THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

CASE Number: JR 1937 / 23

(1)	REPORTABLE: ~~YES~~/**NO**
(2)	OF INTEREST TO OTHER JUDGES: ~~YES~~/**NO**
(3)	REVISED: **YES**/~~NO~~
	11 March 2026

In the matter between:

LEWIS STORES (PTY) LTD **Applicant**

and

SKHUMBUZO WALTER MLANGENI **First Respondent**

COMMISSION FOR CONCILIATION, MEDIATION AND

ARBITRATION **Second Respondent**

ROLIEN VELLOEN *N.O.* (AS COMMISSIONER) **Third Respondent**

This judgment was handed down electronically by circulation to the parties and legal representatives by email. The date and time for hand-down is deemed to be 11 March 2026

<u>Summary</u>: CCMA arbitration proceedings – review of award of arbitrator – s 145 of LRA 1995 – review test considered – entails determination of conduct of arbitrator, gross irregularities and reasonable outcome

Dismissal – gross negligence – principles considered – conduct of employee constituting gross negligence – arbitrator failing to have proper regard to evidence establishing gross negligence – arbitrator negating and misconstruing essential facts relating to misconduct – finding of substantive unfairness reviewable

Dismissal – arbitrator unduly limiting issue of misconduct – arbitrator failing to decide complete case – finding that no misconduct existed irreconcilable with evidence – arbitrator failing to conduct proper evaluation of the evidence – constitutes material failure by arbitrator – conclusion arrived at by arbitrator on the facts unreasonable / reviewable

Review of award – conclusion of arbitrator unreasonable – arbitration award reviewed and set aside – substituted with award that dismissal substantively fair

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JUDGMENT

SNYMAN, AJ

<u>Introduction</u>

[1] The applicant has brought an application to review and set aside an arbitration award of an arbitrator appointed by the Commission for Conciliation, Mediation and Arbitration (CCMA) to arbitrate an unfair dismissal dispute between the applicant and the first respondent. In terms of this award, the third respondent, as the duly appointed CCMA arbitrator, determined that the dismissal of the first respondent by the applicant was substantively unfair. The application has been brought by the applicant in terms of section 145 of the Labour Relations Act (LRA)[1].

[1] Act 66 of 1995 (as amended).

[2] The arbitration award of the third respondent, dated 30 August 2023, was received by the applicant on the same date. In terms of section 145(1) of the LRA, any review application must be brought within six weeks from date the party seeking to challenge the award on review, having become aware of the award. The applicant's review application was brought on 12 October 2023, which is within this time limit. The review application is therefore properly before this Court for determination. The application has been opposed by the first respondent.

[3] I will now proceed to decide the applicant's review application by first setting out the relevant background facts in this matter.

The relevant background

[4] The applicant conducts business in the retail industry, selling furniture, appliances and electronic and related goods out of a large number of retail stores (branches) spread across the Country. The first respondent at the time of his dismissal on 17 August 2022 was employed in the position of Divisional Credit Manager (DCM) for the Eastern Division of the applicant. He occupied the DCM position for about four years prior to his dismissal. Before that, he had a total of 15 years' working experience with the applicant.

[5] Because of the nature of its business, and in particular its extent and geographical spread, the applicant substantially regulates its business by way of a number of prescribed practices, policies and procedures, of which employees at all times must be aware of and adhere to. These standards are communicated to employees on a regular basis through a system and process referred to as the Administrative Directive Memorandum (ADM).

[6] The applicant has a number of separate divisions. Each of these divisions would have a Divisional General manager (DGM) and a Divisional Credit Manager (DCM).[2] In essence, the DCM is assigned to oversee and manage what can generally be called customer credit in the Division. DCMs are allocated core duties relating to the management of the Divisions allocated to

[2] There are also other Divisional Managers that are responsible for finance and sales in the division.

them. These core duties are reflected in a specific job profile issued to each DCM, and can be summarized as: (1) ensuring the effectiveness of credit / debtors policies and procedures in each branch; (2) planning and co-ordination of the activities of the Regional Accounts Managers that report into the DCM; (3) training the Regional Accounts Managers and all staff dealing with the actioning of accounts; (4) ensuring that all branches and individual staff members have daily, weekly and monthly targets and progress to achieving them; (5) informing the Operational Credit Manager of any situation which could constitute an unacceptable risk in a branch; and (6) reporting any unacceptable situations to the Regional Controller and DGM so that corrective action is implemented. In order to execute these duties, DCMs must regularly visit and monitor branches under their supervision and control and actively engage with employees in the branches.

[7] Because of the large number and geographical spread of the branches, the applicant's head office is to a large extent reliant on information provided by Stock Clerks, Branch Managers, Warehouse Managers, Regional Controllers, DCMs and DGMs overseeing operations in each of the branches / regions / dvisions to monitor the business's financial status / affairs, to manage operations at a group level, and to ensure compliance with all prescribed policies and procedures. In this context, the applicant places a great deal of trust in its employees, specifically those employees in management positions, such as the DCMs. As such, any contraventions of the applicant's policies, practices and/or procedures are viewed in a serious light and may result in the dismissal of employees who contravene the same.

[8] It was undisputed that the first respondent was at all times fully aware of all the applicant's policies and procedures, was familiar with the ADM, and knew what his core duties as DCM required of him. In particular, he was aware of his core duty to immediately report any impropriety he may find to exist in any of the branches whilst carrying out his oversight and supervisory functions. The first respondent was also well experienced in his role as DCM.

[9] The events giving rise to the ultimate dismissal of the first respondent arose from what is termed an annual 'write-off' cycle that is embarked upon by the applicant in every financial year. The applicant's financial year is from 1 April

of the year to 31 March of the following year. At the conclusion of the financial year, and in particular in the period beginning January to end March, the applicant does a comprehensive assessment of all accounts that may constitute bad debts, so that the status of these accounts can be determined and resolved before the commencement of the next financial year.

[10] How this actually works is that employees in the Finance Department work through all the bad debt accounts, which are accounts of customers who have consistently failed to make payments, and identify accounts that must potentially be written off as bad debts. But then, and in this period January to March, employees in each of the branches are tasked to focus on contacting and / or tracing these potential bad debt customers, with the view to securing either the settlement of the accounts, or at least a current payment on the account, which intervention would cause the account not to be regarded as a bad debt. If the employees are successful in their efforts in this regard, the potential bad debt account is considered to be '*saved*' from having to be written off as a bad debt, and termed a '*saved account'*. However, if the employees are not successful in these efforts, the account must be written off as a bad debt with all its adverse financial implications to the applicant.

[11] As a result of the adverse financial implications of having to write off a bulk quantity of accounts as bad debts, the applicant does require commitment from all employees in this write off period to save as much accounts as possible. And importantly in this context, employees are incentivised, only in this period, for all accounts saved, by way of a financial bonus. The incentives are lucrative, and because of this, employees are in informed in writing beforehand of the amounts of the incentives, however, are also at the same time specifically warned that any dishonesty in this regard will not be tolerated and employees contravening policy will face dismissal.

[12] How the incentives work is that employees are given a target of saved accounts to achieve. If they achieve that target, they receive a financial bonus. This bonus would apply across management levels as well, and if the overall target for the division is achieved, then the first respondent, as DCM, would also receive a financial bonus.

[13] As per the normal business practice, the same *modus operandae* then applied for the write-off period from January to March 2022. In this period, and in the first respondent's Division, it was reflected that the account saving target had not only been achieved, but had been exceeded. As a result, all involved employees, including the first respondent himself, received financial bonuses. But this favourable outcome however turned out to be based on a complete manipulation of the applicant's systems, and truthfully considered, most of the accounts reflected as being saved were in fact not saved and in reality needed to have been written off.

[14] The irregularity came to the fore when the applicant's head office management noticed an inordinate amount of stock mark downs and stock shortages, as well as refunds, within various branches in the Division. This state of affairs was highly unusual. As a result, the applicant was prompted to conduct an audit investigation into this anomaly. This audit investigation, carried out by the applicant's audit department, revealed that employees in the branches involved in the account saving process had been fraudulently saving accounts in order to meet their targets and receive the financial bonuses. This fraudulent account saving was done in several ways, including stock manipulation, and using illegitimate funds received from other fraudulent / unlawful conduct. A specific example was that employees would mark down stock which had already been bought on account by a customer, causing the total amount owing as reflected on the applicant's systems to be reduced, and that reduction is misrepresented to be a payment by the customer and thus a saved account. Or, refunds to any customer would be processed, without any involvement of the customer, and this refund would be allocated to other potential bad debt accounts, thereby also reflecting such account as saved. In short, it was an elaborate unlawful stratagem, perpetrated on a significant scale, designed to obtain payment of financial bonuses to the employees.

[15] The first respondent, as DCM, was required to have proper oversight over this entire process. But it appears that he did not discover any impropriety and certainly never reported such. If it was not for the audit investigation carried out by the applicant's head office, this may well have never been discovered. The upshot of this entire unlawful account saving was that a total of R13 million in bad debts had to be written off in the new financial year, causing a

material financial loss to the applicant. And further, financial bonuses were paid to non-deserving employees.

[16] After the audit investigation had commenced, the first respondent was asked to provide his input into what happened. It is only then, for the first time, that the first respondent came up with a written statement, in which he in essence admitted that where it came to the previous year write off period (January to March 2021), he became aware of fraudulent account saving, in the course of June 2021. In this statement, he alleged that he did report this to management for the applicant, and he was then asked if he had proof of this. He responded that he had no proof and only suspicions, and the matter was left there. The applicant viewed this statement as acknowledgement (admission) by the first respondent of wrongdoing and an indication that he failed to discharge his duties.

[17] As a result of all of the above events, the first respondent was charged with two charges of misconduct, in the form of gross negligence. These charges read as follows:

> 'Charge 1: Gross Negligence in that between 2021 and 2022 you neglected to ensure that report the wrongdoings in the Eastern Division regarding the marking down of stock and the write off accounts that were being saved by staff You further failed to escalate this matter so senior management so that it can be properly investigated and that company assets be protected from these activities. Your conduct has led to a serious financial loss to the company because of these mark downs. The trust relationship has been irreparably broken.
>
> Charge 2: Gross Negligence in that between 2021 and 2022 you neglected to ensure that you provide a supervisory oversight as the DCM in the Eastern Division by failing to ensure that you put systems in place for the write off accounts not to be unethically saved by staff, this is despite the fact that you were aware of these wrongdoings in the Division. Your conduct is totally unacceptable, especially in your seniority as the Divisional Credit Manager as this has a/so led to yourself and staff unduly qualifying for the write off incentives. Your actions has seriously dented the employment relationship which is based on trust.' (sic)

[18] A disciplinary hearing in respect of these two misconduct charges was held on 11 August 2022. Pursuant to this disciplinary hearing, the first respondent was found guilty of both charges against him, and he was then dismissed from his employment on 17 August 2022. Dissatisfied with being dismissed, the first respondent referred an unfair dismissal dispute to the CCMA on 30 August 2022. The dispute could not be resolved at conciliation, and the proceeded to arbitration where it came before the third respondent as arbitrator. The arbitration was conducted on 7 and 8 June, 17 and 19 July, and 10 – 11 August 2023.

[19] On 7 June 2023, at the first sitting of the arbitration, the issues in dispute were narrowed, and the third respondent recorded what had been agreed to by the parties as to the issues to be decided in the arbitration. Where it came to procedural fairness, the first respondent placed two procedural aspects in dispute. The first was a contention that the chairperson was biased. The second was that he was denied the opportunity to peruse documents prior to the hearing. As to substantive fairness, the first respondent disputed that he committed any misconduct. The first respondent also raised an inconsistency challenge where he contended two other employees (Regional Credit Managers) should also have been dismissed but were not dismissed.

[20] Several witnesses testified for the applicant in the arbitration. These witnesses were: (1) Harry Rankapole (Rankapole), the chairperson of the disciplinary hearing; (2) Sally Swanepoel (Swanepoel), the Senior Divisional Credit Manager to whom the first respondent reported at the time of his dismissal; (3) Clyne Erasmus (Erasmus), the applicant's General Manager; (4) Gerrit Loggenberg (Loggenberg), the Divisional Human Resources Manager; (5) Brendan Le Roux (Le Roux), the Internal Auditor who conducted the investigation; (6) Disebo Maleka (Maleka), a Regional Accounts Manager; and (7) Andre Strydom (Strydom), the General Manager Credit. The first respondent testified on his own behalf and called one witnesses, being Theo Dikgale (Dikgale), a former Regional Accounts Manager employed at the applicant.

[21] In her arbitration award dated 30 August 2023, the third respondent found in favour of the first respondent. She found that the first respondent's dismissal

was substantively unfair on the basis that he did not commit the misconduct with which he had been charged. She awarded the first respondent reinstatement on the same terms and conditions of employment he enjoyed prior to his dismissal and ordered the applicant to pay back pay from the date of dismissal to date of reinstatement in the sum of R375 991.20. It is these findings that form the subject matter of the current review application of the applicant.

[22] What is also apparent from the third respondent's arbitration award is that she made no findings on procedural unfairness, nor did she make any finding on the first respondent's dismissal being unfair as a result of inconsistency. There is no cross review raised by the first respondent in this respect. Therefore, none of these issues need to be dealt with further in this judgment.

<u>The test for review</u>

[23] The test for review is trite. In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others,*[3] the Court held that '*the reasonableness standard should now suffuse s 145 of the LRA*', and that the threshold test for the reasonableness of an award was: *'… Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?...'*[4]*.* This means that the award in question is tested against all the facts before the arbitrator to ascertain if it meets the requirement of reasonableness.[5] In conducting this test it is necessary for the Court to enquire into and consider the merits of the matter and the entire evidence on record in deciding what is reasonable.[6] In *Herholdt v Nedbank Ltd and Another*[7] the Court said:

> '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. Material errors of

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[3] (2007) 28 *ILJ* 2405 (CC).
[4] Id at para 110. See also *CUSA v Tao Ying Metal Industries and Others* (2008) 29 *ILJ* 2461 (CC) at para 134; *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others* (2008) 29 *ILJ* 964 (LAC) at para 96.
[5] See *Duncanmec (Pty) Ltd v Gaylard NO and Others* (2018) 39 *ILJ* 2633 (CC) at paras 43.
[6] Id at para 41.
[7] (2013) 34 *ILJ* 2795 (SCA) at para 25. See also *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others* (2014) 35 *ILJ* 943 (LAC) at para 14; *Monare v SA Tourism and Others* (2016) 37 *ILJ* 394 (LAC) at para 59; *Quest Flexible Staffing Solutions (Pty) Ltd (A Division of Adcorp Fulfilment Services (Pty) Ltd) v Legobate* (2015) 36 *ILJ* 968 (LAC) at paras 15 – 17; *National Union of Mineworkers and Another v Commission for Conciliation, Mediation and Arbitration and Others* (2015) 36 *ILJ* 2038 (LAC) at para 16.

> fact, as well as the weight and relevance to be attached to the particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of consequence if their effect is to render the outcome unreasonable …'

[24] In sum, applying the correct review test has a logical chronology. First, it is ascertained whether there is a failure or error on the part of the arbitrator. Second, and only where there is such a failure or error, it must be shown that the outcome arrived at by the arbitrator was unreasonable, based on all the evidence and issues before the arbitrator, even if it may be for different reasons or on different grounds as those referred to by the arbitrator.[8] It would only be if the consideration of the evidence and issues before the arbitrator shows that the outcome arrived at by the arbitrator cannot be sustained on any grounds, and the irregularity, failure or error concerned is the only basis to sustain the outcome the arbitrator arrived at, that the review application would succeed.[9]

[25] As against the above principles and test, I will now turn to deciding the merits of the review application by the applicant.

<u>Analysis</u>

[26] In deciding this case, it is appropriate to commence with some factual findings made by the first respondent herself. She accepted the evidence presented by the applicant that there was in fact an elaborate '*scheme*' embarked upon by the employees in the branches manipulating the accounts saved in the write off period, so that the employees could benefit from incentives and receive financial bonuses. This scheme was applied across many of the applicant's stores, and ultimately resulted in a loss of some R13 million in accounts written off. So, it is not in issue that there was large scale wrongdoing that occurred under the purview of the first respondent's management duties and responsibilities in his Division.

[27] According to the first respondent, the question she needed to answer was whether the first respondent should be held accountable for the operating of

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[8] *Fidelity Cash Management Service* (*supra*) at para 102.

[9] See *Campbell Scientific Africa (Pty) Ltd v Simmers and Others* (2016) 37 *ILJ* 116 (LAC) at para 32; *Anglo Platinum (Pty) Ltd (Bafokeng Rasemone Mine) v De Beer and Others* (2015) 36 *ILJ* 1453 (LAC) at para 12.

this scheme which took place in the branches under his purview. In this respect, I am satisfied that she correctly identified the issue for determination. However, the first respondent did not stop there, and then proceeded to unduly further narrow the enquiry. She formulated what she needed to decide, as reflected in her award, as follows: '*The evidence in respect of the Applicant's alleged negligence however only hammers on one point, that he conceded that he had knowledge of the saving of accounts, as he stated in his report that he knows of it since 2021*'. This unduly narrow approach adopted by the first respondent, in my view, unfortunately blinded her to what the issue in dispute before her actually was, and what the first respondent had been changed with and dismissed for. In short, the gross negligence for which the first respondent was dismissed was always far more than him just being aware of irregularities in 2021 and not reporting it. The consequence of this flawed approach was that the first respondent negated pertinent evidence, leading to an unreasonable outcome.

[28] As touched on above, what had happened in 2022 is that only after the investigation had already commenced, the first respondent gave a written statement. This entire statement was quoted verbatim in the third respondent's award, and effectively formed the substratum of her award. What does appear from the statement, as it reads, is that after the previous write off period in 2021, the first respondent had informed Erasmus (the GM) that he was suspicious of the number of accounts that allegedly been saved. According to the statement, Erasmus asked him if he had proof and his answer was 'no', and that is where the matter ended. He also stated that he did conduct an investigation of his own at one of the branches in 2021, and came across three customers that were unlawfully indicated as saved. There is no indication in the statement of what he did about it. The statement also dealt with a number of other unrelated issues where he accused store employees of being dishonest, however this had little to do with the case at hand, and I will not devote further attention to the same.

[29] The third respondent, when the considering the statement made by the first respondent, found that the first respondent was not '*unequivocally aware*' of the unlawful saving of accounts. She also finds that the first respondent was not aware of the saving of accounts by way of marking down stock or refunds,

and no such instances ever came to his attention. She accepts that the first respondent was '*suspicious*' but had no evidence to back up his suspicions. For these reasons, the third respondent finds that no misconduct could be proven, as the first respondent was not aware of the misconduct relating to the saving of accounts. This conclusion by the third respondent clearly illustrates the consequences of her failure to properly determine the issue she had to decide and what the first respondent was actually dismissed for, leading her to a complete misconstruing of the evidence and the case to be decided.

[30] Before dealing with specific aspects of the evidence, I am compelled to say something about the manner in which the third respondent evaluated and then determined the evidence. Importantly, she never found that any of the several witnesses that testified for the applicant were not creditworthy or that their evidence should for any reason be discounted or rejected. The transcript in this matter, properly considered, also leaves me convinced that the testimony by the applicant's witnesses was indeed creditworthy, reliable, consistent in all material respects, and should be accepted in deciding this matter. The problem is that the third respondent conducts no credibility and reliability assessment at all where it comes to all this evidence presented.[10] The third respondent, when making the pertinent findings that she did favouring the first respondent, simply plumbed for his version without more, despite the clear evidence presented by the applicant's witnesses that directly contradicts such version. And to make matters worse, the third respondent unreservedly accepts the first respondent's version despite several material parts of the first respondent's testimony never being put to the applicant's witnesses under cross examination, which included the versions relating to the first respondent's disciplining of two other employees (dealt with in more detail below), the version of what he had reported to Erasmus and under what circumstances, the contention that he actually did his own investigation in 2022 about the saved accounts, and that two Regional Credit Managers were responsible for a bulk of the losses.[11] The third respondent's failures in the

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[10] As said in *SFW Group Ltd and Another v Martell et Cie and Others* 2003 (1) SA 11 (SCA) at para 5: '*… To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities …*'.

[11] In *ABSA Brokers (Pty) Ltd v Moshoana NO and Others* (2005) 26 *ILJ* 1652 (LAC) at para 39, the Court said: *'… A failure to cross-examine may, in general, imply an acceptance of the witness' testimony…'*. And in *Trio Glass t/a The Glass Group v Molapo NO and Others* (2013) 34 *ILJ* 2662 (LC)

aforesaid respects constitutes a material irregularity, considering the following *dictum* in *Sasol Mining* (*Pty*) *Ltd v Ngqeleni NO and others*[12]:

> 'One of the commissioner's prime functions was to ascertain the truth as to the conflicting versions before him. The commissioner was obliged at least to make some attempt to assess the credibility of each of the witnesses and to make some observation on their demeanour. He ought also to have considered the prospects of any partiality, prejudice or self-interest on their part, and determined the credit to be given to the testimony of each witness by reason of its inherent probability or improbability. He ought then to have considered the probability or improbability of each party's version. …'

[31] But what the third respondent further does is to in essence follow a reasonable doubt approach in finding that despite all this unassailable testimony, gross negligence was not proven. This is evident from reasoning like 'unequivocally' and 'knew', as opposed to 'likely' and 'reasonably should have known'. A reasonable doubt approach is impermissible in deciding unfair dismissal disputes in arbitration proceeding sunder the LRA. What is required to be determined is what is called the '*inherent probabilities*'.[13] The determination of probabilities entails an inference to be drawn from the evidence as a whole, on the following basis, as explained in *SA Post Office v De Lacy and Another*[14]:

> 'The process of inferential reasoning calls for an evaluation of all the evidence and not merely selected parts. The inference that is sought to be drawn must be 'consistent with all the proved facts. If it is not, then the inference cannot be drawn' and it must be the 'more natural or plausible, conclusion from among several conceivable ones' when measured against the probabilities.'

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at para 41, the Court held: *'… The effect of the failure to put such an important issue to the third respondent under cross-examination must mean that this evidence must be disregarded….'*.

[12] (2011) 32 ILJ 723 (LC) at para 7. See also *Blitz Printers v Commission for Conciliation, Mediation and Arbitration and Others* [2015] JOL 33126 (LC) at para 37; *Southern Sun Hotel Interests (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2010) 31 *ILJ* 452 (LC) at para 20.

[13] See *SFW Group* (*supra*) at para 5; *National Union of Mineworkers and Another v Commission for Conciliation, Mediation and Arbitration and Others* (2013) 34 ILJ 945 (LC) at para 34; *Mphigalale v Safety and Security Sectoral Bargaining Council and Others* (2012) 33 ILJ 1464 (LC) at para 12; *Sasol Mining* (*supra*) at para 8.

[14] 2009 (5) SA 255 (SCA) at para 35. See also *Govan v Skidmore* 1952 (1) SA 732 (N) at 734A-C; *Food and Allied Workers Union and Others v Amalgamated Beverage Industries Ltd* (1994) 15 ILJ 1057 (LAC) at 1064C-E; *National Union of Mineworkers* (*supra*) at para 37.

Deciding a matter on the probabilities thus entails a complete consideration of all the evidence, as a whole, in order to decide which outcome is the most logical, natural and plausible out of a number of possible different outcomes. As said in *Bates and Lloyd Aviation (Pty) Ltd v Aviation Insurance Co*[15]:

> 'The process of reasoning by inference frequently includes consideration of various hypotheses which are open on the evidence and in civil cases the selection from them, by balancing probabilities, of that hypothesis which seems to be the most natural and plausible (in the sense of acceptable, credible or suitable).'

[32] The above being said, I find it difficult to sustain the third respondent's findings to the effect that the first respondent was not aware, other than merely having an unsubstantiated suspicion, of the unlawful saving of accounts in 2021. As touched on earlier, he conducted his own investigation when he visited the Hammanskraal branch in 2021 and found, in June 2021, at least three such unlawfully saved accounts. If that does not constitute even 'unequivocal' knowledge, it is hard to understand what would. But it certainly is evidence of likely knowledge. In any event, and considering the very nature of his duties, if he had suspicions, he is duty bound to investigate to see if there is evidence of such. He knew he had to do this, considering his investigation at Hammanskraal. Further, he testifies as follows in the arbitration: *'… when I was giving the statement, I already had the knowledge of the wrongdoing that was taking place in the branches …*'. And lastly in the context of evaluating the first respondent's evidence, despite the fact that he disputed when cross examining the applicant's witnesses that he benefitted under the 2022 monetary incentive for saved accounts, it turned out that he did, where he actually testified: *'… The incentive for 2022 I also deserved. I did work for it, I didn't cheat, I worked straight …*' (sic). This statement is quite surprising considering that this incentive payment is entirely founded on unlawful conduct in the branches, and how the first respondent thus 'earned it' is unclear. All this considered, how the first respondent could have found as she did, in the face of all this evidence, is perplexing.

[15] 1985 (3) SA 916 (A) at 939I-J.

[33] Erasmus testified that the first respondent, despite what he records in his statement, never reported to him (Erasmus) that he was suspicious of fraudulent saving of accounts in 2021, and he said that until the bomb burst in 2022, he was not aware of this. This testimony was confirmed by Strydom. Swanepoel also confirmed that management was not aware of this. Further, Erasmus was critical of the fact that the first respondent only came forward with a statement only after the investigation had started. Le Roux, who conducted the investigation, testified that he followed a simple exercise of taking a list of customers purportedly saved because they paid an instalment in March 2022, and then checking each one. How hard can this possibly be, and there is no reason why the first respondent could not have done the same proactively and of his own accord. In fact, and applying this simple exercise, Le Roux was, for example, able to easily ascertain that two customers last paid accounts in 2021, one customer was actually deceased, and one customer had a considerably inflated payment as opposed to what was actually paid. Le Roux explained that if the first respondent simply conducted this basic exercise, which was expected of him, he would have discovered this just as easily. Erasmus specifically testified that the first respondent must have been aware of the difficulties with the unlawfully saved accounts in the previous year, when this happened in 2022, compelling him to have exercised due care and oversight to prevent it from happening again. Loggenberg added another dimension to this, by explaining that considering one of the first respondent's core duties is management and control of bad debts, he must have been aware of all the bad debts accounts during the course of the 2021 year, and it must therefore have been a huge red flag to find these accounts active again in the January to March 2022 write off period. The third respondent however does not refer to any of this pertinent testimony at all, which must mean that she never even considered it.[16]

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[16] In *Maepe v Commission for Conciliation, Mediation and Arbitration and Another* (2008) 29 ILJ 2189 (LAC) at para 8 the Court said: '*Although a commissioner is required to give brief reasons for his or her award in a dismissal dispute, he or she can be expected to include in his or her brief reasons those matters or factors which he or she took into account which are of great significance to or which are critical to one or other of the issues he or she is called upon to decide. While it is reasonable to expect a commissioner to leave out of his reasons for the award matters or factors that are of marginal significance or relevance to the issues at hand, his or her omission in his or her reasons of a matter of great significance or relevance to one or more of such issues can give rise to an inference that he or she did not take such matter or factor into account.*'

[34] It appears to me that in the third respondent seeking to narrow down the scope of the enquiry into whether the first respondent had committed misconduct, as described above, she effectively negated the second charge of gross negligence as well. This charge did not relate to the first respondent actually reporting the wrongdoing of the employees. It specifically relates to the first respondent failing to exercise the necessary oversight expected of him, despite being aware of wrongdoing. The point in this regard is that even on his own version, the first respondent was aware, in 2021, that there was impropriety where it came to the 2021 saved accounts exercise. He knew that, again on his own version, because of what he actually found in conducting his own investigation during 2021. Now the 2022 write off window and account saving exercise again comes up. He knows, again on his own version, that nothing had been done about his concerns he says he raised in 2021. But he still does absolutely nothing in exercising proper control and implementing measures and checks to ensure it does not happen again, which is exactly what is expected of him in respect of one of his core duties as DCM. This failure must be a significant contributing factor to what ultimately resulted in a basically a free for all scheme perpetrated by the employees, and a material loss to the applicant. And to add to this, he also benefitted from this undue incentive. All the aforesaid is clearly what the second charge of gross negligence as all about. The third respondent, in my view quite unreasonably and irregularly, failed to have any regard to it at all.

[35] The above being the case on the second charge, it really becomes a red herring as to whether the first respondent did or failed to report and escalate the wrongdoing in 2021, which is all the third respondent was basically focussed on. Although the first charge of gross negligence refers to this, I do not believe it is necessary to even decide this in assessing whether the first respondent's dismissal was fair. Rather, it is about what he did in respect of the 2022 write off window and purported saving of accounts. His failure to report wrongdoing in respect of the first charge of gross negligence also related to his failure to report and escalate the wrongdoing in 2022. The charge does not read, as the third respondent seems to think, that specifically because the first respondent was actually aware of the misconduct and had proof of it, he was required to report it. The charge, as defined, and in particular with regard to the failure to report the wrongdoing in 2022, does not

rely on actual prior knowledge at all. In this respect, and once this aspect of the charge is considered along with the second charge of gross negligence, it is clear to me that what was expected of the first respondent, taking into account his own version of events in 2021, was to proactively exercise proper oversight and immediately report any irregularity to senior management for investigation / action. He however did nothing of the sort. In fact, if the investigation was not initiated based on entirely other red flags, this entire 'scheme', as the third respondent herself calls it, may never have been discovered.

[36] This brings me to the next stage in the proper conducting of the enquiry into the first respondent's misconduct, as he was charged with. It is significant that despite an inordinate number of saved accounts in a short period in 2022, which the first respondent was obviously aware of, he does not conduct his own proactive investigation, and instead remains supine. It is only when senior management notices the suspicious stock write offs and refunds, and actually initiates an investigation first, that the first respondent is asked to make a statement. The first respondent never initiated an investigation, nor did he come forward of his own accord. When the first respondent made a statement as asked, he records that he was aware of this wrongdoing the previous year and told management about this. This was obviously intended by him to somehow exonerate him, as he was clearly aware of what was coming.[17] In essence, he was saying 'I told you so, but you did nothing', and thus he cannot be blamed. This kind of conduct is not a defence. It is instead an indictment, especially considering the nature of the first respondent's duties and responsibilities, described earlier in this judgment.

[37] The third respondent in her finding does decide that the first respondent took action against employees involved in the wrongdoing, although the offences for which they were disciplined were not specifically for the saving of accounts. The third respondent reasons that the notion of 'saving of accounts' only came to the fore later, and hence these offences could after the fact be equated to misconduct relating to the saving of accounts. These findings of the third respondent are in my view unfounded, and at best, pure speculation. The first

[17] It may be added that he was required to undergo a polygraph test at the same time, and it showed deception where it came to a question relating to his involvement in the saving of accounts.

respondent's disciplining of the employees concerned, especially considering his own version as to what they had been disciplined for, had nothing to do with the saving of accounts, and were based on entirely different types of misconduct.[18] Swanepoel and Erasmus specifically testified to this effect. In fact, it would not be possible for the employees to have been disciplined by the first respondent for saving accounts, as on the undisputed facts the first respondent never conducted any investigation into or oversight of the write off period in 2022, and the accounts that were purportedly saved in that period. The misconduct for which the first respondent took action against the employees long preceded this period, and took place in 2021. The third respondent appears do go out of her way to exonerate the first respondent, thereby misconstruing the evidence and coming to a conclusion simply not supported by the evidence.

[38] The third respondent finds that it is not easy to identify an unlawfully saved account. This finding is in essence based on a half-truth, and that results in the third respondent completely missing the point. I accept that the evidence showed that in the general conducting of operations at the applicant's stores throughout the year, it may be difficult to establish whether for example refund transactions would be part of an unlawful saving of an account. But the fact that it is difficult should not stand in the way of the first respondent, had he simply exercised due care, still being able to conduct an enquiry into this. Strydom explained in his evidence that there are specific indicators that may in and of themselves flag that further investigation is required, such as when the account was paid and how much was paid. That is when the customer must be contacted directly, which contact would easily answer the question.[19] But even this all said, this is not what the current case is about at all. What simply cannot be ignored is that this case is only about the dedicated write off period in January to March where employees are only then only incentivised for

[18] For example, and in a 17 November 2021 branch visit report penned by the first respondent, he complained about all kinds of other failures, such as branch cleanliness, the manager and clerk's credit work file not being in use, a high number of bad debt accounts and employees failing to conduct personal calls and locate customers who fail to pay their accounts, and a high number of problematic accounts at the branch which were not being checked by employees and credit proposals not being carried out in terms of the policies and procedures, thus leading to increasing bad debts within the branch. None of this can have anything to do with the misconduct of unlawfully saving accounts either in 2021 or 2022.

[19] Even a customer that is impossible to contact may answer the question, especially if that customer had recently purportedly made a payment.

accounts saved. That being the case, more detailed circumspection and specific focus is required specifically for this activity, as next addressed.

[39] Swanepoel testified that there is a difference between write offs done throughout the year in the formal course, and the dedicated write off project done between January and March of every year, because of the financial incentive to employees that only applies for this period. She testified that the first respondent needed to work through all the names on the accounts lists prepared by the branches, which he needed to obtain from each branch when he visited the branches in this January to March period. And what the first respondent, being directly responsible for credit in the Division, should have done in this instance is aptly illustrated by the evidence of Le Roux. Considering the implications of what is involved and the risk of maleficence because there is a direct financial benefit to employees, all the first respondent must do, when he obtains a list of saved accounts from each and every branch before it is finally processed, is to take names from the list and conduct the kind of check done by Le Roux. This would immediately expose an unlawfully saved account. It is not difficult. Le Roux explained, which is undeniable, that where it is shown that a customer paid one instalment in a year on the account and this happens only in the January to March period, there is likely something untoward and must be investigated. And lastly, added to this, Le Roux testified that the first respondent had a whole team available to him to assist in conducting this exercise. This last part of the truth as summarized above, the third respondent simply did not appreciate, did not consider, and this led to an unreasonable outcome in favour of the first respondent.

[40] Next, the third respondent decided that the applicant 'undermined' the efforts of the first respondent, whatever these efforts may be, by reinstating Rita Visagie (Visagie) and not properly disciplining Reply Tshungu (Tshungu), both being Regional Credit Managers in the first respondent's Division. On this basis alone, the third respondent finds that the second charge of gross negligence is negated, as the first respondent did deal with 'serious issues' however was undermined. This kind of general finding and reasoning of the third respondent, without referring to what happened in the case of Visagie and Tshungu, is entirely unreasonable and irregular. Importantly, the entire detailed version of the first respondent relating to Visagie and Tshungu and

the specific circumstances relating to the applicant's alleged undue intervention in their discipline was never put to the applicant's witnesses under cross examination. There is no indication on the facts that the applicant somehow acted *mala fide* and with the intent to undermine the first respondent in the manner that these two employees were dealt with. Lastly, all this happened in 2021. It simply cannot follow that just because these two employees were not dismissed, as demanded by the first respondent at that time, that he is now somehow exonerated in respect of anything that goes wrong where it may involve these employees.

[41] But once again, the issues relating to Visagie and Tshungu and what they may have been disciplined for has nothing to do with what was expected of the first respondent and how he failed. Accepting for the moment that the applicant was wrong where it came to the manner in which things case to pass with regard to Visagie and Tshungu, and this somehow enabled the saving of accounts scheme, the simple answer must still be that this does not incapacitate the first respondent, and what he is expected to do in terms of the core duties assigned to him. Nothing stops the first respondent, even with these two employees still on the scene, to exercise focussed oversight in the case of the once off event of the annual write off window which is of short duration, and do all he reasonably can to limit any impropriety. This is especially important, considering his own complaints about other employees' earlier conduct and the fact that he was aware of earlier wrongdoing in this regard. Had he done what is said above, it would have been very easy for him to report wrongdoing perpetrated by any employee, including the two employees referred to. If management then did not take action, then obviously he would have a legitimate defence. But the first respondent did not even discharge his most basic duties in this respect. Hence, what may have been the case with Visagie and Tshungu earlier cannot assist him.

[42] In giving his evidence, the first respondent testified that Visagie and Tshungu were instrumental in the account saving scheme, and were responsible for unlawfully saved account losses of R8 174 000 out of the R13 million. Crucially however, this entire version was never put to any of the applicant's witnesses to answer, meaning this evidence cannot be accepted, especially considering the first respondent was legally represented in the arbitration. And

yet again, if the first respondent was so concerned about these two employees, he could have simply kept an eye on them, and then immediately identify and report impropriety on their part in 2022, which is long after the complaints of the first respondent relating to events in 2021. In short, and despite his clear duties, the first respondent did nothing to neutralise errant employees like Visagie and Tshungu (on his own version). In the end, both Visagie and Tshungu were actually dismissed in 2022 for their involvement in the 2022 account saving scheme.[20]

[43] One cannot ignore the seniority of the first respondent's position in his Division. Simply described, the buck stopped with him where it came to all credit issues in his Division. For such a fundamental failure that took place in this case to come to pass, he should have fallen on his sword. What happened in 2022 *in casu* can only happen as a result of his complete failure to take the care expected of him in discharging his duties. It must also be added in this respect that the DGM of the Division, being Lerato Banda (Banda), was also dismissed as a result of this fundamental failure, as Banda was overall responsible for the Division. As stated above, Tshungu and Visagie responsible for credit in the regions resorting under the Division were also dismissed. Despite all of this, the first respondent, even into the arbitration, refused to accept any responsibility and even suggested that he was unfairly treated because Swanepoel and Erasmus should have disciplined, despite the facts that he raised no inconsistency challenge in the arbitration relating to these two persons. Lastly in this regard, all the testimony by various witnesses for the applicant that the trust relationship with the first respondent had been destroyed as result of the first respondent's failures, as specifically mentioned in the charges, was never disputed nor contradicted.

[44] The third respondent needed to consider what misconduct, on all of the facts, the first respondent had actually perpetrated, as compared to what is contained in the two charges preferred against him. To unduly limit the enquiry to only certain facts that support a particular narrative is manifestly irregular. Considering that the charges related to gross negligence, the facts as a whole needed to be applied to the relevant legal principles in order to establish

[20] Although not an issue in this judgment as dealt with earlier, this obviously puts paid to any possible inconsistency challenge.

whether the misconduct of gross negligence existed *in casu*. In *Transnet Ltd t/a Portnet v Owners of the MV Stella Tingas and Another*[21] the Court described gross negligence as follows:

> '… It follows, I think, that to qualify as gross negligence the conduct in question, although falling short of *dolus eventualis*, must involve a departure from the standard of the reasonable person to such an extent that it may properly be categorised as extreme; it must demonstrate, where there is found to be conscious risk-taking, a complete obtuseness of mind or, where there is no conscious risk-taking, a total failure to take care …'

[45] Appositely, the Court in *National Union of Metalworkers of SA and Another v Commission for Conciliation, Mediation and Arbitration and Others*[22] gave the following exposition of what would be expected from an employee in the particular position of the first respondent:

> '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 the 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 …'

The Court in *National Union of Metalworkers* added:[23]

> 'The test to be applied and with whom the employee is compared, is that of a reasonable employee, having experience and skill comparable with that of the employee charged, in the context of the particular workplace or industry,

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[21] 2003 (2) SA 473 (SCA) at para 7.
[22] (2023) 44 *ILJ* 1575 (LC) at para 32.
[23] Id at para 40. In *Sibanye Gold Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2024) 45 ILJ 2376 (LC) at para 45, the Court said that: '*… Gross negligence inter alia means a total failure to take care …*'.

considering the performance standards and procedures set by the employer. …'

[46] Applying the aforesaid, what does one then have *in casu*? Firstly, the first respondent is responsible and accountable for credit in the Division. What went wrong directly relates to credit. And what went wrong is so extensive and material, that it must realistically be said that the first respondent, *per se*, failed in his duties. This is especially so considering that the exercising of proper control over the accounts saving exercise in the write off period between January and March 2022 was not hard to do, and required proper focus and oversight, which appears to be completely absent. Truth be told, it can be said that all management responsible for credit in the Division materially failed, including the first respondent. That is why they were all dismissed, and in my view, properly and justifiably so. Yet the first respondent is the only one that feels hard done by.

[47] If one drills down even deeper into what really happened, the complete failure to take care, on the part of the first respondent, is even more apparent. The first respondent, as DCM, must surely know that where it comes to incentives paid to employees against the achieving of a target such the targets set in this case, there is an unfortunate incentive and opportunity for wrongdoing. It is the very duty of the first respondent as the DCM to keep a firm hand on this. It is also not as if this particular exercise happens the whole year long. It is limited to a specific period. Kowing the opportunities presented to the employees for possible wrongdoing, even common sense dictates that the first respondent, during this time, should conduct regular inspections, checks, and even random investigations. That is the kind of implemented mechanisms that will substantially inhibit unlawful account saving, which is exactly what the second charge against him contemplated. What makes this even worse is that on his own version, and already in 2021, he knew account saving conduct by employees was a problem. It does not matter if he reported it or not. He clearly knew the risks, was aware of the opportunity for wrongdoing being exploited by employees, and even knew when this may happen. To in such circumstances do nothing, which is what the first respondent in essence did, is in my view a complete failure to take proper care. That is gross negligence, no

matter how one may cut it. And the ultimate consequence is a R13 million loss to the applicant and financial bonuses paid to undeserving employees.

[48] I believe that *in casu*, there was a material departure from the norm that would not be expected from a senior, knowledgeable, long serving and experienced employee such as the first respondent. This departure from the norm is extreme, considering what actually happened in this case, and what the core duties of the first respondent entail. And then to put matters beyond doubt, the first respondent in essence accepts no wrongdoing, blames everyone else for what happened and even says that he earned his incentive for the 2022 accounts saved, despite all that happened. All considered, there was a complete failure to take care by the first respondent. What is incomprehensible is that the third respondent did not appreciate any of these essential facts.

[49] All said, it is my view that the only rational and reasonable conclusion the third respondent could have come to, considering the undisputed facts and the relevant principles of law, is that the negligence perpetrated by the first respondent in this case was very serious, goes to the heart of his duties, and cannot be justified in any manner. It is the kind of misconduct which competently attracts dismissal as a being justified and fair, as it can without much hesitation be described as 'gross'. For example, in *Nampak Corrugated Wadeville v Khoza*[24] the employee party was charged and dismissed for gross negligence in that he had failed to take proper care of equipment for which he was responsible. The Industrial Court found that the employee was negligent but could not find gross negligence to exist which justified dismissal. The erstwhile LAC disagreed and held:

> '…The probable explanation for his conduct, in these circumstances, is simply that he deliberately neglected to perform his duties. Consequently, I do not share the view of the Industrial Court that the evidence against Khoza was so circumstantial that it could not be used to explain his conduct. It was Khoza who had to furnish that explanation. In the absence of any credible explanation, the inference that he deliberately neglected to perform his duty is irresistible. This finding by the employer cannot be faulted.'

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[24] (1999) 20 *ILJ* 578 (LAC) at para 35.

[50] Another example can be found in *Standard Bank Insurance Brokers v Dlamini and Others*[25]. In that case, the employee concerned failed to attend to the renewal of client policies, despite this being a core part of her duties and that the employer's system in fact altered her that the renewals were due. The Court held as follows in finding gross negligence to exist:[26]

> '… This departure from the norm is extreme, considering what actually happened in this case, and the very nature of the financial services industry. Surely, how hard can it be to process a renewal especially if one is reminded of it beforehand? In simple terms, the first respondent would be warned by the System two months in advance, and all she needs to do is to come into contact with the client to explain the renewal and then, with the client, process the renewal. But she did not do any of this, where it came to the clients referred to in the charge. And then to put matters beyond doubt, she explains her failure on the basis, effectively, that she does not think it is a problem, because the System automatically renews, despite the fact that the one-on-one client renewal is to specifically avoid automatic system renewals which would violate the Code. All considered, there was a complete failure to take care by the first respondent. …'

[51] When the first respondent's evidence presented in the arbitration is considered, it is apparent to me that the manner in which the first respondent sought to deal with the obvious problem that existed in this case and how he may at least have some responsibility in this respect, shows a complete lack of appreciation for the consequences and harm his failures caused the applicant. He denied doing anything wrong, basically blamed everyone else for what had happened, and never sought to explain why he could not act proactively even considering what he knew beforehand on his own version. He never sought to even acknowledge that he could have done better. He persisted with this approach even into the arbitration. This lack of appreciation would also be a relevant factor justifying his dismissal, but the third respondent unfortunately had no regard to it. In *EOH Abantu (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*[27] it was held as follows in deciding that

[25] (JR15/24) [2025] ZALCJHB 147 (7 April 2025).
[26] Id at para 42.
[27] (2019) 40 *ILJ* 2477 (LAC) at para 21. *De Beers Consolidated Mines Ltd v Commission for Conciliation, Mediation and Arbitration and Others*(2000) 21 *ILJ* 1051 (LAC) at para at para 22. See

the dismissal was substantively fair, which in my view can equally be applied *in casu*:

> ‘When it was put to him in the arbitration that he had been negligent, he denied that he was guilty of negligence. That compounds his folly and intimates a lack of appreciation of the reputational harm to the appellant his conduct might have caused …’

[52] Overall considered, and if the third respondent had proper, reasonable and rational regard to all of the evidence in this case, as well as the principles applicable to conduct that constitutes gross negligence, the only reasonable conclusion she could have arrived at is that the dismissal of the first respondent on both charges of gross negligence was justified, and fair. It can hardly be better described than the following *dictum* in *Solari v Nedbank Ltd and Others*[28]:

> ‘… it is clear on the totality of the evidence before the commissioner that he did not properly consider all the evidence and therefore arrived at a conclusion that a reasonable decision maker could not reach then the award ought to be set aside. The same will apply when the commissioner makes certain inferences from the proven facts that are totally out of sync with those facts. The inference reached without a proper consideration of the proven facts would be an unreasonable decision or a decision which a reasonable decision maker could not reach …’

[53] For all the reasons as set out above, it is my view that the determination by the third respondent in her award to the effect that that the first respondent did not commit the misconduct of gross negligence is grossly irregular, and resorts well outside the bands of what may be considered to be a reasonable outcome.[29] As such, the award of the third respondent falls to be reviewed and set aside.

<u>Conclusion</u>

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also *Rustenburg Platinum Mines Ltd (Rustenburg Section) v National Union of Mineworkers and Others* (2001) 22 *ILJ* 658 (LAC) at paras 21 – 22; *National Union of Metalworkers* (*supra*) at para 54; *Vilakazi v Commission for Conciliation, Mediation and Arbitration and Others* (2024) 45 *ILJ* 369 (LC) at para 70.

[28] (2014) 35 *ILJ* 3349 (LAC) at para 29.

[29] Compare *Msunduzi Municipality v Hoskins* (2017) 38 *ILJ* 582 (LAC) at para 30.

[54] For all the reasons as set out above, I conclude that the third respondent's finding that the dismissal of the first respondent was substantively unfair constitutes an unreasonable outcome based on the facts and case before her, as a whole. It therefore cannot be sustained and falls to be reviewed and set aside.

[55] Having reviewed and set aside the arbitration award of the third respondent, I see no reason to remit this matter back to the second respondent for determination *de novo* before another arbitrator. The matter is straight forward, and the necessary evidence has been fully ventilated and reflected in a transcript that was in all respects complete. The relevant documentary evidence also speaks for itself, and was largely uncontested. There is simply no need to go through the whole exercise of arbitration again. Exercising the powers I have under section 145(4) of the LRA,[30] I consider it appropriate to finally determine this matter. I shall accordingly substitute the arbitration award of the third respondent with an award that the dismissal of the first respondent by the applicant was substantively fair.

<u>Costs</u>

[56] This then only leaves the issue of costs. In terms of the provisions of section 162(1) of the LRA, I have a wide discretion where it comes to the issue of costs. Even though the applicant was successful, I do not intend to burden the first respondent with a costs order, especially considering the opportunity afforded to me to bring this matter finally to an end. I also do not consider the first respondent's opposition to this matter to be *mala fide* or unreasonable. I am mindful of the *dictum* of the Constitutional Court in *Zungu v Premier of the Province of Kwa-Zulu Natal and Others*[31] where it comes to costs awards in employment disputes before this Court, and I do not consider there to be sufficient reason to depart from what the Court had to say in this regard. I accordingly exercise my discretion as to costs in this matter by making no order as to costs.

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[30] Section 145(4)(a) reads: '*If the award is set aside, the Labour Court may – (a) determine the dispute in the manner it considers appropriate …*'
[31] (2018) 39 ILJ 523 (CC) at para 25.

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

<u>Order</u>

1. The applicant's review application is granted.

2. The arbitration award of the third respondent, arbitrator Rolien Velloen, dated 30 August 2023 and issued under case number GAJB 12424 – 22, is reviewed and set aside.

3. The arbitration award is substituted with an award that the dismissal of the first respondent, Skhumbuzo Walter Mlangeni, by the applicant, was substantively fair.

4. There is no order as to costs.

S. Snyman

Acting Judge of the Labour Court of South Africa

<u>Appearances:</u>

For the Applicant: Ms Buhle Mcengwa of Edward Nathan Sonnenbergs Inc Attorneys

For the First Respondent: Advocate Isiah Mureriwa

Instructed by: Machingura Attorneys