

SOUTH AFRICA / JUDGMENT

Solomons v Commission for Conciliation Mediation and Arbitration (CCMA) (C401/2024) [2025] ZALCCT 62 (7 August 2025) [2025] ZALCCT 62

COURT

Labour Court Cape Town

BEFORE

T Du Preez

CASE / FILE NUMBER

C401/2024

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THE

LABOUR COURT OF SOUTH AFRICA,
HELD AT CAPE TOWN

Case Number: C401/2024

Not Reportable

In the matter between:

GARTH
SOLOMONS
Applicant
And
COMMISSION FOR
CONCILIATION MEDIATION
AND
ARBITRATION (CCMA)
First Respondent
COMMISSIONER
CARLTON JOHNSON
Second Respondent
COCA-COLA
PENINSULA BEVERAGES (PTY)LTD
Third Respondent

Heard:

4 July 2025
Delivered: 7
August 2025

JUDGMENT

DU PREEZ AJ

- [1] This is an application in terms of section 145 of the Labour Relations Act 66 of 1995 (“the LRA”) in which the Applicant seeks to review and set aside an arbitration award issued by the Second Respondent (“the Commissioner”) under the auspices of the First Respondent, the CCMA.
- [2] Although the Notice of Motion reflected two individual applicants, the Applicant confirmed in his replying affidavit and during argument that it is only him, Garth Solomons, who is pursuing the review.
- [3] The Commissioner found that the Applicant’s dismissal by the Third Respondent was both substantively and procedurally fair. The Applicant, a cooler technician, had been dismissed for dishonesty relating to his misrepresentation of services allegedly conducted on coolers at various customer sites.
- [4] The grounds of review advanced by the Applicant are: (a) misconduct on the part of the Commissioner; (b) gross irregularity in the conduct of the arbitration; (c) that the Commissioner exceeded his powers; and (d) that the award is one that a reasonable decision-maker could not have made.
- [5] The crux of the Applicant’s case is that the Commissioner ignored material evidence and in doing so arrived at an irrational conclusion in upholding the dismissal.
- [6] It is trite that a review court must not concern itself with the correctness of the decision, but with whether the decision falls

within the band of reasonableness contemplated by the Constitutional Court in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008

(2) SA 24 (CC).

Evaluation.

- [7] The Applicant alleged that his conduct, booking incomplete services as completed services, was common practice within the company and not intended to mislead. He claimed, somewhat confusingly and contradictory, that “services” often entailed only visual inspections and did not always require cleaning condensers or using spares.
- [8] The record of the arbitration proceedings, however, reveals that this defence was inconsistent, contradicted by several witnesses, and in fact stands in contrast to the Applicant’s own prior admissions.

- [9] The Applicant's representative, during the hearing of the review application, attempted to argue that it was always the Applicant's intention to return to the customers in order to "finish" the services. If the Applicant held the real belief that a service will not necessarily always require the cleaning of the condenser, this argument made by his representative makes no sense and in fact contradicts the Applicant's contention that it was not always necessary to clean the condensers. Put differently, if the Applicant did not deem it necessary to wash the condensers before recording a completed service, why would he have had to return to "finish" the services which he already recorded as complete?
- [10] The facts, as they appear from the record, is that the Applicant closed a number of services knowing that the services were either not done or that they were not completed. In this regard, the Commissioner reasoned, in paragraph 61 of the award, that: "in any event it remains a misrepresentation to report to management that a service was done when in fact only a light was replaced for example". In my view, the commissioner's finding falls well within the bounds of reasonableness.
- [11] The Third Respondent led extensive evidence from several witnesses, including Mr Roberts and Mr McAnda, who clearly explained that the defining and most critical feature of a service is the cleaning of the condenser. It was at the very least shown by the Third Respondent that cleaning of the condenser constitutes a substantial and necessary part of a particular service.
- [12] The Applicant's own statements in the disciplinary hearing held on 29 June 2022, which were admitted in the arbitration, confirmed his understanding that condenser cleaning was an essential component of a service. He also confirmed knowledge of the employer's policy against servicing "bastardised" coolers, yet he still recorded those jobs as services after performing mere visual inspections.
- [13] The Applicant's conduct was not an isolated incident, but a pattern repeated over several days and multiple sites. The incentive scheme, tied to the completion of 12 services per day, provided a clear motive for the conduct. The inference drawn by the Commissioner that the Applicant deliberately misrepresented his work to benefit from the incentive scheme cannot be faulted as unreasonable.
- [14] Much was made by the Applicant concerning paragraph 58 of the arbitration award.

In paragraph 58, the Commissioner states the following:

"During cross examination it was not to the respondent's witnesses that the applicants never alleged that the condensers were cleaned. Instead, the applicants argued that they closed the jobs as services completed because no space were used in the process."

- [15] The Third Respondent contends that paragraph 58 of the arbitration award contains an obvious typographical error in that the word "not" should have been "put".

[16] The Applicant on the other hand, suggest that this paragraph shows that the Commissioner failed to consider the evidence presented by the Applicant during the arbitration. The argument is that the Commissioner, in paragraph 58, states that the Applicant failed to put it to the Third Respondent's witnesses during cross examination that he never alleged that the condensers were in fact cleaned. The Applicant denies this and states that he, and the other employees who were involved in the arbitration and dismissed on the same grounds, did in fact concede from the outset of the hearing that the condensers were not cleaned and that it was put

to the Third Respondent's witnesses that they never alleged that the condensers were cleaned and, therefore, the Applicant argues that he was not guilty of misrepresentation or any form of dishonesty.

[17] Considering the arbitration award holistically, it is clear that the Commissioner was well aware of the fact that the Applicant never alleged that the condensers were in fact cleaned and the contents of paragraph 58 of the award, even on the Applicant's interpretation, does not have the effect of rendering the ultimate conclusion reached by the Commission unreasonable.

[18] In *Head of the Department of Education v Mofokeng and others*[1]. The Labour Appeal Court found that:

"[32] However, sight may not be lost of the intention of the legislature to restrict the scope of review when it enacted section 145 of the LRA, confining review to "defects" as defined in section 145(2) being misconduct, gross irregularity, exceeding powers and improperly obtaining the award. Review is not permissible on the same grounds that apply under PAJA. Mere errors of fact or law may not be enough to vitiate the award. Something more is required. To repeat: flaws in the reasoning of the arbitrator, evidenced in the failure to apply the mind, reliance on irrelevant considerations or the ignoring of material factors etc must be assessed with the purpose of establishing whether the arbitrator has undertaken the wrong enquiry, undertaken the enquiry in the wrong manner or arrived at an unreasonable result. Lapses in lawfulness, latent or patent irregularities and instances of dialectical unreasonableness should be of such an order (singularly or cumulatively) as to result in a misconceived inquiry or a decision which no reasonable decision-maker could reach on all the material that was before him or her.

[33] 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 inquiry. 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 upon the arbitrator's conception of the inquiry, the delimitation 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. A 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 enquiry 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.”

[19] It is irrelevant if the Applicant placed the version that he never stated that he cleaned the compressors to the Third Respondent’s witnesses. What is relevant is the evidence which presented before the Commissioner to the effect that it was a critical part of a service for the condenser to be cleaned, that a service cannot be recorded if the condenser was not cleaned, and the Applicant’s concession that he did in fact record services, and claimed the incentives, despite the fact that the condenser was not cleaned.

[20] The Commissioner further found, in paragraph 61 of the award, that the Applicant’s representation that he conducted 7 services in 15 minutes is “so unlikely that it does not require any further consideration”. The Applicant, in this instance, reported that he conducted 7 services and fitted a fan on 6 June 2022 at Ottery Friendly Supermarket where he spent approximately 15 minutes only. In light of the fact that it was common cause that a service takes between 3 minutes and 30 minutes to complete, the conclusion reached by the Commissioner falls well within the bounds of reasonableness.

[21] In *Quest Flexible Staffing Solutions (Pty) Ltd (A division v Lebogate (Quest Flexible Staffing) [2]*, the LAC confirmed the test to be applied on review:

“[12] The test that the Labour Court is required to apply in a review of an arbitrator’s award is this: “Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?” Our courts have repeatedly stated that in order to maintain the distinction between review and appeal, an award of an arbitrator will only be set aside if both the reasons and the result are unreasonable. In determining whether the result of an arbitrator’s award is unreasonable, the Labour Court must broadly evaluate the merits of the dispute and consider whether, if the arbitrator’s reasoning is found to be unreasonable, the result is nevertheless capable of justification for reasons other than those given by the arbitrator. The result will, however, be unreasonable if it is entirely disconnected with the evidence, unsupported by any evidence and involves speculation by the arbitrator.

[13] An award will no doubt be considered to be reasonable when there is a material connection between the evidence and the result or, put differently, when the result is reasonably supported by some evidence. Unreasonableness is, thus, the threshold for interference with an arbitrator’s award on review.”

- [22] The Commissioner carefully considered the evidence and gave comprehensive reasons for his findings. The assertion that he ignored material evidence is not borne out by the record or the arbitration award. He weighed the Applicant's version against extensive contradictory evidence and found it improbable and dishonest. That finding was open to him on the facts.
- [23] The Commissioner's finding in paragraph 67 of the arbitration award that he "find no legal basis to displace the findings of the respondent that dismissal was an appropriate sanction" in my view shows a clear understanding of his duties as arbitrator and the trite authority that "But recognising that the employer has such discretion does not mean that in determining whether the sanction imposed by the employer is fair, the commissioner must defer to the employer. Nor does it mean that the commissioner must start with bias in favour of the employer. What this means is that the commissioner, as the CCMA submitted, does not start with a blank page and determine afresh what the appropriate sanction is. The commissioner's starting point is the employer's decision to dismiss. The commissioner's task is not to ask what the appropriate sanction is but whether the employer's decision to dismiss is fair"[3].
- [24] The review grounds premised on misconduct, gross irregularity, and excess of powers are equally without merit. There is no suggestion that the Commissioner failed to apply his mind to the material issues or that he misunderstood the nature of the enquiry before him.
- [25] It must be mentioned that, In the Applicant's founding papers, the Applicant refers to page 39 and 40 of the transcribed record and suggest that the Third Respondent's witness testified that services are done by doing "visual checks of the overall compressor, meaning the doors, light, handles, the gaskets and then also, checking the condenser and looking, listening for any visual vibrations". The Applicant's representative repeated the above submissions during argument.
- [26] The Applicant's argument, as I have stated above, was that this was the Third Respondent's witness' evidence as to what a service entails and that it did not necessarily include the cleaning of the condensers.
- [27] Mr Cassels, on behalf of the Third Respondent, correctly pointed out that the Applicant failed to refer the Court to the next 2 pages of the record, page 41 and 42, where the same witness confirmed that "the most important thing is cleaning of the condensers" and "commissioner, it's, the reason why we clean the condensers, it's almost like an oil change of a vehicle when you do a service of a vehicle. It's imperative that that is always clean because that is the heart of the engine, and the heart of the engine being here is the compressor, to expand the lifespan of it and to prevent breakdowns".
- [28] Further to the above, the Applicant, whilst complaining that the Commissioner was unreasonable in finding that he did misrepresented the true nature of the work done in order to benefit from an incentive scheme, attempted to argue that he was unable to complete the services as he was requested by management to assist other employees, and in the case of 6 June 2022, where he reported 7 services in 15 minutes, that he had to attend to

a SARS meeting at 14:30. The fact remains that the Applicant did report that he conducted the services and claimed entitlement to the incentive scheme. If he was unable to finish the services due to circumstances beyond his control, he should not have recorded the services as completed and he should not have claimed the incentive bonus.

[29] The contention that he did perform the services and was entitled to the incentive, despite the failure to clean the condensers, contradicts the contention that he was not able to complete the services due to meetings or management instructing him to assist other employees.

[30] This Court finds that the award is reasonable, rational, and justifiable on the evidence presented. The application for review must accordingly fail.

Delay in dismissing the Applicant.

[31] The Applicant states that the delay in his dismissal indicates that the trust relationship is still intact.

[32] The delay in instituting disciplinary action and eventually dismissing the Applicant was not excessive. The notice to attend the disciplinary hearing was served on the Applicant on 2 August 2022 and the outcome of the hearing was received on 22 August 2022.

[33] The relatively short delay in finalising the disciplinary hearing does on its own supports the contention that there was no breakdown in the trust relationship. The Applicant did not dispute the Third Respondent's evidence that technicians work independently and without supervision and that a high degree of honesty is expected from them.

[34] In *Autozone v Dispute Resolution Centre of Motor Industry and Others*[4], the LAC held that:

"[13] Dishonest conduct, deceitfully and consciously engaged in against the interests of the employer, inevitably poses an operational difficulty. The employer thereafter will be hard pressed to place trust in such an employee. It will be difficult going forward for any task involving a measure of discretion or reliance to be entrusted to the deceitful employee. The operational requirements of the employer alone, therefore, may very well justify the dismissal. An employer is entitled to have a driver it can rely on to act in good faith to advance and protect its interests."

Costs.

[35] Although Mr. Cassels presented strong argument in support of a cost order being granted in favour of the Third Respondent, I am mindful of the fact that the Applicant has lodged this application as an individual and the trade union which assisted him has not been cited as a party to these proceedings.

[36] Although the Third Respondent did not specifically seek a cost order against the union official representing the Applicant, I do not believe that such an order would be justified in the circumstances.

[37] In *Indwe Risk Services (Pty) Ltd v Van Zyl*[5] the Court considered circumstances where a *de bonis propriis* cost order was warranted and held that:

“I am also mindful of the fact that an order for costs de bonis propriis is only awarded in exceptional cases and usually where the court is of the view that the representative of a litigant has acted in a manner which constitutes a material departure from the responsibilities of his office. Such an order shall not be made where the legal representative has acted bona fide or where the representative merely made an error of judgment. However, where the court is of the view that there is a want of bona fides or where the representative had acted negligently or even unreasonably, the court will consider awarding costs against the representative. Because the representative acted in a manner which constitutes a departure from his office, the court will grant the order against the representative to indemnify the party against an account for costs from his own representative. (See in general Erasmus Superior Court Practice at E12-27.)” (own emphasis)

[38] In *Chithi and others In Re Luhlwinini Mchunu Community v Hancock and Others*[6] the Supreme Court of Appeal confirmed the principle that an order of costs *de bonis propriis*, can only be made against a person once such a person at least has had the opportunity to address the court regarding such a possible costs order. There is no indication in the answering papers or in the Third Respondent’s heads of argument that costs will be sought against the union or the union official who represented the Applicant.

[39] Whilst the review application, in my view, is without merit, the Applicant as an individual employee who has been dismissed should not be ordered to pay the costs of the review as it will have the effect of discouraging employees to seek redress in the Labour Court protecting their rights if they believe that they have been violated, even if the approach to the Court might be misguided.

[40] In the circumstances, the following order is made

Order:

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

T Du Preez AJ

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr J Dlala

NATIONAL UNION FOR ALL SECTORS

For the Third Respondent: Mr G Cassels

MASERUMULE ATTORNEYS

- [1] [2015] 1 BLLR 50 (LAC)
 - [2] (2015) 36 ILJ 968 (LAC) at paras 12 - 13
 - [3] Sidumo and Another v Rustenburg Platinum Mines Ltd and Others 2008 (2) SA 24 (CC). at par 178
 - [4] (JA52/2015) [2019] ZALAC 46; [2019] 6 BLLR 551 (LAC); (2019) 40 ILJ 1501 (LAC) (13 February 2019)
 - [5] (2010) 31 ILJ 956 (LC)
 - [6] [2021] JOL 51092 (SCA).
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