



- (1) Reportable
- (2) Of interest to other Judges: Yes/No
- (3) Revised

Signature

Date

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Case no: C06/2025

In the matter between:

**CAPE THAI RESTAURANT (PTY) LTD T/A
SIMPLY ASIA DURBANVILLE**

Applicant

and

**COMMISSION FOR CONCILIATION, MEDIATION
& ARBITRATION (CCMA)**

First Respondent

GERALD JACOBS

Second Respondent

TAPIWA MUTSEEKWA

Third Respondent

Heard: 4 November 2025

Delivered: 09 December 2025

Summary: (Review application - Commissioner should consider the principal issue before him; evaluate the facts presented at the hearing and come to a conclusion which is reasonable to justify the decision he arrived at - arbitrator impermissibly entered the fray when he determined for the employer what disrespectful conduct should or should not be – award set aside)

JUDGMENT

MAY, AJ

Introduction

- [1] This is an opposed application to review and set aside an arbitration award in which the second respondent (the arbitrator) determined that the third respondent's dismissal was substantively unfair and ordered the Applicant to pay the third respondent the sum of R41 200.00 (the equivalent of 4 months' wages).

Background

- [2] The third respondent commenced employment with the Applicant on 21 June 2021 as a Junior Manager. He was dismissed on 20 November 2023.

- [3] The third respondent was called to a disciplinary hearing where he was charged with:

3.1 Charge 1 – Gross misconduct in that you have arrived at work late on numerous occasions, most recently being on 16 October 2021, 19 October 2023 and 20 October 2023.

3.2 Charge 2 – Gross negligence in the performance of your duties and proper management of the store and staff, which has resulted in an excessive number of complaints from customers, most recently totalling sixteen complaints over the period August 2023 to October 2023.

3.3 Charge 3 – Gross disrespect in that you went on a call with Eduard Uys regarding an incident which occurred on Wednesday, 18 October 2023, with regards to long wait times for sushi orders, and hung up on Eduard.

- [4] The hearing was held on 9 November, the third respondent pleaded guilty to charge 1 and not guilty to the rest. The chairperson recommended on 20 November 2023 that the third respondent be found guilty of the remainder of the charges. The Chairperson recommended that the third respondent's service be summarily terminated. Aggrieved by this decision, the third respondent referred the matter to the first respondent, who in turn, appointed the second respondent, who arbitrated the matter.

The award

- [5] The arbitrator assessed that the Applicant's biometric attendance records were not reliable, despite the third respondent admitting being late on at least one of the three dates, and accepted the version preferred by the third respondent that the biometric system could be modified and thus could be manipulated. He also focused on what he alleges to be a significant contradiction in the evidence of the Applicant's witness, Mr Telles. He assessed that there could be record manipulation and thus that the version preferred by the third respondent meant that his arriving late did not amount to misconduct.
- [6] The arbitrator assessed that there is a difference between negligence as a form of misconduct and poor performance, referencing the *dicta* in *ZA One (Pty) Ltd t/a Naartjie Clothing v Goldman No & others (ZA One)*¹. He then finds that there was no evidence of wilful misconduct or deliberate disregard of duties, and thus, like in *Midas Group Komatipoort v NUMSA and Others (Midas Komatipoort)*², in his view, the third respondent should have been taken through a poor performance process instead of being charged for misconduct.³
- [7] In relation to the gross disrespect, the arbitrator held that he did not find that the third respondent's decision to end the call was disrespectful and that he hung up out of frustration and not disrespect.⁴

Grounds of review and evaluation

- [8] Applicant contends that the award is one that no other reasonable decision-maker could reach, and further that the arbitrator committed various irregularities.
- [9] In the present application, this court is called upon to ascertain whether the Commissioner considered the principal issue before him, evaluated the facts presented at the hearing and came to a conclusion which is reasonable to justify the decision he arrived at. This approach was stated in *Gold Fields Mining SA*

¹ (2013) 34 ILJ 2347 (LC) at para 78.

² [2018] ZALCJHB 83; [2019] JOL 43411 (LC).

³ Page 22 of the pleadings record.

⁴ Page 21 of the pleadings record.

(Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation & Arbitration & others (*supra*).⁵ In the latter decision, the Labour Appeal Court also stated thus:

'The questions to ask are these: (i) In terms of his or her duty to deal with the matter with the minimum of legal formalities, did the process that the arbitrator employ give the parties a full opportunity to have their say in respect of the dispute? (ii) Did the arbitrator identify the dispute he or she was required to arbitrate (This may in certain cases only become clear after both parties have led their evidence.) (iii) Did the arbitrator understand the nature of the dispute he or she was required to arbitrate? (iv) Did he or she deal with the substantial merits of the dispute? (v) Is the arbitrator's decision one that another decision maker could reasonably have arrived at based on the evidence?'⁶

- [10] The test that the Labour Court is required to apply in a review of an arbitrator's award is this: "*Is the decision reached by the commissioner one that a reasonable decision maker could not reach?*"⁷
- [11] Our courts have repeatedly stated that in order to maintain the distinction between review and appeal, an award of an arbitrator will only be set aside if both the reasons and the result are unreasonable. In determining whether the result of an arbitrator's award is unreasonable, the Labour Court must broadly evaluate the merits of the dispute and consider whether, if the arbitrator's reasoning is found to be unreasonable, the result is, nevertheless, capable of justification for reasons other than those given by the arbitrator. The result will, however, be unreasonable if it is entirely disconnected with the evidence, unsupported by any evidence and involves speculation by the arbitrator.⁸ An award will no doubt be considered to be reasonable when there is a material connection between the evidence and the result or, put differently, when the result is reasonably supported by some evidence.

⁵ (2014) 35 ILJ 943 (LAC).

⁶ *Ibid* at para 20.

⁷ *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others (Sidumo)* 2007 (28) ILJ 2405 (CC); [2007] 12 BLLR 1097 (CC) at para 110.

⁸ *Herholdt v Nedbank Ltd (Congress of South African Trade Unions as amicus curiae)* [2012] 11 BLLR 1074 (SCA); (2013) 34 ILJ 2795 (LAC) at paras 12 and 13.

[12] The arbitrator's task was to *"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"*.⁹

[13] The following conclusions reached by him were irregular:

13.1 In relation to charge 1, his finding of a contradiction is not borne out by the evidence. During evidence in chief, the witness, Mr Telles, is asked whether the document referred to could be manipulated by him, he said no. The follow-up question was whether he could add times or take times away, to which he responded yes, but once they have clocked in, the report will show what time they clocked in. in cross-examination, the third respondent asks the same question and receives the exact same answer. There was therefore no contradiction. Importantly, however, the third respondent never asserts that the witness in fact tampered with or changed the times. This was also never his version. His version was that he was late on the 16th of October, and if he was late on the other two days, it may have been that his senior, Andrea, could have sent him to go fetch stock or was sent to the bank to make change. His concession on being late was sufficient to justify the finding of guilt on charge 1.

13.2 The arbitrator had a clear misapprehension of the *ZA One* and *Midas Komatipoort* judgments and failed to have regard to the fact that in *ZA One*, the Court added the following:

'In my view, the distinction between poor performance and misconduct (negligence) can be established by the asking of two simple questions when it has been established that an employee indeed failed. The first

⁹ *Sidumo* at para 78.

question is "Did the employee try but could not?" and the second question is "Could the employee do it, but did not?" If the first question is answered in the affirmative, then it has to be poor performance, because an employee who honestly (for the want of a better word) seeks to achieve what is expected of him or her but is unable to do so is incapacitated and would not behave wilfully or indifferently or fail to apply the necessary care. If the second question is answered in the affirmative, then it has to be misconduct, as this would be a situation where the employee is fully able to do what is required not to fail, and such failure could therefore only be because of indifference or wilfulness or a failure to take care....' (Own emphasis) In *casu* this was a clear instance of the third respondent being able to but did not. The finding by the arbitrator to the contrary is therefore unreasonable.

13.3 In respect of charge 3, I agree with the submission by Mr De Kock, who appeared for the Applicant, that the arbitrator impermissibly entered the fray when he determined for the employer what disrespectful conduct should or should not be. That is beyond his remit. His remit was to assess the evidence and determine whether the conduct complained of constituted misconduct and whether the sanction was appropriate. It is true that there were two mutually destructive versions as to what was said, but that's neither here nor there in circumstances where it was common cause that the call was abruptly ended. Whether the polygraph test assisted or not was, in this Court's view, not relevant to whether the conduct complained of, being the abrupt ending of the telephone call, constituted misconduct or not. Ultimately, the third respondent admitted cutting the call abruptly because he didn't like what his superior was saying to him that is the definition of disrespect.

13.4 The cumulative effect of a finding of guilt on all of the charges makes a sanction of dismissal reasonable in the circumstances.

[14] The second respondent failed to take into account the gravity of the charges and the circumstance that the third respondent was a junior manager. He also failed to take into account that the third respondent showed no remorse for failing to adhere to the rule or policy of the applicant, with huge financial

implications for the applicant. Had he done so, he would have found that dismissal was appropriate in the circumstances. The arbitrator's outcome, therefore, is one a reasonable decision-maker could not reach. The findings by the arbitrator are divorced from the material before him, and he misconceived what was required of him.

- [15] Substitution is appropriate where the full record is available to the court and where a judge is in the same position as a commissioner would be to make an appropriate award. The Court has the benefit of a full record and is in as much of a position to assess the version of the third respondent as against the Applicant's. The version of the Applicant, in the Court's view, is imminently more probable than the third respondent's.

Order

1. The finding of the second respondent in the arbitration award WECT19379-23, issued on 8 December 2024, that the third respondent's dismissal was substantively unfair, and the consequential relief awarded is reviewed and set aside.
2. The finding of the second respondent that the third respondent's dismissal was substantively unfair is replaced with a finding that the third respondent's dismissal was substantively fair.
3. There is no order as to costs.



C May
Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant

Adv. C De Kock

Instructed by:

Carelse Khan Attorneys, Cape Town

For the third respondent

In person

LABOUR COURT