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

Signature 03/08/2026
Date

**THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN**

CASE NO: C679-2022

In the matter between:

**JOHN THOMAS ROBERTSON** **Applicant**

and

**THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION** **First Respondent**

**LAMEESAH JOOMA *(N.O.)*** **Second Respondent**

**PEP CLOTHING (A DIVISION OF PEPKOR TRADING (PTY) LTD)** **Third Respondent**

**Heard: 21 May 2025**

**Delivered: 03 August 2026**

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**JUDGMENT**

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**LAGRANGE, J**

Introduction

[1] This is an application brought in terms of Section 145 of the Labour Relations Act, No. 66 of 1995 ("the LRA"). The applicant seeks to review, set aside, and correct an arbitration award issued by the second respondent ("the Arbitrator") under the auspices of the first respondent, dated 15 November 2022. In her award, the arbitrator determined that the dismissal of the applicant by the third respondent ('Pepkor') was substantively fair, declaring that the applicant's appetite for refusing to submit to managerial authority was met with an appropriate operational remedy. The applicant prays for full retrospective reinstatement to his position as a mechanic, whereas Pepkor opposes the application and requests, in the alternative, that the matter be remitted back to the CCMA for a trial *de novo*.

Summary of the Material Facts

[2] The applicant, Mr. J T Robertson ('Robertson'), was a highly experienced employee who served Pepkor as a mechanic for a continuous period of 31 years. The employment relationship was historically rooted in a signed employment contract dating back to 16 March 1999. In December 2018, Robertson signed an updated contract of employment.

[3] In January 2022, Pepkor conducted an internal file audit which revealed that the personnel file of Robertson lacked a signed employment contract on record. Pepkor explained that this administrative shortfall arose when payroll functions shifted between internal company divisions.

[4] On 14 January 2022, Pepkor presented a draft employment contract to Robertson for his signature. Robertson refused to sign. He raised a material variance, demonstrating that the draft document recorded a reduced monthly salary of R12,053.45 instead of his actual contract benefit of R13,083.80. Pepkor candidly admitted that its Human Resources personnel made a clerical calculation error on the initial draft. Robertson requested to take the document home, which was permitted, and he sought legal counsel. On 24

January 2022, Robertson returned and filed a formal grievance regarding the forced signature of a contract depicting a salary reduction.

[5] A sharp factual and legal dispute emerges regarding subsequent events. Pepkor maintains that on 15 February 2022, its Human Resources officers called Robertson to a meeting, presented an administratively corrected contract reflecting his full true benefits, and explicitly instructed him to sign it, but Robertson continuously refused to. Robertson disputes the character of this interaction, maintaining that the managers merely *requested* a signature, which left him with a choice. Furthermore, Robertson stated that he did not trust management because of the initial salary discrepancy. Pepkor counter-argued that during these interactions, managers realised that Robertson had five previous signed contracts in his possession at home. When requested to bring a copy to update his personnel file, Robertson flatly refused.

[6] On 16 February 2022, Robertson lodged a second internal grievance, alleging that Human Resources was placing undue pressure on him to enter into a new contract. On 17 February 2022, Pepkor served Robertson with a disciplinary notice, which was amended on 21 February 2022, to face two distinct allegations of misconduct, namely:

6.1 Charge 1 (Gross Insubordination): In that you refused to follow a reasonable and lawful instruction from People Support to sign a copy of your employment contract.

6.2 Charge 2 (Behaving in an Intolerable Manner)**:** In that you are making this employment relationship intolerable because when given instructions that do not suit you, you retaliate by lodging frivolous grievances, directly decreasing floor productivity and rendering yourself unmanageable.

[7] The disciplinary notice recorded the date of the alleged offenses as 15 February 2022. Following an internal inquiry, Robertson was found guilty and dismissed.

The Arbitrator's Reasoning

[8] In her analysis, the arbitrator preferred the version of Pepkor on a balance of probabilities, for the reasons set out below.

[9] Regarding Charge 1, the arbitrator found that the instruction to sign the contract was presented in a respectful manner. She determined that Robertson misinterpreted standard managerial politeness to mean that Human Resources was asking rather than issuing a binding instruction. The arbitrator rejected Robertson's defence, finding that he clearly and blatantly contravened a valid rule of conduct.

[10] Secondly, the arbitrator evaluated the lawfulness and reasonableness of the rule by heavily relying on testimony concerning an upcoming Walt Disney World compliance audit. The arbitrator concluded that Pepkor was under a strict contractual obligation to comply with external audits, and that failing to produce signed employment contracts would invalidate its licensing rights to manufacture Disney products, causing massive commercial and financial loss. Consequently, she found that Robertson was obliged to comply.

[11] Thirdly, in relation to Charge 2, the arbitrator evaluated Robertson's historical record, noting that he had received prior disciplinary sessions, including a first written warning for unauthorized breaks and a final written warning for unruly, defiant behavior in early 2021. The arbitrator reasoned that these historical warnings established an unmanageable pattern of non-compliant conduct.

[12] Lastly, the arbitrator confirmed the penalty of dismissal, stating that the employment relationship is inherently one of subordination. She concluded that Robertson laboured under a misguided notion that his 31 years of long service exempted him from the authority of management.

The Review

*Robertson's grounds of review*

[13] Robertson challenges the reasonableness and procedural integrity of the award on four principal fronts.

[14] Robertson argues that the entire commercial justification regarding the Disney World audit was a pure afterthought. It was never raised at his disciplinary inquiry and was only brought to light by the employer's witnesses during *re-examination* at the arbitration. The arbitrator committed a gross irregularity by denying him an opportunity to cross-examine or lead evidence refuting this novel commercial claim, which effectively provided a new rationale for his dismissal.

[15] Further, Robertson argues that while the charge sheet bound the employer to proof of an act of insubordination on 15 February 2022, the employer's evidence and the internal chairperson's finding focused entirely on a refusal on 31 January 2022, which was not mentioned in the charge sheet. Neither the chairperson of the enquiry nor the arbitrator should have entertained this effective reformulation of the charge. The arbitrator did not deal with this at all.

[16] The written charge sheet explicitly limited the scope of intolerability to the act of *lodging grievances*. Because the employer's main witness admitted on cross-examination that Robertson was not dismissed for utilizing the grievance policy, the arbitrator committed a fatal misdirection by straying outside the charge sheet to construct a finding of guilt based on 21 historical, settled administrative events.

[17] Robertson notes that the arbitrator entered the arena, repeatedly shielded evasive employer witnesses, and actively shut down the cross-examination of the unrepresented applicant, going as far as to state that she did not care about his explanation. These interventions demonstrated palpable bias on the part of the arbitrator.

*Pepkor's response*

[18] Pepkor argued that the grounds of review were akin to grounds of appeal and amount to an invitation to the court to conduct a piece meal approach which blurs the lines between a review and an appeal and is at odds with the

jurisprudence, such as *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others* [1].

[19] Accordingly, Pepkor argues that process-related errors or intermediate mistakes made by an arbitrator did not automatically invalidate a result, provided the final conclusion survives the constitutional standard of reasonableness.

[20] Pepkor contends that it never forced a new contract or an operational novation. The instruction was a simple, lawful administrative mandate to update an internal file. Robertson displayed flagrant bad faith by withholding his home copy of the 2018 contract, which would have instantly resolved the crisis.

[21] Pepkor argued that Charge 2 did not punish the clean use of internal grievance structures, but rather exposed a malicious pattern of behavior. Robertson utilized repetitive, frivolous grievances as a weapon of retaliation to ground workplace productivity whenever management exercised its lawful authority.

<u>Evaluation</u>

[22] The standard of review under Section 145 of the LRA is well-established. This Court must determine whether the decision reached by the arbitrator is one that a reasonable decision-maker could not reach based on the evidentiary material placed before them. A process-related irregularity will only warrant judicial interference if it directly prevents a fair trial of the issues and causes an unreasonable outcome.

[23] An analysis of the award reveals that the arbitrator's award is fundamentally disconnected from the evidence and entailed important misdirections that led her to conclusions that were untenable.

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[1] [2014] 1 BLLR 20 (LAC) at paragraphs 14-21

[24] Firstly, the arbitrator committed a severe, reviewable irregularity by basing her entire evaluation of the gravity of Charge 1 on the Walt Disney World compliance audit. The record conclusively shows that the Disney audit was never canvassed at Robertson's internal disciplinary inquiry. It was introduced for the first time at the arbitration during re-examination, materially altering the gravity of the charge.

[25] It is trite law that re-examination is strictly confined to clearing up ambiguities arising from cross-examination. It cannot be used as an ambush mechanism to introduce completely new and damaging evidence. The arbitrator permitted the employer to introduce the evidence of the Disney audit and, crucially, denied Robertson any meaningful opportunity to recross-examine or lead evidence in response.

[26] Furthermore, the arbitrator then tendentiously concluded that Disney would cancel its manufacturing licenses, despite the employer failing to discover or place the underlying Disney contract into evidence. Her findings based on admitting the new material on the Disney contract and then speculating about its content materially skewed her judgment in favour of the employer.

[27] The arbitrator's findings on Charge 2 was also the result of a serious reframing of the charge. As a result she considered misconduct which Robertson had not been charged with. The text of Charge 2 explicitly bound the inquiry to an allegation that the relationship was made intolerable because Robertson *retaliated by lodging grievances*.

[28] During the CCMA proceedings, Mr A Railoun, the head mechanic, initiator of the enquiry and Robertson's direct supervisor, answered a clear and decisive *"NO"* to the question of whether Mr. Robertson was dismissed for lodging grievances. Despite this absolute material admission, the arbitrator ignored the employer's concession and actively strayed outside the parameters of the charge sheet. She resurrected a list of 21 historical, dormant administrative events dating back to 2018—the vast majority of which had been fully resolved internally or represented expired warnings—to construct a generalized finding of non-compliant behaviour.

[29] Following the binding Labour Appeal Court authority in *Palluci Home Depot (Pty) Ltd v Herskowitz*[2], an arbitrator commits a gross irregularity when they find an employee guilty of misconduct that played no part in the original decision to dismiss, or which departs fundamentally from what was formally charged. The arbitrator effectively permitted the employer to utilize stale workplace friction as an afterthought to remove a vocal employee.

[30] Robertson's claim of process-related bias is justifiable on the record. In multiple instances, when he attempted to cross-examine Human Resources witnesses regarding the core changes in the contract drafts, the arbitrator improperly stepped into the arena. The arbitrator actively cut off Robertson, answered the questions on behalf of the employer's witnesses, and directed hostile remarks towards him, such as telling Robertson that she did not care about his explanations.

[31] While Section 138 of the LRA grants commissioners a wide discretion to conduct arbitrations with a minimum of legal formalities, it demands absolute neutrality. A commissioner who actively takes over the defense of a witness or displays open hostility toward a lay litigant fundamentally undermines the *audi alteram partem* principle. Robertson did not get a fair hearing in consequence.

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[2] (2015) 36 *ILJ* 1511 (LAC), viz: '[46*] This finding by the chairperson was, in any event, made in the context of the poor work performance/incapacity charge (charge (b)), and I not the failure to carry out reasonable instructions (charge (c)). This notwithstanding, the commissioner in his award went beyond the findings of the chairperson in his recommendation, and dealt with all the subcharges under charge (c) and arrived at a finding that the first respondent had failed to carry out instructions as described in that charge. In Fidelity Cash Management Service v CCMA & others, 24 this court held that:*

*'It is an elementary principle of not only our labour law in this country, but also of labour law in many other countries that the fairness or otherwise of the dismissal of an employee must be determined on the basis of the reasons for the dismissal which the employer gave at the time of the dismissal. The exception to this general rule is where, at the time of the dismissal, the employer gave a particular reason as the reason for the dismissal in order to hide the true reason such as union membership. In such a case, the court or tribunal dealing with the matter can decide the fairness or validity of the dismissal not on the basis of the reason that an employer gave for the dismissal but on the basis of the true reason for the dismissal.'*

*Accordingly, the commissioner undertook the enquiry in a misconceived manner by determining the fairness of the first respondent's dismissal on the basis of reasons for the dismissal which the appellant did not rely upon at the time of dismissing the first respondent. But for this error, I believe that the commissioner would have arrived at a different result in the award*.'

Relief

[32] Pepkor argues that even if the dismissal was substantively unfair, reinstatement is operationally unfeasible under Section 193(2)(b) of the LRA because Robertson stated under oath that he no longer trusts management.

[33] The bar for proving that an employment relationship has been rendered truly "intolerable" is exceptionally high, requiring substantial evidence. During oral argument, the court raised the point that it appeared that the entire friction between Robertson and Pepkor was a bureaucratic scrap with the employer’s human resource administration, emanating from their desire to file a physical update. It had absolutely no bearing on his capability, conduct, or execution of his daily duties as a mechanic fixing sewing machinery on the floor. In my view, Robertson’s misplaced distrust of Human Resources does not amount to a fundamental breach of trust rendering a continued employment relationship intolerable. In consequence, reinstatement is the appropriate remedy.

Order

1. The arbitration award issued by the Second Respondent under case number WECT4881-22, dated 15 November 2022, is reviewed and set aside.

2. The award is replaced with an order that the dismissal of Robertson, Mr. John Thomas Robertson, was substantively unfair.

3. Pepkor is ordered to reinstate the Applicant retrospectively to his date of dismissal in his position as a mechanic, on the same terms and conditions of employment that governed his relationship under the 2018 contract.

4. Pepkor must pay the Applicant all back-pay due to the Applicant from the date of his dismissal to the date of this judgment, payable within fourteen (14) days hereof.

5. The Applicant must report for duty within fourteen (14) days of the date of this judgment.

**R Lagrange**

**Judge of the Labour Court of South Africa**

Appearances:

For the Applicant: C A Casner

Instructed by: Elroy Adams & Associates

For the Respondent: J van der Walt of Cliffe Dekker Hofmeyer Inc.