



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

Signature

Date

IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

Case No: D1361/2018

In the matter between:

SHOPRITE CHECKERS (PTY) LTD

Applicant

and

THANDEKA MABEL NGCOBO

First Respondent

JABULANI NGWANE N.O.

Second Respondent

COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION

Third Respondent

Heard: 14 April 2026

Delivered: This judgment was handed down electronically by circulation to the parties and / or their legal representatives by email. The date and time for handing-down is deemed 10h00 on 12 May 2026.

JUDGMENT

ALLEN-YAMAN J

Introduction

- [1] This review application concerns an award handed down by the second respondent on 28 May 2018 in terms of which he found the dismissal of the first respondent (Ms Ngcobo) by the applicant (Shoprite) to have been substantively unfair. As a consequence of such finding he awarded her retrospective reinstatement together with backpay.
- [2] The application was first argued on 29 June 2021, on which date judgment was reserved by the Acting Judge who had then presided. As the judgment was not forthcoming on 30 January 2025 the Registrar of this court enquired of the parties as to whether they wished for the matter to be reheard. Pursuant to their having indicated their assent, a directive was issued to this effect and the matter was re-enrolled for argument on 14 April 2026 on which date judgment was reserved by this court.

Background

- [3] Ms Ngcobo was employed by Shoprite as a packer in 1988. She was promoted over time, by 2003 having been promoted to the position of Cash Office Clerk, a position which she held until she was dismissed in 2017. Discernible from the job description for the position which was introduced in evidence at the arbitration, the work of the Cash Office Clerk entailed dealing with and being responsible for cash in the Cash Office. The main purpose of the job was stated to have been,

'To ensure that till floats and amounts on trail [sic] balances correspond and balance.'

Included amongst the daily tasks of the Cash Office Clerk was the requirement that the incumbent,

'Take responsibility for money whilst under their control.'

- [4] On 3 November 2017 Ms Ngcobo was scheduled to work a shift which was to commence at 10:00 am and end at 7:00 pm. Upon the commencement of such shift she joined another Cash Office Clerk, 'Queen', who had started her own shift at 7:00 am, scheduled to end at 4:00 pm. Shortly before Queen's departure later that day, she handed the cash in the cash office over to Ms Ngcobo, at which time the amount balanced.
- [5] It had originally been intended that Ms Ngcobo would be assisted by a cashier, 'Mbali', when Queen completed her shift, however this proved not to be possible as Mbali was then occupied with her work as a cashier. The store's Admin Manager, Ms Skye Jones, instructed a Trainee Manager, Ms Ntombifuthi Buthelezi, to assist her in the Cash Office.
- [6] Shortly before 5:00 pm Ms Ngcobo left Ms Buthelezi alone in the Cash Office in order to go to the ladies'. Upon her return shortly thereafter Ms Buthelezi departed the Cash Office, then informing her that she was leaving work at 5:00 pm.
- [7] The following day when Ms Ngcobo was handing over the Cash Office to her replacement, it was discovered that the cash on hand did not tally with the documented receipts, and that R10 000.00 was missing. She immediately informed Ms Jones of the discrepancy and together they searched for the missing money. It remained unaccounted for and was confirmed as such by the guard who came to the store that afternoon. Upon the cashiers being cashed up at the end of the day, it was unequivocally established that the amount in question was missing.
- [8] The full extent of the investigation which was subsequently conducted by Ms Jones was not placed before the second respondent, however it was established that polygraph tests had been conducted on all the individuals who had been present in the cash office at the relevant times, with the exception of Ms Buthelezi, who had not been tested. The results of the polygraph testing indicated that none of those tested had been directly involved in what appeared to have been the theft of the money.

- [9] Whilst Shoprite accepted that Ms Ngcobo had not taken the money herself, it nonetheless held her responsible for its loss. It called her to a disciplinary enquiry to answer the allegation,

'Gross Negligence in that on the 04/11/2017 the safe did not balance resulting in the safe reflecting a shortage of R10 000.00 which you were responsible for it was your duty to ensure that all transactions that were processed for the safe was accounted for so that the safe balanced. Your actions have resulted in a financial loss to the business.'

- [10] The chairperson of the disciplinary enquiry found Ms Ngcobo to have committed the infraction. Her reasoning was recorded in the outcome as follows,

'You are a well versed cash office clerk and are working in the cash office for 15 years. You left the cash office without securing the safe which you were responsible for. The mere fact that you failed to follow simple rules as lock the safe and keep the keys with you cannot be denied has resulted in gross negligence.'

She issued the sanction of summary dismissal which was given effect on 27 November 2017.

- [11] Ms Ngcobo challenged the fairness of her dismissal at the CCMA and it was the outcome of that dispute which led to the initiation of the present application.

Analysis

- [12] It was Shoprite's assertion that on the proven facts, a reasonable commissioner would have concluded that Ms Ngcobo had been grossly negligent. On the contrary, in finding as he had, the second respondent:

- misconstrued the issue he was required to determine;
- misconstrued the nature of the enquiry he was required to undertake;
- made findings which were unsupported by the evidence before him; and
- exceeded his powers as a commissioner.

[13] In consideration of the second respondent's analysis of the evidence before him, it is evident that he failed to determine whether Ms Ngcobo was, in fact, guilty of negligence, gross or otherwise. As asserted by Shoprite, he instead embarked upon his consideration of the fairness of Ms Ngcobo's dismissal in relation to the investigation conducted regarding the missing money. In this, his point of departure appears to have been the issue taken by him with the fact that Ms Buthelezi, an obviously potential culprit of the misdeed which led to the loss, had been entirely excluded from the investigation process.

[14] That he did so is not, however, dispositive of the matter. As was explained in Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation Mediation and Arbitration and Others (2014) 35 ILJ 943 (LAC),

*'In other words, in a case such as the present, where a gross irregularity in the proceedings is alleged, the enquiry is not confined to whether the arbitrator misconceived the nature of the proceedings, but extends to whether the result was unreasonable, or put another way, whether the decision that the arbitrator arrived at is one that falls in a band of decisions to which a reasonable decision-maker could come on the available material.'*¹

[15] Any confusion which arose concerning the issue which the second respondent had been required to determine arose, in no small part, as a result of the disparity between the wording of the charge itself, the findings of the disciplinary enquiry, and the evidence led at the arbitration by Shoprite. Despite that the charge was framed in such a way that the reader thereof would be inclined to believe that Ms Ngcobo was accused of having been negligent in her capturing of the transactions on the day in question, she was dismissed for having failed to lock the safe whilst she had been away from the cash office. Whilst the evidence of Ms Jones in the course of the arbitration related to the issue of the locking of the safe, given the terms in which the charge had been expressed, it was not unreasonable for Ms Jiba, Ms Ngcobo's representative, to have questioned the failure on the part of Shoprite to have subjected Ms

¹ At paragraph 14

Buthelezi to a polygraph examination. Given the evidence and the issues before him, it was also not unreasonable for the second respondent to have sought clarification from her as to the precise act of misconduct for which Ms Ngcobo had been dismissed. In response, Ms Jones confirmed that the complaint related to the failure on the part of Ms Ngcobo to have locked the safe, but that the dismissal was as a result of the loss itself, rather than her omission.

[16] In the context of the totality of the evidence led, it is understood that Ms Ngcobo was dismissed for the reason that Shoprite was of the belief that her failure to have locked the safe when she went to the ladies constituted an act of gross negligence, which had resulted in a loss to it of R10 000.00. The issue before the second respondent was accordingly whether her dismissal for that reason had been substantively fair.

[17] Shoprite bore the onus to prove the substantive fairness of its decision. In consideration of the Code of Good Practice: Dismissal,² it was required to have established, firstly, that Ms Ngcobo had contravened a rule or standard relevant to its workplace; and, if so, whether:

- the rule was both valid and reasonable;
- she had been aware thereof;
- the rule had been consistently applied by it; and
- dismissal was the appropriate sanction for the contravention.

[18] The only evidence introduced by Shoprite concerning the existence of the rule was the testimony of Ms Jones whose evidence at the outset was predicated, to a great extent, on the statements which had been attributed to Ms Ngcobo herself in the disciplinary enquiry. Putting aside for the moment that such statements were extracted from the handwritten notes of the chairperson who did not testify at the arbitration, the fact that Ms Ngcobo may have accepted that she had not locked the safe did not *ipso facto* establish the existence of a

² Labour Relations Act, 1995, Schedule 8, Item 7

rule that required the safe to be locked whenever she was not present in the cash office.

- [19] When Ms Jones she did finally explain the procedure which she asserted was utilized by Shoprite she stated only that,

'There's two keys, one which they only keep and the other one given to the manager. So if you go to the toilet or go for a break, they just have to put the two keys in you lock, turn the keys and lock it, they'll take one key and one key will be given to the Manager.'

- [20] The source of the rule was not explained. Whether by way of a Code, a Policy, a Rule, or a Procedure from which the source of the alleged rule might have been discerned, nothing of this nature was placed in evidence at the arbitration.³

- [21] In argument Mr Hobden, who appeared on behalf of Shoprite, sought to persuade this court that the following exchange between Ms Ngcobo and her own representative constituted an admission as to her own guilt,

'Ms Zibi: Okay. Now the company is alleging that you were not supposed to have went to the toilet leaving the safe key unlocked.

Ms Ngcobo: Ja.

Ms Zibi: So that is a breach of company policy and procedures.

Ms Ngcobo: Ja, I admit I did.'

- [22] That was not where the exchange ended, however, for after she was then asked to amplify her statement she stated,

'Although I left the safe unlocked, but my hands are clean and my concern is that why Ntombifuthi was not questioned because she also worked in the office that day.'

³ Shoprite's Company Rules were included in the documentary evidence relied on by Shoprite, but these Rules did not deal with the manner in which the Cash Office safe was required to be dealt with.

[23] Although Ms Ngcobo admitted to having left the safe unlocked when she went to the ladies, she categorically denied that, as a matter of practice, the safe was locked in the manner described by Ms Jones, and explained that the locking and separation of the two keys occurred only when the staff went home. When cross-examined on the issue of why she had left the safe open, she responded, *'It wasn't the first time I leave the safe, all of us leave the safe. Even Ms Skye Jones and all that, they say, "We leave the safe but we trust one another" and nothing happened at all. It was the first time a huge amount disappeared. Because sometimes when we are going outside they ask something from the safe it takes long to open.*

...

We all know that.

...

She also knows we don't lock the safe.'

[24] In light of the procedure in question having been placed in serious dispute, it is difficult to understand why Shoprite failed to attempt to have substantiated the existence of the rule on which Ms Ngcobo's dismissal rested, beyond Ms Jones' *ipse dixit*, which itself did not begin to address the issue of Ms Ngcobo's awareness thereof.

[25] If both the existence of the rule and Ms Ngcobo's awareness thereof could somehow have been gleaned from Shoprite's evidence, then the further issue which is required to be addressed is the appropriateness of the sanction of dismissal for its breach.

[26] Shoprite categorised the nature of Ms Ngcobo's actions as having been grossly negligent. As was pointed out by Mr Athman, who appeared on behalf of Ms Ngcobo, the mere categorisation by an employer of an act as such does not establish the correctness thereof.

[27] An individual may be regarded as having been negligent in circumstances in which a reasonable person in the same position would have foreseen the possibility of his or her conduct injuring another person or property, and causing

patrimonial loss, and would have taken steps to guard against such occurrence, but nonetheless failed to do so.⁴ In an employment context, it is accepted that the 'reasonable person' is the 'reasonable employee' within the specific industry in question.

[28] For negligent conduct to be elevated to that of 'gross negligence', more is required. The Supreme Court of Appeal considered the distinction in Transnet Ltd t/a Portnet v MV 'Stella Tingas' and Another 2003 (2) SA 473 (SCA),

'... Gross negligence is not an exact concept capable of precise definition. Despite dicta which sometimes seem to suggest the contrary, what is now clear, following the decision of this Court in S v Van Zyl, is that it is not consciousness of risk-taking that distinguishes gross negligence from ordinary negligence. This must be so. If consciously taking a risk is reasonable, there will be no negligence at all. If a person foresees the risk of harm but acts, or fails to act, in the unreasonable belief that he or she will be able to avoid the danger or that for some other reason it will not eventuate, the conduct in question may amount to ordinary negligence or it may amount to gross negligence (...) depending on the circumstances. If, of course, the risk of harm is foreseen and the person acts recklessly or indifferently as to whether it ensues or not, the conduct will amount to recklessness in the narrow sense, in other words, dolus eventualis; but it would then exceed the bounds of our modern day understanding of gross negligence. On the other hand, even in the absence of conscious risk taking, conduct may depart so radically from the standard of the reasonable person as to amount to gross negligence. (...) It follows that whether there is conscious risk taking or not, it is necessary in each case to determine whether the deviation from what is reasonable is so marked as to justify it being condemned as gross. ... 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. If something less

⁴ Kruger v Coetzee 1966 2 SA 428 (A) at 430

*were required, the distinction between ordinary and gross negligence would lose its validity.*⁵

- [29] For Ms Ngcobo to have been guilty of negligence, it was necessary for Shoprite to have established that her failure to have locked the safe had occurred in circumstances in which another employee in her position would have reasonably foreseen that such failure would be likely to result in harm to it. For it to have established that her omission constituted gross negligence, it was required to have established that she had consciously elected to disregard the possibility of harm, or conducted herself in a manner entirely devoid of any appreciation for the responsibilities of her position.
- [30] Even if it were to be accepted that Shoprite had established the existence of the rule contended for by it, that the safe was to be locked whenever the responsible key holder left the Cash Office, and that Ms Ngcobo was aware thereof, that would not mean that Ms Ngcobo's failure to have adhered to the rule automatically rendered her guilty of negligent conduct.
- [31] Firstly, it never having been established that it had been Ms Buthelezi who had stolen the money, it was never established that it was the Ms Ngcobo's omission to have locked the safe which actually led to the loss. Secondly, if this state of affairs should somehow have been accepted as having been the case, Ms Ngcobo nonetheless testified that when she left the cash office to go to the ladies, she perceived no possible risk in leaving the safe unlocked. Given that Ms Buthelezi was a Trainee Manager, and that she, as much as Ms Ngcobo, owed a duty of care to Shoprite, the consequences which ensued were not patently foreseeable. Accordingly, Ms Ngcobo's failure to foresee the possibility of any harm arising out of her omission to lock the safe was not unreasonable in the circumstances. As the omission did not establish simple negligence on her part, it could not have met the higher threshold required for the establishment of gross negligence.

⁵ At paragraph 7

[32] There are further difficulties with the issue of the appropriateness of the sanction of dismissal; these relate to the concepts of progressive discipline and of mitigation.

[33] The second respondent's observation that Shoprite had not led any evidence suggesting that the employment relationship had irretrievably broken down was correct. Shoprite's only witness was Ms Jones, who herself had not taken the decision to dismiss Ms Ngcobo. That decision had ostensibly been taken by Ms Sunitha Raghunath, although Ms Jones testified that,

'When it comes to anything where procedures or anything are broken, related actually to our HR they give us and tell us what sanctions or what charges or anything we must give. So everything we do is related to HR and they give us feedback on what we must do.'

[34] The LRA endorses a concept of progressive discipline, it being generally accepted that dismissal for a first offence in circumstances other than the most egregious forms of misconduct would be inappropriate. From the reasoning recorded by the chairperson of the disciplinary enquiry in which she found the sanction of dismissal to have been warranted, it is not evident that any consideration was given to this possibility. Nor was any consideration given to the circumstances which led to Ms Ngcobo leaving the safe unlocked; the fact that Ms Ngcobo had not attempted to conceal her own part in the events which led to the loss; her 29 years' service; her unblemished disciplinary record, or the fact that at the time she was the sole breadwinner in her family who, then 53 years of age, would be likely to confront potentially insurmountable obstacles in finding alternative employment.

[35] On the evidence before the second respondent, another decision maker could reasonably have found that Ms Ngcobo had not been guilty of the misconduct alleged, on the basis of any one or more of the following conclusions:

- Shoprite had failed to establish the existence of the rule on which it sought to rely;

- Shoprite led no evidence which could have established that Ms Ngcobo was aware of the rule in question; and / or
- Even if a rule was found to have been applicable and knowingly breached, it could reasonably have been found that this nonetheless did not constitute negligence, let alone gross negligence.

[36] Equally, even if the commission of misconduct by Ms Ngcobo had been established, it was also entirely possible for another decision maker to have found that the sanction of dismissal itself had been unfair for the reasons that:

- Shoprite had failed to consider the possibility of corrective discipline in circumstances in which the misconduct was not of the nature and type which could be said to have warranted dismissal as a matter of course, and in the absence of any evidence having been led which demonstrated that the relationship between the parties had been irreparably damaged; and / or
- Shoprite seemingly failed to appreciate that the factors presented by Ms Ngcobo in mitigation potentially justified the imposition of a lesser sanction.

[37] The fact that the second respondent did not conduct the enquiry he was required to undertake does not alter the fact that he ultimately arrived at a conclusion which another reasonable decision maker evaluating the evidence before him could have arrived at. The further issues raised by Shoprite concerning the manner in which the second respondent dealt with individual aspects of the evidence before him were either unsustainable in relation to the record, or would not have affected the outcome.

[38] In the circumstances, despite the second respondent's findings and reasoning, it cannot be found that no other reasonable decision maker considering the evidence before the second respondent could have concluded that Ms Ngcobo's dismissal had been substantively unfair. As his ultimate conclusion is not one that no reasonable decision maker could have arrived at, the award does not fall to be reviewed and set aside.

Costs

[39] Ms Ngcobo asked for an order as to costs.

[40] Mr Athman argued that this is an instance in which the exception to the general rule of this court that each party bear their own costs should apply: Shoprite having persisted with a hopeless and unmeritorious case, fairness required that it be ordered to pay Ms Ngcobo's costs.

[41] Whilst this court has found that the application lacked merit, it is not apparent that it was so obviously devoid of any prospects of success that Shoprite's conduct, in having persisted therewith, can be categorised as vexatious or *mala fides*. This, coupled with the fact that the upholding of the award will lead to the reinstatement of the employment relationship between the parties, leads this court to conclude that there is no reason to depart from the application of the ordinary principle that each party be required to bear its own costs.

Order

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

K. ALLEN-YAMAN J

Judge of the Labour Court of South Africa

Appearances

Applicant:

Mr P Hobden, Peter Hobden Attorneys

First Respondent:

Mr C Athman, Clifford Athman Attorneys

LABOUR COURT