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

[redacted] 23/Jan/26
Signature Date

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Case No: C92/2024

In the matter between:

SADHASIVAN NAIR	**Applicant**
and	
PETROLEUM LIMITED	**First Respondent**
NATIONAL BARGAINING COUNCIL FOR	
THE CHEMCAL INDUSTRY	**Second Respondent**
COMMISSIONER ANDISWA MAKASI N.O	**Third Respondent**

Heard: **30 October 2025**

Delivered: **23 January 2026**

Summary: Letter of Employment - Contract of employment, Company Policy and Procedure and/or Acceptable Company Practice. Parole evidence rule. Gross misconduct-Gross negligence: failure to secure and/or finalize signed agreements with dealers - to operationalize - end to end management of contract. Failure to collect rebates timeously across multiple suppliers, 2019-2022. Failure in ensuring trade agreements are signed and or are in place and updated with suppliers allocated by Line Managers. Exposing the company to potential financial losses - actual financial losses. Employee alleges lacked authority to unilaterally sign contracts or fully manage rebate collection.

JUDGMENT

GURA, AJ

Introduction

[1] This judgment is in relation to an application brought in terms of Section 145 of the Labour Relations Act[1] (as amended) read with Rule 7A of the Rules of Proceedings in the Labour Court[2]. The Arbitration Award was granted against the Applicant in the matter dated 8 February 2017 , issued by the Third Respondent in the matter under the auspices of the Second Respondent, under case number CHEM229-22/23. The First Respondent opposes the application.

[2] The Applicant was at all material times represented by Mr de Wet from Brundon Attorneys, and the Respondent was represented by Mr Jose Jorge from Thompson Wilks Incorporated. The Respondents argued that the Applicant has failed to provide a proper index for the Documentary Record. Thus, Respondent's Heads refer to the pagination in the Applicant's and Respondent's bundles as they were used in the CCMA. Argued further that the transcripts have no line numbers and are not chronologically numbered, thus making referencing difficult.

Background

[3] Engen operates in the Petroleum Sector. It has retail operations through which it services a network of Engen branded service stations, which are franchised and owned by independent dealers. Many of the service stations offer convenience shopping in the form of Engen branded Quick Stores. Engen, on behalf of the dealers, will secure suppliers for the Quick Shops, negotiate terms and conclude trade agreements with the suppliers. The First Respondent further placed on record that Engen secures a significant amount of revenue

[1] Act 66 of 1995 (as amended).
[2] GN 1665 of 1996: Rules for the Conduct of Proceedings in the Labour Court, repealed with effect from July 2024.

from these agreements as it earns rebates from the suppliers on the supplier stock that is sold at the Quick Shops, which rebates are usually shared with the dealers. Ms Dutton testified on behalf of the First Respondent and placed on record that Applicant managed specific categories, being tobacco, confectionery, and perishables.

[4] The Applicant was employed by the First Respondent from 2005 until his dismissal in 2023. He was employed as a National Category Manager with a monthly net salary of approximately R76 931.00[3], a senior position in the organization. First Respondent argued that the Applicant's Manager (and his Manager) has an oversight role. They did not implement the end-to-end function[4]. The Category Manager will typically source a supplier, formalize the relationship in the form of a trade agreement and then operationalize the agreement and roll it out. The trade agreement is critical as it regulates the relationship and provides certainty and protection from liability to Engen and the dealers it services. Argued further by the First Respondents that the key issue in these contracts are the rebates, the rebates being the reason for the contracts[5]. The trade agreements are typically for 12 months, running from January to December of a year.

[5] The First Respondent argued further that the Key Accountabilities for the Category Manager require, amongst others, that the Category Manager:

> 'Manage assigned sub-category by building and executing strategic sourcing and category management plans, supported by in depth analysis of purchasing demand 'supplier, market, price cost structures, generate the suppliers list and assessment criteria, drive the negotiation strategy and <u>prepare/operationalize</u> (First Respondent's emphasis) the contract to ensure delivery of business objectives[6].

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[3] First Respondent placed on record Applicant earned just short of R 1 000 000.00 a year.
[4] Transcript DM 551338-19 October 2023;Dutton cross -pages 3 and 4.
[5] Transcript DM551336-26/7/23: Dutton ; page 5 & 13 respectively.
[6] Paragraph 12 of First Respondents' Heads and Applicant's CCMA bundle, page 37, Category Management, bullet 1.

Manage end to end contract management life cycle and develop mitigation plans to ensure delivery and performance of suppliers as per agreed SLAs[7]. (First Respondent's emphasis)

[6] First Respondent argued that the Category Manager cannot perform his or her tasks properly without a trade agreement being in place at the commencement of the year. Further, Engen has a Buying Commission Procedure[8]. (The Procedure) which applies to all Category Managers. That Buying Commission is another term for the rebates that are *collected by the Category Managers from suppliers. Further, in terms of the procedure:*

> 'Buying Commission is the amount that is negotiated between Engen and suppliers as commission for utilization of Engen's network. Buying commission is negotiated at the time of contract creation and changes annually, depending on current negotiations. Category Managers are responsible for negotiating buying commission[9].'

[7] First Respondent argued that rebate negotiations must be concluded when the contract is created. A Category Manager cannot effectively perform his or her duties without a trade agreement being concluded before the supplier renders its services. Argued further that the Procedure is to reduce the risk of liabilities being under or overstated[10]. It is the Category Manager's responsibility to post buying commission transactions in the Engen SAP system. A rebate analyst will assist the Category Manager and will check buying commission accounts (which have been entered into the SAP system) on a monthly basis.

[8] The First Respondent argued that, in terms of clause 2.9 of the Procedure, the Category Manager and the rebate analyst must follow up on any outstanding payments[11]. That the Applicant had been warned previously that he had to submit rebates timeously. That on 9 April 2021, the Applicant's Manager issued a warning to him for submitting his rebates timeously[12], and the Applicant must have known of the seriousness of not doing so. First Respondent argued that

[7] Applicant's CCMA bundle, page 37, Category Management, bullet 5.
[8] Applicant's CCMA Bundle.
[9] Applicant's CCMA, bundle, page 8 Introduction.
[10] Applicant's CCMA bundle, page 8 Purpose.
[11] Applicant's CCMA bundle , page 12 (page 5 of policy).
[12] Respondent's CCMA bundle, page 43.

the Applicant was responsible for negotiating and concluding the trade agreements with British and American Tobacco (BAT), a supplier of tobacco products. Argued further that the 2020 trade agreement with BATSA is relevant in this dispute. The trade agreement for 2020 should have been finalized in December 2019. The Applicant failed to do so. This led to a loss of R 2 348 84.56 million[13].

[9] The charges meted against the Applicant related to an alleged gross negligence involving failure to finalize and collect supplier rebates and agreements and trade agreements, resulting in an alleged significant financial loss to the First Respondent. The Applicant argues and challenges the Arbitration Award that the same is flawed as it properly failed to consider his evidence and job description limitations on the following grounds:

9.1. That Applicant tried to get the agreements signed but lacked the authority to sign without the manager's approval[14]. Secondly, that the Rule that was breached was vague and did not explicitly require him to sign agreements on behalf of the First Respondent[15]. Thirdly, Applicant's job description does not include responsibility for rebate collection, only negotiation[16]. Fourthly, that the First Respondent's alleged financial losses were potential, not actual, with some amounts still recoverable[17]. Fifthly, the Employer did not prove gross negligence, as the Applicant forwarded contracts to his line manager, acting reasonably[18].

<u>The charges meted against the Applicant</u>

[10] The three charges meted against the Applicant, wherein a notice of a disciplinary enquiry was issued on 9 December 2022, were as follows:

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[13] Transcript DM551336 - 26/7/23: Dutton-page 8, Respondent's CCMA bundle, page 10.
[14] As per Founding Affidavit Page 7-15 of Pleadings Bundle.
[15] As per Founding Affidavit Page 7-15 of Pleadings Bundle.
[16] As per Founding Affidavit Page 7-15 of Pleadings Bundle.
[17] As per Founding Affidavit Page 7 -15 of Pleadings Bundle.
[18] As per Founding Affidavit Page 7-15 of Pleadings Bundle.

'Charge 1-BATSA 2022 Trade Agreement

Alleged gross misconduct in that you have acted in gross breach of the position of trust and confidence, which your employment within Engen Petroleum Limited as Category Manager, is a consequence of the following:

1. That contrary to company policy and procedure and or acceptable company practice, you failed to perform your duties to secure and or finalize a signed agreement with BATSA (British and American Tobacco South Africa) for the rebate period relating to FINANCIAL Year 2020. Your failure resulted in loss of income of approximately R2 348 847.56 for the company including 50% as per the original agreement, potentially straining company and dealer operational relations and bringing the company's name into disrepute. Your conduct amounts to gross negligence.

Ms Dutton for the First Respondent testified that on 15 July 2020, Engen received an email from the suppliers with two documents of sales figures and the second agreement was aware for a sales agreement. That the Applicant was aware of the email but failed to respond or to escalate the emails, was further aware that Engen would lose money. Applicant was aware of the conclusion of the payments, aware of his accountability and his role in collecting and allocating the payments.

Applicant argued that evidence showed a sharing agreement with BATSA and same was in place and being signed during the relevant period. The First Respondent's witness admitted that there was a sharing agreement in place with BATSA and the BATSA 2020 trade agreement was in the process of being signed and eventually signed in 2023 [19].

Charge 2 -Collection of Rebates

That contrary to company policy and procedure and /or acceptable company practices, you failed to perform your duties in collecting rebates timeously across multiple suppliers over the period in 2019-2022. Your failure has resulted in approximately R15 000 000.00 in supplier rebates not being

[19] Record DM551336., Page 10 Line 12 and Record DM551389 Page 32-33

collected timeously, with monies still not paid up to date. Your conduct amounts to gross negligence.'

Ms Dutton's evidence was to the effect that it was clear that from 2019 to 2022, as per the potential loss of rebate income spreadsheet submitted, the amount in yellow reflected what the rebate would have been. Where there was zero, there was no income collected at all. Placed on record that the money collected from 2019 was R1 million, to 2021 and nothing in 2022, and the Applicant was aware of the rule because there is a certain amount that is collected as it is laid out in the contract. The Rebate Specialists are there to assist with the accounting function and cannot assist in any way if the rebate is not invoiced in the system

The Applicant argued that the job description of the Category Manager did not include rebate collection responsibilities, but rather negotiation of the rebate percentages. Thus, it was never the Applicant's job description to collect rebates, but only to negotiate the rebate percentages. Evidence further indicated that some rebate monies were collected but not properly allocated, and that the loss was potential rather than actual.

'Charge 3 – Trade Agreements

That contrary to company policy and procedure and /or acceptable company practices, you failed to perform your duties in ensuring that <u>Trade Agreements are signed and/or are in place and updated with suppliers allocated to yourself by your line manager. Your conduct amounts to gross negligence and exposes the company to potential financial losses.'</u>

Ms Dutton's evidence was to the effect that in October 2022, 10 months into the year, there were 45% of contracts that were not in place, as many contracts were not in place not done, as rebates were not done and they were not on the system, which made it difficult for Engen to collect rebates, without a contract, Engen had no leg to stand on. Further, the same put Engen's reputation at risk and makes it difficult to conclude contracts moving forward because of the way relationship has been conducted over the years.

The Applicant argued that the charge meted against them accused Applicant of failing to ensure trade agreements were signed and updated, constituting gross negligence. The Applicant argued further that the testimony revealed that contract signing involved multiple levels, including superiors who had to authorize or sign agreements and that the Applicant did not have signing powers.

[11] A synopsis of the Applicant's key arguments was thus that they lacked the authority to unilaterally sign contracts or fully manage rebate collection, with superiors and other departments playing significant roles. The diffusion of responsibility is crucial in contesting the charges of gross negligence. That the distinction made between potential and actual financial loss to the company regarding rebates highlights that the alleged misconduct may not have caused the First Respondent direct harm, weakening grounds for dismissal.

[12] The First Respondent's argument in relation to the BATSA trade agreement, which led to the alleged R2 348 84.56 million loss, the Applicant's Manager wrote to him on 19 May 2020, requiring urgent feedback on the Joint Panel Buying (JPB) and asking for updates on the BATSA payment. Thus, argued that the Applicant knew and was aware that he was responsible for ensuring that payments were made by BATSA. That on 19 May 2020, Ms Simone Kearns wrote to the Applicant to inform him that it was difficult to allocate BATSA Q1 and Q2 2018 payments from a bank statement which did not show which account it belonged to. The Applicant responded by informing Ms Kearns that the Q1 and Q2 2018 invoice was still due for payment; thus, this shows that the Applicant understood that he was liaison between Engen and the supplier and that this was not Credit Administration's job. Further that it also demonstrated the Applicant's role in the rebate process in that he had to explain what the payments were for and where they had to be allocated, and to attend to the same, the Applicant would have to monitor the payments carefully.

[13] The First Respondent argued that the Applicant's role in the rebate process is further confirmed by the Applicant's email of 2 July 2020 to Ms Kearns asking her to allocate the payments as per BATSA's payment schedule. That on 15 July 2020, some seven months after the start of the trading year, Riaan du Preez, the BAT Senior Account Manager dealing with Engen, sent an email to the Applicant. The email read as follows :

'Hi Cyril

Attached the numbers for Engen from a BATSA perspective. I've concluded opposition performance as well for your reference. Also, I attach the proposed agreement for 2020, however time is running out and with no agreement in place, Engen will lose out on the potential earnings.'

Argued that BATSA had made it clear that the absence of a signed agreement placed the collection of rebates at risk[20]. The Applicant did nothing at all to action or escalate the signing of the agreement[21]. No agreement for 2020 was concluded with BATSA.

[14] The First Respondent argued that, as a result, BATSA refused to pay any rebates for the 2020 trading year, leading to a loss of R 2 348 847.56 in unpaid rebates from Engen. That this further impacted the dealers who demanded their share of the rebates from Engen. That the same not only led to financial loss for Engen but also seriously damaged its reputation and relationships with BATSA and other affected dealers.

[15] The First Respondent placed on record that the Applicant's Manager wrote to him again on 23 November 2020, asking him for confirmation of the 2020 BATSA JBP payment due dates[22]. The First Respondent argued that this again showed that the Applicant should have been aware that he was responsible for ensuring that payments were made by BATSA. Further, an investigation by Engen revealed that the Applicant had been grossly negligent in the performance of his duties. That Applicant had failed to collect the rebates timeously in the period 2019 to 2022. The full extent of the potential losses, although calculated at R15 754 042.52 based on the information available, was closer to R20million[23]. The First Respondent argued that the Applicant knew what was required of him as he had previously collected rebates and put the amounts into the SAP system without any issues[24]. Further, this had to be done timeously as failure of same compromised Engen's relationship with the

[20] Transcript DM551339-19 October 2023 :Dutton cross - page 12.
[21] Transcript DM 551336-26/7/23: Dutton - page 10.
[22] Transcript DM551336-26/7/23: Dutton - page11, Respondent's CCMA bundle, page 47.
[23] Respondent's CCMA bundle, page 51; Transcript DM551337-26/7/23;Dutton -pages 4 to 7.
[24] Transcript DM551337-26/7/23: Dutton - page 5.

supplier. Either the supplier felt Engen did not care, or when required to pay late, they would be required to make a much larger payment later which could place financial strain on the supplier. Furthermore, without a contract there would be no legal responsibility on the supplier to pay Engen.

[16] The First Respondent argued further that Rebate Specialists were there to assist with the accounting function, a checking function. Argued further that it is also apparent from the Buying Commission Procedure that the Applicant, in conjunction with the Rebate Specialist would follow up on outstanding payments[25]. That the Applicant was responsible for managing the relationship with the supplier and placing the invoices on the SAP system or ensure that the Category Assistant did so. The Rebate Specialists cannot check something which has not been placed in the SAP system[26]. Thus, argued by the First Respondent, the Applicant had to use the Age Analysis report to check amounts owed by suppliers and contact them to follow up on outstanding amounts[27], same which was part of the Applicant's end to end function.

[17] The First Respondent further argued that the investigation also revealed that the Applicant had failed to conclude trade agreements with at least 45% of his suppliers as of October 2022 and contracts had to be concluded by at least December of the preceding year[28]. Engen had not been aware of more contracts and First Respondent argued that same was because the Applicant had not entered invoices onto the system nor collected rebates. Argued further that the contract underpins the entire relationship with the supplier as the same is how Engen derives income from a supplier. That same was the Applicant's job to manage this job and did not do so for 4 years.

Issues to be decided

[18] The first issue to be decided by the Third Respondent is whether the Applicant has misconstrued the allegations meted against him as per the First

[25] Applicant's CCMA bundle - page 11, paragraph 2.9; Transcript DM551338-19 October 2023: Dutton cross - page 21.
[26] Transcript DM551337-26/7/23: Dutton - pages 4 and 8; Transcript DM 551338-19 October 2023; Dutton cross - page 31 and 36 and 37.
[27] Applicant's CCMA bundle, page 9; Transcript DM551338-19 October 2023: Dutton cross page 15.
[28] Transcript DM551337 - 26/7/23: Dutton - page 10.

Respondent. Latter submitting that the essence of Charge 1 is that the Applicant did not perform his duties in securing or finalizing a signed agreement with BATSA. The Applicant's stance being that he was found guilty of a breach of duties which he did not perform, specifically that he did not have the authority to sign agreements without his manager's approval. The First Respondent further submitting a key point Applicant seems to not understand is that the Applicant is responsible for the end-to-end management of the contract. Further, to develop mitigation plans to ensure that rebates are collected, not at all to sign the contracts. However, the Applicant was required to ensure that the contracts were signed and operationalized. The trade agreements cannot be operationalized unless they are signed and placed into the SAP system. First Respondent argues to operationalize means to put into operation or use. Thus, a breach of a rule. A rule inherent in the Applicant's role and further contained in the Applicant's job description.

[19] The second issue relates to charge 2, wherein the Applicant's stance is that he was not to collect rebates as Rebate Specialists were to attend to the same. The First Respondent argued that the Applicant had been collecting rebates for years, it was the Applicant's job, latter knew about the same and did not collect rebates timeously. The Buying Commission Procedure, which was collected by the Applicant himself and from Dutton's evidence, proved that the Applicant knew that he was responsible for collecting rebates. Thus ,question is whether the rule is vague as per the Applicant's stance, which the Third Respondent rejected. The First Respondent argues that the Third Respondent was alive to the inherent duty to collect rebates, apparent from the Buying Commission Procedure that the Applicant must check amounts owed by the suppliers, contact them and follow up on collections. The Applicant was further not at all charged with actual losses, only potential losses, as supplier rebates were not collected timeously, with monies still not up to date. The Applicant's failure to conclude contracts and enter invoices on the SAP system created chaos, the First Respondent arguing that same made it difficult to reconcile the potential loss. Thus, the Third Respondent's finding is correct that the Applicant's submission of recovery of some R9 million rand being recovered, there was still a substantial loss.

[20] The Third bone of contention by the Applicant is to the effect that the parole evidence rule applies. Thus, the Third Respondent could not consider any other factors beyond the contract of employment, unless the other document relied upon was incorporated as part of the contract of employment. The First Respondent argued that this is the Applicant's most bizarre submission, as the Applicant submitted no contract of employment but a Letter of Employment. The latter's responsibilities are apparent from the job description for a Category Manager and the Buying Commission Procedure.

[21] The Applicant's stance is that gross negligence was not at all proved as he forwarded the contracts to his Managers. The First Respondent's stance being that the standard set by Engen for a Category Manager's job is to ensure that there are contracts in place where rebate terms have been negotiated and are payable by suppliers. Category Managers must also ensure that suppliers deliver in terms of the contract, and they pay rebates over to Engen. Thus, to review whether the Third Respondent found correctly that each charge individually amount to gross negligence. The First Respondent concedes to the jurisprudence in relation to gross negligence, as enumerated in the Applicant's Heads of Argument.

<u>The Law</u>

[22] Arbitration awards are reviewable in terms of section 145 of the LRA. In terms of Section 145:

> '(1) Any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award-
>
> ...
>
> (2) A defect referred to in subsection (1), means–
>
> ...
>
> (i) committed misconduct in relation to the duties of the commissioner as an arbitrator;

(ii) committed a gross irregularity in the conduct of the arbitration proceedings; or

(iii) exceed the commissioner's powers; or

(b) that an award has been improperly obtained.'

[23] The Applicant placed on record that for them to succeed herein, they thus have to establish one of the defects above. Thus, their bone of contention is that the Commissioner herein committed misconduct in relation to his duties as an arbitrator by not considering all the evidence, did not take all the evidence into consideration, or the arbitrator made a decision a reasonable decision maker could not have reached.

[24] The *Sidumo* Test [29], as per the Applicant. 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 Court[30]:

> '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.'

[25] The Applicants proceeded in their Heads of Arguments to unpack *Sidumo,* and I quote the Applicant's Heads as follows:

25.1. The case lists or summarizes the essential requirements relating to reviews regarding termination of employment and the requirement of a fair reason relating to conduct, and these are summarized below:

25.1.1. If an employer alleges a dereliction of any duty it is necessary to determine if it was the employee's duty in the first place.

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[29] At paras 14 to 27 of the Applicant's Heads of Argument.

[30] *Sidumo & another v Rustenburg Platinum Mines Ltd & others (Sidumo)* [2007] 12 BLLR 1097 (CC) at para 110 of Navsa AJ's judgment.

25.1.2. Such an enquiry begins with any contract of employment.

25.1.3. Any duty provided for in such a contract must be reasonable, and that depends on a number of factors.

25.2. In certain circumstances, a written directive, rule or regulation containing such a duty would have to be shown.

25.3. If reliance is placed on any specific responsibilities contained in any "job description" it must be produced as evidence prior to the termination.

25.3. Reliance can be placed on other documents, such as policies or manuals, if they form part of the contract of employment.

25.4. An employee's duties must be found within the four corners of an employment contract if that contract provides that it constitutes the entire contract between the parties and that no other contract or promises apply.

25.5. It is permissible to incorporate additional duties by reference in the employment contract.

25.6. The parole evidence rule is offended when an attempt is made to adduce oral evidence of other duties not contained within the written contract of employment, especially when that contract provides that it is the entire contract between the parties.

25.7. When reviewing an award, it is necessary to consider what findings were made with regard to the reasons provided by the employer for the termination of the employment.

25.8. It is necessary in every matter to determine what issue was before the commissioner and if any duties of the employee are relied upon by the employer.

25.9. As already stated, the employee's duties are determined by the terms and conditions of the contract of employment between such parties.

25.10. The test for determining whether arbitration awards are reasonable or unreasonable is whether the commissioner's decision or finding *"is one that a reasonable decision-maker could not reach"*[31].

[26] The proper application of the test on review is summarized by the Supreme Court of Appeal in the *Herholdt* judgment[32]. For an award to be reviewable, the arbitrator must have misconceived the nature of the inquiry or arrived at an 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.

[27] 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. If the decision arrived at by 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 reviewable[33]. In short: A reviewing court must ascertain whether the arbitrator considered the principal issue before him/her, evaluated the facts presented at the hearing and came to a conclusion that is reasonable. *"The review Court is not required to take into account every factor individually, consider how the arbitrator treated and dealt with each of those factors and then determine whether a failure by the arbitrator to deal with it is sufficient to set the award aside. This piecemeal approach of dealing with the award is improper, as the reviewing Court must consider the totality of the evidence and then decide whether the decision made by the arbitrator is one that a reasonable decisionmaker could make. Held further that a reviewing court must ascertain whether the commissioner considered the principal issue before him/her, evaluated the facts presented at the hearing and came to a reasonable conclusion"*.

[28] 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

[31] At para 110 of the *Sidumo* case.
[32] *Herholdt v Nedbank Ltd (Herholdt)* [2013] 11 BLLR 1074 (SCA).
[33] *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA and Others (Gold Fields)* [2014] 1 BLLR 20 (LAC).

the minimum of legal formalities[34]. 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 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 ..."*[35]. It is trite that the test applicable in arbitrations conducted under the auspices of the CCMA is the balances of probabilities[36]. 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 or otherwise of the employer version[37].

[29] In *Bestel v Astral Operations Ltd and Others*[38] the LRA considered the limited scope possessed by the Labour Court to review an arbitration award and accepted that an arbitrator's finding will be unreasonable if the finding is unsupported by any evidence, if it is based on speculation by the arbitrator, if it is disconnected from the evidence, if it is supported by evidence that is insufficiently reasonable to justify the decision or if it was made in ignorance of evidence that was not contradicted.

[30] In *Stocks Civil Engineering (Pty) Ltd v Rip NO and another*[39], the court held that: *"The Labour Court has no inherent common law powers of review. Its powers are to be found within the confines of its enabling act. In the case of reviews of awards of commissioners of the CCMA, it is section 145 of the LRA,*

[34] Section 138 (1) of the LRA.
[35] *Ellerine Holdings Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2008) 29 ILJ 2899 (LAC), at 2906 D to F.
[36] *Potgietersrus Platinum Ltd v Commission for Conciliation, Mediation & Arbitration & others* (1999) 20 ILJ 2679 (LC).
[37] *Marapula & others v Consteen (Pty) Ltd* (1999) 20 ILJ 1837 (LC) at para 33.
[38] [2011] 2 BLLR 129 (LAC) at para 18.
[39] [2002] 3 BLLR 189 (LAC) at para 30.

in the review of functions, acts and omissions under the LRA section 158 (1)(g) of that Act, and in the case of private arbitrations, section 33(1) of the Arbitration Act".

[31] The role of the reviewing Court is limited to deciding issues that are raised in the applicant's founding (and supplementary) affidavit. This was confirmed by the Constitutional Court in *Commercial Workers Union of SA v Tao Ying Metal Industries & others*[40] where it was held that:

> '...the role of the reviewing court is limited to deciding issues that are raised in the review proceedings .It may not on its own raise issues which were not raised by the party who seeks to review an arbitral award. There is much to be said for the submission by the workers that it is not for the reviewing court to tell a litigant what it should complain about. In particular , the LRA specifies the grounds upon which arbitral awards may be reviewed .A party who seeks to review an arbitral award is bound by the grounds contained in the review application .A litigant may not on appeal raise a new ground of review. To permit a party to do so may very well undermine the objective of the LRA to have labour disputes resolved as speedily as possible.'

Gross Negligence

[32] Applicant argued in their Heads of Arguments that in *Mukheiber v Raath and Another*[41], the Supreme Court of Appeal (SCA) restated the test for negligence as follows:

> 'In our law, the standard of conduct expected from all members of society is that of the *bonus paterfamilias*, ie the reasonable man or woman in the position of the defendant. An act which falls short of this standard and which causes damage unlawfully is described as negligent, ie it is tainted with *culpa*.'

The Applicant argued further that for the purposes of liability culpa arises if –

(a) a reasonable person in the position of the defendant –

[40] (2008) 29 ILJ 2461 (CC).
[41] 1999 (3) SA 1065 (SCA) at para 31.

(i) would have foreseen harm of the general kind that actually occurred;

(ii) would have foreseen the general kind of causal sequence by which that harm occurred ;

(iii) would have taken steps to guard against it, and

(b) the defendant failed to take those steps.

'Negligence in short, is the failure to comply with the standard of care that would be exercised in the circumstances by a reasonable person and in the employment context, the employee's conduct is compared with the standard of skill and care that would have been expected of a reasonable employee in the same circumstances. The reasonable employee with whom the employee is compared must have experience and skill comparable with that of an employee charged. In labour law, negligence is not applied 'in vacuo' or against the general standard of a 'reasonable person', but it is applied in the context of the particular workplace or industry, considering the performance standards and procedures set by the employer. Negligence is usually established with reference to workplace rules or procedures applicable in the workplace.'[42]

[33] The Applicants argued that it thus follows that the workplace rules and procedures are thus found in the Applicant's job description. The question is thus whether Applicant acted in accordance with his Job description or not, and whether another Category Manager with the same experience as the Applicant has acted in the same way or not. The Applicants argued further that in relation to negligence, there would have to distinguish negligence from gross negligence. Thus cited *NUMSA obo Selepo v ORAWAB Investments (Pty) Ltd t/a Bergview Engen One-Stop 5 BALR 481* (MIBC), the Commissioner distinguished between ordinary and gross negligence as follows:

'The carelessness of mere failure which constitutes ordinary negligence change into gross negligence due to an indifference to , and blatant violation

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[42] *National Union of Metal Workers of SA & another v Commissioner for Conciliation, Mediation & Arbitration & others* (2023) 44 ILJ 1575 (LC) at para 32.

of, workplace duty. Gross negligence can be described as a conscious and voluntary disregard of the need to use reasonable care.'

[34] The Applicant's stance was thus that, in terms of the job description of the Category Management, which the Applicant were, they are supposed to: Manage end-to-end contract management life cycle and develop mitigation plans to ensure delivery and performance of suppliers as per the agreed SLA's [43]. Thus, as stated and argued by the Applicant, the above is very vague as it does not state that it is the Applicant's responsibility for the signing of the contracts. The Applicant did not have the authority to sign the contracts with the suppliers, only upper management had the authority to sign those contracts. Conceded that the Applicant negotiated the contracts, but when the contracts were drawn up, only upper management could sign on behalf of the First Respondent. The Applicant argued further that in relation to the rebates, the buying commission procedure states that the Category Managers (Buyers) are responsible for negotiating the buying commission[44], nowhere does it state that the Applicant -Category Manager is responsible for the collection of the buying commission. Further, the only time where the category manager are mentioned in the document is where it states that, use the age analysis report to check amounts owed by suppliers[45].

[35] The Applicant argued further that it thus follows that, if the age analysis report is not done, the Category Manager – Applicant can thus not check the amount owed by the suppliers. Thus, if one step in the chain is not done, the Category Manager could not do his part. The Applicants argued and submitted that it thus means that, before charging the Category Manager, everyone in the chain should have been charged. Applicants argued that, thus, when looking at the reasonable person in the position of the Applicant, one must look at the reasonable Category Manager. The question would thus be as to whether the Category Manager acted any differently than another Category Manager in his position. To arrive at an answer, the Applicant thus argued that we would have to look at his job description and the buying commission procedure.

[43] Page 37 of the Applicant's Bundle.
[44] Page 8 of the Applicant's Bundle.
[45] Page 12 of the Applicant's Bundle.

[36] The Applicant proceeded to place on record the case of *A Mauchie (Pty) Ltd t/a Predcision Tools v NUMSA & Others*[46], it was mentioned that job descriptions are not cast in stone and moulded in steel, and that employees cannot hold an expectation that a job description, once issued, can never be changed. Only when the job description changes so dramatically that an employee undertakes an entirely different job than then there is a right to refuse to do the job in the required manner. The Applicants argued that if the First Respondent wanted the Applicant to sign the contracts on its behalf, it should have given him authority to do so. Accordingly as well, if the Applicant was supposed to collect the rebates, which was not the Applicant's responsibility, they should have given the Applicant authority also, coupled with the requisite training for the collection. The Applicant's stance thus being that same would have been an entirely different job, which he did not receive the training and or authority to do.

[37] In concluding, the Applicant thus submitted that the negligence was not at all on the part of the Applicant but was on the First Respondent in not training the latter in respect of collection of the rebates and or secondly, giving the Applicant the authority to sign contracts on their behalf. The Retail Rebate Analyst are the ones who are to maintain the rebate accounts and not the Applicant; thus, Retail Rebate Analysts are the ones who are to be held accountable and not the Applicant. The latter's prayer thus being that the award by the Third Respondent must accordingly be set aside and the Applicant be reinstated in the position that he held.

The common cause is that Applicant was not at all appointed with a contract of employment in place, thus no offer nor acceptance. He was appointed with a one-page letter of position details with his *key accountabilities*, enumerated thereon. Much has been said in relation to these key responsibilities, particularly by the First Respondent. Thus, this court need not over burden this judgment. Another common cause is further that we have to also look into the Engen Buying Power Procedure. As a point of departure it reads: Buying commission is negotiated at the time of contract creation and changed annually,

[46] (1995) 16 ILJ 1 (LAC).

hence a contract has to be in place for Category Managers to negotiate buying commission. Paragraph B 2.29 reads: *"The Buyer (Category Manager), follows up with the Retail rebate analyst , follows up on outstanding payments.*

C 2. reads ; Category Managers (Buyers):1.Use the Age Analysis report to check amounts owed by suppliers

2.Contact suppliers and follow-p on outstanding amounts'. (Own emphasis)

[38] Evidenced from pages 19 to 23 of the Pleading Bundle paragraphs 15 to 47, the Third Respondent complied with her statutory obligations by applying the trite test applicable in arbitrations, on a balance of probabilities and selected an inference that is more natural or plausible of the possible inferences. The issue/s do not relate to the Applicant not signing contracts as per his defence that the same was a job description of upper management. The Applicant's contention that if one step of the chain is not done Category Manager could not check the amount owed. The Applicant further argued that negligence was not on his part but on the part of the First Respondent in not training the Applicant in collecting rebates and /or giving him authority to sign contracts on their behalf. Third Respondent accurately recorded the material evidence of the witnesses that was led before her and applied the balance of probabilities to the evidence. Further, the Third Respondent correctly identifies the test applicable to determining the fairness of a misconduct dismissal, considers the evidence before her in respect of the rules, the breach of the rules and the consequences of the breach.

[39] The Third Respondent then correctly considers the appropriateness of the dismissal as a sanction, including a consideration of Applicant's years of service, consequences of Applicant's gross negligence on Engen's operations, propensity to commit the kind of misconduct he was charged with, gross negligence and lack of remorse. Third Respondent's order that the Applicant's dismissal by Engen was both procedurally and substantively fair is unassailable and not reviewable.

[40] Having heard and read all the evidence before me, the review application is thus dismissed.

[41] The following order is made:

<u>Order</u>

1. The review application is thus dismissed with no order as to costs.

[redacted]

L. Gura

Acting Judge of the Labour Court of South Africa

<u>Appearances</u>

For the Applicant:	Jose De Wet
Instructed by:	Brunsdon Attorneys
For the Respondent:	Jose Jorge
Instructed by:	Thompson Wilks Incorporated