



IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable

Case No: C327/2022

In the matter between:

NONTUTHUZELO THOKOZILE TAOIE

Applicant

and

DEPARTMENT OF HEALTH: FREE STATE

1st Respondent

PUBLIC HEALTH AND SOCIAL DEVELOPMENT

SECTORAL BARGAINING COUNCIL

2nd Respondent

ELSABE SKINNER N.O

3rd Respondent

Heard: 31 July 2025

Delivered: Judgment was handed down electronically by circulation to the parties' representatives by email .The date and time for hand-down is deemed of 2 December 2025.

JUDGMENT

GURA, AJ

Introduction

- [1] The application before me is a review in terms of section 145 of the Labour Relations Act¹ (the LRA), to set aside the arbitration award issued by the Third Respondent under the auspices of the Second Respondent. The review application arises from the Applicant's dismissal, which was found to be substantively fair by the Arbitrator, being the Third Respondent herein. The Applicant is a female former employee of the First Respondent. The Second Respondent is a Bargaining Council duly established in terms of the LRA. The Third Respondent is a commissioner duly appointed by the Second Respondent under case number PSHS386-21/22.
- [2] The Applicant was duly represented by Mr Gonsior, an admitted Attorney from Kramer Welhmann Incorporated in Bloemfontein. Department of Health -Free State was represented by Mr Nhlapo, the Senior Labour Relations Officer of the Respondent. The arbitration was scheduled for arbitration at Bophelo House in Bloemfontein on 16 March 2022, 19 and 20 May 2022. The Respondent filled written heads of arguments on 24 May 2022. Commissioner Elsabe Skinner placed on record that she was bound by the ruling of Commissioner van der Merwe, who had already made a ruling regarding legal representation on 8 September 2022. First Respondent's representative, Mr Nhlapo, had not opposed the application on that day and allowed legal representation, thus binding the Third Respondent.
- [3] The Applicant referred an unfair dismissal dispute to the Council on 19 July 2021. A certificate of non-resolution was issued on 6 August 2021. The Applicant requested arbitration on 10 August 2021. On the date of the argument of this review application, the Applicant was represented by Adv. du Preez and the First Respondent was duly represented by Adv. Morobane from the Office of the State Attorney.

¹ Act 66 of 1995, as amended.

Reasons for the Review Application

[4] Applicant's contention is that the decision arrived at by the Third Respondent is not one which a reasonable decision maker could have arrived at, thus, the Third Respondent erred in law. Further that the award constitutes an unreasonable finding. A copy of the award was marked annexure "FA 1". The application is brought by virtue of the provisions of Section 145, read together with section 158 of the LRA.

[5] On 16 March 2022, Mr Nhlapo made an application that an inspection in loco should be held at the premises where the medication had been found. The following was established on 19 May 2022 during the inspection in loco:

- 5.1 That the premises consist of 3 buildings upon which 2 houses were built with numbers 21959 and 21942, a storeroom and a structure used as a garage.
- 5.2 There is no fence between the 2 houses, they are built 20-30 meters from each other.
- 5.3 The premises are fenced around with wire, a brick wall and palisades at different places.
- 5.4 Each house has its own gate and access from different streets.
- 5.5 The Applicant's husband's vehicle was parked in front of house 21942 on this day.
- 5.6 The Applicant alleged that she and her husband stayed at house 21959.
- 5.7 The parties were not able to access house 21942, where the medicine was allegedly found. It was alleged that the house was locked and the son was not at home.

Background facts to the dispute

- [6] The Applicant worked as a Professional Nurse at MUCPP Community Health Centre in Bloemfontein (neither of the parties knew what MUCPP stood for). The applicant was employed on 1 September 2008 and earned R28 502.00 per month, working for 5 days. The applicant was dismissed on 5 July 2021 when she received the notice of discharge. She was charged with two charges but was found guilty on charge 1.

'Charge 1

That Applicant allegedly was guilty of misconduct in terms of the disciplinary code and procedure in that on or around 12 June 2018, she committed theft in that 11 boxes each box containing 69 bottles of Odimmune and each bottle containing 28 tablets inside , of government ARVs. Odimmune ARVs were found at her premises and the medication in question is regarded to be in her lawful possession and or kept at her premises unlawfully as they belong to the state.

Charge 2

That Applicant is allegedly guilty of misconduct in terms of the disciplinary code and procedure in that on or about the 12 of June 2018 she prejudiced the efficiency and administration of the department in that keeping the medication of 11 boxes containing 69 bottles of Odimmune ARVs each deprived the department to provide patients who were entitled to such medication with same.'

- [7] The Applicant placed all aspects in relation to substantive fairness in dispute.
- [8] In relation to procedural fairness, the parties agreed that procedural fairness is regulated by Resolution 1 of 2003, which is a collective agreement. The Third Respondent was to determine whether the Department complied with the three time periods in the Code pertaining to the period of suspension, holding the disciplinary enquiry and when notice was given for the dismissal (clauses 7.2 and 7.3).

Issues to be decided

- [9] The Court is called upon to decide whether the Third Respondent committed a reviewable irregularity by concluding that the dismissal was substantively fair despite a lack of evidence linking the medication found at her son's house to the First Respondent's property, as per the First Respondent's case. Latter had furnished no evidence of shortages (or theft) of medicine, from the Applicant's workplace. Counsel for the First Respondent, however, argued that the evidence of Ms Gouws, confirmed the Respondent's case in this regard which Applicant was not in agreement with.
- [10] Secondly, as to whether the Third Respondent erred in applying the authority of *AngloGold Ashanti Limited v Association of Mineworkers and Construction Union obo Dlungane and Others*² (*AngloGold*), to the matter under consideration, as in this matter, there was no evidence to the effect that: The evidence found in the Applicant's son's house in fact belonged to the First Respondent. Alternatively, whether the Applicant had exclusive use or control of the room in her son's house in which the medicine was stored.
- [11] Thirdly, whether there was a justifiable reason for the arbitrator to reject the Applicant's version that she did not even know what was in the boxes, on the basis that her son told the police that a colleague of the Applicant brought the boxes into the house, as opposed to the gardener. The Applicant's contention was that evidence showed that it was not the Applicant who stored the boxes, the boxes were not in her possession, and that the Applicant did not even know what was in the boxes.

The Law

- [12] In terms of section 192 of the LRA the onus rests on the Respondent to prove that the dismissal was substantively and procedurally fair.

Procedural Fairness

- [13] Paragraphs 50 to 57 of the Third Respondent's Judgment relate to procedural fairness. The Court will not dwell on same in this judgment, as it has not been raised as a bone of contention of this review application.

² [2020] ZALCJHB 46.

Substantive Fairness

[14] All aspects regarding substantive fairness were placed in dispute during the narrowing of the issues. In terms of item 7 of Schedule 8-Code of Good Practice: Dismissal, a person should consider the following when determining whether a dismissal for misconduct is fair:

- 14.1 Whether or not an employee contravened a rule or standard regulating conduct in, or of relevance to, the workplace; and
- 14.2 If a rule or standard was contravened, whether or not;
- 14.3 The rule was a valid or reasonable standard;
- 14.4 The employee was aware, or could reasonably be expected to have been aware, of the rule or standard;
- 14.5 The rule or standard has been consistently applied by the employer;
- 14.6 Dismissal was an appropriate sanction for the contravention of the rule or standard.

Whether the Applicant breached a rule/standard at work

[15] The parties agreed that the Applicant was found guilty of charge 1, being a charge of theft. Charge 1 reads that she was charged with theft and that she was in unlawful possession of the medicine. Found guilty of unlawful possession of the medicine by the Chairperson of the Disciplinary Hearing. The chairperson further testified that the same is regarded as a serious offence and employees who were found guilty of this were dismissed. Third Respondent in her Award placed on record that this was never disputed during cross-examination, as the same is an implied rule, applicable to all contracts of employment. Thus, satisfied that such rules/ standards exist at work.

[16] The Third Respondent further held that, in lieu of the case of (*AngloGold*), where the court stated that unlawful possession is a competent verdict for a theft charge. The Court held that the labels assigned to the misconduct and

categorization are irrelevant and less important. The point is whether the evidence demonstrates a case of wrongdoing. The Third Respondent further placed on record that charge 1 was drafted in such a way that it mentions two forms of misconduct, being theft and also unlawful possession of property.

[17] Third Respondent further concurred that common cause was that the medication listed in the charge sheet was found at house 21942. The Applicant's version was that the house belonged to her son and presented a copy of an extract of the title deed, which was placed in dispute. The Third Respondent placed on record that she is satisfied that, following the inspection in loco as well, there are indeed two houses on one premise, with both houses having different numbers on them, being 20-30 meters from each other. Thus, satisfied that the medication was not found in the Applicant's house, but found at her son's house.

[18] Paragraph 65 of the Third Respondent's Award, she places on record that in lieu of the above, the question arises as to what "being in possession" in law means. The common cause is that the Applicant's case is that she could not be found guilty of being in possession of the medication, as the house where the medication was found did not belong to her. Third Respondent further places on record that Applicant's case in this regard was corroborated by the evidence of the investigating officer of the police, who held the same view. The Third Respondent continues to place on record that she is in agreement with the Applicant and her representative that, if possession means to be physically in control of an item, then the Applicant was not guilty of unlawful possession.

[19] Paragraph 66 of the Third Respondent's Award she places on record the case of *AngloGold (supra)* with particular reference to paragraph 14. She further places on record that it is clear from paragraph 14 that a person may be found in possession of an item even though it was not in their physical control. Further, in the *AngloGold* case, the gold-bearing material was found in the employee's room, which is not the case herein. The Third Respondent then places on record that the question is thus whether the Applicant had exclusive and intentional control over the medicine. The common cause being that the

Respondent's witness testified that the police were not able to access the room, had to break open a window to have access, after the Applicant's son informed them that he did not have the key. The Third Respondent and Counsel for the First Respondent argued the corroboration as the Applicant's husband had testified that the Applicant herself had informed him that the Applicant herself, had locked the room. It was further Applicant's version that she had asked her son to store the items for Johannes.

- [20] Paragraph 68 of the Third Respondent's award she thus places on record that she is satisfied that the Applicant had arranged for the medication to be stored in the son's house and she had complete control over the room. Thus, the Third Respondent placed on record that she was satisfied that the Applicant was in possession of the medication in the room, albeit the Applicant's version that she had not known that it was medicine. Third Respondent further placed on record that she is thus satisfied that a *prima facie* case exists that the Applicant was found in possession of the medicine, thus, the evidentiary burden then shifts to her to give an explanation. Applicant's version being that she does not know that it was medicine and that her Gardener, Johannes, whom the Applicant had trusted, brought the medication to the latter's son's house, after Johannes had asked that same be stored there.
- [21] The Police Officer, Mr Mkhobo testified that the son told the police that her mother's colleagues brought the medicine as the same was never disputed during cross-examination, which the Third Respondent attached weight to, as undisputed evidence. Further, that same was not put to the police that the son could not have made such a statement as he was moderately mentally retarded. During the argument of this application, the Court had asked the Applicant's Attorneys to address on the particular diagnosis and prognosis of the son's condition, to no avail. The Court was further interested in whether he had any neurological ailments that necessitated medicine, and or whether he was just a slow learner, hence he could not go into mainstream schooling. The Court could not get a response from the Applicant's Representatives, excluding that the son was moderately mentally retarded and went to a private school. Third Respondent, in her award, places on record how the parents

gave conflicting evidence regarding their son's ability to take care of his day-to-day activities. The Applicant's husband placed on record that the son could not take care of himself, whilst the Applicant testified that her son could take care of himself and that she was not involved in the son's day-to-day activities. The Third Respondent held that it was clear that the Applicant-mother was trying to distance herself from her son. Further that during cross-examination, she placed on record that her son had lied to the police. Third Respondent placed on record that she found it probable that the Applicant's son would tell the police that the Applicant's colleagues brought the medicine. As Applicant's son would have placed on record if the same was brought by Johannes the Gardener, as the son knew Johannes.

[22] The Third Respondent in her award further placed on record in paragraph 70 that Police Officer Mokhobo never testified that the criminal case was withdrawn as the son was not able to stand trial. Applicant's stance having been that her son could not come and testify as he was moderately mentally retarded. The Court enquired from the litigant's representatives as to whether the Third Respondent could not and or had no powers to subpoena witnesses. The answer was in the affirmative that the Third Respondent had such powers. As per the Third Respondent, the Applicant's husband testified that the son was not going to be brought to testify as their son had never entered a court after he was arrested. The Third Respondent places on record that the police decided to let Applicant's son go, as the police realized that he had nothing to do with it.

[23] Paragraphs 71 and 72 of the Third Respondent's Award, she places on record that the Applicant has not provided a probable and reasonable explanation in relation to the Applicant's possession of the medicine. That Applicant's one version is that Johannes brought the items, whom the Applicant trusted. The other version being that of Applicant's son to the police that Applicant's colleagues are the ones who brought the boxes of medication. Third Respondent in her award held that if the Applicant's version were to be accepted, then she was not satisfied that the Applicant's version was probable, that she had never seen the boxes until the day at the Police

Station, as the Applicant's version is that she only saw the plastics being brought by Johannes. The Applicant's husband confirmed that his wife, informed him that Johannes brought the items with a wheelbarrow, thus confirming that the Applicant witnessed the delivery of the boxes. The Third Respondent in paragraph 71 of her Award places on record that she wonders why the Applicant would lie about this, thus clear that the Applicant was trying to distance herself from the boxes. Moreover, as the police officer testified that the son told him that the mother was aware of the medication, same which was not disputed during cross-examination. Thus, the Third Respondent held that she was satisfied that the Applicant knew about the medication. Thus, the Applicant had failed to provide a probable, reasonable explanation of her possession of the medicine.

- [24] The Third Respondent in paragraph 73 of her Award placed on record that the Applicant's representatives had stated during cross-examination of the chairperson that it was not in dispute that the medication belonged to the Respondent. However, as per the Third Respondent, the Applicant's Representatives placed a lot of emphasis on the fact that there was no direct evidence on where, what and when the medication was stolen. No reports of stolen medication were ever filed. The Third Respondent proceeds to place on record the *AngloGold* decision, which is one bone of contention of the Review Application. In the latter decision, the court held that although none of that evidence was led, the gold-bearing material was found in the employee's room and same constitutes theft and the court held further that the commissioner had misconstrued theft. The Third Respondent placed on record that since the test herein is on a balance of probabilities and not beyond a reasonable doubt as in a criminal court, she is satisfied that the Applicant was found in possession of the ARV medication, it belonged to the Respondent, and the Applicant had failed to provide a probable, reasonable explanation for her possession. Thus, the Third Respondent satisfied that the Applicant was charged with theft and that her unlawful possession of the medication constituted theft. The Third Respondent further places on record that, however, in the event that she is wrong and Applicant's actions only amount to unlawful possession, the Third Respondent takes into account that

the court held in *Continental Oil Mill (Pty) Ltd v Singh NO & others*³, that theft and unauthorized possession stem from the same category of dishonest conduct. Thus, satisfied that the rule was valid and that the Applicant ought to have been aware of these rules/ standards, no evidence that the rules had been inconsistently applied by the Respondent. The chairperson testified that all employees who were found guilty of unlawful possession were dismissed.

Whether dismissal is the appropriate sanction for breach of the Rule

- [25] The Third Respondent proceeded to state in her Award at paragraph 75 that it is trite law that when determining whether dismissal is an appropriate sanction, an enquiry into the gravity of the contravention of the rule, an enquiry into the consistency of application of the rule and sanction, and an enquiry into factors that may have justified a different sanction needs to be undertaken. Further, the issue of consistency had not been placed in dispute by the parties. That it is trite law that a commissioner should not defer to the decision of the employer, as the commissioner's own sense of fairness must prevail after considering all the circumstances.
- [26] The Third Respondent held that she is satisfied that the Applicant was found guilty of a serious offence, of theft of ARV medication or unlawful possession of ARV medication. In the event that the Third Respondent is wrong, that both categories of misconduct stems from dishonest conduct, thus the Third Respondent satisfied that the trust relationship had broken down between the parties, as the court in the case of *Impala Platinum Ltd v Jansen and Others*⁴ reaffirmed that the breakdown in the trust relationship may also be implied from the gravity of the misconduct, and no evidence needs to be led regarding the trust relationship. The Applicant was employed as a professional nurse, in a position of trust, and to act in the well-being of her patients.
- [27] In her further reasons for her judgment, the Third Respondent placed on record in paragraph 78 that the Applicant showed no remorse for her actions, she did her level best to distance herself from the medication. The Third

³ (2013) 34 ILJ 2573 (LC); [2013] ZALCJHB 30.

⁴ [2017] 4 BLLR 325 (LAC).

Respondent placed on record as being guided by the case of *De Beers Consolidated Mines Ltd v Commission for Conciliation, Mediation & Arbitration & others*⁵ where the court held “it would be in my view difficult for an employer to re-employ an employee who has shown no remorse. Acknowledgement of wrongdoing is the first step towards rehabilitation”. That Applicant’s long service of 13 years in Third Respondent’s view must have been regarded as an aggravating circumstance and not a mitigating circumstance, as the Applicant was expected to know better after 13 years of service. Albeit fact that the Applicant had a clean record, the Third Respondent placed on record that when considering the seriousness of the charge, the Applicant’s position of trust and that the Applicant did not show any remorse, satisfied that dismissal of the Applicant is the appropriate sanction as in the former’s view, the aggravating circumstances far outweigh the mitigating circumstances.

[28] Thus, dismissal of the Applicant was both substantively and procedurally fair, and thus dismissed the Applicant’s claim.

[29] The Arbitration awards are reviewable in terms of section 145 of the LRA. The test in deciding whether to review and set aside an arbitration award is well established. It is the reasonableness test as postulated by the Constitutional Court⁶:

‘The better approach is that section 145 is now suffused by the constitutional standard of reasonableness. That standard is the one explained in *Bato Star*: Is the decision reached by the commissioner one that a reasonable decision-maker could not reach? Applying it will give effect not only to the constitutional right to fair labour practices, but also to the right to administrative action which is lawful, reasonable and procedurally fair.’

[30] The proper application of the test on review is summarized by the Supreme Court of Appeal in the *Herholdt* judgment⁷. For an award to be reviewable, the arbitrator must have misconceived the nature of the inquiry or arrived at an

⁵ (2000) 21 ILJ 1051 (LAC); [2000] 9 BLLR 995 (LC) at para 25.

⁶ *Sidumo & another v Rustenburg Platinum Mines Ltd & others* [2007] 12 BLLR 1097 (CC); (2007) 28 ILJ 2405 (CC) at para 110 of Navsa AJ’s judgment.

⁷ *Herholdt v Nedbank Ltd (Congress of South African Trade Unions as amicus curiae)* [2013] 11 BLLR 1074 (SCA); (2013) 34 ILJ 2795 (LAC).

unreasonable result. Most importantly, a result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator.

- [31] The Labour Appeal Court has further confirmed that where a gross irregularity in the arbitration proceedings is alleged, the enquiry extends to whether the result was unreasonable. the decision arrived at by the arbitrator is one that falls within a band of decisions to which a reasonable decision-maker could come on the available material, then the award is not reviewable⁸.
- [32] A CCMA (or bargaining council) arbitrator must conduct an arbitration in a manner that he or she considers appropriate in order to deal with the dispute fairly and quickly, but must deal with the substantial merits of the dispute with the minimum of legal formalities⁹. The Labour Appeal Court has held that a court must be careful not to parse an award by a commissioner of the CCMA in the same fashion as one would an elegant judgment of the Supreme Court of Appeal or the Constitutional Court. Awards must be read for what they are, awards made by arbitrators, who are not judges. *“When all the evidence is taken into account, when there is no irregularity of a material kind and that evidence was ignored or improperly rejected, or where there was not a full opportunity for an examination of all aspects of the case, then there is no gross irregularity ...”*¹⁰. It is trite that the test applicable in arbitrations conducted under the auspices of the CCMA is the balance of probabilities¹¹. According to the test, where the evidence permits more than one reasonable inference, the selected inference must, by the balancing of probabilities, be the more natural and plausible conclusion of the possible inferences. The credibility of witnesses and the probability of what they say should not be regarded as separate enquiries to be considered piecemeal. They are part of a single investigation into the acceptability of the employer version¹².

⁸ *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and others (Gold Fields)* [2014] 1 BLLR 20 (LAC); (2014) 35 ILJ 943 (LAC).

⁹ Section 138(1) of the LRA.

¹⁰ *Ellerine Holdings Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2008) 29 ILJ 2899 (LAC); [2008] JOL 22087 (LAC) at 2906 D to F.

¹¹ *Potgietersrus Platinum Limited v Commission for Conciliation, Mediation and Arbitration and Others* [1999] ZALC 191; (1999) ILJ 279 (LC).

¹² *Marapula & others v Consteen (Pty) Ltd* [1999] 8 BLLR 829 (LC); (1999) ILJ 1837 (LC) at para 33.

[33] In applying the law to the facts, it is common cause that the medication was not found at the Applicant's house but was found at her son's property. Further common cause, no evidence was adduced of shortages at the First Respondent's premises. Counsel for the First Respondent argued that the medication that was found belonged to the First Respondent. Upon the court enquiring for proof of same from the legal representatives and directed to the records Bundle C, with particular reference to the evidence of Ms Gouws, it is clear that the common cause was that the pharmaceutical company that manufactured the drugs was CIPLA. The court further enquired if the medication is only dispatched by Provincial Hospitals, and Private Hospitals cannot dispatch the medication. Further that was there a particular marking that distinguished the medication as belonging to the Third Respondent and nobody else or not? Advocate Morobane for the First Respondent then placed on record that in accordance with the Public Service Co-ordinating Bargaining Council Resolution 1 /2003 Annexure A, which is titled Acts of MISCONDUCT. Albeit the list not being exhaustive, it is enumerated that an employee commits misconduct if she or he amongst other things; steals, bribes or commits fraud. Argued further that the Applicant was in possession of state property not necessarily belonging to the First Respondent, thus committed misconduct, as the medication belonged to the state. Applicant thus arguing same as an irregularity and the arbitrator concluded that the dismissal was substantively fair.

[34] Further common cause is that the points *in limine* had been abandoned. In the argument counsel for the Applicant placed on record that the Labour Court and Labour Appeal Courts have held in numerous cases that being in possession is a competent verdict for theft and not vice versa. Thus, if the employee was never in possession of the medication, same is the end of the enquiry. Thus, an error in law as the employee was never charged with theft and the fact that there were no losses at the hospital, there cannot be theft. That the employee did not have exclusive possession of the medication, at paragraph 47, the Commissioner places on record that even if someone else brought the medication, the employee failed to report that a member of the public gave her state property. Page 18, paragraph 25, the Police Official

further corroborates the Applicant's stance that she did not see and could not see what was in the black refuse bag. The Arbitrator, however, concludes that the employee should have known because the son informed two members of the South African Police Service -Mr Phooko, that the mother and her colleagues, knew of the medication. Counsel for the Applicant thus argues that the son's evidence must not be accorded any value as further tantamount to hearsay. To Mr Mokhobo, the son informed the police that the medication belonged to the mother. Thus, the medication must be construed as having been brought by the gardener wherein the Applicant requested the son to store same. The Third Respondent thus erred in applying the authority in the *AngloGold* case.

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

Order

1. The Applicant has thus made a proper case, and the arbitration award issued by Third Respondent under Second Respondent Case Number PSHS386-21/22 and dated 1 June 2022 (the award) is set aside.
2. The Applicant's dismissal was unfair and the First Respondent is ordered to pay the Applicant compensation in an amount equal to 12 months salary.

L. Gura

Acting Judge of the Labour Court of South Africa

Appearances

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