



**THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

Not Reportable

Case no: JR1747/21

In the matter between:

**JD GROUP (PTY) LTD t/a HI-FI CORPORATION**

**Applicant**

and

**MOLOKO S M N. O**

**First Respondent**

**COMMISSION FOR CONCILIATION, MEDIATION AND  
ARBITRATION**

**Second Respondent**

**MILLER MOGAMAT MILLER**

**Third Respondent**

**Heard: 13 August 2025**

**Delivered: 27 November 2025.**

**Summary:** An application to review and set aside an award, which found the dismissal of a branch manager for gross negligence following a store robbery to be substantively unfair, and awarded maximum compensation, as the employee did not wish to be reinstated. The finding of unfairness is reasonable, but the award of maximum compensation is reduced.

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**JUDGMENT**

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**GANDIDZE, J**

## Introduction

- [1] This is an opposed review application seeking to set aside an arbitration award dated 19 July 2021, issued by the first respondent commissioner, S.M. Moloko, under the auspices of the second respondent (the CCMA), in case number GAJB18206-20. The award found that the dismissal of the third respondent, Mr Mogamat Ganief Miller (Miller), was procedurally fair but substantively unfair. If the award is reviewed and set aside, the applicant, JD Group Pty Ltd t/a Hi-Fi Corporation (Hi-Fi), seeks an order substituting the award with one that declares the dismissal to be substantively fair, or, alternatively, an order reducing the maximum compensation awarded. In the further alternative, Hi-Fi seeks an order remitting the matter to the CCMA for a fresh hearing before a different commissioner, other than commissioner S. M. Moloko.
- [2] Miller opposed the application and also sought costs on an attorney-client scale.

## Background facts

- [3] Hi-Fi is a retailer of consumer appliances, devices, equipment, and related accessories, with stores nationwide. Miller was employed as the branch manager of the Southgate Mall branch (the store), having started working for Hi-Fi<sup>1</sup> in 2005. In that role, he was responsible for all aspects of the store's operations, including ensuring compliance with all store security procedures and policies.
- [4] On the morning of 10 July 2020, Miller received a call informing him that his son had tested positive for COVID-19, and he needed to self-isolate in accordance with COVID-19 procedures. On 12 July 2020, while Miller was in isolation, a robbery occurred at the store. A total of 231 cell phones and tablets, valued at over R300 000, were stolen from the high-risk cage.

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<sup>1</sup> Or its predecessor.

- [5] Following the robbery, an investigation was carried out, and Miller, the Sales Manager, Alfred Mugano (Mugano), and the Front and Back Officer Supervisor, Sibusiso Nkosi (Nkosi), were charged.
- [6] Miller was charged with:
- '[1] Gross negligence in that during the period 01 May 2020 to 12 July 2020, you failed to ensure that all cellular/tablet stock in HF Southgate was properly secured in the time delay safe, resulting in this stock being easily accessed and/or stolen in a robbery that occurred in the store on 12 July 2020.
  - [2] Breach of the Display Alarm and Store Security Policy(CR-13-P) in that during the period 22 February 2020 to 12 July 2020 you failed to ensure that access/controls to the high risk cage and/or stock in HF Southgate was properly managed/implemented.'
- [7] Following a disciplinary hearing held on 4 September 2020, Miller was found guilty of both charges, and the chairperson recommended that he be demoted to a lower position, subject to his agreement. Miller did not agree to the demotion, and the dismissal sanction was imposed on 10 September 2020. Pursuant to the dismissal, Miller referred a dispute to the CCMA, seeking compensation rather than reinstatement.
- [8] In the review, Hi-Fi submits that it did not blame Miller for the robbery, but that the incident highlighted several instances of material non-compliance with the relevant security and stock control policies and procedures in the store, which, if followed, would have significantly reduced the losses it experienced during the robbery.
- [9] The first is the Display Alarm and Store Security Policy (the Policy), which stipulates that all high-value, high-risk stock, which includes laptops, hard drives, memory cards, and mobile phones and tablets valued at more than R1000, except for five units, must be kept locked in a time-delay safe (the safe) located inside a high-risk cage (the cage) in the High-Risk Storeroom (the storeroom). The storeroom stays locked, and only management can open

it. The cage is also locked at all times and only opens 10 minutes after entering a security PIN, known only to management. Similarly, the safe inside the cage has four separate drawers, each of which can only be opened by entering a security PIN known only to management, and there is a 10-minute delay after entering the PIN before a drawer can be accessed. According to Hi-Fi, the investigation into the robbery found that, for two weeks beforehand, most high-risk items were stored in the cage rather than in the safe, as required. According to Hi-Fi, if this requirement had been followed, the high-risk items probably would not have been stolen.

- [10] The second security and control measure was that the movement of all high-risk and high-value stock had to be recorded in a High Value Control Register (the register). According to Hi-Fi, the investigation concluded that this was not done.
- [11] The third security and control measure was a daily stock inspection of the store, which was necessary, but it was not carried out.
- [12] I will now turn to the arbitration proceedings.

#### The arbitration proceedings

- [13] Miller challenged both the procedural and substantive fairness of his dismissal.
- [14] Hi-Fi called as its witnesses, Mr Zahir Maal (Maal), the regional manager of the Southgate store at the time of the robbery, and Mr Claude David (David), who took over from Maal in August 2020. Miller represented himself and testified in his own defence.
- [15] The commissioner's summary of the evidence relevant to the review application is outlined below.
- [16] David testified that he initiated the disciplinary proceedings against Miller. He explained the layout of the storeroom, the cage, and the safe. When the robbery occurred on 12 July 2021, the storeroom door was open, and the cage was unlocked. The robbers stayed inside the storeroom for 38 minutes.

It was Miller's responsibility to ensure proper management of the high-value stock, and Miller's gross negligence in failing to do so dated back to May 2020, with the policy breach regarding the register having been ongoing since February 2020.

- [17] Under cross-examination, he stated that he was appointed as the regional manager after the robbery. Although Miller was not on duty at the time of the incident, he was grossly negligent and breached policy, resulting in the store suffering a loss. Mugano, who was in charge of the store during Miller's absence, admitted that he failed to observe the security policy by leaving the storeroom door open. Mugano and Nkosi were also dismissed.
- [18] David could not respond to the proposition that the Store Clerk, Ernest Boikanyo (Boikanyo), and Mugano received high-risk stock and were responsible for entering it into the register, and that Miller did not get involved.
- [19] On the contention that Miller had scored above average in the operation audits (audits) for the store between February and June 2020, David stated that these audits did not include high-value items in the safe.
- [20] The second witness was Maal. He testified that when the robbery took place, Miller reported to him as the regional manager. During the week of the incident, he visited the store and met with Miller to discuss the issue of high-risk stock not being secured in the safe, although he could not recall the exact date.
- [21] He investigated the robbery and concluded that the robbers stole items from the cage because the safe was inaccessible. He found that high-value items had not been stored in the safe between May and 12 July 2020, as required, and that registers had not been completed since February 2020. This is why Miller was charged, according to Maal.
- [22] When it was put to him that after disciplining an employee on 9 July 2020, Miller called a staff meeting on 10 July 2020 to discuss security issues, Maal responded that the staff meeting was about sales, not security.

- [23] He agreed with David's account that the audits carried out between February and June 2020 did not include the high-value stock kept in the safe, and that no audits had been conducted for that stock.
- [24] Miller testified in his own defence. On 9 July 2020, he spent most of the day at the store next door, Incredible Connection, conducting a disciplinary hearing against an employee for breaching the policy. He issued this employee a final written warning. He returned to the store late in the afternoon and, as part of his routine checks, went to the storeroom. He found high-value items stored in the cage, and he made a note to discuss it with the staff the following day.
- [25] The next morning, he held the weekly staff meeting and instructed the responsible staff to ensure that high-value items are stored in the safe. During the meeting, it was brought to his attention that stock had not been entered into the register due to issues with the scanner. He instructed that stock received must be recorded manually. Additionally, he took the staff through the policies, and all staff signed to confirm. At least two employees prepared statements confirming the discussion at the staff meeting.
- [26] Before he could follow up on his instructions, he received a phone call about his son's COVID-19 test results, and he left the store to isolate. In his absence, Mugano was to assume and perform all his duties. Mugano attended the meeting on 10 July 2020. Mugano took responsibility for the lapse in security on 12 July 2020, when a staff member was left alone in the storeroom with the door and cage unlocked. Despite not being at work on 12 July 2020, he was subjected to a polygraph test and was told he failed and would be subjected to a second test, which did not happen.
- [27] Boikanyo and Mugano were responsible for receiving, recording in the register, and storing stock in the safe. He was not required to sign the register. The register was in the storeroom on 9 July 2020. When he returned from isolation on 24 July 2020, he was shocked to hear that it had not been there since February 2020, yet the Store Clerk informed him that, in his absence, Maal had taken the register as part of his investigation.

- [28] Commenting on a version by one of the employees that the high-value items were not secured in the safe for two weeks before the robbery because they could not be recorded in the register due to computer issues, he responded that he was only made aware of this at the meeting on 10 July 2020. At that meeting, he instructed staff to manually register the high-value items and secure them in the safe.
- [29] He also realised that cellphones were not locked in the safe on 9 July 2020, which is why he raised the issue at the meeting on 10 July 2020.
- [30] He denied that Maal visited the store during the week of the robbery or that he had a discussion with him. If Maal had visited the store as alleged, it would have been captured on CCTV.
- [31] The chairperson of the disciplinary hearing was biased against him and incorrectly recorded his overall audit score as 53%, when it was higher than 80%. He disagreed that audits did not cover high-risk value items.
- [32] He had a clean disciplinary record.

#### The award

- [33] With reference to case authorities,<sup>2</sup> the commissioner determined that he was required to ascertain the real or true dispute between the parties. He determined that he was required to identify the proximate or dominant cause of Miller's dismissal, which was the robbery on 12 July 2020. He also determined that, even though Miller was not at work on the day, Hi-Fi's case was that Miller had been negligent, since February 2020, in failing to ensure compliance with the Policy, and since May 2020, in failing to ensure that high-value items were secured in the safe.
- [34] The award records that during the presentation of Hi-Fi's case, the commissioner found it challenging to understand why Miller was charged with negligence, let alone gross negligence, as no evidence had been presented. It

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<sup>2</sup> *CUSA v Tao Ying Metal Industries and Others* [2009] 1 BLLR 1 (CC) and *Health and Other Services Personnel Trade Union of South Africa obo Tshambi v Department of Health, KwaZulu-Natal* [2016] 7 BLLR 649 (LAC).

also notes that Hi-Fi was asked to address this issue in its closing submissions.

- [35] The commissioner noted that David could not have helped Hi-Fi's case, as he was appointed after the robbery. He did not provide documentary evidence, such as reports, minutes of meetings with Miller, or Miller's performance management records for the period in question.
- [36] Regarding Maal's evidence, the commissioner questioned his credibility. Firstly, he referred to an alleged meeting with Miller a day before the robbery, during which security issues were discussed, and noted Maal's failure to produce proof of the meeting, which Miller disputed ever took place. Secondly, he claimed that the store had not used the register since February 2020. However, Miller testified that on 9 July 2020, the register was in the store. Boikanyo informed Miller that Maal had taken the register while Miller was in isolation as part of an investigation. The commissioner found that the employee who alleged that the register had not been used in the days leading up to the robbery, and that the high-value items had not been placed in the safe due to computer issues, was not called to testify. According to the commissioner, even if that version could be accepted, Miller testified that he only became aware that high-value stock was being stored in the cage on 9 July 2020. He addressed the issue at the staff meeting on 10 July 2020, when he also learnt that the high-value items had not been recorded in the register. He then instructed that both issues be rectified and had to leave the store before he could ensure his instructions were complied with.
- [37] As he had found regarding David's evidence, the commissioner found that Maal had not provided any evidence of breach of the Policy since February 2020, nor of negligence by Miller since May 2020.
- [38] The commissioner also referenced the audits conducted between February and June 2020, noting that, on average, Miller achieved 80% and 100% in Security and Risk Management. Importantly, the commissioner pointed out that this evidence was uncontested, other than to claim that the audits did not

cover high-value items and that Hi-Fi failed to produce the audit reports concerning these items.

- [39] The commissioner also considered that on 9 July 2020, Miller disciplined an employee and issued him a final written warning for breaching the security policy, a fact not disputed by Hi-Fi.
- [40] The commissioner also referred to the weekly staff meeting on 10 July 2020, where, among other topics, security was discussed. Staff were instructed to register and lock high-value items in the safe. Two employees confirmed this account.
- [41] The Hi-Fi version, which suggested that if the cellphones had been stored in the safe's four drawers, they would not have been accessed because it takes 10 minutes to open each drawer, was rejected. The commissioner found that the robbers were in the storeroom for 38 minutes, and during that period, Mugano would have had enough time to open at least three of the four drawers.
- [42] The commissioner concluded that Miller was not grossly negligent regarding the register and not ensuring that high-value stock was placed in the safe. Instead, the evidence, according to the commissioner, showed that Miller performed his duties diligently to ensure compliance with the security policy.
- [43] On sanction, the commissioner found that Hi-Fi had not discharged the onus to prove that Miller was guilty of the misconduct he was charged with, but that, even if it had, the dismissal would have been substantively unfair.
- [44] The commissioner dismissed Miller's challenge to procedural fairness, finding that, despite his audit scores being incorrectly recorded, he was still allowed to present his case.
- [45] The commissioner concluded that Miller's dismissal was substantively unfair and that section 193 of the Labour Relations Act<sup>3</sup> (LRA) required him to

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<sup>3</sup> Act 66 of 1995, as amended.

reinstate Miller unless Miller chose not to be reinstated. The commissioner recorded the dismissal date as 4 September 2020 and awarded the maximum compensation of twelve months, which he considered fair and appropriate.

### Review test

[46] This being a review application, not an appeal, the starting point is that awards should not be lightly interfered with. In *Phalaborwa Mining Co Ltd v Cheetam and Others*<sup>4</sup> (*Cheetam*), the court held that this court must defer to the commissioner's decision and should interfere with awards only in limited circumstances. This Court cannot interfere with an award because it, or another decision maker, could have reached a different conclusion on the same facts.<sup>5</sup> Even if irregularities can be identified, this Court can only interfere with an award if the outcome is one that no reasonable decision-maker could reach.<sup>6</sup>

[47] In addition, on review, the Court must have regard to all the material before the commissioner, even if the commissioner does not refer to it in the award, and decide, on the totality of the evidence, whether the outcome is reasonable.<sup>7</sup>

[48] Hi-Fi's grounds of review must be measured against the above test.

### Grounds of review

[49] Broadly, the submission is that the award is wrong in fact and in law, that it cannot be justified having regard to the evidence which was before the commissioner, that there were irregularities and that the award is one that no reasonable decision maker could have reached. The specific issues raised will be addressed shortly, but I need to record that the commissioner filed an explanatory affidavit, which repeats the findings set out in the award and the reasons for those findings.

<sup>4</sup> (2008) 29 ILJ 306 (LAC) at paras 4 -5.

<sup>5</sup> *Fidelity Cash Management Services v CCMA and Others* [2008] 3 BLLR 197 (LAC) (*Fidelity*) at para 98.

<sup>6</sup> *Sidumo & another v Rustenburg Platinum Mines Ltd & others* (2007) 28 ILJ 2405 (CC).

<sup>7</sup> *Fidelity* supra at para 103.

*Miller's address to staff on 10 July 2020 was 'a little too late'*

- [50] Hi-Fi submitted that the commissioner accepted Miller's evidence that, on 10 July 2020, he addressed staff about items not being locked in the safe, despite the stock having been in the cage for approximately two weeks prior. The submission was further that, if Miller had exercised proper control over the stock as required, he would have noticed the lapses much earlier than 10 July 2020, and ensured that the high-value items were moved from the cage into the safe. The submission was also that Miller ought to have moved the stock into the safe before leaving the store on 10 July 2020.
- [51] In my reading of the award, the commissioner addressed this issue. He appreciated that Miller faced two charges: the first related to high-value stock stored in the cage since May 2020, and the second concerned the register not being completed from February 2020 until the robbery. Hi-Fi bore the onus to prove that the high-value items had indeed been stored in the cage since May 2020, and that the register had not been completed since February 2020. Only once Hi-Fi's allegations had been proven could it be said that Miller's actions on 10 July 2020, in addressing staff about, *inter alia*, security concerns, were somewhat too late.
- [52] David and Maal were the only witnesses for Hi-Fi.
- [53] David testified that the cell phones were not in the safe from May to July 2020, as observed during visits to the store made during that period. However, David became the regional manager after the robbery and could not have been aware of visits to the Southgate store before assuming that role. This explains why the commissioner commented that no reports, meeting minutes, or performance reports for that period had been provided.
- [54] Hi-Fi's version about the register not being completed was unclear.
- [55] David testified that there were no registers, and when asked for proof of whether the high-value items were recorded or not recorded in the register, David responded, '*I don't have that*'.

- [56] In the arbitration, the commissioner pointed out that Hi-Fi had not provided any evidence to support Miller's alleged negligence for the period mentioned in the charge sheet, to which David replied: *'You can go through the pack and find that evidence it is submitted there'*.
- [57] Later on, David said, *'Uuh, the evidence, all the statements, all the witnesses at that time, that uh confirmed that there was no register and that the stock was not in the correct position.'*
- [58] Under cross-examination, Miller sought evidence from David that he (Miller) had been negligent from May to July 2020 regarding stock in the cage, and David responded that Miller would find out when he is cross-examined. The commissioner reminded David that earlier on, he had also sought this evidence, and asked whether there were any reports, minutes or documents for the period May to July 2020, to which David responded that *'Uhh I think it was a verbal conversation with Mr Zahir Maal'*. David specifically confirmed that there were no reports for the period from February 2020 to July 2020 regarding the registers, stating that *'it was never implemented'*.
- [59] Later in the proceedings, the commissioner advised Hi-Fi that it should address the question of the lack of evidence, and the following exchange ensued:

Mr C David:

The applicant was aware that these items were placed in the incorrect area for two weeks prior to the incident occurring.

Commissioner:

And there is uh evidence that you have read.

Mr C David:

That is based on all the witnesses statements the testimonies and cross examinations handed in, in the disciplinary inquiry. Every other witness in that inquiry confirms that these items were not placed in the cell partition uh cell vault safe.'

[60] The commissioner patiently explained that the arbitration was a *de novo* hearing and that he would only consider evidence placed before him. Even this caution was ignored.

[61] David also testified that Miller would have known about the high-value items in the cage for two weeks because *'as the manager of the store, he would have entered that high-value room more than once'*, and that Miller had been negligent each time he entered the storeroom. However, Miller's versions that he did not check that everything was in order every day and that he worked with other managers were not disputed.

[62] When Maal testified, he referred to his visits to the store, during which he found that the register was incorrect, as well as his visit to the store during the week of the robbery, when he instructed Miller to ensure that high-value items were stored in the safe. He testified that:

*'I had a meeting with them that same week Chair and I've had numerous meetings with him, in fact I wasn't part of the hearing but had I been part of the hearing would have entered into evidence mails that I have sent to Ganief that says that there been numerous breaches of procedures in your store have resulted in losses and I am going to start holding you accountable for these losses.'*

[63] He also testified that *'if I recall I addressed with him the standards in the safe and I asked in his high value cage and I asked him to fix it.'*

[64] Under cross-examination, Miller requested proof that Maal had visited the store in the week of the robbery and that a discussion had been held, to which Maal responded that this was not reflected in Maal's audits, but that Miller could check his audits to see what was recorded. Miller pressed for evidence that he had been addressed on shortcomings, to which Maal responded:

*'Mr Chair sorry let me put it to you this way so that you can understand also that Ganief can understand. Like I said we checked a sample of things these two were not on the sample. Is the stationary racks on audit? No. I can mention 300 things that are not on the audit that could have been right that could have been wrong.'*

[65] On when he visited the store, Maal responded that he could not remember the date, but that *'if he was there the Thursday he [Miller] had two days [to fix the problem]'*. He also stated that he set up a follow-up date by which the security issues needed to be addressed. Under cross-examination, Maal stated that the visit could have been on a Monday.

[66] Miller denied this version and required proof of the visit, which was not produced.

[67] The commissioner inquired whether anyone saw Maal during his visit, to which he responded:

'There are people that saw me. In fact, if I'm not mistaken, it will be part of witness testimony and evidence in one or two of the previous hearings where they saying that Zahir visited the store and then Ganief held a hearing with us at the meeting with us and then we didn't fix it so evidence can be obtained from a number of sources.'

[68] Miller's version on the high-value stock lying in the cage was that he only became aware of it in the late afternoon of 9 July 2020. He decided to raise the issue at the staff meeting on 10 July 2020, which he did, as confirmed by two statements from employees. He also referred to the minutes of that meeting, which indicated that security issues were discussed. Maal disputed that security issues were discussed at the meeting, despite not being present.

[69] When Maal was requested to produce the registers, which were last completed in February 2020 and were incomplete, Maal responded thus:

'...everything I had was handed over to the initiator. I don't have any proof of anything. Like I said, I wasn't involved in the hearing. I didn't initiate anything, I wasn't sharing. I have moved on to another role. I handed over everything to Claude, but I would assume that had you disputed it he would enter into evidence at the time of the hearing, but this is not in line yesterday (inaudible).'

[70] Miller's version was that he was not responsible for receiving stock and recording it in the register, and that Mugano and Boikanyo were accountable.

As the branch manager, he was not required to sign the register. He was only informed at the staff meeting on 10 July 2020 that the scanner used to record stock in the register had not been working, and he directed staff to record the stock received manually. Since he shared managerial duties with Mugano and Nkosi, in his absence, these managers should have ensured that stock was captured in the register and stored in the safe, as he instructed at the staff meeting held before he left the store on 10 July 2020.

- [71] On the first charge, the commissioner reasoned that the former employee, who claimed the high-value stock had been in the cage for two weeks, did not testify at the arbitration. This evidence was crucial because Miller denied that the stock had been in the cage for two weeks before the robbery. The commissioner explicitly cautioned that, unless the former employee testified, he would regard the version as hearsay. Despite this warning, the employee in question was not called to give evidence.
- [72] David and Maal's claims about the high-value stock being in the cage since May 2020 were unsubstantiated.
- [73] The same applies to the registers. If they were incomplete as alleged, they could have been produced.
- [74] Hi-Fi also argued that if the high-value stock had been in the safe, the losses could have been minimised. The commissioner correctly dismissed this argument, noting that the robbers were in the storeroom for 38 minutes and had enough time to instruct Mugano to open at least three of the four safe drawers.
- [75] Hi-Fi's submission that Miller should have moved the high-value items before leaving the store to isolate ignores the COVID-19 protocols in place at the time.
- [76] Miller's intervention on 10 July 2020 demonstrated that he acted quickly after becoming aware of high-value items being stored in the cage on 9 July 2020. It was not too late, as he was unaware of the high-value stock in the cage before 9 July 2020, and Hi-Fi failed to provide evidence that Miller was aware.

It was also not disputed that on 9 July 2020, he issued an employee with a final written warning for breaching the security place. The commissioner's conclusion that Hi-Fi did not prove any negligence by Miller during the periods specified in the charges was both reasonable and correct. This ground of review must fail.

### *The audits*

- [77] Hi-Fi challenges the commissioner's conclusion that Miller's passing of three audits between February and June 2020 related to security measures in the store showed he was not negligent. According to Hi-Fi, this conclusion ignores several essential factors. The first is that the complaint against Miller concerned only the two weeks before the robbery, and there was no audit report for that period. Second, is that an audit covers a day, not the days before and after. Third, that the audits conducted did not check whether the high-value items were kept in the safe or whether the register was being used correctly. Therefore, according to Hi-Fi, the audit reports had no relevance to the question of whether Miller had been negligent during the period in question.
- [78] It appears that Maal conducted the audits. The commissioner raised a concern about the charges being for cellphones and asked whether there were audits for them, and Maal responded negatively. Under cross-examination, David was referred to the May 2020 audit report-spot check 5, which showed high-risk items from the stock status report scored a hundred per cent, and he responded that high-risk items were not specific to cellphones, but included refrigerators too, a version that Miller disputed. He also testified that the audit does not check the location of the stock or the register.
- [79] The charge against Miller was negligence for the period from February 2020 to July 2020. Therefore, the audits conducted in February, May, and June 2020 were relevant. The charge sheet did not refer to the two weeks before the robbery. When the audit scores were raised, Maal claimed that Miller

scored below the acceptable 85%, implying that the audit scores were relevant but that Miller had not met the required standard.

[80] In the absence of separate audit reports for high-value items for the period in question, the version that the audits conducted between February and May 2020 excluded high-value items, had to be rejected.

[81] There is no merit in this ground of review.

*Miller disciplined an employee for not complying with the Policy*

[82] It was also Hi-Fi's submission that the commissioner committed a gross and reviewable irregularity by finding that Miller had fulfilled his duty by disciplining an employee on 9 July 2020 for gross negligence in breach of the Policy. The submission was that '*one teacup does not constitute a complete tea set*', and disciplining a single staff member on this occasion falls well short of proving that Miller enforced the policy in all respects, as was expected of him.

[83] Above, I addressed the ground of review that the alleged negligence had persisted since February 2020 (regarding the registers) and since May 2020 (concerning high-value stock stored in the cage), and that Hi-Fi did not provide any evidence to support its case. The fact that on 9 July 2020, Miller disciplined an employee for breaching policy undermines Hi-Fi's claim that Miller had been in breach of the policy since February. On 10 July 2020, he instructed that high-value stock must be kept in the safe and that stock received must be recorded manually, as the scanners were experiencing issues. Contrary to the case Hi-Fi sought to make against him, the evidence proved that Miller took appropriate steps to address policy compliance issues once he became aware of them.

[84] This ground of review also fails.

*The commissioner applied the reasonable doubt test*

[85] The submission is that if one has regard to the reasoning of the commissioner, he decided the matter applying the reasonable doubt test and conducted no proper assessment of the probabilities, which required him to

determine which eventuality, among several possible ones, was most plausible and made the most sense.<sup>8</sup> Had the commissioner done what was required, so the argument went, he would have found Miller guilty of gross negligence, as defined in *Transnet Ltd t/a Portnet v Owners of the MV Stella Tingas and Another*<sup>9</sup>.

[86] The different versions that the commissioner was required to assess but failed to do so are not set out.

[87] Be that as it may, the ground of review lacks merit. H-Fi bore the burden of proving the gross negligence it alleged against Miller, and the commissioner records this in the award. Hi-Fi failed to prove its case because it presented no acceptable evidence, not because the commissioner applied the wrong test regarding the burden of proof. Nowhere in the award is it recorded that the commissioner applied the reasonable doubt test.

[88] This ground of review fails, too.

#### *Sanction*

[89] The submission was that the commissioner found dismissal too harsh but did not find Miller guilty, and that this constitutes a gross irregularity for several reasons. First, because dismissal is justified in cases of gross negligence. Second, the parties did not address the sanction to be imposed, but rather whether Miller was negligent. Third, the commissioner had no regard for the relevant factors set out in *Sidumo* when deciding the sanction, and in this case, dismissal was justified given the nature of the offence, the breakdown in the trust relationship, the complete lack of remorse, the loss suffered by Hi-Fi, that employees guilty of similar misconduct were dismissed, and Miller's rejection of demotion to avoid dismissal.

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<sup>8</sup> *Minister of Safety and Security v Jordaan t/a Andre Jordaan Transport* (2000) 21 ILJ 2585 (SCA), and *Bates & Lloyd Aviation (Pty) Ltd and Another v Aviation Insurance Co; Bates & Lloyd Aviation (Pty) Ltd v Aviation Insurance Co* 1985 (3) SA 916 (A).

<sup>9</sup> 2003 (2) SA 473 (SCA) at para 7.

[90] The submission has no merit. The commissioner found that Miller had not been grossly negligent, let alone negligent. That is a not guilty finding, even if the award does not explicitly record that Miller was not guilty.

[91] The finding that Miller was neither negligent nor grossly negligent should have concluded the inquiry. The sanction to be imposed and the factors outlined in *Sidumo* regarding the sanction, or any other considerations, became irrelevant. The commissioner's conclusion that even if Hi-Fi discharged the onus to prove Miller's negligence, he would still have found that dismissal was harsh, was superfluous, but does not amount to an irregularity.

[92] The review ground is misplaced.

*Maximum compensation awarded*

[93] Finally, Hi-Fi also takes issue with the maximum compensation awarded to Miller, which it says was not motivated and is unduly punitive.<sup>10</sup> The submission is further that the commissioner ought to have considered that (a) Miller did not lead any evidence about his attempts to find alternative employment and mitigate his loss, (b) Miller was grossly negligent, (c) Hi-Fi suffered a huge loss, (d) Miller refused the alternative of a demotion, and (e) the dismissal was procedurally fair. In oral argument, Mr Posthuma for Hi-Fi submitted that four months' compensation would be fair.

[94] In deciding the relief to grant, the commissioner referred to section 193 of the LRA, which provides that an arbitrator may order reinstatement, re-employment or compensation for an unfair dismissal.

[95] Then the commissioner also referred to section 194(1) of the LRA which provides as follows:

'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

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<sup>10</sup> *Rawlins v Kemp t/a Centralmed* (2010) 31 ILJ 2325 (SCA).

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.'

[96] After pointing out that Miller did not wish to be reinstated, noting the date of dismissal as 4 September 2020, and Miller's monthly salary, the commissioner found that '*for the reasons provided in my analysis above, I find twelve months compensation to be just and equitable*'. The motivation for the maximum compensation awarded is as set out in that part of the award analysing the evidence, as well as sections 193 and 194(1) of the LRA.

[97] In *McGregor v Public Health and Social Development Sectoral Bargaining Council and Others*,<sup>11</sup> the Constitutional Court approved the approach taken in *Kemp t/a Centralmed v Rawlins*<sup>12</sup> (*Kemp*). It held that when determining the amount of compensation under section 194(1) of the LRA, an arbitrator exercises a true or narrow discretion, and the Court's power to interfere is limited. Such interference can only occur on specific grounds that the arbitrator (i) did not exercise a judicial discretion; (ii) exercised discretion capriciously; (iii) based the discretion on a wrong principle; (iv) failed to bring an unbiased judgment to the question; (v) did not act for substantial reasons; (vi) misunderstood the facts; or (vii) reached a decision that a court properly directing itself to all relevant facts and principles could not reasonably arrive at. During oral argument, Mr Posthuma agreed that this is the test when determining whether the Court may interfere with the quantum of the awarded compensation.

[98] Do any of these factors apply to the commissioner's decision to grant maximum compensation?

[99] The commissioner correctly noted the dismissal date as September 2020. The award was issued in July 2021, which is nine months after the dismissal. From the transcript, I also observed that Miller requested nine months' compensation, probably because he was out of work for that period.

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<sup>11</sup> (2021) 42 ILJ 1643 (CC).

<sup>12</sup> (2009) 30 ILJ 2677 (LAC).

Nonetheless, the commissioner awarded the maximum compensation of twelve months.

[100] In *Billion Group (Pty) Ltd v Mosheshe and Others*<sup>13</sup>, the Labour Appeal Court considered an appeal in which this Court had reduced the quantum of compensation awarded to an employee for a procedurally unfair dismissal from four months to two months. The Labour Appeal Court stated this:

‘[16] Turning to the quantum of the compensation ordered, the Labour Court properly had regard to the fact that while the employee had only sought that he be paid out until the end of his fixed-term contract, the commissioner awarded compensation of four months. While it is so that compensation for procedural unfairness amounts to a solatium for the unfairness committed, the court cannot be faulted for finding that it was neither just nor equitable to grant relief both beyond the period sought by the employee and in excess of the period which remained on his fixed-term contract.’

[101] Therefore, an employee must be awarded the compensation they requested, and not more; otherwise, the conclusion that the quantum is punitive becomes unavoidable.

[102] In *Maroveke v Talane NO & Others*<sup>14</sup>, the Constitutional Court was called upon to determine an appeal in which this Court, on review, reduced the quantum of the back pay awarded to an employee whose dismissal was found to have been substantively unfair, but had had the good fortune of finding alternative employment two months after the dismissal. The Constitutional Court found that this Court had been correct in reducing the quantum of back pay to two months, the period during which the employee was unemployed. Even though the matter concerned back pay following a reinstatement order, as opposed to compensation when an employee does not wish to be

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<sup>13</sup> (2018) 39 ILJ 368 (LAC)

<sup>14</sup> (2021) 42 ILJ 1871 (CC). See also *Kukard v GDK Delkor (Pty) Ltd* [2015] 1 BLLR 63 (LAC), and *Le Monde Luggage CC t/a Pakwells Petje v Dunn NO & Others* (2007) 28 ILJ 2238 (LAC), which both found that payment of compensation made to an employee who has been unfairly dismissed is to offset the financial loss which has resulted from the unfair dismissal.

reinstated, it is my view that the below-quoted paragraphs from the judgment guide on the quantum of compensation to be granted:

[27] ....However, the applicant's claim for appropriate backpay stands on a different footing and there are reasonable prospects that this court will materially alter the decision of the Labour Court. The compensation to the wronged party is intended to 'offset' the financial loss suffered as a result of a wrongful act. What must be determined is the extent of the loss, while considering the nature of the unfair dismissal. Underlying this is the intent to restore the applicant to the position he would have been in but for the wrongful act by the employer. That restoration must not assume a punitive character. This view is properly enunciated in *Dauids* as follows:

'The compensation which must be made to the wronged party is a payment to offset the financial loss which has resulted from a wrongful act. The primary enquiry for a court is to determine the extent of that loss, taking into account the nature of the unfair dismissal and hence the scope of the wrongful act on the part of the employer. This court has been careful to ensure that the purpose of the compensation is to make good the employee's loss and not to punish the employer.'

[103] Above, I noted that at the time the arbitration award was issued, Miller had been out of work for nine months. Therefore, the extent of his loss was nine months' compensation, which would have put him in the position he would have been, but for the dismissal. Had Miller opted to be reinstated, his back pay would have been limited to nine months. His preference not to be reinstated should not result in him receiving more than an employee who opted to be reinstated, who would have had to render services post-award to receive remuneration beyond the nine months. The dismissal was procedurally fair. On the facts of this case, the compensation was not meant to serve purposes broader than mere patrimonial loss. The compensation was intended to address the loss of nine months' salary.

[104] For the reasons stated above, I find that in awarding the maximum compensation, the commissioner exercised his discretion capriciously, acted

with bias, and adopted the wrong approach. A just and fair award is nine months' compensation; therefore, the award will be reviewed, but only to this extent.

#### Concluding remarks and costs

[105] On the one hand, Mr Posthuma, for Hi-Fi, argued that it was difficult to understand how Miller was exonerated from liability, which was the core of Hi-Fi's case on review. On the other hand, it was argued on behalf of Miller that the review application was merely a thinly veiled attempt to appeal an award that Hi-Fi was unhappy with.

[106] There is merit in the submission on behalf of Miller as it relates to the commissioner's finding that his dismissal was substantively unfair. Hi-Fi's approach on this issue, in my view, was no different to that of the applicant in *Securitas Specialised Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*<sup>15</sup>, where the Court commented thus:

'[33] The appellant's grounds of review against the arbitration award of the arbitrator contradict the very essence of what the Constitutional Court in *Sidumo* and this Court in *Gold Fields* sought to ensure in a review against an arbitration award. The grounds of review raised by the appellant in the review application seek, in this respect, to blur the lines between an appeal and review. Not a single ground of review raised by the appellant implicates the reasonableness of the arbitrator's award. They seek instead, on a piecemeal basis, to challenge the correctness of the arbitrator's award. This is impermissible. Accordingly, the Labour Court's dismissal of the appellant's review application, on the basis that "the decision of the arbitrator is not a decision that a reasonable decision-maker could not reach" on the totality of the evidence, was justified.'

[107] However, regarding the amount of compensation awarded, Hi-Fi has succeeded in having it reduced for the reasons outlined above.

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<sup>15</sup> (2021) 42 ILJ 1071 (LAC).

[108] A costs order, in accordance with the requirements of law and fairness, is for each party to pay its own costs.

[109] In the premises, the following order is made:

Order

1. The award is reviewed and set aside, but only to the extent that the compensation payable to Mogamat Ganief Miller is reduced to nine months.
2. There is no order as to costs.

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T Gandidze

Judge of the Labour Court of South Africa

Appearances

For the Applicant: Mr Arend Posthuma

Instructed by: Snyman Attorneys

For the Respondent: Mr Pandor

Instructed by: Pandor Davids Attorneys Inc.

LABOUR COURT