



THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable
Case No: C348/2024

In the matter between:

CITY OF CAPE TOWN

Applicant

and

**IMATU OBO ATHENKOSI MAZWI
SOUTH AFRICAN LOCAL GOVERNMENT
BARGAINING COUNCIL (WESTERN CAPE)
COMMISSIONER T NDZOMBANE**

First Respondent

Second Respondent

Third Respondent

Heard: 3 September 2025

Delivered: 12 September 2025

This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing down judgment is deemed to be 10h00 on 12 September 2025.

JUDGMENT

DE KOCK, AJIntroduction

- [1] This matter came before the court as an application to review the arbitration award issued by the third respondent (the commissioner) in terms of section 145 of the Labour Relations Act¹. The review application brings to the fore, like many before it, the existence of some irregularities by a commissioner in the conduct of the arbitration proceedings, where this court is required to determine whether, despite the irregularities, the conclusion reached is a reasonable conclusion based on the evidence presented. It is not for this court to replace its own decision with that of the commissioner, as this would be tantamount to an appeal. The court must determine whether the conclusion reached by the commissioner is one that a reasonable decision-maker could not reach after consideration of all the evidence that was presented.
- [2] Insofar as the applicant filed the review application late, the application for condonation was not opposed and the parties agreed to abide by this court's decision. The court is satisfied that the delay was not severe, that there is an explanation for the delay although not entirely satisfactory, and that the applicant's prospects of success are good. The court therefore condones the late filing for the review application.

Background

- [3] The first respondent (hereinafter referred to as "the respondent") was employed by the applicant on 4 September 2019. He started as a Learner Law Enforcement Officer, where after he became a Law Enforcement Officer within the Motor Metal Theft Unit stationed in Goodwood on 1 August 2023.

¹ Act 66 of 1995, as amended.

- [4] On 26 March 2023 the respondent's shift ended at 12:00 noon. Thereafter and whilst on standby, the respondent used the applicant's vehicle by driving to Gugulethu and Phillipi, which locations are identified as high risk (or "red zone" areas), from 12:30 to 20:42, making multiple stops in these areas without the requisite authorisation from the applicant to do so.
- [5] On the same day, the applicant, through Ms. M Holding (Holding), its Assistant Chief of Law Enforcement, was made aware on its senior management team WhatsApp group of the unauthorised use, alternatively misuse of its vehicle. Holding instructed Law Enforcement officials to trace and follow the vehicle, which they did at about 20:00 to 21:00.
- [6] The officials found the vehicle parked on the pavement opposite the respondent's residence in Khayelitsha. The rear passenger window of the vehicle was half open, and a bullet proof vest, an Epic device and a handheld radio were in the vehicle and clearly visible from the outside. The officials seized the vehicle as the vehicle was not parked in a secure parking area and due to the rear passenger window of the vehicle being half open, exposing the applicant's equipment.
- [7] As a result of the conduct of the respondent, the applicant initiated disciplinary proceedings against the respondent in respect of the following allegations of misconduct (charge 2 is not quoted since the respondent was found not guilty of charge 2):

"Charge 1

It is alleged that on or about 26 March 2023, you committed an act of gross misconduct when you misused City vehicle CCT34154 by driving the vehicle when off duty to Gugulethu and other unknown locations between 12h30 and 20h42.

Charge 3

It is alleged that on or about 26 March 2023, you committed an act of gross negligence when you left City marked vehicle CCT34154 unattended, unlocked and windows half down opposite your residence with your bullet vest, radio and Epic device being clearly visible inside the vehicle (the allegation that the vehicle was unlocked was not persisted with).

Charge 4

It is alleged that on or about 26 March 2023 at about 20h42 you committed gross misconduct when you left City marked vehicle CCT34154 unattended in the road outside your residence in contrary to the Fleet Management Policy.”

- [8] A disciplinary hearing was scheduled for 20 September 2023 but was postponed to 10 October 2023 as the respondent's representative was unavailable. On 10 October 2023, the respondent and his representative failed to appear. The disciplinary hearing continued in their absence. After consideration of all the evidence presented, the chairperson found the respondent guilty of charges 1, 3 and 4. The respondent was dismissed on 25 October 2023, whereafter he referred an unfair dismissal dispute to the second respondent (SALGBC).

Arbitration award

- [9] The commissioner, after surveying the evidence, finds that the respondent's dismissal was effected in accordance with a fair procedure given the respondent did not dispute the procedural fairness of his dismissal. The commissioner notes that the respondent did not dispute that he was aware of the rules governing the usage of the applicant's vehicle and taking care of the applicant's property given to him. The respondent admitted that he is guilty of transgressing the rules and there was no dispute that the rules are consistently applied in the workplace. The respondent, however, believed that the sanction of dismissal was too harsh.

- [10] The commissioner finds that it is clear to him that everything just went wrong for the respondent on the day in question because these acts of misconduct occurred in one day. Apparently, one led to the other. The commissioner notes that, generally, misuse of a company vehicle may lead to dismissal depending on the circumstances of each case. The commissioner states that it is common cause that the respondent was permitted to have the vehicle in his possession, as he was on standby. However, he was not permitted to go to Gugulethu and Phillippi. The respondent knew that he was required to seek permission before he could embark on such a journey, which he did not do.
- [11] The respondent failed to provide an explanation as to why he did not seek permission. The commissioner finds that, be that as it may, the vehicle would have been in the respondent's possession until standby lapsed. Being in possession of the vehicle would not have negatively affected the operations of the applicant. The commissioner states that he thinks it was exaggerated that by driving the vehicle in the so called 'red zone' placed the vehicle at risk. The respondent would in any event have driven the vehicle to Khayelitsha which is also a 'red zone'.
- [12] The commissioner states that the respondent pleaded guilty to an act of negligence and that it is generally acceptable that the sanction of dismissal is justified in instances of gross negligence as opposed to negligence only. The respondent parked the vehicle on the pavement outside his yard with a half open window. According to the respondent, he was going to remove another vehicle in the parking lot. The commissioner finds that the parking of the vehicle on the pavement appears to be reasonable. What appears to be at fault was leaving the vehicle with a half open window. The commissioner then asks whether this action could be regarded as negligence or gross negligence.
- [13] The commissioner finds that the respondent was careless in leaving a window half open. However, the officers found, on their arrival, that the engine was still warm. This therefore means that the window was left half open for some few

minutes if not seconds. The commissioner also takes note of the fact that the applicant did not suffer any financial loss although the potential existed to occasion a loss. The commissioner finds that it becomes clear that the most serious allegation is the misuse of the applicant's vehicle. Remorse is considered as a sign that a person is willing to accept wrongness and can be rehabilitated if further training is offered. The commissioner finds that remorse may play a long way to rehabilitating the employment relationship.

[14] The commissioner considers the fact that the respondent was employed as a law enforcement officer and that he should be beyond reproach in his deeds; that the respondent had a clean disciplinary record; that the respondent admitted his wrongdoing; the size of the applicant as a large employer; and that there is high unemployment in the country, which makes the security of employment more important. The respondent is still young, and he owned up to his wrongdoing. Further training could rehabilitate his behaviour. The commissioner also considers the risk to the operations of the applicant and that the applicant randomly monitors the vehicles. The respondent, prior to this incident, was portrayed as a model employee and had a good working relationship with Holding. The commissioner finds it difficult that such a good working relationship could be so fragile to such an extent that these acts of misconduct could completely destroy the relationship. The respondent also claimed that he is a breadwinner and that he lost his parents when he was nine years old.

[15] Having considered the evidence as a whole, the commissioner finds, on a balance of probabilities, that the dismissal was too harsh in the circumstances. The dismissal is therefore found to be substantively unfair. Instead of reinstatement, the commissioner finds that fairness dictates that the applicant should be given sole discretion as to which position it feels will be appropriate for the respondent. Re-employment is relief that allows the employer greater flexibility where it comes to having to take the employee back to work. The commissioner therefore ordered the applicant to re-employ the respondent by no later than 24 June 2024.

Grounds of review

[16] The applicant challenges the arbitration award on the basis that the commissioner committed a gross irregularity in the conduct of the arbitration proceedings. The applicant's grounds of review, as per their heads of argument, focuses on three ground of review. These grounds of review are stated to be the following:

- a. The commissioner misconducted himself and/or exceeded his powers when he decided an issue, the gravity of the misconduct (gross negligence and gross misconduct), which the parties did not place in dispute. The respondent pleaded guilty to gross misconduct and gross negligence and was found guilty of same.
- b. The commissioner erred in not finding the respondent guilty of gross misconduct and gross negligence. The commissioner found the respondent guilty of mere negligence and misconduct.
- c. The commissioner erred in finding that the trust relationship between the respondent and the applicant had not irretrievably broken down.

Review Test

[17] In *Sidumo & another v Rustenburg Platinum Mines Ltd & others*,² 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?...*”³. In *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)*⁴ the Court applied this reasonableness consideration as follows:

² (2007) 28 ILJ 2405 (CC); 2008 (2) SA 24 (CC).

³ Id at para 110.

⁴ (2013) 34 ILJ 2795 (SCA); [2013] 11 BLLR 1074 (SCA) at para 25.

“In summary, the position regarding the review of CCMA awards is this: A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in s 145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2)(a)(ii), the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. 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 particular facts, are not 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.”

- [18] 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.
- [19] 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.⁵ 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

⁵ *Fidelity* at para 102.

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.⁶

[20] In *Goldfields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA & Others*⁷ the Labour Appeal Court further explained the reasonableness test in the following terms:

“[15] A ‘process-related review suggests an extended standard of review, one that admits the review of an award on the grounds of a failure by the arbitrator to take material facts into account, or by taking into accounts facts that are irrelevant, and the like. The emphasis here is on process and not result. Proponents of this view argue that where an arbitrator has committed a gross irregularity in the conduct of the arbitration as contemplated by s145(2), it remains open for the award to be reviewed and set aside irrespective of the fact that the decision arrived at by the arbitrator survives the Sidumo test. I disagree. What is required is first to consider the gross irregularity that the arbitrator is said to have committed and then to apply the reasonableness test established by Sidumo. The gross irregularity is not a self-standing ground insulated from or standing independent of the Sidumo test. That being the case, it serves no purpose for the reviewing court to consider and analyse every issue raised at the arbitration and regard failure by the arbitrator to consider all or some of the issues albeit material as rendering the award liable to be set aside on the grounds of process-related review.”

and

⁶ 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.

⁷ (JA 2/2012) [2013] ZALAC 28; [2014] 1 BLLR 20 (LAC); (2014) 35 ILJ 943 (LAC) (4 November 2013).

“[20] To do it differently or to evaluate every factor individually and independently is to defeat the very requirement set out in section 138 of the LRA which requires the arbitrator to deal with the substantial merits of the dispute between the parties with the minimum of legal formalities and do so expeditiously and fairly. This is also confirmed in the decision of CUSA v Tao Ying Metal Industries. Failing to consider a gross irregularity in the above context would mean that an award is open to be set aside where an arbitrator (i) fails to mention a material fact in his award; or (ii) fails to deal in his/her award in some way with an issue which has some material bearing on the issue in dispute; and/or (iii) commits an error in respect of the evaluation or considerations of facts presented at the arbitration. The questions to ask are these: (i) In terms of his or her duty to deal with the matter with the minimum of legal formalities, did the process that the arbitrator employed give the parties a full opportunity to have their say in respect of the dispute? (ii) Did the arbitrator identify the dispute he was required to arbitrate (this may in certain cases only become clear after both parties have led their evidence)? (iii) Did the arbitrator understand the nature of the dispute he or she was required to arbitrate? (iv) Did he or she deal with the substantial merits of the dispute? and (v) Is the arbitrator’s decision one that another decision-maker could reasonably have arrived at based on the evidence?”

and

“[21] Where the arbitrator fails to have regard to the material facts it is likely that he or she will fail to arrive at a reasonable decision. Where the arbitrator fails to follow proper process he or she may produce an unreasonable outcome (see Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others 2006 (2) SA 311 (CC)). But again, this is considered on the totality of the evidence not on a fragmented, piecemeal analysis. As soon as it is done in a piecemeal fashion, the evaluation of the decision arrived at by the arbitrator assumes the form of an appeal. A

fragmented analysis rather than a broad based evaluation of the totality of the evidence defeats review as a process. It follows that the argument that the failure to have regard to material facts may potentially result in a wrong decision has no place in review applications. Failure to have regard to material facts must actually defeat the constitutional imperative that the award must be rational and reasonable - there is no room for conjecture and guesswork”

- [21] The Labour Appeal Court in *Head of the Department of Education v Mofokeng and Others*⁸ provided the following exposition of the review test:

“[33] Irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide a compelling indication that the arbitrator misconceived the inquiry. In the final analysis, it will depend on the materiality of the error or irregularity and its relation to the result. Whether the irregularity or error is material must be assessed and determined with reference to the distorting effect it may or may not have had upon the arbitrator’s conception of the inquiry, the delimitation of the issues to be determined and the ultimate outcome. If but for an error or irregularity a different outcome would have resulted, it will ex hypothesi be material to the determination of the dispute. A material error of this order would point to at least a prima facie unreasonable result. The reviewing judge must then have regard to the general nature of the decision in issue; the range of relevant factors informing the decision; the nature of the competing interests impacted upon by the decision; and then ask whether a reasonable equilibrium has been struck in accordance with the objects of the LRA. Provided the right question was asked and answered by the arbitrator, a wrong answer will not necessarily be unreasonable. By the same token, an irregularity or error material to the determination of the dispute may constitute a misconception of the nature of the enquiry so as

⁸ (JA14/2014) [2014] ZALAC 50; [2015] 1 BLLR 50 (LAC); (2015) 36 ILJ 2802 (LAC) (1 October 2014).

to lead to no fair trial of the issues, with the result that the award may be set aside on that ground alone. The arbitrator, however, must be shown to have diverted from the correct path in the conduct of the arbitration and as a result failed to address the question raised for determination.”

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

Evaluation of grounds of review

- [23] In commencing the evaluation of the grounds of review this court finds firstly that the commissioner's reasoning reveals a material misdirection in the characterisation of the misconduct. The respondent admitted to the charges of gross misconduct and gross negligence at the commencement of the arbitration, yet the commissioner reclassified the conduct as mere negligence and misconduct without any sound evidentiary basis. The commissioner's conduct constitutes a failure to appreciate the nature of the enquiry, and the gravity of the charges. The applicant's first two grounds of review therefore have merit and must be upheld.
- [24] The commissioner does not explain why he decided to disregard the respondent's admission that he was guilty of the charges. The very nature of the charges is serious in nature, and there was no reason for the commissioner to disregard the essence of the charges, which were gross misconduct and gross negligence. However, on the review test, this court must nonetheless consider the evidence as a whole and determine whether the outcome arrived at by the commissioner, i.e., that the dismissal was substantively unfair and that the respondent must be re-employed is a reasonable outcome.
- [25] The first charge, i.e., the unauthorised use of the applicant's vehicle without seeking authorisation and spending some eight hours in the red zone, is a very serious offence. The commissioner finds that the respondent was unable to provide an explanation for his actions, yet he seems to place minimal reliance on

the respondent's evidence in this regard. This is not a minor issue at all. The respondent was aware of the rules, and he failed to comply with the rules. It was not for the commissioner to second guess or question the red zone areas, as identified by the applicant. In any event, the evidence before the commissioner shows that there is a more than acceptable explanation for identifying Gugulethu and Phillippi as red zone areas. The respondent's failure to comply with the rules by first seeking authorisation, and then to spend some eight hours in red zone areas is inexcusable and amount to serious misconduct. The vehicle could have been hijacked, the respondent could have been attacked, or he could even have been killed driving around in a vehicle belonging to the applicant. The respondent was afforded the opportunity to explain his actions, which he failed to do.

[26] The commissioner's finding that everything just went wrong for the respondent on the day in question because all these acts of misconduct occurred in one day is not a decision that a reasonable decision-maker could reach. Everything did not just go wrong on the day in question by itself. The respondent is the sole reason for everything that went wrong by using the vehicle without authorisation in red zone areas for some eight hours, then parking the vehicle outside his house on a pavement whilst leaving the window half open and thus exposing expensive equipment easily noticeable and subject to being stolen by simply grabbing the items through the half open window. Although it is so that the items were not stolen, the respondent left the vehicle and the items in the position where the property of the applicant was placed in jeopardy. The possible consequences had these items been stolen would have been severe, as the items could have been used for criminal activities.

[27] The commissioner finds that the respondent knew that he needed to seek permission before he could embark on the journey into Gugulethu and Phillippi, which he failed to do and failed to explain why he did not seek permission. The commissioner finds that it is safe to say that being in possession of the vehicle would not have negatively affected the operations of the applicant. The commissioner, however, fails to appreciate or misconceives the nature of the

enquiry. The commissioner was not asked to determine whether possession of the vehicle negatively affected the applicant. It is obvious that, as long as the respondent did not breach the rules and policies of the applicant and did what he was required to do, the applicant's operations would not be affected. The question that had to be asked is whether the respondent's breach of the rules and policies negatively affected the operations and the answer to that question is that it did affect the applicant's operations insofar as the potential risks are concerned.

[28] The commissioner finds that he thinks it was exaggerated that by driving the vehicle in the so-called red zone areas placed the vehicle at risk, as the respondent in any event would have driven the vehicle to Khayelitsha which is also a red zone area. The commissioner's finding is completely irregular and not based on a clear appreciation of the evidence placed before him. The respondent was allowed to take the vehicle to his house in Khayelitsha and to park the vehicle behind closed gates. It is unreasonable for the commissioner to conclude that, because the respondent would in any event have driven the vehicle to Khayelitsha, the applicant exaggerated the importance of the red zone areas.

[29] This court finds that the commissioner's decision in relation to the first charge, i.e., the unauthorised use of the vehicle in red zone areas for more than eight hours is an extremely serious offence. Insofar as the commissioner found this to be anything less, and that it did not constitute gross misconduct, his decision is one that a reasonable decision-maker could not reach.

[30] In respect of the third charge, i.e., that the respondent committed an act of gross negligence when he left the vehicle unattended and the window half down opposite his residence with the bullet proof vest, radio and Epic device clearly visible inside the vehicle, the commissioner's finding that this was mere negligence is one that a reasonable decision-maker could not reach. This is over and above the fact that the respondent did not dispute the charge referring to his actions as gross negligence. This court finds the commissioner's reasoning to

support his finding that this was mere negligence quite concerning, as his conclusions are not born out by the evidence placed before him. The commissioner finds that the respondent parked the vehicle on the pavement, as he was going to remove another vehicle in the parking lot. This is not supported by the evidence. When the officers arrived at the vehicle, there was no sight of the respondent, and he was behind closed doors in his house. Similarly, the commissioner's finding that the engine was still warm and that the window was left half open for some few minutes, if not seconds, is not supported by the evidence at all. Up until the arrival of the officers, the respondent showed no visible signs of removing another parked vehicle and safeguarding the vehicle. It was a material misdirection by the commissioner when he concluded that the window was left half open for some few minutes, if not seconds in support of his finding that this was mere negligence rather than gross negligence.

[31] The fourth charge is that the respondent committed gross misconduct when he left the vehicle unattended in the road outside his residence contrary to the Fleet Policy Management Policy. The respondent did not dispute this charge, yet somehow the commissioner seems to place little evidentiary value to this serious breach. The respondent provided no acceptable explanation for leaving the vehicle unattended outside his residence, which is in direct breach of the rules governing the use of the vehicle. The rules were clear. The respondent must park the vehicle behind closed gates. The respondent failed to do what he was required to do, and he committed a serious offence. The vehicle could easily have been stolen whilst it was left unattended in the street, or another vehicle could have bumped into it.

[32] The commissioner's assessment of the evidence and his findings in respect of the seriousness of these three charges are findings that no other reasonable decision-maker could reach and must be reviewed and set aside in its entirety. As stated already, the respondent chose not to challenge these three charges and only attacked the appropriateness of sanction. The commissioner ought to

have accepted the charges as is, and ought to have restricted his enquiry to the appropriateness of the sanction of dismissal.

[33] Insofar as the commissioner ordered the applicant to re-employ the respondent, this court finds it to have been a completely irregular finding. It is unclear why the commissioner would find the dismissal substantively unfair due to the harshness of sanction, and then order re-employment leaving it to the applicant to decide which position the applicant wants to re-employ the respondent in. The commissioner seems not to understand and appreciate the relief of re-employment versus reinstatement. The order of re-employment leaves it wide open to the applicant to pick and choose any position in which to re-employ the respondent. This cannot be regarded as proper relief when a commissioner leaves the decision to the sole discretion of the applicant.

[34] In this regard, reinstatement has the effect that an employee is restored to their original position as if the dismissal never occurred. The contract of employment is revived, not replaced. It also includes continuity of service, benefits and seniority.⁹ Re-employment, on the other hand, has the effect that an employee is hired anew, typically under different terms and conditions. There is no continuity of service or automatic restoration of benefits. Re-employment is often used when reinstatement is impractical due to operational changes to the employee's position in the interim. Or a change in conditions of employment, which does not go as far as taking the employee back into employment impracticable. There appears to be no reason why the commissioner ordered re-employment at the sole discretion of the applicant other than going out of his way to assist the respondent not to face unemployment. The very fact that reinstatement was not ordered is indicative that the commissioner was aware of the seriousness of the offences and that reinstatement into the same or similar position was not possible given the seriousness of the charges.

⁹ See *National Commissioner of the SA Police Service and Another v Myers* (2018) 39 ILJ 1965 (LAC) at para 52.

- [35] This court, however, does not have to address this issue any further given the court's view that the three charges are very serious and that the sanction of dismissal was an appropriate sanction based on the totality of circumstances. The court notes the mitigating factors presented by the respondent. The respondent had some three years' service and had a clear disciplinary record prior to the acts of misconduct that led to his dismissal. It also appears that the respondent was a good employee. When asked whether the respondent would have remedied his behaviour, he testified that he would learn from his mistakes. When asked whether he was remorseful for what he did, the respondent responded that he would take the punishment, and he would change. The respondent testified that he was about to sell his house because he could not afford to pay, but that he managed to sell his car. His adult sisters are also dependent on him, and he lost his parents at a young age.
- [36] The court, however, also notes the aggravating factors in this matter. The respondent failed to explain why he did not seek permission to use the vehicle for a frolic of his own into red zone areas for some eight hours. He failed to explain what exactly he did during the eight hours in the red zone areas. The respondent's explanation for leaving the window half open and leaving the vehicle unattended was not convincing. It appears that he arrived at his residence, left the vehicle outside unattended with a window half open with expensive equipment, and went into his house. All of this being in breach of the applicant's known policies and rules. The respondent was further employed as a law enforcement officer, and his conduct must be evaluated to a higher standard given the position that he occupied. It is unclear why the commissioner believed that the behaviour can be rectified by further training. No training was required. What was required of the respondent is to comply with the known rules and policies and not to expose the applicant and the applicant's property to unnecessary risks and potentially allowing a situation where equipment could be stolen and be used in criminal activities. Holding further testified that she can no longer trust the respondent, as she will have to monitor his whereabouts when he

is using the applicant's vehicle. There is no reason to reject Holding's evidence that the trust relationship has broken down.

[37] This court is therefore unable to find any reason why these acts of gross misconduct and gross negligence should not attract the sanction of dismissal.

Costs

[38] 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. The respondent was required to defend an award that was issued in his favour. This court therefore can find no reason, in law and fairness, to make any order as to costs against the respondent.

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

Order

1. The application for the arbitration award to be reviewed and set aside is granted.
2. The first respondent's dismissal was substantively fair.
3. No order is made as to costs.



C. de Kock

Acting Judge of the Labour Court of South Africa

¹⁰ (2018) 39 ILJ 523 (CC).

Appearances:

For the Applicant:

A Jansen

Instructed by:

T Jantjies from Diale Mogashoa Attorneys

For the First Respondent:

SCF Kuzwayo

Instructed by:

N Mthethwa from Moolla Attorneys

LABOUR COURT