



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

Signature

Date

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case No: JR2841/23

In the matter between:

PROPAY PROPRIETARY LIMITED

Applicant

and

NICOLAAS MARTHINUS STENGEL

First Respondent

SHUMANI SYDNEY TSHAKAFA N.O.

Second Respondent

COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION

Third Respondent

Heard: 21 January 2026

Delivered: 10 February 2026

JUDGMENT

PHEHANE, J

Introduction

- [1] The applicant launched a review application in terms of the provisions of section 145 of the Labour Relations Act¹ (LRA) to review and set aside the arbitration award by the second respondent dated 25 October 2023, in which award, the second respondent found the dismissal of the first respondent from the employ of the applicant as both procedurally and substantively unfair. This application is unopposed.
- [2] In essence, the applicant's grounds of review are that the second respondent ignored the evidence before him, that the applicant gave the first respondent instructions which the first respondent refused to follow. The applicant contends that the second respondent misconstrued the true nature of the dispute before him when he found that the applicant failed to prove that the first respondent committed misconduct and found that the true nature of the dispute concerned poor performance. In addition, the second respondent committed gross irregularities by failing to consider material inconsistencies in the first respondent's evidence relating to the instructions that were given to him. Further, the second respondent ignored the evidence before him that the disciplinary hearing was fair. Therefore, the applicant contends that the second respondent's decision is unreasonable.

Test on review and evaluation

- [3] The test to succeed on review is now well established and need not be repeated.²
- [4] The first respondent was charged with three allegations of misconduct and was subsequently dismissed for misconduct following a disciplinary hearing. The allegations of misconduct read as follows:

Charge 1

¹ Act 66 of 1995, as amended.

² See: *Sidumo and another v Rustenburg Platinum Mines (Pty) Ltd and others* (2007) 28 ILJ 2405 (CC).

Gross negligence and/or insubordination in that you failed without proper cause to integrate into the agile BA way of working, despite numerous coaching sessions.

Charge 2

Gross negligence and/or dereliction of duty in that you without proper cause, failed to carry out your duties with a reasonable standard required when you failed to complete an analysis for the take on of Freedom Front Plus through the delivery of a well-documented series of stories which would allow the development team to begin development of the system for this new client.

Charge 3

Gross negligence and/or dereliction of duty in that you without just cause failed to carry out your duties with the reasonable standard required in that you failed to show a comprehensive analysis and produced documentation on the integration with Easy Debit for the Debit Check requirements.³

- [5] The first respondent was employed in a senior position in the role of Head of Business Analysis. On the evidence before the second respondent, during mid- 2022, the applicant had migrated from a business analysis process termed the Waterfall methodology to the agile methodology. This change in process caused disruption to the applicant's business, as staff were required to be familiar with the new change in order to serve its clients. It is not necessary for the purpose of this judgment to delve into the specifics of the business processes. It is common cause that the change took effect and caused a disruption to the applicant's business as aforesaid. It is also common cause that the first respondent worked well with the Waterfall system, and although he knew of the agile methodology, he was not an expert on it⁴ and required training to utilize this new system – therefore, he upskilled himself.⁵ It is common cause that the first respondent funded his own training on the system, which he completed in December 2022. It is also common cause that the first respondent's manager, Mr Stoltz, had numerous undocumented and informal discussions and coaching sessions with the first

³ See: heads of argument at pp 4 to 5.

⁴ See: transcribed record at p 97.

⁵ See: transcribed record at p 99.

respondent as he had expectations that the first respondent would utilize the agile system to service the needs of the applicant's clients.⁶

- [6] According to the applicant, the first respondent refused to implement the agile system when the applicant took on new work for the Freedom Front Plus political party in 2022, with the result that this client was dissatisfied with the applicant's service. Consequently, the applicant suffered a financial loss and reputational damage
- [7] The evidence of Mr Stoltz was that he expected the first respondent to move over to the agile methodology.⁷ He coached him and advised him to seek guidance from colleagues who were familiar with the system and were implementing it satisfactorily. Mr Stoltz gave up on the numerous informal coaching sessions and reported the issue to human resources, whereafter, the first respondent was charged with misconduct.
- [8] In the applicant's view, the first respondent refused to utilize the new agile system and in so doing, he failed to follow Mr Stoltz' instructions. This resulted in a financial loss in respect of the work for the Freedom Front Plus. In addition, the first respondent failed to integrate systems in the debit order collections project with a large client in line with the instructions of Mr Stoltz, which resulted in the client cancelling the projects. In terms of the applicant's code of conduct, dismissal is the appropriate sanction for insubordination. Mr Stoltz' evidence is that as a business head, the first respondent could not be trusted and thus the employment relationship had broken down.
- [9] On the evidence before the second respondent, at the conclusion of the disciplinary hearing, the chairperson of the hearing, Ms Buthelezi found the first respondent guilty of the charges and recommended demotion as the appropriate sanction. After making her recommendation to this effect, Mr Stoltz and Mr Yanni Acavalos of the applicant met with the first respondent and informed him of the outcome. The first respondent was informed that *"the output hasn't been there [and he was] found guilty of that"*⁸ ; he was told to

⁶ See: transcribed record at pp 141, 145, 157 and 176.

⁷ See fn 5 *supra*.

⁸ See: transcribed record at p 171, lines 1 to 5.

make an election – to accept the demotion or resign. Mr Stoltz' evidence was that if the first respondent refused to accept a demotion, Mrs Buthelezi would need to be engaged for a decision. Mr Stoltz could not demonstrate that she was engaged. On the evidence before the second respondent, after the first respondent refused the demotion, he was dismissed on account of misconduct.

- [10] The applicant makes much of the first respondent's initial defence being that he was wrongly charged and ought to have been performance managed, as poor performance was at issue, however, the first respondent moved from this defence and denied that he had been given any instruction.
- [11] In consideration of the record, the first respondent's challenge to Mr Stoltz' evidence is that poor performance was at issue however, the applicant chose to discipline him for misconduct.
- [12] Mr Stoltz conceded that in February 2023, the first respondent sent an email to him requiring guidance with the method of working. Mr Stoltz stated that he was busy at the time and that he would engage with the first respondent later to identify the gaps and training to close the gaps. However, Mr Stoltz did not do so⁹. It is not disputed that the first respondent was furnished with allegations of misconduct in March 2023.
- [13] Mr Stoltz was directly challenged that he failed to produce any evidence of a valid instruction to the first respondent. He was challenged that on his own version, he had a number of *expectations* that the first respondent would utilize the agile system with the result that he would produce what were termed numerous "*user stories*" for the development team to develop concepts for the business of its clients. Mr Stoltz' evidence was that the colleagues of the applicant managed to produce numerous user stories and the first respondent failed to do so – he only managed to increase/improve the number of stories after he was taken through a disciplinary hearing in March 2023 and before he was dismissed in April 2023.¹⁰

⁹ See: transcribed record at pp 287 to 292.

¹⁰ See: transcribed record at pp 151 to 152.

[14] In consideration of the totality of evidence before the second respondent, in my view, the true nature of the dispute before him concerned incapacity premised on poor performance. The essence of Mr Stoltz' evidence is that the first respondent failed to produce the required outputs that were expected of him despite numerous undocumented coaching sessions.

[15] It is trite that incapacity proceedings are no fault based and misconduct proceedings are fault based. In *Midas Group Komatipoort v NUMSA and others*¹¹ this Court per Snyman AJ held that incapacity proceedings and misconduct proceedings entail different concepts and different procedures. Where the employer fails to follow a fair procedure in dealing with poor performance, dismissal as a result of that poor performance is unfair. The Court went on to hold:

'[43] The applicant's approach in this matter was thus fundamentally flawed. It could not 'charge' the second and third respondents with poor performance, and then also insubordination (misconduct) based on the exact same set of facts and causes of complaint. It is either the one or the other. So, either the second and third respondent received instructions which they in a culpable and blameworthy fashion failed or refused to carry out, or they were not capable or unable to perform the work they were instructed to do. It cannot be both.'¹²

[16] In the present case, while there is evidence of a performance standard required, there is no evidence of any initiatives identified by the applicant to address the gaps and no evidence of meetings or discussions over a period of time to evaluate or assess whether the first respondent's performance had improved to achieve the required standard with the initiatives put in place.

[17] The recommendation by Ms Buthelezi to demote the first respondent after she had heard facts in mitigation and aggravation of sanction, indicates that the relationship of trust had not broken down irretrievably to warrant dismissal. On the evidence of Mr Stoltz, the demotion had the objective of subjecting the first respondent to his work being micromanaged¹³ – this further demonstrates

¹¹ (JR1585/14) [2018] ZALCJHB 83 (14 February 2018) at paras 39 - 41

¹² *Ibid* at para 43.

¹³ See: transcribed record at pp 171 to 172.

that the issue of the breakdown of trust warranting dismissal did not arise. Further, on his own evidence, Mr Stoltz stated that following the hearing, the first respondent's performance had improved. Thus, in my view, it cannot be that the dismissal was substantively fair and that dismissal was the appropriate sanction.

- [18] The second respondent found the dismissal was procedurally unfair as the first respondent did not have sufficient time to prepare for the disciplinary hearing and his evidence was interrupted during the hearing proceedings.
- [19] The second respondent found that the applicant failed to prove that the applicant was guilty of failing to follow a reasonable and lawful instruction, was guilty of dereliction of duty or breached any rule. He found that the true nature of the dispute is that the first respondent failed to perform his duties to the satisfaction of the applicant and therefore, there was no evidence of misconduct.
- [20] The second respondent accordingly found that the applicant failed to discharge the onus on it to prove that the dismissal was both procedurally and substantively fair. He accordingly found that the first respondent's dismissal was fair on both procedure and substance.
- [21] In my view, the second respondent did not misconstrue the nature of the enquiry before him. He was correct to find on the totality of the evidence before him, that the true nature of the dispute concerned poor performance.
- [22] I debated this with Counsel for the applicant. He submitted that the second respondent did not construe the true nature of the dispute as a dispute concerning poor performance – rather, he “*treated*” the dispute as one concerning misconduct. Counsel for the applicant agreed that had the second respondent found that the dispute concerned poor performance, and on that basis found the dismissal to be unfair, the applicant would not have challenged the outcome.

- [23] In my view, this is precisely what the second respondent finds in his arbitration award after analysing the evidence. In paragraph 79 of his award,¹⁴ the second respondent canvasses the guidelines in determining whether a misconduct is unfair and he finds in the dispute before him, that the issue concerned the first respondent failing to perform his duties to the satisfaction of the applicant and he states that there was no evidence to suggest any form of misconduct. Thus, he finds in paragraph 80 of his award that the applicant failed to discharge its onus to prove substantive and procedural fairness.
- [24] The review Court is concerned with the outcome, as our Courts have pronounced that the determination of a review is outcome based.¹⁵ In other words, even if the commissioner committed an irregularity, if his decision falls within the band of reasonable decisions, the decision would in that circumstance, not be reviewable. It is only where the irregularity by the commissioner distorts the outcome or where he or she ignores material evidence, that the decision would be reviewable.
- [25] In the present case, the totality of the evidence before the second respondent shows that the first respondent failed to perform to a required standard and was informally coached on several occasions. Mr Stoltz could not produce any evidence of any instruction, other than stating that instructions of a general nature were given in meetings and the first respondent was expected to perform to the required standards. What is clear from the record is that the first respondent failed to perform to the required expectations or standards. An unmet undertaking was made by Mr Stoltz to assist the first respondent to achieve the required performance outputs. This is different from conduct, which is fault based, such as gross negligence, dereliction of duty and insubordination. According to Mr Stoltz, a demotion and micromanaging the first respondent's work would result in the required standard being met as Mr Stoltz was concerned with outputs. On these facts and on the evidence before the second respondent, the true nature of the dispute is not misconduct. Thus,

¹⁴ Arbitration award at p 30.

¹⁵ See: *Herholdt v Nedbank Ltd (COSATU as amicus curiae)*; 2013 (6) SA 224 (SCA) at para [25]; *Head of Department of Education v Mofokeng and others* [2015] 1 BLLR 50 (LAC).

his finding that the applicant failed to prove any form of misconduct and therefore failed to prove substantive and procedural fairness is reasonable.

[26] Therefore, even on the applicant's contention that the second respondent treated the dispute as one concerning misconduct and not poor performance, on the totality of evidence before the second respondent, his decision is justifiable and reasonable.

[27] There is accordingly no basis for this Court to interfere with the arbitration award.

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

Order

1. The review application is dismissed.

M. T. M. Pehane

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr M Vilakazi

Instructed by: Menzi Vilakazi Attorneys Incorporated

For the Respondent: Mr P Oosthuizen

Instructed by: Oosthuizen Caine Incorporated

LABOUR COURT