



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

Signature

07/09/2026

Date

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JR 1908/23

In the matter between:

BRIDE AND CO EURO SUIT (PTY) LTD

Applicant

and

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

First Respondent

COMMISSIONER PAUL PHUNDU NO

Second Respondent

MABOTE DOROTHY LUCIA AS REPRESENTED BY

SOUTHERN AFRICAN CLOTHING

AND TEXTILE WORKERS UNION

Third Respondent

Heard: 20 May 2026

Delivered: 07 September 2026

JUDGMENT

WHITEAR-NEL, AJ

Introduction

- [1] This is an application for the review of an arbitration award issued under case GAJB 16508-23, where the third respondent's dismissal was found to have been unfair. She was reinstated and awarded three months' remuneration as back pay.
- [2] The applicant avers that the second respondent, the commissioner, committed misconduct in the performance of his duties as arbitrator and also committed a gross irregularity in the conduct of the arbitration proceedings.

Procedural irregularities at the arbitration held at the commission for conciliation, mediation and arbitration (CCMA)

Closing of the applicant's case

- [3] The applicant suggested that the commissioner, either by error or intentionally, attempted to close its case prematurely. The commissioner stated, after the first witness had testified: "*I believe now it is the time for the Applicant [in the arbitration] to take the stand.*" In fact, the applicant still had another witness to call before closing their case. This was brought to the attention of the commissioner, and the second witness for the applicant was called and testified. The applicant closed its case after the second witness had completed his testimony.
- [4] There is nothing sinister about what happened and it is inaccurate to elevate it to the submission that the commissioner tried to close the applicant's case prematurely. The applicant (in the arbitration) had not indicated how many witnesses it would call. As soon as the commissioner was informed that another witness was available, the applicant was allowed to call their next witness, with no delay or hesitation. There was no prejudice caused to anyone, and the brief exchange of remarks referred to above would not have given a reasonable person, in possession of all the facts, any reasonable apprehension of bias. Nor is there any evidence of actual bias.

Closing argument

- [5] At the end of the arbitration, the commissioner said the following:
 'Look, this is the stance that I normally adopt. If you want to present closing argument it is your process. You are more than welcome to do that. But what I need to confirm for you on record is that I have got enough evidence that

would actually enable me to proceed and write the award. So I need to (inaudible) closing arguments if I may put it in that way.'

- [6] The third respondent gave oral closing arguments, and the applicant (in the arbitration) elected to submit written closing arguments.
- [7] The award was dispatched by the CCMA some twenty-two minutes or so after the applicant's closing argument was received. The applicant's heads of argument are some nine pages long. It contains common cause facts, being facts which the commissioner was already aware of. It also contained a section headed '*Facts that are in dispute and issues to be decided.*' The commissioner was also aware of the issues he had to decide. That is apparent from his award. Next in the closing argument is a section called 'Breaking of a rule.' Here, trite case law is cited¹, which sets out the test for substantive fairness in Schedule 8, a test the commissioner would have been well aware of from his training and experience. The closing argument also traverses the evidence, particularly that of Nkabinde, which evidence was already before the commissioner. Then the closing argument addresses whether the employee had knowledge of the rule or could reasonably be expected to have it. Here, the applicant was speaking about the dishonesty rule in the disciplinary code, the knowledge of which was not in dispute. Lastly, the closing argument addresses the issue of consistency and traverses evidence already before the commissioner, as well as consistency-related case law, from which brief extracts were quoted.
- [8] It is not unusual for commissioners to write draft awards while the evidence is still fresh in their minds. The probabilities are that this is what the commissioner did. The award wasn't dispatched before receipt of the closing argument. It seems that the commissioner did read and consider the closing argument, *albeit* in a short period of time (the brevity explained by the circumstances set out above), but apparently found no need to amend or rewrite his award in light of its contents. Nothing in the closing argument was new or unexpected. It did not change the evidence before the commissioner, on which he based his award. It apparently did not persuade the commissioner to amend or rewrite his draft award.

Review

¹ See: *Woolworths v SACCAWU* [2017] ZALAC 54

Grounds of review

- [9] The applicant contended that the grounds of review were that the commissioner committed misconduct and/or a gross irregularity in the proceedings.
- [10] The applicant did not specifically plead that as a result of the misconduct and/or irregularity, the award was unreasonable.
- [11] In *Gold Fields Mining SA Pty Ltd (Kloof Gold Mine) v CCMA and Others*² the Labour Appeal Court (LAC), referring to *Sidumo and another v Rustenburg Platinum Mines Ltd and others*³, explained that the constitutional standard of reasonableness is suffused into the section 145 review test:

‘This implies that an application for review sought on the grounds of misconduct, gross irregularity ... will not lead automatically to a setting aside of the award if any of the above grounds are found to be present. In other words ...where a gross irregularity in the process is alleged, the enquiry is not confined to whether the arbitrator misconstrued the nature of the proceedings, but extends to whether the result was unreasonable....’

- [12] A reviewing court must ascertain whether the arbitrator considered the correct principal issue before him/her; evaluated the facts presented at the hearing and reached a conclusion that was reasonable. That is the enquiry this court embarks on.

Background and facts

- [13] The third respondent, Mabote, commenced duties with the applicant on 1 May 2004 as a sales assistant. She was responsible for assisting clients and securing sales. She was not the only assistant on the shop floor assisting customers. She earned R5800.00 per month plus the commission she made on her sales.
- [14] The third respondent was dismissed on 26 June 2023 after having been found guilty of the following charges at a disciplinary enquiry:

- ‘1. That you failed to apply the necessary fiduciary duty owed to the employer in performing your duties at the end of May 2023 in that due to your actions you are guilty of dishonesty in that you caused other employees to assist you to reach your sales target by diverting their

² (2014) 35 ILJ 943 (LAC) at para 14.

³ (2007) 28 ILJ 2405 (CC).

sales credits to your benefit in order for you to reach your target and earn unwarranted commission.

2. That you failed to apply the necessary fiduciary duty owed to your employer in performing your duties at the end of May 2023 in that due to your actions you caused or potentially caused your employer financial loss in that you caused others to assist you to reach your sales target by diverting their sales credits to you in order for you to reach your target and earn unwarranted commission.'

[15] The third respondent argued that there was no rule prohibiting shop floor assistants from working as a team, and sharing sales credits when they believed it appropriate to do so. The applicant concedes that there is no rule prohibiting the sharing of sales credits (although such a rule was introduced after the applicant's dismissal – I will revert to the significance of this) – but argued that the rule in the disciplinary code prohibiting dishonesty was applicable in these circumstances. That was what the applicant was found guilty of and dismissed for – dishonesty. The rule in the disciplinary code reads as follows:

'theft, bribery, fraud, dishonesty, forgery or any falsification of any nature or assisting and/or concealing any of the above [is a transgression].'

[16] Throughout the proceedings, it was only 'dishonesty' that was referred to.

Analysis

[17] It is definitely not self-evident that shop assistants working as a team on the sales floor, and helping each other (including by allocating their credits to the one who is struggling to reach the target that month) falls within the disciplinary code's dishonesty rule. *Prima facie* there is no dishonesty taking place: the sales are being rung up, the applicant is getting their money and is not paying extra commission and there is a satisfied workforce. The sales assistants, including the applicant, were not covering up their tracks, or hiding anything.

[18] What the employer is rather, actually, relying on is a rule like the one introduced after the dismissal (and referred to in para 15 above) to prohibit the reallocation of sales credits between sales assistants. If one turns to the letter introducing the new rule, the wording used makes it clear that it is changing the *status quo* and introducing a new rule. The letter contains the following:

‘It has come to our attention that there is a culture that has been created for staff to assist one another to make targets...’

- [19] This corroborates the oral evidence of witnesses who testified that it was a norm to help each other in this way, with no adverse consequences being attracted to the practice. It also contains the following words:

‘This behavior is not going to be tolerated any longer. Anyone found to be engaged in such behavior ... could lead to dismissal.’

- [20] The plain wording of the above words is that the described behavior had been tolerated but that there was now going to be a change in policy and it would no longer be tolerated.

- [21] The case of *Dikobe v Mouton NO and others*⁴ shows that the onus on an employer to show the existence of an oral rule is much higher than showing the existence and knowledge of a written rule. It is this hurdle which the commissioner found that the applicant had not cleared. In the *Dikobe* case the court held:

‘An employer who seeks to discipline an employee for breach of an oral rule must expect to encounter obvious difficulties. That insight, self-evidently, is why rules have to be written down. Of course, there is no need to write down ‘thou shalt not steal’ and similar injunctions, but when a need for a rule that is workplace specific is required, the prudence of so doing is manifest.’⁵

- [22] The rule prohibiting a sales team, who help each other serving customers, from sharing sales credits is not a rule akin to ‘*thou shalt not steal*’. It is not a self-evident rule that does not need to be expressly communicated. Especially where this, according to the applicant’s case, and the respondent’s letter introducing the new rule, was the practice and culture on the sales floor.

- [23] The third respondent argued that the commissioner did not take the dishonesty offence into account in his award. However, at para 17 of the award the commissioner refers to Mr Nkabinde indicating that the third respondent was dishonest. Further, at para 26 he says:

‘Although I have considered all the evidence, I will only refer in this award to those aspects relevant to determine the dispute, as I am required in terms of section 138(7) of the LRA to provide an award with brief reasons.’

- [24] At para 33 he says: ‘I reject and disagree with Mr Nkabinde’s testimony that the applicant’s actions showed that she was dishonest...’

⁴ (2016) 37 ILJ 2285 (LAC)

⁵ Ibid at para 16.

- [25] [21] The third respondent also argued that there was no financial (or any other) prejudice to the applicant, because the correct sales had been rung up, and the applicant paid no more commission than he would have been obliged to if the sale in question (for R40 000) had been rung up to only one sales assistant.
- [26] [22] All the sales assistants who were involved in this incident were disciplined but it was only the third respondent who was dismissed. The applicant contended that this showed an inconsistent application of discipline.
- [27] The applicant distinguished the case of the third respondent from the other sales assistants by saying that the applicant had instigated the transaction and that she stood to benefit from it (in that the allocated credits would allow her to reach her target, and so avoid dismissal). Also, the applicant testified that one employee, Inguan, was not dismissed because he was nearing retirement. The applicant herself had some 20 years' service with the applicant. And, one employee was not dismissed because he had not signed the Disciplinary Code of Conduct. The branch manager (holding a more senior position to the third respondent) was also not dismissed. The other sales assistants were fully aware of the reallocation of sales credits amongst the staff, and participated in the conduct complained of by the applicant.

Conclusion

- [28] In balance then, I am satisfied that the second respondent's award is unassailable. There was no justifiable differentiation in the way the applicant was disciplined compared to the others involved. There was no rule prohibiting the applicant's behavior. The specific rule was only introduced after the third respondent's dismissal, and the dishonesty rule in the disciplinary code did not cover the factual conduct by the applicant and her colleagues.
- [29] Accordingly, the third respondent's dismissal was unfair, as the second respondent found in his award, and there is no basis to interfere with the award.

Order

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

N. Whitear-Nel

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant : Cheadle Thompson & Haysom Inc.

For the Respondent : Cranko Karp Attorneys

LABOUR COURT