



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case No.: JR987/2022

In the matter between:

SERITI POWER (PTY) LTD

Applicant

and

THE COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION

First Respondent

FAIZEL MOOI N.O.

Second Respondent

NATIONAL UNION OF MINE WORKERS

Third Respondent

EUGINE MOKALENG

Fourth Respondent

Heard: 23 October 2024

Delivered: 21 May 2025

This judgment was handed down electronically by consent of the parties' legal representatives by circulation to them via email. The date for hand-down is deemed to be 21 May 2025.

JUDGMENT

VUKEYA, AJ

[1] Seriti Power (Pty) Ltd (the applicant), brings an application in terms of section 145 of the Labour Relations Act¹ (the LRA) for the review and setting aside of an arbitration award issued by the second respondent dated 25 April 2022. In its Notice of Motion the applicant prays for an order:

- ‘1.1. Reviewing and setting aside the arbitration award in the dispute between Seriti Power (Pty) Ltd and NUM OBO MOKALENG E, issued by the second respondent under case number GAJB 18678-21 on 25 April 2022 and served on the applicant by the first respondent on 26 April 2022;
- 1.2. Substituting the award, issued by the second respondent with an order that the third respondent’s dismissal was substantively fair;
- 1.3. Alternatively to prayer 2 above, directing that the matter be referred back to the first respondent for consideration *de novo* before a commissioner other than the second respondent;
- 1.4. Directing that such a respondent who opposes the relief sought herein be ordered to pay the costs of the application, jointly and severally, the one paying the other to be absolved.’

[2] The applicant bases its application on a contention that the second respondent committed material irregularities when considering the evidence and determining the issues before him. It contends that, as a result of this, the second respondent arrived at an outcome that was unfairly distorted.

¹ Act 66 of 1995, as amended.

[3] Much of the background pertaining to this matter appears from the record filed, however, the factual matrix can be summarized as follows. The fourth respondent was the employee of the applicant. His position was that of a Supervisor, Employee Data Management and at the time of the incident, he was in his 24th year of employment with the applicant. The fourth respondent's duties included overseeing payroll activities, overseeing movements, hiring and terminations as well as reconciliations of employees' remuneration (Package Reconciliation) on a monthly basis.

[4] He faced charges of misconduct and appeared for a disciplinary hearing for attempted dishonesty, alternatively unacceptable behaviour. Although he denied the allegations against him, he was found guilty for attempted dishonesty and was dismissed from employment with the applicant. The charges were formulated to read as follows:

'On or around 11 January 2021, you had requested/instructed Ms Christelle van Jaarsveldt to open a link/folder for her to place her electronic signature on the package reconciliation with the intention to mislead and to deceive the Auditors, whilst knowing that the November 2020 and December 2020 reconciliation documents were not compliant. Ms Christelle van Jaarsveldt thereafter alerted you that she felt uncomfortable to place her signature on the reconciliation, as she did not have any training to sign off these documents. You still insisted that she sign off the documents and that you only needed two signatures to make the recon documents compliant and she turned down your instruction. Your behaviour is perceived to be unacceptable as it goes against the Disciplinary Code and Procedure and the Code of Business Conduct.'

[5] Aggrieved by the decision to dismiss him, the fourth respondent referred a dispute to the first respondent, the Commission for Conciliation, Mediation and Arbitration (CCMA) alleging that his dismissal was substantively and procedurally unfair. Between 26 January and 19 April 2022, the dispute proceeded to arbitration before the second respondent. After hearing evidence in the dispute the Arbitrator made an award as follows:

'100. Award

101. The dismissal of the applicant, Eugene Makaleng, was procedurally fair and substantively unfair regarding the severity of the sanction. I reinstate the applicant from the 19th of February 2022, with two months and two weeks loss of salary in the sum of R193 744.71. The amount must be paid by the respondent, Seriti Power (Pty) Ltd, within thirty days from the date of this Award, but no later than 19th May 2022. The respondent must reinstate the applicant on the 3rd of May 2022, or any earlier date negotiated between the parties.'

- [6] It is this award that serves before this court for review.
- [7] At the Arbitration hearing, the evidence of the Manager of the applicant, Deon le Roux (Le Roux), was that Ms van Jaarsveld was on his team that manages payroll and the fourth respondent a supervisor. Van Jaarsveldt was an administrator reporting to the fourth respondent. Ms van Jaarsveldt one day reported to him that the applicant had approached her and asked her to sign off on two package recon documents and she felt uncomfortable as she never did them before and complained that she could not be expected to sign off on something she knew nothing about.
- [8] Ms van Jaarsveldt, when asked to explain fully what had happened, said that she had told the fourth respondent that she feels uncomfortable but the fourth respondent said she could sign off on the documents and he would train her later and that it was okay for her to sign as all queries would come to him. It seems from the evidence that there was an incident of a similar nature during November 2020 also involving the fourth respondent. It was the evidence of Le Roux that even though the first incident also involved an element of dishonesty, the applicant elected to give the plaintiff a second chance and only gave him a verbal warning. According to Le Roux, dismissal is recommended on matters of dishonesty even for a first offender.
- [9] Christelle van Jaarsveldt said that on 11 January 2021 she received a call from the fourth respondent requesting her to do the package reconciliation. He told her to apply her electronic signature for November and December 2020 on the recon documents. When she opened the document, she saw the space where she was requested to sign. She could see from the document

that the fourth respondent was the person who did the recon and she was supposed to append her signature as a person who approved it. That made her feel uncomfortable and she informed him. He then told her that he needed the document to be compliant for the auditors, that she must append her signature and he will give her the training later. He further told her that he would deal with the queries should there be any. She did not append her signature on the recon document and a few days thereafter, she reported the incident to Le Roux.

[10] In his defence, the fourth respondent testified that he worked for the applicant since 1997 and was dismissed on 13 September 2021. He was earning a salary of R78 697.42 per month. During January 2021 when he returned from leave, he had to do the package recon and when he was about to start he remembered that he had to train the administrator. He telephoned Ms van Jaarsveldt to provide her with recon training. When doing the package recon, he was supposed to copy the previous month's recon into the current month's recon and then run the report for the current month. When he called Ms van Jaarsveldt, the information on the recon was that of the previous month which he copied to the current month. He then explained to Ms van Jaarsveldt that he did the November recon and no one verified it therefore he was starting with the December recon and needed to train her for the December recon. He then asked her to check the shared drive where the recons are saved and to open the December recon. He explained to her that he wanted to train her to do the December recon and also explained how the package recon worked.

[11] The page she opened was a cover page and it had his name as the person who did the report and Claudia's name as the person who verified it. He explained how the system works and she indicated that she was not comfortable signing the recon for the first month she was doing the recon. He told her that it was okay if she was not comfortable. When asked by the arbitrator if he had asked her to sign an actual recon document or a sample, the fourth respondent testified that he did not ask her to sign anything, asked her to open a document which contained information from the previous month to the current month. He only wanted to train her. The document still had his

name and Claudia's name on it. He had only updated it after he did a report for December and it was not complete yet and therefore there was no reason to ask her to sign the document. It transpired that the document in question did not form part of the bundle. He further stated that he had been requested by Le Roux to train someone and would not have benefitted anything from what happened even if Ms van Jaarsveldt had signed the recon document.

- [12] The fourth respondent denied having told Ms van Jaarsveldt to sign as training would be provided later. He said he wanted to give her the training at that stage. He stated that he first inquired from her if she would be comfortable to do the training on the telephone because after the training, she would have to sign as the person who did the recon and he would have to sign as the person who verified it. To this, Ms van Jaarsveldt responded by saying she did not feel comfortable as she did not think it was enough time for her to understand the recon. Regarding the incident in November 2020, he was not given a verbal warning, or a written warning. He was only told in a meeting by Le Roux not to use Claudia's signature. He had sent a report to Claudia as she had to co-ordinate information with the auditors.
- [13] As already stated earlier in this judgment, the Commissioner's findings were that the fourth respondent's dismissal was procedurally fair but substantively unfair. In reaching this conclusion, the Commissioner remarked that in criminal law there can be an actual crime such as theft, or an attempt to commit a crime such as attempted theft. His view was that to a large degree the same principles apply in labour law. He further commented that, there can be no offence of attempted dishonesty. Either someone committed an act of dishonesty or they did not do so, the mere fact that there was an alleged attempt to be dishonest means that the person did not succeed in being dishonest and is therefore not guilty. The fact that attempted dishonesty is not an offence can be seen from the fact that it does not appear in the respondent's disciplinary code. The code mentions acts of dishonesty or attempted fraud or theft. It does not mention attempted dishonesty.
- [14] The Commissioner's view was that the probabilities favoured that the fourth respondent did engage in unacceptable behaviour. He also found that Ms van

Jaarsveldt has provided a version which was more credible than that of the fourth respondent because the two had a good working relationship and thus, according to the Commissioner, she had no motive to fabricate her version. It is also the Commissioner's view that Ms van Jaarsveldt was clear in her evidence about the fact that the fourth respondent asked her to apply her electronic signature on the documents. Furthermore, according to the Commissioner, the fourth respondent's version that he was only training Ms van Jaarsveldt did not make sense, as there would have been no reason for her to feel uncomfortable that she would report the matter to Le Roux in light of the good working relationship between them. The Commissioner also considered that the manner in which the fourth respondent went about to train Ms van Jaarsveldt did not demonstrate that he was in fact training her.

- [15] It is clear from the above that the Commissioner was not satisfied with the charge of attempted dishonesty and was of the view that there exists no such an offence even in the applicant's code. He was clearly not satisfied with the evidence of the fourth respondent and rejected it while favouring that of Ms van Jaarsveldt. It is therefore apparent from the award that the second respondent's finding of substantive unfairness of the dismissal was directed at the severity of the sanction. He remarked that the sanction of dismissal was unfair for a charge of unacceptable behaviour because the mere point of corrective discipline is to increase the severity of a sanction, wherever possible from a verbal warning to a written warning, a final written warning and then, as a last resort, a dismissal.
- [16] According to the second respondent, because the applicant stated in its evidence that the fourth respondent was previously given a verbal warning for a similar offence, a final written warning would have been an appropriate sanction for unacceptable behaviour. The Commissioner's concern was that he was not pointed to any clause in the applicant's disciplinary Code regarding an appropriate recommended sanction for unacceptable behaviour but the closest he could find was "improper conduct". This conduct attracts a sanction of a final written warning for a second offence and dismissal for a third offence. The Commissioner proceeded to consider the lengthy

experience the fourth respondent had as an employee of the applicant and concluded that the sanction of dismissal was unfair.

[17] The issues for determination are very crisp in this application and they are:

17.1. Whether the finding that there was no attempted dishonesty or that there was no act of misconduct sufficiently serious to warrant a dismissal is justified;

17.2. Whether the re-instatement order is unreasonable and inconsistent with the evidence placed before the Commissioner and;

17.3. Whether the attachment of weight on the lengthy service of the fourth respondent in the employ of the applicant is justified.

[18] The applicant contends that the Commissioner's remarks regarding acts of dishonesty or attempted dishonesty were inconsistent. It submits that the commissioner's remark that in criminal law there can be an actual crime such as theft, or an attempt to commit a crime such as attempted theft and the remark that *"there can be no offence of attempted dishonesty, either someone commits an act of dishonesty or they did not do so. The mere fact that there was an alleged attempt to be dishonest, means that the person did not succeed in being dishonest and is therefore not guilty"*, are inconsistent.

[19] Counsel for the applicant further submits that the second respondent's attempt to support his reasoning by pointing out that the applicant's disciplinary code did not contain an offence of attempted dishonesty was without merit and that it indicated a misconception of the evidence before him. According to the applicant, the Code serves only as a guideline and it is not peremptory. He referred the court to a clause in the disciplinary code, which states that the code is used as a guide, and the transgressions contained therein are not definitive of all transgressions that may be committed. This clause also expresses that it is impossible to list all transgressions and the ones contained in the document are general transgressions. Disciplinary action could still be taken for unacceptable behaviour not listed in the Code, it states.

- [20] The plaintiff contends further that second respondent misconceived the evidence by finding that the fourth respondent did not succeed in being dishonest and therefore was not guilty of an offence. It submits that the second respondent applied a materially flawed logic which, if accepted means an employer who is aware of an employee's intention to commit misconduct is powerless and can only take disciplinary action once the misconduct is completed. It is the applicant's submission that the second respondent unreasonably applied the principle of progressive discipline without due regard to the facts of the misconduct by finding that the sanction of dismissal was unfair for the charge of unacceptable behaviour because, having conducted himself similarly during November 2020, the fourth respondent was only issued with a verbal warning and therefore deserved a final written warning.
- [21] The conclusion that, the fourth respondent would not have gained from his misconduct shows that the second respondent overlooked that he was Ms van Jaarsveldt's supervisor and that he used his position of power to misrepresent the facts to her to try and coerce her to breach an established practice designed to prevent fraud, the applicant submitted. It laments that the award is unreasonable, it was arrived at as a result of errors, it is based on misdirection and therefore, it falls to be reviewed and set aside.
- [22] The fourth respondent submitted that a review of an award is permissible if the defects in the award fall within one or more of the grounds as mentioned under section 145 (2) (a) of the LRA. It submitted that the award made by the second respondent was correct. Although it is conceded that the second respondent failed to consider material evidence before him in arriving at a determination, it is the fourth respondent's submission that the award, in so far as re-instatement is concerned, should not be altered.
- [23] This review concerns the question whether the second respondent committed gross irregularity in the proceedings and if so, whether the award falls to be set aside. In seeking the aforementioned order, the applicant relied on the provisions of section 145 and contended that the Commissioner committed a

gross irregularity in the conduct of the proceedings. Section 145 provides as follows:

- '(1) Any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award-
- (a) ... (b) ...
- (1A) ...
- (2) A defect referred to in subsection (1), means-
 - (a) that the commissioner-
 - (i) committed misconduct in relation to the duties of the commissioner as an arbitrator;
 - (ii) committed a gross irregularity in the conduct of the arbitration proceedings; or
 - (iii) exceeded the commissioner's powers; or
 - (b) that an award has been improperly obtained.
- (3) The Labour Court may stay the enforcement of the award pending its decision.
- (4) If the award is set aside, the Labour Court may-
 - (a) determine the dispute in the manner it considers appropriate; or (
 - (b) make any order it considers appropriate about the procedures to be followed to determine the dispute.

[24] The applicable test to be applied in applications of this nature when deciding whether the arbitrator's decision is reviewable has been emphasized numerous times in numerous decisions and more clearly in *Sidumo and Another v Rustenburg Platinum Mines Ltd and others*². The Constitutional Court held that the test is whether the decision reached by the Commissioner

² (2007) 28 ILJ 2405 (CC) at para 110.

is one that a reasonable decision maker could not reach. The court further held that the arbitrator's conclusion must fall within a range of decisions that a reasonable decision maker could make.

- [25] The labour court has supervisory powers to review proceedings, decisions and awards. It derives its powers from section 145 of the LRA. When faced with a review application based on the contention that a gross irregularity has been committed, the crucial enquiry is whether the conduct of the Commissioner complained of prevented a fair trial of issues. In *Goldfields Investment Limited v City of Johannesburg and Another*³ Schreiner J expressed the principle as follows regarding gross irregularities:

“The law, as stated in *Ellis v. Morgan* (supra) has been accepted in subsequent cases, and the passage which has been quoted from that case shows that it is not merely high-handed or arbitrary conduct which is described as gross irregularity; behaviour which is perfectly well-intentioned and bona fide, though mistaken, may come under that description. The crucial question is whether it prevented a fair trial of the issues. If it did prevent a fair trial of the issues then it will amount to a gross irregularity.”

- [26] In *Ellis v Morgan*⁴ the court said:

“But an irregularity in proceedings does not mean an incorrect judgment; it refers not to the result, but to the methods of a trial, such as, for example, some high-handed or mistaken action which has prevented the aggrieved party from having his case fully and fairly determined.”

- [27] In *casu*, it is contended that the irregularity committed by the Second respondent relates, amongst others, to his conclusion that the Disciplinary Code of the applicant did not contain an offence of attempted dishonesty. Clearly, the second respondent did not well acquaint himself with the contents of the Disciplinary Code of the applicant hence the misconception. The Code, in Appendix 1 containing a schedule of Misconducts, Proposes Action and Policy Guidelines states: “*the disciplinary code serves only as a guideline*”.

³ 1938 TPD 551 at 560

⁴ 1909 TS 576.

This means that even transgressions not included in the list may be punishable if found to be offensive to the employer.

- [28] In a case of this nature, where the Commissioner misconceives the nature of the inquiry, the ensuing hearing cannot, in principle be said to be fair because he or she has failed to perform his or her mandate. The disciplinary code, as a guide, was not peremptory but the second respondent applied it as if it were. According to the disciplinary code, it is impossible to list all transgressions and the ones contained in the document are general transgressions. It is also clear from the disciplinary code that disciplinary action would still be taken for unacceptable behaviour not listed in the Code. The second respondent, however, arrived at a conclusion that because the offence was not listed in the Code, therefore the fourth respondent could not be found guilty of it. This conclusion was incorrect.
- [29] The second respondent accepted the evidence of the applicant's witnesses, particularly that of Ms van Jaarsveldt, and rejected that of the fourth respondent. This means that the evidence of Ms van Jaarsveldt that the fourth respondent asked her to place her electronic signature on a package reconciliation for November and December 2020 while she had not perused it, stands. The fourth respondent, according to this evidence, though summarized herein, took a substantial step towards committing a crime but he could not complete it because Ms van Jaarsveldt refused to append her signature on the package reconciliation. This according to the evidence was an attempt to deceive the employer and/or Ms van Jaarsveldt and even from the evidence of the applicant, the purpose of the deceitful behaviour is unknown.
- [30] Be that as it may, it cannot be denied that despite the fact that the purpose of the deceitful behaviour was unknown, the attempt to act deceitfully was proven by the applicant and the harm or potential harm could not be achieved because Ms van Jaarsveldt refused to append her signature on the package reconciliation. The next question is, on the conspectus of the evidence, can it be said that the fourth respondent attempted to act dishonestly? In *Nedcor*

*Bank Ltd v Frank and others*⁵ the Labour Appeal Court made reference to the definitional elements of dishonesty as entailing ‘a lack of integrity or straightforwardness and in particular, a willingness to steal, cheat, lie or act fraudulently.’

- [31] The fourth respondent instructed Ms van Jaarsveldt to append her signature on the package reconciliation without informing her the purpose of doing so, but only told her he would train her later. The second respondent found this behaviour to be unacceptable as he did not agree with the concept of attempted dishonesty. Even so, the fourth respondent’s behaviour amounted to an attempt to act fraudulently or an attempt to mislead his employer or the Auditors to believe that the November and December 2020 package reconciliations were compliant, even though the harm or potential harm could not be determined.
- [32] Based on the above reasons alone, I am inclined to agree with the applicant that the second respondent’s misconception of the evidence placed before him caused him to arrive at an irrational and materially flawed decision. Considering the mosaic of the evidence, a finding of attempted dishonesty instead of unacceptable behaviour would have been appropriate under the circumstances. I am therefore of the view that the finding that there was no attempted dishonesty or that there was no act of misconduct sufficiently serious to warrant a dismissal was not justified.
- [33] Regarding the sanction, the second respondent found that the fourth respondent was guilty of unacceptable behaviour and concluded that his dismissal was procedurally fair but substantively unfair. He remarked that the fourth respondent’s conduct “*cannot be condoned*” then ordered that the fourth respondent be re-instated. He based this finding on reasons such as that he was not pointed at any clause in the applicant’s disciplinary code regarding an appropriate recommended sanction for unacceptable behaviour and that the applicant could not point to any benefit the fourth respondent would have gained from his misconduct as there does not appear to be any tangible gain. He remarked that the fourth respondent’s behaviour was foolish

⁵ (2002) 23 ILJ 1243 (LAC).

rather than malicious and therefore a sanction less than a dismissal would be appropriate.

[34] According to the second respondent, the fourth respondent had about 24 years of service while holding a clean record, the second respondent found this to be a strong mitigating factor especially after not being found guilty of dishonesty. The second respondent further stated that, considering that in a previous similar incident the fourth respondent was given a verbal warning, a final written warning would have been an appropriate sanction if the applicant were to fulfil the principle of corrective discipline.

[35] Had the second respondent not misconstrued the facts in this matter he would have arrived at a finding that the fourth respondent did attempt to act dishonestly which in itself amounts to an act of dishonesty. In terms of the applicant's disciplinary code, the sanction for this offence is a dismissal. In *Nampak Corrugated Wadeville v Khoza*⁶ the Labour Appeal Court held as follows:

"The determination of an appropriate sanction is a matter which is largely within the discretion of the employer. However, this discretion must be exercised fairly. A court should, therefore, not lightly interfere with the sanction imposed by the employer unless the employer acted unfairly in imposing the sanction. The question is not whether the court would have imposed the sanction imposed by the employer, but whether in the circumstances of the case the sanction was reasonable.'

[36] The employer's decision to dismiss the fourth respondent was justified as it was based on a finding that he attempted to act dishonestly. The decision of the second respondent that it was procedurally fair but substantively unfair falls to be dismissed because the second respondent failed to consider material evidence before him in arriving at this conclusion. The second respondent's misconception of the evidence placed before him caused him to arrive at an irrational and materially flawed decision and my view is that he indeed committed a gross irregularity in his findings and in his orders.

⁶ (1999) 20 ILJ 578 (LAC).

[37] In the result, I make the following order:

Order

1. The application succeeds.
2. The arbitration award in the dispute between Seriti Power (Pty) Ltd and NUM OBO MOKALENG E, issued by the second respondent under case number GAJB 18678-21 on 25 April 2022, is reviewed and set aside. it substituted with the following order:

“The fourth respondent’s dismissal was procedurally and substantively fair.”

3. Each party to pay its own costs.

L. Vukeya

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant

Attorney: M.G Maeso

Instructed by

Shepstone Wylie Attorneys

For the 3rd& 4th Respondent

Attorney: R.Makgamatha

Instructed by

Cheadle Thompson &Hysom Inc.

LABOUR COURT