



Not reportable

**THE LABOUR COURT OF SOUTH AFRICA,
HELD AT CAPE TOWN**

Case no: C610/2022

In the matter between:

VERNON MARCHEL LOMBARD

Applicant

And

**COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION**

First Respondent

COMMISSIONER C M BENNETT

Second Respondent

NETCARE HOSPITALS (PTY) LTD t/a NETCARE

KUILSRIVER HOSPITAL

Third Respondent

Heard: 1 July 2025

Delivered: 7 July 2025

Summary: application to review – review dismissed – applicant failed to prove that commissioner failed to properly consider the evidence or that the decision is one that a reasonable decision maker could not reach.

JUDGMENT

DE KOCK, AJ

Introduction

- [1] This matter concerns an application by the applicant (Lombard) to review and set aside an arbitration award given by the second respondent (Bennett) in his capacity as a commissioner of the first respondent (CCMA). The application has been brought in terms of section 145 of the Labour Relations Act¹ ('the LRA').
- [2] The matter arose from the alleged unfair dismissal of Lombard for allegations of sexual harassment and unsolicited sexual conduct towards female colleagues. The arbitration proceedings before Bennett took place on 1 November 2022. Bennett, following the conclusion of the arbitration proceedings, issued an award dated 14 November 2022 wherein he found that Lombard's dismissal was substantively fair. It is this determination that gave rise to the current review application.

Jurisdictional challenges

- [3] The third respondent (Netcare) argued that the review application was withdrawn because of the deeming provisions contained in clause 11.2.3 of the Labour Court Practice Manual, which was applicable at the time that Lombard's default took place. It was argued that, more over and in any event, the Labour Court Rules, 2024 contain substantially identical provisions and, to the extent that these Rules apply retrospectively, the legal position remains the same. The court is satisfied that the 2024 Labour Court Rules do not apply retrospectively regarding the deeming provisions and that the reinstatement application must be considered in

¹ Act 66 of 1995 (as amended).

terms of the Labour Court Practice Manual that was applicable at the time that Lombard's default took place.

- [4] Mr Whyte, appearing for Netcare, argued that the reinstatement application is defective as it has not been supported by a notice of motion, and thus does not comply with the Labour Court Rules (the Old Rules) or the Labour Court Practice Manual. The application only consists of an affidavit headed "application for condonation for late filing of review application".
- [5] The court is not inclined to adopt an overly technical approach to Lombard's application for the reinstatement of the review application. It may be so that a notice of motion did not accompany the affidavit, and that the heading of the affidavit does not specifically state that what is sought is the reinstatement of the review application. It is however clear that Netcare understood what Lombard did was to seek an order for the reinstatement of the review application, and his application was fully opposed in Netcare's answering affidavit. There is therefore no prejudice to Netcare in this regard and the court will accept Lombard's actions as substantial compliance with the Rules, and the Labour Court Practice Manual.
- [6] The court considered Lombard's explanation for his failure to ensure that the record has been timeously delivered, and Netcare's opposition thereto. The court is satisfied that there is a reasonable explanation for the delay in delivery of the record, that the delay was not severe and that Lombard showed sufficient prospects of success to succeed in the application for reinstatement of the review application. The review application is therefore reinstated, and the merits of the review application will be addressed hereunder.

- [7] Mr Whyte also challenged the further grounds of review included in Lombard's heads of argument. The court pointed out to Lombard, during arguments, that a litigant is not entitled to raise new grounds of review in their heads of argument, especially since Netcare was not afforded an opportunity to answer to these grounds of review when they delivered their answering affidavit. The grounds of review, as raised in the founding affidavit, are therefore the grounds of review which the court will consider in the review application. The further grounds of review, as raised for the first time in Lombard's heads of argument, will not be considered.

The relevant background

- [8] Lombard was dismissed on 29 July 2022, having been found guilty of two independent charges of sexual harassment. Specifically, he was accused of making patently inappropriate sexual remarks inviting female colleagues to have a "*quickie*" and made requests to "*kiss*", "*touch*" and "*feel*" them. The two female colleagues presented evidence that Lombard's conduct was unwelcome, part of ongoing abuse and infringed their right to be free of such conduct.

The CCMA award

- [9] Bennett made the following material findings in his award:
- (a) The balance of probability is the standard of proof to be applied to the factual disputes between the parties.
 - (b) Lombard's defence, apart from denial, was to allege, without corroboration, that there was a conspiracy involving Domingo,

who did not like him, and the two complainants, Struis and Serfontein.

- (c) The probabilities favoured the conclusion that Lombard was guilty of the charges brought against him.
- (d) Lombard's suggestion that the conduct would have stopped had he been taken aside and warned about his conduct, essentially amounted to a concession that the conduct did, in fact, take place – contrary to his denials.

The test for review

[10] In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*,² the Court held that 'the reasonableness standard should now suffuse section 145 of the LRA', and that the threshold test for the reasonableness of an award was: '...Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?...'³. In *Herholdt v Nedbank Ltd and Another*⁴ the Court applied this reasonableness consideration 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 the particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of consequence if their effect is to render the outcome unreasonable.'

² (2007) 28 ILJ 2405 (CC).

³ Id at para 110.

⁴ (2013) 34 ILJ 2795 (SCA) at para 25.

- [11] This test has thus been applied as a two-stage review enquiry. Firstly, the review applicant must establish that there exists a failure or error on the part of the arbitrator. If this cannot be shown to exist, that is the end of the matter. Secondly, if this failure or error is shown to exist, the review applicant must then further show that the outcome arrived at by the arbitrator was unreasonable. If the outcome arrived at is nonetheless reasonable, despite the error or failure, that is equally the end of the review application. In short, in order for the review to succeed, the error or failure must affect the reasonableness of the outcome to the extent of rendering it unreasonable.
- [12] Further, the reasonableness consideration envisages a determination, based on all the evidence and issues before the arbitrator, as to whether the outcome of the arbitrator arrived at can nonetheless be sustained as a reasonable outcome, even if it may be for different reasons or on different grounds.⁵ This necessitates a consideration by the review court of the entire record of the proceedings before the arbitrator, as well as the issues raised by the parties before the arbitrator, with the view to establish whether this material can, or cannot, sustain the outcome arrived at by the arbitrator. In the end, it would only be if the outcome arrived at by the arbitrator cannot be sustained on any grounds, based on the material, and the irregularity, failure or error concerned is the only basis to sustain the outcome the arbitrator arrived at, then the review application would succeed.⁶

⁵ *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others* (2008) 29 ILJ 964 (LAC) at para 102.

⁶ See *Campbell Scientific Africa (Pty) Ltd v Simmers and Others* (2016) 37 ILJ 116 (LAC) at para 32; *Anglo Platinum (Pty) Ltd (Bafokeng Rasemone Mine) v De Beer and Others* (2015) 36 ILJ 1453 (LAC) at para 12.

- [13] The court will now proceed to consider the review application by the applicant against the above principles and test applicable to review applications.

Grounds of review

- [14] Lombard's grounds of review, as contained in his founding affidavit, are that:

- (a) Bennett considered hearsay evidence.
- (b) That the evidence before Bennett was insufficient and/or unduly influenced by Domingo.
- (c) That the disciplinary process was unfair.

Analysis of the grounds of review

- [15] In respect of the allegation by Lombard that Bennett considered hearsay evidence, this ground of review is not supported by the evidence placed before Bennett. The two female colleagues, referred to in the charges, were called to present evidence during the arbitration proceedings. Their evidence therefore does not amount to hearsay evidence, and this ground of review has no merit.

- [16] The second ground of review is that there was not sufficient evidence placed before Bennett, and that the evidence so presented was unduly influenced by Domingo. Having perused the transcribed record, the court is unable to find any merit in this ground of review. The two female colleagues presented clear evidence regarding their respective

complaints and Bennett's acceptance of their evidence, compared to the mere denials by Lombard, cannot be said to be a decision that a reasonable decision maker could not reach. Bennett applied his mind to their evidence and Bennett's conclusions fall within the bands of reasonableness. There is no reason for the court to interfere with his decisions regarding the evidence of the two female colleagues regarding sexual harassment.

- [17] Insofar as Lombard alleges that Domingo unduly influenced their evidence, there is no merit to this allegation. There was no evidence before Bennett to justify a conclusion that the two female colleagues' evidence was influenced by Domingo in any manner whatsoever. Bennett's failure to find that their evidence was unduly influenced by Domingo cannot be criticised on review.
- [18] The third and last ground of review, as pleaded in the founding affidavit, relates to the alleged procedural unfairness of the disciplinary hearing. Lombard did not challenge the procedural fairness of the disciplinary hearing during the arbitration proceedings and there is no reason for the court to entertain this ground of review.
- [19] Insofar as Lombard's ground of review of procedure relates to Netcare's decision not to warn Lombard of the allegations against him, the court finds no reason to interfere with Bennett's arbitration award. Bennett properly addressed Lombard's evidence in this regard when he found that Lombard's evidence that he was not taken to one side, as per the policy, and warned about his conduct is somewhat contradictory as if it his conduct would have stopped, it is tantamount an admission that Lombard was conducting himself in that manner, which Lombard denies.
- [20] Lombard's conduct, as per the evidence of the two female colleagues, and as accepted by Bennett, justified Netcare's decision to follow its

disciplinary process and not to address the complaints by warning Lombard that his conduct was unacceptable.

- [21] In conclusion, the court finds that Bennett correctly identified and embarked upon the proper enquiry, which was to determine whether Lombard's dismissal was substantively fair. Bennett correctly identified and applied the relevant standard of proof, which is a balance of probabilities. Bennett's finding that Lombard's dismissal was substantively fair, given the evidence placed before him, falls within the bands of reasonableness. The court is therefore unable to conclude that Bennett's decision is one that a reasonable decision maker could not reach. There is further no evidence that Bennett committed misconduct or committed a serious irregularity in how he conducted the arbitration, and how he arrived at his conclusion.

Costs

- [22] In terms of the provisions of section 162(1) of the LRA, I have a wide discretion when it comes to the issue of costs. I am mindful of the *dictum* of the Constitutional Court in *Zungu v Premier of the Province of Kwa-Zulu Natal and Others*⁷ when it comes to the issue of costs in employment disputes. In the matter before the court, there is no compelling reason, in law and fairness, for an order to be made regarding costs.

- [23] In the premises, I make the following order:

Order

⁷ (2018) 39 ILJ 523 (CC).

1. The review application is reinstated.
2. The application to review the award is dismissed.
3. No order is made as to costs.



C de Kock

Acting Judge of the Labour Court of South Africa

Representatives:

For the Applicant:

In person (no representative)

For the Respondents:

Mr J Whyte

From:

Norton Rose Fulbright SA Inc.