



(1) Reportable: No
(2) Of interest to other Judges: No
(3) Revised

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Signature

08/09/2026
Date

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case no: JR 1828/23

In the matter between:

TIRISANO TRANSPORT AND SERVICES WORKERS

UNION (TASWU) obo MAKUA

Applicant

and

MOTLATSI PHALA N.O.

First Respondent

NATIONAL BARGAINING COUNCIL FOR

THE ROAD FREIGHT AND LOGISTICS INDUSTRY

Second Respondent

INTERWASTE (PTY) LTD

Third Respondent

Heard: 22 April 2026

Delivered: 08 September 2026

JUDGMENT

RAMASHIA, AJ

Introduction

- [1] This is an application in terms of section 145 (1) (a) read with section 156 (1)(g) of the Labour Relations Act¹ (the LRA) to review and set aside an arbitration award, dated 15 August 2023.
- [2] The said award was issued by First Respondent (Arbitrator), under the auspices of the Second Respondent, the National Bargaining Council for the Road Freight and Logistics Industry; under case Number GPRFB68826

Factual Background

- [3] Mr. Lazarus Makua (Makua), on whose behalf Tirisano Transport And Services Workers Union (TASWU) brought the application, was employed on a permanent basis by Interwaste (Pty) Ltd (the company) as a Truck Driver in May 2022
- [4] Following an incident which took place on 29 August 2022, (details of which are fully described below), Makua appeared before an internal disciplinary hearing to answer charges of alleged misconduct.
- [5] The said charges were listed as follows:

“8.1 in that on 29th August 2022, you left the vehicle unattended. This resulted in the vehicle rolling and causing damage to the company property. Your actions have placed the lives of your colleagues at risk and have resulted in financial implications for the company. Your behaviour is not acceptable to management.”

“8.2 In that on 29th August 2022 you failed to adhere to the Standard Operating Procedure and report an alleged brake defect prior to departure.”

- [6] The internal disciplinary hearing found Makua guilty of misconduct and dismissed him in September 2023.
- [7] Following his dismissal, Makua referred an unfair dismissal dispute to relevant Bargaining Council alleging that his dismissal was substantively unfair.

¹ Act 66 of 1995, as amended

The issue before the Arbitrator

- [8] The main issue to be decided by the Arbitrator was whether Makua's dismissal was substantively fair or not.

Undisputed Facts

- [9] The employer is a waste disposal and logistics company. The company allocates trucks to drivers on daily basis to go out and carry out the business of the company servicing various clients.
- [10] To ensure the smooth operation of the company and to adhere to the relevant legislation regulating health and safety protocols, drivers and other relevant members of the workforce were required to observe the company's established Standard Operation Procedure (SOP).
- [11] On 29 August 2022, Makua parked a truck allocated to him near the gate of the company's premises. Thereafter, the unattended truck rolled forward and crashed into a carport next to the main gate, causing some damage to the company's property.
- [12] Subsequently, one of the Controllers called the depot manager, one Mr. Peter van Der Walt (Van der Walt) to report the incident.
- [13] After visiting the scene of the incident and having ensured that the truck was secure, Van Der Walt went to the control room to view the footage.

Applicable legislation

- [14] According to Schedule 8 to the LRA, a dismissal is regarded as unfair if it is not carried out for a fair reason and in accordance with a fair procedure.
- [15] In situations where a dismissal is not automatically unfair, as is the situation in the present case, the employer bears the burden to prove that the reason for the dismissal is related to the employee's conduct.

- [16] An employer discharges this burden by subjecting an employee to a disciplinary enquiry wherein evidence is led to prove that the conduct of an employee falls within the range of a prohibited act or omission.

The Arbitrator's findings

- [17] After the dispute was referred to the bargaining council, the matter was duly set down and argued before an arbitrator appointed on behalf of the relevant bargaining council.
- [18] Pursuant the arbitration proceedings, the Arbitrator concluded that Makua's dismissal was substantively fair.
- [19] In paragraph 4.1 of the award dated 15th August 2023; under the heading "*Analysis of argument and evidence*", the Arbitrator stated as follows:

"The applicant was charged with Misconduct

- (1) in that on the 29th August 2022, you left the vehicle unattended, this resulted in the vehicle rolling and causing damage to the company property. Your actions have placed the lives of your colleagues and risk and have resulted in financial implications for the company. Your behaviour is not acceptable to management.
- (2) in that on 29 August 2022 you failed to adhere to the Standard Operating Procedure and report an alleged brake defect prior to departure."

- [20] After the arbitrator's finding that Makua's dismissal was substantively fair, the applicant trade union brought an application on Makua's behalf before this court in terms of section 145 and or 158(1)(g) LRA, for a review and setting aside of the Bargaining Council's Award.

- [21] The Applicant trade union seeks an order, substituting the award issued by First Respondent under the auspices of Second Respondent, with a finding that; its member, Makua's dismissal be declared to be substantively unfair; alternatively, that the matter be remitted back to the Second Respondent for proper determination before a Panelist other than the First Respondent

The Arbitrator's Analysis of the Evidence

[22] Having had regard to the submissions and evidence led on behalf of the parties, the Arbitrator made the following observations:

- 22.1 Since the employee had been working for the company for 10 years, he must have been familiar with the safety protocols and procedures drivers were expected to observe in handling trucks they operated.²
- 22.2 The company provided refresher courses for its employees from time to time in order to improve their efficiency and effectiveness in operating their tools of trade.
- 22.3 As proof thereof, the arbitrator referred to the evidence tendered by a certain Mr. Van Der Walt, a senior officer of the company who also testified at the disciplinary hearing.
- 22.4 Van der Walt's evidence was in the form of an attendance register of employees who participated in the training course.
- 22.5 As a beneficiary of the training session in the discipline of SOP for Vacuum and Super Sucker, the arbitrator was satisfied that Makua understood what was required of him in relation to the SOP
- 22.6 In terms of the SOP the driver was required to complete a vehicle checklist before leaving the premises.
- 22.7 As part of the trite protocol, once the document was completed, it was handed to the Controller who would sign same and affix a stamp to confirm that the truck was ready to depart.
- 22.8 The document completed by the driver pointed out that there was no spill kit and park brakes.
- 22.9 Having had regard to defects identified it was clear that the truck was not ready to be driven out of the employer's premises.

² On page 4 of the Award.

- 22.10 In terms of the established protocol, the appropriate correct course of action was to report the defects to the Controller and then refer the truck to the workshop for repairs.
- 22.11 The authorization invoice was a book called the "Red Book" into which issues arising from the checklist must be written by the controllers.
- 22.12 There was no record of an entry in the red book which is ordinarily completed by the controller.
- 22.13 Makua's account of why he left the car unattended, when it rolled down towards the gate was that he had gone to the office to report the problems he had identified with the truck.
- 22.14 While the driver contended that he gave the checklist to one Owen Maphopha, his controller, who affixed the stamp authorizing him to go, there was no explanation as to how the controller was going to deal with the defects raised.
- 22.15 The offence committed by the employee had an element of dishonesty if one considered the questionable checklist the employee submitted.
- 22.16 In the absence of the testimony of Owen Maphopha (who had already been dismissed for collusion arising from the same event); the arbitrator accepted as plausible, the inference drawn by the employer which postulates that Makua initially completed the checklist without pointing out the defects.
- 22.17 Once the accident happened, he 'colluded' with his controller, Owen Maphopha to alter the checklist in order to reflect the defects.
- 22.18 As regards the parity principle raised by the employee, claiming that that the company had been inconsistent in applying discipline and in particular the sanction of dismissal since two other employees had damaged the employer's property but were not dismissed, the Arbitrator noted that unlike the offences committed by the other employees, the arbitrator

concluded that Makua's offence had an element of dishonesty if one considers the 'questionable' check list he submitted.

- [23] It should be borne in mind that the case that the employee was called upon to answer before the Arbitrator was based on the following charges:

"The applicant was charged by with Misconduct (1) 'in that on the 29th of August 2022, you left the vehicle unattended, this resulted in the vehicle rolling and causing damage to the company property. Your actions have placed the lives of your colleagues and at (my correction) risk and have resulted in financial implications for the company. Your behaviour is not acceptable to management."

- [24] It is trite that the requirement for substantive fairness is that the dismissal must be based on a valid, proven reason; and that dismissal must be an appropriate response to the circumstances, assessed holistically.

Applicant's case

- [25] In the matter before court the Applicant has taken issue with the Arbitrator's finding that there was collusion between Applicant and his supervisor, Owen Maphopha without any evidence of dishonesty being led by the employer.
- [26] The applicant trade union also alleges that its member (Makua) was found guilty of an offence he was not invited to answer at the hearing.
- [27] In addition to the above, applicant identifies several issues arising from Van der Walt's evidence listed below which applicant argues that the arbitrator failed to consider in arriving at her decision. These include:

- 27.1 the fact that he testified that he can't tell when the comments about the brakes were made;³

³ Index Record Vol 2-page 201 line 622.

- 27.2 the fact that he testified that in reading the applicant's statement he is not 100% confident and sure whether the Applicant reported the faulty brakes as he did not state whether he reported it to Owen or Pendile;⁴
- 27.3 the fact that he could not dispute that the applicant wrote the comments and Owen stamped the checklist;⁵
- 27.4 Van der Walt's reference to another checklist that was written by Eliam who took the truck to the workshop directly after the accident and Eliam's comments also reflected the park brake issues⁶
- 27.5 When asked whether the Applicant's comments on the checklist constituted a report, Vander Walt's answer was affirmative. He specifically stated as follows: "*it is*".

[28] After having had regard to the above, the applicant concludes as follows in paragraph 4.15 of Applicants Heads:

"the first respondent rejected and or disregarded all of the aforementioned facts and concluded that the Applicant's entire version is made up and created a fiction that the Applicant created a false parking brake issue with the vehicle to cover his tracks for leaving the vehicle unattended. The First Respondent then used far-fetched speculation of Van der Wald to come to the following conclusion:

"4.15.1 The applicant got Owen involved to corroborate the applicant's version and got Owen to alter the documents by adding the faulty comments after the accident"

"4.15.2 The applicant got the driver that took the vehicle to the workshop after the accident, Eliam, involved in writing the same comments on the checklist."

"4.15.3 The applicant and Owen colluded to add a comment that the park brake has failed in the Red Book, after Eliam only reported a small light damage to the truck to Mabundza. Owen, the applicant or Eliam

⁴ Index Record Vol 2-page 208 line 823.

⁵ Index Record Vol 2-page 240 line 323.

⁶ Index Record Vol 1 page 81, Index Record Vol3 page 241 line 354.

thereafter had to amend Eliam's checklist to include the brake failure and had to bring back the original Red Boek Paper to place it over the copy and then only added the brake failure portion to it."

[29] On paragraph 5 of his Heads, Applicant concludes as follows:

"it is submitted that The First Respondent committed several gross and reviewable irregularities in that he failed to properly apply her mind to the legal principles involved, thereby depriving the Applicant of a fair hearing and rendering the award reviewable."

Assessment of the arbitration award

[30] In assessing the first charge against the employee, one does not need much ingenuity to observe that it is not a sustainable charge because there was no rule in the company that prohibits a driver from leaving a vehicle unattended. This observation was confirmed by the Depot Manager, Mr. Pieter Van der Walt⁷. Incidentally the latter was the company's key witness on whose testimony the arbitrator largely relied in arriving at her findings.

[31] The second charge to which the employee had to respond was his alleged failure to adhere to the Standard Operation Procedure (SOP), in particular the alleged failure to report the defective brakes.

[32] The employer's version based on susception was that the employee only reported defective brakes as a cover-up after the accident had happened. However, this version is not consistent with the version that there was nothing wrong with the brakes and that the problem of the brakes was concocted up with the help of the employee's colleagues. These two versions are mutually destructive.

[33] The third challenge that arises from the evidence given on behalf of the employer is the speculative evidence that led the Arbitrator to conclude that :

"[4.21] The offence committed by the employee had an element of dishonesty if one considers the 'questionable' check list he submitted. There was

⁷ Index Record Vol3 page 229 line 28

no doubt there was an element of collusion between the employee and the controller Maphopha.”⁸

- [34] The contents of the above paragraph demonstrate not only that the employee was found guilty of an offence he was not charged with, namely collusion and dishonesty but that the speculative evidence suspecting collusion between the employee and his colleagues was admitted without any proof.
- [35] It is without doubt that the arbitrator who was called upon to adjudicate over this case was faced with mutually destructive or contradictory versions of events.
- [36] However, it is trite that when decision makers are faced with situations of this nature they required to evaluate the evidence systematically rather than speculate or simply prefer one version over another without a reasonable explanation as to why they accept one version and dismiss another.
- [37] The Supreme Court of Appeal held in *Stellenbosch Farmers Winery Group Ltd and another v Martell et Cie and Others*⁹ that where there are two irreconcilable versions, a decision maker must evaluate:
- 37.1 the credibility of the witnesses. This includes their honesty, demeanor, and consistency.
 - 37.2 reliability of the witnesses, including the quality and accuracy of their observations and recollections
 - 37.3 probabilities. In other words, an assessment of which version is more probable in light of evidence before the decision maker
- [38] In *National Employer' General Insurance Company Limited v Jagers*¹⁰ it was held that where the evidence before the decision maker is contradictory and mutually destructive, the party that bears the burden of proof could only succeed by showing that its version is more probable than that of the other party.

⁸ Index Pleading Vol1 page 28 par 4.2.1

⁹ 2003 (1) SA 11 (SCA).

¹⁰ 1984 (4) SA 437 (E)

- [39] In *Sasol Mining (Pty) Ltd V Ngqeleni N.O and Others*¹¹, it was held that a commissioner commits a reviewable irregularity where he or she ignores material evidence, fails to resolve material disputes of facts, reaches conclusions unsupported by evidence; or bases findings on speculation.
- [40] In order to avoid making a decision which a reasonable decision-maker could not make, an arbitrator faced with the situation similar to the one *in casu*, should at minimum, apply an assessment of the credibility of factual witnesses, their reliability and overall assessment of the inherent probabilities of the different versions before her before picking one version and rejecting the other.
- [41] It is also expected of a reasonable decision-maker that, having accepted one version and rejected the other; to objectively explain why the accepted version was admissible and the rejected version not accepted. This approach minimizes incidences where decisions are arrived at by conjecture or speculation.
- [42] It is clear *in casu*, that having listened to conflicting versions of the events which took place at the company, one version was more attractive than the other and the arbitrator accepted a version that favoured the company without a proper analysis and objective basis of accepting such version and rejecting the other.
- [43] The arbitrator did not even attempt to explain why the version that was accepted was more probable than the one that was rejected. This approach often leads to unreasonable conclusions which cannot be rationally explained.

Test for review

- [44] The next task for this court is to determine whether the irregularities committed by the arbitrator are so material as to justify this court's interference with the arbitrator's reward.

¹¹ (2011) 32 ILJ 723 (LC).

- [45] In order to consider this question judiciously the point of departure has to be the seminal case of *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*¹² (*Sidumo*) where the Constitutional Court held that:

“Section 33(1) of the Constitution presently states that everyone has the right to administrative action that is lawful, reasonable and procedurally fair. The reasonableness standard should now suffuse section 145 of the LRA.”

- [46] Furthermore, in *CUSA V Tao Ying Metal Industries and Others*,¹³ following the *Sidumo* judgement, the Constitutional Court held:

“it is clear.... that a commissioner is obliged to apply his or her mind to the issues in a case. Commissioners who do not do so are not acting lawfully and/or reasonably and their decisions will constitute a breach of the right to administrative justice.”

- [47] Considered together, the effect of the above two judgments is that a review court is required to determine whether a decision of an arbitrator is reasonable considering the totality of the evidence that was before the arbitrator together with the issues that the arbitrator was required to determine.

- [48] Further clarity as to what is considered as ‘reasonable’ on the one hand and ‘unreasonable’ on the other, was provided by the Labour Appeal Court (LAC) in *Fidelity Cash Management Service v CCMA and Others*¹⁴ as follows:

“The constitutional Court further held that to determine whether a CCMA commissioner’s arbitration award is reasonable or unreasonable, the question that must be asked is whether or not the decision or finding reached by the commissioner is one that a reasonable decision maker could not reach. If it is an award or decision which a reasonable decision maker could not reach, then the decision or award of the CCMA is unreasonable, and therefore, reviewable and could be set aside. If it is a decision that a reasonable decision maker could reach, the decision or award is reasonable and must stand. It is important to bear in mind that the question is not whether the arbitration award or decision

¹² [2007] 12 BLLR 1097 (CC) at para 106.

¹³ (2008) 29 ILJ 2461 (CC) at para 134.

¹⁴ (2008) 29 ILJ 964 at para 97.

of the commissioner is one that a reasonable decision maker would not reach but one that a reasonable decision maker could not reach.”

(Own emphasis)

Conclusion

- [49] Since everything turns on the credibility of the version accepted by the arbitrator, failure to justify its basis leads to absurdity, placing the process and outcome of the arbitration within the bounds of decisions which a reasonable decision maker could not make.
- [50] Given the above considerations, the court must arrive at an inescapable conclusion that the reason the employee was dismissed was because of the accident that happened when the vehicle was left unattended. The absence of a rule in the OSP that a driver may not leave a truck unattended under any circumstance, renders absurd, the Arbitrator's finding that the employee's dismissal was substantively fair.
- [51] The Arbitrator made findings a reasonable decision maker could not make, and she arrived at conclusions which were not rational, given the facts of the matter and the evidence adduced
- [52] The Arbitrator failed to assess the versions presented and failed to decide the matter on a balance of probabilities.
- [53] On a holistic consideration of the facts before the Arbitrator her finding that the Applicant's dismissal was substantively fair, for reasons recorded in the Arbitrator's award is reasonable and untenable.
- [54] Having had regard to all the gross irregularities pointed out above, it is the finding of this court that the arbitrator reached a conclusion which a reasonable decision maker could reach, given the totality of the evidence before her
- [55] This court has a wide discretion in respect of costs. In this matter the interest of justice will be best served by the court making no order as to cost.
- [56] In the premises the following order is made:

Order

1. The arbitration award dated 15 August 2023 and issued under case number GPRF68826 is hereby reviewed and set aside;
2. To avoid a situation where this court serves as a court of first instance in assessing, inter alia, the credibility of witnesses this dispute is remitted to the Third Respondent for hearing *de novo* on substantive fairness of the dismissal of the employee; before a commissioner other than the Second Respondent,
3. There is no order as to costs.

R. Ramashia

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant : Ms. N Schroeder

Instructed by : Higgs Attorneys

For the Respondent: MJ Van As

Instructed by : Fluxmans Attorneys