**THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

Reportable

Case no: JR 1662/20

In the matter between:

**NATIONAL BARGAINING COUNCIL FOR THE ROAD FREIGHT AND LOGISTICS INDUSTRY** **Applicant**

And

**GUY BLOCH *N.O.*** **First Respondent**

**CRYSTAL COOL LOGISTICS (PTY) LTD** **Second Respondent**

**MOTOR TRANSPORT WORKERS UNION obo MEMBERS** **Third Respondent**

**Heard:** **5 October 2023**

**Delivered:** **26 January 2024**

**This judgment was handed down electronically by circulation to the parties and legal representatives by email. The date and time for hand-down is deemed to be 26 January 2024**

**Summary: Bargaining council arbitration proceedings – review of proceedings, decisions and awards of arbitrators – test for review considered – s 145 as read with s 158(1)(g) of LRA 1995 – determination of conduct of arbitrator, gross irregularities and reasonable outcome**

**Collective agreement – compliance with agreement – principle of substantial compliance considered – employer substantially complying with agreement even though not complying with the letter thereof – arbitrator's finding of substantial compliance upheld**

**Collective agreement – purpose of provision relating to incentive scheme in collective agreement considered – purpose was achieved in this case – incentive scheme valid – finding of arbitrator to this effect not reviewable**
**Bargaining Council collective agreement – purpose of enforcement provisions considered – purpose is to secure compliance and not to punish – employer having remedied non-compliance – objective of enforcement process achieved – arbitrator's finding to this effect sustainable on review**
**Condonation – principles considered – late filing of review application – applicant making out proper case for condonation – condonation granted**
**Review application – arbitration award constituting reasonable outcome – applicant failing to make out case**

**Judgement**

**SNYMAN. AJ**

Introduction

[1] This judgment concerns an application by the National Bargaining Council for the Road Freight and Logistics Industry (NBCRFLI), as applicant, to review and set aside an arbitration award handed down by one of its own arbitrators, emanating from enforcement proceedings between the applicant and the second respondent under section 33A of the Labour Relations Act (LRA)[1]. The dispute placed before the first respondent, who was the duly appointed arbitrator in the proceedings, was whether the second respondent had complied with the provisions of clause 35 of the Main Collective agreement of the NBCRFLI (the Main Agreement). The current review application has been brought in terms of section 145 as read with section 158(1)(g), of the LRA.

[2] In an arbitration award dated 1 August 2020, the first respondent decided that the second respondent was in compliance with clause 35 of the Main Agreement, and therefore that an incentive scheme implemented by the second respondent to

[1] Act 66 of 1995 (as amended).

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remunerate its employees, in terms of that provision, was valid, and stood. It is this award of the first respondent that forms the subject matter of the review application brought by the applicant.

Condonation

[3] The arbitration award of the first respondent was received by the applicant on 1 August 2020. The applicant filed its review application on 19 November 2020. However, the time limit as contemplated by section 145(1) [2] of the LRA expired on 15 September 2020, making the applicant's review application just more than two months out of time. The applicant did apply for condonation as part of its notice of motion and founding affidavit in the review application.

[4] In dealing with the condonation application, I am satisfied that overall considered, it was a proper condonation application dealing with all the condonation considerations as articulated in *Melane v Santam Insurance Co Ltd*[3]. In dealing with an application for condonation specifically where it came to the late filing of a review application, the Labour Appeal Court (LAC) in *A Hardrodt (SA) (Pty) Ltd v Behardien and Others*[4] said:

'The principles laid down … included, firstly that there must be good cause for condonation in the sense that the reasons tendered for the delay had to be convincing. In other words, the excuse for non-compliance with the six-week time period had to be compelling. Secondly, the court held that the prospects of success of the appellant in the proceedings would need to be strong. The court qualified this by stipulating that the exclusion of the appellant's case had to be very serious, ie of the kind that resulted in a miscarriage of justice.'

[5] Dealing first with the length of delay, although the delay of two months, in the context of a review application, would be considered to be excessive, it is not unduly

[2] The prescribed time limit is 6(six) weeks.
[3] 1962 (4) SA 531 (A) at 532C-E. The Court held that these requirements for consideration are the length of the delay, the explanation for the delay, the importance of the case (prejudice) and the prospects of success. These requirements are interrelated, and must be holistically considered.
[4] (2002) 23 ILJ 1229 (LAC) at para 4.

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lengthy to the extent of mitigating, in itself, against the granting of condonation, absent a truly excellent explanation. In short, it sits on the border of becoming problematic, but is not unduly excessive.

[6] The next element to considering any condonation application is that of the explanation provided for the delay. This must be a proper explanation supported by sufficient particularity, dealing with the entire period of the delay. In *Seatlolo and others v Entertainment Logistics Service* (*a division of Gallo Africa Ltd*)[5] the Court held:

'In order to exercise its discretion whether or not to grant condonation, this court must be appraised of all the facts and circumstances relating to the delay. The applicant for condonation must therefore provide a satisfactory explanation for each period of delay. See *NUMSA & another v Hillside Aluminium* [2005] 6 BLLR 601 (LC) where Murphy AJ held that an unsatisfactory explanation for any period of delay will normally be fatal to an application, irrespective of the applicant's prospects of success.'

[7] In my view, the issue of a proper explanation for the entire period of the delay would be the most critical component to any condonation application. This is even more so in a review application, considering the words of '*convincing*' and '*compelling*' used by the LAC in *A Hardrodt supra* in describing what the explanation needs to be. As to how this explanation must be provided, the Court in *Independent Municipal and Allied Trade Union on behalf of Zungu v SA Local Government Bargaining Council and Others*[6] provided the following guidance:

'In explaining the reason for the delay it is necessary for the party seeking condonation to fully explain the reason for the delay in order for the court to be in a proper position to assess whether or not the explanation is a good one. This in my view requires an explanation which covers the full length of the delay. The mere listing of significant events which took place during the period in question without an explanation for the time that lapsed between these events does not place a court in a position properly to assess the explanation for the delay. This amounts to nothing more than a recordal of the dates relevant to the processing of a dispute or application, as the case may be.'

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[5] (2011) 32 ILJ 2206 (LC) at para 11

[6] (2010) 31 *ILJ* 1413 (LC) para 13

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[8] Any explanation in the application for condonation must be considered in the context of the imperative of the expeditious resolution of employment disputes. In *Food and Allied Workers Union on behalf of Gaoshubelwe v Pieman's Pantry (Pty) Ltd*[7] the Court said:

'… Our courts have, on occasion, pronounced on the importance of labour disputes to be conducted with expedition. For example, in *National Research Foundation* the Labour Court held:
'[15] It is now trite that there exists a particular requirement of expedition where it comes to the prosecution of employment law disputes. …'

[9] Next, the applicant for condonation must deal with the issue of prejudice. The applicant must set out in what manner the applicant would be prejudiced if condonation is refused, again with sufficient particularity. The prejudice the applicant would suffer should be compared to the possible prejudice the other party would suffer if condonation is granted, so as to enable the Court to make a balanced decision on this.

[10] The issue of prospects of success must also be considered. However, and where it comes to considering the issue of prospects of success, there is a proviso, which proviso in fact illustrates the critical importance of the explanation for the delay. Where an applicant fails to provide an explanation for the delay or material parts of the delay, the issue of prospects of success may become an irrelevant consideration.[8]

[11] Turning to the explanation provided by the applicant *in casu*, it says that initially, the delay was caused by a misunderstanding between itself, and the Motor Transport Workers Union (MTWU), which union was also a participating party in the arbitration proceedings opposing the second respondent's incentive scheme. The applicant thought that MTWU was going to file the review application, but after about two months, MTWU reverted to the applicant and indicated that it was of the view that the applicant was better suited to proceed with the review application.

[7] (2018) 39 ILJ 1213 (CC) at para 187.
[8] See *Universal Product Network (Pty) Ltd v Mabaso and Others* (2006) 27 ILJ 991 (LAC) at para 20; *Colett v Commission for Conciliation, Mediation and Arbitration and Others* (2014) 35 *ILJ* 1948 (LAC) at para 38; *Mgobhozi v Naidoo NO and Others* (2006) 27 *ILJ* 786 (LAC) at para 34.

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[12] On 2 October 2020, the applicant sought opinion from its attorneys as to prospects of success where it came to the review application, and received this opinion on 14 October 2020. After the applicant's officials properly considered the opinion, it was resolved that the applicant proceed with the review application, and attorneys were instructed on 26 October 2020 to take this action. The draft of the application was completed by 6 November 2020. The draft had to be considered by Mongezi Kekana (Kekana), who was the designated agent directly involved in this matter throughout, but he was on leave which caused a further delay of about a week.

[13] In considering this explanation, it is a little thin, but at least there is an explanation for the entire period of the delay. It is clear to me that at all relevant times, the applicant actively pursued the matter, and was always intent on pursuing it to finality. The bulk of the delay sits in the misunderstanding between the applicant and MTWU, and although one can say that the applicant should have rather simply proceeded with the review of its own accord, the explanation is not unreasonable. The applicant, being a bargaining council funded by contributions from industry employers, cannot be criticised for wanting to first secure legal opinion on the prospects of success of its review application, before deciding to pursue it. The period of just more than three weeks it ultimately took to prepare and file the review application once attorneys were instructed, cannot be considered to be an undue delay. Overall considered, the applicant has thus, in my view, provided a proper explanation for the delay in this instance.

[14] On the issue of prejudice, the applicant did elaborate, in the founding affidavit, on the prejudice it would suffer. I do not intend to repeat all of this in this judgment. Suffice it to say, this consideration favours the applicant. If condonation is not granted, the review application will fail, in an instance where the application and interpretation of the applicant's main agreement is at stake, which is an issue that should be finally determined by this Court and could have importance for the whole industry. Where it comes to prejudice to the second respondent, it will still have opportunity to state its case if condonation is granted, which largely ameliorates its harm. Fairness dictates that the applicant must be given an opportunity to present its review case in this regard to this Court.

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[15] Finally, the issue of prospects of success is interwoven with the merits of the review application, and should not be considered separately in this instance. Condonation is thus essential to enable the merits of the review application to be properly and fairly ventilated.

[16] Even though the second respondent opposed the review application, it did not advance any facts in contradiction to the applicant's explanation, in its answering affidavit. Its opposition was in essence aimed at taking apart the applicant's explanation. Even though some of the criticism of the second respondent levelled at the applicant's explanation is justified, I do not believe it is sufficient to non-suit the applicant where it comes to the explanation provided. I remain satisfied that the applicant always had the intention to pursue the matter further, and did file the review application within about a month after receiving opinion from its attorneys, which is not an undue time taken.

[17] I am therefore inclined to grant the applicant's application for condonation for the late filing of the review application, and I shall now attend to deciding this review application by first setting out the relevant background facts.

<u>The relevant background</u>

[18] The applicant is a bargaining council registered and established in terms of the LRA, for the sector defined as the road freight and logistics industry (the industry). Part of the specific functions bestowed on bargaining councils, under the LRA, is to enforce the provisions of collective agreements concluded between the parties in the bargaining council, as well as against non-parties where the collective agreements have been extended to non-parties by virtue of section 32 of the LRA.

[19] *In casu*, the applicable Main Collective Agreement (Main Agreement) of the applicant, concluded on 16 August 2016, was extended to non-parties by the Minister

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on 28 October 2016.[9] The Main Agreement, and all its provisions, were thus at all relevant times to this case operative and binding on the second respondent.

[20] The second respondent is a logistics business, conducting business within the course and scope of the industry. The second respondent specializes in refrigerated transport. The second respondent employs truck drivers as part of its ordinary operations. At the time of arising of the issue in this matter, the second respondent employed some 103 drivers. The terms and conditions of employment and remuneration of those truck drivers are determined by the Main Agreement.

[21] Ordinarily, the Main Agreement prescribes that truck drivers are remunerated on the basis of an hourly rate linked to hours / days worked by such drivers. However, it is often true that employers in the industry would rather remunerate drivers based the output of work done. This is referred to payment incentive schemes. These schemes not only benefit employers because it enhances work output, but employees have the opportunity to earn far more than simply what is prescribed by the Main Agreement.

[22] Appreciating the need for this basis of remuneration, the parties to the industry brought about a change the Main Agreement effective 16 January 2012, which change introduced clause 35 to the Main Agreement, which clause currently still exists and applies. The current version of clause 35 reads:

'(1) An employer may introduce an incentive scheme in terms of which an employee's remuneration is based on the quantity of work done or the employee's output, if –
(a) the scheme complies with this clause and has the approval of the Council;
(b) the registers prescribed in clauses 50 and 51 of this Agreement are properly kept;
(c) an employee who is part of the scheme, is not paid less than the amount that employee would otherwise be entitled to in terms of clauses 11, 14, 15, 16 and 36 and Schedule 5.

[9] By way of Notice 726 in Government *Gazette* 40385 of 28 October 2016.

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(2) An employer who wishes to introduce an incentive scheme must set up a committee consisting of an equal number of representatives of management and elected representatives of employees to negotiate and agree the terms of the scheme.

(3) The terms of an incentive scheme –
(a) must be reduced to writing and be signed by all the members of the joint representative committee; and
(b) may not be varied or terminated by any party to the scheme unless that party –
(i) has given all other parties notice in writing as may have been agreed upon by the parties who entered into the scheme;
(ii) has complied with any other obligations set out in the scheme for varying or terminating the scheme.'

[23] By virtue of the provisions of clause 35, the second respondent sought to introduce an incentive scheme for its drivers in 2017. It did this by way of what was described as a 'collective agreement' for an incentive payment system it concluded with the 'employees' of the second respondent on 11 July 2017 (the 2017 agreement). This agreement obviously could not be a collective agreement as contemplated by the LRA, as the LRA requires that the agreement be concluded with a registered trade union.[10]

[24] The 2017 agreement was however not signed by all the employees on 11 July 2017 and was ultimately also not signed by each and every individual employee. From the record of the arbitration, it appears that two copies of the 2017 agreement was signed by employees. On one copy, a total of 58 employees signed the 2017 agreement in the period between 11 July 2017 and 28 February 2018. On the other copy, 27 employees signed between the period 26 July 2017 and 31 May 2018. It appears clear that the 2017 agreement was presented to each and every individual employee on a one on one basis to sign.

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[10] In section 213 of the LRA, a collective agreement is defined as '*… a written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded by one or more registered trade unions, on the one hand and, on the other hand- (a) one or more employers; (b) one or more registered employers' organisations; or (c) one or more employers and one or more registered employers' organisations'* (emphasis added).

[25] On 15 September 2017, MTWU, purporting to represent 66 employees employed at the second respondent,[11] submitted an application to the applicant to investigate alleged non-compliance with the payment provisions of the Main Agreement, by the second respondent. It appears that this referral arose because MTWU believed clauses 11, 14, 15, 16 and 36 were not being complied with, pursuant to the implementation of the incentive scheme by the second respondent.

[26] Despite this application for an inspection, MTWU and the second respondent concluded a collective agreement on 20 November 2017 (MTWU agreement). This agreement appears to be more or less identical to the 2017 agreement. This agreement however does not indicate who the members of MTWU were, that were employed at the second respondent.

[27] The upshot of all the aforesaid was that second respondent, pursuant to concluding the two agreements in 2017, implemented the incentive scheme as set out in those agreements. However, the applicant never approved the incentive scheme. Also, and at the time, there was never a committee established with an equal number of management and employee representatives to negotiate and agree the terms of the incentive scheme.

[28] On 5 December 2017, the second respondent sent an e-mail to the applicant attaching the agreements signed by its employees as constituting the agreed incentive scheme, for approval by the applicant. It was stated in this e-mail that the second respondent had also now appointed the members of the joint negotiating committee. The second respondent followed up on this request for approval, by way of a further e-mail on 9 January 2018. The applicant, by way of the senior agent Fernando Pedro (Pedro), answered on 10 January 2018 to the effect that a meeting will be set up with the second respondent to go through the requirements of clause 35 to ensure they have been met.

[29] On 18 January 2018, Pedro sent an e-mail to the second respondent in which he then proposed an inspection at the second respondent to ensure that the second

[11] It turned out later that MTWU only had six members employed at the second respondent.

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respondent was complying with clause 35. Pedro stated in this e-mail that if it was found that clause 35 had been complied with, the applicant will only then be able to state whether approval is given. The second respondent was agreeable to this proposal. The parties then agreed to an inspection on 31 January 2018.

[30] The inspection was conducted by one of the applicant's designated agents, being Kekana, at the second respondent on 31 January 2018, as agreed. Following the inspection, Kekana was not satisfied that the second respondent was compliant with clause 35. It appears that there was a delay in Kekana giving feedback to the second respondent on the outcome of the inspection, and only on 12 April 2018, Kekana gave feedback to the effect that the incentive scheme was not compliant with clause 35 in that there was no joint committee in place. According to Kekana, it was now appropriate to issue a compliance order, so as to enable the second respondent to comply. On the facts, it does appear that Kekana's views were not entirely correct, as the committee had been in place since the start of 2018.

[31] In an e-mail on 2 May 2018 sent to Kekana, the second respondent's managing director, Jaco Viljoen (Viljoen), attached minutes of meetings of the committee held on 12 and 20 April 2018, which, according to Viljoen, put the compliance issue to bed. Viljoen further, in an e-mail on 16 May 2018, attached the agreements concluded in 2017 to prove the terms of the incentive scheme had been agreed to.

[32] Kekana disagreed. In an e-mail dated 16 May 2018 to Viljoen, Kekana indicated that it did not appear from the April 2018 minutes that the committee discussed or agreed to the incentive scheme. Kekana stated that the second respondent was obligated to negotiate the incentive scheme with the committee, after its establishment, and then the committee still had to agree to it. According to Kekana, the agreements concluded in 2017 did not constitute compliance, because it was concluded prior to the establishment of the committee. Kekana stated that a compliance order would now be issued to enable the second respondent to comply with what the applicant required.

[33] Kekana then, on 21 May 2018 issued a compliance order to the second respondent. The compliance order was to the effect that the second respondent had,

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in the period 1 to 28 February 2018, implemented an incentive scheme that did not comply with the requirements of clause 35.

[34] In response to the compliance order, the second respondent convened a meeting of the committee on 1 June 2018. In this meeting, the individual terms of the incentive scheme were discussed, and then agreed to by the committee. It was specifically recorded in the minute of the meeting that all parties were in agreement with the terms of the incentive scheme. Viljoen, in an e-mail dated 4 June 2018, sent the minutes of this meeting to Kekana, and requested that the incentive scheme now be approved.

[35] Kekana was still not satisfied. In an e-mail on 11 July 2018 to *inter alia* Viljoen, he noted the contents of the minutes of 1 June 2018, but then required that the second respondent submit the incentive scheme actually signed by the members of the committee. As far as Kekana was concerned, the agreements signed in 2017 still did not qualify as compliance with the provision that the incentive scheme had to be in writing and signed, even though such agreements were referred to in the minutes and were in essence ratified by the committee.

[36] In order to put an end to the issue, what the second respondent then did was take the incentive agreement, which had now been negotiated and agreed to in the committee established in terms of clause 35, and have it signed again by all the members of the committee. This was done on 18 October 2018. This agreement, duly signed by the committee, was sent to Pedro and Kekana on 22 October 2018, again with a request for approval by the applicant.

[37] Nonetheless, the applicant did not approve the incentive scheme. Instead, it referred the dispute concerning the second respondent's non-compliance with clause 35, to arbitration before an arbitrator appointed by the applicant. Having been dealt with first by default, which was subsequently rescinded, and then postponed on several occasions after that, this dispute was ultimately set down for arbitration on 30 July 2020 before the first respondent. The issue placed before the first respondent concerned the second respondent's alleged continued non-compliance with the compliance order issued on 21 May 2018.

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[38] The first respondent, in his award, recorded that what he was called upon to decide was whether the incentive scheme of the second respondent was valid, considering the provisions of clause 35 of the Main Agreement. He ultimately decided that the incentive scheme was valid, for the reasons dealt with later in this judgment. But in a nutshell, the first respondent concluded that the second respondent had 'substantially' complied with clause 35. This conclusion then gave rise to the current review application.

<u>The test for review</u>

[39] The test for review is trite. In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others,*[12] the Court held that '*the reasonableness standard should now suffuse s 145 of the LRA*', and that the threshold test for the reasonableness of an award was: *'… Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?...'*[13]*.* In *Duncanmec (Pty) Ltd v Gaylard NO and Others*[14] the Court succinctly summarized the test as follows:

'This test means that the reviewing court should not evaluate the reasons provided by the arbitrator with a view to determine whether it agrees with them. That is not the role played by a court in review proceedings. Whether the court disagrees with the reasons is not material.

The correct test is whether the award itself meets the requirement of reasonableness. An award would meet this requirement if there are reasons supporting it. The reasonableness requirement protects parties from arbitrary decisions which are not justified by rational reasons.'

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[12] (2007) 28 ILJ 2405 (CC).
[13] Id at para 110. See also *CUSA v Tao Ying Metal Industries and Others* (2008) 29 ILJ 2461 (CC) at para 134; *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others* (2008) 29 *ILJ* 964 (LAC) at para 96.
[14] (2018) 39 ILJ 2633 (CC) at paras 42 – 43

[40] It is always necessary and important for the Court to enquire into and consider the merits of the matter and the entire evidence on record in deciding what is reasonable.[15] In *Herholdt v Nedbank Ltd and Another*[16] the Court said:

'… A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to the particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of consequence if their effect is to render the outcome unreasonable.'

[41] In sum, the review test has a logical chronology. First, it is determined if there a failure or error on the part of the arbitrator. Second, and where there is such a failure or error, it must be shown that the outcome arrived at by the arbitrator was unreasonable as a result. This reasonableness consideration envisages a determination, based on all the evidence and issues before the arbitrator, as to whether the outcome the arbitrator arrived at can nonetheless be sustained as a reasonable outcome, even if it may be for different reasons or on different grounds.[17] It would only be if the outcome arrived at by the arbitrator cannot be sustained on any grounds, based on that material, and the irregularity, failure or error concerned is the only basis to sustain the outcome the arbitrator arrived at, that the review application would succeed.[18]

[42] Against the above principles and test, I will now proceed to consider the applicant's application to review and set aside the arbitration award of the second respondent.

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[15] Id at para 41.
[16] (2013) 34 *ILJ* 2795 (SCA) at para 25. See also *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others* (2014) 35 ILJ 943 (LAC) at para 14; *Monare v SA Tourism and Others* (2016) 37 ILJ 394 (LAC) at para 59; *Quest Flexible Staffing Solutions (Pty) Ltd (A Division of Adcorp Fulfilment Services (Pty) Ltd) v Legobate* (2015) 36 ILJ 968 (LAC) at paras 15 – 17; *National Union of Mineworkers and Another v Commission for Conciliation, Mediation and Arbitration and Others* (2015) 36 ILJ 2038 (LAC) at para 16.
[17] *Fidelity Cash Management Service (supra)* at para 102.
[18] See *Campbell Scientific Africa (Pty) Ltd v Simmers and Others* (2016) 37 ILJ 116 (LAC) at para 32; *Anglo Platinum (Pty) Ltd (Bafokeng Rasemone Mine) v De Beer and Others* (2015) 36 ILJ 1453 (LAC) at para 12.

Analysis

[43] I must confess that having regard to the facts of this matter, I find it difficult to understand why the applicant persisted in proceeding to arbitration with its challenge that the second respondent failed to comply with clause 35 of the Main Agreement, and simply did not approve the same as required by clause 35(1)(a). As a general proposition, it is always about compliance, and as will be dealt with detail below, compliance happened in this case long before arbitration. This being said, and overall considered, I can find little fault with the reasoning of the first respondent where it comes to the conclusions he arrived at, and these conclusions certainly resort well within the ambit of what may considered to be a reasonable outcome. I will now set out the reasoning for my finding in this regard.

[44] In his arbitration award, the first respondent departed from the premise that where an employer in the industry contravenes the Main Agreement, the system of inspections and compliance orders are designed to bring such an employer in line by remedying the contravention. In simple terms, a compliance order is not there to punish an employer. The very point of the compliance order is that the particulars of non-compliance are specifically brought to the attention of the employer, and the employer is then given the opportunity to remove the causes of complaint. This intention was actually acknowledged by Kekana in his e-mail to the second respondent on 16 May 2018, prior to issuing the compliance order, where he said the same in almost so many words.

[45] The above being so, what did the applicant then want from the second respondent in terms of the compliance order? As the first respondent finds, the applicant was seeking to '*correct*' the second respondent's non-compliance with clause 35, and what the applicant was asking the second respondent to do was '*for a committee to be established and the agreement (re) signed by the committee*'. These findings of the second respondent are in my view unassailable and fully in line with the evidence, for the reasons to follow.

[46] A simple consideration of the e-mail correspondence that passed between the parties in the period 7 December 2017 to 16 May 2018, as well as the events relating

thereto, established what the applicant wanted from the second respondent. It started off with the second respondent sending the incentive agreements signed in 2017 to the applicant, and asking it for approval. The request resulted in an inspection, pursuant to which the applicant adopted the view that the incentive scheme was not compliant with clause 35 in that there was no joint committee in place. It was common cause that following this inspection, a committee as contemplated by clause 35 was indeed established by the second respondent. The committee met in April 2018, and the minutes were sent to the applicant, however the applicant was still not satisfied that the incentive scheme had been properly dealt with and negotiated in the committee. According to the applicant, the agreements concluded in 2017 did not constitute compliance with the requirements that the incentive scheme must be negotiated in the committee, because those agreements were concluded prior to the establishment of the committee. The compliance order of 21 May 2018 was issued on this basis. The second respondent sought to adhere to the compliance order, by convening a meeting of the committee on 1 June 2018, in which the individual terms of the incentive scheme was discussed (negotiated) and agreed to by the committee, and the minutes of such meeting were sent to the applicant. The applicant was still not satisfied, and required that the incentive scheme itself had to be signed by the members of the committee, which was then indeed done on 18 October 2018, and this agreement was submitted to the applicant, again with a request for approval. For all intents and purposes, and in my view, this constituted full compliance with what the applicant required from the second respondent for approval of the incentive scheme. The objective of remedying non-compliance by way of the compliance order had been fulfilled. As a result, and as the first respondent correctly said, in the context of what was required to effect compliance, '*this is what the respondent then did*'.

[47] All the above considered, I simply cannot understand why it would be necessary to delve into the question of whether the 2017 agreement and / or the MTWU agreement were valid and constituted compliance with clause 35 where it came to the incentive scheme applicable in the second respondent. It equally does not matter, for the purposes of deciding this case, to determine the consequences of concluding such agreements in the absence of a committee appointed in terms of clause 35. I will accept, for the purposes of this judgment, that clause 35 requires that the employer must establish a committee as contemplated by clause 35 and negotiate and agree

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on the terms of the incentive scheme in that committee, in order for there to be a valid incentive scheme susceptible to being approved by the applicant. I will also accept that an agreement concluded between individual employees and the employer, in the absence of such a committee, would not meet the clear requirements of what is stipulated in clause 35. But none of these kinds of failures have any consequence or effect in this case, because of the subsequent events that took place in 2018, and the end result arrived at on 22 October 2018.

[48] Whilst it is true that the second respondent implemented the incentive scheme in 2017 in circumstances where it did not comply with clause 35, that is not where the enquiry ends where it comes to deciding whether ultimately, and when the matter was arbitrated, there was a valid incentive scheme in place. If that was where the enquiry would end, it would be impossible for any employer to remedy non-compliance, and this would subvert the essential objective of obtaining compliance from employers, rather than punishing them. As I said, compliance orders are intended to fix things where to comes to what employers do, and what the Main Agreement actually requires them to do.

[49] In the context of clause 35, the Main Agreement allows for employees being remunerated by way of an incentive scheme negotiated and agreed to in an individual employer in the industry. The substantive proviso is that such a scheme cannot cause the employees to be remunerated less than what is guaranteed in the ordinary course, in the Main Agreement, relating to overtime work, Sunday work, work on public holidays, night work, and remuneration and benefits.[19] The employer is further required to maintain prescribed records so as to enable the applicant to ascertain if these minimum standards are adhered to.[20] Then there are further procedural safeguards. The first is that the incentive scheme must be negotiated with the employees in a committee established as prescribed in the clause, for that purpose. The second is that the incentive scheme must be reduced to writing and signed by the

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[19] These are stipulated in clauses 11, 14, 15 and 16, as well as schedule 5, of the Main Agreement.
[20] These records are those prescribed in clauses 50 and 51 of the Main agreement. Clause 50 includes a time, wage and leave register, and a register identifying each employee with date of commencement of employment and class of work. Clause 51 requires a drivers' daily logbook to be kept, containing all the information as prescribed in clause 51(1).

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committee. Once the employer has complied with these provisions, the employer has complied with what is required of it in terms of clause 35.

[50] This leaves the requirement that the applicant must approve the incentive scheme. In my view, this requirement is not a general discretion afforded to the applicant to approve or not to approve an incentive scheme, even if the employer has complied with all the other requirements of clause 35. So, and by way of simple illustration, it is not open the applicant to say to an employer that even where the employer has complied with all that clause 35 requires, the applicant has decided, for its own reasons, not to approve it. The approval contemplated in clause 35 is, in my view, an oversight of compliance function, which, once compliance with clause 35 is established, enables the incentive scheme to come into operation. In short, and where the employer submits an incentive scheme to the applicant for approval, the applicant checks that scheme as against the requirements of clause 35, and if it finds that those requirements are met, it is compelled to approve the incentive scheme.

[51] So where does all the above leave the case *in casu*? As said, and should the second respondent have demanded approval of the incentive scheme only based on the agreements concluded in 2017, the applicant would have been justified in refusing to approve it. And as I have also said, this is indeed where things started. But instead of simply refusing the approve the incentive scheme as asked for by the second respondent at the time, and in a manner which I consider to be proper, rational and responsible conduct, the applicant instead engaged with the second respondent, seeking to arrive at a state of affairs where clause 35 has been complied with and the applicant would be in a position to give its approval. On the facts, this intervention on the part of the applicant was successful. As of 18 October 2018, there was, on the undisputed facts, a proper committee established in terms of clause 35, the incentive scheme had been negotiated and agreed to in this committee (the minutes thereof were submitted to the applicant), and the committee had signed the incentive agreement setting out all the terms of the scheme. There was no dispute as to compliance with the other substantive requirements of clause 35. It follows that the second respondent was entitled to approval of its incentive scheme by the applicant, at this time. It simply does not matter what happened in 2017.

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[52] When the matter came before the first respondent in 2020, the applicant seemed to change tack. It now suggested that there was still not compliance with clause 35, because the second respondent could in essence not remedy that which had already been implemented in 2017 when there was, undeniably, not compliance with clause 35. Considering all the facts in this case, I find this argument rather opportunistic, and simply unsustainable. Throughout, there was never an issue of invalidity of the incentive scheme because it contravened substantive aspects such the guaranteed minimum payments under cause 35(1)(c) or that the necessary records in terms of clause 35(1)(b) were not kept. It was always a case of procuring compliance with the procedural requirements under clause 35(2) and 35(3)(a), so approval for the scheme can be obtained. On the facts, the terms of the incentive scheme as embodied in the 2017 agreements always remained the same, and was again agreed to in writing, once the procedural requirements of clause 35 had been fulfilled, by the committee. It means that when the case came before the first respondent, there was an incentive scheme in full compliance with clause 35. For the applicant to say that all this effort should be discarded because it was impossible to fix, is simply an unfounded proposition.

[53] I can see no reason why the applicant could not have granted its approval for the incentive scheme as of 22 October 2018, when it received the resigned incentive agreement with a request for approval. If the reason is that non-compliance with clause 35 could not be remedied, that is plainly wrong, and flies in the face of the objective sought to be achieved by the compliance order of 21 May 2018. To put it bluntly, the applicant first said to the second respondent, in order to secure its approval for the incentive scheme, to get a committee. That the second respondent did. Then the applicant told the second respondent to negotiate the incentive scheme terms with the committee and get the committee itself to agree to the incentive scheme. Again, the second respondent did this. And finally, the applicant said it wanted the incentive scheme to be signed by the committee after having agreed to its terms. The second respondent provided this signed incentive scheme in the form of an agreement signed by the committee. It is an untenable that the applicant should nonetheless continue with its conduct of not approving the incentive scheme, in all these circumstances.

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[54] One final consideration remains. It is true that when the matter came before the first respondent on 30 June 2020, the applicant had still not approved the incentive scheme. It is also true, as discussed above, that clause 35(1)(a) does specifically prescribe that approval of the applicant is necessary. Does that mean that the first respondent's decision to nonetheless uphold the incentive scheme as valid is flawed? I think not, for the reasons to follow.

[55] One must consider the rationale for the requirement of approval by the applicant, as discussed above. It can perhaps be most simply described as an audit function. Once the 'audit' is successfully completed by the applicant, by ensuring compliance with clause 35, the incentive scheme must be signed off by the applicant, which is what the approval would be. *In casu*, on the facts, and actually pursuant to intervention by the applicant itself, the audit was successfully completed by 22 October 2018. There is no reason why the incentive scheme could not have been then signed off. The applicant's failure to do so, without proper reason or cause, cannot be held against the second respondent, where it comes to the validity of the incentive scheme.

[56] It is also not as if the second respondent simply embarked upon its own mission to establish an incentive scheme, in circumstances where, although complying with clause 35, the incentive scheme was never brought to the attention of the applicant. I accept that clause 35 does contemplate, considering the rationale behind the requirement for approval by the applicant as discussed above, that at the very least the applicant must be provided by an employer with all the information relating to the incentive scheme and its compliance with clause 35, and then be asked by the employer to approve the same. This is exactly what happened *in casu*. The applicant was not only provided with all the information, but it was directly involved in arriving at the point of compliance. It was also on several occasions asked, in writing, to approve the incentive scheme. There was nothing standing in the way of the applicant approving the incentive scheme of the second respondent, as it had before it all that was needed, with a request for approval.

[57] The added problem is that the applicant did even come out and refuse approval. The applicant not once, after 22 October 2018, provided any reason to the second respondent why it did not approve the incentive scheme, and simply remained supine.

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This state of affairs actually illustrates why the absence of approval, in this particular case, cannot serve to visit the second respondent's incentive scheme with invalidity. To illustrate, if the applicant, for its own reasons, decides not to approve an incentive scheme, all it has to do is simply do nothing, and that inaction effectively scuppers the scheme. This cannot be acceptable. The applicant's intransigence, which in this case persisted for almost two years up to the point of arbitration, is untenable. It should not be allowed to serve to invalidate the second respondent's incentive scheme.

[58] The argument presented by the applicant of the second respondent not being able to retrospective remedy the non-compliance only came out in the arbitration. I do not believe this kind of conduct is *bona fide*. What the applicant knew was actually in existence, long before this matter was arbitrated, was a proper incentive scheme at the second respondent in compliance with clause 35. And as I have said, achieving that kind of compliance was the very point of the compliance order the applicant sought to enforce. How can the applicant on the one hand say to the second respondent not to worry about the compliance order, because all that was intended is for it to fix what is wrong, but on the other hand demand enforcement of the compliance order because the second respondent cannot fix what is wrong. It makes no sense.

[59] And finally, one has to ask if the purpose of clause 35 has been complied with, even if there was no approval by the applicant, because the absence of approval would mean that the letter of clause 35 has not been complied with. This is where the issue of so-called 'substantial compliance' comes in, especially considering it is trite that a collective agreement concluded in a bargaining council that has been extended to non-parties by way of section 32 of the LRA, is regarded as subordinate legislation.[21] As said in *National Commissioner of SA Police Service and Others v Phopho*[22]:

'… in order to determine substantial compliance the court must first establish the purpose of the provision and then determine whether what was done by the applicant to comply with the provision satisfied that purpose. If so, the court may find that the

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[21] See *Platinum Mile Investments (Pty) Ltd t/a Transiton Transport v SA Transport and Allied Workers Union and Others* (2010) 31 ILJ 2037 (LAC) at para 41; *Municipal Workers Union and Another v City of Johannesburg and Others* (2018) 39 *ILJ* 894 (LC) at para 35.
[22] (2021) 42 ILJ 1666 (LAC) at para 77.

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action was in substantial compliance of the provision, although it did not comply with the letter thereof.'

[60] The *locus classicus* where it comes to the substantial compliance with a statutory enactment is *Maharaj and Others v Rampersad*[23], where the Court held as follows:

'… The enquiry, I suggest, is not so much whether there has been "exact", "adequate" or "substantial" compliance with this injunction but rather whether there has been compliance therewith. This enquiry postulates an application of the injunction to the facts and as a resultant comparison between what the position is and what, according [to] the requirements of the injunction, it ought to be. It is quite conceivable that the Court might hold that, even though the position as it is, is not identical with what it ought to be, the injunction has nevertheless been complied with. In deciding whether there has been a compliance with the injunction the object sought to be achieved by the injunction and the question of whether this object has been achieved are of importance. …'

[61] The principles as set out in *Maharaj supra* was applied in *National Union of Metalworkers of SA v Intervalve (Pty) Ltd and Others*[24], and the Court came to the following conclusion:

'… This test focuses on the statute's objective or purpose. It countenances deviation from statutory prescriptions provided the purpose has been met. Since *Maharaj*, courts have generally adopted a three-step approach to evaluate this; some courts add a fourth step:

1 What is the purpose of the statute as a whole, as well as the specific provision at issue?

[23] 1964 (4) SA 638 (A) at 646C – D.
[24] (2015) 36 ILJ 363 (CC) at para 45. See also *African Christian Democratic Party v Electoral Commission and Others* 2006 (3) SA 305 (CC) at para 25; *Weenen Transitional Local Council v Van Dyk* 2002 (4) SA 653 (SCA) at para 13.

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2 What steps did the party take to comply with the provision? Here, only the acts of the party seeking to comply are relevant. The conduct of the other party is not.

3 Did the steps taken achieve the purpose of the statute and of the specific provision, even if the precise requirements were not met?

4 Was there any practical prejudice because of non-compliance? …'

And in *National Education Health and Allied Workers Union v Minister of Public Service and Administration and Others; SA Democratic Teachers Union and Others v Minister of Public Service and Administration and Others; Public Servants Association and Others v Minister of Public Service and Administration and Others; National Union of Public Service and Allied Workers and Others v Minister of Public Service and Administration and Others*[25] the Court had the following to say:

'… In deciding whether there has been compliance with the statutory injunction, what is important is the object sought to be achieved by the injunction and whether this object has indeed been achieved. The central element is to link the question of compliance to the purpose of the provision. It has to be determined 'whether what the applicant did constituted compliance with the statutory provisions viewed in the light of their purpose …'

[62] So, and taking this step by step, what is the core purpose of clause 35? This has been dealt with above. However, and in sum, its purpose is to allow for incentive based remuneration to employees, provided the minimum standards in the Main Agreement are not contravened and proper prescribed records are kept. It then also seeks to achieve this purpose by prescribing employees' involvement in the negotiation of, and then their agreement to, such an incentive scheme. Considering the facts of this case, and when the case came before the first respondent, these purposes had all been achieved.

[63] Next, what steps did the second respondent itself take to ensure compliance with the provision? The answer is that it did everything it could. It agreed to an

[25] (2022) 43 ILJ 1032 (CC) at para 72.

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inspection by the applicant. It at all times furnished the applicant with information required. It sought to give effect to all the recommendations made by the applicant. And lastly, it on several occasions asked the applicant to approve the incentive scheme, the last occasion being on 22 October 2018, when it was fully compliant. There was nothing more the second respondent could do, and worse still, there was nothing standing in the way of the applicant approving the incentive scheme as the last outstanding requirement.

[64] The steps taken by the second respondent indeed ensured compliance with all that was required by clause 35. Despite having the agreements concluded in 2017, the second respondent, based on what had transpired in 2018, did not seek to continue to assert, in the face of all else, that those agreements constituted substantial compliance with clause 35. Instead, it established the required committee, convened meetings of that committee, again negotiated the terms of the incentive scheme with the employee representatives in the committee, and then secured their agreement to such terms. The applicant followed this up with a written agreement containing the terms of the incentive scheme signed by all the committee members. If these steps taken are not considered to be proper steps to ensure compliance, it is difficult to comprehend what would be.

[65] There was no prejudice accruing to any of the employees because the applicant did not approve the incentive scheme. As said, the terms of the scheme remained the same since 2017. Even in 2017, as the first respondent correctly appreciated, it was negotiated with the employees on a one on one basis and not unilaterally implemented. However, and in 2018, in the specific context of clause 35, it was again negotiated with employee representatives in the prescribed committee, and it was agreed to by them. It was also undisputed that the incentive scheme left the employees better off, remuneration wise, than what they would earn only under the Main Agreement. The incentive scheme also benefits the second respondent. So, there is no prejudice flowing from regarding the incentive scheme as valid, even in the absence of approval by the applicant. In fact, the only real prejudice that will result to all parties, would occur if the incentive scheme is scuppered because of lack of approval by the applicant.

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[66] Finally, it is not as if the applicant refused approval. It simply did not approve the incentive scheme by doing nothing, and proceeded with enforcement compliance. This is an inexplicable approach to adopt. It left matters in limbo, so to speak, which is most unfair to the second respondent. I am satisfied that the second respondent was justified to continue to apply its incentive scheme in the circumstances. There is nothing to indicate that the applicant, especially considering everything it had been provided with, could not promptly approve the incentive scheme, or at the very latest, by the end of 2018. I thus cannot accept that the second respondent's incentive scheme be compromised as a result of the applicant's wrangling.

[67] Accordingly, I am satisfied that even though, when the matter came before the first respondent for determination, the letter of clause 35 of the Main Agreement had not been complied with because there existed no actual approval of the incentive scheme by the applicant, there had been substantial compliance with the clause. The purpose of the clause had been fully complied with, and the second respondent has done all it could to secure compliance with the clause, with the steps taken by it being sufficient to ensure compliance with the purpose of the clause. There was no prejudice to any party because of the lack of approval by the applicant. And finally, there was no justification or reason for the applicant not to have approved the incentive scheme, which it, in the circumstances of this case, was actually enjoined to do.

[68] Therefore, based on all the reasons set out above, I conclude that the first respondent's arbitration award is simply not reviewable. Insofar as the issue of the outcome arrived at by the first respondent be considered on the basis of it being reasonable or unreasonable, there is in my view no doubt that it would comfortably resort within the bands of reasonableness as required, in order to be sustainable on review. The applicant's review application falls to be dismissed.

Costs

[69] This then leaves only the issue of costs. In terms of the provisions of section 162(1) of the LRA, I have a wide discretion where it comes to the issue of costs. I refer to what the Court said with regard to costs in employment disputes in *Union for Police Security and Corrections Organisation v SA Custodial Management (Pty) Ltd and*

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*Others*[26] in exercising this discretion, which is that when making a costs order in a labour matter, a presiding officer is required to consider that costs are not ordinarily awarded, the principle of fairness must be considered, and due regard must be had to the conduct of the parties. In this instance, the case had some complexity / novelty to it. I do not believe the applicant acted unreasonably in pursuing the review application, even though I do not understand why it decided to do so since, properly considered, the incentive scheme of the second respondent was beyond reproach as it stood. I do not believe the applicant's conducting of the proceedings show the kind of ineptitude or hopelessness that may attract the granting of a costs order. Overall considered, in my view, at worst for the applicant, the scales where it comes to costs are equally balanced, and as such, the ordinary principle as set out above that costs do not follow the result should carry the day. Therefore, I am satisfied in this case that no order as to costs is appropriate and would be fair.

[70] In the premises, I make the following order:

<u>Order</u>

1. The late filing of the applicant's review application is condoned.
2. The applicant's review application is dismissed.
3. There is no order as to costs.

S. Snyman

Acting Judge of the Labour Court of South Africa

<u>Appearances:</u>

For the Applicant: Advocate M R Maphutha

Instructed by: Moeti Kanyane Inc Attorneys

For the Second Respondent: Advocate A L Cook

Instructed by: Cliffe Dekker Hofmeyr Inc Attorneys

[26] (2021) 42 ILJ 2371 (CC) at para 35. See also *Zungu v Premier of the Province of Kwa-Zulu Natal and Others* (2018) 39 ILJ 523 (CC) at para 25; *Long v South African Breweries (Pty) Ltd and Others* (2019) 40 ILJ 965 (CC) at para 30.

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