



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

Signature

Date

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case No: JR 1560/22

In the matter between

EMMANUEL NDOU

Applicant

and

ALBANY BAKERY (A DIVISION OF TIGER BRANDS

LIMITED

First Respondent

COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION

Second Respondent

COMMISSIONER SHUMANI SIDNEY TSHAKAFA N.O.

Third Respondent

Heard: 29 April 2026

Delivered: 29 April 2026

Reasons delivered: 25 May 2026

REASONS FOR ORDER

PHEHANE, J

Introduction

[1] The applicant launched an application in terms of section 145 of the Labour Relations Act¹ (LRA) to review and set aside the arbitration award by the third respondent (the Commissioner) dated 4 June 2022. The applicant sought the following relief:²

- '1. That the arbitration award made by the Third Respondent and under the auspices of the Second Respondent under case number GAJB21405-21 dated 4th of June 2022 be reviewed, set aside and corrected with an order, ordering retrospective reinstatement as a primary and competent remedy of the Applicant.
2. That the compensation awarded to the Applicant is wrong and is not based [on the Applicant's] undisputed evidence of the [Applicant's] total cost to company salary at the time of the dismissal.
3. DIRECTING THAT the Respondents are directed to pay the cost of this application jointly and severally the one paying and the other is absolved.
- ..
4. Granting the Applicant further and/or alternative relief.'

[2] The first respondent opposes this application and seeks an order dismissing it with costs.

[3] Pursuant to hearing oral argument on 29 April 2026, this Court issued an order dismissing the review application with no order as to costs. The reasons for the order follow below.

Brief relevant background

¹ Act 66 of 1995, as amended.

² Pleadings bundle, notice of motion.

- [4] The applicant was employed as a sales manager at the first respondent. He was dismissed in 2021 for misconduct. The charges that were levelled against him read as follows:³

'You are alleged to have committed acts of gross negligence in that you have failed to perform your duties and functions in accordance with Tiger policies and procedures and/or acceptable standards as a senior member of management in good faith, within the limits of your authority. The circumstances under which you rendered yourself guilty of the alleged gross negligence as set out above are as follows:

15.13.3 Gross Dereliction of duty

On or about 11 March you knowingly approved the facilitation of irregular payment processes by Tiger by instructing Elizabeth Jordaan to conclude an agreement with CWAG Suppliers to become an intermediary vendor in the procurement of Achar, between Tiger and Jubilee, knowing that Jubilee was an unapproved vendor. You did this to circumvent [Tiger's] processes related to vendor selection and approval in breach of the Company's Procure to Pay policy[.]

1.3 You caused the Company financial harm when you knowingly approved the use of an intermediary facilitating vendor, agreed to the payment of a 6% markup on the unapproved achar product.

15.5.3/4 Negligence or gross negligence in that

Your decision to procure achar from [Jubilee] without ensuring that the product met all the quality and safety standards [*sic*].

- [5] Following his dismissal, the applicant referred an unfair dismissal dispute to the second respondent that was arbitrated by the Commissioner. The Commissioner found the dismissal of the applicant to be substantively unfair due to the inconsistent application of discipline but procedurally fair. He ordered the first respondent to pay the applicant three months' compensation.⁴

³ Documentary bundle at p 56.

⁴ Pleadings bundle, arbitration award at pp 21 to 45.

Grounds of review and opposition

[6] The applicant's grounds of review⁵ in essence and as submitted in oral argument by Mr Masinga, are constrained to two grounds, as the applicant filed a notice in terms of the former Rule 7A(8)(b) of the now-repealed Rules for the Conduct of Proceedings of the Labour Court⁶ that were operative at the time, indicating that he stands by his notice of motion.⁷

[7] The grounds of review are summarised as follows:

First ground

[8] The Commissioner committed an irregularity by not ordering reinstatement despite exonerating the applicant of any wrong-doing and by failing to make a determination in terms of the provisions of section 193(2) of the LRA.

Second ground

[9] The Commissioner committed misconduct by ignoring and failing to consider the applicant's uncontested evidence relating to his total cost to company package of R1,1 million when calculating the award of compensation.

Opposition

[10] The first respondent contended that both grounds of review lack merit.

[11] Regarding the first ground of review, the Commissioner did not exonerate the applicant of any wrongdoing as alleged. When considering the provisions of item 6 of the former Code of Good Practice: Dismissal⁸ which was applicable at the time, the Commissioner found on the totality of evidence before him, that the applicant's conduct in failing to adhere to procedures relating to quality and safety standards was serious and the evidence of the first respondent's witness that the applicant did not require further training in this regard was credible. He found however, on the evidence before him, that the

⁵ Pleadings bundle, founding affidavit at paras 22 to 28 on pp 19 to 20.

⁶ Repealed and replaced with the Rules Regulating the Conduct of the Proceedings of the Labour Court. Published 3 May 2024 (GN 50608). Effective 17 July 2024.

⁷ Pleadings bundle at p 67.

⁸ Schedule 8 of the LRA repealed on 4 September 2025 (GN53294).

dismissal of the applicant was substantively unfair only in respect of consistency. Further, the Commissioner considered the relief sought by the applicant of reinstatement and determined, based on the evidence before him, that relief of reinstatement was inappropriate, and therefore, he awarded compensation.

[12] Regarding the second ground of review, the first respondent contended that, on the evidence before the Commissioner, a dispute arose over the applicant's salary. The Commissioner made a finding that the applicant's basic salary as recorded in his salary slip, which was confirmed during the evidence of Ms Khumalo for the first respondent, was R75 425.67; thus, the finding of the Commissioner cannot be faulted.

The test

[13] The test to succeed in a review application is trite.⁹

[14] The review Court is concerned with the outcome, as our Courts have pronounced that the determination of a review is outcome-based.¹⁰

[15] It is now well-established that a piecemeal approach to review applications is to be discouraged. The review Court is concerned with whether the decision of a commissioner falls within the bounds of reasonableness on the totality of the evidence placed before him or her.

Evaluation

First ground of review

[16] A finding that the applicant is exonerated of wrongdoing appears nowhere in the arbitration award. Put simply, the Commissioner makes no such finding. On the contrary, the Commissioner found that the applicant's dismissal was substantively unfair, emphasizing that this was due to the inconsistent application of discipline. On the totality of evidence before him, the

⁹ See: *Sidumo and another v Rustenburg Platinum Mines (Pty) Ltd and others* (2007) 28 ILJ 2405 (CC).

¹⁰ See: *Herholdt v Nedbank Ltd (COSATU as amicus curiae)* 2013 (6) SA 224 (SCA) at para 25; *Head of Department of Education v Mofokeng and others* [2015] 1 BLLR 50 (LAC).

Commissioner found that the applicant's line manager, Mr Jaco van der Merwe gave an instruction to Elizabeth Jordaan and the applicant to procure the achar without following the procurement policy and Mr van der Merwe was not disciplined. He found, on the totality of evidence before him, that the standards relating to quality and safety were very important and that it was common cause that should they not be adhered to, this would have disastrous consequences.

[17] With the afore-going findings in mind, it simply does not follow that the Commissioner exonerated the applicant of any wrongdoing. He finds dismissal substantively unfair only in respect of inconsistency.

[18] It is trite that inconsistency is one of the factors to be considered in determining the substantive fairness of a dismissal and it is not the determining factor.¹¹ The applicant does not take issue with this. What he takes issue with, is the Commissioner not reinstating him.

[19] In *Standard Bank of South Africa Ltd v Leslie and others*¹² the Labour Appeal Court stated that:

'... section 193 (2) required the commissioner not simply to adopt a mechanical approach to the award of reinstatement as the primary remedy, but to consider the circumstances surrounding the dismissal to determine whether these were of such a nature that a continued employment relationship between the parties would either be intolerable or not reasonably practicable.'

[20] In my view, the Commissioner considered the relief sought by the applicant for reinstatement and found based on the evidence before him, reinstatement was inappropriate.¹³ The Commissioner provided cogent reasons for granting the remedy of compensation rather than reinstatement, given the evidence before him.¹⁴

¹¹ *Absa Bank Ltd v Naidu and others* (2015) 36 ILJ 602 (LAC) at para 42.

¹² (2021) 42 ILJ 1080 (LAC) at para 17.

¹³ Pleadings bundle, arbitration award at para 148 on p 44.

¹⁴ See: first respondent's heads of argument at para 25 and its sub-paragraphs.

- [21] Therefore, the applicant's contention that the Commissioner did not consider the provisions of section 193(2) does not pass muster.
- [22] On the totality of evidence before the Commissioner, the applicant being a senior manager in sales, with approximately 300 staff reporting to him, ought to have been aware of the policies of the first respondent. He acknowledged receipt of the first respondent's policies¹⁵ and he ought to have been aware of adhering to quality and safety standards in the procurement of achar. The evidence before the Commissioner was that no further training was required.
- [23] On the evidence before the Commissioner, the area where the achar was packaged was not acceptable in terms of the first respondent's quality and health standards, which exposed the first respondent to safety risks.¹⁶ The conduct of the applicant of failing to adhere to quality and safety standards in the procurement of achar is therefore, serious. The applicant did not challenge his conduct in this regard.¹⁷
- [24] Properly construed, the issue before this Court is oft termed a "*penalty review*". In the circumstances, the test is whether the decision of the Commissioner is reasonable and where the decision falls within the bands of reasonableness, as is the case in the present application, there is no basis for this Court to interfere with the arbitrator's decision.¹⁸
- [25] In view of the afore-going, the first ground of review does not succeed.

Second ground of review

- [26] During the arbitration proceedings, the applicant's salary was in dispute.¹⁹ Therefore, it is mischievous for the applicant to aver in these present proceedings, that his salary was uncontested. On the evidence before the Commissioner in the form of the applicant's pay slip²⁰ which the first respondent's witness, Ms Khumalo referred to in her evidence, the applicant's

¹⁵ Documentary bundle at p 195.

¹⁶ *Ibid* at p 248.

¹⁷ *Ibid* at p 33. See also: transcribed record Of 6 April 2022, Vol15 at pp 26 to 17.

¹⁸ *Association of Mineworkers and Construction Workers Union obo Motswadi v Commission for Conciliation, Mediation and Arbitration and others* [2023] JOL 60525 (LC) at paras 7 to 8.

¹⁹ Transcribed record of 9 February 2022, Vol 4 at pp 1 to 5.

²⁰ Documentary bundle at p 394.

pay slip reflects a gross salary of R75 425,67. The averment that the Commissioner ignored the applicant's evidence is not borne out by the record. The Commissioner considered this evidence as is recorded in the arbitration award.²¹ Before the Commissioner was the applicant's payslip that recorded his gross salary as R75 425,67 and not a gross salary of R90 000.00 as per the applicant's version. The salary slip was not placed in dispute. Therefore, the Commissioner's calculation of the award of compensation is rational based on the evidence before him. In the circumstances, the second ground of review is unmeritorious.

Costs

[27] The requirements of the law and fairness indicate that no order for the payment of costs should be made.²²

Conclusion

[28] In view of the afore-going, the above-mentioned order was made.

M. T. M. Pehane

Judge of the Labour Court of South Africa

²¹ At para 75 on p 32 of the pleadings bundle.

²² See: section 162 of the LRA.

Appearances:

For the applicant : Mr Masingo for BEAWUSA Trade Union

For the third respondent : Mr Dube of ENSAfrica

LABOUR COURT