



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JR267/2021

In the matter between:

SAMWU OBO ABEL MOTSHEDI PELLE

Applicant

and

**SOUTH AFRICAN LOCAL GOVERNMENT
BARGAINING COUNCIL**

First Respondent

THE CITY OF JOHANNESBURG

Second Respondent

SILAS RAMUSHOWANA N.O

Third Respondent

Heard: 17 OCTOBER 2024

Delivered: 04 JUNE 2025

(This judgment was handed down electronically by emailing a copy to the parties. The 04 June 2025 is deemed to be the date of delivery of this judgment).

JUDGMENT

MAHALELO, AJ

Introduction

[1] The review proceedings before court are in terms of section 145 of the Labour Relations Act¹ (LRA) against the arbitration award issued in favour of the second respondent (employer). The applicant (employee) seeks to review and set aside the award and to substitute it with an order that his dismissal was substantively unfair alternatively to remit the matter to the first respondent for arbitration *de novo*. The proceedings are opposed by the employer.

[2] In terms of section 145(1) of the LRA, the applicant should have filed this application within six weeks of service of the arbitration award. The applicant delayed and filed an application for condonation of its late filing. The condonation application is unopposed. I have considered it and noted that the delay is not excessive. It did not prejudice the second respondent, and the applicant provided a reasonable explanation for the lateness. I am therefore satisfied that the applicant has shown good cause for condonation to be granted.

The Facts

[3] The applicant was employed by the second respondent as a Metro Police Officer on 1 July 2015 until his dismissal on 12 August 2020.

[4] On 4 March 2018, he was supposed to be on duty. He was running late. An official vehicle, a Ford Ranger Double Cab Bakkie with registration numbers and letters DK23DGGP was parked in his yard by another officer, who was the authorised driver. The applicant drove the official vehicle to work. While driving on the N1 freeway he collided with another vehicle, a Nissan 1400 bakkie. Both vehicles were seriously damaged as the official vehicle had rolled. Both the applicant and the occupants of the Nissan bakkie were injured.

¹ Act 66 of 1995

[5] The applicant was taken to hospital. A breathalyser test was performed on him. It came out positive, it registered 0.40g/ml of alcohol in his breath. Blood samples were also obtained from him by a nurse.

[6] The applicant was charged for misconduct. The charges levelled against him were the following:

‘Charge 1

Failure to comply with a standard of conduct as contained in Annexure A of the Disciplinary Procedure Collective Agreement: Clause 1.1 and 1.2.10 read with 2.7.6.

On the 4th of March 2018 at about 7h30 on the N1 North freeway near Main Road bridge you negligently drove a fully marked Johannesburg Metro Police Department (JMPD) patrol vehicle, Ford Ranger Double Cab with registration numbers and letter DK23DGGP and drove into the rear of (head rear collision) a Red Nissan LDV with registration numbers and letters NPN70846 driven by Mr Hadebe, resulting in serious damage to both vehicles and an injury to occupants of the other vehicle of the other vehicle and to yourself (i.e. you collided into the rear of the other party gross negligence on four part).

Charge 2

Failure to comply with a standard of conduct as contained in Annexure A of the Disciplinary Procedure Collective Agreement clause 1.1 read with 2.7.10, in that on 4 March 2018 at about 07h30 on the N1 North freeway near Main Road, bridge, you operated a fully marked JMPD patrol vehicle Ford Ranger Double Cab registration numbers DK23DGGP, while under the influence of alcohol or intoxicating substance, you drove into the rear of the Red Nissan with registration numbers and letters NPN70846 driven by Mr Hadebe, resulting in serious damage to both vehicles and an injury to occupants of the other vehicle and yourself, you were- breathalysed and a reading of 0.40g/ml was registered from yourself which is above the legal limit of 0,05g/ml.

Charge 3

Failure to comply with a standard of conduct as contained in Annexure A of the Disciplinary Procedure Collective Agreement: clause 1.1, in that on the 4th March 2018 at about 07h30 on the N1 North Freeway near Main Road, bridge you operated a fully marked JMPD patrol vehicle Ford Ranger Double Cab

registration DK23DGGP in contravention of clause 1. 73 of the JMPD vehicle policy.

Alternative Charge

Failure to comply with a standard of conduct as contained in Annexure A of Disciplinary Procedure Collective Agreement: Clause 1.1 read with 1.7.3 of the JMPD vehicle policy.

On the 4th March 2018 at about 07h30 on the N1 North Freeway near Main Road bridge, you operated a fully marked JMPD patrol vehicle Ford Ranger Double Cab registration DK23DGGP while under the influence of alcohol or intoxicating substance, you drove into the Red Nissan with registration numbers and letters NPN70846 driven by Mr Hadebe, resulting in serious damage to both vehicles and an injury to occupants of the other vehicle and yourself, while you did not have the permission to drive the patrol vehicle, furthermore you were breathalysed and reading of 0.40g/ml was registered from yourself which is above the legal limit of 0,05g/ml.'

[7] Following disciplinary proceedings, the applicant was found guilty of misconduct and his employment was terminated on 12 August 2020

[8] He referred an unfair dismissal dispute to the first respondent for conciliation. A certificate of non-resolution was issued. The matter was referred to arbitration. The commissioner, after arbitration of the dispute, issued an award in terms of which he found the applicant's dismissal to be both substantively and procedurally fair. It is this award which is the subject of these review proceedings.

The Arbitration Proceedings

[9] The issue before the arbitrator was whether the applicant's dismissal was substantively and procedurally unfair.

[10] The applicant challenged his dismissal on the grounds that he was not under the influence of alcohol. During his evidence he wanted to hand up the statement of Mr Hadebe (Hadebe), the other driver with whom he was involved in the accident. The statement sought to indicate that Hadebe withdrew the case against the

applicant (as he allegedly realised that he was the one who was negligent). The commissioner refused to accept the statement on the basis that the applicant failed to bring that witness to arbitration in order to attest to that statement.

[11] The applicant explained that he had been sick for the past two days and was taking flu medication. On the issue of the employer's vehicle policy, he explained that his supervisor was aware that he was using the said vehicle on the morning in question. On the issue of the breathalyser test, he contended that the machine that was used was not calibrated because no calibration certificate was produced and no witness testified about the whole procedure of breathalysing him. Moreover, none of the witnesses at the scene of accident testified that he was under the influence of alcohol.

[12] On the issue of the blood test the applicant submitted that he was not aware that his blood was drawn and if it was, it was tampered with because in the statement of the police officer Sergeant Nzaule, it is reflected that when she received the blood kit it was not properly sealed. It had the seal number DD097377. According to the section 212 certificate of Ms Shabalala, the forensic Analyst the blood sample which she received and tested in relation to this case was sealed with seal number DD097378. That just like the breathalyser test, not a single witness testified at arbitration about the chain of evidence. He mentioned that he was not wearing a tag on the day in question and that failure to wear a tag is not a dismissible offence. The applicant further alleged that there was inconsistency in the application of discipline by the employer as there were other employees who were previously involved in accidents with official cars but were never dismissed. He considers the sanction of dismissal to be too harsh and unfair.

[13] The second respondent led the evidence of Mrs Barnard, the superintendent of the second respondent. She testified that on 4 March 2018 she was driving along the N1 North when she observed the accident involving a JMPD marked vehicle which was driven by the applicant. At that stage both drivers were outside. Both cars were severely damaged. The other driver was also seriously injured. The applicant was not in work uniform. She called the freeway patrol and the ambulance and took

the applicant's firearm for safekeeping. She handed over the scene to the police and left.

[14] Mr BI Zuma, a metro police officer testified that he was on duty on 4 March 2018 when he was called to attend the accident on N1 North next to Maritzburg. Upon arrival he observed that the applicant was lying down because he was also injured. He recorded the accident. He was approached by the driver of the other vehicle who requested that the applicant be breathalysed. The applicant was breathalysed at the hospital by inspector Phahlele and the reading was 0.41g/ml of alcohol in his breath.

[15] With regard to the calibration certificate, he explained that Constable Phethele showed it to him but he was not sure if he took it along when he went to open a criminal case of reckless and/or negligent driving against the applicant. That case was withdrawn against the applicant for insufficient evidence. According to Zuma, if an officer is not on duty and would like to use an official vehicle, he/she only phones the radio room or the supervisor to inform them. He conceded that failure to wear a tag is not a dismissible offence. After his evidence the commissioner accepted the statement of Mr Mabekebeke without him having been called to testify.

[16] After having considered the whole evidence, the commissioner issued an award in terms of which he found that the dismissal of the applicant was procedurally and substantively fair. It is this award that is the subject of this application.

The Review Application

[17] The applicant contended that the commissioner committed misconduct and gross irregularities in the conduct of the proceedings, that he committed material errors of fact and law and arrived at a decision that no reasonable decision-maker could have arrived at on the evidentiary material before him. He argued that the arbitrator failed to fully assess the evidence presented to him in that:

1. He failed to admit the third statement purportedly made by Hadebe;
2. He admitted the statement by Mabekebeke without any basis,

3. Despite being aware that the results of the blood samples were in dispute, the arbitrator was biased in that he did not make an inference to the second respondent's failure to produce a witness who could testify about the process followed prior, during and subsequent to blood sample being obtained from the applicant and the breathalyser test being administered.

4. He committed an irregularity by rejecting the applicant's version that his supervisor was aware that he was using the official vehicle that morning;

5. On the appropriateness of the sanction the arbitrator dismally failed to appreciate that the CCMA or Bargaining Council hearing is a hearing *de novo*. He found that the dismissal of the applicant was substantively fair because he relied on the statement of a witness who was never called to testify which statement was prejudicial to the applicant.

Evaluation

[18] Section 145 of the LRA provides that any party to a dispute alleging a defect in any arbitration proceedings may apply to the Labour Court for an order setting aside the arbitration award, and 'defect' is given the following meaning:

- (a) "that the arbitrator
 - (i) committed misconduct in relation to the duties of the arbitrator as an arbitrator;
 - (ii) committed a gross irregularity in the conduct of the arbitration proceedings; or
- (b) exceeded the arbitrator's powers; or that an award has been improperly obtained.'

[19] It is now trite that the requirements for the review of an award under the LRA are stringent and that the applicable test in reviews is that of reasonableness, an award of an arbitrator of the CCMA or a Bargaining Council is reviewable if the decision reached by the arbitrator was one that a reasonable decision-maker could not reach.²

² Sidumo and Another v Rustenburg Platinum Mines Ltd and others (2007) 28 ILJ 2405 (CC).

[20] In *Herholdt v Nedbank Limited*³, the Supreme Court of Appeal stated as follows:

‘[25] ... Material errors of fact, as well as 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.’

[21] In *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others*⁴, it was stated that:

‘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.’

[22] Mere errors or irregularities are not sufficient to vitiate the award. To warrant interference from a review court, the award must be disconnected from the evidence resulting in an unreasonable outcome⁵ and/or the failings, errors, irregularities or misconduct must have resulted in the award ultimately being unreasonable.⁶ In *Makuleni v Standard Bank of SA (Pty) Ltd and others*⁷ the LAC cautioned this Court not to “yield to the seductive power of a lucid argument that the result could be different” because that is the luxury and privilege reserved for the court of appeal. The LAC continued that it is only if the conclusion reached by the commissioner is untenable that the review court will be justified in reviewing and setting aside the award.

³ (2013) 34 ILJ 2795 (SCA).

⁴ (2014) 35 ILJ 943 (LAC).

⁵ *Duncanmec (Pty) Ltd v Williams Itumeleng NO and others* [2020] 7 BLLR 668 (LAC) at para 23; *Securitas Specialised Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and others* (2021) 42 ILJ 1071 (LAC); [2021] 5 BLLR 475 (LAC) at para 19.

⁶ *Heroldt supra*, *Head of Department of Education v Mofokeng and Others* (2015) 36 ILJ 2802 (LAC); [2015] 1 BLLR 50 (LAC) at paras 31 – 3

⁷ (2023) 44 ILJ 1005 (LAC); [2023] 4 BLLR 283 (LAC) (8 February 2023)

[23] Ultimately, the applicant in this case is required to establish that the award was one that could not have been made by a reasonable decision-maker on the evidence presented.

Reasonableness of the award on the evidential material placed before the commissioner.

[24] In his award the arbitrator found that the version of the employer that the applicant was under the influence of alcohol is probable and believable on a balance of probabilities. This was primarily based on the breathalyser test. He found that there was no evidence suggesting that the blood samples were tempered with and that the applicant had been sick of flu two days before the incident

[25] On the issue of the breathalyser test, it is important to distinguish between testing positive for alcohol on the breath of an employee and such an employee being under the influence of alcohol. Being under the influence of alcohol implies that an employee was not capable of safely performing his duties. In this regard, the breathalyser reading or indication of alcohol on the breath of an employee will be considered in addition to other evidence such as witnesses testifying to the behaviour of the employee at the time. For example, slurred speech, unsteady pace, bloodshot eyes etc, there is no evidence led in this regard. The arbitrator does not even give reasons why he finds the version of the employer believable and probable in this regard. He committed a reviewable irregularity.

[26] The commissioner further stated that there was no evidence to suggest that the applicant had been sick of flu for two days before the accident and that the blood samples were tempered with. He was aware that the result of the blood sample drawn from the applicant were in dispute, yet he did not make any inference to the two different serial numbers reflected on the blood kit and on the blood sample that was tested. Further, he did not question the second respondent's failure to produce a calibration certificate and/or call a witness who could testify about the process followed prior, during and subsequent to the breathalyser being administered on the applicant and his blood being drawn. These are all reviewable irregularities committed by the commissioner.

[27] Another glaring irregularity is when the commissioner failed to make any pronouncement on the other charges the applicant was facing. He only found that the applicant was under the influence of alcohol. The applicant was facing four charges. These are separate charges which the commissioner was supposed to analyse and pronounce on.

[28] The commissioner further committed an irregularity when he accepted and relied on the statement of Mabekebeke who was not called to testify during arbitration. It is trite that the commissioner in exercising and executing their duties must balance the interest of employer with those of the employee. This balancing requirement demands that various components must be placed in the scales: an objective analysis of the particular facts of the case; adequate regard to the applicable statutory and policy framework; and adequate regard to the pertinent jurisprudence as developed by the courts.⁸ The record of arbitration read with the award clearly demonstrate that the arbitrator dismally failed to appreciate that a CCMA or Bargaining Council hearing is a hearing *de novo*. This authority was expressed in *County Fair Foods (Pty) Ltd v CCMA and Others*⁹ that:

“the decision of the arbitrator as to the fairness or unfairness of the employer’s decision is not reached with reference to the evidential material that was before the employer at the time of its decision but on the basis of all the evidential material before the arbitrator. To that extent, the arbitration proceedings are a hearing *de novo*”

[29] It appears that the sole reason why the arbitrator found the dismissal of the applicant to be substantively fair is because he relied on the affidavit of a witness who was never called to testify. His reasoning that Mabekebeke’s affidavit ought to have been accepted as evidence during the arbitration proceedings was a serious

⁸Theewaterskloof Municipality v South African Local Government Bargaining Council (Western Cape) and Others para 19. (C966/2008) [2010] ZALC 69; (2010) 31 ILJ 2475 (LC); [2010] 11 BLLR 1216 (LC) (14 May 2010)

⁹ (1999) 20 ILJ 1901 (LAC) at para 11.

miscarriage of justice in that the applicant was denied the opportunity to cross-examine him.

[30] The applicant admitted that he was not authorised to drive the vehicle in question as it was signed out to another official. He however explained that his supervisor was aware that he was using the vehicle that morning. It seems that the commissioner rejected this version despite Zuma testifying that this is what used to happen at the workplace. Even if the applicant did not call the supervisor to testify, fact of the matter is that the witness for the employer testified that one would call the radio room or inform the supervisor over the phone that they would be using the official vehicle which is what the applicant says he has done.

[31] The arbitrator also concluded that there was no evidence that the employer applied discipline inconsistently without saying much. In my view, the arbitrator reached a decision which no reasonable arbitrator could have reached. His conclusion is disconnected to the evidence presented before him. The decision of the arbitrator in this case does not fall within the bands of reasonableness as required by law.

Substitution or remittal

[32] In its alternative prayer for relief, the applicant has sought an order that remits the matter back for the arbitration proceedings to be started afresh before another arbitrator. Having considered all the factors, I believe that a differently constituted CCMA commissioner would be better placed than me to deliver an award after all the evidence has been taken into consideration and a full analysis of all the pertinent evidence is considered.

Costs

[33] I intend on making no order as to costs, the reason being to ensure fairness.

Order

[34] In the premise, the following order is made:

1. The award issued by the third respondent under the auspices of the first respondent under case number JMD082005, dated 13 October 2020, is hereby reviewed and set aside.
2. The matter be remitted back to the South African Local Government Bargaining Council for a hearing *de novo* before an arbitrator other than the third respondent.
3. There is no order as to costs.

MB. Mahalelo

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Ms G. Phakedi
Instructed by:	Phakedi Attorneys
For the Respondent:	Mr Clive Govender
Instructed by:	Salijee Govender Van der Merwe Inc