is determining whether a dismissal for misconduct is unfair should consider —

(a) whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the work-place; and

(b) if a rule or standard was contravened, whether or not—

(i) the rule was a valid or reasonable rule or standard;

(ii) the employee was aware, or could reasonably be expected to have been aware, of the rule or standard;

(iii) the rule or standard has been consistently applied by the employer; and

(iv) dismissal with an appropriate sanction for the contravention of the rule or standard.’

[17] The Commissioner accepted that the Respondent was grossly negligent in that he committed the offence complained of. Although the Respondent pleaded not guilty in his disciplinary hearing and also tried to escape his liability during the arbitration proceedings, he ultimately accepted that he was guilty and that he had made a mistake. The Commissioner then turned to the element of consistency and found that the Applicant had failed to act consistently, more specifically that the Applicant had applied its disciplinary code and procedure inconsistently, and as a result, he held that the dismissal of the Respondent was substantively unfair. The Commissioner comes to this conclusion without considering whether dismissal was nonetheless an appropriate sanction in the circumstances, as required by the Code of Good Practice.

[18] In *National Union of Mineworkers obo Botsane v Anglo Platinum Mine (Rustenburg Section)*,³ the Labour Appeal Court addressed the issue of consistency and held as follows:

‘Moreover, as a matter of practice, a party, usually the aggrieved employee, who believes that a case for inconsistency can be argued, ought, at the outset of proceedings, to aver such an issue openly and unequivocally so that the employer is put on proper and fair terms to address it. A generalised allegation is never good enough. A concrete allegation identifying who the persons are who were treated differently and the basis upon which they ought not to have been treated differently must be set out clearly. Introducing such an issue in an ambush-like fashion, or as an afterthought, does not serve to produce a fair adjudication process. (See: *SACCAWU & others v Irvin & Johnson Ltd* 2002 (3) SA 250 (LAC); (1999) 20 ILJ 2302 (LAC) at para 29; also see *Masubelele v Public Health & Social Development Bargaining Council & others* [2013] ZALCJHB JR2008/1151 which contains an extensive survey of the case law about the idea of inconsistency in employee discipline.)’ (Own emphasis)

³ [2014] ZALAC 24; (2014) 35 ILJ 2406 (LAC) at para 39.

[19] In *Absa Bank Ltd v Naidu & others*,⁴ the Labour Appeal Court also held that the parity principle may not just be applied willy-nilly without any measure of caution. It held that:

‘Indeed, in accordance with the parity principle, the element of consistency on the part of an employer in its treatment of employees is an important factor to take into account in the determination process of the fairness of a dismissal. However, as I say, it is only a factor to take into account in that process. It is by no means decisive of the outcome on the determination of reasonableness and fairness of the decision to dismiss. In my view, the fact that another employee committed a similar transgression in the past and was not dismissed cannot, and should not, be taken to grant a licence to every other employee, willy-nilly, to commit serious misdemeanours, especially of a dishonest nature, towards their employer in the belief that they would not be dismissed. It is well accepted in civilised society that two wrongs can never make a right. The parity principle was never intended to promote or encourage anarchy in the workplace.’

[20] In the matter before Court and during cross-examination of the Applicant’s witnesses, the Respondent made vague allegations of other employees also having acted negligently over the years on other occasions, yet no disciplinary action was taken against them.

[21] In anticipation of claims of inconsistent discipline, the Applicant’s first witness, Mr van Jaarsveld, testified in his evidence-in-chief that the firearms registry had been recently completed and that no firearms were found to be missing even to the extent that the firearms which had been stolen during a robbery of a courier vehicle, had been recovered. He also dealt with the incident whereby flasks were left in a box which was to be thrown out and the boxes not having been flattened as per the required rules, to avoid stock theft or losses.

[22] During re-examination, the Respondent put the incident regarding the flasks to Mr van Jaarsveld as constituting inconsistency, upon which Mr van Jaarsveld

⁴ (2015) 36 ILJ 602 (LAC) at para 42.

confirmed that he had reported the incident regarding the flasks to the managers to investigate and that the outcome was inconclusive.

[23] Mr Nsaliwa also testified on behalf of the Applicant and confirmed that flasks were found in boxes and that the boxes had not been flattened as required. He referred to the ladies that brought the boxes to the receiving section where he was working with the Respondent. He confirmed that the incident was reported to management.

[24] Mr Beetge testified as the Applicant's last witness. He was the manager tasked with investigating both the incident relating to the flasks, as well as the Respondent's incident which resulted in his dismissal. In respect of the latter, he confirmed that not all the items had been cleared from the box by the Respondent and that approximately one-third of the small box was found to have bubble wrap and the three taser cartridges in. He confirmed that, upon picking up the small box, he could clearly hear and feel that items had remained in the box and that the box had not been flattened as required.

[25] He confirmed that he had issued the Respondent with a final written warning in respect of the tag incident in September 2020.

[26] With regards to the incident relating to the flasks, he stated that he did not see the box with the flasks and that he was tasked afterwards to investigate the incident. He confirmed that he had viewed the video footage and that ladies from another department brought boxes into the receiving area. He stated that there had been a lot of movement in the area that day and that he was not able to trace who had brought in the exact box that contained the flasks.

[27] During cross-examination, Mr Beetge indicated with reference to the incident regarding the flasks that the cameras could not see inside the boxes due to the sizes of the boxes and that he had been called after the incident had taken place, to investigate. He reiterated that the incident with the flasks took place on a very busy day when things were messy and sales staff had also been in and out of the area. He confirmed that the cameras showed that the three ladies from the clothing

department had also brought boxes to the receiving area but that he was not able to identify who had brought a box with the flasks in them.

[28] He confirmed that, although all staff were requested to flatten boxes that are brought to the receiving area, it was a mere request for assistance and that the responsibility for the task laid with the received assistants, being Mr Nsliwa and the Respondent.

[29] He confirmed having questioned the staff, including the Respondent and his fellow employee in receiving, Mr Nsaliwa, who said they did not know how the flasks got there. He could not find the culprit despite his efforts and therefore did not take any action, apart from cautioning all the staff to be vigilant and to ensure that all the stock was removed from all the boxes.

[30] The only version put to the Applicant's witnesses with regards to inconsistency was the incident of the flasks.

[31] However, during his own testimony, the Respondent sought to refer to various other incidents of alleged negligence in respect of which he made the assumption that no action was taken. And even in doing so, he made vague allegations without sufficient detail to enable for the Respondent to be able to rebut the allegations.

[32] The Respondent objected to such further incidents being raised in the absence of same having been put to the Applicant's witnesses, which objection the Commissioner upheld.

[33] In doing so, the Commissioner stated as follows:

'The only instance that, the only instance of negligence that you put to the witnesses, was the one regarding the flasks and unflatten boxes. I think it is better to confine yourself to that. Because with this ones, they will not be able to refute it or challenge it because they have already called their witnesses.'

and

'No no, what I'm saying is, they have already closed their case, they called their witnesses. And to their witnesses, you didn't put the ammunition issue,

you didn't put the serial number issue, which they could have answered. If they had known of that. You, the only issue that you put across to them was the one concerning flasks and unflattened boxes. Which gave us the impression that when it's your time to testify, you are going to testify on that. To say, the employer was not considered consistent, there was an instance where boxes and whatever you whatever whatever.'

and

'I say you missed it that one. So, you missed it, it's fine. Just accept it, that you you didn't raise it, but confine yourself to issues that you raised with their witnesses. And that is this flask and the unflattened boxes issue.'

[34] This ruling was in line with the requirements of law and fairness and cannot be faulted.

[35] The problem arises when one gets to the arbitration award which contradicts the evidence that was presented and the above statements by the Commissioner during the arbitration proceedings.

[36] In his analysis of the evidence presented, the Commissioner stated as follows in his award:

'The [Respondent] mentioned four instances where employees committed gross-negligence – the instance involving missing pistol, an instance where a customer was given a wrong serial number, an instance where the customer was issued with a wrong transfer number and an instance where other employees failed to flatten boxes and flasks were found in those boxes – and argued that no action was taken against the culprits in all those incidents. The [Applicant] led rebuttal evidence in only one of the four instances – being the issue involving flasks.'

[37] What has been stated in his award is in direct contradiction with what the Commissioner had stated during the arbitration proceedings. The Commissioner cannot uphold an objection raised by the Applicant during the arbitration and prevent the Respondent from referring to certain incidents due to those not having been put to the Applicant's witnesses and closing the matter only to then, in his award, allow

such evidence and allege that the Applicant did not lead rebuttal evidence in circumstances where it was common cause that those instances had not been put to the Applicant's witnesses in order for them to rebut. The award is completely disconnected from the events during the arbitration proceedings and the evidence presented.

[38] To make matters worse, the Commissioner had the following to say in his award insofar as the incident relating to the flasks are concerned:

'[38] Regarding the flasks issue, the [Applicant] argued that the matter was investigated but the investigations were inconclusive as the culprits could not be identified. In his counter argument the [Respondent] contended that the same method used to identify him (by viewing the CCTV footage three days after the incident) could have been used. The [Respondent] further argued that there were only three employees who were unpacking the boxes containing the flasks and that a video footage could have identified the culprit.

[39] The three people who were responsible for unpacking the boxes could have at least being charged with failing to collapse the boxes because the [Respondent] argued – and [Charles Nsaliwa] corroborated his testimony – that there was a rule on collapsing boxes after unpacking items. The rule was that very box ought to be collapsed before it was taken out of the store. The box containing the flasks was not collapsed. Therefore, the rule was breached and those responsible for unpacking the flasks should have been disciplined for contravening the known rule.

[40] Parity principle dictates that similar offences must be treated consistently. The [Respondent] was found guilty of gross negligence, which is a serious charge the sanction for which is dismissal. But similar cases – which the [Respondent] alluded to when he put statements to the [Applicant's] witnesses, his evidence in chief and which [Charles Nsaliwa] also attested to in his evidence in chief – happened and the [Applicant] did not take (disciplinary) action against the perpetrators, led alone dismissing them.' (sic)

[39] The evidence clearly showed that the incident involving the flasks was reported when it happened and that Mr Beetge was tasked with investigating the incident. He managed to see that it was possibly one of three ladies that was

responsible for leaving the flasks in the box, but he could not say which one of the three due to the cameras not being able to see the inside of the boxes as a result of the boxes being too large, as opposed to the small box involved in the Respondent's incident whereby the video footage shown to the Commissioner during the arbitration was able to identify remaining items in the box due to the small size of the box. For the Commissioner to suggest that all three ladies should have been brought before disciplinary hearings and dismissed because one of them left the flasks in the box, is incomprehensible. The same goes for the Commissioner stating that the same method used to identify the Respondent, namely the video footage, should have been used to identify the culprit in the flask incident where it was not challenged that Mr Beetge indeed did attempt that without success, due to the difference in sizes of the boxes.

[40] The issue of the three ladies not having flattened the boxes were not raised as separate issues of inconsistency in applying discipline. Moreover, the Respondent was not just dismissed for not flattening boxes. He was found to have been grossly negligent in not emptying all the stock from the box, with the flattening of the box being merely incidental thereto. Furthermore, the Respondent had already been issued with a final written warning just more than one month prior, which warning was still valid.

[41] Also, it was not put to Mr Nsaliwa that there was a rule that everyone that brings boxes to receiving, has to flatten the boxes. Mr Beetge's evidence was clear that the rule was that the staff in receiving, being Mr Nsaliwa and the Respondent, had the duty to flatten the boxes, although they did request assistance from other staff insofar as the staff were able to assist. There had however not been an instruction to other staff to flatten the boxes and it was not a rule in respect of them, but merely a request to assist if possible.

[42] During argument, it was contended that inconsistency becomes more important when we are dealing with a firearms dealer such as the Applicant and that for that reason alone, the Commissioner cannot be faulted despite the Commissioner not having said anything about it. To now impute further findings in respect of the

matter where the Commissioner himself has not done so and when no cross-review has been lodged, is untenable. Furthermore, this point was not raised in the papers.

[43] The findings are therefore unsupported by the evidence and disconnected from it. The Commissioner did not take relevant evidence into account or ignore irrelevant evidence. His findings are unreasonable and do not fall within the range of reasonableness.

[44] In light of the findings above, the remainder of the review grounds raised by the Applicant becomes academic and need not be dealt with.

[45] The parties were *ad idem* that all the facts had been placed before Court to enable the Court to substitute the findings with the Court's own findings in the event of the award being set aside.

[46] It is common cause that the Respondent had been issued with a final written warning for gross negligence just more than a month prior to the incident that caused his dismissal and that such final warning had not been challenged and was valid. The final warning was issued despite the Applicant's policy providing for summary dismissal in respect of a first offence. It was also common cause that the Respondent was guilty of the second offence of gross negligence. The Applicant has therefore applied progressive discipline. The mitigating factors presented were not such to justify a deviation from the finding of summary dismissal.

[47] In relation to costs, the Applicant conceded that one cannot fault the Respondent for having attempted to defend an award that was made in his favour. The Court agrees with these sentiments.

[48] In the premises, the following order is made:

Order

1. The Third Respondent's late service and filing of his answering affidavit is condoned.

2. The arbitration award issued under case number GATW15092/20 by the Second Respondent and dated 11 October 2021 is reviewed and set aside.
3. The award is replaced by the following order:
 - 3.1. The dismissal of Mr Chirashanye is found to be fair and the file is to be closed.
4. No order as to costs.

L. Erasmus

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Adv. W. Bekker

Instructed by: JW Botes Inc. Attorneys

For the Third Respondent: Adv. P. Eilers

Instructed by: Erasmus Inc Attorneys