

SOUTH AFRICA / JUDGMENT

East Rand Plastics (Proprietary) Limited v National Union of Metalworkers of South Africa obo Mabena (JR1400/22) [2025] ZALCJHB 345 (8 August 2025)

[2025] ZALCJHB 345

COURT

Labour Court Johannesburg

BEFORE

Anestidis

CASE / FILE NUMBER

JR1400/22

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

THE LABOUR COURT OF SOUTH
AFRICA, JOHANNESBURG

Not

Reportable Case

No:

JR1400/22
In

the matter between:

EAST
RAND PLASTICS (PROPRIETARY) LIMITED
Applicant
and
NATIONAL
UNION OF METALWORKERS OF
SOUTH
AFRICA obo MABENA, LETTIE
First Respondent
METAL
AND ENGINEERING INDUSTRIES
BARGAINING
COUNCIL ("MEIBC")
Second Respondent
DLAMINI,
KENNETH N.O
Third Respondent

Heard:

5 November 2024

Delivered:8 August 2025

JUDGMENT

ANESTIDIS, AJ

Introduction

- [1] This matter concerns a review application to review and set aside an arbitration award issued by the third respondent, acting under the auspices of the second respondent, in terms of which it was found that the dismissal of the first respondent was procedurally fair and substantively unfair. In terms of the Award, the first respondent was to be retrospectively reinstated to the same or similar position, and on the same terms and conditions of employment, which prevailed prior to the date of her dismissal on 12 February 2021 (the Award).
- [2] As per the applicant's notice of motion, it seeks to have the Award reviewed, set aside and substituted with an order that the dismissal was fair, alternatively, that the matter be remitted to the second respondent for an arbitration afresh before a different commissioner.
- [3] The review application is opposed.

Background**facts**

- [4] On or about 10 December 2020, the first respondent was charged with the following alleged misconduct:
- "Fraud – Falsifying Quality records and not doing quality checks"*
- [5] That was the sole charge, from start to finish, and no further particulars or information were included in the charge.
- [6] The first respondent's disciplinary hearing, eventually, proceeded in February 2021, after several delays, which delays are irrelevant to the present application and, therefore, need not be dealt with or considered, as the first respondent's dismissal was held to be procedurally fair, which finding has not been challenged in this review application. It is worth noting, however, that when the first respondent's disciplinary hearing eventually took place, the hearing was conducted in the first

respondent's absence, as the first respondent and her trade union representatives walked out of the hearing, at the commencement

thereof, since according to them the hearing had already been conducted before a different chairperson in December 2020 (Mr Jan

Dreyer) and that the parties were still awaiting the outcome of that hearing. According to the applicant, Mr Dreyer had fallen ill, with the result that a new disciplinary hearing was convened before a different chairperson.

- [7] In support of the charge levelled against the first respondent, the applicant relied, in the main, on video surveillance (CCTV) footage and an affidavit deposed to by its main witness, Ms Natasha Northmann (Northmann), together with certain documentary evidence.
- [8] The first respondent essentially denied the charge and denied committing any wrongdoing whatsoever.
- [9] On or about 12 February 2021, the first respondent was summarily dismissed by the applicant.

The arbitration

Applicant's evidence

- [10] The applicant called one witness to testify in support of its case, namely Northmann. She testified with reference to video footage, a series of quality record documents and a previous written statement signed by her.
- [11] In summary, Northmann testified that the applicant procured a new client, called Reynolds, which concluded a contract worth R90,000,000 (ninety million rand) for the production of a plastic (refuse bag) product called Hefty.
- [12] She testified that, at the time of the alleged misconduct, the first respondent was employed in the position of Quality Control Assistant/Inspector.
- [13] She explained that, as per the available video footage, the first respondent did not perform certain quality checks, as were required of her, during the evening to morning of 14 – 15 November and 23 – 24 November 2020 (2 nights), albeit that there appeared to be technical difficulties with the video footage and/or equipment in respect of 23 – 24 November 2020. Pursuant thereto, so she stated, the first respondent populated certain quality records, which falsely recorded that she had conducted

certain quality checks and tests, in circumstances where she had not actually conducted or completed any such checks or tests. Certain of the checks needed to be conducted every 15 minutes, and the relevant documentation had to be filled in every 30 minutes.

- [14] She further explained that the shift supervisor and operator signed off on the quality records and checks done by the first respondent. She testified that, at the end of each shift, the supervisor would ensure that the documentation was signed and filled in, and that the checks were done by the first respondent. The shift supervisor and operator signed off on the documentation in order to confirm that they had checked and approved the contents thereof.
- [15] Northmann explained, in some detail, certain of the checks and tests which the first respondent was required to conduct, but did not actually do, pursuant to her falsely completing the necessary quality records.
- [16] Under cross-examination, Northmann confirmed that the supervisors, such as “Chris” and “Mister Twala”, signed off on the checks and quality records performed by the first respondent. She stated that supervisors do spot checks and look after the entire factory, not only one employee.

The first respondent’s evidence

- [17] The first respondent was the only witness who testified in support of her case. In summary, she testified that she understood the charge of misconduct to relate only to the night of 23 – 24 November 2020.
- [18] The first respondent confirmed that at the eventual and relevant disciplinary hearing, she attended with two trade union shop stewards, Mr Twala Xhosa and a Mr Vincent. She confirmed that, at this disciplinary hearing, she did not immediately walk out of the hearing. Rather, she and the two shop stewards signed the attendance register, after which they proceeded to argue that the holding of this hearing was wrong and unfair, in light of the previous hearing where no outcome was rendered due to the illness of the chairperson who presided over that hearing. Once the first respondent’s rights were explained to her, she and the two shop stewards proceeded to walk out of the hearing, as they felt that the process was unfair and improper. The first respondent testified that the chairperson duly advised her of the risks of walking out of the hearing, in that the process would still proceed, and she could be dismissed.
- [19] The first respondent testified that she was never trained for the Quality Control position, which she occupied. She also testified that she did not have access to a computer, and that she only shared one computer with a colleague named Malefitsi.
- [20] She testified that the supervisor did spot checks and signed the same quality record checklists, which she completed, which confirmed that all the checks were done and that the quality records were completed correctly. She testified that the supervisor “okayed everything” by countersigning her quality records.

- [21] The first respondent testified that, although the quality records reflect that certain checks were done at specific times, for example, at 19h40, it does not necessarily mean that she did, or had to, conduct any actual tests at that time. She could have been elsewhere or doing other checks at that time.
- [22] She testified that she could complete the quality records/checklists at “any time” and that she was not visible on the video footage because she could have been elsewhere. She stated that she could simply “multitask” in order to explain/justify how she was able to still record the measurements in circumstances where she was not present at the recorded times to conduct the physical checks. She also stated that she was not visible on the video footage because the camera was situated at the back of the machine and would therefore not capture her.
- [23] She confirmed that she attended a toolbox talk, but argued that it related to health and safety only, and had nothing to do with the customer, Reynolds, and the new product (the Hefty) to be produced for it.
- [24] The first respondent maintained that she duly conducted all her checks, as required, correctly completed the relevant quality records/checklists and was not guilty of the charge or any other wrongdoing or misconduct.

Grounds of review

- [25] The applicant raised three grounds of review.
- [26] The first ground of review entails that the third respondent misconstrued the applicant’s case. The third respondent, so it is contended, incorrectly focused on whether harm had been suffered as opposed to whether any records were falsified by the first respondent. As part of this ground of review, the applicant contends that the third respondent ought to have taken issue with the first respondent’s defence (to the disciplinary charge) that she did not have to be physically at the machines in order to conduct the necessary checks.
- [27] The second ground of review entails that the third respondent made a credibility finding in a vacuum. Under this ground, it is alleged that the third respondent drew an inference that the first respondent was credible and that the applicant’s witness, Northmann, was not credible, despite not recording a single piece of evidence analysing any conflicting versions or evidence.
- [28] The third ground of review entails the third respondent rejecting conflicting versions without providing any reasoning therefor. This angle of attack is directed at the third respondent’s finding that the first respondent did not receive any training in respect of performing quality checks and tests, or completing the relevant documents. The applicant argues that the third respondent effectively rejected a common cause fact.

First respondent’s submissions

- [29] The first respondent reiterated, in her opposing papers, that she had not committed any misconduct or wrongdoing in her view. On this basis, it was contended that the third respondent took into consideration all relevant factors and reached a conclusion which a reasonable commissioner would have reached.
- [30] The first respondent denied that the third respondent's award was unsupported by the facts before him. The first respondent also criticised the applicant for failing to direct this Court to any portions of the evidence in a supplementary affidavit in terms of rule 7A(8)(a) of the applicable Labour Court's rules at the time (i.e. Rules for the Conduct of Proceedings in the Labour Court). The applicant only filed a notice in terms of rule 7A(8)(b) to stand by its notice of motion and founding affidavit.

Analysis

The Award

- [31] I commence by dealing with the applicant's contention that the impugned Award stands to be reviewed and set aside based on the third respondent having misdirected himself and/or having misconstrued the true nature of the enquiry before him.
- [32] The principles to be applied in this regard are well-established. In *Head of the Department of Education v Mofokeng and others*[1], Murphy AJA said the following:

"The failure by an arbitrator to apply his or her mind to issues which are material to the determination of a case will usually be an irregularity. However, the Supreme Court of Appeal ("the SCA") in Herholdt v Nedbank Ltd and this court in Goldfields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA and others have held that before such an irregularity will result in the setting aside of the award, it must in addition reveal a misconception of the true enquiry or result in an unreasonable outcome." (at paragraph 30) (own emphasis)

"The determination of whether a decision is unreasonable in its result is an exercise inherently dependent on variable considerations and circumstantial factors. A finding of unreasonableness usually implies that some other ground is present, either latently or comprising manifest unlawfulness. Accordingly, the process of judicial review on grounds of unreasonableness often entails examination of interrelated questions of rationality, lawfulness and proportionality, pertaining to the purpose, basis, reasoning or effect of the decision, corresponding to the scrutiny envisaged in the distinctive review grounds developed at common law, now codified and mostly specified in section 6 of the Promotion of Administrative Justice Act ("PAJA"); such as failing to apply the mind, taking into account irrelevant considerations, ignoring relevant considerations, acting for an ulterior purpose, in bad faith arbitrarily or capriciously etc. The Court must nonetheless still consider with apart from the flawed reasons of or any irregularity by the arbitrator, the result could be reasonably reached in light of the issues and the evidence. Moreover, judges of the Labour Court should keep in mind that it is not only the reasonableness of the outcome which is subject to scrutiny. As the SCA held in Herholdt, the arbitrator must not misconceive the inquiry or undertake the inquiry in a misconceived manner. There must be a fair trial of the issues" (at paragraph 31) (own emphasis)

Further:

“Irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide a compelling indication that the arbitrator misconceived the enquiry. In the final analysis, it will depend on the materiality of the error or irregularity and its relation to the result. Whether the irregularity or error is material must be assessed and determined with reference to the distorting effect it may or may not have had on the arbitrator’s conception of the enquiry, the determination of the issues to be determined and the ultimate outcome. If but for an error or irregularity a different outcome would have resulted, it will ex hypothesi be material to the determination of the dispute. The material error of this order would point to at least a prima facie unreasonable result. The reviewing judge must then have regard to the general nature of the decision in issue; the range of relevant factors informing the decision; the nature of the competing interests impacted upon by the decision; and then ask whether a reasonable equilibrium has been struck in accordance with the objects of the LRA. Provided the right question was asked and answered by the arbitrator, a wrong answer will not necessarily be unreasonable. By the same token, an irregularity or error material to the determination of the dispute may constitute a misconception of the nature of the inquiry so as to lead to no fair trial of the issues, with the result that the award may be set aside on that ground alone. The arbitrator however must be shown to have diverted from the correct path in the conduct of the arbitration and as a result failed to address the question raised for determination.” (at paragraph 33) (own emphasis)

- [33] Thus, the Award ought to be assessed against the above guiding principles. Buckle in, as a rather turbulent journey lies ahead in assessing the Award and dealing with the matter as a whole.
- [34] The main portion of the Award on the merits of the matter is rather scant, it must be said. Be that as it may, the third respondent made certain curious findings in the Award, which are dealt with more fully below.
- [35] Firstly, at paragraph 49 of the Award, the third respondent found that: no evidence was presented to establish that, as a result of the first respondent not appearing on the video footage timelines, there were products “which were later discovered to be non-conforming to the required specifications of the product”.
- [36] This finding demonstrates that, indeed, the third respondent misconstrued the true nature of the enquiry before him and he, consequently, misdirected himself.
- [37] The sole disciplinary charge levelled against the first respondent was that of fraud in relation to the alleged falsification of records in circumstances where the first respondent did not perform quality checks, a duty required of her position. While proof of any defective or non-conforming products could serve as an aggravating factor or consequence of the alleged misconduct, the existence of defective or non-conforming products, or lack thereof, was, in truth, irrelevant to the true nature of the enquiry before the third respondent.

[38] The third respondent was enjoined to determine whether the first respondent had contravened a workplace rule and committed the misconduct with which she was charged and, if so, whether dismissal was an appropriate sanction for such misconduct. Therefore, by focusing on an apparent failure by the applicant to produce evidence in regard to the likely or possible consequences of the first respondent's misconduct, the third respondent misdirected himself and misconstrued the true nature of the enquiry before him.

[39] It was certainly not the applicant's case that, due to the first respondent's misconduct, defective and/or non-conforming products were produced, which resulted in certain detrimental consequences for the applicant and its business. Rather, the applicant's case was simply that the first respondent falsified quality records when she falsely completed certain documentary

checklists (which attest to her physically being at the machines and actually conducting such tests) in circumstances where she was not present at particular machines and/or did not physically or actually conduct such quality checks and tests.

[40] Differently put, even if it were to be established that no products were (later) discovered to be defective or non-conforming to specification, as a result of the first respondent's alleged misconduct, this would not be relevant to or determinative of whether the first respondent committed the alleged fraud in the form of alleged falsification of quality records by virtue of not performing quality checks, which was the only misconduct with which she was charged.

[41] Secondly, at paragraph 50 of the Award, the third respondent found, on grounds dubious at best, that the applicant's version on the following important aspects was highly improbable: (i) that the first respondent had been trained and (ii) that the first respondent was well aware of what was expected in the production of the new Reynolds product.

[42] These findings are materially incongruent with the evidence presented during the arbitration, with the result that the third respondent committed an error or irregularity in relation to significant facts, which undoubtedly affected the final outcome of the arbitration. It is clear that these material factual errors had a tangible distorting effect on the third respondent's conception of the enquiry before him and his determination of the issues to be decided, which culminated in a patently unreasonable result.

[43] In confirmation of the above, one need not search further than the first respondent's own evidence. The first respondent testified as follows in regard to the internal training she received from the applicant:

43.1 "MS LETTIE MABENA: I was, to perform, I was shown how to [unclear] this. So I never attended any training. I was never trained." [2]

43.2 "MS LETTIE MABENA: I was shown how to fill this checklist, it's on Bundle 'B' page 55 and what to fill in, in this [unclear]

...

MS LETTIE MABENA: I'll say again on record that I was never trained. I was shown to fill this checklist.”[3]

43.3 “MS LETTIE MABENA: It means that I’ve done my job correctly. I did what was showed to me.”[4]

43.4 “MS LETTIE MABENA: Clearly means that I did what I was shown.”[5]

43.5 “APPLICANT’S REPRESENTATIVE: In your understanding or trained... [unclear] I forgot to include this... in terms of the training, if you have been trained, firstly you might have been trained by a certain institution. What is expected of a person who is said to have been trained by people, that would not be us or [unclear] but for the purpose of proof, or proof that you were training, what is that is expected. You can just give your, just give us what you know about training. Training and what would subsequently be the end product of that process?

MS LETTIE MABENA: My definition of being trained is to be trained and be conducted and inducted and also certified.

APPLICANT’S REPRESENTATIVE: And here, you are not certified?

MS LETTIE MABENA: I was not inducted.

APPLICANT’S REPRESENTATIVE: You’re not inducted?

MS LETTIE MABENA: No.

APPLICANT’S REPRESENTATIVE: You are saying you are not trained?

MS LETTIE MABENA: No.”[6]

43.6 “RESPONDENT’S REPRESENTATIVE: Okay. I want us to go to an example and you make mention that you were not trained, you were shown. Can you confirm that it’s these documents that you were shown how to complete, is that correct?

MS LETTIE MABENA: Yes.”[7]

43.7 “MS LETTIE MABENA: ... it means that they passed. I was shown like that. I said I was never trained but I was shown like that that the operator bursts, I burst, the supervisor burst and the assistant burst so you have four in the machine.”[8]

43.8 “MS LETTIE MABENA: Yes, you will see me, [unclear] at the hand of the machine, at the front of the machine, I do checks at the front. Hence I was

explaining to the Commissioner when the roll comes in, you stand at the front of the machine... that is what I was told by Natasha Northmann and also Shaun, that when the roll starts you stand in the front of the machine. So you won’t see me, you won’t see me on the video footage because it does not show where I was but I checked the

sample...”[9]

43.9 “RESPONDENT’S REPRESENTATIVE: It was twenty minutes, for two days duration. It was about the quality. The discussion around this is reflected on pages 34 to 35 of Bundle ‘B’. So you confirm Miss Mabena that this is the toolbox talk that you yourself attended to on the 20th of the 8th of 2020? I just want to know if you agree that you did attend to the toolbox talk.

MS LETTIE MABENA: Yes, I did attend to a toolbox, it was a toolbox talk.”[10]

43.10 “RESPONDENT’S REPRESENTATIVE: Part of your specifications, are to follow through with the documentation... [interrupted]

MS LETTIE MABENA: Which I was shown. Which I was shown...”[11]

[44] The training of employees may obviously involve on-the-job training, internally, by other staff members of an employer[12]. Of course, not all training need be elevated to the format or status as perceived by the first respondent, which involves formal induction and certification as proof thereof. This would simply be unreasonable, impractical and out of kilter with reality. In this regard, I found that the first respondent was plainly disingenuous, which renders the third respondent’s findings at paragraph 50 all the more unreasonable and tantamount to an error and/or irregularity.

[45] In regard to the expectations and specification requirements for the production of the new Reynolds product, the first respondent herself testified as follows:

45.1 On this issue, the first respondent commenced by testifying as follows on page 343 of the record at line 20 to page 344, line 10:

“MS LETTIE MABENA: ... Number one, I don’t have a password to that computer or whatever she said. So I didn’t see any email of any job specification, I didn’t see anything because the email was not assigned to me.

APPLICANT’S REPRESENTATIVE: Now, I’m talking about the email, the email I’m talking Commissioner, is the, are the emails from page 29 to page 41. If you can have [unclear] let’s put one finger on page 49 and other one, we can look for page 29 to page ... Maybe tell us as to whether, is there any email that you recognise there?

MS LETTIE MABENA: No. As my name is not there, on the recipient. So I don’t recall reading any emails or getting any emails [unclear]

APPLICANT’S REPRESENTATIVE: Now talk to the fact that she said okay, she said I sent you an email, one, on the other and when she was asked the question she said you guys are two and are sharing the password. Who is this employee that you are sharing your password?

MS LETTIE MABENA: I’m sharing a password? I was working with Malefitsi, he’s the quality control so I don’t think Natasha really [unclear]”

45.2 Under cross-examination, the first respondent gave the following evidence at page 390, line 11 to page 391, line 20 of the record:

“RESPONDENT’S REPRESENTATIVE: You’ve indicated that these emails, you never seen them? You don’t have access to a computer. How do you print your labels?”

MS LETTIE MABENA: Sometimes they print it for me, [unclear] prints it for me or the other supervisor, they do that for me.

RESPONDENT’S REPRESENTATIVE: So you don’t print your own labels?

MS LETTIE MABENA: I print sometimes. I don’t go to email.

RESPONDENT’S REPRESENTATIVE: So you do have access to a computer?

MS LETTIE MABENA: No I don’t have access; they must open it for me first.

RESPONDENT’S REPRESENTATIVE: So you do have access to a computer [interrupted]

MS LETTIE MABENA: No I don’t have access without them. They must open it for me so I can access it but normally they print [unclear] the labels for me or the supervisor prints the labels for me because by the time I’m printing the labels, the machine is running is there. I must do checks.

RESPONDENT’S REPRESENTATIVE: I put it to you that you do have access to the computer. You yourself has just confirmed that you print your labels. I also want to draw your attention to the fact that if you do not check your emails that these emails have been, or it has brought to your attention by the QC inspector that there is various information that needs to be relayed to you. What do you say to that?

MS LETTIE MABENA: About what? The emails?

RESPONDENT’S REPRESENTATIVE: That any emails that was sent by Natasha Northmann, these are relayed to you by the QC inspector.

MS LETTIE MABENA: They relay it to me?

RESPONDENT’S REPRESENTATIVE: Yes.

MS LETTIE MABENA: They might relay it to me but then I didn’t see it or we don’t even speak about them, in their presence also. Even with the supervisor because there, they, even was assigned to the supervisor and the [unclear] inspectors.” (own emphasis)

[46] Again, the first respondent was plainly disingenuous, contradicted herself and/or altered her version at will. This again renders the third respondent’s findings at paragraph 50 all the more unreasonable and tantamount to an error and/or irregularity.

- [47] Relatedly and consequently, the credibility finding made by the third respondent in respect of the applicant's witness, as contained at paragraph 51 of the Award, was irregular and/or unsupported and unsubstantiated by the evidence before him and the testimony given by the applicant's witness, namely Northmann.
- [48] Finally, at paragraph 53 of the Award, the third respondent found that, without any evidence presented before him to "prove that by her conduct the [first respondent] commit[ed] fraud and that the [first respondent] benefitted and/or there was a negative and adverse impact in the production of the product as a direct result of the [first respondent] having not done the required checks as required[,] [the applicant] failed to discharge its onus as required".
- [49] Again, the third respondent misconstrued the true nature of the enquiry before him and misdirected himself. The enquiry before the third respondent did not entail whether or not the first respondent had personally benefitted, which was not the applicant's case at all. Similarly, it was not the applicant's case that there were negative impacts on the production process or the products being produced. The applicant's case was simply that the first respondent falsely/dishonestly populated certain quality record documentation in circumstances where she was not physically present at particular machines and, therefore, could not have possibly completed the checks, and in the manner required of her position, which the quality records reflect she had.
- [50] Clearly, the third respondent misconstrued the concept of "fraud".
- [51] *Snyman: Criminal Law*, at 461, defines fraud as being the unlawful and intentional making of a misrepresentation which causes actual prejudice or which is potentially prejudicial to another. As per *Gardiner and Lansdown: Criminal law and Procedure* (2), at 1735, the traditional definition of fraud entails a wilful perversion of the truth made with intent to deceive and resulting in actual or potential prejudice to another[13]. An intention to deceive is insufficient for fraud; an intention to defraud (which is something quite different) is required. Judge

Solomon's definition in *R v Nay*[14] is also useful and apt: "Fraud consists of a false representation deliberately made with the intention of being acted upon by another to his detriment.". Finally, *De Wet and Swanepoel: Strafrecht*, at 388, regard fraud as deceiving another person, thus inducing that person to act in a manner injurious to his or her proprietary interests.

- [52] Based on the above principles, whether or not the first respondent personally benefitted from the alleged misconduct was an entirely misplaced consideration and, worse still, a finding to make in the Award. This demonstrates that, indeed, the third respondent committed an error or irregularity in (i) making such an irrelevant and misplaced finding and (ii) then utilising such a finding to conclude that the applicant failed to discharge the onus placed on it.

- [53] Relatedly, the finding that there was no evidence of any negative or adverse impact on the production of the product was misplaced and irrelevant to the true enquiry before the third respondent. The applicant's case was simply that of fraud and, essentially, dishonesty in the falsification of records. Nothing more and nothing less. The existence or lack of any negative or adverse impact on the production of the product would not, in truth, directly (or at all) speak to the charge of misconduct levelled against the first respondent.
- [54] If there were indeed negative or adverse impacts on the production process, and ultimately the products produced, this could potentially have been viewed as an aggravating factor or consequence of the main alleged misconduct. However, clearly no such disciplinary charge or allegation was ever levelled against the first respondent.
- [55] Finally, in this regard, any possible negative or adverse impact on the production process or product would not speak, at all, to any possible intention (on the part of the first respondent) to deceive the applicant and induce it to act to its detriment. As stated above, any negative impact on the production process or product could serve as an aggravating factor or consequence of the alleged misconduct. But it certainly does not speak to any alleged fraud or dishonesty committed by the first respondent, and, furthermore, this was not at all the applicant's case against the first respondent and was not part of the onus which the applicant was required to discharge before the third respondent.
- [56] I, accordingly, find that the third respondent's errors, irregularities and misdirection were of a sufficiently material nature to render the Award unreasonable. The third respondent clearly failed to properly apply his mind to the true issues and enquiries at hand. The third respondent misconceived the enquiry or, at the very least, undertook the enquiry in a misconceived manner. The third respondent's errors, irregularities and misdirection clearly struck at the heart of the Award, which renders the Award reviewable.
- [57] In conclusion, and for all of the reasons stated above, I find that the third respondent's award is reviewable and ought to be set aside.

Whether to remit the dispute or substitute the Award

- [58] As held by the Labour Appeal Court in the recent judgment of *Phakoago v SANCA Witbank Alcohol and Drug Help Centre and Others*[15], in terms of section 145(4)(a) of the LRA, this Court has the broadest powers to determine a dispute in whatever manner it considers appropriate. In exercising this power, this Court may, after reviewing the proceedings, and if it finds in favour of the applicant
- by upholding the review, either substitute its decision for that of the commissioner or remit the matter to the CCMA.

[59] In Phakoago, the Labour Appeal Court considered and applied the judgment of Southern Sun Hotel Interests (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others[16], where the court set out the circumstances in which this Court would rather correct the decision than refer it back to the CCMA as being as follows:

“(i) where the end result is a foregone conclusion and it would merely be a waste of time to order the CCMA

to reconsider the matter;

(ii) where a further delay would cause unjustified prejudice to the parties;

(iii) where the CCMA has exhibited such bias or incompetence that it would be unfair to require the applicant to submit to the same jurisdiction again; or

(iv) where the court is in as good a position as the CCMA to make the decision itself.”

[60] In Phakoago, the Labour Appeal Court further considered and applied the judgment of Auto Industrial Group (Pty) Ltd and Others v Commission for Conciliation, Mediation and Arbitration and Others[17], where the Court held that:

“A court will ordinarily substitute the decision of a commissioner where all of the available evidence is before the court and little purpose would be served in a rehearing.”

[61] In light of the above principles, this Court is indeed in a position to substitute the Award with its own findings, since all of the evidence (in the form of the relevant portions of the bundles, documentary evidence and transcripts) is before this Court and it is, consequently, in as good a position as the CCMA to make the decision itself.

The first respondent's misconduct and the disciplinary prosecution thereof

[62] Despite my findings above in regard to the Award, the applicant is certainly not out of the proverbial woods. The formulation of the charge levelled against the first respondent calls for some scrutiny. The sole charge reads: “Fraud – Falsifying Quality records and not doing quality checks”.

[63] While the legal position regarding the formulation of disciplinary charge sheets is unequivocally settled by now, in that such charge sheets should not be akin to or measured against the criminal law standard of charge sheets and employees need only be provided with adequate information to ascertain what misconduct they have allegedly committed and the workplace rule/s they have allegedly breached,[18] the charge sheet in this matter calls for further inspection.

[64] In the matter of EOH Abantu (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and others[19], the LAC maintained and held as follows in regard to disciplinary charge sheets, while recognising the settled legal position regarding

employment charge sheets:

“It is always best for the charges to be precisely formulated and given to the employee in advance of the hearing in order to afford a fair opportunity for preparation. The charges must be specific enough for the employee to be able to answer them...” (at paragraph 15)

“... It will be enough if the employee is informed that the disciplinary enquiry arose out of the fact that on a certain date, time and place he is alleged to have acted wrongfully or in breach of applicable rules or standards.” (at paragraph 16)

- [65] The charge in casu is vague, lacks particularity (in regard to, for example, alleged dates/ period of the misconduct, details as to which records, or parts thereof, were falsified and which checks exactly were not performed) and appears to muddle or include two different allegations into one charge. As the documentation and evidence traversed during the arbitration proved, different dates were involved, and the quality records referred to many different quality checks and processes.
- [66] Ultimately, the rather poor formulation of the charge was a recipe for a disorganised and disorderly hearing into the alleged misconduct and, furthermore, resulted in some prejudice to the first respondent in that it remained unclear and confusing as to exactly (i) which quality records (or portions thereof) were allegedly falsified (ii) when those records were allegedly falsified (iii) which quality checks and tests were allegedly not done and (iv) when those quality checks and tests were allegedly not done. The applicant effectively adopted a shotgun approach by establishing, at random, that certain checks were not done and certain records were falsely completed, without clearly articulating exactly which checks were not done and which records were falsified in a structured manner.
- [67] Since the applicant elected, as dominus litis in the disciplinary process, to charge the first respondent with “Fraud”, it must then proverbially live or die by this decision. In this regard, the following passage and finding by the LAC in the matter of *Monare v South African Tourism and others*[20], bears reference:

“It was not unreasonable for the Commissioner to rely on the so-called ‘criminal law’ definition of fraud. Fraud has the same elements even in a civil law context. The first respondent alleged that the appellant was fraudulent and dishonest and it bore the onus to establish those rather serious allegations ‘clearly and distinctly’, on a balance of probabilities. The fact that the appellant did not comply with the company procedures did not make him guilty of fraud or dishonesty, or even deceitful...” (at paragraph 66)

- [68] The above passage is not to be confused with the third respondent’s (in casu) reviewable irregularities vis-à-vis the irregular manner in which he understood and applied the principles/elements of fraud in his award, as more fully dealt with

above.

[69] Notwithstanding the above considerations, it is indeed apparent that the first respondent committed certain acts of misconduct involving gross dishonesty, negligence and/or non-compliance with Company procedure.

[70] Furthermore, this Court has taken into careful consideration the following facts and circumstances, which ought to be viewed as, at best, mitigating factors for the first respondent:

70.1 as per pages 29 (second paragraph) and 78 of the record, the first respondent had, relatively recently (during July 2020), returned from maternity leave and was placed in a new, alternatively, altered position (Quality Control Assistant/Inspector) to that which she occupied prior to her maternity leave (Material Controller). Therefore, at the time of the alleged misconduct, the first respondent had occupied this new position for a relatively short period of time and, furthermore, a new process and procedure were implemented specifically for the applicant's customer, Reynolds, and the "Hefty" product being produced for this customer;

70.2 as per page 43 of the record, during 2020, the first respondent suffered from a medical complication brought on by a post-c-section infection and postpartum depression;

70.3 evidence was led during the arbitration[21] confirming that (i) a shift supervisor signed off the quality records and checks and (ii) an operator also signs off the quality records and can even conduct certain checks himself, which are only verified by the first respondent. Under cross-examination[22], the applicant's witness confirmed that one "Chris" was the supervisor who signed off on the quality checks and records done by the first respondent, and evidence was led in relation to a Mr "Bafana Twala", who was another supervisor or operator;

70.4 the applicant did not present any tangible or significant aggravating factors. The applicant merely repeatedly referenced a lucrative customer contract, but only in passing and without demonstrating that the contract was affected in any way;

70.5 no evidence was presented or allegation made that the applicant suffered any financial (or other) loss or damage to its business; and

70.6 no evidence was presented of any forms of (prior) progressive discipline having been applied towards the first respondent by the applicant.

The appropriate sanction vis-à-vis the first respondent's misconduct

[71] I have found that, despite certain concerns regarding the manner in which the first respondent was disciplined for her misconduct, the first respondent nevertheless committed acts of serious dishonesty, negligence and/or non-compliance with Company procedures and processes.

- [72] Whether or not the first respondent actually committed fraud, in the true legal or factual sense, is not entirely determinative of the matter and is not prescriptive in regard to the appropriate sanction to be applied to the first respondent, in light of her misconduct. Suffice it to add that I have certain doubts and reservations as to whether the first respondent's misconduct was tantamount to and reached the threshold of fraud, which is a crime.
- [73] The first respondent still committed several repetitive acts of gross dishonesty, negligence and/or non-compliance with Company procedures and processes.
- [74] In addition, the first respondent's conduct, both during the relevant internal disciplinary hearing and CCMA arbitration, left a lot to be desired and, at times, was tantamount to further perpetration of dishonesty on her part.
- [75] Firstly, at the relevant internal disciplinary hearing, the first respondent walked out of the hearing, together with the two shop stewards who were representing her. The first respondent (and the two shop stewards) walked out of the hearing, effectively at the commencement thereof, but after being warned of the risks associated with such conduct. The first respondent's reasons for walking out were poor, even if supplied to her by her trade union and/or the two shop stewards, and demonstrated a contemptuous attitude towards the process and her employer[23].
- [76] Secondly, and as more fully dealt with above, the first respondent was, often, plainly disingenuous when giving evidence under oath during the arbitration in relation to material aspects such as the on-the-job training she received and her access to a computer which she shared with another colleague (Malefitsi).
- [77] Thirdly, the first respondent's evidence during the arbitration, overall, was rather poor, disingenuous, contradictory and/or contrived. She routinely manufactured fanciful versions and defences to the allegations against her.
- [78] This was clearly apparent from the first respondent's testimony involving: (i) a curious understanding of what fraud entails[24] (ii) stubborn arguments (albeit misplaced) that the applicant did not rely on or present any evidence regarding misconduct perpetrated on 14 – 15 November 2020, which caused unnecessary debate and ire[25] (iii) raising new arguments and defences for the first time when giving evidence, which were not put to the applicant's witness, such as not needing to be present to conduct physical checks[26], that the times reflected on the quality records/checklists did not necessarily mean that she was, or had to be, physically present at the machines at that time[27], she could complete the quality records/checklists at "any time"[28], that she was not visible on the video footage because she could have been elsewhere[29], that she could simply "multitask" in order to explain/justify how she was able to still record the measurements in circumstances where she was not present at the

recorded times to conduct the physical checks[30], and that she was not visible on the video footage also because the camera was situated at the back of the machine and would therefore not capture her[31].

[79] In culmination of the above, when concluding her evidence under cross-examination, the first respondent ended by materially

contradicting herself and her own argument and defence to the charges:

“RESPONDENT’S REPRESENTATIVE: My question was that, according to the specifications, the applicant did not follow through with the various checks that need to be conducted. She has herself indicated that the times that she recorded are not necessarily the times that are indicated on these documents. Is going to correct Miss Mabena?”

MS LETTIE MABENA: No it’s not correct. That statement I dispute it. It’s not correct.

RESPONDENT’S REPRESENTATIVE: So these times that are on these documents are a true reflection of the times that you did [interrupted]

MS LETTIE MABENA: Yes.”[32]

[80] Against all of the above, I am guided by the following case law authority.

[81] In the matter of SASBO – The Finance Union and another v Standard Bank of SA Ltd and others[33], the LAC held as follows in relation to an employee who committed acts of documentary dishonesty:

“[1] In National Union of Metalworkers of South Africa obo Nganezi & others v Dunlop Mixing and Technical Services (Pty) Limited & others the Constitutional Court held that: ‘In our law, fiduciary duties are not implied by law into all employment relationships. They may be inferred as a matter of fact from employment contracts and moral notions of trust, confidence, loyalty and good faith.’ This appeal concerns primarily the question whether the conduct of Ms Charline Frazenburg (the second appellant), insofar as it is alleged by Standard Bank of South Africa Limited (the bank / the first respondent) that she falsified its records, amounted to dishonesty and thus breached the duty of trust and fidelity she owed to the bank.”

[17] Dishonesty as an aspect of misconduct is a generic term embracing all forms of conduct involving deception. This Court in Nedcor Bank Ltd v Frank & others defined dishonesty as a lack of integrity or straightforwardness and, in

particular, a willingness to steal, cheat, lie or act fraudulently. Deceitfulness can manifest itself in various forms, which includes

providing false information, non-disclosure of information, pilfering, theft and fraud. The fiduciary duty owed by an employee to the employer generally renders any dishonest conduct a material breach of the employment relationship, thereby justifying summary

dismissal...

- [26] The main thrust of the charge against Ms Frazenburg was that she balanced her till with money that was not in her safe in order to show a balanced position during the period 18 to 20 February 2017. According to the bank, insofar as Ms Frazenburg entered an incorrect figure of her takeover of 17 February 2017, she falsified its records. To consider whether Ms Frazenburg falsified the bank records or that she simply made a mistake requires a careful scrutiny of the evidence presented. Ms Frazenburg sought to portray a picture that, at all relevant times, her team leaders had been around when she attempted to balance her safe....
- [28] Ms Frazenburg agreed to be honest in her dealings with the bank in her general terms of employment which she concluded with the bank. There was no debate, in this case, that there is a rule in the workplace that prohibits falsification of the bank's record which is legally sound and operationally rational. Ms Frazenburg did not contest that she was aware of the rule. As already said, the bank's disciplinary code lists falsification of the bank's records under examples of dismissible offences without previous warnings...
- [29] From the foregoing, the capturing of the false balance on the bank's records points to a dishonest conduct and not foolhardiness as found by the commissioner who clearly paid no attention to the operational needs of the banking industry. Ms Frazenburg's persistent plea of a mistake cannot avail her. The Labour Court correctly reasoned that in the banking environment, as fully set out in the general terms of employment, the employees are expected to be honest and not to circumvent the checks and balances put in place to prevent the misconduct of a kind committed here. The court's assessment of the evidence that Ms Frazenburg altered the bank records to reflect a false picture cannot be faulted.
- [30] Ms Cassim testified that Ms Frazenburg's conduct had an impact on the relationship of trust and continued

employment relationship because she did not live up to one of the values of the bank which is to act with honesty and integrity. The need for employees to act with honesty and fidelity is so fundamental in the financial services industry, more so, where the employees deal with large sums of money. A breach of trust in the form of conduct involving dishonesty is one that goes to the heart of the relationship and is destructive of it. It can hardly be argued that the dismissal was not justified." (own emphasis)

- [82] Furthermore, at no point has the first respondent ever displayed a shred of remorse for her misconduct, either prior to or during the disciplinary hearing and CCMA arbitration. Instead, she put the employer to the trouble of embarking upon a disciplinary hearing (and subsequent arbitration) to prove her guilt. In *De Beer Consolidated Mines Ltd vs Commission for Conciliation, Mediation and Arbitration and Others*[34] the following was held in this regard:

"It would in my view be difficult for an employer to re-employ an employee who has shown no remorse. Acknowledgement of wrong- doing is the first step towards rehabilitation. In the absence of a re-commitment to the employer's workplace values, an employee cannot hope to re-establish the trust which she herself has broken. Where, as in this case, an employee, over and

above having committed an act of dishonesty, falsely denies having done so, an employer would, particularly where a high degree of trust is reposed in an employee, be legitimately entitled to say to itself that the risk of continuing to employ the offender is unacceptably great." (own emphasis)

[83] In the LAC post *Sidumo and another v Rustenburg Platinum Mines Ltd* decision of *Timothy v Nampak Corrugated Containers (Pty) Ltd*,^[35] the following was held in regard to lack of remorse and progressive discipline:

"[the employee] contended that, given the fact that [the employee] had an unblemished record and that, until this point, there was no indication in his conduct of any dishonesty or any impropriety prior to the events that gave rise to this dispute, a form of progressive sanction would have been more appropriate. I have no doubt that these arguments would have carried far greater weight had there been a scintilla of recognition by the appellant of his wrongdoing... Throughout the disciplinary hearing and the hearing before third respondent [the employee] continued to take the view that the allegations brought against him were no more than lies. [The employee] showed no remorse, no recognition of misconduct, save for a blatant and clearly dishonest denial. That places this case into an order of different magnitude from those urged upon us by [the employee]." (own emphasis)

[84] It is trite that the breach of an employee's duty of good faith to an employer is destructive of the employment relationship^[36]. In the case of *Penta Publications (Pty) Ltd vs Scoombie*^[37] the court held that every employee owes a fiduciary duty to his employer.

[85] The court in *Phillips vs Fieldstone Africa (Pty) Ltd*^[38] held that a contract of employment is regarded as a contract of the utmost good faith. In *Thompson vs Samaki Beach Lodge*^[39] the commissioner stated that it is an implied term of the contract of employment that the employee will act with good faith towards his employer and that the duty which the employee owes his employer is a fiduciary one^[40]. The commissioner relied on the case of *Council for Scientific and Industrial Research vs FIJEN*^[41] where the court held that:

"it is a well-established principal that the relationship between an employer and employee is an essence one of trust and confidence."

[86] For all of the reasons stated above, I find that the first respondent's dismissal was substantively fair.

Costs

[87] In relation to costs, this Court has a broad discretion in terms of section 162 of the LRA to make orders for costs according to the requirements of the law and fairness.

[88] The first respondent was a low earner while employed at the applicant, and presumably may have been unemployed for some time after her dismissal, and may still be unemployed.

[89] I therefore find that the interests of fairness, justice and equity dictate and will be best served by each party bearing their own costs.

[90] In the premise the following order is made:

Order

1. The third respondent's arbitration award is hereby reviewed and set aside;
2. The first respondent's dismissal was substantively fair.
3. Paragraphs 54, 55, 56 and 57 of the Award are hereby substituted with the following paragraph:

"54. The Applicant's dismissal was procedurally and substantively fair.

55. The Applicant's referral is dismissed."
4. No order as to costs.

A. Anestidis

Acting Judge of the Labour Court of South Africa

Appearances:

For the applicant: Mr A J Nel

Instructed by: Darren Ledden Inc

For the first respondent: Letsholo M

[1]

[2015] 1 BLLR 50 (LAC) at para 30.

[2] Page 338 of the record, line 22 - 23

[3] Page 339 of the record, line 3 – 4 and 20 - 21

[4] Page 340 of the record, line 16 - 17

[5] Page 347 of the record, line 8

[6] Page 352 of the record, line 1 - 15

[7] Page 366 of the record, line 8 – 11.

[8] Page 383 of the record, line 12 – 15.

[9] Page 389 of the record, line 6 – 11.

[10] Page 394 of the record, line 8 – 13.

[11] Page 396 of the record, line 1 – 4.

[12] As testified by the applicant's main witness on page 258 of the record, line 5 – 12.

- [13] Followed inter alia in *R v Jones and More* 1926 AD 350 at p. 352; *R v Davies* 1928 AD 165 at p. 170; *R v Henkes* 1941 AD 143 161; *S v Heller* (2) [1964] 1 All SA 477 (W); *S v Shaban* [1965] 4 All SA 226 (W); *S v Isaacs* [1968] 1 All SA 20 (D).
- [14] 1934 TPD 52 p. 54
- [15]
- [2024] 12 BLLR 1271 (LAC).
- [16]
- (2010) 31 ILJ 452 (LC) at para 33.
- [17]
- (2019) 40 ILJ 550 (LC) at para 60.
- [18] See: *Avril Elizabeth Home for the Mentally Handicapped v CCMA and others*
- [2006] 9 BLLR 833 (LC); and *EOH Abantu (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and others*
- [2019] 12 BLLR 1304 (LAC).
- [19]
- [2019] 12 BLLR 1304 (LAC).
- [20]
- [2016] 2 BLLR 115 (LAC)
- [21] Page 218 of the record, line 18 to page 222.
- [22] Page 291 – 292 of the record; Page 132 of the record also reflects a Mr “X P Mathebula” as signing next to the first respondent, and an illegible signature is beside the first respondent’s signature on page 102 of the record, which could be a Mr “Twala” as per page 294, line 22 of the record.
- [23] Page 332 of the record, line 19, to page 334 line 7; Page 335 of the record, line 11 – 15.
- [24] Page 351 of the record, line 13 – 14.
- [25] Page 359 of the record, line 7 to page 364, line 18; Page 367 – 369 of the record.
- [26] Page 365 of the record, line 18, to page 366, line 4.
- [27] Page 373 of the record, line 5 to page 377, line 12.
- [28] Page 377 of the record, line 13 – 18.
- [29] Page 389 of the record, line 10 – 12.

- [30] Page 389 of the record, line 13 – 22.
- [31] Page 390 of the record, line 6 – 8.
- [32] Page 396 of the record, line 10 – 18.
- [33]
- [2022] JOL 55532 (LAC).
- [34]
- (2000) 21 ILJ 1051 (LAC).
- [35]
- [2010] 8 BLLR 830 (LAC) at p. 834.
- [36] Thompson vs Samaki Beach Lodge
- [2009] 3 BALR 302 9 (CCMA) at p. 319.
- [37] (2000) 2 BLLR 199 (LC).
- [38] [2004] 25 ILJ 1005 (SCA).
- [39] [2009] 3 BALR 302 9 (CCMA).
- [40] Here the court referenced SAPPI Novoboard (Pty) Ltd vs Bolleurs
- [1998] 5 BLLR 460 (LAC)
- [41] 1996 (2) SA 1 (A) at p. 9 H.
-

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZALCJHB/2025/345.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/east-rand-plastics-proprietary-limited-v-national-unknown-topic-alcjhb-2025>

Prepared on 8 October 2026 · Esheria