

# Employment Law

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SOUTH AFRICA

Misconduct confessions: When are they voluntary and admissible?

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## Misconduct confessions: When are they voluntary and admissible?

*In the case of Brauns and Others v Wilkes N.O and Others [2024] 4 BLLR 365 (LAC), the three appellants sought to appeal the Labour Court judgment which dismissed their application to review an arbitration award which had found that their dismissal for dishonesty was substantively fair.*

The dishonesty arose due to the first appellant paying an unauthorised amount to the second and third appellants for overtime that was not worked by them and authorising it using another employee's name. The three appellants were all related to each other and part of the charge against them was that they conspired to commit fraud.

While the issue of a dismissal for dishonesty is not ordinarily ground-breaking, this case is particularly interesting because it concerned the submission of evidence in the form of a confession which was documented by a magistrate. The first appellant claimed that the confession was invalid as it was made before he managed to consider the evidence that his employer had against him, especially the fact that he was not at work when the transactions were performed.

The first appellant argued further that he made the confession because he: *"Was emotionally threatened with criminal prosecution and operated under the oblique notion that he was ostensibly liable on account of his User ID having been used in the transactions."*

### Background

The South African Police Service (SAPS) investigated a tip off on fraudulent overtime payments and discovered that they were done by the first appellant, who apologised

for his conduct. Arrangements were then made for the first appellant to appear before a magistrate and make a confession in this regard. A criminal case was opened against them, however the prosecutor declined to prosecute the matter.

The appellants were then charged for misconduct and were dismissed pursuant to a disciplinary hearing. They subsequently referred the matter to the Safety and Security Sectoral Bargaining Council, which found that their dismissal was substantively fair.

The evidence proffered by SAPS, including all the testimony and the confession, demonstrated that the appellants were guilty as charged and that the second and third appellants received money, that they did not work for, as a result of actions by the first appellant.

In the Labour Court the appellants complained that the Commissioner failed to consider the material presented before him, misconceived the nature of the enquiry, and thus arrived at an unreasonable outcome. The Labour Court disagreed and found the Commissioner's award to be reasonable.

### The Labour Appeal Court

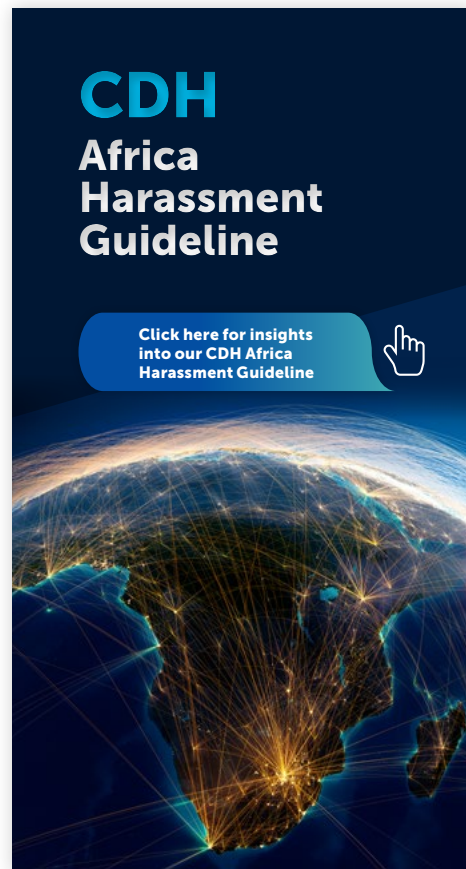
In the Labour Appeal Court (LAC) the appellants raised similar issues as they did in the Labour Court but added that the Labour Court erred in accepting the basis on which the Commissioner relied on the first appellant's *"purported confession"*.

The LAC found that the Commissioner did not misconstrue the nature of the enquiry he was tasked to conduct. The approach he adopted in dealing with the issue before him was correct in that the conclusion reached

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was one that a reasonable decision-maker could have reached. The LAC also disagreed with the appellants that the Commissioner, in arriving at his decision, considered irrelevant evidence and ignored relevant evidence. Even if that were the case, the LAC stated that it is trite that an arbitration award will not be vitiated by mere errors of fact or law on the part of the Commissioner.

In respect of the confession, the court stated that an essential element in labour disciplinary proceedings is that a confession is an acknowledgement, on the part of an employee, of a fault, wrongdoing or breach of a rule. The LAC held further that a confession is said to be valid if it is freely and voluntarily made without undue influence, coercion or intimidation from the employer or any other person. The other requirement for a valid confession is that the employer has to show that the confession was clear and unambiguous and that the employee understood the consequences of the confession.

Accordingly, the taking of the statement and the statement as such should be looked at against the background and the circumstances under which the statement was taken. A further principle governing confession in labour matters is that a valid confession does not, without more, justify an employee's dismissal.

The LAC stated further that while a confession based on fear of criminal prosecution may be considered involuntary, it will not be the case where the confession is voluntary and corroborated.

In admitting the first appellant's confession, the Commissioner reasoned that it was made voluntarily to an independent magistrate. In addition, the magistrate's evidence was that she had been at pains to ensure that the applicant was informed of his rights and asked several questions to ascertain that there was no undue influence or threat.

In respect of the first appellant's claim that he didn't have all the evidence before making the confession, the LAC found that this had no merit as a confession is extra-curial and generally forms part of an investigation into an employee's misconduct; thus, it is not made by first finding out what information the employer has and only then making the confession.

An employee who confessed to an offence can still plead not guilty to the charges or even challenge the confession itself, including its reliability at the disciplinary inquiry. An employee can also present evidence and argument to prove their innocence, including mitigating the severity of punishment.

The LAC accordingly found that the Labour Court could not be faulted in its finding that the award of the Commissioner was one which a reasonable decision-maker could have reached and accordingly dismissed the appellants' review application.

Employers should take note that when obtaining a confession of any sort from an employee who faces disciplinary action, it must be done freely and voluntarily and that must be evidence of this if an employer is to justify the disciplinary action.

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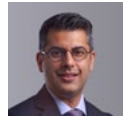
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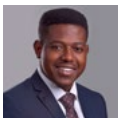
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