THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no. JR 1452/22

In the matter between:

SIBANYE STILLWATER LTD t/a SIBANYE GOLD LTD	**Applicant**
and	
COMMISSIONER FOR CONCILIATION, MEDIATION AND ARBITRATION	**First Respondent**
COMMISSIONER WILSON, D *N.O*	**Second Respondent**
NUM obo MAPHOLOBA, VH	**Third Respondent**

Heard: **11 September 2025**

Delivered: **19 September 2025**

JUDGMENT

BALOYI, AJ

Introduction

[1] The critical issue in this review application is the sanction imposed by the second respondent, who sat as an arbitrator in the unfair dismissal dispute between the applicant and the third respondent. The second respondent agreed with the applicant that the third respondent was indeed guilty of dishonesty. The second respondent, however, found the sanction of dismissal to be harsh. He substituted it with a final written warning valid for 12 months and ordered the applicant to reinstate the third respondent retrospectively to the date of dismissal with full backpay.

[2] The applicant is aggrieved by this decision; hence, it is seeking to review and set aside the arbitration award. The applicant held a strong view that the most appropriate sanction for dishonesty is dismissal. According to the applicant, the second respondent's decision is not the one which a reasonable decision maker could reach, as he did not uphold the dismissal. The applicant further finds the awarding of full backpay after 43 months unreasonable. This complaint is founded on the delays in finalising the arbitration proceedings, most of which were occasioned by the instances of the third respondent. The third respondent opposed the review application. More on this appears hereunder.

Factual background

[3] The applicant and the third respondent entered into an employment relationship on 26 November 1987. The applicant dismissed the third respondent on 13 October 2018. At the time of his dismissal, he was occupying the position of Human Resources Officer. During the Christmas break in December 2017, the third respondent was rostered to perform overtime duties on 24, 26, 27, 28, 29, and 30 December 2017. The charges that led to his dismissal stem from his reporting for duty on 23 December 2017, whilst he was not rostered for this day. The applicant preferred three charges against the third respondent, and a sanction of dismissal was handed down.

[4] The three charges formed part of the material placed before the second respondent. After hearing evidence from both parties, the second respondent issued an arbitration award, in which he made findings that the third respondent was not guilty of the first two charges but was guilty of the third charge of dishonesty. The not guilty finding on the first two charges signalled the end of the matter, as far as these charges were concerned. Since the decision about the first two charges is not the subject matter of this review application, it will serve no purpose to discuss them herein. The third respondent went on to determine the appropriate sanction in relation to the third charge. As pointed out above, he ultimately substituted the sanction of dismissal with a final written warning valid for 12 months. He ordered the applicant to reinstate the third respondent retrospectively to the date of his dismissal.

[5] The facts that led to the formulation of this charge are hugely common cause.

[6] According to the applicant, the third respondent was not required to report for duty on 23 December 2017; however, he did and submitted a claim for overtime payment for the day and for the period he did not render any service, which is between 06h00 and 07h36. What the applicant found to be extremely dishonest about the third respondent's conduct was to ask his colleague, Ms Nqini, to assist him with clocking manually. This request was made around 12h00.

[7] In terms of the third respondent's version, he had always known that he was not supposed to report for duty on 23 December 2017. He reported for duty after receiving a call from his colleague in HR, Ms Nqini, who informed him that he was expected to report for duty. He did not argue with what Ms Nqini told him, as he held a belief that the circumstances might have changed. He arrived at the workplace at 06h00, but was unable to gain access to the workplace as he forgot his clock card at home. He went back home and returned at 07h36, clocked in at the shaft access point. He did not clock in at the next point, which calculates the working hours, and remembered at about 12h00 that he had not done so. He then asked Ms Nqini to assist him with manual clocking to reflect that he had started his shift at 06h00.

[8] It later came to the attention of one of the third respondent's supervisors, Ms Human, that the third respondent reported for duty on 23 December 2017, whilst he was not supposed to. Ms Human issued an instruction that the third respondent's claim for working on 23 December 2017 should be cancelled. It was also not disputable that manual clocking could only be applied with the approval of the Head of Department. This was not done according to Ms Nqini, who was called as the third respondent's witness. She admitted to calling the third respondent to come to work on 23 December 2017 and acknowledged that she committed the mistakes regarding the manual clocking, not the third respondent.

[9] In arriving at the decision made, the second respondent took into account, amongst others, the following:

1. The third respondent's length of service of 31 years.

2. The dishonesty in question relates to a claim for the period between 06h00 and 07h36, which is not substantial.

3. The extent of the dishonesty being minor,

4. The third respondent's clean record and,

5. The mitigating factors being significant.

[10] The applicant is aggrieved by the second respondent's findings and posted an attack on the second respondent's decision on two fronts. Firstly, he failed to apply his mind when determining the appropriate sanction for dishonesty. According to the applicant's disciplinary code, dishonesty is a dismissible misconduct. The second respondent trivialised the seriousness of the misconduct and failed to consider the aggravating factors. Secondly, it is the applicant's case that the second respondent's decision to award the third respondent reinstatement with full backpay after 43 months. The delays were caused by the third respondent and his representative in the form of multiple requests for postponements and a six-month delay in filing the recission

application. The award of backpay is, according to the applicant, capricious, unjustifiable, and patently unreasonable.

[11] The third respondent opposed the application and saw no irregularities or unreasonableness in the decision of the second respondent. Furthermore, the applicant has failed to discharge its burden of proof to succeed in the sanction review. The third respondent was not the only party to blame for the delays in the finalisation of the arbitration proceedings. The delays encountered were a result of the baggage that comes with litigation. The second respondent had applied his mind properly by awarding the third respondent primary relief of reinstatement. The review application should be dismissed.

[12] This Court has been called upon to make a determination of costs that were reserved on 24 November 2023. The third respondent's union representative, Mr Bongi Zwane, filed an answering affidavit prematurely and was directed to remove a cause of complaint by withdrawing the premature answering affidavit. He did this without the knowledge of the trade union's attorney of record and refused to remove such cause of complaint. This led to the applicant filing an application, which Mr Zwane opposed. The premature answering affidavit was only withdrawn on the date of the hearing of the interlocutory application. This issue is dealt with further below.

<u>The test for review</u>

[13] There is no doubt that the review test is well settled. Firstly, the determination of the sense of fairness of the dismissal is reserved for the commissioner. The default position is that even when the Court feels that it would have held otherwise had it been tasked with arbitrating the dispute, it cannot do so in view of the reasonableness test. In *Fidelity Cash Management Service v CCMA & Others*[1] held as follows:

> 'It will often happen that, in assessing the reasonableness or otherwise of an arbitration award or other decision of a CCMA commissioner, the Court feels that it would have arrived at a different decision or finding to that reached by the commissioner. When that happens, the Court will need to remind itself

[1] [2008] 3 BLLR 197 (LAC) at para 98.

> that the task of determining the fairness or otherwise of such a dismissal is in terms of the Act primarily given to the commissioner and that the system would never work if the Court would interfere with every decision or arbitration award of the CCMA simply because it, that is the Court, would have dealt with the matter differently. Obviously, this does not, in any way, mean that decisions or arbitration awards of the CCMA are shielded from the legitimate scrutiny of the Labour Court on review.'

[14] Though the reasonableness test raises the bar for the review of arbitration awards, the Court cannot, in the face of the test, rigidly align itself with the primary consideration of the sense of fairness of the dismissal being reserved for the commissioner. Surely, by bringing the review application, the applicant is calling for the scrutiny of the decision made by the second respondent in the arbitration award. When scrutinised, with the application of the reasonableness test, the review court is not bound to find the arbitration award reviewable just because it has spotted certain misdirections in the arbitrator's decision; hence, the Supreme Court of Appeal held in *Herholdt v Nedbank Ltd (Congress of South African Trade Unions as amicus curiae)*[2] that the misconstruing of the inquiry by the arbitrator may only result in the review of the arbitration, if such misconstruction has the effect to render the outcome unreasonable.

[15] In essence, not all the defects in the arbitration award have the effect of rendering the award reviewable. The Labour Appeal Court (LAC) in *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others*[3] cautioned against the approach to the review of an arbitration award on a fragmented basis, otherwise, this may take the form of appeal in the guise of a review. The following was said:

> 'An application of the piecemeal approach would mean that an award is open to be set aside where an arbitrator (i) fails to mention a material fact in his or her 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

[2] [2013] 11 BLLR 1074 (SCA) at para 25.
[3] [2014] 1 BLLR 20 (LAC) at para 20.

> 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 or she 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? (v) Is the arbitrator's decision one that another decision-maker could reasonably have arrived at based on the evidence?'

<u>Evaluation</u>

[16] Before this Court is the question of whether the substitution of the dismissal sanction with a final written warning is a decision falling within the bands of reasonableness and/or whether it passes the review test, as Ms Ngwenya for the applicant argued. The decision falls to be reviewed and set aside as the second respondent placed more emphasis on mitigating factors than on aggravating factors. Dishonesty cannot be minimised to attract a lesser sanction than dismissal. She relied on *Autozone v Dispute Resolution Centre of Motor Industry & Others*[4] where the LAC found it not to be mandatory for the employer to lead evidence on the breakdown of the trust relationship, where it can be drawn from the dishonest conduct of the employee, '*who by reason of the misconduct alone will have demonstrated a degree of untrustworthiness rendering him unreliable and the continuation of the relationship intolerable or unfeasible'*[5]*.* A sanction of dismissal in circumstances of dishonesty is viewed as an appropriate response to operational risk.[6]

[4] (2019) 40 ILJ 1501 (LAC)
[5] Ibid at para 12.
[6] See *De Beers Consolidated Mines Ltd v Commission for Conciliation, Mediation & Arbitration & others*, (2000) 21 ILJ 1051 (LAC) at para 26 where it is said: '*Dismissal is not an expression of moral outrage; much less is it an act of vengeance. It is, or should be, a sensible operational response to risk management in the particular enterprise. That is why supermarket shelf packers who steal small items are routinely dismissed. Their dismissal has little to do with society's moral opprobrium of a minor theft; it has everything to do with the operational requirements of the employer's enterprise*.'

[17] The third respondent's position, as argued by Mr Makalima, is that not all offences of dishonesty warrant a sanction of dismissal. He subscribed to a view expressed in *ABSA Bank Ltd v Naidu*[7] that there are varying degrees of dishonesty which are determinable based on the facts of each case. The second respondent committed no irregularity, even on the award of reinstatement with full backpay, which is a primary relief.

[18] In terms of section 138(7) of the Labour Relations Act[8] (LRA), the commissioner is required to issue a signed arbitration award with brief reasons. The LAC in *Maepe v CCMA & Others*[9] held in this respect as follows.

> 'Although a commissioner is required to give brief reasons for his or her award in a dismissal dispute, he or she can be expected to include in his or her brief reasons those matters or factors which he or she took into account which are of great significance to or which are critical to one or other of the issues he or she is called upon to decide. While it is reasonable to expect a commissioner to leave out of his reasons for the award matters or factors that are of marginal significance or relevance to the issues at hand, his or her omission in his or her reasons of a matter of great significance or relevance to one or more of such issues can give rise to an inference that he or she did not take such matter or factor into account.'

[19] Whilst giving such brief reasons, the arbitrator must consider the totality of factors placed before him or her when determining the fairness of the dismissal. In this instant matter, it only came to the third respondent's attention through Ms Nqini that he was required to report for duty on 23 December 2017. Ms Nqini corroborated this and went further to acknowledge that the flaunting of the manual clocking process was attributable to her. With this at the disposal of the second respondent, the underlying blameworthiness of the misconduct committed by the third respondent did not entirely fall on him. The second respondent cannot, under these circumstances, be faulted for having found the third respondent guilty of dishonesty on a lesser degree.

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[7] [2015] 1 BLLR 1 (LAC) at para 52.
[8] Act 66 of 1995, as amended.
[9] [2008] 8 BLLR 723 (LAC) at para 8.

This militated against the imposition of a dismissal sanction. The applicant's attempt to have the arbitration award reviewed on this point should fail.

[20] The second aspect of the review application relates to the relief awarded to the third respondent. The third respondent seemed to be comfortable with the second respondent's guilty finding; hence, there is no cross review posted. What the third respondent is not taking into account is that the relief was awarded in circumstances where his hands were not clean. On the same token, the Court is alive to the fact that the third respondent did not choose to be unfairly dismissed. However, the reasonableness of the second respondent's decision should have gone to the extent of taking into account the fact that the third respondent should not unduly benefit from his wrongdoing, even if there were no delays in finalising the arbitration proceedings.

[21] Reinstatement is certainly a primary remedy to be awarded to an employee in terms of section 193(1) of the LRA[10] unless any of the provisos in section 193(2) form part of the material placed before the second respondent. The second respondent awarded reinstatement as such. The Court will also not ignore the third respondent's delay of six months prior to applying for rescission of the ruling made in his absence. The rescission application was dismissed and challenged by way of review, which was ultimately granted based on consent to an order. Had it not been for the delays occasioned, the arbitration could have been finalised within a year. With the material placed before him, including the guilty finding, full backpay to the date of dismissal

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[10] '(1) If the Labour Court or an arbitrator appointed in terms of this Act finds that a dismissal is unfair, the Court or the arbitrator may –
(a) order the employer to reinstate the employee from any date not earlier than the date of dismissal;
(b) order the employer to re-employ the employee, either in the work in which the employee was employed before the dismissal or in other reasonably suitable work on any terms and from any date not earlier than the date of dismissal;
(c) or order the employer to pay compensation to the employee.
(2) The Labour Court or the arbitrator must require the employer to reinstate or re-employ the employee unless –
(a) the employee does not wish to be reinstated or re-employed;
(b) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable;
(c) it is not reasonably practicable for the employer to reinstate or re-employ the employee; or
(d) the dismissal is unfair only because the employer did not follow a fair procedure.

should not have been awarded. The second respondent has, in this regard, failed to apply his mind to the material placed before him. His decision should, as a result, be interfered with insofar as the relief is concerned.

[22] When looking at what the second respondent has failed to consider, as pointed out above, the full backpay would probably not have exceeded a year. With the third respondent's guilt to be taken into account, the awarding of the back pay of not more than six months would not have been unreasonable.

Costs

[23] The applicant is seeking costs against the trade union arising out of the conduct of its union official, Mr Bongi Zwane, who bypassed the trade union's attorneys of record by filing an answering affidavit prematurely without the knowledge of the trade union's attorneys. He was advised to refrain from such conduct and warned that a cost order would be sought if he persisted with it. The applicant is aggrieved by the fact that it ended up applying to remove the cause of complaint, which was settled on the date of its hearing with costs reserved. There was no plausible reason from the trade union for why such a cost order should not be made against the trade union. A submission that Mr Zwane is a layperson cannot stick because the union had already appointed attorneys in the matter and had access to legal advice. Surely, the applicant has a point on this aspect. It will not be in the interest of law and fairness not to make a cost order on the issue.

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

Order

1. The arbitration award issued by the first respondent under case number GAJB24407/22 is reviewed and set aside insofar as the relief awarded to the third respondent, and is substituted with the following order.

1.1. The dismissal of the third respondent is found to be substantively unfair.

1.2. The applicant is ordered to reinstate the third respondent retrospectively to the date of his dismissal with backpay limited to an equivalent of six months' remuneration within 14 days of this order.

2. The trade union, NUM, is ordered to pay the costs of this application occasioned by the premature filing of the answering affidavit up to the settlement of the application to remove the cause of complaint.

3. Each party to pay its own costs in the review application.

MM Baloyi

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Adv Z Ngwenya
Instructed by:	Solomon Holmes Attorneys
For the Third Respondent:	Mr S Makalima
	Cheadle Thompson & Haysom