



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JR2106/19

In the matter between:

EMFULENI LOCAL MUNICIPALITY

Applicant

and

SAMWU obo MDLULI AND OTHERS

First Respondent

COMMISSIONER MM LEGODI N.O

Second Respondent

**SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING
COUNCIL**

Third Respondent

Heard: 5 February 2025

Delivered: 05 May 2025

JUDGMENT

TSHISEVHE, AJ

Introduction

[1] This is an application for review in terms of Section 145(1)(a) of the Labour Relations Act¹ (LRA).

[2] The Applicant filed a review application two days late, and the Applicant, as a result, also filed a condonation application, which is opposed by the First Respondent.

[3] The First Respondents also filed a cross-review application against certain findings of the Second Respondent.

[4] As a result of the delay in filing the arbitration records and prosecution of the review application, the First Respondents also filed a then-Rule 11 application² where they seek the review application to be deemed to have been withdrawn in terms of clauses 11.2.3 of the now-repealed Labour Court Practice Manual³ and therefore dismissed.

[5] The Applicant, on the other hand, also filed an application for the reinstatement of the review application, which the First Respondent opposed.

[6] On 19 April 2023, the parties before Van Niekerk J consented to an order that both applications are to be heard simultaneously.

[7] For the sake of convenience, in all the interlocutory applications, the parties will be referred to as cited in the review application.

Material background facts

¹ Act 66 of 1995, as amended.

² GN 1665 of 1996: Rules for the Conduct of Proceedings in the Labour Court (repealed, 17 July 2024).

³ Practice Manual of the Labour Court of South Africa (repealed, 17 July 2024).

[8] The Applicant employed two staff members, including Ms MA Kenke, who were both transferred to Emfuleni Municipality from Sedibeng Municipality.

[9] The two employees were transferred with the Mayor, Mr Mofokeng, in 2019.

[10] The two staff members were hired as general workers graded at level 12 at their then-employer, Sedibeng Municipality, and when transferred to Emfuleni Municipality, their level 12 salary level was higher due to the municipality's grading system.

[11] Emfuleni Municipality is a local municipality, whereas Sedibeng Municipality is a district municipality, which is graded higher than Emfuleni Municipality.

[12] The two staff members were earning R136 920, whereas the Applicant's employees earned R74 772 and were at level 16. This is despite the fact that all of them are categorised as general workers. This is the genesis of the current dispute.

[13] Ms MA Kenke was offered two letters of appointment on the same day, with one as a general worker and another as an office assistant.

[14] The First Respondent felt aggrieved by the pay level discrepancies and, as a result, declared a dispute with the Third Respondent, where the Second Respondent was appointed as an arbitrator.

[15] The First Respondent sought relief in the form of the individual employee's placement at post level 12, just like the two staff members from Sedibeng Municipality, whom they allege were promoted, but they were left at post level 16, whereas they occupied the same positions as general workers.

[16] The Second Respondent, in his award dated 6 August 2019, found in the First Respondent's favour and awarded them 10 months' compensation.

[17] The Applicant herein filed a review application on 19 September 2019. As a result, the review application was some two days late.

Condonation for the late filing of the review application

[18] The facts are recorded in the papers, and there is no need to burden this judgment with a repetition of the factual background.

[19] However, it is sufficient to state that it is common cause that the review application was filed two days late.

[20] The present application was filed outside of the six-week time period established by the LRA, and the Applicant seeks condonation for the late filing of the review application.

[21] If condonation is not granted, then this Court lacks the necessary jurisdiction to consider the review application, and if the condonation is granted, then I will turn to consider the other interlocutory applications, followed by the merits of the review application.

[22] One of the purposes of the LRA is the speedy resolution of disputes. Therefore, when a party is dilatory in instituting or referring a dispute to this Court, they are sort of defeating the purpose of the LRA, which in the end frustrates the opponent in the matter.

[23] However, not all delays are wilful and/or deliberate like in the matter *in casu* as explained.

[24] On the other hand, the Applicant has demonstrated good prospects of success in the matter.

[25] I should state outright that in my view, a delay for a period of some two days is not excessive.

[26] It is well accepted that condonation cannot be had for the mere asking. This notion was emphasised in *Grootboom v National Prosecuting Authority*,⁴ where the Constitutional Court, per the majority judgement, stated that:

[22] ...[T]he standard for considering an application for condonation is the interests of justice. However, the concept “interests of justice” is so elastic that it is not capable of precise definition. As the two cases demonstrate, it includes: the nature of the relief sought; the extent and cause of the delay; the effect of the delay on the administration of justice and other litigants; the reasonableness of the explanation for the delay; the importance of the issue to be raised in the intended appeal; and the prospects of success. It is crucial to reiterate that both Brummer and Van Wyk emphasise that the ultimate determination of what is in the interests of justice must reflect due regard to all the relevant factors but it is not necessarily limited to those mentioned above. The particular circumstances of each case will determine which of these factors are relevant.

[23] It is now trite that condonation cannot be had for the mere asking. A party seeking condonation must make out a case entitling it to the court’s indulgence. It must show sufficient cause. This requires a party to give a full explanation for the non-compliance with the rules or court’s directions. Of great significance, the explanation must be reasonable enough to excuse the default.’

[27] The well-established legal principles are set out in *Melane v Santam Insurance Co. Ltd*⁵ (*Melane*). The approach which the Labour Court and the Labour Appeal Court (LAC) have followed in determining whether good cause has been shown is the often-referred-to passage enunciated by Holmes JA in *Melane*:

‘In deciding whether sufficient cause has been shown, the basic principle is that the court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case. Ordinarily these

⁴ 2014 (2) SA 68 (CC) (*Grootboom*).

⁵ 1962 (4) SA 531 (A) at 532C - E.

facts are interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion...'

[28] In applying the *ratio* in *Melane*, the Court in *Academic and Professional Staff Association v Pretorius NO and Others*,⁶ summarised the principles for consideration as follows:

'[17] The factors which the court takes into consideration in assessing whether or not to grant condonation are: (a) the degree of lateness or non-compliance with the prescribed time frame; (b) the explanation for the lateness or the failure to comply with time frame; (c) prospects of success or *bona fide* defence in the main case; (d) the importance of the case; (e) the respondent's interest in the finality of the judgment; (f) the convenience of the court; and (g) avoidance of unnecessary delay in the administration of justice.

...

[18] It is trite law that these factors are not individually decisive but are interrelated and must be weighed against each other. In weighing these factors for instance, a good explanation for the lateness may assist the applicant in compensating for weak prospects of success. Similarly, strong prospects of success may compensate the inadequate explanation and long delay.'⁷

[29] I already indicated that the delay of two days is not excessive.

[30] In this Court, the principles have long been qualified by the rule that where there is an inordinate delay that is not satisfactorily explained, the applicant's prospects of success are immaterial.

[31] I therefore see no reason why the application for condonation for the late filing of the review application should not succeed.

[32] I now turn to consider the remaining interlocutory applications.

⁶ (2008) 29 ILJ 318 (LC) at paras 17 - 18.

⁷ See also: *Minister of Public Works and Infrastructure v GPSSBC and Others* [2024] JOL 65513 (LC).

Rule 11 application and reinstatement of review application

[33] I deem it appropriate to deal with the two applications (Rule 11 and reinstatement application) simultaneously since the reasons averred herein are the same.

[34] The First Respondent brought an interlocutory application seeking a dismissal of the review application due to the Applicant's failure to deliver a complete record of the arbitration hearing.

[35] It was also specifically stated that since the filing of the review application, the Applicant had done nothing and has not taken any further steps to prosecute the review application.

[36] The First Respondent submitted that the Applicant failed to apply for a reconstruction of the record after realising that the record was incomplete.

[37] The First Respondent further submitted that several meetings were held with a view to reconstruct the missing records of 27 September 2018; however, at the end of the day, the Applicant was dilatory.

[38] The First Respondent further argued that the review application is also deemed to have been withdrawn in terms of clause 11.2.3 of the then-Labour Court Practice Manual, as the Applicant failed to deliver the records within a period of 60 days.

[39] On the other hand, the Applicant argued that the application is meritless as the First Respondent was aware that the record dispatched by the Bargaining Council was incomplete and same transpired after the received record was filed.

[40] The Applicant further argued that the First Respondent is being disingenuous because they actively participated in the reconstruction of the missing records and as a result, cannot claim that the Applicant failed to prosecute the review within a

period of six months or even 12 months for that matter as they, by implication, consented to late filing of records.

Analysis of Rule 11 application and reinstatement of review application

[41] In most cases, litigants resort to review applications in order to frustrate the respondents, and in many of those instances, it will be employers who file for review just to frustrate a poor employee in cases where there are no merit.

[42] Majority of those litigants file review applications and thereafter do not do anything in the matter until they are asked or put to terms by their opponent. Such conduct defeats the objectives of the LRA and same should be frowned upon by the courts.

[43] This Court is still being inundated by Rule 11 applications for the dismissal of review applications as a result of a lack of diligent prosecution thereof by litigants. Not only does this unnecessarily clog up the Court roll, but it leaves a dispute which was always intended to be expeditiously resolved hanging in the air.

[44] In *Karan t/a Karan Beef Feedlot and Another v Randall*,⁸ it was held:

‘In summary: despite the fact that the rules of this court make no specific provision for an application to dismiss a claim on account of the delay in its prosecution, the court has a discretion to grant an order to dismiss a claim on account of an unreasonable delay in pursuing it. In the exercise of its discretion, the court ought to consider three factors:

- (a) the length of the delay;
- (b) the explanation for the delay; and
- (c) the effect of the delay on the other party and the prejudice that that party will suffer should the claim not be dismissed.’

[45] This Court has a discretion to grant an order to dismiss a review application on account of an unreasonable delay in pursuing it, and in the exercise of its

⁸ (2009) 30 ILJ 2937 (LC) at para 14.

discretion, the Court ought to consider the factors set out *supra*. The test to be applied is similar to that of condonation.

[46] It is common cause that the records delivered to the Labour Court by the SALGBC were incomplete, and same prompted parties to engage in a reconstruction of evidence of 27 September 2019.

[47] On this ground alone, the application to have the review application deemed to have been withdrawn stands to fail.

[48] The Applicant was expected to file records of arbitration within a period of 60 days in compliance with Rule 7A(5) of the then Rules of this Court.

[49] The filing of records should be done within 60 days after the Registrar has notified parties that they must collect the records.

[50] The Applicant, in explaining the period of delay, averred that they could not have been expected to file complete record whereas the record filed with the Registrar was not complete.

[51] I wish to indicate that the scheme of Rule 7A(5) should be understood to mean that the period of 60 days starts to run when the Applicant has received a complete record of the arbitration, not when they receive a portion thereof. Otherwise, the purpose of those provisions will be defeated.

[52] It is trite that a review application is urgent in nature and must be finalised as soon as possible.

[53] Clause 11.2.3 of the Practice Manual provides that:

'If the applicant fails to file a record within the prescribed period, the applicant will be deemed to have withdrawn the application, unless the applicant has during that period requested the respondent's consent for an extension of time and consent has been given. If consent is refused, the applicant may, on notice of motion supported by affidavit, apply to the Judge President in

chambers for an extension of time. The application must be accompanied by proof of service on all other parties, and answering and replying affidavits may be filed within the time limits prescribed by Rule 7. The Judge President will then allocate the file to a judge for a ruling, to be made in chambers, on any extension of time that the respondent should be afforded to file the record.'

[54] The reason behind clause 11.2.3 is simply a speedy resolution of the dispute.

[55] In *Khumalo and Another v Member of the Executive Council for Education: KwaZulu-Natal*,⁹ Skweyiya J said:

'... the importance of resolving labour disputes in good time is thus central to the LRA framework. ...'

[56] Further, Jafta J in *Aviation Union of SA and Another v SA Airways (Pty) Ltd and Others*¹⁰, held:

'... Speedy resolution is a distinctive feature of adjudication in labour relations disputes. ...'

[57] Finally, in *National Education Health and Allied Workers Union v University of Cape Town and Others*¹¹ Ngcobo J said:

'By their very nature labour disputes must be resolved expeditiously and be brought to finality so that the parties can organize their affairs accordingly. They affect our economy and labour peace. It is in the public interest that labour disputes be resolved speedily...'

[58] The speedy resolution of labour disputes has been a cornerstone of employment and labour law. In this light, Rule 11 of the then-Rules of this Court provides for an avenue for a litigant to pursue the dismissal of an application in the Labour Court due to an applicant's failure to prosecute it diligently.

⁹ (2014) 35 ILJ 613 (CC) at para 42.

¹⁰ (2011) 32 ILJ 2861 (CC) at para 76.

¹¹ (2003) 24 ILJ 95 (CC) at para 31. See also *Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile and Others* (2010) 31 ILJ 273 (CC) at para 46; *Strategic Liquor Services v Mvumbi NO and Others* (2009) 30 ILJ 1526 (CC) at paras 12 – 13.

[59] The above general principle is then given practical application in clause 11.2.7 of the Practice Manual. This is evident from the following dictum in *Samuels v Old Mutual Bank*,¹² where the Court said, with specific reference to the Practice manual:

‘... Its purpose is, inter alia, to provide access to justice by all those whom the Labour Court serves; promote uniformity and/or consistency in practice and procedure and set guidelines on standards of conduct expected of those who practise and litigate in the Labour Court. Its objective is to improve the quality of the court’s service to the public, and promote the statutory imperative of expeditious dispute resolution. ...’

[60] Clause 11.2.7 reads:

‘A review application is by its nature an urgent application. An applicant in a review application is therefore required to ensure that all the necessary papers in the application are filed within twelve (12) months of the date of the launch of the application (excluding heads of argument) and the registrar is informed in writing that the application is ready for allocation for hearing. Where this time limit is not complied with, the application will be archived and be regarded as lapsed unless good cause is shown why the application should not to be archived or be removed from the archive.’

[61] This Court has on numerous occasions stressed that litigants must always ensure that the time periods recorded in the LRA, the Rules and the then-Practice Manual are complied with because failure to do so may result in a court refusing to hear a review application which potentially had good prospects of success.

[62] In a case where the court finds that an applicant in a review application failed to prosecute their review application within the required period of time as envisaged in the Rules and Practice Manual, and in the absence of seeking condonation for the delay, the review court lacks jurisdiction to determine the review application.

¹² (2017) 38 ILJ 1790 (LAC) at para 14. See also *Macsteel Trading Wadeville v Van der Merwe NO and Others* (2019) 40 ILJ 798 (LAC) (*Macsteel*) at paras 21 – 22

[63] The above provisions received attention in *Macsteel Trading Wadeville v Francois van der Merwe N.O and Others*¹³ (*Macsteel*), and flowing from that decision, it can be accepted that:

63.1 These provisions are binding on this Court and the parties;

63.2 Where the time limits are not complied with, the application will be archived and be regarded as lapsed unless good cause is shown why the application should not be archived or be removed from the archives;

63.3 Where undue delay in prosecuting the review application is raised in the answering affidavit in the review application, and since that application had in effect lapsed and been archived, this Court would lack jurisdiction to determine the issue of the undue delay raised there. In these circumstances, a party complaining of undue delay would have been required to bring a separate Rule 11 application for the review application to be dismissed or struck from the roll on the grounds of the other party's undue delay in prosecuting it.

[64] On the other hand, Clause 11.2.7 imposes an obligation on the applicant to ensure that all the necessary papers in the application are filed within 12 months of the date of the launch of the application (excluding heads of argument), and the Registrar is informed in writing that the application is ready to be set down for hearing. Where this time limit is not complied with, the application will be archived and be regarded as lapsed unless good cause is shown why the application should not be archived or be removed from the archive.

[65] *In casu*, the Applicant exercised the right afforded to it upon the lapsing of the review application, by indeed bringing an application for the reinstatement of its review application. In the face of this application, the Applicant only had one choice to save its review application, and that is to show good cause to resurrect it. The Applicant's submissions are convincing in all material respects.

¹³ *Macsteel supra*.

[66] In *Macsteel*, the LAC confirmed that this Court would lack jurisdiction in instances where a matter is deemed withdrawn and where the opposing party only raised the issue of non-compliance with the time frames in the answering affidavit.

[67] It is therefore my firm view that, based on the fact that the Applicant was never favoured with a complete record of the arbitration proceedings, the period of 60 days could not be said to have commenced to run. The said period only began to run from the date on which a reconstruction process was completed. As a result of the above, the subsequent time periods within which the Applicant was expected to have acted will also be affected.

[68] It is equally trite that, when it comes to the dismissal of the review application based on the Applicant's alleged failure to speedily prosecute the review application within a period of six months, the First Respondent should demonstrate that the delay was wilful or deliberate.

[69] The amendments to section 145 of the LRA, which took effect on 1 January 2015, are specifically aimed at expediting the prosecution of review applications and *inter alia*, require that an applicant on review must apply for a hearing date within six months of launching the review application.

[70] This is evident from the attitude adopted by the Court as far back as 2006, when the Court in *Bezuidenhout v Johnston NO and Others*¹⁴ held that:

'If applicant parties have unduly delayed prosecuting their applications, and fail to provide acceptable reasons for the delays, the ultimate penalty of dismissing such applications should be used in appropriate cases. This will hopefully help creating a culture of compliance and ensure that disputes are expeditiously dealt with.'

[71] The First Respondent must demonstrate that they also played an equal role in order to ensure that the matter is speedily resolved instead of just sitting by idly, doing nothing and bidding time for the Applicant's failure.

¹⁴ (2006) 27 ILJ 2337 (LC) at paras 31.

[72] I should say that I do not see anywhere where the First Respondents demonstrated that they played a role in the speedy prosecution of the review, other than taking part in the reconstruction of the missing record.

[73] It is very much surprising that they now claim that the Applicant failed to take steps in prosecuting the review application for a period of six months, whereas they were aware that such could not have been achieved due to the missing record and they were party to the process of record reconstruction.

[74] I am therefore equally in agreement with the Applicant that it was also not possible to attend to the reconstruction process from March 2020 due to the COVID-19 regulations, which restricted movements.

[75] The last factor to be considered is the effect of the delay on the Respondent and the prejudice they would suffer should the application for review not be dismissed.

[76] The First Respondent obtained an arbitration award in their favour in terms of which they were awarded compensation. The prejudice of a pending review application is obvious as the order of compensation will not be given effect whilst the review application remains pending. Moreover, the First Respondent also failed to play its role when it comes to the speedy prosecution of the review application.

[77] I am convinced that the Applicant has shown good cause that the review application be reinstated, more so considering their chances when it comes to the prospects of success in the review application, which compensates for the period of delay.

[78] Based on the above, the application for the dismissal of the review application in terms of Rule 11 stands to fail.

Arbitration proceedings

[79] It is common cause that the Mayor of Sedibeng Municipality was deployed to Emfuleni Municipality and he decided to take along two of his support staff.

[80] It is further common cause that the two staff members were working as general workers at post level 12, whereas general workers at Emfuleni Municipality are at post level 16.

[81] It is, however, common cause that Sedibeng Municipality is graded higher compared to Emfuleni Municipality, hence the post levels differentiation.

[82] The First Respondent demanded that the individual employees be promoted to post level 12, just like the two staff members who came to Emfuleni Municipality.

[83] The second Respondent found that the Applicant committed acts of unfair labour practice against the First Respondent employees and awarded the First Respondent employees compensation amounting to 10 months' salary.

[84] The Applicant now wish to have such decision of the Second Respondent reviewed and set aside.

Grounds for review

[85] The Applicant raised several grounds of review and are summarised below as follows:

85.1 That the award is irrational based on the totality of evidence before the arbitrator and the arbitrator failed to comprehend her duties.

85.2 That no reasonable arbitrator could have made the finding that the transfer of the two employees from Sedibeng Municipality was a promotion.

85.3 That the arbitrator's award is disconnected from the reasons proffered and no reasonable arbitrator could have granted the relief she granted based on the totality of evidence before her.

The arbitration award

[86] The Second Respondent in her arbitration award set out the evidence adduced by the witnesses, which is well documented therein and therefore, there is no need to burden this judgment with a repetition of same.

[87] In her analysis of evidence and arguments, the arbitrator identified the issue to be decided which was whether the Applicant committed unfair labour practice as contemplated in section 186(2)(a) of the LRA against the First Respondent employees when it did not promote them from level 16 to 12, as it is alleged to have done with two other employees from Sedibeng District Municipality. r.

The Issue to be decided

[88] I am required to determine whether the finding of the Second Respondent that the Applicant committed acts of unfair labour practice is reasonable based on the totality of evidence before her.

[89] If I find that it was unreasonable within the totality of evidence before her, I am required to interfere with such a decision and substitute it with an appropriate one.

Test for review

[90] I have to deal with the grounds for review within the context of the test that this Court must apply in deciding whether the arbitrator's decision is reviewable. The test that the Labour Court is required to apply in a review of an arbitrator's award is to determine whether the decision reached by the commissioner is one that a reasonable decision maker could not reach within the totality of evidence at his disposal.

[91] The Constitutional Court settled the issue of the test for review of an arbitration award in the case of *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*.¹⁵ The Court at para 110 held that the test for review is whether the

¹⁵ (2007) 28 ILJ 2405 (CC) (*Sidumo*) at para 110.

decision reached by the Commissioner is one that a reasonable decision maker could not reach in relation to the totality of evidence before him or her.¹⁶

[92] The test to be applied is one that recognises and reinforces the distinction between a review and an appeal. This Court is entitled to intervene if and only if the arbitrator's decision is one that falls outside of a band of decisions to which a reasonable decision-maker could come to on the available material evidence before him.

[93] The LAC in *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA*¹⁷ affirmed the test to be applied in review proceedings and held that:

'[16] In short: A reviewing court must ascertain whether the arbitrator considered the principal issue before him/her; evaluated the facts presented at the hearing and came to a conclusion that is reasonable.

...

[17] ... the reviewing court is not required to take into account every factor individually, consider how the arbitrator treated and dealt with each of those factors and then determine whether a failure by the arbitrator to deal with one or some of the factors amounts to process related irregularity sufficient to set aside the award. This piecemeal approach of dealing with the arbitrator's award is improper as the reviewing court must necessarily 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.'

[94] As the Court rightly pointed out in the *National Commissioner of the South African Police Service v Myers and Others*¹⁸:

¹⁶ In *CUSA v Tao Ying Metal Industries and Others* [2009] 1 BLLR 1 (CC) at paras 76 and 134 the Constitutional Court held that it is now axiomatic that a commissioner of the CCMA (or an arbitrator of a bargaining council) is required to apply his or her mind to the issues before him or her and that failure to do so may result in the ensuing award being reviewed and set aside. The irregularity must, however, result in an unreasonable outcome or misconception of the true enquiry, resulting in no fair trial of the issues. See also *Sidumo*.

¹⁷ (2014) 35 ILJ 943 (LAC) at paras 16 and 18.

¹⁸ (2012) 33 ILJ 1417 (LAC) at para 103.

‘Whatever one’s personal view may be, the test as set out in *Sidumo*... is whether or not the arbitrator’s decision that dismissal is an appropriate sanction is a decision that a reasonable decision-maker could reach.’

[95] In *Head of Department of Education v Mofokeng and Others*¹⁹ (*Mofokeng*), the LAC held that:

‘... an irregularity or error material to the 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.’

[96] The critical approach to reviews that turn on ‘unreasonableness’ was articulated by Murphy AJA in *Mofokeng*²⁰ at paragraphs 30 to 33. The significant passages are emphasised:

‘[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*²¹ and this court in *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA and others*²² 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 inter-related questions of rationality, lawfulness and proportionality, pertaining to the

¹⁹ (2015) 36 ILJ 2802 (LAC) (*Mofokeng*) at para 33. See also: *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA) at paras 52 - 78 and 85 - 88.

²⁰ *Mofokeng supra*.

²¹ (2013) 34 ILJ 2795 (SCA); 2013 (6) SA 224 (SCA).

²² [2014] 1 BLLR 20 (LAC); [2013] ZALAC 28.

purpose, basis, reasoning or effect of the decision, corresponding to the scrutiny envisioned in the distinctive review grounds developed casuistically at common law, now codified and mostly specified in section 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 section 145 of the LRA, confining review to “defects” as defined in section 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 hypothesi* be material to the determination of the dispute. A material error of this order would point to at least a *prima facie* unreasonable result. The reviewing judge must then have regard 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 the 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.'

Analysis of submissions

[97] The *Sidumo* test, however, justifies setting aside an award on review if the decision is '*entirely disconnected with the evidence*' or is '*unsupported by any evidence*' and involves speculation by the commissioner.

[98] The Applicant argued that the arbitrator's finding that the Applicant committed acts of unfair labour practice when they failed to promote the First Respondent employees herein, whereas they promoted the two staff members from Emfuleni Municipality, is unreasonable based on the totality of evidence before her.

[99] On the other hand, the arbitrator found that the Applicant committed acts of unfair labour practice against the First Respondents when it absorbed erstwhile general workers from another municipality into special positions without first considering the ripple effect of such a decision.

[100] In terms of the *Sidumo* test, the Applicant is not only required to prove a defect in arbitration proceedings as set out in section 145, but also to prove that the decision in itself was unreasonable.

[101] When I look at the reasons that the arbitrator rejected, that the two staff members were also doing other duties, I am persuaded that they were not just general workers.

[102] I will not hesitate to state that the submissions by the First Respondent that the two staff members were promoted to level 12 are untruthful. I say this because it is clear that the two staff members, when they were transferred to Emfuleni Municipality, held the same salary level, and as a result, there was no promotion at all.

[103] In this regard, I am convinced that the Applicant has demonstrated material errors in the award of the Second Respondent.

[104] In determining whether the result of an arbitrator's award is unreasonable, the Labour Court must broadly evaluate the merits of the dispute and consider whether the arbitrator's reasoning is found to be unreasonable, the result is nevertheless capable of justification for reasons other than those given by the arbitrator.²³ The result will, however, be unreasonable if it is entirely disconnected with the evidence, unsupported by any evidence and involves speculation by the arbitrator.

[105] A consideration of the evidence presented by the witnesses as contained in the transcript convinces me that the same reasoning as posited in *National Union of Mineworkers and Another v Commission for Conciliation, Mediation and Arbitration and Others*²⁴ applies equally.

[106] The Second Respondent's award is totally disconnected from the material evidence before her.

²³ See: *National Union of Mineworkers and Another v Samancor Ltd (Tubatse Ferrochrome) and Others* (2011) 32 ILJ 1618 (SCA).

²⁴ [2018] 3 BLLR 267 (LAC).

Conclusion

[107] Having considered the evidence adduced at the arbitration proceedings, the findings made by the arbitrator and the grounds for review as raised by the Applicant, I find that the arbitrator's award is unreasonable under the circumstances. Therefore, I am left with no choice but to interfere with her decision and substitute it with a reasonable one.

[108] The reasons provided by the arbitrator are, in my view, legally flawed, factually incorrect, and certainly unsubstantiated by the transcript.

[109] Having due regard to the reasoning of the arbitrator on the evidence before her at the arbitration, it is clear from an analysis of the award that the arbitrator committed material irregularity both factually and in the application of the law and improperly weighed all of the evidence before her.

[110] The arbitrator's decision does not pass the *Sidumo* test and as a result stands to be reviewed and set aside based on the totality of material evidence before her.

[111] The Applicant averred cogent grounds of review that leave me with no choice but to interfere with her decision, as it falls outside the band of reasonableness.

[112] There were no acts of unfair labour practice committed by the Applicant.

Cross-review

[113] On the other hand, based on my findings that the award of the Second Respondent is unreasonable and is not one that a reasonable decision maker could arrive at, based on the totality of evidence before her, I deem it appropriate to equally dismiss the cross-review application as it lacks merit.

Costs

[114] I have had regard to the requirements of law and fairness in considering costs and am of the view that costs should only be awarded where it is warranted.

[115] I am of the view that a cost order is not warranted in this matter.

[116] In the premises, I make the following orders:

Order

1. Condonation for the late filing of the review application is hereby granted.
2. The review application is hereby reinstated.
3. The Rule 11 application for the dismissal of the review application is dismissed.
4. The application for review is upheld.
5. The arbitration award issued by the Second Respondent dated 6 August 2019, under case number GPD051815, is reviewed and set aside and substituted with an order finding that the Applicant did not commit an unfair labour practice towards the First Respondent employees.
6. The cross-review application is dismissed.
7. No order is made as to costs.

N Tshisevhe

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant:	Seleka Attorneys
For the Respondent:	Adv M Sebopa
Instructed by:	NP Nqopa Attorneys Inc