



THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Case no: C614/2023

In the matter between:

AURELIA SOMORA RICHARDS

Applicant

and

SANTAM LIMITED

First Respondent

COMMISSION FOR CONCILIATION, ARBITRATION

AND MEDIATION

Second Respondent

COMMISSIONER MXOLUSI NDULZWANA N.O.

Third Respondent

Heard: 18 September 2025

Delivered: 31 July 2026

Summary:

Applicant was employed by First Respondent ("Santam"). In terms of the then-applicable COVID protocols, in order to be allowed to enter the workplace Santam's vaccination policy required employees to either be vaccinated, alternatively provide regular negative PCR Covid tests should they opt not to be vaccinated.

Applicant elected not to be vaccinated and provided regular negative PCR tests until 14 April 2022 when she failed to submit a negative PCR test and failed to

attend work the next day, for which she was issued with a written warning valid for 6 months.

Applicant thereafter complied with the requirement to submit a negative PCR test until 6 June 2022, when she again failed to do so and failed to report for duty for the period between 7 and 14 June 2022. On 17 June 2022 Applicant received a final written warning valid for 12 months for not providing a negative PCR test, failing to report for duty from 7 to 14 June 2022, and failing to attend her disciplinary hearing on 15 June 2022.

Applicant remained absent from work and on 8 July 2022 she was issued with a notice to attend a disciplinary enquiry in terms of which she was required to answer allegations of misconduct. Subsequent to a hearing, Applicant was found guilty and dismissed for misconduct (gross insubordination in refusing to follow a direct instruction to return to work) and dishonesty.

In an opposed application for the review and setting aside of the Arbitration Award issued by the Third Respondent in which he found that the dismissal of the Applicant was fair, Applicant raised three grounds for review:

Firstly, the Commissioner misconceived the nature of the enquiry and committed a material error of law by dealing with the matter on the basis of misconduct as opposed to one of incapacity;

Second, even if the Commissioner were correct in dealing with the matter as one of misconduct, he failed to properly apply the law as it pertains to misconduct since Applicant's failure to submit a negative PCR test was neither wilful nor deliberate, but caused by her inability to afford the cost thereof; and

Thirdly, the Commissioner failed to properly apply the law concerning dishonesty, since the allegations made by Applicant were made on the basis of what she genuinely perceived to be unfair treatment by Santam and in the absence of any intention to deceive.

As to the first ground of review, Applicant failed to provide any convincing evidence to justify her grounds for electing not to receive the vaccination.

Having opted to provide regular PCR tests at her own expense, her subsequent financial incapacity did not amount to a disability or incapacity as envisaged in the COVID protocols, and the Commissioner was correct in characterising the dispute as one of misconduct. Accordingly, there had been no material error of law and the first ground of review had to fail.

As to the second ground of review, it was common cause that the Applicant was aware of the vaccination policy and did not dispute its lawfulness, applicability, or reasonableness. The evidence established that she had in fact complied therewith for a substantial period. Applicant refused to be vaccinated on religious grounds but did not provide any convincing evidence to justify this position. That Applicant subsequently became unable to pay for PCR tests was regrettable, but in the circumstances of the case could not be interpreted as some form of incapacity or disability. Applicant did not present herself for duty in the period between 17 and 28 June 2022, leading to the conclusion that her conduct was both wilful and persistent, amounting to a serious challenge to the employer's authority. Accordingly, the Commissioner's conclusion that Applicant had knowingly failed to comply with a valid or reasonable instruction to return to work, amounting to gross insubordination, could not be faulted, and was one which a reasonable decision-maker could have reached on the evidence available. Accordingly, the second ground of review had to fail.

As to the third ground of review, Applicant's referral of an unfair labour dispute to the CCMA made serious allegations of favouritism, inconsistent application of the vaccine policy, unequal treatment of employees in general, discrimination, racial discrimination, unfair treatment and abusive workplace practices.

Applicant was unable to substantiate any these allegations in evidence, and the only conclusion which could be drawn from the available evidence was that the allegations were made with no other purpose than to achieve the desired outcome of success in her unfair labour practice dispute as against the employer. In the premises, the Commissioner could not be faulted for finding that Applicant had been dishonest. Accordingly the third ground of review had to fail.

The application for review was dismissed with no order as to costs.

JUDGMENT

ABRAHAMS, AJ

Introduction

- [1] This is an opposed application for the review and setting aside of an Arbitration Award (the Award) issued by the Third Respondent (the Commissioner) on 18 October 2023 in which he found that the dismissal of the Applicant was fair.

Background

- [2] Applicant was employed by First Respondent (Santam) in the capacity of Service Consultant as from 1 May 2014. Her role required her, together with another Service Consultant, to, *inter alia*, assist Relationship Managers with their service duties, answer telephone calls, prepare broker packs, and deal with walk-in clients.
- [3] With the advent of COVID-19 in 2020 and the resulting hard lockdown, Santam's employees were initially required to work from home. As the COVID-19 period continued, the Applicant was required to return to the office every alternate week. The office operated on a reduced staff complement who were rotated weekly.
- [4] Santam then issued an instruction to all office-bound employees, informing them that, as from 1 March 2022, they would all be required to return permanently to the office. The Applicant was one of these office-bound employees. Santam had a vaccination policy which required employees to either be vaccinated, alternatively to provide regular negative PCR Covid tests, should they opt not to be vaccinated.

- [5] The Applicant elected not to be vaccinated and opted to provide Santam with regular negative PCR tests, which she duly did during March and April 2022. Applicant had in the meantime applied to be exempted from the provisions of the vaccination policy, which application was rejected.
- [6] On 14 April 2022 the Applicant failed to submit a negative PCR test, and did not attend work on 15 April 2022, for which she was issued with a written warning valid for six months¹. Upon receipt of the written warning the Applicant requested her immediate supervisor to afford her the opportunity to either work from home, alternatively to revert to the rotational basis which Santam had employed during the early months of the COVID-19 pandemic. This request was declined on the basis of the operational needs of the office.
- [7] Applicant thereafter complied with the requirement to submit a negative PCR test until 6 June 2022, when she again failed to do so. The Applicant did not report for duty from 7 to 14 June 2022, nor did she attend a disciplinary hearing on 15 June 2022.
- [8] Accordingly, on 17 June 2022, the Applicant received a final written warning valid for 12 months for not providing a negative PCR test, for failing to report for duty from 7 to 14 June 2022, and for failing to attend her disciplinary hearing on 15 June 2022.²
- [9] It must be noted that, on 24 June 2022, Santam issued a notice to its employees which indicated that the submission of a negative PCR test would no longer be a requirement.
- [10] However, it appears that the Applicant continued to remain absent until at least 28 June 2022, and on 8 July 2022 the Applicant was issued with a notice to attend a disciplinary enquiry in terms of which she was required to answer the following allegations of misconduct:

¹ Record of Proceedings ('R') p 443

² R p 442

- '(a) Gross insubordination in that from 6 to 28 June 2022 you have been grossly insubordinate when you refused to follow direct instructions to return to work;
- (b) Absent from work without authorisation from 6 to 28 June 2022; and
- (c) Dishonesty in that you provided false and defamatory information about Santam and its employees on your CCMA referral form for ECEL 1367-22.³

[11] Applicant pleaded not guilty to these allegations, but was, subsequent to a hearing, found guilty of the charges against her and dismissed with effect from 30 August 2022.

[12] The Applicant then referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) which culminated in the Award presently under review.

The award

[13] The Commissioner considered the charges and held that the first two charges depended on the same factual basis and would therefore be considered as one charge, i.e gross insubordination in refusing to obey an instruction to return to work, alternatively being absent from work without authorisation.⁴

[14] Furthermore, the Commissioner held that the charge of gross insubordination for the period between 6 June and 16 June 2022 was *res judicata*, insofar as a final written warning had been issued in this regard on 17 June 2022.⁵

[15] The Commissioner proceeded to consider the Applicant's reasons for not submitting any negative PCR tests for the period between 17 and 28 June 2022, namely that she could not afford the tests (which, it is common cause, cost R150.00 each), and rejected them⁶, finding that the Applicant had knowingly

³ R p 305

⁴ Pleadings ('P') pp 20 – 21, Award par 18 - 22

⁵ P p 21, Award par 23 - 26

⁶ P p 27 – 28, Award par 56 - 58

failed to comply with a valid and reasonable instruction to return to work and was therefore guilty of gross insubordination.⁷

- [16] The Commissioner proceeded to consider the charge of dishonesty and found that the employee had supplied false and defamatory information in her referral to the CCMA, thereby bringing the name of her employer into disrepute.⁸
- [17] Accordingly, the Commissioner concluded that Applicant's lack of remorse (in making false and defamatory statements about her employer even after they were proved to be untrue), persistence in peddling false information and failure to return to work after 17 June 2022 justified her dismissal, and that the continued employment relationship had been rendered intolerable.⁹

The review application

- [18] The primary issue to be determined in this review¹⁰ is whether the Commissioner committed a reviewable irregularity when he determined that *"the dismissal of Ms Aurelia Semora Richards by Santam Ltd on 31 August 2023 is fair and Ms Aurelia Semora Richards is not entitled to any relief"*.¹¹
- [19] Ultimately, the Court must ascertain *"whether the Arbitrator considered the principal issue before him/her, evaluated the facts presented at the hearing, and came to a conclusion that is reasonable"*.¹² Put differently: *"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"*.¹³
- [20] The Applicant has raised various grounds for review, which may conveniently be summarized as follows:

⁷ P p 29, Award par 66 - 67

⁸ P p 31, Award par 74 - 76

⁹ P p 32 - 33, Award par 78 - 82

¹⁰ See: *Head of Department of Education v Mofokeng and Others* (2015) 36 ILJ 2802 (LAC) at para 30. See also *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as amicus curiae)* (2013) 34 ILJ 2795 (SCA) at para 25; *Goldfields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commissioner for Conciliation, Mediation and Arbitration and Others* (2014) 35 ILJ 943 (LAC) at paras 16 to 18.

¹¹ P p 34, Award par 84

¹² *Goldfields Mining* (id fn 10) at para 16.

¹³ *Herholdt* (id fn 10) at para 25. See also *Sidumo and another v Rustenburg Platinum Mines and others* 2008 (2) SA 24 (CC) at para 110.

- 20.1. Firstly, the Commissioner misconceived the nature of the enquiry and committed a material error of law by dealing with the matter on the basis of misconduct as opposed to one of incapacity;
- 20.2. Second, even if the Commissioner were correct in dealing with the matter as one of misconduct, he failed to properly apply the law as it pertains to misconduct since Applicant's failure to submit a negative PCR test was neither wilful nor deliberate, but caused by her inability to afford the cost thereof; and
- 20.3. Thirdly, the Commissioner failed to properly apply the law concerning dishonesty, since the allegations made by Applicant were made on the basis of what she genuinely perceived to be unfair treatment by Santam and in the absence of any intention to deceive.

[21] In regard to the first ground of review, Applicant's argument is based on the following line of reasoning:

- 21.1. Santam's vaccination policy required employees to either be vaccinated, alternatively to provide regular negative PCR COVID-19 tests, should they opt not to be vaccinated;
- 21.2. Applicant declined to be vaccinated on the basis of her religious beliefs as a Christian;
- 21.3. Applicant therefore complied with the vaccination policy by providing regular PCR tests until she could no longer afford to do so;
- 21.4. Applicant's financial incapacity therefore resulted in her effectively being rendered incapable of complying with the vaccination policy;
- 21.5. The matter should therefore have been dealt with on the basis of incapacity rather than misconduct.

Analysis of the law

- [22] The Code of Good Practice: Managing Exposure to SARS-COV-2 in the Workplace, 2022¹⁴ ("the Covid Code") provided, *inter alia*, that "*if an employee refuses to be vaccinated, the employer must... take steps to reasonably accommodate the employee in a position that does not require the employee to vaccinated*".¹⁵
- [23] 'Reasonable accommodation' is defined in the Covid Code as "*any modification or adjustment to a job or to the working environment that will allow an employee who fails or refuses to be vaccinated to remain in employment and incorporates the relevant portions of the Code of Good Practice on Employment of People with Disabilities published in terms of the Employment Equity Act, 1999 (Act 97 of 1999)*".¹⁶
- [24] I was referred in argument to the Code of Good Practice on Employment of People with Disabilities¹⁷ as somehow being applicable to this matter. However, since section 1 of the Employment Equity Act¹⁸ defines 'people with disabilities' as "*people who have a long-term or recurring physical, mental, intellectual or sensory impairment which, in interaction with various barriers, may substantially limit their prospects of entry into, or advancement in, employment*", to the extent that I am invited to consider Applicant's inability to pay for PCR tests as resulting in some form of disability as defined, I must respectfully decline.
- [25] Crucially, the lawfulness and applicability of Santam's vaccination policy was not in dispute between the parties.
- [26] Annexure C to Santam's vaccination policy incorporated similar provisions to those quoted from the Covid Code above¹⁹, although it is noted that the vaccination policy refers to an employee who "*refuses to be vaccinated on any constitutional or medical grounds*". That such constitutional or medical grounds must be valid is an inescapable adjunct to the above.

¹⁴ Published in GN 46043, 15 February 2022

¹⁵ Code of Good Practice: Managing Exposure to SARS-COV-2 in the Workplace, 2022, Clause 12(4)

¹⁶ *Ibid*, Clause 3(1)

¹⁷ Published in GG 39383 on 9 November 2015

¹⁸ Act 55 of 1988

¹⁹ R p 414, par 5(2) and 5(3)

- [27] The right to freedom of religion, thought, and belief is enshrined in our Constitution²⁰. However, in order to invoke this right it is incumbent on the employee to establish a clear basis upon which they rely on the right and to demonstrate how vaccination would infringe this right.
- [28] Clearly, if an employee's religion proscribes vaccination, then a mandatory vaccination policy would infringe this right; however, the employee is required to prove that he sincerely subscribes to a particular religion and that the religion forbids vaccination. In the absence of such evidence, the objection to taking the vaccination based on Constitutional grounds cannot be sustained.²¹
- [29] There is no evidence to doubt the sincerity of the Applicant's religious beliefs; however, she failed to provide any convincing evidence to justify the proposition that Christianity forbids vaccination.
- [30] An objection to taking the vaccination that lacks substantiation or relies on conspiracy theories is unlikely to be found valid.²²
- [31] In *Mulderij v Goldrush Group*²³, the employee refused to be vaccinated on religious grounds. The Commissioner found that she had incapacitated herself, and that her dismissal for incapacity was therefore fair.
- [32] The Commissioner quoted a memorandum from the Deputy Judge-President of the Gauteng Division of the High Court (as he then was), Judge Roland Sutherland, on the issue of vaccinations in the workplace:
- 'The proper question is whether or not an individual is sufficiently civic minded to appreciate that a duty of care is owed to colleagues and others with whom contact is made to safeguard them from harm. If one wishes to be an active member of a community then the incontrovertible legitimate interest of the community must trump the preferences of the individual.'²⁴

²⁰ The Constitution of the Republic of South Africa, 1996.

²¹ See: *Kok v Ndaka Security and Services* (2022) 43 ILJ 958 (CCMA).

²² See: *Dreyden v Duncan Korabie Attorneys* (2022) 43 ILJ 1405 (CCMA) at paras 80 and 85.

²³ (2022) 43 ILJ 671 (CCMA)

²⁴ See *Dreyden* (id fn 22) at para 32.

- [33] It would therefore seem that, even if the Commissioner had treated the matter as one of incapacity, in the circumstances of this case a dismissal for incapacity would have been justified.
- [34] Be that as it may, in the present matter the Commissioner was correct in finding that the Applicant was not dismissed for refusing to vaccinate.²⁵ The Applicant's subsequent financial incapacity did not amount to a disability or incapacity as envisaged in the COVID protocols, and the Commissioner was correct in characterising the dispute as one of misconduct. Accordingly, there was no material error of law and the first ground of review must fail.
- [35] As to the second ground of review, it is common cause that the Applicant was aware of the vaccination policy and did not dispute its lawfulness, applicability, or reasonableness. The evidence establishes that she did, in fact, comply therewith for a substantial period. The Applicant refused to be vaccinated on religious grounds but did not provide any convincing evidence to justify this position.
- [36] That the Applicant subsequently became unable to pay for PCR tests is regrettable, but in the circumstances of this case it is beyond the bounds of reasonableness to interpret this as some form of incapacity or disability.
- [37] It is also common cause that the Applicant did not present herself for duty in the period between 17 and 28 June 2022, even if only to be refused entry. One can only conclude that her actions in this regard were both wilful and persistent, and amounted to a serious challenge to the employer's authority. Again, the reasonableness of the vaccination policy was not seriously disputed.
- [38] Having made her decision to refuse the vaccine, Applicant was unable to provide any convincing evidence that her reasons for doing so were justifiable, and she cannot escape the consequences of that choice. Freedom of choice is not freedom from consequence.
- [39] Given that Applicant was subject to a final written warning issued on 17 June 2022, the Commissioner's conclusion that the Applicant had knowingly failed to

²⁵ Pp 22 – 23, Award at para 29 and 33.

comply with a valid or reasonable instruction to return to work which amounted to gross insubordination cannot be faulted and is one which a reasonable decision-maker could have reached on the evidence available.

[40] Accordingly, the second ground of review must fail.

[41] As to the third ground of review, both parties, in their respective heads of argument, cited the principle enunciated in *Nedcor Ltd v Frank and Others*²⁶ to the effect that "*Dishonesty entails a lack of integrity or straightforwardness and, in particular, a willingness to steal, cheat, lie or act fraudulently.*"

[42] Ms Schensema, for Applicant, argued strenuously that negligence, however gross, can never constitute dishonesty, since some form of intention is required to be dishonest. In addition, it was submitted, an important distinction needed to be made between an allegation which is found to be untrue, as opposed to an allegation which is dishonest. The distinction is a fine one, but in the circumstances of this case it is ultimately a distinction without a difference.

[43] The case of *Nedcor v Frank*, upon which both parties relied, was decided on the basis of whether the conduct of the employees could be said to have destroyed the relationship of trust between them and the bank. Finding that, insofar as the bank and its customers was concerned, no intention to steal, cheat, lie or act fraudulently was manifest, the Labour Appeal Court (LAC) held that it could not.²⁷ To the contrary, the employees' contention that they wished to shield the bank from the wrath of airport management was held to be entirely plausible.²⁸

[44] In the present matter, Applicant's referral of an unfair labour dispute to the CCMA made serious allegations of favoritism, inconsistent application of the vaccine policy, unequal treatment of employees in general, discrimination, racial discrimination, unfair treatment and abusive workplace practices.

²⁶ (2002) 23 ILJ 1243 (LAC) at para 15.

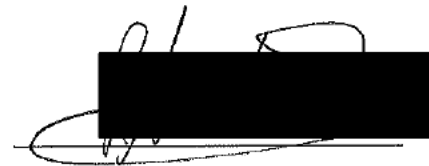
²⁷ Ibid

²⁸ See *Nedcor v Frank* (id fn 26) at para 14.

- [45] The Applicant was unable to substantiate a single one of these allegations in evidence, and it is difficult not to conclude that these very serious allegations were made with no other purpose than to achieve the desired outcome of success in her unfair labour practice dispute as against the employer. No other intention can be gleaned from the evidence available at the arbitration.
- [46] To the extent that some form of intention is required for there to be dishonesty, therefore, the Commissioner cannot be faulted for finding that there was dishonesty on the part of Applicant in making the aforementioned allegations, since no other intention was evident.
- [47] In the premises, the third ground of review must also fail.
- [48] Accordingly, the following order is made:

Order

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



R. Abrahams

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Attorney: H Schensema

Instructed by: Cohan- Harper Madikizela Attorneys

For the Respondent: Advocate: Brenton Joseph / Attorney: Nasheetah Smith

Instructed by: Werksmans Attorneys

LABOUR COURT