

SOUTH AFRICA / JUDGMENT

Kekana v Stapelberg NO and Others (JR2280/21) [2025]

ZALCJHB 178 (19 May 2025)

[2025] ZALCJHB 178

COURT

Labour Court Johannesburg

BEFORE

Daniels

CASE / FILE NUMBER

JR2280/21

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THE

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

NOT REPORTABLE

Case

No: JR2280/21

In

the matter between:

SELLO
LUCKY KEKANA
Applicant
and
COMMISSIONER
STAPELBERG NO
First Respondent
COMMISSION
FOR CONCILIATION,
Second Respondent
MEDIATION
AND ARBITRATION
MAKRO
SA (PTY) LTD
Third Respondent

Heard:

20 February 2025
Delivered: 19
May 2025

Summary: Application to review and set aside an arbitration award. Outcome reasonable. Application dismissed.

JUDGMENT

DANIELS J

Introduction

[1] This is an application brought to review and set aside an arbitration award issued by the first respondent (hereafter the “commissioner”). The commissioner found that the dismissal of the applicant by the third respondent (hereafter the “company” or “employer”) was substantively fair. Procedure was not in dispute.

Background

facts

[2] The applicant was employed as a junior sales manager by the company.

[3] The applicant was charged, found guilty, and dismissed, based on two charges: (1) gross misconduct in that he allegedly failed to follow company procedures in relation to the trade debtor cards which resulted in loss of R170 337, 40; (2) gross negligence in that he allegedly permitted the sale of liquor to a customer without a liquor licence (in circumstances which required a liquor licence) while using the incorrect authorisation documents.

[4] The applicant assisted an individual, Mr Jabu Motsweni (“Jabu”) to obtain liquor from the employer on 28 August 2020 and 1 September 2020.

4.1 On 28 August, liquor was purchased by Jabu, on credit, allegedly for Middelstraat Motors, to the approximate value of R23 000, 00.

4.2 On 1 September, liquor was purchased by Jabu, on credit, allegedly for Formax, to the approximate value of R148 000, 00.

[5] The company discovered that the transactions on both days, allegedly conducted on behalf of two different customers were fraudulent, and had been done in breach of the applicable policies and procedures.

[6] In video footage, recorded on both days, the applicant was seen collecting items from Jabu on 28 August and 1 September. The company believed that these items were gifts from Jabu.

[7] Through its witnesses,[1] the company presented evidence that:

7.1 The applicant, the sales manager, was the most senior manager involved with the transactions.

7.2 The other employees who were involved with the transactions were influenced, or intimidated, by the applicant to approve the transactions. Many employees are scared of the applicant.[2]

7.3 With assistance from the applicant, transactions on Friday 28 August, and 1 September were authorised in the absence of trade debtor cards, despite policies in place.[3] The trade debtor cards are issued by the company to regular and credit worthy customers, and functions as a credit card.

7.4 The applicant presented trade debtor card numbers to the accounts department.[4] In respect of one of the customers, the number was incorrect and had to be corrected by the store staff.[5]

7.5 Contrary to policy, the transactions were approved despite the absence of a liquor licence.[6] Instead, the applicant presented to the cashiers, and staff in the accounts department, “authorisation letters” he received from customers.[7] The cashiers, and the accounts department, accepted the authorisation letters because it came from or through the applicant.[8]

7.6 The applicant actively assisted Jabu to fraudulently obtain liquor on (Friday) 28th August and (Tuesday) 1st September. Among other things, the applicant assisted with the selection of liquor and the taking of the liquor to the parking

area.[9] The applicant actively intervened, with the cashiers and the accounts department, to ensure that the transaction was successful.[10]

7.7 The Covid-19 regulations, which were applicable then, permitted only liquor traders to purchase liquor in excess of 120 (or 150) litres, and only liquor traders could make such purchases on Fridays.[11] However, on the days in question (28 August and 1 September) contrary to the regulations, liquor in excess of 120 (or 150) litres was “purchased” without a liquor trading licence.

7.8 As a result of fraudulent transactions at another of the Makro stores, from May 2020, the company had implemented a “soft lock” which required staff to phone the customer’s contact person for transactions over R15 000, 00.[12] The contact person is reflected on Makro SAP CRM system, and cannot be obtained from the shopper.[13]

7.9 After the transactions, the company discovered that the contacts for those customers, as reflected on the Makro SAP CRM, had not been contacted.

7.10 The applicant represented to Ms Lalla Morgan (“Morgan”), the junior developing trainee in the accounts department, that he had phoned the customer contacts and they had authorised the purchase liquor. Given that Morgan had passed away, this was hearsay evidence, presented by Mr Leach. There was no objection to the presentation of hearsay evidence.

7.11 The applicant collected the supervisor card from Morgan and handed it to the cashier assisting him to conclude the transaction for Jabu.[14] The company's written rule records: "No person may use another person's supervisor card at any given time".[15] At arbitration, the applicant acknowledged that he was aware of the company rules. He also signed a document acknowledging this.[16]

7.12 The applicant assisted Jabu at the till points, despite the absence of the trade debtor card, by providing the cashiers with the card numbers.[17] Furthermore, the applicant assisted Jabu to find the correct quantity of liquor to fall within the credit available to the customers.

7.13 Gifts were obtained from Jabu in suspicious circumstances, and they were not declared. The applicant had no receipt, invoice or other proof that he had purchased any items from Jabu. Furthermore, the video footage demonstrated that:

7.13.1 On 28 August, the applicant collected the gift from Jabu in the parking area and left it in an empty fridge outside the store. At the end of the day, the applicant drove his vehicle all the way around the store to collect the gift.[18]

7.13.2 On 1 September, the applicant told Jabu to leave the gift with security at the "Empties Department" and to inform security that it belonged to the applicant.[19] Later, the applicant collected the item, placed it into a plastic bag, entered the store with it. He did not however declare the gift, as required by the policy.

7.14 As a result of the breach of company policies, the company lost stock to the value of R170 337, 40. The two customers, on whose behalf the liquor was purchased, had to be refunded.

[8] In a nutshell, the applicant contended that he was not the only individual who breached the policies of the company, the accounts department approved the transactions, he accepted no gifts from Jabu (and instead made certain purchases from him), and the company applied discipline inconsistently.

The arbitration award

[9] The commissioner found that:

9.1 The applicant was the most senior person involved with the fraudulent transactions.

9.2 The applicant was intimately and directly involved in the fraudulent transactions, and acted in breach of several policies and procedures. He helped the customers select the stock, he read the trade debtor card numbers to the cashiers without the presence of the cards, he oversaw the use of the supervisor's card by the cashier in the absence of the cashier herself. He also acted in breach of legislation which restricted the sale of liquor (in excess of certain volumes) to customers who were not liquor traders, and which prohibited the sale of liquor, on Fridays, to those who were not liquor traders.

9.3 Morgan received a final written warning for her role in the transactions. It was problematic that the cashiers were not disciplined but the applicant cannot profit from this inconsistency. There was no evidence linking the finance executive and the accounts manager to the transactions.

9.4 On the probabilities, the applicant accepted gifts from Jabu given the source of the gifts, and the absence of any evidence that the items had been purchased.

Legal principles

Review applications in general

- [10] The arbitration process and the resulting arbitration award both constitute administrative action. Accordingly, section 33(1) of the Constitution requires that the process and the outcome must be lawful, reasonable, and procedurally fair.
- [11] It is in this context that the review test^[20] applicable to arbitration awards issued by the CCMA and Bargaining Councils, was formulated, as follows: is the arbitration award one which no reasonable commissioner could reach on the material before him or her? It is known as the “reasonableness test.”
- [12] As to what is reasonable, this must be determined by the circumstances of each case. The court must consider factors such as the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected.^[21]
- [13] In *Bestel v Astral Operations Ltd & others*^[22] the court considered the narrow scope of review and accepted that an arbitrator’s finding would be unreasonable if it is unsupported by any evidence, based on speculation, disconnected from the evidence, supported only by evidence that is insufficiently to justify the decision, or if it was made in ignorance of evidence that was uncontradicted. The Court held that ‘... the ultimate principle upon which a review is based is justification for the decision as opposed to it being considered to be correct by the reviewing court; that is whatever this Court might consider to be a better decision is irrelevant to review proceedings as opposed to an appeal. Thus, great care must be taken to ensure that this distinction, however difficult it is to always maintain, is respected.’ (own emphasis)
- [14] It is important to remember that reasonableness embraces a wide range of outcomes several of which may be reasonable.^[23] The courts have warned that the award, or outcome, must not be evaluated on a piecemeal basis, but on the totality of all the evidence.
- [15] Where a commissioner fails to apply his mind to the material issues, this will usually indicate that the outcome is unreasonable or that the nature of the enquiry was misconceived. However, when a mistake of fact or law does occur, what matters is its materiality – and whether it had a distorting effect on the outcome.^[24]

Grounds of review

[16] The applicant alleges that the award is unreasonable because it is not grounded in the evidence. In essence, the applicant contends that:

16.1 The commissioner failed to consider that the authorisation letters can only be verified or approved by the accounts department.[25]

16.2 The company failed to prove that the items he obtained from Jabu were gifts.

16.3 The evidence (relating to liquor traders) related to instances where liquor was purchased in excess of 150 litres, but this should be 120 litres or more.

16.4 The commissioner ignored evidence that several other individuals were involved, but were not disciplined.

Analysis

of the grounds of review

[17] As previously mentioned, the applicant contends that the commissioner failed to consider that the authorisation letters can only be verified or approved by the accounts department. I do not accept that this is a valid criticism of the award. On the evidence, the commissioner concluded that the applicant helped Jabu select the stock, he read the trade debtor card numbers to the cashiers without the presence of the cards, and he oversaw the use of the supervisor's card by the cashier in the absence of the supervisor. The commissioner also concluded that the applicant acted in breach of legislation, at that time, which restricted the sale of liquor to customers who were not liquor traders (when the circumstances required that they must be). These conclusions are imminently reasonable on the evidence before the commissioner.

[18] The applicant alleges that the company failed to prove that the items he obtained from Jabu were gifts. This submission is without merit. The company was not required to prove beyond doubt that the items were gifts. It suffices that the probabilities indicate that they were gifts. The commissioner's conclusion, on the probabilities, that they were gifts, was reasonable.

[19] The applicant alleges that the evidence (relating to liquor traders) related to instances where liquor was purchased in excess of 150 litres, but this should be 120 litres or more. Nothing turns on this. The applicant did not argue that no liquor licence was required for the transactions.

[20] The applicant alleges that the commissioner ignored evidence that several other individuals were involved but not disciplined. The commissioner did not ignore such evidence. Indeed, the commissioner criticised the company for failing to take disciplinary action against the cashiers. The commissioner found that the applicant could not profit from this failing of the company. This approach cannot be faulted. Our courts have held that inconsistency does not invariably result in unfairness and inconsistency must be assessed to determine the motives

of the employer in the particular circumstances of each matter.[26] There is no indication on the facts of this matter that the inconsistency was capricious. In any event, the evidence suggested

that the cashiers were not employed by the company.

- [21] In my view, in this application, the applicant assesses the evidence in a piecemeal fashion. This is improper. The proper approach is to assess the evidence in its totality and consider whether the outcome is reasonable. In my view, based on the totality of the evidence, the outcome was reasonable. It cannot be doubted that the applicant failed to follow procedures. Had he done so, the significant financial losses to the company could have been avoided. As a manager, trained in the policies, he had no excuse.
- [22] In my view, this application more closely resembles an appeal than a review. The courts must be careful to avoid treating reviews as appeals and therefore, inadvertently, undermining the policy decisions taken by the legislature.[27] In *Sidumo*,[28] at para 245, Justice Ngcobo warned that: "... the drafters appear to have opted for the narrowest species of review. By adopting 'a simple, quick, cheap and non-legalistic' approach to the adjudication of unfair dismissals, the drafters of the LRA intended that, as far as is possible arbitration awards would be final and would only be interfered with in very limited circumstances." More recently, the LAC reminded us that the threshold on review is high. [29] Sutherland JA noted at para 13 that, to meet the threshold on review, the arbitration award must be "so egregious that no reasonable person could reach such a result."
- [23] Even if I am incorrect, and the award was unreasonable based on the reasons provided, the outcome was not so unreasonable that no reasonable decisionmaker could reach it. The evidence indicated that the applicant was involved in the breach of several policies and procedures which had been adopted to prevent theft and fraud. The applicant did not deny that the policies and procedures had been breached, or that he was involved with the breaches. It was clear that large financial losses could have been prevented if the policies had not been breached. Among other things, the applicant's version that he was behaving innocently is belied by his failure to detect the obvious - that Jabu was making two large purchases for two different customers within a matter of days. The applicant's version on the gifts is equally improbable. For example, he had hundreds of rands available to spend on the spur of the moment, he placed the items "purchased" in the hands of others whom he barely knew, he had no proof that he had purchased the items, and he took steps to ensure that the items were not brought into the store.

Costs

- [24] In labour disputes costs do not follow the result. There are no special circumstances which warrant a cost order, based on the dual considerations of law and fairness. Accordingly, no cost order will be made.

Conclusion

[25] In the circumstances, I make the following order:

25.1 The application to review the arbitration award, dated 20 October 2021, issued by the first respondent under case ref GATW16462-20, is dismissed;

25.2 There is no order as to costs.

Reynaud Daniels

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

Mr Khoza

HICRAWU

For the Third Respondent:

Adv Ndebele

Webber Wentzel Attorneys

[1] This included Mr Richard Leach, the General Merchandise Manager; Ms Lerato Modise, a security officer employed by Fidelity Security; Mr Thokozani Masemola, an employee of a labour broker working as a cashier for Makro; Ms Lorraine Morudu, the Risk Manager who chaired the disciplinary hearing. Ms Lala Morgan, who testified at the disciplinary enquiry, had passed away on 11 January 2021. She therefore did not testify at the arbitration, which commenced on 15 June 2021.

[2] Record Vol2: Transcript p125 lines 7 – 10

[3] Record Vol2: Transcript p31 lines 9 – 13; Vol6: p174

[4] Record Vol2: Transcript p66 lines 20 – 25

[5] Record Vol2: Transcript p40 lines 10 – 16

[6] Record Vol2: Transcript p34 lines 8 – 11

[7] Ibid.

[8] Record Vol4: Transcript p194 lines 1 – 12

[9] Record Vol5: Transcript p332 lines 24 – p333 line 2

[10] Record Vol2: Transcript p30 lines 21 – 24

[11] Record Vol2: Transcript p30=3 lines 1 – 5

- [12] Record Vol6: p88
- [13] Record Vol2: Transcript p63 lines 23 – 25; Vol6: p166
- [14] Record Vol4: Transcript p195 lines 19 – 25
- [15] Record Vol6: p82
- [16] Record Vol6: p5
- [17] Record Vol2: Transcript p145 lines 8 – 16; Vol. 4 p197 lines 9 – 25
- [18] Record Vol2: Transcript p36 lines 21 - 25
- [19] Record Vol2: Transcript p35 lines 13 – 23; p41 lines 10 – 21
- [20] Sidumo and another v Rustenburg Platinum Mines Ltd & others
(2007) 28 ILJ 2405 (CC) at para [110]
- [21] Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and others
[2004] ZACC 15; 2004
(4) SA 490 (CC) at para [45]
- [22]
- [2011] 2 BLLR 129 (LAC) at para [18]
- [23] Goldfields Mining SA (Pty) Ltd v CCMA and others (2014) 35 ILJ 943 (LAC) at para [14]
- [24] Head of the Department of Education v Mofokeng and others
[2015] 1 BLLR 50 (LAC) at para [33]
- [25] Record Vol5: Transcript p340 lines 5 – 12
- [26] SA Commercial Catering & Allied Workers Union & others v Irvin & Johnson Ltd 2002
- (3) SA 250 (LAC); (1999) 20 ILJ 2302 (LAC) at para 29; Absa Bank Ltd v Naidu & others (2015) 36 ILJ 602 (LAC) at para
37. See generally, P A K le Roux 'Consistency in Discipline — A New Trend from the Courts?' (2014) 24(5) Contemporary Labour Law at 31.
- [27] Booie v Amathole District Municipality and others (2002) 43 ILJ 91 (CC) at para [51]
- [28] Full citation in fn. 20
- [29] Makuleni v Standard Bank of SA (Pty) Ltd & others
(2023) 44 ILJ 1005 (LAC)

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