



THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable
Case no: C574/2023

In the matter between:

ROBERT LEBI

Applicant

and

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

First Respondent

PATRIC STILWELL N.O.

Second Respondent

DSV SOLUTIONS (PTY) LTD

Third Respondent

Heard: 27 August 2026

Delivered: 28 August 2026

JUDGMENT

JACOBS AJ

Introduction

[1] This is an opposed review application.

[2] The Applicant seeks an order:

- 2.1 Reviewing and setting aside the award of the Second Respondent under case number RFBC 69443, dated 30 September 2023 in terms of section 145 of the Act;
- 2.2 The court determining the dispute in the manner it considers appropriate by substituting its decision for the award;
- 2.3 Costs against any such party that opposes the relief sought by the Applicant; and
- 2.4 Granting the Applicant further and/or alternative relief.

Preliminary issues

[3] Certain preliminary objections were raised on behalf of the Third Respondent. These are that the review application was filed one day late, that the record was not dealt with within the 60-day limit imposed by the Practice Manual in operation at the time, and that the Applicant had not adhered to a perceived requirement that the notice in terms of Rule 7A(8) had to be delivered within 10 days of compliance with Rule 7A(6).

[4] At commencement of proceedings, a condonation application for the late filing of the review application was handed up by counsel for the Applicant. This application was not opposed. On behalf of the Third Respondent, it was submitted that the preliminary issues relating to delays would not be pursued, and that the Third Respondent would raise no objection to condonation being granted.

[5] Considering factors such as the degree of lateness, the reasons for lateness, the balance of convenience, possible prejudice to the parties and the interest of justice, condonation is granted for the late filing of the review application and the delay between compliance with 7A(6) and the filing of the notice in terms of Rule 7A(8).

- [6] In light of factors such as the initial filing of the wrong record by the CCMA, and the consensus between the parties that it would be in the parties best interest and the interest of justice for the matter to be disposed of on the merits, reinstatement is ordered as far as the matter may have been deemed withdrawn due to the failure to file the record within the 60-day limit.

Historical context

- [7] The Applicant was appointed as operations manager by the Third Respondent on 1 January 2021.
- [8] On 2 December 2022 an incident occurred involving the Applicant and one of his colleagues, Ms Pearl van der Merwe ("Pearl"). Pearl insisted on working overtime, but the Applicant as her manager, denied the request.
- [9] Pearl would not accept the Applicant's decision and an argument ensued. During the heated exchange between the Applicant and Pearl, both of them resorted to colourful language. The Applicant told Pearl to "stop fucking interrupting me" and she also used the same expletive rather unsparingly. During the altercation, Pearl turned around to leave, and the Applicant approached her and put his hand(s) on her shoulders to turn her around.
- [10] Two other employees witnessed the incident, and more employees were present in close proximity.
- [11] Both Pearl and the Applicant were called before disciplinary hearings, and both were dismissed, the Applicant on 19 December 2023.
- [12] The charges against the Applicant were for the use of abusive and offensive language on the company premises and assault.
- [13] The Applicant admitted to swearing although the number of times the offending words were used, was in dispute. The Applicant also admitted that he had taken Pearl by the shoulder to physically turn her around. Whether he used one or two hands was in dispute.

[14] The Applicant believes that the sanction of dismissal was too harsh and he referred a dispute to the NBCRFLI. The dispute was subsequently transferred to the CCMA.

[15] The Applicant challenged only the substantive fairness of his dismissal at the arbitration hearing on 20 September 2023.

[16] The Second Respondent (the Arbitrator) issued an award on 30 September 2023, in which he ruled that the dismissal of the Applicant was fair.

The arbitration award

[17] In his award, the Arbitrator recorded that the Applicant's case relied entirely on the contention that the sanction of dismissal was too harsh.

[18] The Arbitrator found that the sanction of dismissal fell within the range of fair sanctions because:

18.1 The disciplinary code prohibited swearing and assault;

18.2 Pearl had been dismissed for her role in the incident;

18.3 Case law exists that supports the notion that this type of conduct is dismissible; and

18.4 The Applicant's conduct also entailed a violation of a person's constitutional rights.

[19] The Arbitrator found that the Applicant's dismissal was substantively fair.

Test on review

[20] Despite a submission by counsel for the Applicant that the correctness test could apply in this instance due to the nature of the Arbitrator's alleged misconduct, it is clear that the test applicable in this instance can only be the reasonable-test, as formulated in *Sidumo*.¹

¹ *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others* (2007) 28 ILJ 2405 (CC); *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others* (2008) 29 ILJ 964 (LAC).

[21] The test therefore is whether or not the decision reached by the arbitrator, was one that a reasonable decision maker could not reach. In other words, whether or not the award falls outside of the range of reasonableness.²

The review grounds

[22] The Applicant pleaded that the Arbitrator's award stands to be reviewed and set aside for the following reasons:

- 22.1 The Arbitrator failed to consider the comprehensive written submissions made pursuant the arbitration hearing;
- 22.2 Arbitrator failed to consider that the employer bears onus to prove fairness of dismissal and in particular that dismissal was the appropriate sanction due to the breakdown of the trust relationship;
- 22.3 The Arbitrator failed to consider arbitration is hearing *de novo* and decided the issue of assault on evidence that was relied on by the employer during the disciplinary hearing;
- 22.4 The Arbitrator unduly deferred to the employer's reasoning;
- 22.5 The Arbitrator failed to consider that the employer led no evidence regarding the appropriateness of the sanction of dismissal;
- 22.6 The Arbitrator failed to consider that the employer had presented no evidence regarding the breakdown of the trust relationship;
- 22.7 The Arbitrator failed to consider that the employer adduced no evidence regarding a zero-tolerance policy relevant to the charges, or that such a zero-tolerance policy was justified; and
- 22.8 The Arbitrator had failed to consider that the employer presented no evidence regarding the consistent application of the rule.

² See eg: *Sidumo supra*; *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA* (2014) 35 ILJ 943 (LAC); *Securitas Specialised Services (Pty) Ltd v Commission for Conciliation Mediation and Arbitration and Others* [2021] 5 BLLR 475 (LAC).

[23] The Applicant emphasised provocation as a defence against the allegations levelled against him. He also emphasised his version of swearing only once and only laying one hand on Pearl.

Submissions by the parties

[24] For the Applicant, the grounds for review referred to above, were elaborated on. Emphasis was placed on the following aspects:

24.1 The Arbitrator's apparent failure to consider the comprehensive written submissions made by the Applicant pursuant the arbitration hearing. It was submitted that no reference was made to the Applicant's extensive submissions, although the Arbitrator referred to submissions by the Third Respondent twice in his award.

24.2 It was argued on behalf of the Applicant that the import of the facts and the Arbitrator's unreasonable interpretation thereof, is central to the application.

24.3 The Applicant's reliance on provocation as a defence was reconfirmed.

24.4 It was submitted that a zero-tolerance approach to misconduct may not merely be assumed or adopted and that no evidence was placed before the Arbitrator that such an approach applied to the misconduct that the Applicant was charged with.

24.5 The Arbitrator's unreasonably failed to deal with the question whether the trust relationship had been broken.

[25] For the Applicant, it was submitted that the Arbitrator had committed irregularities and errors that no reasonable arbitrator could make, and that the conclusions he reached and the award he issued, were therefore unreasonable.

[26] For the Third Respondent it was submitted that the ruling made by the Arbitrator is not shocking and falls well within the required band of reasonableness.

[27] The Third Respondent submitted that the Arbitrator correctly and accurately summarised the relevant contextual issues.

[28] The Third Respondent submitted that the award was reasonable.

Evaluation

- [29] The parties agreed that the arbitration hearing was a hearing *de novo* and that the only issue for determination by the Arbitrator, was the question whether dismissal was the appropriate sanction. This had to be determined in light of the evidence before the Arbitrator.
- [30] The Applicant's submission that the Arbitrator had failed to consider the comprehensive written submissions made by the Applicant pursuant the arbitration hearing cannot be sustained.
- [31] The first reference in the award to submissions made by the Third Respondent, related to authorities dealing with swearing as a form of misconduct. The second reference criticised the Third Respondent's submissions of what actions may constitute assault.
- [32] The averment that the Arbitrator had failed to consider submissions made by the Applicant is not substantiated by the material before court. In the award, at par 4.1, the Arbitrator confirms that he had considered all oral and documentary evidence and arguments placed before him.
- [33] The fact that the Arbitrator's award does not accord with the submissions made by the Applicant pursuant the arbitration hearing, does not necessarily mean that the submissions were not considered.
- [34] The Applicant's allegation in the papers that the Arbitrator failed to consider that the arbitration is a hearing *de novo* is not supported. The transcript shows that the Arbitrator had emphasised this fact during arbitration proceedings.
- [35] The facts relevant to determining whether assault was proven or not, were sufficiently canvassed at arbitration. The transcript shows that it was common cause that the Applicant had put a hand on Pearl to turn her around. Whether it was one hand or two, it remains common cause that the Applicant had tried to physically turn Pearl around when she sought to walk away from the heated altercation with the Applicant. This is assault.
- [36] Whether the Applicant had sworn once or three times is of little consequence. It was unacceptable for the Applicant, as a manager, to resort to such language

in the circumstances. Resorting to the language he had used in the circumstances, was not acceptable conduct.

- [37] The Applicant in his own testimony submitted that they worked in a high-volume, volatile workplace. Reliance on a defence of provocation when the workplace standard is challenging, is not convincing.
- [38] The matter of provocation has previously been dealt with by this court. The very fact that a person's actions followed in response to the conduct of another does not mean that the law will come to their aid.³ In *Nampak Products (Pty) Ltd t/a Megapak v CCMA and Others*,⁴ the court confirmed that the mere raising of provocation as a defence, does not automatically spare the employee from a dismissal. The court emphasised that when provocation is raised, the inquiry is whether the extent of the provocation was such that it would have caused any reasonable person in the position of the assailant to have responded in that way.⁵ The courts in *Nampak* and *Tedco Plastics* emphasised that provocation cannot be accepted as a defence if the act under scrutiny was not defensive but aggressive in nature.⁶ The Applicant's conduct in this matter was not defensive.
- [39] There is no indication that the Arbitrator had merely deferred to the employer's reasoning as the Applicant suggested. The evidence before the Arbitrator supported the conclusions he reached.
- [40] The Applicant submitted that Arbitrator failed to consider that the employer bears the onus to prove the fairness of the dismissal, and in particular that dismissal was the appropriate sanction due to the breakdown of the trust relationship.
- [41] The Applicant submitted that the Arbitrator failed to consider that the employer had presented no evidence regarding the breakdown of the trust relationship.

³ *Tedco Plastics (Pty) Ltd v National Union of Metalworkers of SA & others* (2000) 21 ILJ 2710 (LC).

⁴ (C512/2018) [2021] ZALCCT.

⁵ At par [35].

⁶ *Nampak supra* at par 36.2; *Tedco Plastics supra* at par [15].

- [42] Dismissal is an operational response to an untenable situation.⁷ Whether misconduct had breached the trust relationship to an extent that rendered the employment relationship intolerable can be deduced from the facts and does not always require specific evidence. Where misconduct is such that it can be accepted that an employer would lose trust in the employee, no evidence is necessary to show that the trust relationship had been irretrievably destroyed.⁸
- [43] In this instance the Applicant's conduct toward a female subordinate in the presence of other employees, cannot be tolerated.
- [44] The Applicant argued that the Arbitrator failed to consider that the employer adduced no evidence regarding a zero-tolerance policy relevant to the charges, or that such a zero-tolerance policy was justified. There is no requirement that a zero-tolerance policy must exist before dismissal can be considered. Each instance is evaluated in its particular context with reference to the facts relevant to that matter. If the misconduct is serious, the employee is senior and does not appreciate the inappropriateness of his conduct, a reasonable operational response will be the dismissal of the employee.
- [45] The Applicant submitted that the Arbitrator had failed to consider that the employer presented no evidence regarding the consistent application of the rule.
- [46] Where an allegation of inconsistency is made, the gravity of misconduct remains a critical factor in weighing whether the sanction imposed by the employer is unfair.⁹ The arbitrator must consider the simple question whether the dismissal was fair, based on his own sense of fairness. The question cannot possibly be answered on the basis of somebody else's notion of fairness.¹⁰

⁷ See eg: *PSA OBO Rae v General Public Services Sectoral Bargaining Council and Others* (JR755/14) [2017] ZALCJHB 410 (6 April 2017); *Schwartz v Sasol Polymers and Others* (JA46/2014) [2015] ZALAC 58; (2017) 38 ILJ 915 (LAC) (5 October 2015).

⁸ See eg: *Autozone v Dispute Resolution Centre of Motor Industry and Others* (JA52/2015) [2019] ZALAC 46; [2019] 6 BLLR 551 (LAC); (2019) 40 ILJ 1501 (LAC) (13 February 2019)

⁹ *Monte Casino v Commission for Conciliation Mediation and Arbitration and Others* (JR 314/2011) [2012] ZALCJHB 171 (27 December 2012) at [13]

¹⁰ *Monte Casino supra* at [14].

Once a finding is made that an employee is guilty of dismissible misconduct, the sanction of dismissal is justified.¹¹

Conclusion

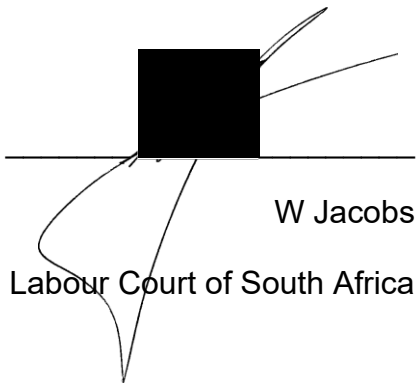
[47] An arbitrator's conclusions must fall within a range of decisions that a reasonable decision maker could make.¹² The court must broadly evaluate the merits of the dispute and consider whether the resulting award can be justified, even for reasons other than those relied on by the arbitrator. The court must consider the totality of the evidence in deciding whether the decision made by the arbitrator is one that a reasonable decision maker could make.¹³

[48] The Arbitrator's ruling resonates with the evidence placed before him. The Arbitrator's reasoning, evaluation of the facts and the conclusions reached by him, fall well within the band of decisions which a reasonable decision-maker could make on the available evidence.

[49] In the result, the following order is made:

Order

1. The application is dismissed.
2. There is no order of cost.



W Jacobs
Acting Judge of the Labour Court of South Africa

¹¹ Also see: *Samancor Limited (Eastern Chrome Mines) v Commission for Conciliation, Mediation and Arbitration Limpopo and Others* (JA140/2018) [2020] ZALAC 17; [2020] 9 BLLR 908 (LAC); (2020) 41 ILJ 2135 (LAC) (18 May 2020); *SACCAWU & others v Irvin Johnson Limited* [2008] BLLR 869 (LAC).

¹² *Sidumo supra*

¹³ *Securitas Specialised Services (Pty) Ltd v Commission for Conciliation Mediation and Arbitration and Others* [2021] 5 BLLR 475 (LAC).

Appearances:

For the Applicant: - Adv M Aggenbach

Instructed by: - De Waal Boshoff Inc

For the Third Respondent: - Adv A.J. Nel

Instructed by: - Darran Ledden Inc

LABOUR COURT