



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JR458/22

In the matter between:

**BARLOWORLD EQUIPMENT SOUTHERN
AFRICA (PTY) LTD**

Applicant

and

**COMMISSION FOR CONCILIATION MEDIATION AND
ARBITRATION**

First Respondent

JOSIAS SELLO MAAKE N.O.

Second Respondent

RUDZANI MOSES MASHOVHELA

Third Respondent

Heard: 27 May 2025

Delivered: 27 May 2025

Reasons delivered: 24 June 2025 (This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing-down is deemed to be 10h00 on 24 June 2025.)

REASONS FOR ORDER

PHEHANE, J

Introduction

[1] Three applications served before this Court.

[2] The first is an application by Barloworld Equipment Southern Africa (Pty) Ltd (Barloworld) to reinstate its review application which lapsed for lack of compliance with the provisions of item 11.2.7 of the former Practice Manual of this Court¹ (revival application). The third respondent opposes the revival application.

[3] The second is an application by the third respondent to condone the late filing of his answering affidavit in the review application, pursuant to Barloworld filing a notice objecting to its late filing (condonation application). Barloworld opposes the condonation application.

[4] The third is a review application launched by Barloworld in terms of the provisions of section 145 of the Labour Relations Act² (LRA) to review and set aside the arbitration award by the second respondent dated 1 February 2022.

[5] On 27 May 2025, this Court handed down an order granting the reinstatement application, dismissing the condonation application, reviewing and setting aside the arbitration award and substituting same with an order that the dismissal of the third respondent is substantively fair, and ordering the third respondent to pay the costs.

[6] The reasons for the orders follow.

¹ Practice Manual of the Labour Court of 2013 (repealed on 17 July 2024). Item 11.2.7 provided that all the necessary papers in a review application must be filed within 12 months of the launch of the review application, failing which the application will lapse and will be archived.

² Act 66 of 1995, as amended.

Revival application

[7] Barloworld's notice in terms of the former Rule 22 B of the now repealed Rules for the Conduct of Proceedings in the Labour Court³ (the former rules) was delivered approximately nine days late. This period of delay is minimal.

[8] This Court is satisfied that good reasons have been proffered by Barloworld for the delay. Barloworld has demonstrated that it has reasonable prospects of success in the review application. In the interests of justice, this Court exercised its discretion to grant the revival application. Therefore, the review application is reinstated.

Condonation application

[9] The test to succeed in an application for condonation is well established.⁴ An applicant for condonation seeks the indulgence of the Court. Condonation is not for the mere asking. The onus is on the applicant to demonstrate good cause for the delay and in so doing, the applicant must provide a detailed and accurate explanation for the entire period of delay.⁵

³ GN 1665 in GG 17495 of 14 October 1996 (repealed on 17 July 2024).

⁴ *Melane v Santam Insurance Co Ltd* [1962] 4 All SA 442 (A); *Grootboom v National Prosecuting Authority and another* [2014] 1 BLLR 1 (CC).

⁵ In *Independent Municipal and Allied Trade Union on behalf of Zungu v South African Local Government Bargaining Council and Others* (2010) 31 ILJ 1413 (LC) the Labour Appeal Court held as follows at para 13: "*In explaining the reason for the delay, it is necessary for the party seeking condonation to fully explain the reason for the delay in order for the court to be in a proper position to assess whether or not the explanation is a good one. This in my view requires an explanation which covers the full length of the delay. The mere listing of significant events which took place during the period in question without an explanation for the time that lapse between these events does not place a court in a position properly to assess the explanation for the delay. This amounts to nothing more than a recordal of the days relevant to the prosecuting of a dispute or application, as the case may be*".

[10] The third respondent failed to provide a detailed and accurate explanation for the entire period of delay. The extent of the delay is eight months, which is excessive in view of the ethos of the LRA that employment law disputes are to be resolved expeditiously.

[11] The explanation for the delay over the period that *is* accounted for, is not reasonable. The third respondent was passive and did not pursue his opposition in the review application diligently. His excuses of not having network coverage where he resides and thus not being contactable to his legal representatives is not a good reason for the delay. The reason proffered in respect of the exchanges between his legal insurer and his legal representatives in respect of payment for legal services is equally not a good reason for the delay. Where no reasonable explanation is proffered for the delay, the prospects are immaterial.⁶

[12] In the present case, the third respondent has failed to demonstrate to this Court that he has reasonable prospects of success in the review application. Therefore, in consideration of the foregoing, it is not in the interest of justice to grant condonation for the late filing of the answering affidavit.

Review application

[13] In view of the foregoing orders, the review application proceeded on an unopposed basis.

[14] The test on review is trite.⁷

Brief factual background

⁶ *National Union of Mineworkers v Council for Mineral Technology* [199] 3 BLLR 209 (LAC).

⁷ *Sidumo and Another v Rustenburg Platinum Mine Ltd and Others* [2007] BLLR 1097 (CC). *Goldfields Mining South Africa (Pty) Ltd (Kloof Goldmine) v Commission for Conciliation, Mediation and Arbitration and others* [2014] 1 BLLR 20 (LAC); *Herholdt v Nedbank Limited and Congress of South African Trade Unions (Amicus Curiae)* [2013] 11 BLLR 1074 (SCA).

[15] Whistleblowers resported to Barloworld that employees were complicit in defrauding its medical aid scheme. Following an investigation, two anonymous witnesses named the third respondent as a participant in this scheme. Consequently, the third respondent was called to a disciplinary hearing to answer to the following allegation of misconduct:

'CHARGE 1: DISHONESTY AND/OR ALTERNATIVELY COMPLICIT IN SUBMITTING IRREGULAR CLAIMS

in that:

you have perpetrated and/or you were complicit in filing irregular claims against Barlowold Medical Scheme while you have not consulted and/or used the services of the following service providers:

1. MR MZAMANI DONALD MATHEBULA'

As a result of your dishonest actions Barloworld Medical Scheme has unwarrantedly and unduly paid the above service providers R17 978,20 which in actual fact should not have been paid to the said service providers.⁸

[16] The third respondent was dismissed following the disciplinary hearing. He subsequently referred an unfair dismissal dispute to the first respondent which was arbitrated by the second respondent. Procedural fairness was not in dispute.

[17] The second respondent found that the third respondent's dismissal was substantively unfair and ordered Barloworld to pay the third respondent six months' salary compensation plus interest.

[18] Barloworld challenges this decision by the second respondent.

Grounds of review

⁸ Records bundle at p 5.

[19] The grounds of review are that the second respondent committed a gross irregularity and / or a material error of law and misconstrued the nature of the enquiry before him in the following respects:

19.1 He refused to consider the admission of hearsay evidence in circumstances where whistleblowers had alerted Barloworld to the misconduct of the third respondent for which he was charged.

19.2 He raised the threshold of the onus in a disciplinary hearing to proof beyond reasonable doubt and failed to assess the circumstantial evidence before him on a balance of probabilities.

19.3 On numerous occasions, the second respondent interrupted Barloworld's representative and assisted the third respondent in his defence.

Evaluation

[20] Section 3 of the Law of Evidence Amendment Act⁹ (LEAA) provides:

'3. Hearsay evidence

(1) Subject to the provisions of any other law , hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless—

(a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;

(b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or

(c) the court, having regard to—

(i) the nature of the proceedings;

(ii) the nature of the evidence ;

(iii) the purpose for which the evidence is tendered;

(iv) the probative value of the evidence ;

⁹ Act 45 of 1988.

- (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;
- (vi) any prejudice to a party which the admission of such evidence might entail; and
- (vii) any other factor which should in the opinion of the court be taken into account,

is of the opinion that such evidence should be admitted in the interests of justice.

(2) The provisions of subsection (1) shall not render admissible any evidence which is inadmissible on any ground other than that such evidence is hearsay evidence .

(3) Hearsay evidence may be provisionally admitted in terms of subsection (1)(b) if the court is informed that the person upon whose credibility the probative value of such evidence depends, will himself testify in such proceedings: Provided that if such person does not later testify in such proceedings, the hearsay evidence shall be left out of account unless the hearsay evidence is admitted in terms of paragraph (a) of subsection (1) or is admitted by the court in terms of paragraph (c) of that subsection.

(4) For the purposes of this section—

“hearsay evidence” means evidence , whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence ;

“party” means the accused or party against whom hearsay evidence is to be adduced, including the prosecution.’

[21] Section 3(1)(c) of the LEAA provides factors that a triar of evidence may take into account in determining whether it is in the interests of justice to admit hearsay evidence. It is trite that in terms of section 138 of the LRA, a commissioner has a discretion to conduct an arbitration in a manner that he or she considers appropriate so as to determine a dispute fairly and quickly and to do so with minimum legal formalities. However, this does not imply that the commissioner may arbitrarily exclude hearsay evidence.

[22] The second respondent insisted on direct evidence in circumstances where the facts of the case before him related to whistleblowers placing evidence before an employer upon which evidence, an employee was charged for misconduct. The second respondent did not permit the representative of Barloworld to make representations to him, despite repeated requests, on the admission of hearsay evidence. He considered prejudice to the third respondent only and that the authors of the affidavits would not be called as witnesses. He repeatedly refused to hear any submissions on the admissibility of hearsay evidence. He stated that he was well aware on the provisions of the LEAA,¹⁰ yet he failed to properly apply them.

[23] Applying the common law rules for the exclusion of hearsay evidence without any consideration of section 3(1)(c) of the LEAA was not in the interests of justice. Further, refusing to permit any submissions in regard to the admission of hearsay evidence was grossly irregular, and denied Barloworld a fair hearing.

[24] Had the second respondent considered the law in relation to the admissibility of hearsay evidence, he would have undertaken the correct inquiry in terms of Section 3(1) of the LEAA. Having failed to do so renders his decision unreasonable.

[25] Despite the charge of misconduct being placed before the second respondent, he was of the view that the charge related to fraud. He was fixated on Barloworld having to prove fraud beyond a reasonable doubt. He was further fixated on Barloworld having to prove that monies were exchanged between the practitioner who submitted fraudulent claims to the medical aid (Mr Mathebula, a physiotherapist) and the third respondent, and required Barloworld to prove that Mr Mathebula was unjustly enriched.¹¹ This is not what the third respondent was charged for.

[26] The second respondent ignored, closed his mind to, and without any basis for doing so, rejected the evidence of Barloworld's human resources business partner, Ms Maphalle, who led evidence on the multiplicity of duplicated medical aid claims

¹⁰ Transcribed record at pp 183 to 187.

¹¹ Transcribed record at pp 250 to 256.

by Mr Mathebula for alleged treatment on the third respondent which raised alarm bells for Barloworld.¹² He does not mention her evidence in his arbitration award.

[27] In *Country Fair Foods (Pty) Ltd v Commission for Conciliation Mediation and Arbitration and Others*¹³ the Labour Appeal Court (LAC) stated that it is not expected for commisisoners to write well researched and scholarly awards and that awards are to be brief. However, a failure to deal with an important facet may, depending on the circumstances, indicate that a commisisonet failed to apply his or her mind to that partucular facet.

[28] Ms Maphalle stated that in view of the multiplicity of claims, had they been genuine, the third respondent was obliged to report his illness to Barloworld and he would have been subjected to incapacity procedures, which he was not.

[29] Therefore, in failing to deal with the evidence of Ms Maphalle and insisiting on direct evidence throughout the proceedings, the second respondent failed to apply his mind to the circumstantial evidence before him.

[30] In *Komape v Spoornet (Pty) Ltd and others*¹⁴ this Court stated as folloiwng regarding the assessment of circumstantial evidence:

'In assessing circumstantial evidence the arbitrator should always consider the cumulative effect of all the items of the evidence before him or her. In assessing the inference to be drawn from the facts the commissioner should look at the totality of the evidence and weigh it on a balance of probabilities. See Zeffert et al, (supra), Numsa v Kia Motors (2007) 28 ILJ 2283 [also reported at [2007] JOL 20069 (LC) – Ed], SA Nylon Printers (Pty) Ltd v Davids 1998 2 BLLR 135 (LAC) at 1369 [also reported at [1998] JOL 1833 (LAC) – Ed]. The inference must be drawn through a careful survey of the connection between the facts and their relationship to the offence alleged to have been

¹² The multiple claims appear on p 77 of the documentary bundle. Her evidence in relation thereto is from p 212 to 215 of the transcribed record.

¹³ (1999) 20 ILJ 1701 (LAC) at para 39.

¹⁴ (2008) 29 ILJ 2967 (LC) at para 28.

committed by the employee. To this extent the court in *Smith v Arthurs* 1976 (3) SA 378, when dealing with circumstantial evidence the court held that: *"All the relevant facts must necessary go into the melting pot and the essence must finally be extracted there from."*

(Own emphasis).

[31] Faced with circumstantial evidence, the second respondent was duty bound to consider the cumulative effect of all the evidence before him and ought to have drawn an inference through a careful survey of the connection between the facts and and the offence alleged to have been committed by the third respondent. In assessing the inference to be drawn from the facts, the second respondent ought to have considered the probabilities taking into account the totality of evidence before him. The correct test is on a balance of probabilities. The second respondent ought to have considered whether on a balance of probabilities, Barloworld discharged its onus to prove that the third respondent was guilty of the offence *for which he was charged*.

[32] The failure by the second respondent to assess the circumstantial evidence, apply his mind to the charge that was levelled against the third respondent and to raise the threshold of proof for Barloworld constitute gross irregularities that render his outcome unreasonable.

[33] It is worth noting that at the start of the proceedings, the second respondent refused the third respondent legal representation. He however, ruled that the third respondent's legal representative could remain seated in the venue and be available to consult and assist the third respondent in his defence.¹⁵

[34] The second respondent effectively led the third respondent's cross - examination and defence on his behalf. He unequivocally stated that he acts in the interest of the parties and can dictate how to conduct the proceedings.¹⁶ Barloworld's representative and witnesses were interrupted on several occasions. This is

¹⁵ Transcribed record ap p 176, lines 1 to 5.

¹⁶ Transcribed record at p 205, lines 20 to 25.

apparent from the transcribed record. His tone cannot be described other than bullying.¹⁷ In so doing, the second respondent committed a gross irregularity which rendered his outcome unreasonable.

[35] The grounds of review all have merit. The second respondent failed to apply his mind to the evidence, committed gross irregularities in the conduct of the proceedings as set out above which renders his decision unreasonable.

[36] On the record before this Court, there is sufficient basis for this Court to substitute the arbitrator's award.

Costs

[37] The third respondent opposed the revival application on an incorrect premise that the review application had lapsed as contemplated in item 16 of the former Practice Manual of this Court,¹⁸ averring that the review application lapsed on 5 January 2023 as no further steps were taken by Barloworld since 5 July 2022. This contention is mischievous, as the third respondent failed to file its answering affidavit which was to be filed on 4 July 2022. The answering affidavit was filed approximately eight months late, on 28 March 2023. The third respondent cannot contend that the last process filed was on 5 July 2022 when no process was filed on that date.

[38] Barloworld filed all the necessary papers in the review application as required, barring the notice in terms of the former Rule 22B which, read with item 11.2.7 of the former Practice Manual, required an applicant to file all the necessary papers in the review application and request a hearing date from the Registrar within 12 months of the launch of the review application. The review application was launched on 15 March 2022. The Rule 22B notice was filed on 28 March 2023, eight days late, due to the third respondent filing its answering affidavit late.

¹⁷ See: transcribed record at p 204, lines 20 to 25 and p 205, line 1 to 25; p 186, lines 1 to 20.

¹⁸ Practice Manual of the Labour Court of South Africa, 2013 (repealed on 17 July 2024).

[39] During oral argument, the third respondent's legal representative conceded that the basis of opposition on the premise of the review application having lapsed as contemplated in item 16 of the Practice Manual was incorrect. Therefore, in my view, the opposition was without merit and resulted in the further delay in disposing of this dispute. This, coupled with the fact that the dispute was delayed due to the late filing of the third's respondent's answering affidavit in circumstances where no good cause was shown for the delay.

[40] In short, the defence by the third respondent and the manner in which he proceeded with his defence is unmeritorious. Barloworld is out of pocket for having to, when required, answer to unmeritorious defences by the third respondent.

[41] Thus, costs against the third respondent are warranted due to his conduct in these proceedings.

[42] It is for the above reasons that the aforesaid order was made.

T. M. Phehane
Judge of the Labour Court of South Africa