THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR 1303/2020

In the matter between:

BIDVEST PANALPINA LOGISTICS **Applicant**
Now BIDVEST INTERNATIONAL LOGISTICS

and

COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION **First Respondent**

COMMISSIONER SAKI NGADA, *NO* **Second Respondent**

BHEKUKWENZA NDLOVU **Third Respondent**

Heard: **9 October 2024**

Delivered: **The Judgment was handed down electronically by circulation to the applicant and respondent's legal representative by email. The date and time for handing down is deemed to be 8 November 2024.**

Summary: Review application under section 145 of the LRA – Arbitration award falls within bands of reasonableness- New things not raised at arbitration impermissible- Review not an appeal.

JUDGMENT

SHABA, AJ

Introduction

[1] This is an application in terms of section 145 of the Labourt Relations Act,[1] (LRA), seeking to review and set aside an arbitration award of the Second Respondent dated 07 September 2020, wherein the Second Respondent found the dismissal of the Third Respondent by the Applicant for misconduct, to be substantively unfair. The Third Respondent opposes the application.

[2] The Third Respondent abandoned its preliminary point on the exemption for payment of security[2] by the Applicant and so did the Applicant abandon, its alternative prayer that the matter be remitted back to the First Respondent to be heard by another Commissioner other than the Second Respondent.

Background facts

[3] The Third Respondent was employed by the Applicant as its Operations/Warehouse Superintendent at its Denver facility. The Applicant is a transport and logistics services company that provides logistics services by air, sea, road transport and warehousing.

[4] The Third Respondent was dismissed for misconduct relating to briefly stated, gross negligence and bringing the Applicant's name into disrepute.

[1] No. 66 of 1995.
[2] Section 145 (8) of the LRA.

[5] The Third Respondent referred an unfair dismissal dispute to the First Respondent for conciliation on 09 July 2019. Failing conciliation, the Third Respondent referred a dispute to the First Respondent for arbitration on 20 August 2019.

[6] The Second Respondent issued an award dated 07 September 2020, in favour of the First Respondent, wherein it was found that the dismissal of the Third Respondent, by the Applicant, was substantively unfair.

[7] The Second Respondent further ordered the retrospective reinstatement of the Third Respondent with a written warning valid for six months and payment of the amount of R514 248.42.

[8] Aggrieved by the Second Respondent's aforementioned award, the Applicant launched the present application. The Third Respondent opposes the application.

Award

[9] After a survey and analysis of evidence and parties' arguments, the Second Respondent, found the Third Respondent not guilty of misconduct of bringing the Applicant's name into disrepute[3].

[10] The second Respondent based on the survey, analysis and evidence and parties' arguments further found the Third Respondent not guilty of gross negligence, but negligence[4].

[11] The Third Respondent was retrospectively reinstated by the Second Respondent on the same conditions of employment that the employee enjoyed prior to his dismissal with effect from 24 June 2019 with back pay of R514 249.42[5].

[3] Para 45 of the award.
[4] Para 49 of the award.
[5] Paras 52 and 53 of the award.

[12] The reinstatement of the Third Respondent by the Second Respondent is subject to a written warning, valid for six months, from 14 September 2020 to 14 March 2021[6].

[13] The Second Respondent's award is lucid and contains a detailed summary of both parties' extensive oral and documentary evidence including arguments that were placed before him.

[14] The gist of the Second Respondent's main finding based on the above, was that the Applicant failed to discharge its onus to prove that the employee's dismissal was fair and accordingly, further found that the dismissal of the Third Respondent is substantively unfair[7].

Grounds of review

[15] The Applicant assails the Second Respondent's award on a long list of a plethora of grounds[8] as quoted hereunder:"

> "37.1 The commissioner committed misconduct and / or irregularity by rejecting evidence corroborated by two witnesses that the employee said in the presence of a client, IMCD, that the Third Respondent had no resources when the client was addressing them on stock-take requirements.
>
> 37.2 The commissioner committed misconduct and / or irregularity by failing to find that the Third Respondent lied under oath when he denied to have said in the presence of the client that the Applicant had no resources.
>
> 37.3 The commissioner committed misconduct and / or irregularity by failing to find that the Third Respondent's lies constituted dishonesty and thereby eroding the trust relationship between the Applicant's and the Third Respondent.

[6] Para 56 of the award.
[7] Para 57 of the award.
[8] Applicant's founding affidavit ("founding affidavit") paras 37.1 to 37.11 (sic).

37.4 The commissioner committed misconduct and / or irregularity by finding that the Messrs Rodgers and Govender did not corroborate each other beyond what the Third Respondent said in the meeting with client when both witnesses indicated that during that break, the Third Respondent was criticized for the remark he made in the meeting.

37.5 The commissioner committed misconduct and / or irregularity by finding that the Govender corroborated the employee's version when in fact he corroborated the evidence of Rodgers in material respect.

37.5 (Sic 37.5A) The commissioner committed misconduct and / or irregularity by finding that the remark by the Third Respondent was based only on the scheduling of the stock taking and not on the employer's ability to meet the client's stock taking requirement when the comment also meant that in the circumstances as outlined by the client, the Third Respondent would not have capacity to meet the client's expectations.

37.6 The commissioner committed misconduct and / or irregularity by finding that the comment "Boss we do not have resources" could not have been made in the context to undermine the Third Respondent effort to attain the client when the comment clearly casted a negative light to the Applicant's ability to provide services as required by the client.

37.7 The commissioner committed misconduct and / or irregularity by finding that the Third Respondent did call witnesses in the case of Tshepo. Clearly the commissioner did not understand the Third Respondent's case as it was never the Third Respondent's case that the employee did not call witnesses. Ngwenya testified, to demonstrate lack of preparedness on the side of the Third Respondent, he even called witnesses that contradicted his case.

37.8 The commissioner committed misconduct and / or irregularity by finding that the Third Respondent had no valid final written when, had he used the credibility tools, could have found that on balance of probability such warning existed.

37.9 The commissioner committed misconduct and / or irregularity by issuing the Third Respondent with a written warning without

considering the existence of a valid written warning against the Third Respondent.

37.10 The commissioner committed misconduct and / or irregularity by reinstating the Third Respondent in the presence of overwhelming evidence demonstrating dishonesty on the part of the Third Respondent and where the trust relationship was irretrievably broken down.

37.11 The commissioner committed misconduct and / or irregularity by finding the Third Respondent guilty of negligence and not gross-negligence when evidence clearly demonstrated that in more than one occasion, the Third Respondent was ill-prepared in the case of Tshepo Makgola.

37.11 (Sic 37.11A) The commissioner committed misconduct and / or irregularity by accepting the Third Respondent's version even when such versions were never put to the Applicant's witnesses."

[16] The Applicant's grounds of review are convoluted as some of them are a duplication and an overlap. This much is acknowledged by the Applicant in its supplementary heads that: *"…. not all of the grounds of review canvassed in the founding affidavit will be addressed, for the sole reason that some amounts to duplication or they overlap each other*[9]*.* Some of the aforementioned Applicant's grounds of review are new things that were not argued before the Second Respondent and some border on appeal. I will deal with this aspect when dealing systematically with the Applicant's grounds of review later after outlining the test for review and what a defect based on misconduct and gross irregularities ought to be in terms of the LRA[10].

[17] The common denominator and buzz wording of the Applicant's plethora of grounds of review, is that the Second Respondent committed misconduct and / or irregularity.

[18] I will similarly deal with the aspect of the Applicant's plethora grounds of misconduct of the Second Respondent and grounds on irregularities after

[9] Para 19 of Applicant's supplementary heads of argument.
[10] Act No: 66 of 1995 sections 145 (2)(a)(i) and 145 (2)(a)(ii).

outlining the test for review and the defect relating to gross irregularities as contemplated in section 145 of the LRA.

Test for review

[19] The test for review of arbitration awards was comprehensively set out by the Labour Appeal Court (LAC) in *Makuleni v Standard Bank of SA Ltd and others*[11] wherein it was held that:

> '[3] The critical approach to reviews that turn on 'unreasonableness' was articulated by Murphy AJA in Head of Department of Education v Mofokeng & others at paras [30] to [33]. The significant passages are emphasized:
>
> [30] 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 (Congress of SA Trade Unions as Amicus Curia) and this court in Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation & Arbitration & 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.
>
> [31] 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 envisioned in the distinctive review grounds developed casuistically at common

[11] [2023] 4 BLLR 283 (LAC) at paras 3 and 4.

law, now codified and mostly specified in s 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 whether apart from the flawed reasons of or any irregularity by the arbitrator, the result could be reasonably reached in the 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 enquiry or undertake the enquiry in a misconceived manner. There must be a fair trial of the issues.

[32] However, sight may not be lost of the intention of the legislature to restrict the scope of review when it enacted s 145 of the LA, confining review to 'defects' as defined in S/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 enquiry 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 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 upon the arbitrator's conception of the enquiry, 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 hypothesis be material to the determination of 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 fine 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."

[4] The import of these remarks demands reflection in order to digest the essence of the exercise that a commissioner embarks upon. The court asked to review a decision of commissioner must not yield to the seductive power of a lucid argument that the result could be different. The luxury of indulging in that temptation i.e. reserved for the court of appeal. At the heart of the exercise is a fair reading of the award, in the context of the body of evidence adduced and an even-handed assessment of whether such conclusions are untenable. Only the conclusion is untenable is a review and setting aside warranted.'

[20] Apart from the above authorities, there is a plethora of authorities on the test for the review of arbitration awards by commissioners in terms of the LRA, which must be read together in order to review an award and to determine

whether the decision reached is one that a reasonable decision maker could have reached and whether such decision-maker committed any misconduct or gross irregularity[12].

[21] To succeed with a review application, an Applicant must show, firstly, that there exists a failure or error on the part of the arbitrator but even if this failure or error is shown to exist, the Applicant must then further show that the outcome arrived at by the arbitrator was unreasonable.

[22] Therefore, despite any irregularity, error, or failure on the part of the arbitrator, if the outcome arrived at, is nonetheless reasonable, that is the end of the review application. To succeed, there must be *an unreasonable outcome*.

[23] Given all the above authorities, misconduct and gross irregularity, by an arbitrator, arises only in an instance where a party, is not afforded a fair trial of issues. It does not necessarily follow that once a Commissioner finds against a party, such Commissioner commits gross irregularity and misconduct.

[24] This being a review application, the adjudication by this Court, is not about the correctness of the award by the Arbitrator as such fact may well be a subject matter of appeal, but about the process that was followed and most importantly, whether a reasonable decision-maker would not have made the award by the first respondent in this case.

[12] See: *Sidumo and another v Rustenburg Platinum Mines Ltd and others* [2007] ZACC 22; [2007] 12 BLLR 1097 (CC) at para 110; *Super Group Autoparts t/a AutoZone v Hlongwane NO and others* [2009] ZALCJHB 68; [2010] 4 BLLR 458 (LC) at 461 8E; *Manana v Department of Labour and others* [2010] ZALAC 26; [2010] 6 BLLR 664 at 668 20F; *NUM and another v Samancor Ltd (Tubatse Ferrochrome) and others supra*, *Afrox Healthcare Ltd v Commission for Conciliation Mediation and Arbitration and others* [2012] ZALAC 2; [2012] 7 BLLR 649 (LAC) at 657 21D-I; *Herholdt v Nedbank Ltd (Congress of South African Trade Unions as "amicus curiae")* [2013] ZASCA 97; [2013] 11 BLLR 1074 (SCA) at 1084 24C-D; *Goldfields supra*; *Derivco (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration* [2014] ZALCJHB 257; [2014] 10 BLLR 1000 (LC) at 1007 37B; *Shoprite Checkers v CCMA* [2015] 10 BLLR 1052 (LC) at 1056E-H 9-10; *Mbatha v Safety and Security Sectoral Bargaining Council* JR372/13 [2015] ZALCJHB 332 (30 September 2015) at para 25; *Head of the Department of Education v Mofokeng and others* [2014] ZALAC 50; [2015] 1 BLLR 50 (LAC) at paras 60 – 61; *Kock v Commission for Conciliation, Mediation and Arbitration and Others* (2019) 40 ILJ 1625 (LC) at para 27; and *Ethekwini Municipality v Hadebe and others* [2016] ZALAC 14, [2016] 8 BLLR 745 (LAC) at para 20. *Belloord 28 CC v CCMA Johannesburg* [2019] JOL 42664 (LC) at para 10.

[25] In *Tao Ying Metal, Industry (Pty) Ltd v Pooe and others*[13] the Supreme Court of Appeal held that the focus of the enquiry on review is how the Arbitrator arrived at the challenged conclusion, while focus on appeal is whether the decision is right or wrong.

[26] In *SAMWU obo NS Mathabathe and SALGBC* and others[14] it was held that:

> "[5] By now it is crystal clear that this Court has no appeal powers against arbitration awards. There seem to be a growing tendency that attempts to blur the distinction between an appeal and a review. Just to reconfirm the distinction stays and ought to be maintained at all material times."

[27] The above are stated against the backdrop of the already stated requirements of a trite test for review.

[28] The above notwithstanding and to the extent that all of the Applicant's grounds for the punting of the First Respondent's award, is about alleged misconduct and/or irregularities, pertaining to a non-consideration of evidence and the fact that the Third Respondent lied at the disciplinary hearing and the arbitration proceedings relevant herein, I will deal with all these grounds, based on the trite test of reasonableness, and alleged defects of misconduct and gross irregularities principles, as further hereunder.

Analysis

Whether Second Respondent committed misconduct?

[29] Section 145 of the LRA[15] states that:

> "(2) A defect referred to in subsection (1), means-

[13] [2007] 7 BLLR 583 (SCA) See: also, *Paarl Coldset (Pty) v Singh* [2022] 10 BLLR 920 (LAC) and *Booi v Amathole district Municipality* [2022] 1 BLLR 1 (CC).
[14] Case No: JR 24/18 (Unreported) at para 5.
[15] Act No: 66 of 1995 section 145 (2)(a)(i) .

(a) that the commissioner-

(i) committed misconduct in relation to the duties of the commissioner as an arbitrator;"

[30] Misconduct as a defect, is not defined in the LRA.

[31] A close analysis of all the Applicant's grounds of review, is indicative of one of the denominators therein, being that the Second Respondent committed misconduct.

[32] I find no trace of any misconduct, as contemplated in section 145(2)(a)(i) of the LRA, committed by the Second Respondent, as misconduct by commissioners/arbitrators, has since been qualified in *inter alia County Fair Foods (Pty) Ltd v Theron NO and others*[16], wherein it was held that:

> "For there to be misconduct, it has been held that there must be some 'wrongful or improper conduct' on the part of the decision maker, in this instance the Commissioner. (See Dickinson and Brown v Fisher's Executors 1915 AD 166 at 176.) Misconduct has also been described as requiring some 'personal turpitude' on the part of the decision maker. (See *Reunert Industries (Pty) Ltd t/a Reutech Defence Industries v Naicker and others* (1997) 18 ILJ 1393 (LC) at 1395H–I.) The basic standards of proper conduct for an arbitrator are to be found in the principles of natural justice, and in particular the obligation to afford the parties a fair and unbiased hearing. (See Baxter Administrative Law at 536.) These principles have been reinforced by the constitutional imperatives regarding fair administrative action. (See Carephone (Pty) Ltd v Marcus NO (1998) 19 ILJ 1425 (LAC) at 1431I–1432A.) The core requirements of natural justice are the need to hear both sides (audi alteram partem) and the impartiality of the decision maker (*nemo iudex in sua causa*). (See Baxter at 536.)" [Emphasis added].

[33] Given the above, there is absolutely, no merit nor basis on all the Applicant's grounds for review, that the Second Respondent committed a misconduct.

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[16] (2000) 21 ILJ 2649 (LC) at para 7. See also: *BAUR Research CC v Commission for Conciliation, Mediation and Arbitration and others* [2013] ZALCJHB 338; (2014) 35 ILJ 1528 (LC) at para 35.

Whether the Second Respondent in the alternative, committed irregularities?

[34] Section 145 of the LRA[17] states that:

> "(2) A defect referred to in subsection (1), means-
>
> (a) that the commissioner-
>
> (ii) committed a gross irregularity in the conduct of the arbitration proceedings; "

[35] Gross irregularity, the same as misconduct, is not defined in the LRA as already stated.

[36] A closer analysis of all the Applicant's grounds for review is, in the alternative, about the fact that the Second Respondent, committed irregularities in relation to what is averred in a plethora of the Applicant's grounds of review.[18]

[37] On the Applicant's own version, as per its pleadings and in relation to all its grounds, for the review of the Second Respondent's award, the Applicant does not regard the irregularity averred in relation to each of its grounds of review, as a defect, constituting gross irregularity, as contemplated in section 145(2)(a)(ii) of the LRA.

[38] The above is fatal to all the Applicant's grounds of review as pleaded, as the defect relied on to plunge the Second Respondent's arbitration award, is that of irregularity and not gross irregularity contemplated in the LRA *supra.*

[39] Even if this Court, was to take the view that the irregularities averred by the Applicant in its grounds of review, are cumulatively speaking, gross, which averment, has not been pleaded, this Court still finds that notwithstanding such irregularity, the outcome that the Second Respondent arrived at, is

[17] Act No: 66 of 1995 section 145 (2)(a)(ii).
[18] Applicant's grounds of review, paras 37.1 to 37.11.

reasonable and justifiable based on evidence and arguments, placed before the Second Respondent and the reasons advanced for such outcome.

[40] The proper application of the test for review and defects relating to gross irregularities were summarized by *inter alia* the Supreme Court of Appeal in *Herholdt v Nedbank (Herholdt)*[19] as follows:

> ” Review of an award is permissible if the defect in the proceedings falls within one of the grounds listed in section 145(2)(a). To fall within the scope of section 145(2)(a)(ii), the arbitrator must have misconceived the nature of the inquiry and arrived at an unreasonable result. The result will be unreasonable if it is one a reasonable arbitrator could not have reached on the available evidence. Material errors of fact, as well as the weight and relevance attached to particular facts, are not in and of themselves sufficient to set an award aside. Such mistakes are of consequence only if they render the result unreasonable.”

Whether the Second Respondent committed gross irregularity based on the Applicant’s grounds for review?

[41] *In Quest Flexible Staffing Solutions (Pty) Ltd (a division of Adcorp Fulfilment Services (Pty) Ltd) v Legobate* [20], the Labour Appeal Court held inter alia that

> “[16] In Gold Fields, this Court rejected the piecemeal or fragmented approach to reviews, where each factor that the Commissioner failed to consider is analysed individually and independently, for principally two reasons. The first is that it “assumes the form of an appeal” and not a review, and the second is that it is mandatory for the reviewing Court to consider the totality of the evidence and then decide whether the decision made by the arbitrator is one that a reasonable decision-maker could make. To evaluate every factor individually and independently, it observed, is to defeat the requirements in section 138 of the LRA in terms of which the arbitrator is required to deal with

[19] [2013] 11 BLLR 1074 (SCA) at H.
[20] [2014] ZALAC 55; [2015] 2 BLLR 105 (LAC) at para 16. See: *Belloord 28* CC v CCMA *(supra).*

> the substantial merits of the dispute between the parties with the minimum of legal formalities, albeit expeditiously and fairly. On this approach, therefore, the failure of a Commissioner "to mention a material fact in his or her award", or "to deal in his/her award in some way with an issue which has some material bearing on the issue in dispute", or "commits an error in respect of the evaluation or consideration of facts presented at the arbitration" would not, in itself, render the award reviewable." [Emphasis added].

[42] In *NUM and another v Samancor Ltd (Tubatse Ferrochrome) and others*[21], it was held that an error by an arbitrator, is not in itself, a proper basis for reconsidering an award.

[43] In the premises, and based on the above, this Court concludes that the first respondent's lucid award, is reasonably justifiable and not assailable, based merely on the fact that he may not have considered some of the factual evidence, or committed errors, based on the applicant's grounds of review. The first respondent based on the content of the award, did consider and applied his mind to what was before him as contrary to the applicant's grounds for review, he did not misconceive what was before him for determination and gave both parties a fair trial based on the contents of the lucid award.

[44] To the extent that I may be wrong in concluding that the Applicant's grounds of review are much more of an appeal than review subject matter, and further that all such grounds cannot assail the award at hand, based on the defects of misconduct and gross irregularity contemplated in section 145 of the LRA and authorities on the test for review above, I will nevertheless deal systematically with the Applicant's grounds for review as hereunder, for the sake of completeness.

[21] [2011] 11 BLLR 1041 (SCA) at paras 9 – 12.

Applicant's Ground 37.1[22] for review ("rejection of corroborated evidence")

[45] There is no merit in this ground of review given the test for review based on all the authorities *supra*. The Second Respondent, reasonably found that all the Applicant's witnesses were able to corroborate each other and proved the common cause fact, that the words that the Third Respondent uttered were only that "*Boss we do not have resources"* in relation to the misconduct charge of bringing the company's name into disrepute [23].

[46] The Second Respondent's further reasonable finding that, the Applicant failed to prove beyond those words, that what the Third Respondent meant, was what is stated in the Applicant's charge sheet in relation to the charge about disrepute aforementioned, because the Applicant's witness evidence of Rodger and Govender, were contradictory in this regard, is reasonable and supported by the totality of evidence that was before the Second Respondent[24] and did not commit irregularity.

[47] The reasonable conclusion by the Second Respondent as aforementioned, was also based on the arguments of both parties at the arbitration proceedings relevant herein. The Applicant cannot introduce new things that were not argued before the arbitrator in these proceedings.

[48] Submission and new things that were not canvassed at arbitration proceedings and raised for the first time in these review proceedings, are not permissible. This also goes for new things that were not pleaded.

[49] It is not open for the applicant, to introduce new things that were not up for a decision by the first respondent at arbitration proceedings *a quo* in this Court, as was held in amongst others *Gqibela v West Driefontein Mine and others*,[25]

[22] Para 37.1 of the founding affidavit.
[23] Para 40 of the award.
[24] Para 41 of the award.
[25] [2000] 4 BLLR 414 (LC) at 417 para 14.

Coin Security (Pty) Ltd v CCMA and others[26] and *MEC for the Department of Finance, Eastern Cape v De Milander and others*[27].

Applicant's Ground 37.2 [28] for review ("Lying under oath")

[50] This ground has no merit given the test for review and authorities *supra.* The Second Respondent reasonably found and did not commit an irregularity that, the Applicant failed to prove what the Third Respondent meant beyond the words "*Boss we do not have the resources"* in relation to stock scheduling and stock taking vis-à-vis potential business by IMCD, (Applicant's client), based on the contradictory evidence of the Applicant's witnesses, Rodger and Govender, on what the Applicant precisely stated beyond these words.

[51] The Second Respondent's contextualizing of the denial of the uttering of the aforementioned words by the Third Respondent and accordingly not attaching too much weight to having uttered the aforementioned words, at some stage of the arbitration proceedings, is not out of kilter with that of a reasonable decision-maker[29].

Applicant's Ground 37.3[30] for review ("dishonesty")

[52] This ground has no merit given the test for review and the authorities *supra*. The Third Respondent was not charged with any dishonesty, so much so that the Second Respondent could have found such Respondent to have breached the employer's workplace rule in that regard.

[53] Irretrievable employment relationship of trust is a subject matter for determination in a disciplinary hearing as an aggravating factor. Unless specific evidence in that specific regard, is led and argued at arbitration proceedings, such subject matter falls beyond the requisite jurisdiction of a

[26] [2005] 7 BLLR 672 (LC) at 678 at para 37.
[27] [2011] 9 BLLR 893 (LC) at 901 para 29.
[28] Para 37.2 of the founding affidavit.
[29] Para 43 of the award.
[30] Para 37.3 of the founding affidavit.

commissioner in the shoes of the Second Respondent, when adjudicating an unfair labour practice dispute.

[54] In any event, this ground of review, has no merit as it was not an issue before the Second Respondent and amounts to one of the new things raised for the first time in these proceedings that was not arbitrated by the Second Respondent.

Applicant's Ground 37.4[31] for review ("non-corroboration by Rodger and Govender")

[55] This ground of review has no merit given the test for review and the authorities *supra*. The Second Respondent's finding, based on the totality of evidence before him, that the Applicant's witnesses Rodger and Govender contradicted each other, beyond what happened after the utterances of the words "*Boss we do not have staff"* by the Third Respondent and that the Third Respondent's version in this regard, was corroborated by Govender, is that of a reasonable decision-maker as well as that Govender's evidence corroborated the Third Respondent's version, is not out of kilter with that of a reasonable decision-maker.[32]

[56] Second Respondent's reasonable finding that even if the employee made the above remark, it was not made in the context of seeking to undermine the Applicant's effort to attain the client, is that of a reasonable decision-maker[33] including the fact that the Third Respondent was responsible for carrying out the stock taking at the Denver facility and thus had a right to seek details of the stock taking proposals by the client and thereby not finding the Third Respondent to have breached the Applicant's workplace rule, in this regard, is that of a reasonable decision-maker.

[31] Para 37.4 of the founding affidavit.
[32] Para 44 of the award.
[33] Paras 44 and 45 of the award.

Applicant's Ground 37.5[34] for review ("Corroboration of Third Respondent's version and Rodger's")

[57] This ground is a repetition and this Court has already concluded that the Second Respondent's finding that the two Applicant's witnesses, Rodger and Govender, contradicted each other on what happened and/or what was said by the Third Respondent after the utterances of these words, is that of a reasonable decision-maker based on the totality of evidence and argument that were put before him.

Applicant's Ground 37.5 for review (sic "37.5A")[35] (Stock scheduling vis-à-vis stock taking")

[58] This ground has no merit based on the review test and the authorities *supra.* Given the contradiction of the two Applicant's witnesses aforementioned on what the Third Respondent meant, what happened and what was said beyond the utterances of the words "*Boss we do not have resources*", by the Third Respondent *supra*, the Second Respondent's conclusion, based on the totality of evidence placed before him, that these utterances were about the scheduling of stock taking and not stock taking, is that of a reasonable decision and not an irregularity.

[59] The second Respondent's further finding that the Third Respondent was responsible for carrying stock taking at the Denver facility and thus had the right to seek details about the proposed stock proposals by client[36], is that of a reasonable decision-maker and not an irregularity.

[34] Para 37.5 of the founding affidavit.
[35] Para "37.5A" (sic) of the founding affidavit.
[36] Para 45 of the award.

Applicant's Ground ("37.6")[37] for review (Comment: "Boss we do not have resources")

[60] There is no merit in this ground given the test of review and the authorities *supra*. It is a repetition and this Court has already concluded that the Applicant through its witnesses, Rodger and Govender, given contradictions in their testimony, failed to prove the charge of bringing the Applicant into disrepute. The Third Respondent has reasonably found that the utterances by the Third Respondent, could not have been made to undermine the Third Respondent's effort to attain the client relevant herein. The Second Respondent did not commit irregularity based on this repeated ground.

Applicant's Ground 37.7[38] for review ("calling of witnesses and preparedness at Tshepo's DC")

[61] There is no merit in this ground based on the test for review and the authorities *supra*.

[62] The Second Respondent's finding *inter alia*[39] of the award that:

> "[47] Apart from Ngwenya's findings on the disciplinary hearing of the employee, no other documentary evidence was adduced by the employer to support Ngwenya's evidence. Rodger's oral evidence could not assist the employer, as it was not relevant to the issues in dispute. In other words, Rodger's evidence was not reliable, as he did not have the opportunity to observe the employee's state of preparedness during the hearing. This dispute is about what transpired during the disciplinary hearing. Thus, one would expect the employer to include the minutes of the hearing in its bundle, which were not there. I, therefore, find that the employee did call the witnesses to testify in the hearing."

[37] Para 37.6 of the founding affidavit.
[38] Para 37.7 of the founding affidavit.
[39] Para 47 of the award.

[63] Based on the above, if the Applicant wanted to rely on anything that transpired at the disciplinary hearing of one "Tshepo" mentioned *supra,* and in which as a matter of common cause, the Third Respondent was an initiator therein, then and in that event, the Third Respondent, could have placed the minute and/or record of the disciplinary hearing, relevant before the Second Respondent.

[64] The above goes for the Applicant's review proceedings in this Court. If the Applicant wants to rely on what transpired or did not transpire at the disciplinary hearing, relevant herein, for purposes of its grounds of review in these proceedings.

[65] In *Francis Baard Municipality v Rex and others*[40], It was held that:

> "[24] The grounds of review are, *inter alia*, that the factual findings of the Commissioner did not correspond with the evidence and documents placed before the Commissioner, and that he did not apply his mind properly and rationally to the fact and the law.
>
> [25] The court should ideally see all the material that was before the decision-maker so that it can fully and fairly deal with the grounds of review especially when the grounds of review are dependant [sic] on the factual findings of the Commissioner. It goes without saying that there can, in some cases, be no full and fair review if all the evidence is not before the court."

[66] In *Liwambano v Department of Land Affairs and others*[41], the Labour Court had earlier held that:

> "In the case of *JDG Trading (Pty) Ltd t/a Russells v Whitcher NO & others*, the Labour Appeal Court made it clear that an applicant who seeks relief in a review on the basis of a defective record runs the risk that it will be unsuccessful on that ground alone. This must be based on the simple principle that "evidence at the heart of the attack on the decision of a

[40] [2016] ZALAC 33; [2016] 10 BLLR 1009 (LAC) at paras 24 – 25.
[41] [2012] ZALCJHB 14; [2012] 6 BLLR 571 (LC) at para 30.

> Commissioner must be 'properly available' to the reviewing Court." [Footnote omitted].

[67] The benefit of a complete record is key to review proceedings as was further held in *EBS Security Admin Pty (Ltd) v Commission for Conciliation, Mediation and Arbitration and Others*[42] wherein it was held *inter alia* that:

> "In sum, the Applicant's review application required a complete record. In the absence of a complete record, a determination on whether a gross irregularity (that was material to the outcome) was committed and a finding on whether the arbitrator produced an unreasonable outcome cannot be made."

[68] Based on the above authorities, absent the record or minutes of the disciplinary hearing, relevant herein, in which the Third Respondent was the initiator, neither the Second Respondent nor this Court, can come to the rescue of the Applicant regarding this ground for review about what transpired or did not transpire at such hearing.

Applicant's Ground 37.8 [43]for review ("no valid final written warning")

[69] This ground has no merit based on the test for review and authorities *supra.*

[70] The Second Respondent's finding that the Applicant's document on page 21,[44] of the bundle that served at arbitration and that purported to be a final written warning issued to the employer on 30 October 2018, is not backed by any evidence to show that the Third Respondent signed or refused to sign such document as well as that he could not disagree with the Third Respondent that such final written warning was never issued to him, is that of a reasonable decision-maker and not an irregularity.[45]

[42] (JR1314/13) [2015] ZALCJHB 347 (6 October 2015) at para 19.
[43] Para 37.8 of the founding affidavit.
[44] Page 65 of the record of proceedings Bundle.
[45] Para 50 of the award.

Applicant's Ground 37.9 [46] for review ("Written warning by Second Respondent")

[71] There is no merit in this ground based on the test for review and the authorities *supra*. The Third Respondent's finding that there was no such valid final written warning issued to the employee aforementioned, is reasonable and not an irregularity.

[72] The Third Respondent is permitted in terms of the guidelines in the LRA contained in schedule 8, to determine the fairness of an employee's sanction of dismissal based on a determination of whether, such sanction is appropriate. I deal further with this aspect, when dealing with the reasonableness of the Second Respondent's finding that the Third Respondent's dismissal is substantively unfair.

Applicant's Ground 37.10 [47] for review ("dishonesty and the trust relationship")

[73] This ground(s) is/are a repetition and this Court has already dealt with it/them above and there is no merit in it based on the test for review and authorities *supra.*

Applicant's Ground 37.11[48] ("Negligence vs gross negligence")

[74] There is no merit in this ground based on the test for review and the authorities *supra.*

[75] The totality of evidence presented before the Second Respondent led him to reasonably conclude that a competent verdict, based on such evidence, regarding the charge of gross negligence, pointed to only negligence and not gross negligence.

[46] Para 37.9 of the founding affidavit.
[47] Para 37.10 of the founding affidavit.
[48] Para 37.11 of the award.

[76] Page 83 of the Applicant's Disciplinary Action Procedures that was before the Second Respondent states *inter alia* that:

> "[5.6.2.2] Gross Misconduct
> Is defined as any offence as detailed under Misconduct which is of such a serious nature that Summary Dismissal would be appropriate. Such offences would include assault, theft, insubordination and sabotage amongst others."

[77] There is nothing in the Applicant's Disciplinary Action Procedure referred to above, that states that such a disciplinary code, is a guideline, that can be departed from in appropriate circumstances like it was held in *MEC: Department of Finance, Economic Affairs and Tourism, Northern Province v Mahumani*[49]*.*

[78] The guidelines for misconduct contained in schedule 8[50] of the LRA, do not list what The Third Respondent was charged with in relation to the charge on gross negligence as gross or serious misconduct.

[79] Submissions by the Applicant in these proceedings, about gross negligence and/or as opposed to negligence, were not put before the Second Respondent during the arbitration proceedings *a quo*. Even if they were, such submissions would still fall short of the definition of gross misconduct as per Applicant's in Disciplinary Action Procedures *supra***.**

Applicant's Ground 37.11 sic ("37.11A")[51] for review ("Acceptance of versions that were never put")

[80] This ground lacks merit as it is more of a bold statement and conclusion that lacks specifics on what is averred therein and accordingly, not sufficient to render the Second Respondent's award reviewable.

[49] [2005] 2 BLLR 173 SCA at 176 10B.
[50] Subsection 3(4) of Schedule 8 of Act No: 66 of 1995.
[51] Para "37.11 A" (sic) of the founding affidavit.

[81] Based on the above, Applicant's vague grounds of review, it was held in *Naidoo v National Bargaining Council for the Chemical Industry and others* [52] that:

> "[22] It is not sufficient for an Applicant applying to review and set aside an award of an arbitrator to simply pay lip service to the provisions of section 145 of the LRA. Rule 7A quite obviously requires an Applicant to deal fully with such factual and legal grounds upon which the Applicant relies with reference to the award and evidence."

[82] The Applicant's grounds of review fall short of satisfying the test for review based on the authority *supra*.

[83] The Second Respondent's award is lucid and satisfies the requirements of the review test and the law laid down in all the authorities referred to, over and above those dealing with the review test *supra*. Such award is that of a reasonable decision-maker as dealt with further hereunder.

Whether the Second Respondent's finding that the dismissal of the Third Respondent is substantively unfair is unreasonable?

[84] This Court is persuaded that the Second Respondent arrived at a reasonable result that the dismissal of the Third Respondent is substantively unfair, and that such decision is that of a reasonable decision-maker, based on the evidence and arguments that were before the Second Respondent.

[85] The Second Respondent's finding that the Third Respondent's dismissal is substantively unfair, is that of a reasonable decision-maker as he did not misconceive the issues for determination and enquiry before him and determined the substantive fairness of the Third Respondent's dismissal based on the pre-arbitration minutes[53] agreed to by the parties and most significantly, made a reasonable finding that the Third Respondent's dismissal

[52] [2012] 9 BLLR 915 (LC) at 921 para 22.
[53] Pre-arbitration minutes

is substantively unfair based on the totality of oral and documentary evidence and submissions that were before him.

[86] Based on the above, the Second Respondent's main decision that the Third Respondent's dismissal is substantively unfair, is reasonably justifiable and falls within the bounds of reasonableness based on the reasons advanced further hereunder.

[87] The guidelines for the determination of substantive fairness by Commissioners/arbitrators who deal with arbitrations in terms of the LRA are clearly outlined in the Code of Good Practice contained in schedule 8 of the LRA. Which states that:

> "7. Guidelines in cases of dismissal for misconduct. —Any person who is determining whether a dismissal for misconduct is unfair should consider—
>
> (a) whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the workplace; and
>
> (b) if a rule or standard was contravened, whether or not—
>
> (i) the rule was a valid or reasonable rule or standard.
>
> (ii) the employee was aware, or could reasonably be expected to have been aware, of the rule or standard;
>
> (iii) the rule or standard has been consistently applied by the employer; and
>
> (iv) dismissal with (sic) an appropriate sanction for the contravention of the rule or standard."

[88] The Applicant's Disciplinary Action Procedures provides as hereunder:

> "[5.5.2] Substantive fairness
>
> Substantive fairness deals with the nature and extent of the offence. It is incumbent upon the Company to ensure the following has been considered before a decision is made as to what sanction is applicable.

5.5.2.1 Misconduct

- Was there any breach of a rule and, if so, was the rule valid and reasonable.
- Was the employee aware, or could be reasonably expected to be aware, of the rule.
- Has the rule been consistently applied by the Company in the past.
- If breach of the rule results in dismissal then was dismissal the appropriate sanction considering:
  - The personal circumstances of the employee.
  - The nature of the job.
  - The circumstances surrounding the breach of the rules.
  - Whether the action taken is consistent with previous cases "

[Emphasis added].

[89] There is a rational connection between the totality of oral and documentary evidence that was placed before the Second Respondent and his reasonable conclusion that the Third Respondent is not guilty of the charge relating to bringing the Applicant into disrepute. I dealt with the evidence that was the basis for the Second Respondent's finding in this regard.

[90] There is a further rational connection between the totality of oral and documentary evidence placed before the Second Respondent and his finding that the Second Respondent could not be found guilty in the arbitration proceedings relevant herein, of gross negligence and instead found him guilty of negligence.

[91] The Second Respondent's specific finding that, *inter alia,* no evidence was led before him of gross negligence by Applicant, save for the negligence against the Third Respondent, relating to the non-discovery of the incident report, that served in the disciplinary hearing of Tshepo Makgola, in which the Third Respondent was the initiator, is not out of kilter with that of a reasonable decision-maker.

[92] The above finding is in light of the Applicant's own Disciplinary Action of Procedures that defines serious misconduct[54].

[93] Serious misconducts that may warrant dismissal, are also defined in the Code of Good Practice[55]. The type of negligence that the Third Respondent, admitted, and was given a final written warning, when the Second Respondent made a determination on whether the sanction of dismissal imposed by the Applicant on the Second Respondent was appropriate and fair, is reasonable.

[94] Applicant's heads on differentiation between negligence and gross negligence are new things that were not placed before the Second Respondent.

In *Ethekwini Municipality*, it was held inter *alia* that:[56]

> 'With regard to the practical approach to be adopted by Commissioners and Arbitrators in considering the sanction of dismissal, the Court laid down the following guidelines:
>
> "… To sum up. In terms of the LRA, a Commissioner has to determine whether a dismissal is fair or not. A Commissioner is not given the power to consider afresh what he or she would do, but simply to decide whether what the employer did was fair. In arriving at a decision a Commissioner is not required to defer to the decision of the employer. What is required is that he or she must consider all relevant circumstances." [Emphasis added].

[95] The Second Respondent's further finding that the Third Respondent's dismissal was substantively unfair because the Applicant could not prove existence of any previous valid final written warning issued to the Third Respondent in the arbitration proceedings *a quo* and that a dismissal based on such non-existent final written warning, is substantively unfair, is that which

[54] Clause 5.6.2.2 of the Disciplinary Action Procedures.
[55] Item 3(4) of Schedule 8 of the Code of Good Practice: Dismissal for Misconduct.
[56] *Ethekwini Municipality* at para 21.

any reasonable decision-maker would make based on the oral, documentary and submissions that were before the Second Respondent.

[96] The Second Respondent's main finding based on the totality of oral and documentary evidence before him, that the Applicant failed to discharge the onus to prove that the Third Respondent's dismissal was fair and that such dismissal is accordingly substantively unfair, is that of a reasonable decision maker.

[97] The Second Respondent's decision to retrospectively reinstate the Third Respondent with back pay, subject to a written warning, valid for six months as stipulated in the award, is equally justified and falls within the bounds of reasonableness.

[98] In the premises, the following order is made:

Order

1. The Applicant's review application is dismissed.
2. The Third Respondent is reinstated retrospectively to his position from the date of dismissal (24 June 2019) with all terms and conditions and benefits no less favourable than prior to his dismissal.
3. The Applicant is ordered to back pay salary to the Third Respondent for the period from 24 June 2019 to the date of his reinstatement.
4. The payment of the back pay salary shall be effected within 30 days of the date of this order.

5. The Third Respondent is to present himself for reinstatement at the Applicant and resume duty within 14 days of the date of this order.
6. The written warning issued by the Second Respondent to the Third Respondent, will run 6 months after the Third Respondent's reinstatement.
7. There is no order as to costs.

_____

S M Shaba

Acting Judge of the Labour Court of South Africa.

Appearances:

For the Applicant:	Adv L Monnakgotla
Instructed by:	C N Phukubye Inc Attorneys
For the Respondent:	Adv A Makile
Instructed by:	Sudeshine Naidoo Attorneys