



LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case no: JR443/23

In the matter between:

MAXWELL STHEMBISO NTOMBELA

Applicant

and

**METAL AND ENGINEERING INDUSTRIES
BARGAINING COUNCIL**

First Respondent

COMMISSIONER CHARMAINE HALIAN STRIPP

Second Respondent

CIRCUIT BREAKER INDUSTRIES (PTY) LTD

Third Respondent

Heard: 16 April 2025

Delivered: 15 May 2025

(This judgment was handed down electronically by emailing a copy to the parties. The 15th of May 2025 is deemed to be the date of delivery of this judgment).

Summary: Review of arbitration award – section 145 of LRA and review test considered – determination of conduct of arbitrator, gross irregularities and unreasonable outcome. Evidence and submissions considered – findings and conclusions of Commissioner not justifiable and unreasonable – award reviewed and set aside.

JUDGMENT

PHAKEDI, AJ

Introduction

[1] The Applicant is approaching this Court in terms of section 145 of the Labour Relations Act¹ (LRA), seeking to review and set aside the arbitration award issued by the second respondent under case number MEGA 58765 dated 21 December 2022.

[2] The Applicant further seeks an order condoning the late filing of his review application. Should the condonation application be declined, this Court lacks the necessary jurisdiction to consider the merits of the application. In order to succeed with his condonation application, the Applicant has to make an application at the earliest available opportunity and show good cause that he is deserving of the Court's indulgence for his non-compliance.

Condonation application

[3] The Applicant avers that he received a notification from the first respondent that his referral had been dismissed via short message service (SMS) on 21 December 2022. However, at the time he could not access the arbitration award because the offices of the first and second respondents were closed and they only re-opened on 4 January 2023.

[4] He only received the arbitration award on 17 January 2023 from NUMSA offices in Kempton Park. He believed that he also needed the bundles exchanged by the parties during arbitration so he can submit them at Labour Court. He struggled to get the bundles from NUMSA on several occasions and eventually he was told to

¹ Act 66 of 1995, as amended.

collect them from the Kempton Park Office and he approached the Labour Court to file his review application on 12 April 2023. He delayed in filing the review application due to the attitude of NUMSA not providing him with the bundles timeously and immediately upon receipt of the bundles he then filed his review application without any legal assistance.

[5] The Registrar made him aware that the record had been filed on 24 April 2023 and he filed a document titled notice of motion in terms of Rule 7A (8)(a) incorporating an application for condonation together with a supplementary affidavit on or about 7 June 2023.

[6] He only consulted with his legal representatives on 18 May 2023 and they advised him that he ought to also comply with the Rules relating to the filing of the record. He also submitted the degree of lateness is not too excessive and he had strong prospects of success in the review application where he will prove that the award is reviewable and stands to be set aside on the basis that the Commissioner was biased and did not consider the evidence in totality.

[7] The third respondent is opposing the condonation application and stated that the Applicant ought to have filed his review application on or before 01 February 2023. The period of delay was approximately 10 weeks when the Applicant served and filed his review application on 12 April 2023. It was further submitted that the explanation for the delay was unsatisfactory in that the Applicant failed to provide cogent reasons for his failure to file the review timeously.

[8] The second issue was that the Applicant did not comply with the Rules in that although he filed the record of arbitration proceedings on time, he failed to file the notice in terms of Rule 7A(8) on time but only served same on 15 November 2023. The Applicant failed to deal with prospects of success and third respondent will be prejudiced if the condonation application is granted in that financial resources will have to be employed to defend the review application.

[9] The Constitutional Court in *Booi v Amathole District Municipality and Others*² emphasized that condonation is not merely there for the taking. The Court confirmed that condonation should be granted if it is in the interests of justice, which has to be determined by reference to all relevant factors including the nature of the relief sought, the extent and cause of the delay, the effect on the administration of justice, prejudice and the reasonableness of the explanation for the delay.

[10] The Labour Appeal Court (LAC) in *Lekhesa: In re Ngwenya v Trustees for the Time being of Sishen Iron Ore Co Community Development Trust and another*³ stated:

‘The grant of condonation involves the exercise of a discretion, with a decision to condone a party's non-compliance with the rules of the court or directions constituting an indulgence granted by the court. Such an application should be granted if, having regard to the particular circumstances of the matter, it is in the interests of justice to do so, and refused if it is not. To reach a decision, regard is to be had to factors including the nature of the relief sought, the extent and cause of the delay, the reasonableness of the explanation for the delay, the importance of the issue to be raised, issues of prejudice and the prospects of success. As a general proposition, the factors to be considered are not individually decisive of an application for condonation but are all considered to determine what is in the interests of justice.’

[13] The LAC restated the above-mentioned condonation principles in *SACCAWU obo Letsoalo and Another v Commission for Conciliation, Mediation and Arbitration and Others*⁴ where it was held that:

[18] It is well accepted that condonation cannot be had for the mere asking but a plea for the court's indulgence to excuse the non-compliance with the prerequisite time limits in terms of the prescripts on sufficient cause shown. The yardstick is the interest of justice which entails a consideration of all the relevant factors, including the extent and cause of the delay; the effect of the delay on the administration of justice and other litigants; the reasonableness

² [2022] 1 BLLR 1 (CC) at para 27.

³ (2024) 45 ILJ 1220 (LAC) at para 14.

⁴ (JA 155/23) [2025] ZALAC 12 (30 January 2025).

of the explanation for the delay; the importance of the issue to be raised in the intended appeal; and the prospects of success. Ultimately, the particular circumstances of each case will determine which of these factors are relevant.

[19] Added to the general principles, in *Steenkamp and Others v Edcon Ltd*, the Constitutional Court endorsed the Labour Law-specific factors and considerations which are premised on one of the primary objects of the LRA to have labour disputes resolved expeditiously. Since labour disputes are inherently urgent, the LRA imposes strict time limits within which various applications and referrals must be launched to give effect to the primary object of the LRA. As a result, and pertinent to the case at hand, condonation in a case of disputes over individual dismissals will not readily be granted unless, inter alia, the explanation for non-compliance is compelling. What is more, a higher threshold has been set where the delay is attributed to the internal processes and procedures of trade unions.

[20] ...

[21] In **Government Printing Works v Public Service Association & 1 another (JA35/24) ZALAC 63**, this Court likewise was confronted with the Labour Court's refusal to condone the late delivery of the statement of opposition against a claim of unfair discrimination. The Labour Court opined that, given the extent of the delay and the unreasonable explanation, it was not enjoined to consider the prospects of success. The approach followed by the Labour Court to condonation was rejected as it is at odds with the broad and balancing approach that has emerged in our jurisprudence which is characterised by proportionality and flexibility. The following observations are pertinent:

[28] The endorsement of these sentiments in **Steenkamp** highlights its significance. **Steenkamp's** single-sentence synthesis of the majority and minority expressions in Grootboom appears to put the settled approach beyond doubt:

"All factors should therefore be taken into account when assessing whether it is in the interests of justice to grant or refuse condonation."

[29] The effect is that an approach which completely ignores the prospects of success on the merits whenever there is an unsatisfactory, unreasonable or unacceptable explanation for a delay, requires explication. There does come

a time in any case where a party's disregard for procedure and delay in pursuing a matter is so extensive that they will be penalised irrespective of the merits of the case. The SCA has confirmed that an assessment of prospects of success is a relevant factor in the exercise of a discretion regarding condonation, unless the cumulative effect of the other relevant factors in the case is such as to render the application for condonation 'obviously unworthy of consideration'. It is in cases of 'flagrant', 'gross' breaches of the rules, especially in the absence of an acceptable explanation, that condonation may be refused regardless of the merits of the appeal, even where the blame lies solely with the legal representative. In this court, it has been acknowledged that excellent prospects of success lead to the granting of condonation even when the delay is substantial and the explanation inadequate.

[30] Assuming that there remains some scope to ignore the prospects of success completely, doing so requires careful and deliberate analysis. Borrowing from the language supported in Steenkamp, it is first necessary to conclude, with due deliberation, that the delay is 'unacceptably excessive'. Secondly, and accepting that the reference to 'no explanation for the delay' is not to be construed literally, consideration must still be given to whether the explanation offered is tantamount to an absence of a full and reasonable (acceptable, sufficiently cogent) explanation for the delay. It should be clear, when considering the explanation offered, that the non-observance of the rule is 'flagrant and gross' before the inquiry into the prospects of success may be jettisoned. Thirdly, and noting the usual reluctance to do so, the court must exercise a discretion to refuse condonation without any consideration of the prospects of success." [Own emphasis]

[22] *Government Printing Works v Public Service Association and another* aptly expounded the applicable general principles for condonation and dealt with a misconception that once an applicant fails to proffer a reasonable explanation for the excessive delay, prospects of success are of no consequence and could be automatically discounted...

[11] In applying the above principles to the present application, I am of the view that although the period of delay is approximately 10 weeks and not too excessive, and the Applicant has provided an explanation for the delay in filing his review application.

[12] In respect of prospects of success, the Applicant alleged that the second respondent was biased in the manner in which she conducted the hearing. The test for bias is whether a reasonable, objective and informed person would, on the correct facts, reasonably apprehend bias. Mere apprehensiveness on the part of a litigant or even a strong and honestly held anxiety would not be enough. The question to be answered is: what would an informed person, viewing the matter realistically and practically and having thought the matter through conclude?⁵

[13] In order to ventilate this issue and determine whether the commissioner was indeed biased, the Court is required to have regard to the award and the total material which served before the arbitrator. As such, I am therefore enjoined by decisions from the LAC to entertain the application for condonation. Both parties have filed their prescribed sets of affidavits and heads of argument in the main application. I am of the view that it is in the interests of justice and fairness that the late filing of the review application be condoned for the purposes of properly considering the review on the merits.

Background facts

[14] The Applicant was employed by the third respondent as a Cleaner from 14 August 1995 and at the time of his dismissal he was earning R69.00 per hour. He was dismissed on 25 April 2022 subsequent to a disciplinary hearing premised on the following allegations of misconduct:

‘gross negligence in that on 7th February 2022, public members that had authorised permission to remove wooden pallets on your behalf, also removed the company’s backing plates without authorisation / permission. You failed to ensure that the correct items were removed and your gross negligence has caused your employer a severe financial loss. A reasonable employee in your position would have ensured that only items that were authorised were loaded from the premises”.

⁵ See: *Grindrod Logistics (Pty) Ltd v SATAWU obo Kgwele and Others* (2018) 39 ILJ 144 (LAC) at para 31.

[15] It is common cause that the Applicant was given some wooden pallets by the third respondent and he obtained permission to have same removed by a third party transport. On the day in question, the Applicant directed the transporters to the area where they are collecting the wood and left them unattended and carried on with his daily duties. The movements of these visitors was recorded on a video footage and they were seen on the footage removing two items other than the wooden pallets. The third respondent maintains that the removed items were backing plates and the Applicant denied that backing plates were removed from the third respondent's premises and that the Security personnel at the gate could have reported the theft had the backing plates been removed as the authorization was only for the removal of wooden pallets.

[16] During the disciplinary hearing, the Applicant called a witness, Mr Molefe who took the chairperson together with the witnesses of the third respondent and pointed out the backing plates to them confirming that they were not stolen.

[17] The third respondent called two witnesses, Mr Mulder and Mr Niraj Kanjee. Mr Mulder confirmed that he issued the Applicant with a permit to remove the scrap pallets to be removed from the third respondent's premises. The following day he was approached by a certain Mandla from the tool room who told him that the plates were missing and a certain contractor had seen the plates being loaded onto a truck. He then commissioned the viewing of video footage which he had to view 120 times to confirm that indeed the items being loaded onto the truck were backing plates.

[18] The second witness, Mr Kanjee testified that he was the initiator during the disciplinary hearing. He confirmed that an inspection *in loco* was conducted and indeed the backing plates were shown to them. However, he testified in the hearing that subsequent to the dismissal of the Applicant he conducted an investigation and found that the backing plates shown at the inspection *in loco* belonged to another machine. The missing plates were later replaced and as a result the third respondent suffered loss.

[19] The Applicant agreed that the transporters were seen on the video footage loading '*something*' other than the wooden pallets and it was not clear as to what

exactly was removed because the video footage was not clear. However, he denied that what they were seen loading was backing plates. He relied on the testimony of Molefe who testified that in order to move backing plates an overhead crane is needed. He denied further that there was a rule on the workplace which demanded that he must keep an eye on the visitors.

[20] The Applicant's witness, Mr Molefe testified that he was a supervisor in the Moulding Department. He explained that when visitors came to collect the pallets, the Security Officers accompanies them to ensure that they do not do anything wrong. He testified that the backing plates were not missing and he is the one who pointed them out during the disciplinary hearing.

Arbitration proceedings and the award

[21] Subsequent to his dismissal, the applicant referred a dispute of unfair dismissal to the Bargaining Council. The second respondent, commissioner Charmaine Halian Stripp (Commissioner) was appointed to arbitrate the matter. Two witnesses testified on behalf of the third respondent and the applicant and his witness also testified in his own defence. He maintained that the backing plates were not removed from the third respondent's premises and he was dismissed for a non-mandatory rule and sought to be reinstated to his position.

[22] The arbitrator stated that the version of Mulder and Kanjee was not challenged during cross examination. She further stated that the Applicant did not dispute that he had a duty to accompany his visitors as prescribed in the Policy and he did not comply with the policy when he left the visitors unattended.

[23] The Commissioner stated that she took into account Mulder's direct evidence that he viewed the video footage as he was told that the plates were missing. She then concluded further that Molefe's evidence that the plates could be moved by an overhead crane was not put to the witnesses as such she did not consider his testimony and concluded that the plates were removed.

[24] At the close of proceedings, the Commissioner found that the dismissal of the applicant was substantively fair and confirmed his dismissal.

Applicant's grounds for review

[25] The Applicant is challenging the arbitration award on the grounds that the Commissioner failed to ensure that there was a fair trial of the issues in that she was biased. She failed to properly deal with contradictory statements of the third respondent's witnesses, Mr Mulder and Mr Kanjee.

[26] The Commissioner failed to properly assess the evidence and unduly placed too much weight on the video footage. She failed to take into account that the video footage was not clear hence the third respondent's witness, Mr Mulder had to look at it 120 times in order to satisfy himself that it was indeed the backing plates which were loaded on to the truck.

[27] She failed to take into account the fact that investigations were made by Mr Kanjee after the dismissal of the Applicant as a result he came up with a new version that the backing plates pointed out by Mr Molefe during the disciplinary hearing belonged to another machine.

[28] The Commissioner unreasonably excluded the evidence of Mr Molefe who testified that an overhead crane machine is required for moving plates as they are heavy and cannot be moved by hand. The Commissioner erred in excluding his evidence on the basis that it was not put to the witnesses. She failed to request the parties to undertake an inspection *in loco* in order to satisfy herself of the size, shape and weight of the backing plates.

[29] She failed to apply the provisions of Schedule 8 of the LRA in a fair and consistent manner in that she only focused on the provisions which favoured the case of the respondent and ignored the fact that the Applicant was dismissed for a non-mandatory rule and also failed to take his personal circumstances into account.

The test for review

[30] The Constitutional Court in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*⁶ held that “the reasonableness standard should now suffuse section 145 of the LRA⁷”, and that the threshold test for reasonableness of an award “...is [whether] decision reached by the commissioner one that a reasonable decision maker could not reach?”⁸

[31] The Supreme Court of Appeal in *Herholdt v Nedbank Ltd and Another (Congress of SA Trade Unions as Amicus Curiae)*⁹ held as follows: ‘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 particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.’

[32] In this matter, the Applicant has listed a number of grounds for review which have been summarised above. The debate on the right to review an arbitration award on process-related grounds as opposed to result-related grounds was finally settled by the Labour Appeal Court (LAC) in *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others*¹⁰ as follows:

‘[13] The right to review an arbitration award on process related grounds has been a topic of recent discussion and debate. It has been regarded as a different species of review to that postulated in *Sidumo*. *Sidumo* requires the review court to ask the question: is the decision made by the arbitrator one that a reasonable decision maker could not reach on the available material? This has been interpreted by some to suggest that the *Sidumo* test deals only with the result or outcome of the arbitration proceedings and that it remains open to review an award on process-related grounds.

⁶ [2007] ZACC 22; (2007) 28 ILJ 2405 (CC) (*Sidumo*).

⁷ Ibid at para 106.

⁸ Id fn 6 at para 110.

⁹ (2013) 34 ILJ 2795 (SCA) at para 25.

¹⁰ [2014] 1 BLLR 20 (LAC) at paras 13 – 14 and 18.

[14] *Sidumo* does not postulate a test that requires a simple evaluation of the evidence presented to the arbitrator and based on that evaluation, a determination of the reasonableness of the decision arrived at by the arbitrator. The court in *Sidumo* was at pains to state that arbitration awards made under the Labour Relations Act (LRA) continue to be determined in terms of section 145 of the LRA but that the constitutional standard of reasonableness is “suffused” in the application of section 145 of the LRA. This implies that an application for review sought on the grounds of misconduct, gross irregularity in the conduct of the arbitration proceedings, and/or excess of powers will not lead automatically to a setting aside of the award if any of the above grounds are found to be present. In other words, in a case such as the present, where a gross irregularity in the proceedings is alleged, the enquiry is not confined to whether the arbitrator misconceived the nature of the proceedings, but extends to whether the result was unreasonable, or put another way, whether the decision that the arbitrator arrived at is one that falls in a band of decisions to which a reasonable decision-maker could come on the available material.

...

[18] In a review conducted under section 145(2)(a)(c) (ii) of the LRA, 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.’

[33] The LAC has made it clear that a review court is not at liberty to pick and choose certain aspects of the award and evaluate them independently as such a piecemeal approach will defeat the requirements in section 138 of the LRA which prescribes how commissioners must conduct arbitration proceedings.

Evaluation

[34] The Applicant was dismissed on allegations of gross negligence in that that on 7 February 2022, public members that had authorised permission to remove wooden pallets on your behalf, also removed the company's backing plates without authorisation / permission. You failed to ensure that the correct items were removed and your gross negligence has caused your employer a severe financial loss. A reasonable employee in your position would have ensured that only items that were authorised were loaded from the premises.

[35] The Commissioner in paragraph 43 of his award stated that:
"the applicant left the visitors, together with their truck, unattended in an area where they had access to the respondent's property. I have found that the visitors removed two plates without authorisation. The respondent suffered a loss (two plates) as a result of the applicant's failure to comply with the policy. The applicant ought to have foreseen that his conduct exposed the respondent the risk of unauthorised removal of property. The applicant did not take reasonable care to safeguard the respondent's assets whilst the visitors were carrying out tasks on his behalf. I accordingly find the applicant guilty of gross negligence."

[36] According to Grogan,¹¹ in order to warrant a dismissal at first instance, negligence by an employee must be 'gross'. Gross negligence may be said to have occurred if the employee is persistently negligent, or if the act or omission under consideration is particularly serious in itself. While in civil law the term 'gross negligence' has a technical meaning, in employment law it can be taken to mean negligence that is particularly inexcusable."

[37] The requirements for a dismissal based on negligence are that the employee failed to exercise the standard of care that can reasonably be expected of him through conduct that caused loss or potential loss to the employer. In this case, the Applicant was charged with gross negligence which required a conscious and voluntary disregard of the need to employ reasonable care to prevent any

¹¹ Grogan *Dismissal* (2nd ed) at p 246 – 247.

foreseeable grave injury or harm. The Applicant testified that this was not his first time to have visitors on the property and he did not see the need to stay with them while they were loading because he knew that the Security officers will still search the truck when it leaves the premises of the employer.

[38] It is not clear on what basis did the commissioner reach a finding that the Applicant was guilty of gross negligence as charged. The SCA in *Transnet Ltd t/a Portnet v Owners of The MV Stella Tingas and Another: MV Stella Tingas*¹² held that *“for a conduct to constitute gross negligence, “the conduct in question must involve a departure from the standard of the reasonable person to such an extent that it may properly be categorised as extreme; it must demonstrate, where there is found to be conscious risk-taking, a complete obtuseness of mind or, where there is no conscious risk-taking, a total failure to take care. If something less were required, the distinction between ordinary and gross negligence would lose its validity.”*

[39] In paragraph 39 of the award, the Commissioner states that *“schedule 8, the Code of Good Practice: Dismissal, hereinafter referred to as the Code states that “any person who is determining whether a dismissal for misconduct is unfair should consider whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the workplace...”* It is not clear on what basis did the Commissioner conclude that the Applicant was guilty of gross negligence as stated in the arbitration award. She relied on Clause 6.5 of the HR Related Policy which deals with mandatory and non-mandatory rules that:

“Conduct of visitors: (Non-mandatory)

6.5.1 Employees shall advise their visitors of Company rules as requires and shall ensure that visitors act in an unacceptable manner.

6.5.2 No Employee shall allow their visitors on the Company premises unaccompanied by an Employee or Manager.”

....

6.11. Negligence which causes Damage (Mandatory)

6.11.1 NO employee shall be negligent in his/her behaviour which may involve waste, scrap or damage.

¹² 2003 (2) SA 473 (SCA) at para 7.

39.12 Gross Negligence or damage (mandatory).

Schedule 8 of the LRA Code of good practice: dismissal (the code)

[40] Section 188 (2) of the LRA provides that any person considering whether or not the reason for dismissal is for a fair reason must take into account any relevant code of good practice issued in terms of the LRA. In considering the fair reason of the dismissal of the Applicant, the second respondent was obliged to have regard to the code of good practice. Of relevance to this matter is item 7 of the code which provides as follows:

“7. Guidelines in cases of dismissal for misconduct

Any person who is determining whether a dismissal for misconduct is unfair should consider –

- (a) Whether or not the employee contravened a rule or standard regulating conduct in or of relevance to, the workplace; and
- (b) If a rule or standard was contravened, whether-
 - (i) The rule was a valid or reasonable rule or standard;
 - (ii) The employee was aware, or could reasonably be expected to have been aware, of the rule or standard;
 - (iii) The rule or standard has been consistently applied by the employer; and
 - (iv). Dismissal was an appropriate sanction for the contravention of the rule or standard.”

[41] Item 4 states that:

“Generally, it is not appropriate to dismiss an employee for a first offence, except if the misconduct is serious and of such gravity that it makes a continued employment relationship intolerable. Examples of serious misconduct, subject to the rule that each case should be judged on its merits, are gross dishonesty or wilful damage to the property of the employer, wilful endangering of the safety of others physical assault on the employer, a fellow employee, client or customer and gross insubordination. Whatever the merits of the case for dismissal might be, a dismissal will not be fair if it does not meet the requirements of section 188.”

[42] Item 5 states that:

“When deciding whether or not to impose the penalty of dismissal, the employer should in addition to the gravity of the misconduct consider factors such as the employee’s circumstances (including length of service, previous disciplinary record and personal circumstances), the nature of the job and the circumstances of the infringement itself.”

[43] The Applicant and his witnesses testified that the visitors did not remove the backing plates and there was a security officer who was responsible for ensuring that the visitors only remove the items stated in the authorization document. The Commissioner rejected the evidence of the applicant but found that all the witnesses of the third respondent were credible and their version was not disputed. However, she failed to consider that the investigation was only conducted subsequent to the dismissal of the Applicant and the backing plates were pointed out during the disciplinary proceedings which the witness did not dispute.

[44] The second issue is that the witness of the third respondent, Mr Mulder testified that he had to watch the video footage 120 times just to satisfy himself that indeed the items loaded on the truck were backing plates. The arbitrator failed to follow binding court decisions regarding what was expected of her when faced with two irreconcilable versions from the witnesses.

[45] The Supreme Court of Appeal in *Stellenbosch Farmers’ Winery Group Ltd and another v Martell et Cie and others*¹³ laid out the accepted test applicable to both a trial court and an arbitrator when faced with a factual dispute, in particular when faced with two irreconcilable versions. According to this judgment, the Court had to come to a conclusion on the disputed issues by making findings on (1) the credibility of the various factual witnesses; (2) their reliability; and (3) the probabilities:

‘... The court’s finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. This finding will, in turn, depend on a variety of subsidiary factors... such as (i) the witness’ candour

¹³ 2003 (1) SA 11 (SCA) at para 5.

and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events...

[46] The applicant and his witness corroborated each other in respect of the nature of the rule he is alleged to have contravened, the fact that backing plates were never stolen and the fact that the video footage was not clear. The commissioner then opted to exclude the evidence on the basis that it was not put to the witnesses as a result she failed to deal with the merits of the case before her. The LAC in *South African Society of Bank Officials (SASBO) and Another v The Standard Bank Of South Africa and Others*¹⁴ held that:

'The trier of fact is expected, in the context of discipline in the workplace, to deal with the wrong committed by an employee even if the charge may have been inelegantly phrased provided that the employee is not significantly prejudiced by the incorrect labelling of the charge.'

[47] I am required to determine if the Commissioner complied with the requirements prescribed in section 138 of the LRA. I am satisfied that she identified the nature of the dispute she was required to arbitrate, and she afforded both parties an opportunity to lead and adduce evidence. However, from reading the award and considering the evidence presented to her, I am of the view that she was biased against the applicant and prejudiced him greatly by rejecting the evidence which could have assisted in determining whether the dismissal of the Applicant was for a fair reason. She furthermore ignored the material contradictions and the improbabilities of the evidence of the witnesses in that if indeed the items loaded on the truck were backing plates, it did not need Mulder to watch the video footage 120 times in order to identify the items being loaded on the truck.

¹⁴ (2022) 43 ILJ 1794 (LAC) at para 25.

[48] Accordingly, the review application stands to succeed and the arbitration award is reviewed and set aside. Having reviewed and set aside the award, this Court retains powers to either remit the matter to the CCMA for a hearing *de novo* or substitute the award with its own decision. In *Palluci Home Depot (Pty) Ltd v Herskowitz and Others*¹⁵, the Labour Appeal Court set out the approach to be applied when deciding whether to remit or substitute, as follows:

'Where all the facts required to make a determination on the disputed issues are before a reviewing court in an unfair dismissal or unfair labour practice dispute such that the court is "in as good a position" as the administrative tribunal to make the determination, I see no reason why a reviewing court should not decide the matter itself. Such an approach is consistent with the powers of the Labour Court under s 158 of the LRA, which are primarily directed at remedying a wrong, and providing the effective and speedy resolution of disputes. The need for bringing a speedy finality to a labour dispute is thus an important consideration in the determination by a court of review of whether to remit the matter to the CCMA for reconsideration, or substitute its own decision for that of the commissioner. Thus, where the issues are largely common cause, the pleadings comprehensive, the full record of both the disciplinary and arbitration proceedings are before the court, and there has been a elapse of almost 20 months from the date of dismissal to the date of finalisation of the review application, such as in this case, the consideration of bringing the dispute to a speedy finality would certainly have a bearing on the decision of the reviewing court to decide the dispute, and not remit it to the CCMA, because it is 'in as good a position' as the CCMA to do so...'

[49] Where a decision is made on the basis of flawed reasoning, or an error of law, there is similarly no point to remit the matter back for determination *de novo*, where the facts remain the same.¹⁶ Applying the aforesaid *in casu*, it is my view that in this particular case the arbitration award must be substituted in the interests of bringing this matter to finality.

¹⁵ (2015) 36 ILJ 1511 (LAC) at para 58.

¹⁶ See *Rustenburg Platinum Mines Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2007) 28 ILJ 417 (LC) at para 28.

[50] The application was opposed and both parties made submissions that they are seeking costs of suit in the event of success with their cases. I do not believe that it is in the interests of justice and fairness that the third respondent should be ordered to pay costs of the applicant. In the Labour Court costs do not automatically follow the results.

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

Order

1. The application for condonation for the late filing of the review application is granted.
2. The arbitration award issued by the Metal and Engineering Industries Bargaining Council under case number MEGA 58765 is reviewed and set aside and substituted with an order that the dismissal of the Applicant was substantively unfair.
3. The third respondent is ordered to reinstate the Applicant with retrospective effect on the same terms and conditions which governed their employment contract at the time of the termination of employment on 25 April 2022 with no loss of benefits.
4. There is no order as to costs.

G C Phakedi

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

Mr Zungu of VS Mosehla Incorporated

For the Respondent:

Mr De Villiers of De Villiers & Du Plessis Attorneys