



- (1) Reportable: No
(2) Of interest to other Judges: No

Signature

Date

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case no:JR430/22

In the matter between:

MOBILE TELEPHONE NETWORKS PROPRIETARY

LIMITED

Applicant

and

COMMISSION FOR CONCILIATION MEDIATION AND

ARBITRATION

First Respondent

COMMISSIONER XOLANI NYAMEZELE N.O

Second Respondent

NEO THLAME

Third Respondent

Date of Hearing: In chambers

Date of Judgment: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date of handing down judgment is deemed to be 24 April 2026.

JUDGMENT IN THE LEAVE TO APPEAL APPLICATION

GANDIDZE, J

Introduction

- [1] Mobile Telephone Networks Proprietary Limited (MTN) seeks leave to appeal against the judgment and order of this Court delivered on 10 November 2025, which partially reviewed and set aside an award in favour of a former employee, Neo Thlame (Thlame). The order found that Thlame was guilty of misconduct, as the commissioner had not expressly ruled on this issue in the award. It also reduced the back pay payable to Thlame to six months.
- [2] Thlame opposed the application, and although the submissions made on his behalf have not been referred to in this judgment, they were taken into account.

Leave to appeal grounds

- [3] MTN submits that the court failed to consider, or to consider appropriately, the factors that render dismissal the only appropriate sanction. The factors not considered or properly considered are (i) that Thlame showed no remorse, which the court acknowledged, and that it is trite that an employer is not expected to reinstate an employee who lacks remorse; (ii) the gravity of the misconduct, namely absence from work and defiance of a manager's instruction to report for duty; and (iii) that Thlame was a repeat offender despite that progressive discipline had been applied.
- [4] The second ground on which leave to appeal is sought is that no back pay ought to have been awarded to Thlame.
- [5] MTN submits that there is a reasonable prospect that another court will come to a different conclusion on the above issues

The test in applications for leave to appeal

- [6] Section 17(1) of the Superior Courts Act¹ sets out the only grounds on which leave to appeal may be granted. These include, *inter alia*, a prospect of

¹ Act 10 of 2013.

success and a compelling reason for the appeal to be heard. MTN relies solely on its prospects of success in the Labour Appeal Court (LAC) finding that Thlame deserved to be dismissed, and if that fails, that he should not have been awarded any backpay.

- [7] In considering whether an appeal would have prospects of success, the court *a quo* must consider whether the LAC could reasonably reach a different conclusion from its decision and whether there is a realistic prospect of the appeal succeeding.²

Discussion

- [8] The applicant submitted that a judgment reinstating an employee who has been counselled and is already on a final written warning has a 'chilling effect', in that it sends a message that an employee who repeats the same misconduct cannot be reinstated. The main judgment did not and could never have established such a principle.
- [9] The submission that it is '*trite that an employer cannot be expected to reinstate an employee who is not remorseful*' was not supported by case authorities establishing such a principle. *De Beers Consolidated Mines Ltd v Commission for Conciliation, Mediation and Arbitration and Others*³ which was relied upon, does not lay down a principle that an employee who shows no remorse must automatically be dismissed. MTN's own submission is that, in *De Beers*, the court found that a lack of remorse makes reinstatement difficult. That is very different from saying that an employee who shows no remorse can never be reinstated. In *De Beers*, the employees were charged with fraud, which was considered serious. The misconduct committed by Thlame cannot, by any stretch of the imagination, be compared to what the employees in *De Beers* were charged with.

² *S v Smith* 2010 (1) SACR at 576 (SCA).

³ (2000) 21 ILJ 1051 (LAC).

[10] Reliance was also placed on *Algoa Bus Co (Pty) Ltd v Tirisano Transport & Services Workers Union on behalf of Mazwi and Others*⁴. The proper context of the paragraphs relied upon is that the court was at pains to re-emphasise the principle that all factors must be considered. It stated this:

[13]To the extent that Mr *Higgs* submitted that the arbitrator had misdirected himself because the appellant had led no evidence at the arbitration hearing regarding the seriousness of the accident, or whether it constituted a major or minor incident, the fact that these factors receive specific mention in the code does not require evidence to be led in a mechanistic fashion, in some isolated sense, regarding each of these factors—they are better considered in the context of the evidence as a whole. This is precisely what the arbitrator did. The arbitrator considered the facts before him in a holistic fashion (as he was obliged to do), and came to the conclusion that, having regard to all the relevant factors, dismissal was an appropriate sanction. In the course of his consideration of an appropriate sanction, he clearly had regard to the seriousness of the employee's misconduct, the actual and potential consequences and importantly, the employee's mendacious denial of any misconduct. As this court has previously stated, the acknowledgment of wrongdoing is the first step towards rehabilitation. In the present instance, the employee refused to take even that first step. In short: the arbitrator's assessment of the evidence regarding the appropriateness of dismissal as a sanction cannot be faulted.'

[11] A lack of remorse does not outweigh all other factors, and whether it justifies dismissal in a given case is to be decided on the facts of that case.

[12] The further case authorities, which were referenced and, as correctly pointed out, are binding on this court, namely *Western Cape Education Department v Baatjes & Others*⁵ (*Baatjies*), and *Masscash (Pty) Ltd t/a Jumbo Cash & Carry v Mtsotsoyi & Others*⁶ (*Masscash*), do not lay down the principle that employees who show no remorse must not be reinstated. Instead, they

⁴ (2025) 46 ILJ 89 (LAC).

⁵ (2022) 43 ILJ 1353 (LAC).

⁶ (2023) 44 ILJ 162 (LAC).

reiterate that whether an employee must be dismissed is to be decided by considering all relevant factors. For instance, in *Baatjies*, the court listed the relevant factors that justified dismissal as follows:

[64] To the contrary, the nature of the misconduct, which includes two assaults on a 12-year-old learner and another on the learner's 56-year-old elderly petite grandmother over two consecutive days, exacerbated further by the gravity of the misconduct which includes the unprovoked manner in which the respondent hit the learner and his grandmother and the injuries sustained, coupled with the statutory injunction not to administer corporal punishment against learners, the overriding constitutional principle of the best interests of the child, as well as the respondent's lack of remorse, manifestly justify dismissal as an appropriate sanction. As such, the dismissal stands to be confirmed.'

- [13] The relevant paragraphs from *Masscash*, reproduced in MTN's heads of argument make the same point that several factors must be taken into account when deciding whether an employee must be dismissed. The main judgment sets out the factors the court considered in concluding that the commissioner's decision that dismissal was harsh cannot be interfered with on review.
- [14] The submission that reinstating an employee who shows no remorse runs counter to the Constitutionally entrenched right to fair labour practices that MTN, as an employer, enjoys is, in the Court's view, an exaggeration of the real issue at hand. The case does not raise a Constitutional issue. It is not in every case where an employee shows no remorse that the misconduct should be met with a sanction of dismissal. Thlame's lack of remorse, together with the gravity of the misconduct, the fact that he defied a manager's instruction, and the previous warnings were all factors considered in reducing his backpay to six months.
- [15] The court's conclusion that the commissioner was biased against MTN and its witnesses could not, on its own, lead to a conclusion that the award was reviewable, an issue dealt with in the main judgment.

[16] There is no prospect that the LAC will reach a different conclusion from the finding that the dismissal was too harsh. Thlame's lack of remorse is not a decisive factor in determining the sanction. Thlame's back pay was reduced so that he did not get off scot-free. Leave to appeal on this ground is refused.

That no back pay should have been awarded

[17] This ground of leave to appeal must also fail. The back pay payable to Thlame was reduced precisely because MTN's case on review was that the back pay ought to have been limited. That submission was accepted by the court, and Thlame's back pay was reduced. There is no prospect that the LAC will interfere with that decision on appeal, and find that no backpay ought to have been awarded.

[18] In the result, the following order is made:

Order

1. The application for leave to appeal is dismissed.
2. There is no order as to costs.

T. Gandidze
Judge of the Labour Court of South Africa