



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

Signature

Date

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Case No: C181/2024

In the matter between:

MPACT OPERATIONS (PTY) LTD

Applicant

and

**METAL AND ENGINEERING BARGAINING
COUNCIL**

First Respondent

A SINGH-BHOOPCHAND N.O.

Second Respondent

NUMSA obo BRIAN THEODORE APRIL

Third Respondent

Heard: 16 October 2025

Delivered: 15 January 2026

Summary: Review application - proof of - theft - attempt to remove - initial investigation compromised

JUDGMENT

MKHATSHWA, AJ

Introduction

- [1] This is an opposed review application for the following order:

'reviewing and setting aside the ruling under case number **MEWC 13277**, dated 18 March 2024 (the Award) made by the Second Respondent under the auspice of the First Respondent. In the alternative, the matter be remitted back to the First Respondent, to be dealt with by an arbitrator other than the Second Respondent.'

Background Facts

- [2] The Third Respondent, Mr Theodore April, was employed as a Winder Operator. He commenced employment with the Applicant in 2009. He was dismissed on 7 November 2022 after he was found guilty at an internal disciplinary hearing. He was earning R12 000 per month at the time of his dismissal. The charges that he faced were the following:

'Theft or unauthorized possession of Company Property: in that on the 21st of October 2022, security found a roll of toilet paper in your possession after your shift had ended. The toilet paper was the same brand as what the company are using.

Dishonesty: In that you attempted to remove company property without authorization and permission.'

- [3] It was not disputed at the arbitration that a roll of toilet paper (the roll) was found in the Third Respondent's possession when security conducted a search. The Third Respondent denied that the roll belonged to the Applicant and claimed that he carried it with him from his home. He also argued that the Applicant had not been consistent in the application of the sanction of dismissal.
- [4] The Applicant, on its part, argued at the arbitration that it received a tip off that the Third Respondent was stealing company toilet paper. Acting on the tip off, the Applicant's security staff at the gate were instructed to carry out a search and found a roll that belonged to the Applicant in the Third Respondent's bag. The Applicant's rule is that employees must declare items that they bring from home if they are the same/similar to items that are on the Applicant's premises.

- [5] The Second Respondent found that the dismissal of the Third Respondent was unfair, and she ordered his reinstatement with 12 months back pay amounting to R120 000.

Grounds of review

The Applicant raises the following grounds of review against the Award of the Second Respondent under three main headings:

The rule in the workplace

- [6] The Second Respondent failed to apply her mind to the evidence and thereby grossly misconducted herself by not establishing whether the Applicant proved that the Third Respondent reasonably knew, or ought to have known of the rule in the workplace.
- [7] A bare denial of the rule by the Third Respondent was not sufficient, and in any event, he later conceded at the arbitration that *"he now accepts the rule and acknowledges that he is guilty for not declaring"* the item. That the Second Respondent ought to have accepted that the Third Respondent knew of the rule, and that the rule was reasonable and further that it was applied consistently.

Breach of the rule

- [8] The testimony revealed that the Applicant's roll is unique and cannot be found in a retail store, as it is purchased from a supplier. Since the Third Respondent did not deny this, the Second Respondent should have accepted it as a fact.
- [9] There was no evidence from the Third Respondent on where he purchased *"his roll"*. Except that he said he brought it from home.
- [10] The Second Respondent grossly erred by comparing the roll brought by the Third Respondent to the disciplinary hearing. That instead she should have scrutinised the roll confiscated on the date of the incident, with that which the Applicant generally purchases.

Breach of trust

- [11] The Second Respondent failed to properly take into account the serious nature of the Third Respondent's conduct and misconstrued the application of the case law entirely.
- [12] That she failed to determine whether the trust relationship had been breached, and wholly ignored evidence speaking to this. She focused on the value of the item in question, and not the testimony presented.

Remedy

- [13] As a result of the above, the Second Respondent arrived at a decision that no reasonable decision maker could reach.
- [14] The Second Respondent erred in law as she failed to apply her mind to the relevant facts and evidence presented, which constitutes a gross irregularity and/or process.
- [15] She miscalculated the back-pay as 12 months x R12 000 equals R144 000.

Supplementary grounds

- [16] According to the Applicant, the Third Respondent never seriously disputed that the roll used by the Applicant is unique and that it could not be purchased at retail stores
- [17] The photograph of the rolls, which was taken on the day of the disciplinary hearing, takes the matter no further.
- [18] Further that to conclude that the roll was not the property of the Applicant, the Second Respondent had to find that the roll was different to those used by the Applicant, and by making such a finding, she would have had to reject the direct evidence presented by Rall, the Applicant's witness.
- [19] On the sanction, the Applicant argues that the Second Respondent was unreasonable in concluding that if the Third Respondent did in fact steal the roll, dismissal was too harsh.

- [20] The Second Respondent did not consider the fact that the Applicant's witnesses testified that there is no longer any trust relationship between the Applicant and the Third Respondent.

Award

- [21] The Second Respondent identified the issue that she had to decide as being:

'...whether the dismissal of the Applicant was substantively fair.'

- [22] In her analysis of the evidence, she states that she is not convinced by the version of the Applicant. She explains that it is difficult to make a comparison from the pictures provided in the Applicant's bundle as all the rolls look similar. She states that it is also not possible to establish which of the rolls is a two-ply version, as one could only see one sheet. Further that there is no picture of the two relevant rolls together, and she questions why no such picture was taken.
- [23] She makes the point in the Award that the Third Respondent was allowed to leave the Applicant's premises with the roll that was found on him. Had security managers been so convinced, it is more likely that they would have been at pains to confiscate the roll. She finds that the Third Respondent's version that he put the roll back into his bag because he thought his explanation was accepted is plausible.
- [24] Further that the Third Respondent did so in the presence of all the security officers and security managers, and no one tried to stop him. Furthermore, the security manager's explanation that they did not pay attention as there was a lot happening around them is 'lame'. She explains that she concludes as such because the managers were called to the scene specifically to deal with the Third Respondent and not with anything that may have been happening around them.
- [25] She questions why the roll that was found in the Third Respondent's possession was not confiscated. She refers to this as a fatal flaw in the Applicant's case. She also refers to video footage which was presented as evidence at the arbitration, and she finds that it does not serve to prove anything. She states that the Third Respondent does not dispute that he had a roll in his possession.

That she did not note any obvious reluctance to have his shoulder bag searched. She finds that the Third Respondent's explanation that he had to put his hand in the bag to move the money and the biltong is plausible. Accordingly, she finds that on a holistic consideration of the evidence, the Third Respondent's version to be the more probable version and that the Applicant failed to discharge the onus to prove that the Applicant is guilty of the allegations against him.

- [26] The Second Respondent then engages in a discussion around the sanction. I do not intend to deal with this part of the Award, as it will be apparent in the analysis of the evidence and the legal position below.
- [27] In her conclusion, the Second Respondent found that the dismissal of the Third Respondent was unfair.

Analysis of the facts

- [28] The Applicant is involved in the packaging business and recycling in Africa. It also makes rigid plastic packaging, trays, film and jumbo bins or crates.
- [29] The Third Respondent was employed as a Winder Operator since 2009. His duties include setting of machines, checking the quality of products, ordering product material, determining whether packaging matched with the product, reporting deviations and compliance with what is referred to as HAVVP procedures.
- [30] The circumstances of the stop and search of the Third Respondent are largely undisputed. It started with him being suspected of theft of toilet paper arising from a tip off. On 21 October 2022, at the end of his work shift, he was stopped and searched by security. Among his possessions, a roll was found inside his bag after he emptied the contents of the bag.
- [31] Rall, one of the Applicant's witnesses, took pictures of the roll that the Third Respondent allegedly brought from home in different positions, one picture showed the roll from above with the middle hole being visible, and another picture showed only the side of the roll. These pictures are alleged to have been

taken on the day of the incident on 21 October 2022. As to why Rall did not take a picture of the Applicant's roll, on 21 October 2022, he stated that there was a lot happening at the security office at the time. This explanation makes no sense whatsoever. The picture of the roll that the Third Respondent had allegedly brought from home provides no credible evidence of a comparison at the time of the incident. Even if Rall says he compared the toilet rolls on the spot, the picture of both toilet rolls would have gone a long way to support his version.

- [32] The next picture shows two rolls, with the sheet of the rolls showing in both pictures. According to the handwritten note accompanying the picture, the picture on the left is the roll of the Third Respondent, which he brought from home. The picture is alleged to have been taken on the day of the disciplinary hearing.
- [33] At this point, things start taking a rather bizarre turn. Firstly, there is no explanation as to why only the roll that the Third Respondent allegedly brought from home was taken on the day of the incident. While the picture of the sample of the Applicant's roll was not taken on the same day side by side with the one the Third Respondent allegedly brought from home.
- [34] At the time of the disciplinary hearing, it was apparent that the proverbial horse had bolted. Taking a picture comparing the roll that the Third Respondent allegedly brought from home (for purposes of the hearing, it would appear) next to the roll of the Applicant does not provide proof of any offence having been committed by the Third Respondent on 21 October 2022.
- [35] It is simply unbelievable that the Third Respondent was then allowed to place the suspected stolen roll, which, according to his version, he had brought from home, back in his bag on 21 October 2022, and he was allowed to leave with it. This is captured on video, and this evidence is common cause. It is the explanation by Arendse, the Employer's other witness, that is incredible. He stated that he did not pay attention as the security office was very busy at the time. This is just unfathomable.

- [36] The above shows firstly that the Applicant's case was botched from the moment of the investigation. The photographs of the suspected stolen roll, together with a photograph of the Applicant's toilet roll, would have almost invariably proven the guilt or otherwise of the Third Respondent. Conveniently or by some stroke of 'misfortune', Rall and the rest of the contingent of the Applicant's staff did not deem it necessary to ensure that those comparative pictures were taken for posterity.
- [37] Having failed on the above score, a failure that is frankly inexcusable, there was a second opportunity to preserve the evidence necessary to prove the guilt or otherwise of the Third Respondent; instead, the Third Respondent was allowed to leave the premises with the suspected stolen roll. The real and best evidence was lost by the Applicant at this juncture. The Third Respondent was not stealing the roll; implicitly, he had permission to leave with the roll because, once again, all those present did not deem it necessary to confiscate the 'exhibit'.
- [38] It is even more troubling considering the scene was teaming with the Applicant's security personnel. The calibre of those who witnessed the incident on 21 October 2022 on behalf of the Applicant needs only to be enumerated to be understood. Those present included: Rall (Manager), Kwati (Security Officer), Arendse and (Safety and Security Manager). These were not junior security personnel who did not know their responsibilities; their collective skills set ought to have enabled them to deal with the scene more professionally and effectively than they did. They failed in the execution of their duties.
- [39] In truth and in fact, the Applicant's case collapsed at its inception, namely at the point of the initial investigation of the alleged theft or attempt to remove company property without authorization and permission. The initial investigation was heavily compromised.

Legal Analysis

- [40] Schedule 8, item 7 of the Labour Relations Act¹ as amended provides that:

¹ Act 66 of 1995, as amended.

'Any person who is determining whether a dismissal for misconduct is unfair should consider-

- (a) whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the workplace; and
- (b) if a rule or standard was contravened, whether or not-
 - (i) the rule was a valid or reasonable rule or standard;
 - (ii) the employee was aware, or could reasonably be expected to have been aware, of the rule or standard;
 - (iii) the rule or standard has been consistently applied by the employer; and
 - (iv) dismissal was an appropriate sanction for the contravention of the rule or standard.

[41] I will return to item (a) above in a moment. In terms of items (b)(i), (ii) and (iv), there is no dispute that those issues are common cause on the facts of this case. Regarding item (b)(iii), the Third Respondent argued that in the case of one Ronel, who was found guilty of possession of company toilet paper, the rule was not applied consistently. In its reply, the Applicant indicated that she was, in fact, dismissed, but she was reinstated on appeal. Accordingly, this issue can be put to rest on the basis that the rule has been applied consistently.

[42] I turn now back to item (a), namely: "*whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the workplace?*".

[43] It has been held that the mental element is present if the employee knew that the goods did not belong to him/her and he/she intended to remove the property permanently from the owner, knowing that he/she is not entitled to do so. However, where the employee genuinely believes that he/she is authorised to consume the goods, he/she is not guilty of theft².

² *Matsekoleng v Shoprite Checkers (Pty) Ltd* [2013] 2 BLLR 130 (LAC).

- [44] In light of the manner in which the investigation of the alleged offence was handled as illustrated above, there is only one conclusion that can be reached. And that is that the Third Respondent did not contravene a rule or standard regulating conduct in, or of relevance to, the workplace. The Applicant failed to prove on a balance of probabilities that the Third Respondent committed:

'Theft or unauthorized possession of Company Property: in that on the 21st of October 2022, security found a roll of toilet paper in your possession after your shift had ended. The toilet paper was the same brand as what the company are using.

Dishonesty: In that you attempted to remove company property without authorization and permission.'

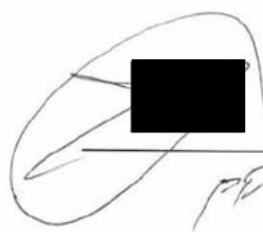
Conclusion

- [45] As indicated above, once the Second Respondent found that the Applicant failed to discharge the onus to prove that the Third Respondent was guilty of the allegations against him, that should have been the end of the enquiry as she identified it in the Award. Accordingly, whether dismissal was an appropriate sanction, as a separate enquiry, does not arise where the guilt of the Third Respondent has not been proved on a balance of probabilities nor inferred from the Applicant's conduct. It is apparent that the Second Respondent acted *ex abundanti cautela* in addressing the issue of the sanction, and she cannot be faulted for that.
- [46] Accordingly, the Second Respondent reached a decision that a reasonable arbitrator would have reached when presented with the same set of facts and the same legal material.
- [47] On her calculation of the back pay, it is obvious that she made a typographical error in the Award, she clearly stated that a period of 17 months had by then lapsed since the dismissal and that the delays were beyond the control of either of the parties. She accordingly deemed it appropriate to limit the backpay to 10 months. Hence the amount of R120 000 on the basis that the Third Respondent was earning R12 000 per month.

Order

In light of the above, there is no reason to interfere with the Second Respondent's Award, save to update the relevant dates. Accordingly:

1. The application is dismissed.
2. The dismissal of the Third Respondent, Theodore April, was substantively unfair.
3. The Applicant is ordered to reinstate the Third Respondent with full back pay from the date of dismissal.
4. The back pay is limited to 10 months' compensation, amounting to R120 000.
5. The above amount is to be paid to the Third Respondent by 28 February 2026.
6. The Third Respondent must report for duty on 2 February 2026.
7. There is no order as to costs.



M Mkhathswa

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr N Du Preez

Instructed by: Van Der Spuy & Partners

For the Third Respondent: Ms Z. Hlongwane

Instructed by: National Union of Mineworkers of South Africa

LABOUR COURT