



THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable/Of interest to other Judges

Case no: C390/2021

In the matter between:

LETSEMENG LOCAL MUNICIPALITY

Applicant

And

**SOUTH AFRICAN LOCAL GOVERNMENT
BARGAINING COUNCIL (“SALGBC”)**

First Respondent

**COMMISSIONER BAAS TIMOTHY TUMELO
N.O.**

Second Respondent

SAMWU obo NONOFO THUPE

Third Respondent

Heard: 27 JUNE 2025

Delivered: 21 JULY 2025

Summary: (Review application – applicant alleges arbitrator failed to act inquisitorially and establish the true facts - commissioner enjoined to lend a helping hand and may commit a gross irregularity where they fail to fairly try the issues or fails to lend the hand where the circumstances and procedural fairness so require – no duty on an arbitrator to infer evidence from the documents contained in a record

or to arbitrarily receive or exclude hearsay evidence or any other kind of evidence – application dismissed)

JUDGMENT

MAY, AJ

Introduction

[1] This is an opposed application to review and set aside an arbitration award in which the second respondent (“the arbitrator”) determined that the Third Respondent’s dismissal was substantively unfair, ordered his reinstatement, on similar terms and conditions which regulated the employment relationship prior to the date of dismissal, on 19 March 2021, ordered that he report for duty on 15 June 2021 and ordered the Applicant to pay the Third Respondent back pay amounting to R 99 916.86 by 15 June 2021¹.

Background

[2] The facts herein were largely common cause. The third respondent was called to attend a disciplinary hearing on 24 August 2020 in which it was alleged that he had made himself guilty of:

2.1 Gross insubordination in that he on or around the 22nd of June 2020 refused to take instructions from his supervisor and or the person with authority to give such instruction in that he was instructed to make audit (sic) on bypass meters or faulty meters in contravention of clause 1.2.4 of the Disciplinary Procedure Collective Agreement;

¹ Page 15 of the record, page 8 of the arbitration award, paragraph 9.

2.2 Insolence in that he on or around the 23rd of June 2020 refused to take instructions from the person duly authorised to give such instruction in that he did not do audit (sic) to the other part of Donkerhoek and thus failed to perform his tasks and responsibilities in a diligent and careful manner in contravention of clause 1.2.3 of the Disciplinary Procedure Collective Agreement;

2.3 Gross insubordination in that he on 25th of June 2020 did not make a follow-up audit which are executed on a daily basis in contravention of clause 1.2.4 of the Disciplinary Procedure Collective Agreement; and

2.4 Absenteeism in that he on 26th of June 2020 was absent from work without authority in contravention of clause 1.2.7 of the Disciplinary Collective Agreement.²

[3] The Third Respondent was found guilty of the charges and dismissed.³ He appealed, and his appeal was also unsuccessful.⁴ The matter was referred to the First Respondent who appointed the Second Respondent to arbitrate the dispute. The arbitration was held on 3 June 2021. The Third Respondent testified in his own defence and the Applicant called Mpho Tsoene as its sole witness⁵.

[4] Mr Tsoene testified that he was the acting technical officer at the Applicant. He manages the operations side that includes water and sanitation, road and stormwater as well as the electrical supply.⁶ He knew the Third Respondent as an electrician.⁷ He testified that a meeting was held with the electrical section the week before the 22nd of June 2020, where they were told that they should start with the meter audit the following week on the Monday, the 22nd of June 2020. The Third Respondent was in the meeting.⁸

² Pages 17 to 18 of the record.

³ Pages 24 to 27 of the record.

⁴ Record pages 28 to 30.

⁵ Paragraph 4.1 of the award, page 9 of the record.

⁶ Transcript page 92.

⁷ Transcript page 92.

⁸ Pages 92 to 93 of the transcript.

[5] On the Monday, he was with Sizwe Fikizolo, an electrical engineer seconded to the Applicant, and they wanted to ascertain if the audit had commenced. When they called the senior electrician, Enoch Mdzane, he informed them that the third respondent did not want to do the auditing.⁹ They then went to the site to check if the audit was taking place and they found no one present. They then called the third respondent whose response was that they did not know what they were doing according to the witness.¹⁰ He then sent him an SMS the same day instructing him to commence the audit, but he only started doing the audit the next day on the 23rd.¹¹

[6] Mr Tsoene was then led by the Applicant's representative on what transpired on the 26th of June 2020 relevant in relation to charge 4.¹² Importantly, the second respondent tells the representative that the witness has not said anything yet about the 23rd and 25th (relevant to charges 2 and 3) to which the representative replies that he is aware and he still wants to proceed to lead evidence on the 26th. The Commissioner indicates that he assumes that the representative has his reasons for doing so, that he doesn't have a problem proceeding and that he was just checking with him whether that was in fact his intention.¹³ At this point an objection is noted by the third respondent's representative to the commissioner advising the witness. The arbitrator indicates that he will refrain from doing that, but he had thought that maybe the representative had forgotten about the other days and raised it for this reason.¹⁴

[7] Mr. Tsoene then testified that the third respondent was nowhere to be found on the 25th of June 2020. He was the only electrician on duty on that day as the others had taken leave. They tried to call him on his phone, and he was not answering.¹⁵ When pressed on this issue by the arbitrator, he indicated that the third respondent had reported for duty but was not on site during the assessment and when he was called, he did not answer calls. The same situation was true for the 26th

⁹ Pages 94 to 95 of the transcript.

¹⁰ Pages 96 to 97 of the transcript.

¹¹ Page 97 of the transcript.

¹² Page 102 of the transcript.

¹³ Page 102 of the transcript.

¹⁴ Page 103 of the transcript.

¹⁵ Page 103 of the transcript.

of June according to the witness.¹⁶ That was the extent of the evidence in chief and the case for the Applicant.

[8] Under cross- examination, and in relation to charge 1 it was put to him that an electricity transformer had to be replaced at Donkerhoek on the 22nd of June 2020, which he conceded.¹⁷ He further conceded that this meant that there would be no electricity in Donkerhoek as a result.¹⁸ It was further put to him that there was also scheduled loadshedding in Donkerhoek on 22 June 2020 and that, in fact, because of the loadshedding, the electricity department took advantage of the loadshedding to get the transformer and replace it.¹⁹

[9] It was put to him that as a result of the loadshedding, it was impossible to do meter auditing as this requires a specific code to be punched into the electricity meter which could not be attended to if there were no electricity. He could not dispute this.²⁰

[10] Mr Tsoene alleged that he was advised by Mr Enoch Futsane that he, Mr Futsane, instructed the third respondent to go to the other side of Donkerhoek seemingly unaffected by the loadshedding and go and do audits there²¹. It was put to him that the third respondent disputes receiving such an instruction²². This was over and above the statement that the third respondent would testify that the whole of Donkerhoek was without electricity. Enoch Futsane was not called to testify.

[11] It was then put to Mr Tsoene that the third respondent had in fact attended to the audits of various properties on the 23rd, 25th and 26th of June 2020, relative to charges 2 to 4 and with references to the audit forms on pages 36 to 74 of the record. It was also put to him that that these forms were in fact handed to Mr

¹⁶ Page 104 of the transcript.

¹⁷ Page 109 of the transcript.

¹⁸ Page 112 of the transcript.

¹⁹ Page 113 of the transcript.

²⁰ Pages 115 to 116 of the transcript.

²¹ Pages 115 to 116 of the transcript.

²² Page 116 of the transcript.

Futsane, who was the third respondent's senior.²³ Mr Tsoene indicated that he did not believe that the third respondent had given them to Mr Futsane.

[12] The third respondent testified that he did receive the instruction to attend to the audits on the 22nd of June 2020.²⁴ He indicated that there was loadshedding and the transformer was blown so they replaced the transformer whilst the electricity was off²⁵. He also confirmed that the meter audit cannot be done if there is no electricity as he needs to punch in the 20-digit code to check whether the meter has been tampered with. This requires electricity.²⁶ He testified that all of the electricians were busy changing the transformer on 22 June 2020.²⁷ The third respondent then also confirmed, with reference to the audit forms, that he did conduct the meter audits over the period 23 to 26 June 2020.²⁸

[13] Under cross – examination, the Applicant's representative, Mr Phalane, did not challenge any of the evidence other than whether he submitted the forms to Mr Enoch Futsane. He maintained that he had.²⁹ That was the extent of the evidence led at arbitration.

The award

[14] The arbitrator in analysing the evidence before him concluded that the Applicant bore the onus to prove that the dismissal was for a fair reason, he correctly summarised that the Applicant failed to establish that the third respondent had failed to follow an instruction given and had failed to establish that the third respondent was absent on the 26th of June 2020.

[15] The arbitrator, correctly in my view, summarised that a substantial amount of evidence, uncontested, showed that the third respondent was busy replacing the

²³ Pages 123 to 143 of the record.

²⁴ Page 153 of the transcript.

²⁵ Page 155 of the transcript.

²⁶ Pages 155 to 156 of the transcript.

²⁷ Page 156 of the transcript.

²⁸ Pages 159 to 164 of the transcript.

²⁹ Pages 171 to 172 of the transcript.

faulty transformer on 22 June 2020 and had conducted meter audits from the 23rd to the 26th of June 2020.

Grounds of review and evaluation

[16] Applicant contends that the award is defective in that the arbitrator committed misconduct in relation to his duties as commissioner and arbitrator, he committed an irregularity in the conduct of the proceedings, and he exceeded his powers in that:

16.1 he did not consider that the charges against the third respondent also related to the failure to conduct an audit in other areas of Donkerhoek and to perform a follow-up audit whilst it was clear from the documents before him which were not in dispute that the charges were those which was mentioned and that these were the charges that the third respondent had to answer in the disciplinary enquiry and the fact that he was unable too answer those charges satisfactorily;

16.2 the arbitrator failed to act inquisitorially and establish the true facts, especially when he had before him documentation which indicated that the third respondent was not only charged for failure to carry out an instruction given on 22 June 2020 but also for failure to carry out an instruction to do audits in other areas in Donkerhoek and to do a follow-up audit;

16.3 he failed to consider that the third respondent was on standby duty on 26 June 2020 and absent in his duties in this regard;

16.4 he failed to consider the fact that the undisputed evidence was that the third respondent had failed to carry out an audit in other areas of Donkerhoek and a follow-up audit on 25 June 2020;

16.5 these failures means that the arbitrator's findings were irrational.³⁰

³⁰ Page 11 to 13 of the pleadings record.

[17] They contend that the arbitrator's outcome therefore is one a reasonable decision-maker could not reach.

[18] The well-established test for review is whether the decision reached by the arbitrator is one that a reasonable decision maker could not reach.³¹ In assessing the impugned decision for reasonableness, this court takes into account the totality of the evidence which was before the arbitrator, and will only set aside an award if irregularities identified had a material effect on the outcome, in the sense that they led directly to the unreasonable result.³²

[19] For a review on the grounds of unreasonableness to be determined, the court has to consider the often-inter-related questions of rationality, lawfulness and proportionality.³³ The court must also consider whether, apart from the flawed reasons of or any irregularity by the arbitrator, the result could be reasonably reached in light of the issues and the evidence before the arbitrator.³⁴ In other words, whether the arbitrator misconceived the inquiry or undertook the inquiry in a misconceived manner and thus whether there was a fair trial of the issues.³⁵

[20] It is by now trite that there is always a duty on the arbitrator to ascertain the real nature of the issue in dispute.³⁶

³¹ *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (2007) 28 ILJ 2405 (CC) at para 110. See also *CUSA v Tao Ying Metal Industries and Others* (2008) 29 ILJ 2461 (CC) at para 134; *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others* (2008) 29 ILJ 964 (LAC) at para 96. *Anglo Platinum (Pty) Ltd (Bafokeng Rasemone Mine) v De Beer and Others* (2015) 36 ILJ 1453 (LAC) at para 12

³² *Herholdt v Nedbank Ltd & another* (2013) 34 ILJ 2795 (SCA) at para 25; see also *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others* (2014) 35 ILJ 943 (LAC) at para 14; *Monare v SA Tourism and Others* (2016) 37 ILJ 394 (LAC) at para 59; *Quest Flexible Staffing Solutions (Pty) Ltd (A Division of Adcorp Fulfilment Services (Pty) Ltd) v Legobate* (2015) 36 ILJ 968 (LAC) at paras 15 – 17; *National Union of Mineworkers and Another v Commission for Conciliation, Mediation and Arbitration and Others* (2015) 36 ILJ 2038 (LAC) at para 16

³³ *Head of the Department of Education v Mofokeng and Others* [2015] 1 BLLR 50 (LAC) at paragraph 32.

³⁴ *Herholdt v Nedbank Ltd* 2013 (6) SA 224 (SCA) at paragraph 12.

³⁵ *CUSA v Tao Ying Metal Industries and Others* [2009] 1 BLLR 1 (CC) at paragraph 76.

³⁶ *National Union of Metalworkers of SA and Others v Bader Bop (Pty) Ltd and Another* (2003) 24 ILJ 305 (CC) at para.52.

[21] The commissioner is also enjoined to lend a helping hand and may commit a gross irregularity where they fail to fairly try the issues or fails to lend the hand where the circumstances and procedural fairness so require. Not doing so could result in an unreasonable award. A commissioner also commits a reviewable irregularity not only when the outcome of an award is unreasonable but also where the nature of the enquiry has been misconceived which may happen when the issues are not ventilated by proper lines of enquiry.³⁷

[22] The findings by the arbitrator are not divorced from the material before him in that no evidence was led to support the contention that an instruction was given to the third respondent to conduct an audit in other areas of Donkerhoek or to conduct a follow-up audit. The evidence before the arbitrator, relevant to charge one, shows that there was loadshedding in Donkerhoek as a result of which the third respondent and other electricians replaced the transformer. It was common cause that meter audits could not be performed if there were no electricity. The uncontested evidence also shows that the third respondent was on duty and had conducted meter audits on 23 to 26 June 2020. The evidence from the Applicant, relevant to charges 3 and 4, were that the third respondent was on duty but nowhere to be found and not reachable on his phone. This version was disputed by the third respondent who contended that he was on duty, was reachable on his phone, had in fact spoken to the witness on the phone and had submitted the meter audit forms to his superior. No evidence was led to gainsay this.

[23] There is no duty on an arbitrator to infer evidence from the documents contained in a record. The provisions of section 138 of the Labour Relations Act, 1995 (LRA) give a Commissioner a discretion to conduct an arbitration in a manner that he or she considers appropriate to determine a dispute fairly and quickly, and to do so with a minimum of legal formalities. However, I am mindful once again of the dicta in *the Exxaro case*³⁸ where the court said that this discretion “*does not imply that the commissioner may arbitrarily receive or exclude hearsay evidence, or for*

³⁷ *Nkomati Joint Venture v Commission for Conciliation, Mediation and Arbitration and Others* (2019) 40 ILJ 819 (LAC) at paragraph 18.

³⁸ *Exxaro Coal (Pty) Ltd & another v Chipana & others* (JA161/17) [2019] ZALAC 52; [2019] 10 BLLR 991 (LAC); (2019) 40 ILJ 2485 (LAC)

that matter any other kind of evidence. In the case of hearsay evidence, even though section 3 of the LEAA, by providing a set of rules or principles for the admission or exclusion of hearsay evidence, assumes some legal formality, it is invaluable. While a commissioner is notionally not obliged to apply it because of the discretion bestowed on him or her by section 138 of the LRA, the prudent commissioner does not err by applying it when dealing with hearsay evidence, rather than conceive of an alternative norm that will ensure not only fairness in the process, but also in the outcome of the arbitration. Applying the common law rules for the reception, or exclusion, of hearsay evidence appears not to be the answer, because those rules have already rightly been jettisoned for their “rigidity, inflexibility – and occasional absurdity”.³⁹ Those “epithets” are not consonant with fairness and reasonableness.⁴⁰

[24] The Applicant did not introduce any evidence to support its contentions under review. Despite the wide powers afforded an arbitrator, it is this Court’s view that those powers do not include making inferences from the record. If the arbitrator had done so, it would amount to an irregularity. The arbitrator was mindful of his duties to lend a helping hand and did what he could to remind the Applicant’s witness and representative of their obligation to lead evidence on the charges.

[25] On the basis of the discussion above, the arbitrator’s conclusion that it was unfair to dismiss the third respondent was one a reasonable arbitrator could have arrived at on the evidence before him in the circumstances.

[26] Considering the law and fairness, no costs order will be made herein.

Order

1. The application for review is dismissed.
2. There is no order as to costs.

C May
Acting Judge of the Labour Court of South Africa

³⁹ S v Ndhlovu and others at para 15.

⁴⁰ Exxaro at para 21.

Appearances

For the Applicant

L Roux

Instructed by Peyper Attorneys,

Bloemfontein

For the third respondent

T Du Preez

Instructed by Kramer Weihmann

Incorporated, Bloemfontein