THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR 634/23

In the matter between:

ADONIA MUSHWANA	**Applicant**
and	
THABAZIMBI LOCAL MUNICIPALITY	**First Respondent**
SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING COUNCIL	**Second Respondent**
DIALE NTSOANE N.O.	**Third Respondent**

Heard: **3 July 2025**

Delivered: **2 September 2025**

JUDGMENT

SCHENSEMA, AJ

Introduction

[1] This is an application brought by the applicant to review and set aside the arbitration award of the third respondent (the Commissioner) in terms of which the applicant's unfair dismissal referral to the second respondent was dismissed.

[2] At the outset of the proceedings, I queried the absence of the first respondent. The applicant's representative informed the Court that the first respondent's legal representatives had served a notice of withdrawal on the applicant's attorneys on 2 July 2025, and a copy of this notice was presented to the Court. After having considered the set down notice and communication to the parties contained in the Court file, I was satisfied that proper notice of the hearing had been given to the first respondent and proceeded with the matter accordingly.

[3] In relation to the pleadings, the pleadings bundle includes an unsigned answering affidavit from the first respondent. This Court retains the discretion to accept or reject an affidavit that does not comply with the requirements of the Justices of the Peace and Commissioners of Oaths Act[1]. Considering that the first respondent, despite being duly notified, failed to attend the proceedings, the answering affidavit cannot be regarded as properly before the Court; accordingly, this review application will be considered on an unopposed basis.

Condonation

[4] The applicant further seeks condonation for the late filing of his review application. The award was received on 28 February 2023, and the applicant served his review application on 13 April 2023 and filed it at Court on 21 April 2023.

[5] In accordance with the stipulated timelines, the review application was due on 12 April 2023; the review application is therefore one day late and not three days as deposed to by the applicant in his founding affidavit. I have considered the reasons

[1] Act 16 of 1963.

provided for the delay, and I am satisfied that a basis has been established for the delay in filing the review application, and condonation is therefore granted.

Background

[6] The applicant was employed by the first respondent as a Manager: Local Economic Development in June 2018. In terms of the applicant's responsibilities, he was required to deal with Thabazimbi's business community, the business individuals and hawkers needing assistance. Given the nature of these responsibilities, it would not have been possible for the applicant to have conducted these duties remotely.

[7] Due to the COVID-19 pandemic and the national lockdown imposed, the abovementioned duties could not be performed. Nevertheless, the first respondent's employees were required to work remotely and were provided with the necessary tools to do so.

[8] On 26 June 2020, the first respondent issued a letter instructing all employees to return to the workplace on 30 June 2020. The employees were further notified of the COVID-19 measures that it had implemented.

[9] On 4 August 2020, the first respondent in another letter to its employees advised that, as per the Disaster Management Act[2], employees who were over 60 years of age or had underlying comorbidities would qualify to work from home and further sought that each department provide a report to *inter alia* confirm which employees would be working from home and to obtain a medical certificate confirming the underlying condition in respect of the employees with comorbidities.

[10] Thereafter, and on 1 October 2020, the first respondent issued another letter to its employees in which all employees subject to the conditions set out in the letter were to return to work on 5 October 2020. Of significance in respect of this letter are paragraphs 6.3, 6.4 and 7:

[2] Act 57 of 2002.

'…

6.3 Comorbidities management: it is acknowledged that not all employees will be returning to work to identified uncontrolled risks and vulnerabilities, notwithstanding all municipal services must be provided during this period. Employees who are 60 years and older, with one or more stated comorbidities (as published by the Department of health) which is not managed or controlled as medically determined may be permitted to work remotely where possible, <u>subject to prior written approval from their HOD</u>.

6.4 A medical report from a medical practitioner, which confirms that the employees suffers from any one of the comorbidities as published by National department of Health should be provided to corroborate and support the conditions as stated in the medical certificate. <u>The standard medical certificate will be insufficient for this purpose and will not be accepted, without the attached short medical report stating the following details/information:</u>

6.4.1 medical practitioners details;

6.4.2 duration that they have been treating the patient for the stated condition;

6.4.3 Confirmation that the employee does have a stated comorbidity, which is catagorised in the broad group as determined by the National department of Health. If the employee as a patient agrees to provide granular details of actual sated sub-group condition, then such information can be provided. Example: Comorbidity: Metabollo Syndrome (which includes poorly controlled diabetes mellitus as the details, amoungst other conditions);

6.4.4 Confirmation that the stated comorbidity does present a medical risk and such risk/s must be clearly stated in relation to that comorbidity.

6.4.5 Confirmation of the recommended duration that the employee remains at risk and is recommended for a managed return to the workplace.

6.4.6 <u>The onus of proof is upon the employee to produce all relevant requested medical reports as required to assess the risks of the comorbidities and other vulnerabilities</u>.

7. All employees are to comply with the instructions as set out above failing which will be regarded as a transgression and will lead to disciplinary action being instituted.' (*sic*) (Own emphasis added)

[11] The first respondent's employees, including the applicant, also received a workplace return schedule, which clearly indicates that the applicant was required to be present at the first respondent's offices and to also work from home if and when permitted to do so.

[12] The applicant complied with the instruction and resumed his duties on 30 June 2020. In response to the first respondent's directive of 4 August 2020, the applicant obtained a medical certificate dated 30 July 2020 in which Dr D. Chauke only records the following:

> 'Sir/Madam
> Mr A Mushwana is our client and he has a chronic condition of respiratory airways viz asthma, the condition falls under those high renders the sufferer vulnerable to the severe form of covid 19, he therefore qualifies for a special arrangement at his work place.'

[13] After returning in January 2021, the applicant contracted COVID-19, following which he submitted a medical certificate which booked him off from work for the period 11 January 2021 to 21 January 2021. Notwithstanding the return date as recorded in the medical certificate, the applicant did not return to work after 21 January 2021.

[14] The applicant has submitted that upon being booked off, he attended to submit his medical certificate from Dr Marais together with the aforementioned medical certificate from Dr Chauke to Mrs Lindiwe Makaya. Mrs Makaya subsequently instructed the applicant to submit the medical certificates to Mr Letsoalo, the first respondent's safety officer, who the applicant alleges had instructed the applicant to work from home.

<u>The charges</u>

[15] The applicant was charged with gross insubordination, dereliction of duty and gross dishonesty. In support of these charges, the first respondent presented the testimony of Mrs Makaya, the Acting Municipal Manager, and Mr Jakobus van der

Merwe, the former Senior Manager: Corporate Services, who also served as the chairperson of the internal disciplinary enquiry, together with documentary evidence.

[16] Mrs Makaya testified that the applicant had failed to comply with her instructions and had repeatedly missed several virtual meetings. On 8 December 2021, the applicant was directed to attend a meeting; however, he declined, stating that previous meetings had not been honoured and therefore he would not attend the one scheduled for that date. The documentary evidence presented further confirms that the applicant had failed to attend numerous meetings between February 2020 to September 2021.

[17] In light of the applicant's persistent absence, it was decided by the first respondent in response to the two memorandums it had received from Mrs Makaya, that the 'no work, no pay' principle would be applied. The uncontested evidence of Mrs Makaya further demonstrated that, as a result of the applicant's persistent absence, the department experienced numerous operational challenges due to a lack of communication between the applicant and his team. This breakdown in communication negatively impacted the overall performance of the department.

[18] Mr van der Merwe testified that he chaired the internal disciplinary enquiry, which the applicant did not attend, citing financial constraints. Mr van der Merwe confirmed that there was no obligation on the first respondent to provide financial assistance for the applicant's attendance and that the applicant had received proper notice of the proceedings. The enquiry proceeded in the applicant's absence, and he was ultimately found guilty and dismissed.

[19] In response, the applicant testified that, prior to his dismissal, he reported directly to Mrs Makaya and had three subordinates reporting to him. He stated that he had submitted a medical certificate from Dr D. Chauke by placing it under the door to avoid physical contact with other staff members. He maintained that he had complied with the directives from the first respondent and continued to work remotely. According to the applicant, the lack of further follow-up communications from the first respondent led him to believe that he was authorised to work from home. He also confirmed that he received his salary until October 2021.

[20] The applicant further denied Mrs Makaya's claim that he had failed to submit reports. He acknowledged that while the reports may not have been in the specified format, he believed that Mrs Makaya often gave contradictory instructions. He concluded by asserting that the first respondent was always aware of his location, that he had been working from home, and that he was unable to attend the disciplinary enquiry due to financial constraints.

<u>The award</u>

[21] The Commissioner found that the applicant's dismissal was both procedurally and substantively fair.

[22] Regarding substantive fairness, the Commissioner concluded that the applicant could not reasonably claim to have been working from home while residing in Tzaneen, approximately 250 kilometres away from his designated workplace.

[23] The Commissioner emphasised that employees cannot assert they are working from home when they are not within reasonable proximity to the workplace. The applicant's persistent failure to report for duty, despite multiple instructions to do so, was deemed gross insubordination. The Commissioner held that dismissal was an appropriate sanction under these circumstances.

[24] On the issue of the applicant's failure to comply with instructions to submit monthly reports, the Commissioner found that the first respondent had sufficiently demonstrated this failure. Furthermore, the applicant had ample opportunity to request any relevant information from the first respondent to challenge this claim, but did not do so. Accordingly, the Commissioner concluded that dismissal was also appropriate in relation to this charge.

[25] With respect to the charge of dishonesty, the Commissioner found that, given that the matter was still pending before the Labour Court, there was no valid basis for the first respondent to allege that the applicant had brought the organisation into

disrepute. Consequently, the Commissioner determined that the first respondent had not proven that the finding or sanction relating to this charge was fair.

[26] As for procedural fairness, the Commissioner held that the applicant had been duly notified of the disciplinary enquiry but chose not to attend. By failing to participate, the applicant effectively waived his right to be heard. The dismissal was accordingly determined to be procedurally fair.

Grounds of review

[27] The applicant holds the view that the Commissioner's award fails to meet the standard of reasonableness required by the authorities and denied the applicant a fair trial for the following reasons:

27.1 The Commissioner's conclusion that the applicant was guilty of the charge of gross insubordination was unreasonable for the following reasons:

27.1.1 the charge of insubordination requires for an employee to refuse to obey a reasonable instruction. During the applicant's evidence he testified that he had honoured the first respondent's instructions by returning to work on 30 June 2020;

27.1.2 the WhatsApp the applicant had received from a colleague to return to work did not constitute an instruction;

27.1.3 no letter or telephone call was sent or made by the first respondent requesting him to return to work;

27.1.4 the applicant had been instructed to submit his medical certificate to the safety officer by Mrs Makaya;

27.1.5 the first respondent had failed to prove that there had been any instruction given to him to return to work on 30 June 2021;

27.1.6 the applicant had submitted a doctor's note, and that Mrs Makaya had not indicated to him that she would not be accepting the doctor's note;

27.1.7 the first respondent's letters were general communication to staff and cannot therefore be said to be a communication directed at the applicant specifically ordering him to return to work;

27.1.8 in respect of the second charge relating to dereliction of duties, the applicant is of the view that the first respondent has failed to prove that there had been any form of dereliction of his duties during the period July 2021 and January 2022 in that the first respondent had relied on emails from 2019, which emails do not assist the first respondent in proving the charge of dereliction of duties, and the Commissioner failed to take this into consideration; and

27.1.9 the applicant was able to prove that he had submitted a fourth quarter report in June 2021, which was not disputed by the first respondent and that he led evidence in chief that he had submitted all his reports, however he was unable to provide these reports as his work laptop had been taken from him prior to the disciplinary enquiry, which version was not disputed by the first respondent.

[28] The applicant considers that the above reasons demonstrate that the manner in which the Commissioner approached the matter constitutes a reviewable irregularity in that he had misconstrued the evidence and issues before him, and that the outcome was therefore unreasonable. For the reasons set out below, I do not agree.

Test for review

[29] In a range of cases, starting with *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[3] and the jurisprudence that followed[4], the test on review is trite. The Supreme Court of Appeal, in the matter *of Herholdt v Nedbank Limited*[5], has defined with greater clarity the standard of review:

29.1 It must be established, either that the arbitrator has misconceived the nature of the enquiry, or that they arrived at an unreasonable result.

29.2 For an award to be unreasonable, the arbitrator's conclusion must be one that a reasonable decision-maker could not reach on the material that was before the arbitrator.

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[3] (2007) 28 ILJ 2405 (CC).

[4] *Cusa v Tao Ying Metal Industries and others* 2009 (2) SA 204 (CC); *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and others* (2008) 29 ILJ 964 (LAC); *Herholdt v Nedbank Ltd (COSATU as amicus curiae)* 2013 (6) SA 224 (SCA) (*Herholdt*); *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and others* [2014] 1 BLLR 20 (LAC) (*Gold Fields*).

[5] *Herholdt* supra.

29.3 Material errors of fact, including errors concerning the weight and relevance to be attached to certain facts, are only of consequence if their effect is to render the outcome unreasonable.

29.4 If the arbitrator's reasons provide a reasonable 'route' leading towards the conclusions, it must follow that the decision is one that could have been reached (and in fact was) by a reasonable decision-maker. A review application would, in such circumstances, not succeed.

29.5 Even if there are flaws in the arbitrator's reasons, a review must still consider whether, apart from the arbitrator's reasons, '*the result is one a reasonable decision maker could reach in the light of the issues and the evidence'*[6].

29.6 A review court is required to examine the merits '*in the round*' only.

[30] It is thus obvious that reasonableness can only be assessed with regard to the evidence before the decision-maker.

[31] It is uncontroversial that the review test is whether an arbitrator has misconceived the nature of the enquiry or arrived at an unreasonable result.[7] A result will be considered to be unreasonable if it is one that a reasonable arbitrator could not reach on all the material presented to him or her.[8]

[32] The court on review is therefore not required to consider each and every issue raised during arbitration. Instead the Court must decide whether the commissioner considered the principal issue before him, evaluated the material evidence and concluded that the outcome is reasonable.[9]

[33] In *Head of the Department of Education v Mofokeng & others*[10] Murphy AJA said the following:

'The determination of whether a decision is unreasonable in its result is an exercise inherently dependant on variable considerations and circumstantial

[6] Ibid at para 12.
[7] *SA Rugby Union v Watson and others* (2019) 40 ILJ 1052 (LAC) (*Watson*) at para 25.
[8] Ibid.
[9] *Gold Fields supra* at paras 15 and 16
[10] [2015] 1 BLLR 50 (LAC) at paras 31 and 33.

factors. A finding of unreasonableness usually implies that some other ground is present, either latently or comprising manifest unlawfulness. Accordingly, the process of judicial review on grounds of unreasonableness often entails examination of inter-related questions of rationality, lawfulness and proportionality, pertaining to the purpose, basis, reasoning or effect of the decision, corresponding to the scrutiny envisioned in the distinctive review grounds developed casuistically at common law, now codified and mostly specified in section 6 of the Promotion of Administrative Justice Act ("PAJA"); such as failing to apply the mind, taking into account irrelevant considerations, ignoring relevant considerations, acting for an ulterior purpose, in bad faith arbitrarily or capriciously etc. The court must nonetheless still 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. …'

Further:

Irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide a compelling indication that the arbitrator misconceived the inquiry. In the final analysis, it will depend on the materiality of the error or irregularity and its relation to the result. Whether the irregularity or error is material must be assessed and determined with reference to the distorting effect it may or may not have had upon the arbitrator's conception of the inquiry, the delimitation of the issues to be determined and the ultimate outcome. If but for an error or irregularity a different outcome would have resulted, it will *ex hypothesi* be material to the determination of the dispute. A material error of this order would point to at least a prima facie unreasonable result. The reviewing judge must then have regard to the general nature of the decision in issue; the range of relevant factors informing the decision; the nature of the competing interests impacted upon by the decision; and then ask whether a reasonable equilibrium has been struck in accordance with the objects of the LRA. Provided the right question was asked and answered by the arbitrator, a wrong answer will not necessarily be unreasonable. By the same token, an irregularity or error material to the determination of the dispute may constitute a misconception of the nature of the enquiry so as to lead to no fair trial of the issues, with the result that the award may be set aside on that ground alone. The arbitrator however must be shown to have diverted from the correct path in the conduct of the arbitration and as a result failed to address the question raised for determination..'

[34] As Myburgh and Bosch suggest:

'This passage makes it clear that errors of fact and law may translate into a commissioner misconceiving the inquiry, and that this leads to the losing parties being deprived of its right to a fair trial, which constitutes in itself a basis for review (without the reasonableness of the outcome having to be assailed). But in order for it to be held that the Commissioner misconceived the inquiry, it must be established that the errors of fact or law committed by him or her cause the commissioner to diverge from the correct and failed to address the question raised for determination.'[11]

[35] The primary task of a commissioner is to take into account the totality of the circumstances. In the present matter, the Commissioner clearly had regard to all of the relevant factors and committed no reviewable irregularity that has the consequence that the award under review is so unreasonable that no reasonable decision maker could reach the decision to which the Commissioner came on the basis of the available evidence.

[36] It is uncontroversial that the review test is whether an arbitrator has misconceived the nature of the enquiry or arrived at an unreasonable result.[12] A result will be considered to be unreasonable if it is one that a reasonable arbitrator could not reach on all the material presented to him or her.[13]

[37] The applicant contends that the award *inter alia* stands to be reviewed and set aside on the basis of the Commissioner's failure to properly and/or adequately consider the evidence before him, and that the first respondent had failed to prove the misconduct for the following reasons:

[11] A Myburgh, C Bosch, 'Reviews in the Labour Courts, LexisNexis at p 77.
[12] *Watson supra.*
[13] Ibid.

37.1 in respect of the first charge, the Commissioner had failed to take into consideration that the applicant had been present at work until 30 June 2020 when the country went into the second lockdown period. The applicant had obtained a medical certificate from Dr Chauke in which it is confirmed that the applicant suffers from asthma and therefore qualified for a '*special arrangement at his workplace*'. In January 2021, the applicant contracted COVID-19 and he was booked off from 11 January 2021 to 21 January 2021;

37.2 upon being booked off, the applicant submitted his medical certificate in confirmation of his illness. The applicant further attempted to submit his two medical certificates to Mrs Makaya, who advised him that he should submit his medical certificates to Mr Letsoala, the first respondent's safety officer, who, according to the applicant, had authorised him to work from home from January 2021. Accordingly the applicant submits that he had taken steps to obtain approval, which steps had not been considered by the Commissioner; and

37.3 in respect of the second charge of dereliction of duty, the applicant submits that the first respondent had only relied on emails for the period of 2019, which do not fall within the time frame that the applicant was charged for. Furthermore that he submitted all reports required of him and that in light of the fact that he was unable to have access to his laptop he was not in a position to provide proof in confirmation of his version.

<u>Application to the facts</u>

[38] The common cause evidence is that the first respondent had addressed numerous letters to its employees in which the employees were *inter alia* specifically provided with instructions as to what steps would be required to be taken by an employee in order to be able to work from home on the basis of a comorbidity. On the applicant's own version, the applicant has knowledge of these correspondences, yet does not believe that these constitute instructions as they were not specifically addressed to him.

[39] It is further common cause that the applicant had not obtained the authority as envisaged in the first respondent's correspondence to simply work from home on the

basis of Dr Chauke's medical note. Furthermore, the applicant relies on unverified evidence that Mr Letsoala authorised him to work from home, despite the process as set out in the first respondent's correspondence, which, as set out above, required the following:

> 'The standard medical certificate will be insufficient for this purpose and will not be accepted, without the attached short medical report stating the following details/information:
>
> 6.4.1 medical practitioners details;
>
> 6.4.2 duration that they have been treating the patient for the stated condition;
>
> 6.4.3 Confirmation that the employee does have a stated comorbidity, which is catagorised in the broad group as determined by the National department of Health. If the employee as a patient agrees to provide granular details of actual sated sub-group condition, then such information can be provided. Example: Comorbidity: Metabollo Syndrome (which includes poorly controlled diabetes mellitus as the details, amoungst other conditions);
>
> 6.4.4 Confirmation that the stated comorbidity does present a medical risk and such risk/s must be clearly stated in relation to that comorbidity.
>
> 6.4.5 Confirmation of the recommended duration that the employee remains at risk and is recommended for a managed return to the workplace.
>
> 6.4.6 The onus of proof is upon the employee to produce all relevant requested medical reports as required to assess the risks of the comorbidities and other vulnerabilities.' (own emphasis)

[40] The medical certificate of Dr Chauke clearly does not comply with these requirements.

[41] Furthermore, in relation to the second charge, there is no explanation as to why the applicant could not have simply subpoenaed the information he required to disprove the first respondent's charge of dereliction of duty.

[42] It is trite that if the employer succeeds in establishing a *prima facie* case that implicates the employee on a balance of probabilities, the burden then shifts to the employee to prove any defence or explanation they put forward. In practical terms,

this means the employee must substantiate their version of events or justification, which the applicant failed to do.

[43] I am therefore satisfied that the award falls within the bounds of reasonableness and is not susceptible to review on the grounds advanced in the review application.

Costs

[44] Although the review application was misguided, I find no legal or equitable basis to burden the applicant with a costs order. It is trite that in this Court, costs do not automatically follow the outcome.[14]

[45] In the premises, I make the following order:

Order

1. Condonation is granted for the late filing of the review application;
2. The review application is dismissed.
3. There is no order as to costs.

H Schensema

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Advocate A Seshoka

Instructed by: Ndobela and Associates

For the First Respondent: No appearance

[14] *Zungu Premier of the Province of KwaZulu-Natal & others* (2018) 39 ILJ 523 (CC).