



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case no: JR 2066/20

In the matter between

365 ON POINT (PTY) LTD

Applicant

and

MASETLA, M. N.O

First Respondent

**THE COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

Second Respondent

RACHEL MACHETE

Third Respondent

Heard: 28 August 2025

Delivered: 24 November 2025

JUDGEMENT

SIDZUMO, AJ

Introduction

- [1] This is an application in terms of which the applicant seeks to review and set aside an arbitration award issued by the first respondent. It was the first respondent's finding that the dismissal of the third respondent was substantively unfair, and the applicant was ordered to compensate the third

respondent the sum of R46 800.00 by no later than 5 November 2020. The applicant, dissatisfied with the outcome, launched the present application.

Background facts

- [2] The third respondent (Rachel Machete), was employed by the applicant, 365 On Point (Pty) Ltd, as the merchandiser responsible for ensuring that the correct stock (amongst others, the Dark 'n Lovely Anti-breakage kits) was on the shelves of a Shoprite retail store.
- [3] As of the date of arbitration, the third respondent had eight years of service with the applicant.
- [4] On 17th July 2020, a disciplinary hearing was held where the third respondent was charged with gross negligence in that on 5 July 2020, she failed, without proper cause, to perform her duties with proper care required in that she did not remove expired Dark 'n Lovely Anti-breakage kits from the shelf. Secondly, she was charged with unauthorised absence from work between the period 12 June 2020 and 23 June 2020.
- [5] The third respondent was found guilty only of the first charge of gross negligence in that on 5 July 2020, she failed without proper cause to perform her duties with the proper care required, and the chairperson of the disciplinary enquiry recommended dismissal. Aggrieved with her dismissal, the third respondent referred a dispute to the second respondent, the Commission for Conciliation, Mediation and Arbitration (CCMA).
- [6] At arbitration, her dismissal was found to be substantively unfair, and the applicant was ordered to pay 12 months' compensation in the sum of R46 800.00 by no later than 5 November 2020. It is upon this basis that the applicant sought the review of the arbitration award in this Court.

Grounds for review

- [7] The applicant alleges that the first respondent failed to apply her mind to the evidence presented to her by the parties at the arbitration and that she erred on and/or misrepresented same. It is alleged that the first respondent's

reasoning process in terms of the factual and legal findings made by her in the award, as well as her assessment of the evidence, is inexplicable and, as such, that she reached a decision that a reasonable decision maker could not reach.

- [8] It is further alleged that the first respondent committed a reviewable irregularity and thereby arrived at a conclusion which no reasonable decision maker could have reached in the finding that the dismissal of the third respondent was substantively and procedurally unfair.
- [9] Lastly, it is alleged by the applicant that the first respondent committed a gross irregularity by awarding 12 months' compensation without motivating why she would award the maximum amount of compensation possible in law. It is alleged by the applicant that the first respondent in this respect did not judicially exercise her discretion.

The award

- [10] The first respondent's analysis of the evidence concerning whether the third respondent was, on a balance of probabilities, guilty of the alleged misconduct is confined to six paragraphs in the award. The first respondent's reasoning is captured as follows:

[20] The employer's only witness who testified in the arbitration proceedings was Daniel Ziwenga. The version of this witness did not assist the employer for the reasons I set out here. Firstly, he stated that he was contacted telephonically by the Styloop Shoprite manager on 6th July 2020 who informed him that a customer bought Dark 'n Lovely stock which had expired. He was requested to visit the store to attend to the issue. Under cross examination, he was referred to the charge sheet which reflects an incident that took place on 5th July 2020. He then changed and said it was on 5th July 2020.

- [21] Secondly, Mr Ziwenga stated that, on being called to the store, he came and entered the store through the customer entrance. He called that employee and told her that the Store Manager did not want her there. Instead of addressing the issue that brought him to the store

and verifying if indeed expired stock was on the shelf, he tells the employee that she was no longer needed there. This witness did not even bother to at least see and satisfy himself that indeed there was expired stock on her shelf. As an objective and reasonable person in the position of this witness it was expected that before arriving at any conclusion, he should satisfy himself of the correctness of the information to him by the store manager. Even when he was asked during cross examination as to how could he trust the store manager and not believe her employee, he said there was no reason for the manager to lie. He simply rejected the employee's version without properly ascertaining the truth or correctness of what he was told. In my view this witness had already concluded on the guilt of the employee.

[22] Thirdly, the employee, as she said in the disciplinary hearing, said that she was not at work on 5th July 2020 when the alleged Dark 'n Lovely item was bought by the customer. The witness could not produce evidence to prove that the employee was at work. This was a fairly simple issue to prove because the employee probably clocks in at work or video footage by the employer would have solved the issue. The importance of this date is that the employee's version was that he was surprised when she received a notice to attend a hearing on 9th July 2020 when she was never made aware of the alleged expired goods found on her shelf.

[23] Fourthly, Mr Ziwenga said the Shoprite Manager told her that the customer had bought the Dark 'n Lovely item. There was however no proof of purchase in the form of a till slip to indeed confirm that a customer had bought the item. In fact, when he was cross examined on this point, he said he could not remember well because the customer saw that the item expired when he or she wanted to pay at the till.

[24] Overall, Mr Ziwenga contradicted himself in the proceedings, he failed to present evidence that at least show on a balance of probabilities that the employee did not do her job with the required levels of care and diligence. Instead I have to agree and accept the employee's version that there were grudges between herself and Mr Ziwenga who

just wanted to please Shoprite by dismissing her. The manager of Shoprite told him that he did not want her there.

- [25] Given the manner in which the employee was dismissed for no substantive reason, it is my view that the requirements of fairness would compel me to award the employee 12 months' compensation in the amount of R46 800.00 (R3900 X 12= R46 800.00).'

Analysis

- [11] Where an applicant brings an application in terms of section 145 of the Labour Relations Act¹ (LRA), the Court may only review and set aside an arbitration award or ruling if it is shown to contain a defect as contemplated by section 145 of the LRA that renders the arbitration award so unreasonable that no reasonable decision-maker could have reached the same conclusion.

- [12] The test to review an arbitration award of the CCMA is now well-established. The Labour Appeal Court in *Minister of Police v Safety and Security Sectoral Bargaining Council and Others*² held:

'The test on review comprises two stages. The first is to identify some reviewable irregularity or misdirection on the part of the arbitrator. The existence of some cognitive error or misdirection is not in itself a basis on which to review and set aside an award, the applicant must further establish that the outcome or result of the proceedings does not fall within a band of decisions to which a reasonable decision-maker could come. Put another way, the applicant must show that on the totality of the evidence, avoiding a piecemeal examination of the evidence, the outcome reached by the arbitrator was not one that could reasonably be reached.'

- [13] The Constitutional Court in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*³ clearly set out how an arbitrator is required to determine the fairness of the sanction of dismissal applied by the employer, and thus places a high threshold on applicants seeking to challenge an arbitration outcome or a ruling. The Constitutional Court stated that:

¹ Act 66 of 1995, as amended.

² (PA 13/2023) [2025] ZALAC 14 (4 March 2025) at para 14.

³ [2007] 12 BLLR 1097 (CC) at para 78.

'In approaching the dismissal dispute impartially, a commissioner will take into account the totality of circumstances. He or she will necessarily take into account the importance of the rule that had been breached. The commissioner must of course consider the reason the employer imposed the sanction of dismissal, as he or she must take into account the basis of the employee's challenge to the dismissal. There are other factors that will require consideration. For example, the harm caused by the employee's conduct, whether additional training and instruction may result in the employee not repeating the misconduct, the effect of dismissal on the employee and his or her long-service record. This is not an exhaustive list.'

[14] The court in *National Union of Mineworkers and Another v Rustenburg Platinum Mine (Mogalakwena Section) and Others*⁴ held that:

[26] A reasonable award is not necessarily a right or correct award. As long as it falls within the range of reasonable decisions that could be made based on the evidence before the decision-maker, there would be no reason to set the award aside. The reviewing court should always guard against substituting its views for those of the decision-maker. ...

[27] When analysing an award, the reviewing court must look at all the material that was before the commissioner and not only the reasons given by the latter in the award. Where the material before the commissioner shows that there are other reasons, except those mentioned by the commissioner, which render the award reasonable, the reviewing court must consider such evidence.'

[15] Having regard to the grounds of review raised by the applicant, it is necessary for this Court to assess the evidence before the commissioner as part of the assessment into the reasonableness of these findings and the award.

[16] The Court has to consider the existence of the rule and the question of whether the rule was broken by the third respondent or not.

[17] It is established that there was a disciplinary code which provided for dismissal as the appropriate sanction for the offence of gross negligence, thus

⁴ [2015] 1 BLLR 77 (LAC).

validating the existence of the rule. As a rule, the third respondent had to remove any expired products of Dark 'n Lovely Anti-breakage kits from the shelf.

- [18] At the arbitration hearing, there was no evidence before the first respondent of an expired Dark 'n Lovely Anti-breakage kit being removed from the shelf or proof that a customer bought or intended to buy the expired product. The applicant did not call a witness, neither the store manager to testify that he found the expired stock on the shelf, nor was a customer called to testify that the expired product was indeed bought or about to be bought by the customer.
- [19] There was no till receipt brought as evidence to confirm the sale of the alleged expired Dark 'n Lovely product. It was the third respondent's contention that the expired stock was not even from Shoprite, and this remained undisputed.
- [20] Section 3 of the Law of Evidence Amendment Act⁵, clearly indicates the circumstances under which hearsay evidence shall not be admissible. Relevant to this matter, the person upon whose credibility the probative value of such evidence depends on must testify at such proceedings. The store manager or the customer was not called in to testify by the applicant, thus rendering the evidence of Mr Ziwenga hearsay.
- [21] I am unable to concur with the applicant's submission that the first respondent's conclusion on the evidence is misconceived and unreasonable; rather, it is evident that no rule has been contravened by the third respondent. It is irrefutable that when confronted with an allegation that a customer had bought an expired product, at least a till receipt or the alleged expired product should be shown as proof, including a witness called to testify as to the veracity thereof. None of these were done; for this reason, also, it cannot be concluded that the first respondent did not apply her mind or that her assessment of the evidence is inexplicable.

⁵ Act 45 of 1988.

[22] The first respondent found that Mr Ziwenga, the applicant's witness, had already presumed the employee's guilt. This may have been unwarranted, as Mr Ziwenga told the employee that the Store Manager did not want her there before confirming if expired stock was actually present or if proof existed that a customer bought an expired item. Therefore, the first respondent concluded that Mr Ziwenga had prejudged the employee. A question, therefore, arises whether the first respondent's finding was misplaced.

[23] The Labour Court has, in *Mofokeng v Botha and Others*⁶ held:

'In the determination of disputes, it is acceptable and sometimes necessary to draw inferences. However, inferences must be based on proven facts and arrived at through logical reasoning. Inferences should not be mere conjecture or speculation. In the judgment in *Caswell v Powell Duffryn Associated Collieries Ltd* it was put thus:

'Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish... But if there are no positive proved facts from which the inference can be made, the method of inference fails, and what is left is mere speculation or conjecture.'

[24] In light of the foregoing reasoning, the conclusion and inference advanced by the first respondent were entirely appropriate and not misplaced. Accordingly, I am satisfied that the first respondent's conclusion that Mr Ziwenga prejudged the employee is both reasonable and justified under the circumstances.

[25] There is no reason before this Court to disagree with the first respondent's analysis or conclusion. No evidence established that the third respondent breached any rule or that a customer bought expired stock. The applicant's claims of poor performance or complaints by the store manager were unsupported by a lack of evidence of remedial steps taken. No investigation was conducted, and the dismissal was driven by the store manager's preference rather than proven misconduct. The dismissal was thus

⁶ (JR1105/21) [2025] ZALCJHB 102 (14 March 2025) at para 60.

substantively and procedurally unfair, and the decision reached by the first respondent was reasonable given the evidence before her.

- [26] The question now stands whether, indeed, according to the applicant, the first respondent committed a gross irregularity by awarding 12 months' compensation without motivating why he should award the maximum amount of compensation possible in law? And whether she did not exercise her discretion judicially?
- [27] Section 193 (1) (c) of the LRA provides that if the Labour Court or an arbitrator appointed in terms of this Act finds that a dismissal was unfair, the Court or the arbitrator may order to pay compensation to the employee.
- [28] Section 194 provides for limits on compensation. The compensation awarded to an employee whose dismissal is found to be unfair either because the employer did not prove that the reason for dismissal was a fair reason relating to the employee's conduct or capacity or the employer's operational requirements or the employer did not follow a fair procedure, or both, must be just and equitable in all the circumstances, but may not be more than the equivalent of 12 months' remuneration calculated at the employee's rate of remuneration on the date of dismissal.
- [29] The court in *Ndaba v South African Mint (Rf) (Pty) Ltd*⁷ quoted Professor Rochelle le Roux, who opines that the meaning of 'just' is as follows:

'[115] ...

"When exploring the meaning of "just" ... the starting-point should be the injustice (unfairness) suffered by the employee, whether or not it was a no-fault dismissal, and whether it concerns procedural or substantive unfairness or both. The focus should be on the conduct of both parties in relation to the unfairness and the harm (patrimonial and non-patrimonial) that followed. Were the actions of the employer malicious, insensitive or honourable? To what extent did the employee's actions contribute to the dispute? Does the unfairness involve the infringement of constitutional rights...? ... Another

⁷ (2025) 46 ILJ 964 (LC).

important consideration would be whether patrimonial and non-patrimonial loss was caused by the unfairness.”

[30] The first respondent in addressing the issue of compensation said the following:

‘Given the manner in which the employee was dismissed for no substantive reason, it is my view that the requirements of fairness would compel me to award the employee 12 months’ compensation in the amount of R46 800.00 (R3900 X 12= R46 800.00).’

[31] It is, however, borne in mind that the compensation must be just and equitable and may not be more than 12 months. This affords the first respondent to exercise her discretion. However, this discretion must be within the bounds of reasonableness.

[32] In determining the amount of compensation, the first respondent clearly understood the nature and extent of her discretionary powers. She carefully considered the facts of the case, particularly the nature of the dismissal and the circumstances leading up to it, which she found to be unfair, a conclusion with which this Court agrees. The first respondent provided a concise reason, based on fairness and supported by the evidence before her. There is no indication that her discretion fell outside the bounds of reasonableness.

[33] On the other hand, upon consideration of the applicant’s heads of argument, it is evident that the submissions do not advance beyond expressing dissatisfaction with the 12-month compensation award and what should be contained in the award according to the applicant. The case law cited merely reflects the applicant’s assertion that the first respondent declared such compensation must be awarded, accompanied by the unsubstantiated claim that this was intended to punish the applicant. No reasons are provided to support this allegation, nor does the record contain any evidence to substantiate the applicant’s contention.

[34] The applicant, in his heads of argument, relied on the case of *Kemp t/a Centralmed v Rawlins*⁸ (*Kemp*). However, the *Kemp* matter is distinguishable from the present matter. The Court in *Kemp* had to decide whether the award was fair or not, considering the fact that the employee had rejected the offer of reinstatement, including the employee's conduct of failing to respond to the employer, who was trying to resolve the matter. In the present matter, no offer of reinstatement was presented to the fourth respondent. The first respondent considered the nature of the dismissal, the circumstances leading to the dismissal and the twelve months' compensation.

[35] Section 193(2) of the LRA deals specifically with the issue of reinstatement. According to this section, the 'Labour Court or the arbitrator must require the employer to re-instate 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.'

[36] It is clear from the record of the arbitration proceedings that the first respondent did not deal with or direct herself to whether section 193(2)(a) to (d) of the LRA was satisfied. The first respondent only confined herself to the remedy related to the calculation of the amount of 12 months' compensation that the fourth respondent would receive. It is rather unfortunate that the issue of reinstatement was not dealt with at all. Although the dismissal was unfair and a period of five years has elapsed since the third respondent's dismissal in 2020, it is necessary to remit the matter to the second respondent to deal with the issue of reinstatement. I am, therefore, unable to deal with the issue of reinstatement due to the fact that no evidence has been led this far on

⁸ (2010) 31 ILJ 2325 (SCA).

whether the third respondent wants to be reinstated or not, or whether the reinstatement is practical or not.

[37] Having read and considered the submissions made, pleadings and the record filed herein and in the absence of evidence that the first respondent's discretion was arbitrary or unreasonable. I see no reason why this Court should interfere with the award wholly. I am therefore satisfied that the first respondent's award was reasonable in light of the evidence that was placed before her by the parties in the arbitration proceedings.

[38] In the circumstances, I make the following order:

Order

1. The review application is dismissed.
2. The compensation awarded to the third respondent in terms of the arbitration award is to be paid within 30 days of this order.
3. The issue of reinstatement is remitted back to the second respondent.
4. There is no order as to costs.

WN Sidzumo

Acting Judge of the Labour Court of South Africa

Appearance:

For the Applicant: Mr A.J Posthuma, Snyman Attorneys

For the Fourth Respondent: Ms T Mbonani, AFADWU