THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR1014/18

In the matter between:

JDG (PTY) LTD t/a HI FI CORPORATION	**Applicant**
and	
LARRY SHEAR	**First Respondent**
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	**Second Respondent**
MIRRIAM MALESHANE MSOMI	**Third Respondent**

Heard: **20 August 2025**

Delivered: **29 August 2025**

This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date for handing down judgment is deemed to be 29 August 2025.

JUDGMENT

DE KOCK, AJ

Introduction

[1] This matter came before the court as an application to review the arbitration award issued by the third respondent. The applicant raised various grounds of review alleging that the first respondent committed irregularities and arrived at a decision that a reasonable decision maker could not reach. The outcome of the award is that the third respondent's dismissal was substantively unfair, and the applicant was ordered to reinstate the third respondent with no backpay.

Background

[2] The third respondent was employed as the sales manager of the applicant's branch in Jabulani Mall. On 22 November 2017 the third respondent took petty cash money, on two separate occasions, from the applicant to purchase stationery for a promotion run by the applicant. The third respondent purchased the stationery but also bought two chocolates for her private consumption. She did not disclose this purchase to the branch manager.

[3] A week after the above purchase the branch manager made a reconciliation and noticed the shortage in the petty cash account. He approached the third respondent who claimed that she did not know how to repay the money to the petty cash account. The third respondent was brought before a disciplinary hearing, and she was found guilty. The chairperson recommended dismissal, which was implemented.

Arbitration award

[4] The first respondent, after surveying the evidence and argument, finds that if the third respondent was intent on concealing the purchase, she would not have submitted the till slips to the applicant which provided evidence of the two purchases. He found that the till slips are there for everybody to see. The first respondent notes that he appreciates that the third respondent was not authorised to purchase chocolates but accepts her explanation that she was hungry and that she did not have an opportunity to have lunch. The first respondent finds that the third respondent has a clean disciplinary record, and, in his view, there are sufficient mitigating factors to conclude that dismissal was an inappropriate and harsh sanction. He also finds that he does not believe that the applicant has proved that the third respondent can no longer be trusted. She immediately admitted to purchasing the chocolates, albeit when confronted, and offered to repay the money. The first respondent also finds that the third respondent was not charged with dishonesty per se, but rather with the misuse of petty cash money. The first respondent finds that it is his intention to reinstate the third respondent, but as she infringed the applicant's petty cash policy, and as she did not bring the matter to the immediate attention of the applicant, he does not order the applicant to pay any backpay.

<u>Review Test</u>

[5] In *Sidumo & another v Rustenburg Platinum Mines Ltd & others*,[1] the Court held that *"the reasonableness standard should now suffuse section 145 of the LRA"*, and that the threshold test for the reasonableness of an award was: *"… Is the decision reached by the commissioner one that a reasonable decision maker could not reach?..."*[2]. In *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)*[3] the Court applied this reasonableness consideration as follows:

> '*… A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to the particular facts, are not*

[1] (2007) 28 ILJ 2405 (CC); 2008 (2) SA 24 (CC).
[2] Id at para 110.
[3] (2013) 34 ILJ 2795 (SCA); [2013] 11 BLLR 1074 (SCA) at para 25.

in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.'

[6] This test has thus been applied as a two-stage review enquiry. Firstly, the review applicant must establish that there exists a failure or error on the part of the arbitrator. If this cannot be shown to exist, that is the end of the matter. Secondly, if this failure or error is shown to exist, the review applicant must then further show that the outcome arrived at by the arbitrator was unreasonable. If the outcome arrived at is nonetheless reasonable, despite the error or failure, that is equally the end of the review application. In short, in order for the review to succeed, the error or failure must affect the reasonableness of the outcome to the extent of rendering it unreasonable.

[7] Further, the reasonableness consideration envisages a determination, based on all the evidence and issues before the arbitrator, as to whether the outcome of the arbitrator arrived at can nonetheless be sustained as a reasonable outcome, even if it may be for different reasons or on different grounds.[4] This necessitates a consideration by the review court of the entire record of the proceedings before the arbitrator, as well as the issues raised by the parties before the arbitrator, with the view to establish whether this material can, or cannot, sustain the outcome arrived at by the arbitrator. In the end, it would only be if the outcome arrived by the arbitrator cannot be sustained on any grounds, based on the material, and the irregularity, failure or error concerned is the only basis to sustain the outcome the arbitrator arrived at, then the review application would succeed.[5]

[8] The court will now proceed to consider the review application by the applicant against the above principles and the test applicable to review applications.

<u>Grounds of review</u>

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[4] *Fidelity* at para 102.

[5] See *Campbell Scientific Africa (Pty) Ltd v Simmers & others* (2016) 37 ILJ 116 (LAC); [2016] 1 BLLR 1 (LAC) at para 32; *Anglo Platinum (Pty) Ltd (Bafokeng Rasemone Mine) v De Beer & others* (2015) 36 ILJ 1453 (LAC); [2015] 4 BLLR 394 (LAC) at para 12.

[9] The essence of the applicant's grounds for review is that the first respondent failed to appreciate that the third respondent made herself guilty of an offence which falls under the scope of dishonesty. The uncontested evidence was that the third respondent utlised company funds to purchase chocolates for herself and she failed to disclose this to anyone. It is alleged that the first respondent reached an unreasonable conclusion by determining that because the third respondent returned the slips, she was innocent of concealing the purchase.

[10] The applicant states that the mere fact that the third respondent did not tell anyone about purchasing the chocolate is an act of concealment. If the slips were not eventually checked the fact that she purchased items for herself using company funds would never have been discovered. The first respondent therefore completely misunderstood the evidence which leads to a conclusion that could not have been reached by another.

[11] The first respondent committed a further irregularity by not considering the applicant's evidence of the misconduct and the fact that the trust relationship is completely destroyed. The evidence of Mr. Gaza, who testified to the trust relationship, was never disputed, as the third respondent did not cross-examine him. The first respondent furthermore did not consider the third respondent's own admission that she was dishonest. It was an unreasonable conclusion to reach that the third respondent had some sort of justification for using company funds and then not to disclose that she had done so.

<u>Evaluation of the grounds of review</u>

[12] The first issue that this court must determine is whether the third respondent's conduct of using petty cash, on two occasions and on each occasion having bought herself chocolates, amounts to an act of dishonesty. This must be considered in conjunction with the undisputed fact that when she returned to the shop, on both

occasions, she failed to bring the purchases of two chocolates, on two different occasions on the same day, to the attention of management. The third respondent returned and submitted the receipts for the purchases, which included the purchasing of two chocolates for her own use.

[13] The first respondent concluded that the third respondent was not charged with dishonesty but rather with misuse of petty cash money. It appears therefore that the first respondent did not accept the evidence that the third respondent's actions were dishonest. If this was the conclusion, and this is not clearly stated in the award but inferred from the reasons of his finding, the first respondent's finding is clearly wrong. It is beyond this court's understanding that the first respondent can find that an act of using petty cash monies, for an employee's own personal use, did not constitute an act of dishonesty. The undisputed evidence was that she did not seek permission to use petty cash money for her own use and neither did she declare the fact that she used petty cash money when she returned to the workplace on both occasions after she purchased chocolates.

[14] This court has no hesitation whatsoever to find that the act of using petty cash money, without permission, constitutes an act of dishonesty. It is immaterial whether the third respondent was charged with misuse of petty cash and not with dishonesty, as the use of petty cash without permission is an act of dishonesty. The third respondent was not charged with failure to comply with policies or procedures but with using petty cash monies. The first respondent's finding therefore is a finding that a reasonable decision-maker could not reach.

[15] The act of dishonesty by using petty cash monies is exacerbated by the fact that the third respondent, on her return to the workplace, failed to report that she used petty cash monies for her own personal use. She simply submitted the slips in the hope that the contents of the slips would not be looked at and that her use of petty cash monies for personal use would not be discovered. The third respondent's actions, although still dishonest, could have been mitigated had she reported the fact that she used petty

cash monies for her own personal use and offered to repay it immediately. However, the fact that she twice went to the shops and on both occasions used petty cash for her own use is indicative of the dishonest behaviour of the third respondent.

[16] This court has serious difficulties with the first respondent's finding further that, if the third respondent was intent on concealing the purchase, she would not have submitted the till slips for everyone to see. This conclusion is completely unreasonable and makes absolutely no sense at all. The third respondent had no option but to submit the till slips to the applicant, as she used petty cash monies which had to be accounted for. By not submitting the slips, it was inevitable that the shortage in the petty cash would be discovered. By submitting the slips, without disclosing that she used money to buy chocolates, it would have required someone to examine the contents of the slip before realising that the third respondent used petty cash to purchase chocolates. Insofar as this was a factor considered by the first respondent to support his finding, it is illogical, unreasonable and clearly wrong.

[17] This court also has a serious issue with the first respondent's finding that, although he appreciates that the third respondent was not authorised to purchase chocolates, he however accepts the third respondent's explanation that she was hungry and that she did not have an opportunity to have lunch. It is difficult to comprehend how a reasonable decision-maker can accept such evidence. Based on the first respondent's reasoning, it is fine for an employee to use their employer's money, without permission, if they are hungry and did not have an opportunity to have lunch. It would lead to anarchy in an employment context if this was to be allowed as a reason to explain an act of dishonesty. The first respondent clearly did not apply his mind before arriving at such a untenable conclusion.

[18] This court also has serious concerns with the first respondent's finding that he does not believe that the applicant has proved that the third respondent can no longer be trusted. Mr. Gaza's undisputed, and unchallenged evidence was that the third respondent committed a dishonest act, and she only disclosed the purchases when

confronted a week later. He testified that he would be unable to work with the third respondent. The third respondent occupied the position of senior sales manager, and she was the custodian of policies and procedures and must lead by example, as she has staff reporting to her. The first respondent's conclusion is not supported by the evidence, and he simply ignored Mr. Gaza's evidence regarding the trust relationship having been broken. In fact, the first respondent does not even address the senior position occupied by the third respondent in his conclusion that the applicant failed to prove that the third respondent can no longer be trusted.

[19] The first respondent failed to properly consider the evidence presented to him in arriving at the conclusion that the third respondent's dismissal was substantively unfair. This finding is a very good example of instances where this court must interfere because the finding is one that no reasonable decision-maker could reach. The findings are illogical and completely unreasonable.

[20] The Labour Appeal Court in *Nedcor Bank Ltd v Frank & Others*[6] held that dishonesty entails a lack of integrity or straightforwardness and, in particular, a willingness to steal, cheat, lie or act fraudulently[7]. The court referred to the Canadian case of *Lynch & Co v United States Fidelity & Fidelity & Guaranty Co* where the following was said:

> *"Dishonest is normally used to describe an act where there has been some intent to deceive to deceive or cheat. To use it to describe acts which are merely reckless, disobedient or foolish is not in accordance with popular usage of the dictionary meaning."*

[21] The third respondent's actions were not merely reckless, disobedient or foolish. The third respondent was aware that she is not allowed to use petty cash for her own use, and she attempted to conceal her dishonesty by submitting the slips, without

[6] (DA4/01) [2002] ZALAC 11; [2002] 7 BLLR 600 (LAC); (2002) 23 ILJ 1243 (LAC) (8 May 2002).
[7] *Id* at para 14.

disclosing what she did, in the hope that no one would look at the slips to notice her dishonest use of petty cash money.

[22] The Labour Appeal Court in *Anglo American Farms t/a Boschendal Restaurant v Komjwayo*[8] the following was said:

> *"It seems to me that the relationship between such an employer and such an employee is of such a nature that, for it to be healthy, the employer must, of necessity, be confident that he can trust the employee not to steal his stock-in-trade. If that confidence is destroyed or substantially diminished by the realisation that the employee is a thief, the continuation of their relationship can be expected to become intolerable, at least for the employer."*

[23] In the matter before this court, a senior sales manager used petty cash money belonging to her employer to purchase chocolates on two separate occasions on the same day without disclosing same until confronted a week later. This is act of dishonesty that destroyed the trust relationship between an employer and an employee. The value of the chocolates may not have been high, but this is irrelevant in the context of this case. What is relevant, and which the first respondent completely overlooked, is that the third respondent's conduct destroyed the trust that the applicant placed in her. The fact that the third respondent had a clean disciplinary record, that she was hungry and that she did not have time to have lunch can by no stretch of the imagination be held to have constituted sufficient mitigating factors to excuse the acts of dishonesty.

[24] This court is aware of the requirement that, even in cases where there is an act of dishonesty, each case must be determined on its own merits and that in exceptional cases years of service, the amount in question, and a clean disciplinary record may have an impact on the appropriateness of the sanction of dismissal. This, however, would be in exceptional cases and the case before this court is not such an exceptional case. In *Shoprite Checkers (Pty) Ltd v Commission for Conciliation, Mediation and*

[8] (1992) 13 ILJ 573 (LAC)

Arbitration and Others[9] the Labour Appeal Court accepted that, despite the employee having a clean disciplinary record and having worked for the employer for nine years, the acts of dishonesty led to the trust relationship having broken down and the dismissal had been fair. This court has no hesitation in finding that, because of the third respondent's acts of dishonesty, the trust relationship had broken down completely, as per the unchallenged evidence of Mr. Gaza.

Costs

[25] In terms of the provisions of section 162(1) of the LRA, this court has wide discretion when it comes to the issue of costs. The court is mindful of the *dictum* of the Constitutional Court in *Zungu v Premier of the Province of Kwa-Zulu Natal and Others*[10] when it comes to the issue of costs in employment disputes. This court is of the view that in this matter where the third respondent defended an award that was granted in her favour, unreasonably so, it will not be in the interest of law and fairness to saddle her with a cost order.

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

Order

1. The application for the arbitration award to be reviewed and set aside is granted. The third respondent's dismissal is found to have been substantively fair.
2. There is no order as to costs.

C. de Kock

Acting Judge of the Labour Court of South Africa

Appearances:

[9] (JA 08/2004) [2008] ZALAC 9; [2008] 9 BLLR 838 (LAC); (2008) 29 ILJ 2581 (LAC) (20 June 2008).
[10] (2018) 39 ILJ 523 (CC).

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