



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR835-20

In the matter between:

DEKS SERVICES (PTY) LTD

Applicant

and

SIKWANE, LERATO NO

First Respondent

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

Second Respondent

GROBLER C

Third Respondent

Heard: 22 May 2025

Delivered: 1 October 2025

Summary: Application to review and set aside arbitration award.
Commissioner failing to consider all the evidence or determine all
the issues, outcome unreasonable. Application successful.

JUDGMENT

DANIELS J

Introduction

- [1] This judgment relates to an application brought in terms of section 145 of the Labour Relations Act No. 66 of 1995 (the “LRA”) to review and set aside the arbitration award of the first respondent (the “commissioner”), issued on 6 March 2020, under case number GATW11733-19.

Material facts

- [2] The facts are largely common cause, particularly given that the third respondent failed to testify at the arbitration. The facts, drawn from the evidence, both oral and documentary, are as follows:

- 2.1 The applicant is a labour broker, which supplies labour in South Africa *inter alia* to Kawasaki Robotics (GmbH) (“Kawasaki”).
- 2.2 Kawasaki, a foreign company, has no offices in South Africa.
- 2.3 With effect from February 2019, the third respondent was employed by the applicant, to be the sales representative of Kawasaki in South Africa.
- 2.4 The applicant and the third respondent concluded a Confidentiality and Non-Disclosure Agreement (the “confidentiality agreement”) which prohibited the third respondent *inter alia* from making unauthorised disclosures of confidential and sensitive information of the applicant.¹

¹ The confidentiality agreement does not purport to protect the sensitive or confidential information of the applicant’s clients.

- 2.5 The managing director of the applicant, Mr Johann De Klerk (“De Klerk”) is also the managing director of a company known as Novitiate (Pty) Ltd (“Novitiate”). Novitiate provides training services to Kawasaki in Gauteng. Novitiate is described as a sister company to the applicant, but the relationship is not explained further.
- 2.6 A different company, Directech (“DT”) also provides training services to Kawasaki, but it does so in Kwa-Zulu Natal. Third respondent’s father, Mr Marius Grobler, worked for DT based at its offices in Gauteng.
- 2.7 On 6 February 2019, Mr Marcus Bretschneider (“Bretschneider”) emailed the third respondent and advised her that a potential client had contacted Kawasaki and requested training. Bretschneider asked the third respondent to consider where the training could be done. The third respondent replied that the client was in Gauteng, and the training should therefore be done in Gauteng, by Novitiate. However, the following day, the third respondent sent the details of the potential client to her father by WhatsApp messenger. Thereafter, when De Klerk contacted the client, the client was no longer contactable. The client required training for two individuals, priced at R42 000, 00.² The applicant believed that, because the third respondent shared information relating to the potential client with her father, this business was lost.
- 2.8 Through DT, Kawasaki provides support services to Ford. However, because the relationship soured, Kawasaki decided it would no longer use DT to do so. During May 2019, emails were exchanged between Kawasaki and Ford concerning this issue. Three of these

² Record, transcript, pp 77 – 79

emails (two on 28 May 2019 and one on 29 May 2019) included the third respondent as a recipient. In one of the emails, Kawasaki indicated to Ford that DT has become aware that it may lose business. In the email, Kawasaki indicates that it is concerned about this because it wants to ensure a smooth transition for Ford.

2.9 As representative for Kawasaki, the third respondent was instructed to attend the Africa Automation Fair ("AAF"), at the Dome Conference Centre, on 4 June 2019.

2.10 On 4 June 2019, at approximately 13h14, De Klerk telephoned the third respondent and enquired where she was. The third respondent informed him that she was at the AAF. De Klerk noticed that there was no background noise and became suspicious, because he expected the AAF would be noisy. De Klerk tracked the third respondent's phone and discovered that, as at 13h41, she was at the offices of DT in Kya Sand.

2.11 Following an investigation, the applicant discovered that the third respondent had shared confidential and sensitive information with DT, which she communicated to her father and the chief executive officer of DT. The third respondent forwarded internal email correspondence, to the CEO of DT, on 4 June 2019 at 12h35 and again at 13h08. These emails had been exchanged between Kawasaki and Ford. The emails included three attachments: (1) the Ford – Kawasaki support agreement, (2) a letter dated 3 June 2019 from Kawasaki to Ford explaining that Novitiate would take over maintenance and service for Ford, and (3) a list of spare parts that Kawasaki recommended that Ford keep in stock.

2.12 The third respondent was charged with the following:

- “2.1 Misconduct in that on 7 February 2019 you dispatched sensitive and/or confidential information relating to our company and that of Kawasaki Robotics via WhatsApp messenger to your father, Mr Marius Grobler, currently employed with Directech, our direct competition resulting in a breach of your confidentiality agreement with us ... attached hereto marked annexure “A”.
- 2.2 Misconduct in that on 4 June 2019 you provided / dispatched via email correspondence, sensitive and/or confidential information relating to our industry, our company and that of Kawasaki Robotics to Mr Peter Erasmus, current CEO of our direct competition being Directech resulting in a breach of your confidentiality agreement with us ... attached hereto marked annexure “B”.
- 2.3 Misconduct in that on 4 June 2019 you dispatched sensitive and/or confidential information relating to our company and more specifically Kawasaki Robotics via email correspondence to Mr Peter Erasmus, current CEO of our direct competition being Directech resulting in a breach of your confidentiality agreement with us ... attached hereto marked annexure “C”.
- 2.4 Dishonesty (Misconduct) in that on 4 June you were supposed to attend to the Africa Automation Fair held at the Dome Conference Centre as a representative of Kawasaki Robotics, but that you failed (sic) proof your attendance, at the time you had to attend to the Africa Automation Fair you were at the premises of our direct competition, being Directech, and lied about your whereabouts, when questioned by your employer, Mr Johann de Klerk and Mr Marcus Bretschneider from Kawasaki Robotics Germany. ...

2.5 Breakdown of trust and confidence in that you were dishonest about your whereabouts as stipulated in charge 2.4 supra and due to your alleged actions as contemplated in charges 2.1 to 2.3 supra.”

2.12 The chairperson of the disciplinary hearing found the third respondent guilty of charges 2.1 to 2.4 and dismissed her. The third respondent challenged the fairness of her dismissal at the Commission for Conciliation, Mediation and Arbitration. Following the arbitration, the commissioner found that the third respondent's dismissal was procedurally fair but substantively unfair. The third respondent was awarded compensation equivalent to seven months remuneration.

2.13 At arbitration, the applicant called three witnesses namely De Klerk, Bretschneider and Ms L. Smit. Ms Smit had chaired the disciplinary hearing and her evidence related to the procedural fairness of the dismissal. De Klerk and Bretschneider both testified that, when the relationship between Kawasaki and DT began to sour, an instruction was issued to the third respondent that she was not to go to DT without the prior authorisation of Bretschneider. De Klerk testified that the third respondent did not attend the AAF and she instead attended the offices of DT. The third respondent did not testify, nor did she call any witnesses. Thus, the third respondent did not deny disclosing sensitive and confidential information, nor did she deny not attending the AAF while informing De Klerk that she had done so.

Legal principles

[3] In relation to awards of the CCMA, the test on review is settled. The court is required to ask whether the *“arbitration award [is] one which no reasonable commissioner could reach on the material before him or*

her?” The test is known as the ‘reasonableness test’ or the ‘*Sidumo* test’ named after the case citation.³

- [4] As to what is reasonable, this is determined by the circumstances of each case. In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and others*⁴ the Constitutional Court held:

“What will constitute a reasonable decision will depend on the circumstances of each case, much as what will constitute a fair procedure will depend on the circumstances of each case. Factors relevant to determining whether a decision is reasonable or not will include the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected. Although the review functions of the Court now have a substantive as well as a procedural ingredient, the distinction between appeals and reviews continues to be significant. The Court should take care not to usurp the functions of administrative agencies. Its task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution.”

(own emphasis)

- [5] The court on review need not consider every issue raised at arbitration. Instead, the court must decide whether the commissioner considered the principal issue before him/her; evaluated the evidence presented, and the outcome is reasonable.⁵
- [6] Provided that the commissioner asks the right question, and applies his mind to the issues, the award is not reviewable merely because the outcome is incorrect. The court must guard against using the correctness test in reviews, except where this is mandated by the nature of the issue.⁶

³ *Sidumo and another v Rustenburg Platinum Mines Ltd and others* (2007) 28 ILJ 2405 (CC)

⁴ 2004 (4) SA 490 (CC) at para [45]

⁵ *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA & others* (2014) 35 ILJ 943 (LAC) at paras [15] and [16]

⁶ *Bestel v Astral Operations Ltd & others* [2011] 2 BLLR 129 (LAC) at para [18]

[7] When applying the review test, the court follows a logical sequence.

7.1 First, it must be determined if there is a failure or error on the part of the commissioner.

7.2 Second, where there are errors, it must be shown that, but for the errors, the outcome would have been different.⁷ Errors of fact, by themselves, may not be sufficient to vitiate the award. What matters is the materiality of the errors.

[8] Importantly, it is only where the award cannot be sustained on any of the evidence properly before the commissioner that the review will succeed.⁸ This principle is recognized in *Sidumo* at para 119.

[9] More recently, the Constitutional Court, in *Vodacom (Pty) Ltd v Makate and another*⁹ (“*Vodacom*”) held as follows

“The duty of proper consideration is an integral component of the fair hearing right. The founding constitutional value of the rule of law and section 34 of the Bill of Rights require, in my view, that a court should have regard to all material evidence and all material submissions bearing on the issues it must decide. And the court must bring its reasoning to bear on those material issues and reach a conclusion on them. The evaluation of the evidence and reasoning may – as I say – be erroneous, but there cannot be a fair hearing in compliance with the

⁷ *Fidelity Cash Management Service* (2008) 29 ILJ 964 (LAC) at para [96]; *Head of the Department of Education v Mofokeng and others* [2015] 1 BLLR 50 (LAC) at paras [32] and [33]

⁸ *Campbell Scientific Africa (Pty) Ltd v Simmers and others* (2016) 37 ILJ 116 (LAC) at para [32]; *Anglo Platinum (Pty) Ltd (Bafokeng Rasemone Mine) v De Beer and others* (2015) 36 ILJ 1453 (LAC) at para [12]

⁹ (CCT 51/24) [2025] ZACC 13 (31 July 2025) at para [45]

rule of law and section 34 if proper consideration of the matter before the court has not occurred.” (own emphasis)

- [10] Given that the reasons given for the outcome acts as the first indication of whether the evidence and submissions received proper consideration, *Vodacom* held that:

“the reasons should deal with the substantial points which have been raised; include findings on material questions of fact; refer to the evidence or other material upon which those findings are based; and provide an intelligible explanation of the process of reasoning that has led the judge from the evidence to the findings and from the findings to the ultimate conclusion.”

Grounds of review and analysis

- [11] The grounds of review, in the founding and supplementary affidavits, must now be considered. It is trite that heads of argument cannot broaden the grounds of review, which appears from the pleadings.¹⁰
- [12] The applicant submits that the commissioner committed a material mistake of fact by finding that no instruction had been issued to third respondent that she must not attend at DT (without the prior authorisation of Bretschneider). The commissioner found that it was improbable that such an important instruction would not have been recorded in writing. The applicant contends that the evidence of De Klerk and Bretschneider was improperly rejected, and the commissioner ought to have drawn an adverse inference from the third respondent’s failure to testify.

¹⁰ *CWU and others v SA Post Office Ltd and others* (2013) 34 ILJ 626 at paras [35] and [39]

- [13] In a civil case, the question is whether the plaintiff's evidence is, on the probabilities, correct. It is only where a consideration of the probabilities fails to indicate where the truth probably lies, that the court need have regard to an estimate of relative credibility (of witnesses) apart from the probabilities.¹¹ Where the court has regard only to demeanour and not the probabilities, this constitutes a misdirection.¹² There can be no doubt that the probabilities must be assessed *inter alia* on all the relevant evidence using a blend of common sense, logic and judicial experience.
- [14] In this matter, the commissioner rejected the evidence of De Klerk and Bretschneider (that an instruction had been issued) based only on the fact that the instruction was not recorded in writing at the time it was issued to the third respondent. Critically, the commissioner failed to consider the presence or absence of reasons why the instruction was not recorded in writing, nor did she consider that subsequent emails between De Klerk and Bretschneider referred to such an instruction having been issued. Nor does the commissioner consider that the third respondent herself did not testify to deny the instruction. In the circumstances, the commissioner failed to properly evaluate the uncontradicted evidence of the applicant's witness. Furthermore, the evidence should have been evaluated against the probabilities, using all the evidence as the measure. This failure constitutes a serious irregularity in the commissioner's assessment of the evidence.
- [15] The applicant contends that the commissioner improperly rejected the misconduct reflected in charges 2.1 to 2.3 solely on the basis that there was no confidential or sensitive information *disclosed to a competitor* of the applicant. The applicant argues that the commissioner should have considered that the third respondent disclosed confidential and sensitive information to a third party when this was impermissible. The

¹¹ *National Employers General Insurance Co Ltd v Jagers* 1984 (4) SA 437 (E) at 440 – 441

¹² *Body Corporate of Dumbarton Oaks v Faiga* 1999 (1) SA 975 (SCA) at 979

commissioner should have considered whether the essence of charges 2.1 to 2.3 was proven. If the commissioner had properly considered the evidence, it would have been clear that DT and Novitiate were competitors for the training business of Kawasaki, and the provision of support services to Ford.

- [16] It is trite that an employer is not bound to the precise formulation of the disciplinary charge.¹³ What matters is whether the employee has notice of the essential elements of the alleged misconduct and is not prejudiced. In *Woolworths (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others*¹⁴ the LAC held:

“Unlike in criminal proceedings where it is said that ‘the description of any statutory offence in the words of the law creating the offence, or in similar words, shall be sufficient’, the misconduct charge on and for which the employee was arraigned and convicted at the disciplinary enquiry did not necessarily have to be strictly framed in accordance with the wording of the relevant acts of misconduct as listed in the appellant’s disciplinary codes, referred to above. It was sufficient that the wording of the misconduct alleged in the charge-sheet conformed, with sufficient clarity so as to be understood by the employee, to the substance and import of any one or more of the listed offences. After all, it is to be borne in mind that misconduct charges in the workplace are generally drafted by people who are not legally qualified and trained. In this regard I refer to the work of Le Roux & Van Niekerk where the learned authors offer a suitable example, with which I agree: ‘Employers embarking on disciplinary proceedings occasionally define the alleged misconduct incorrectly. For example, an employee is charged with theft and the evidence either at the disciplinary enquiry or during the industrial court proceedings, establishes unauthorised possession of company property. Here the rule appears to be that, provided a disciplinary rule has been

¹³ *EOH Abantu (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2019) 40 ILJ 2477 (LAC) paras [16] and [17]

¹⁴ (2011) 32 ILJ 2455 (LAC) at para [32]

contravened, that the employee knew that such conduct could be the subject of disciplinary proceedings, and that he was not significantly prejudiced by the incorrect characterization, discipline appropriate to the offence found to have been committed may be imposed.'

(own emphasis)

- [17] In this matter, the commissioner purported to hold the applicant to the precise formulation of the charge. This was a misdirection on the facts, one which had a profound impact on the outcome. In any event, the commissioner misunderstood the essence of the charges in 2.1 to 2.3. The essence of these charges was that the third respondent disclosed information (of the applicant, and Kawasaki) which was sensitive or confidential information to a third party, without authorisation. The essence of charges 2.1 to 2.3 is that she "dispatched sensitive and/or confidential information relating to the company and more specifically Kawasaki Robotics...". In the circumstances, the commissioner committed a material misdirection on the facts, which affected the outcome. In the absence of evidence by the third respondent, it is hard to understand how the commissioner could have reached any conclusion other than that the applicant had disclosed sensitive and confidential information to a third party without authorisation.
- [18] The applicant contends that the commissioner failed to properly consider the evidence and a reasonable decisionmaker would have concluded that the third respondent did not attend the AAF and lied about her whereabouts.¹⁵ The commissioner did not consider the evidence relating to the charge and made no finding at all in relation to the charge. The commissioner was duty bound to have regard to all material evidence and all material submissions bearing on the issues she must decide. In this instance, the commissioner did not do so. She simply did not decide

¹⁵ Pleadings, Supplementary Affidavit, para 15

an important issue in dispute. In the circumstances, the outcome is unreasonable.

[19] The applicant contends that the commissioner unreasonably and irrationally awarded the third respondent compensation equivalent to seven months remuneration despite finding that the third respondent was only employed for a period of six months.

[20] Compensation awarded must be just and equitable in all the circumstances.¹⁶ In assessing the amount of compensation, the arbitrator must consider *inter alia* the extent of the loss, the nature of the unfair dismissal, and the scope of the wrongful act on the part of the employer. The purpose of compensation is to make good the employee's loss and not to punish the employer.¹⁷ In this matter, the third respondent did not testify. There was therefore no evidence before the commissioner as to the extent of the loss. One of the circumstances, before the commissioner, was the fact that the third respondent had been employed for only six months. Thus, the award of compensation equal to seven months was not just and equitable in all the circumstances. The commissioner's failure to take all the circumstances into consideration is an error of law, which impacted on the outcome.

Remedy

[21] The arbitration award is one no reasonable decisionmaker could arrive at on the evidence before the first respondent. It is apparent that the commissioner failed to apply her mind to all the relevant evidence and determine all the issues before her. The arbitration award falls to be reviewed and set aside.

¹⁶ See section 194(1) of the LRA

¹⁷ *Le Monde Luggage CC t/a Pakwells Petje v Dunn NO & others* (2007) 28 ILJ 2238 (LAC) at para 30.

[22] The applicant has provided the court with a complete record of the proceedings. The court is in as good a position to determine the dispute. This is in the interests of justice, and the expeditious resolution of labour disputes.

[23] In my view, the applicant has proven on a balance of probabilities that, by disclosing sensitive and confidential information to a third party without authorisation, the third respondent committed the misconduct contemplated in charges 2.1 to 2.3. The uncontradicted evidence also proved that the third respondent failed to attend the AAF and lied to her manager that she had done so. This misconduct was serious and destroyed the trust relationship. An adverse inference must be drawn from the third respondent's failure to testify, and the uncontradicted evidence of the applicant must be accepted. In the circumstances, I find that the dismissal of the third respondent was procedurally and substantively fair.

Costs

[24] I see no reason in law and fairness to depart from the rule in this court that costs do not follow the result. Accordingly, no costs order is made.

Conclusion

[25] The following order is made:

25.1 The arbitration award issued by the first respondent under CCMA case number GATW11733-19 is reviewed and set aside,

25.2 The dismissal of the third respondent by the applicant was procedurally and substantively fair,

25.3 There is no order as to costs.

RN Daniels
Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

Adv AJ Nel

Jordaan Smit Inc

For the Third Respondent

Adv T Lautré

Van Zyl Johnson Inc