



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR 1179/19

In the matter between:

ERGO MINING (PTY) LTD

Applicant

and

UASA obo SIBONGISENI BLESSING NGCOBO

First Respondent

**COMMISSION FOR CONCILIATION, MEDIATION
& ARBITRATION**

Second Respondent

**DUMISANI JOHANNES NGWENYA N.O &
SUZAN SELZER N.O**

Third Respondent

Heard: 26 June 2025

Delivered: 27 October 2025

Summary: *Review application. Commissioner used criminal test in assessing evidence before her. Material error of law. Award reviewed and set aside. Matter remitted for fresh determination before a new commissioner.*

JUDGMENT

MOSIKILI, AJ

Introduction

- [1] The applicant seeks to review and set aside an award issued by the third respondent/s (commissioner/s)¹. In the award, dated 23 April 2019, the commissioner/s held that the dismissal of Mr. Sibongiseni Mazibuko was unfair, and ordered the applicant to re-employ him from 2 May 2019.
- [2] The material facts appear from the award, and do not warrant repetition here. For present purposes, it is sufficient to record that the employee commenced his employment in January 2008 and was dismissed on 6 December 2018 for misconduct. The employee was charged with three charges of misconduct: Charge 1: assisting in the possible theft/sale of the company copper and copper busbars. Charge 2: theft of company copper and copper busbars. Charge 3: gross abuse of a company vehicle for private use. While the employee was found guilty on charge 3, he was exonerated on charges 1 and 2, hence the re-employment award.
- [3] The award is premised on the conclusion that the applicant failed to provide direct evidence to support the two charges relating to theft and/or assisting and /or selling company copper and copper busbars as all evidence referred to was circumstantial, as a result, the inferences sought to be drawn from the facts are not consistent with all the proven facts and not every reasonable inference was excluded.
- [4] In this regard, the commissioner/s held that there is no direct evidence that, while the employee admitted to removing the items from the old gold plant (milling section), there was no direct evidence that there were copper busbars or copper cables in the black duffel bags he carried, as seen on the video footage. Furthermore, there is no direct evidence that the employee entered the building of the scrap yard at Voortrekker Road.

¹ For consistency, herein referred as “she” and nothing turning on this.

[5] The applicant has raised a number of grounds of review, which need no repeating. In the main, the applicant complains of the commissioner's assessment of the evidence. The applicant contends that the commissioner failed to properly consider the evidence that served before her, and she came to a conclusion to which no reasonable decision-maker could have come to. In particular, the applicant contends that the commissioner failed to consider the overwhelming fact/evidence that on 24 October 2018, the employee, without just cause, entered the applicant's milling session where copper was stored and left carrying duffel bags with a co-employee, and ultimately, after a few stops later, drove to a scrap yard at Voortrekker Road. Here, the irresistible inference is that copper was stolen and sold at the scrap yard by the employee, so the argument unfolds.

[6] Further, the applicant contends that the commissioner committed an error of law and/or misconceived the nature of the inquiry when she applied the criminal standard, as opposed to civil standards, to draw an inference from the evidence led, and thus she erred in this respect. Herein, upon assessing all the evidence presented before her, she assessed whether the inference sought to be drawn was the only reasonable inference to be drawn; however, she ought to have assessed what was the most probable or plausible inference to be drawn. The commissioner/s, therefore, used the criminal test as opposed to the civil test. It is argued that, had the commissioner used the civil test, she would have found that the most probable or plausible inference on the evidence presented was that the employee is guilty of charges 1 and 2 as well. This is premised on the fact that:

6.1 The employee had no cogent reason to be at the old gold mine plant (milling section) on the day in question, 24 October 2018. This being the place where the drums of copper cables and copper plates/busbars were stored.

6.2 The video footage showed the employee with a colleague, Lungile, carrying duffel bags from the milling section, and Lungile's bag looked like it carried something significantly heavy as he was leaning to the left and trying to balance his weight.

6.3 Additionally, the said duffel bags were put in a vehicle used by the employee - at the medical gate the employee was physically searched, however, the vehicle was not searched; he then proceeded to exit the employment premises .

6.4 Lastly, the same vehicle with duffel bags was tracked to have driven off and later located parked at 421 Voortrekker Road, Brakpan, which was within proximity of a scrap metal yard and a spares shop. Notably, it was the same scrap yard where the applicant's specifically marked copper cable had been retrieved and or found to have been stolen on another previous occasion. When asked about this, the employee stated that he had attended to a nearby spares shop where he went to purchase parts for a motor vehicle he was re-building. However, no evidence of the actual purchase at the spares shop on the day in question.

6.5 Furthermore, the company vehicle tracker clearly demonstrated that the employee had been at or near Voortrekker Road 13 times in the last three preceding months (August – November 2018) and had the same explanation that he was purchasing car parts without providing proof for his transactions.

[7] For its trouble, the applicant contends that the commissioner misconceived the nature of the enquiry that she had to conduct in order to draw an inference from the circumstantial evidence. Her misconception is that she held herself bound to the criminal standard as opposed to the civil standard. This, accordingly, constituted a material error of law in that she applied the incorrect legal test and this, had a direct and material impact on the outcome of the hearing.

Test for review

[8] The test to be applied on review is now axiomatic; the threshold in a review application is deliberately stringent for an applicant to surmount; this is

consistent with the limited scope of judicial intervention. This is so because a review is not an appeal in disguise. In **Sidumo and Another v Rustenburg Platinum Mines Ltd and Others**², the apex court held that the outcome of the proceedings under review, in the form of the arbitrator's conclusion, must fall within a range of decisions that a reasonable decision-maker could make.

- [9] In **Duncanmec (Pty) Ltd v Gaylard No and Others**³ the Constitutional Court held that:

The correct test is whether the award itself meets the requirements of the reasonableness. An award would meet this requirement if there are reasons supporting it. The reasonableness requirement protects parties from arbitrary decisions which are not justified by rational reasons.

- [10] In **Zono v Minister of Justice and Correctional Services: In re: Minister of Justice and Correctional Services v Zono and Others**⁴, it was held that:

"This court is empowered to intervene if and only if the decision to which the arbitrator came is so unreasonable that no reasonable decision-maker could come to that decision on available evidence. As the Labour Appeal Court has often observed, given the threshold that applies, it is not often that applicants will succeed in a review. In the present instance, the primary attack on the award is one that goes to the assessment of evidence. Where review is sought on these grounds, the court must particularly be cautious not to blur the line between a review and an appeal. Arbitrators are allowed to be wrong, and a fragmented, piecemeal analysis of the award should be awarded."

- [11] In **Securitas Specialised Services (Pty) Ltd v Commission for the Conciliation Mediation and Arbitration and Others**⁵, the LAC buttressed the test as follows:

² Sidumo and Another v Rustenburg Platinum Mines Ltd and Others 2007 28 ILJ 2405 (CC) , para 110

³ (2018) 39 ILJ 2633, para 42

⁴ Zono v Minister of Justice and Correctional Services: In re: Minister of Justice and Correctional Services v Zono and Others [2020] 11 BLLR (LC)

The test for review is this: “is the decision reached by the arbitrator one that a reasonable decision-maker could have reached? To maintain the distinction between review and appeal, an award of an arbitrator will only be set aside if both the reasons and the result are unreasonable. In determining whether the result of an arbitrator’s award is unreasonable, the Labour Court must broadly evaluate the merits of the dispute and consider whether, if the arbitrator’s reasoning is found to be unreasonable, the result is, nevertheless capable of justification for reasons other than those given by the arbitrator. The result will be unreasonable if it is entirely disconnected with the evidence, unsupported by any evidence and involves speculation by the arbitrator”.

Evaluation, analysis and law

- [12] In a case like this, where the main grounds for the review concern the commissioner’s evaluation of the evidence, the court must be especially careful to distinguish between a review and an appeal. As demonstrated by authorities cited above, the court may only intervene if, and only if it is apparent that the commissioner committed a reviewable irregularity and that the outcome of the proceedings lies outside the range of decisions that a reasonable decision-maker could have reached based on the evidence.
- [13] I with the ground of review relating to material error of law and/or misconceived nature of the enquiry. Herein, it will be recalled and noted that, while no direct evidence was linked to the employee in the commission of charges 1 and 2, accordingly, in dealing with the circumstantial evidence to reach her outcome, the commissioner/s used the criminal test/standard.
- [14] At paragraph 38 of the award, in dealing with the evidence before her, the commissioner makes specific reference to a case of **The State v Ndundula (CC47/17)**[2018] ZAECHGHC 99, para 179 with reference to R v Blom 1939 AD 188 at 202 and 203 whereby the principle laid there was that inference sought to be drawn must be consistent with the proven facts. If not, no inference

⁵ Securitas Specialised Services (Pty) Ltd v Commission for the Conciliation Mediation and Arbitration and Others [2021] 5 BLLR 475 LAC

could be drawn. The proven facts should be such that they exclude every reasonable inference save the one sought to be drawn. If they do not exclude reasonable inference, then there must be doubt whether the inference sought to be drawn is indeed correct.

- [15] Manifestly, employment law disputes are not criminal proceedings, but rather akin to civil proceedings in nature. To underscore this, The Labour Appeal Court in **Combined Transport Services (Pty) Ltd v Buhle Zamokwakhe Miya and others**⁶, affirmed the applicability of the “balance of probabilities test” in employment law disputes, when it held that a proper assessment of evidence requires the attachment of more weight on the evidence that is consistent and/ or more credible. Further, the test herein is “*balance of probabilities*”, dictating that a more probable version should be accepted, as opposed to a “*beyond reasonable doubt*” test, which is the test applicable to criminal cases.
- [16] Dealing with the standard of proof, in **Govan v Skidmore**⁷ the Court held that it was trite law that in finding facts and making inferences in civil proceedings, the Court may go upon a mere preponderance of probabilities, even though in doing so it does not exclude every reasonable doubt, so that one may, by balancing probabilities, select a conclusion which seems to be a more natural, or plausible conclusion from amongst several conceivable ones, even though that conclusion may not be the only reasonable one.
- [17] The Constitutional Court in **National Union of Metalworkers of South Africa obo Nganezi and Others v Dunlop Mixing and Technical Services (Pty) Limited and Others**⁸ stated that an inference may be drawn from the proven or uncontested facts. Where there is more than one possible inference, the most probable and natural one should be accepted.

⁶ (DA15/2014) [2016] ZALAC 57 (25 November 2016)

⁷ [1952] (1) SA 732

⁸ (CCT202/18) [2019] ZACC 25; 2019 (8) BCLR 966 (CC); (2019) 40 ILJ 1957 (CC); [2019] 9 BLLR 865 (CC) ; 2019 (5) SA 354 (CC) (28 June 2019)

[18] Having entered the incorrect GPS co-ordinates, the commissioner was bound to end up at the wrong destination like Jonas in Tarshis. I say this because part of the reason the commissioner came to a wrong conclusion on the evaluation of the evidence was the postulation of the criminal law standard, when she said, *“in support of the case law below⁹, the inference sought was not consistent with the proven facts and not every reasonable inference was excluded”*.

[19] But in this case, various possibilities existed, including a possibility that:

19.1 When the employee's vehicle tracker location revealed that on 24 October 2019 (a few minutes having left the milling section with duffel bags) the vehicle was located and packed at Voortrekker Road - reasonable inference was that, having left the employment, he went to the scrap yard to sell the copper/ busbars.

19.2 The employee could have attended the spares shop, *albeit* he failed to produce any evidence in support of this allegation.

19.3 The evidence that the applicant's vehicle was not searched at the medical gate left a strong probability that he could have left with said copper inside the duffel bag undetected. And or a possible collusion as testified.

19.4 The uncontested fact is that the employee had no business attending the milling session on 24 October 2018, where copper is kept; the inference is that he was there to take the copper.

⁹ Case law referred to by the commissioner is *The State v Ndulula supra*

[20] In addition, in executing her duties, the commissioner ought to have fully addressed the considerations prescribed by the SCA in **Stellenbosch Farmers' Winery Group Ltd and Another v Martell ET Cie and Others**, namely:

"To come to a conclusion on the disputed issues a Court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the Court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the other factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of the assessment of (a), (b) and (c) the Court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it."

[21] A reading of the award makes it pertinently evident that the commissioner failed to deal fully or at all with factors prescribed by the SCA outlined above. More specifically, the commissioner failed to:

21.1 Properly analyse and evaluate the probabilities and improbabilities of each parties' witness. This is because she adopted the wrong test.

21.2 Properly assess, the credibility and reliability of the witnesses. For example, the employee gave two different accounts on what was contained inside the duffel bags on 24 October 2018. It remains unclear what the commission made of this inconsistency in her analysis.

- [22] Notwithstanding the above principles, having found the employee guilty on charge 3 for “*gross abuse of the company vehicle for private use*”, the commissioner failed to adequately evaluate the evidence before her with specific reference to the employees’ credibility in relation to charges 1 and 2, and the overall probabilities of his version when determining the explanation to, *inter alia*, what was inside the duffel bag, his reasons for being at the milling section; his presence at Voortreker Road (scrap yard / spare shop) on 24 October 2018 and on other previous occasions.

Conclusion

- [23] As a result, I conclude that the commissioner committed a material error of law by applying the criminal test in assessing the circumstantial evidence before her. The criminal law test led her astray. This wrong test materially affected the outcome of the matter.
- [24] Informed by the wrong test, the commissioner failed to properly apply her mind to the evidence and drew conclusions that were not sustainable with reference to the evidence. This had the consequence that her award, unstained as it was by the evidence, fails to meet the reasonableness threshold.
- [25] The applicant sought to have the award set aside and that I make a substitution. I am disinclined to grant a substitution partly because during the hearing of the matter, attempts were made to have a video footage which seems relevant in proving that the applicant or his co-employee left the milling session with a heavy duffel bags, however, despite concerted effort by both parties, the video footage could not be played. In the circumstances. Instead, I intend to refer the matter for a fresh hearing before a different commissioner.
- [26] Finally, in so far as costs are concerned, the requirements of the law and fairness are best satisfied by each party bearing its own costs, including costs on condonation so granted..

I make the following order:

Order

1. *The award issued by the third respondent on 23 April 2019 under case number GAEK2629-19 is reviewed and set aside.*
2. *The matter is remitted to the second respondent for a fresh hearing before a commissioner other than the third respondents.*

T Mosikili

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Adv P Moll

Instructed by: Alan Jacobs & Associates Inc

For the First Respondent: Adv. VW Masinga

Instructed by: Mngqingo Attorneys Inc