



Not reportable

**THE LABOUR COURT OF SOUTH AFRICA,
HELD AT CAPE TOWN**

CASE NO: C378/2023

In the matter between:

HELLOISE SMIT

Applicant

and

MALAN LOURENS VILJOEN INC

First Respondent

CCMA

Second Respondent

REAGAN JACOBS N.O.

Third Respondent

Date of Hearing: 12 November 2025

Date of Judgment: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing down judgment is deemed to be 10h00 on 17 November 2025 .

Summary: The employee was dismissed for misconduct and was on a valid final written warning at time of dismissal. She pleaded guilty to the allegations against her. The arbitrator found dismissal was an appropriate sanction applying the correct principles. On review, the applicant was confined to the limited grounds in her founding affidavit. Review test restated and applied. The arbitrator's decision was not unreasonable and the application for review was dismissed.

JUDGMENT

BOSCH AJ

INTRODUCTION

- [1] The applicant seeks to review and set aside an arbitration award by the third respondent ("the arbitrator") under the auspices of the second respondent ("the CCMA").
- [2] The applicant commenced employment with the first respondent ("the employer") on 1 December 2020 in the capacity of legal secretary. On 4 March 2022 she was issued with a notice to attend a disciplinary hearing. The hearing was chaired by a

Mr Neethling Joubert and related to allegations that the applicant had been negligent in putting incorrect information on documents. After that hearing the applicant was found guilty of the misconduct alleged against her and was given a final written warning.

- [3] A second disciplinary hearing was held on 30 September 2022, also relating to allegations that the applicant had been negligent in relation to information on various documents. The applicant was found guilty of the misconduct alleged against her and summarily dismissed.
- [4] On 7 October 2022, she appealed her dismissal. The appeal was dismissed and the applicant was advised that she could refer a dispute to the CCMA.
- [5] She referred an unfair dismissal dispute to the CCMA on 13 October 2022, challenging the substantive and procedural fairness of her dismissal and arbitration proceedings were conducted on 17 April and 5 June 2023. The arbitrator found that the dismissal was substantively and procedurally fair. The applicant seeks to review that decision.

THE ARBITRATION AWARD

- [6] It was common cause that the applicant attended but did not participate in the disciplinary hearing which led to her dismissal. She said that was because she was unhappy with the behaviour of the chairperson in the hearing which led to the final written warning.
- [7] The arbitrator found that since the applicant had not referred a dispute relating to the final written warning to the CCMA it fell outside of the bounds of what he could decide. He found, with reference to the decision in *Old Mutual Life Assurance Co SA*

Ltd v Gumbi [2007] 9 BLLR 699 (SCA), that the applicant's waiver of her right to participate in the hearing did not constitute procedural fairness. The arbitrator pointed out the applicant's concession that the chairperson in the second hearing was not rude to her and had repeatedly attempted to get her to participate in the hearing.

- [8] As far as substantive fairness was concerned, the arbitrator recorded that the applicant had pleaded guilty to the allegations against her. She was also aware of the rule or standard, not least of all because of the final written warning which was still valid at the time of the second disciplinary hearing. The applicant led no evidence relating to inconsistency. The arbitrator found that dismissal was an appropriate sanction because the applicant was guilty of repeated acts of misconduct and was on a valid final written warning at the time of the dismissal which had gone unchallenged despite the employer advising the applicant that she could challenge it by way of an unfair labour practice dispute.
- [9] In addition, the applicant had put up no evidence to show that she could not have approached the employer if she required assistance. The arbitrator found that the applicant was not an unsophisticated employee and she played an important role in the business. She was also experienced in the industry and had obtained an LLB degree and other qualifications.
- [10] With reference to the Constitutional Court's decision in *Sidumo & another v Rustenburg Platinum Mines* (2007) 28 ILJ 2405 (CC), the arbitrator reviewed the 'totality of circumstances'. Those included the applicant's role with the employer, her

length of service and her prior disciplinary record and the evidence before him. On the basis of that he concluded that dismissal was an appropriate sanction.

THE GROUNDS OF REVIEW

[11] In her founding affidavit, the applicant alleged that the award was not a decision that a reasonable commissioner could reach. That was because the sanction of dismissal was too severe given that she had pleaded guilty and her misconduct was not that serious. It did not involve elements of dishonesty or insubordination and the employer failed to demonstrate that it had suffered any harm, loss or embarrassment. As I understood it, the applicant also alleged that the employer was inconsistent because its answering affidavit in response to her application for legal representation in the CCMA, allegedly drafted by Mr Herbert (a director of the employer), contained various errors which were similar to the errors which led to her dismissal and no action was taken against Mr Herbert.

[12] The applicant did not file a supplementary affidavit in the review, instead electing to stand by her notice of motion and its accompanying founding affidavit. She filed a replying affidavit in which she dealt at some length with the evidence before the arbitrator and other matters.

THE MERITS OF THE REVIEW

[13] It is trite that an applicant in review proceedings must set out the grounds of review in her founding affidavit, read with her supplementary affidavit, if there is one.

And, except for some limited grounds which appear from the record (such as jurisdictional issues) the applicant is confined to what she has pleaded in those affidavits.¹

[14] It is noteworthy that the applicant does not challenge the arbitrator's findings on the procedural fairness of her dismissal. On a proper assessment of her pleadings, the review challenge is limited to an allegation that the arbitrator reached a decision that no reasonable arbitrator could reach in finding that dismissal was an appropriate sanction.

[15] The Labour Appeal Court² has said the following regarding the standard to be applied in determining the reasonableness of arbitrators' decisions:

'... The court asked to review a decision of commissioner must not yield to the seductive power of a lucid argument that the result could be different. The luxury of indulging in that temptation is reserved for the court of appeal. At the heart of the exercise is a fair reading of the award, in the context of the body of evidence adduced and an even-handed assessment of whether such conclusions are untenable. Only if the conclusion is untenable is a review and setting aside warranted.'

¹ *CUSA v Tao Ying Metal Industries & others* [2009] 1 BLLR 1 (CC) para 67; *Comtech (Pty) Ltd v Molony N.O and Others* (DA 12/05) [2007] ZALAC 35 (21 December 2007) at paras 13-14; *Mpe v Polokwane Local Municipality and Others* (JR101/2023) [2024] ZALCJHB 426 (7 November 2024) at paragraphs 9 – 15; *Gibela Rail Transport Consortium Rf Pty (Ltd) v NUMSA obo Dube and Others* (JR1558/2022) [2025] ZALCJHB 301 (28 July 2025) at para 24

² *Makuleni v Standard Bank of South Africa* (2023) 44 ILJ 1005 (LAC) at paras 4 and 13; *AJ Charnaud and Company v SACTWU obo Members and Others* (2024) 45 ILJ 2257 (LAC) at para 24; *Mashele v South African Reserve Bank and Others* (JA128/24) [2025] ZALAC 51 (21 October 2025) at paras 28-29

And further:

'To meet the review test, the result of the award has to be so egregious that, as the test requires, no reasonable person could reach such a result.'

[16] The allegation relating to inconsistency is of no assistance to the applicant.

Firstly, she did not articulate why the award was reviewable because the employer's answering affidavit in the application for legal representation contained errors.

However, because she is a layperson which entitles her to some latitude³, the court will assume that she meant to convey that the arbitrator ought to have taken this into account in assessing the fairness of her dismissal and that his failure to do so renders the award unreasonable.

[17] The arbitrator found that the applicant did not lead any evidence of inconsistency. That was correct. The evidence relating to the answering affidavit arose in the cross examination of Mr Herbert. The arbitrator committed no irregularity in not taking it into account given that it was irrelevant. That is because Mr Herbert's conduct was not the same as that for which the applicant was dismissed. It also transpired that Mr Herbert had not drafted the affidavit, albeit that he had signed it.

[18] Mr Herbert testified in cross examination that action was taken against other employees who were guilty of similar misconduct to the applicant's, but, as far as he

³ *Moswane v South African Police Services and Others, In re: South African Police Services and Another v Moswane and Others* (JR813/08) [2010] ZALC 260 (20 October 2010) at para 9

could recall, none had been dismissed. That evidence was not challenged. In addition, there was no evidence regarding the disciplinary records of those other employees. It was obviously important whether they were on a valid final written warning at the time of any disciplinary proceedings against them, but that evidence was lacking.

[19] Therefore, the arbitrator did not reach an unreasonable decision because he did not find that there was inconsistency in the applicant's dismissal.

[20] As to the issue of whether dismissal was an appropriate sanction, the arbitrator (as was required of him) took into account various factors in considering whether dismissal was an appropriate sanction. It cannot be said that the decision was unreasonable in the sense that it was so egregious that no reasonable person could reach such a result.

[21] The applicant was on a valid final written warning at the time of her dismissal, she conceded in cross examination that she was capable of doing the work and was aware after receiving the final written warning that further misconduct of the same nature could lead to her dismissal. In addition, the applicant did not apologise for her misconduct and the fact that the employer did not demonstrate *actual* harm due to her repeated misconduct does not count in her favour. That is because the applicant appears to have accepted in cross examination that her misconduct *could have* caused harm to the employer if it was not detected. Fortunately, it was.

[22] In the circumstances, the applicant has failed to prove that the arbitrator's decision was unreasonable and her application for review falls to be dismissed.

[23] As far as costs are concerned, the employer did not request that I award costs in its favour and I can see no reason in the circumstances to deviate from the general rule that costs are not awarded in matters such as this.

[24] In the premises, I make the following order:

1. The application to review and set aside the award issued under case number WECT-16141/22 is dismissed.
2. There is no order as to costs.



Craig Bosch
Acting Judge of the Labour Court of South Africa

APPEARANCES:

Applicant: In person

Respondent: Advocate Manser, instructed by Malan Lourens Viljoen