



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR271/2023

In the matter between:

BABALWA INNOCENTIA MSITSHANA

Applicant

and

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

First Respondent

SIFISO NGALA N.O.

Second Respondent

SERITI NEW DENMARK COLLIERY

Third Respondent

Heard: 12 June 2025

Delivered: 09 September 2025

Summary: Review of arbitration award filed outside the prescribed period of six weeks – unopposed condonation application granted – totality of evidence and principles of evidence considered – zero-tolerance approach valid and justifiable – findings and conclusions of Commissioner reasonable – Review application dismissed.

JUDGMENT

PHAKEDI, AJIntroduction

[1] The Applicant is approaching this Court in terms of section 145 of the Labour Relations Act¹ (LRA), seeking an order to review and set aside the arbitration award issued by the commissioner of the Commission for Conciliation, Mediation and Arbitration (CCMA) under case number MPED 3417-22 dated 23 November 2022. The Applicant further seeks an order condoning the late filing of her review application. The review application was filed on 23 February 2023, and the condonation application was filed on 23 March 2023.

[2] The third respondent, despite raising a preliminary point to the late filing of the review application, did not file opposing papers when served with the condonation application. However, the review application is opposed.

[3] The Applicant, in her replying affidavit, took issue with the third respondent's late filing of its answering affidavit. It is stated that the answering affidavit ought to have been filed on or before 21 June 2023. However, despite numerous indulgences granted to the third respondent, it only filed its answering affidavit on 20 July 2023 without any accompanying application for condonation.

[4] However, despite the preliminary point, the Applicant did not file a notice of objection together with her replying affidavit. Item 11.4.2 of the repealed Practice Manual of the Labour Court² provides that:

'Where the respondent or the applicant has filed its opposing or replying affidavits outside the time period set out in the rules, there is no need to apply for condonation for the late filling of such affidavits unless the party upon whom the affidavits are served files and serves a Notice of Objection to the late filing of the affidavits. The Notice of Objection must be served and filed

¹ Act 66 of 1995, as amended.

² Practice Manual of the Labour Court of South Africa, 2013 (repealed, effective 17 July 2024).

within 10 days of the receipt of the affidavits after which time the right to object shall lapse.'

[5] In the absence of the notice of objection being served on the third respondent, the application for condonation was not necessary and the answering affidavit will be considered in determining this matter.

Condonation application

[6] As stated above, the third respondent is not opposing the condonation application. It is common cause that the review application ought to have been filed on or during the first week of January 2023, but it was only filed on 23 February, which is approximately seven weeks outside the prescribed timeframe.

[7] The Applicant was dismissed for breaching the alcohol policy in that her results showed a positive alcohol content in her mouth during the routine screening at her workplace on 2 March 2022. Subsequent to her dismissal, she referred an unfair dismissal dispute to the CCMA and the arbitration award was issued on 23 November 2022, confirming that her dismissal was substantively fair. She, however, received the award on 25 November 2022 from her erstwhile attorneys, Jordan Coetzee Attorneys, who are on the panel of legal practitioners servicing FNB Law On Call clients. She held a policy with FNB and she was depending on the cover in order to be assisted with the matter.

[8] She consulted with Jordan Coetzee Attorneys on 1 December 2022 to discuss the outcome of the award. She was informed during that consultation that her referral had been dismissed, and the Attorneys would liaise with FNB to seek further instructions to review the arbitration award. On 19 December 2022, she went to the attorneys' offices to enquire about the status of her matter, and she was advised that the attorney who was assisting her, a certain Miss Queeneth, was on leave and she would contact her upon her return.

[9] On or about 20 January 2023, she was advised that her attorneys did not receive instructions from FNB in respect of the review application. She immediately

contacted her insurance, and she was advised that new attorneys were being appointed. On 31 January 2023, she called again and she was informed that new attorneys would be appointed within a period of 14 days.

[10] On 13 January 2023, her attorneys of record were appointed to assist with her review application, and they consulted on 16 February 2023. She then submitted all the supporting documents to her attorneys of record on 19 February 2023. On 21 February 2023, the review application was served on the respondents and filed at Court on 23 February 2023. She stated that the late filing of the review application was occasioned by the withdrawal of her erstwhile attorneys, transition to appoint new attorneys and the festive season.

[11] She stated that the degree of lateness is not excessive, and the Court must condone the late filing of her review application because she has good prospects of success in the main application. She stated that on 2 March 2022, when she reported for work to resume her night shift duties, she had taken flu medication, hence she tested positive for alcohol consumption on two occasions between 20h40 and 21h00. She had indicated while she was being tested for the first time that she had consumed flu medication. Her first test at 20h40 recorded 0.0012 alcohol content, and the second time after the grace period of twenty minutes, the alcohol content was recorded at 0.005 at 21h00.

[12] In respect of prejudice, she stated that the respondents would suffer little or no prejudice if her condonation application is granted. However, should her condonation application be refused, she stands to suffer greatly. She further submitted that she considers the charges levelled against her serious, and if her dismissal is not uplifted, she will not be able to find work anywhere else in the Mining industry as the sanction of dismissal will remain in her records forever.

[13] The Labour Court is a creature of statutes and derives its powers and jurisdiction from the LRA. In order to exercise its review powers, the court must have jurisdiction to entertain the application. Furthermore, an Applicant in a condonation application has to show good cause that she is deserving of the Court's indulgence for her non-compliance with its rules and the law.

Applicable legal principles

[14] Section 145(1A) of the LRA provides that '*the Labour Court may on good cause shown condone the late filing of an application in terms of subsection (1).*'

[15] It is trite that in considering an application for condonation, the Labour Court exercises a discretion which must be exercised judicially, premised on all the relevant factors such as good cause, length of delay, explanation for delay, prospects of success, interests of justice and prejudice.

[16] The onus of showing the existence of good cause in a condonation application rests with the applicant, and this essentially entails satisfying the two well-established requirements, namely: (a) providing a satisfactory explanation for the delay and (b) showing the prospect of success in the main case. The applicant bears the burden of showing good cause. A mere allegation of good cause will not be sufficient to assist the Court in exercising its discretion whether to grant condonation or not. In other words, as stated in *Standard General Insurance Co Ltd v Eversafe (Pty) Ltd and Others*³, the applicant must '*at least, furnish an explanation of his default sufficiently full to enable the court to understand how it really came about and to assess his conduct and motives... Where there has been a long delay, the court should require the party in default to satisfy the court that the relief sought should be granted*'.⁴

[17] The Constitutional Court in *Booi v Amathole District Municipality and Others*⁵ emphasised that condonation is not merely there for the taking. The Court confirmed that condonation should be granted if it is in the interests of justice, which has to be determined by reference to all relevant factors, including the nature of the relief sought, the extent and cause of the delay, the effect on the administration of justice, prejudice and the reasonableness of the explanation for the delay.

³ [2000] JOL 6440 (W) at para 12.

⁴ See also: *Aspen Holdings Pty Ltd and Another v Phelane and Another (Aspen Holdings)* [2025] 4 BLLR 409 (LAC) at para 14.

⁵ [2022] 1 BLLR 1 (CC) at para 27.

[18] The Labour Appeal Court (LAC) in *Govender v Others v Commission for Conciliation, Mediation and Arbitration and Others*⁶ expanded the above-mentioned principles and held that:

[57] ... The factors relevant in the consideration of the grant or refusal of condonation include the degree of lateness, the explanation therefor, the prospects of success and the importance of the case. And in certain cases, the interest of justice may play a role.

[58] Added to the factors applicable to condonation applications is the consideration that employment disputes should be dealt with expeditiously as a delay in the resolution of labour disputes undermines the object of the LRA and “any determination of the issue of good cause must always be considered against the *backdrop of this fundamental principle*” and further that review applications are by their nature, urgent and must be treated with a degree of diligence and promptness.’

[19] The LAC in *Aspen Holdings Pty Ltd and Another v Phelane and Another*⁷ held that ‘... *the applicant must also show that prospects of success exist in the main claim. The applicant has to satisfy the requirements of good cause by making out the case in the founding affidavit supporting the condonation application*’. In *Van Wyk v Unitas Hospital and Others*⁸, the Constitutional Court held that:

‘An applicant for condonation must give a full explanation for the delay. In addition, the explanation must cover the entire period of delay. And, what is more, the explanation given must be reasonable.’

[20] The Applicant in this matter has provided a full account of the period from when she received the arbitration award and provided supporting evidence that the delays were occasioned by internal arrangements within the FNB Law On Call Insurance which only gave instructions for her to be assisted on 14 February 2023. The review application was served and filed within a period of two weeks from the date of this approval.

⁶ [2024] 5 BLLR 453 (LAC).

⁷ *Aspen Holdings* supra at para 15.

⁸ 2008 (4) BCLR 442 (CC) at para 22.

[21] During the arbitration proceedings, she was represented by a firm of attorneys who were instructed by her Insurer, and it is the same Insurer who had taken a decision to move the matter to a new firm of attorneys. The Applicant acted immediately upon being informed that the mandate of her erstwhile attorneys had been terminated. When the mandate was terminated, the six-week period had already passed, and none of the delays could be attributed to her.

[22] In *South African Transport and Allied Workers' Union obo Members v South African Airways (Pty) Ltd and Others*⁹, the LAC held that

‘...The remainder of the period [of delay] was caused by the internal processes within the appellant [trade union] in taking a decision to proceed with the claim and instructing attorneys accordingly. Although the period is lengthy, it has been, in my view, adequately explained and it would be unfair to punish the individual employees for a process they did not have direct control...’

[23] In applying the above principles to the present application, this Court is of the view that although the period of delay is excessive, and the Applicant has provided an explanation for the delay, and the delay cannot be imputed solely on her, but on the internal processes of the insurance company. Although the condonation application was only filed four weeks after the review application had been launched, the Court is satisfied that the Applicant took all the reasonable steps to prosecute her matter diligently. The Court is of the view that it is in the interests of justice and fairness that the late filing of the review application be condoned for the purposes of properly considering the applicant's prospects of success in the review application.

Background facts

[24] The Applicant was employed by the third respondent, a mining company, in the position of Faceboss on 11 November 2018 until she was dismissed on 26th May 2022, subsequent to being found guilty of a misconduct of breach of the third

⁹ [2015] 2 BLLR 137 (LAC) at para 16.

respondent's alcohol policy on 2 March 2022. The Applicant then unsuccessfully lodged an appeal seeking to overturn her dismissal, but the dismissal was upheld.

[25] She then referred an unfair dismissal dispute to the CCMA and the second respondent was appointed to deal with the matter. Two witnesses testified on behalf of the third respondent and the applicant testified in her own defence. She denied that she breached any rule or standard regulating conduct in or relevant to her workplace. Her case was that on the day in question, she had consumed Alcophyllex cough syrup which contains alcohol, and she did report this to the Officer who was administering the breathalyser test.

Arbitration proceedings and the award

[26] The third respondent's first witness was Ms Princess Mdletshe who testified that she was employed by Bidvest Protea Coin as a Security Officer. She was qualified to operate the Lion AlcoBlow Rapid Test and Lion Alcometer 500. Her responsibilities included alcohol screening and testing of all persons entering the mine. She testified that the general rule in the workplace was that no person who had tested positive and had alcohol in his/her system should be allowed to enter the mine.

[27] Prior to administering any breathalyser, she ensured that the machine is properly calibrated. The calibration certificate for the Lion Alcometer 500 indicated that it was calibrated on 29 November 2021 and it was due for the next calibration cycle on 29 May 2022. She testified that she followed the procedure prescribed in clause 7 which regulated the Alcohol Screening and Testing Procedure. She testified that she followed the procedure by testing the Applicant twice with a twenty-minute interval between the two tests in line with the Procedure.

[28] She stated that she first tested the Applicant at about 20h40 using the Lion Alcoblow Rapid Test machine which indicated through a sound that the Applicant had alcohol in her system. She then invited her to come inside the guard house where she used a different machine, the Lion Alcometer 500 and her results came back showing 0.012 alcohol content in her system.

[29] She then requested the Applicant to wait for twenty minutes in order for the second test to be conducted. During the waiting period, the Applicant requested drinking water as she was sweating and dehydrated. She then informed the Applicant that she was not allowed to consume any liquids during the waiting period. However, the Applicant drank Tropika juice and later consumed Grand-Pa powder, and all this was recorded on video footage. She then started requesting permission to use the bathroom, and she was allowed to do so on more than three occasions.

[30] At about 21h00, she requested her supervisor to assist her in conducting the second test on the Applicant. She used the Alcometer 500 machine, and the reading was 0.005. Immediately after the second test was carried out, her supervisor, Lucky Khumalo, completed the Sensory Evidence Checklist (checklist) at around 21h01. She confirmed the correctness of what is recorded in the checklist with respect to the Applicant's aggressive and unorthodox behaviour. The Applicant was requested to exit the mine. The Applicant then informed her that she had taken Alcophyllex cough syrup just before her shift, but she did not produce the bottle of such medication. She further testified that the Applicant smelled of alcohol on her breath, and she had informed her that she had consumed alcohol the previous day.

[31] The second witness was Mr Mduduzi Mbatha, who testified that he was employed by the third respondent as Human Resources Coordinator. He stated that the third respondent bought the mine from Anglo American Coal in 2018, and they continued to apply the same policies which were applicable prior to the sale of the business. He confirmed that the two testing machines (Lion AlcoBlow Rapid Test and Lion Alcometer 500) were used consistently, on a daily basis. He stated that formal blood tests were only undertaken when there was an incident underground in the mine.

[32] He further testified that the Applicant was fully aware of the workplace rule that no persons are allowed to report for duty while under the influence of alcohol. He made reference to an incident which took place on 5 September 2019, when the Applicant was charged for breaching the alcohol policy and she pleaded guilty. She

was then given a final written warning and was referred to the Employee Assistance Program offered by the Careway Group.

[33] The Applicant testified in her own defence and confirmed that during her induction, she was subjected to safety training and standards. She, however, disputed being trained on the Alcohol and Drugs Related Policy. She stated that on 1 March 2022, she consulted Doctor Eze and he prescribed some flu medication for her. On the afternoon of 2 March 2022, she drank her medication. She admitted to testing positive for alcohol on 2 March 2022. She informed Ms Mdletshe that she had taken flu medication, but she rejected her version and did not ask her to produce that medication. She was also not given an opportunity to present her medical certificate, and it was only considered by the chairperson of the disciplinary hearing.

[34] She further denied that she had consumed any alcohol on 1 March 2022, as stated by Ms Mdletshe, because she was working night shift on that day. She further disputed the correctness of the information captured in the checklist and denied that she was smelling of alcohol or that she was aggressive on the day in question. She further confirmed that in 2019, she was given a final written warning for reporting for duty while under the influence of alcohol, but clarified that the warning had expired when she was charged again in March 2022. She further confirmed that she had visited the bathroom as captured on the CCTV footage, but there was nothing unusual about such bathroom breaks.

[35] She further confirmed having represented the employer as a complainant against a junior employee within her section, a certain Simelane, just before she was also charged. She stated that she was not the one who charged him, but she was only the complainant, and it was the Human Resources Department which had charged the employee. She further confirmed that there was a rule within the workplace which prohibited employees from reporting for duty while under the influence of liquor, but maintained that she had not consumed liquor.

[36] In support of her case, the Applicant called Mr Nkosana Maduna. He testified that he had represented the Applicant during the internal disciplinary and appeal hearing. He stated that the procedure followed by the third respondent was flawed in

that the Applicant was suspended without being afforded an opportunity to respond, and the third respondent had failed to provide them with the Alcohol and Drug Policy when they requested it.

[37] He stated that he had joined Seriti in April 2020, and the Alcohol and Drug Policy was never discussed during induction sessions. He further confirmed that the final written warning issued to the Applicant had lapsed after a period of six months from the date of issue, and it was no longer in place when the Applicant was charged on 2 March 2022; as such, the sanction of dismissal was too harsh. He, however, admitted that the third respondent had a zero-tolerance approach to employees reporting for duty under the influence of alcohol.

[38] At the close of proceedings, the Commissioner found that the dismissal of the Applicant was substantively fair and upheld the dismissal. The Applicant is aggrieved with the outcome of the award and seeks to have same reviewed and set aside.

Applicant's grounds for review

[39] The Applicant is challenging the arbitration award on certain grounds, including that the Commissioner committed gross irregularities in the conduct of the arbitration proceedings by disregarding the material evidence which was placed before him, and this resulted in him reaching a decision which a reasonable decision-maker could not have reached. The other ground is that the Commissioner had accepted the Applicant's unchallenged version that she had taken flu medication just before she was tested, and this explained why alcohol was found in her system.

[40] It was also submitted on behalf of the Applicant that the Commissioner failed to have regard to her medical certificate, which was submitted as part of the evidence, and failed to appreciate that she had requested blood tests to be done on the day of testing to prove that she had not consumed alcohol. The Applicant further takes issue with the fact that the Commissioner recited the provisions of the Disciplinary Code without stating how it applied to her matter. Paragraph 61 of the award records that:

'The disciplinary code contains a waiver that says disciplinary penalties which are still in force should be considered when deciding disciplinary action on any subsequent occasion, except (sic) in cases of habitual violations.'

[41] The Applicant argued further that the Commissioner committed a misconduct during the proceedings by failing to allow her time to consult with her legal representative.

[42] The Applicant further took issue with the fact that the Commissioner admitted the Alcohol and Drug Policy as evidence, although it was in dispute. She submitted that the Policy belonged to Anglo Coal employees and not employees of Seriti New Denmark. By accepting this policy, he ignored the fact that the third respondent failed to rely on its own policy as the Procedure clearly stated that Seriti has a clear policy on Alcohol and Drug Related Behaviours. By doing this, he therefore arrived at an unreasonable conclusion that the Applicant was a habitual violator of the policy without any supporting evidence.

[43] The Applicant further takes issue with the fact that the policy was not strictly followed in that she was not given a full 20-minute grace period from the first test. She states that the Commissioner reached an unreasonable conclusion when he accepted the evidence as recorded in the checklist that she was given a full grace period, and this deprived her of an opportunity to fully state her case.

[44] The third respondent argued that the Commissioner correctly rejected the evidence of the Applicant and the Court should not interfere with the arbitration award as it falls within the band of reasonableness. The third respondent did not dispute that the Applicant had informed Ms Mdletshe that she had taken Alcophyllex cough mixture, but this was only after the second test. However, the evidence of Mdletshe that the alcohol from the cough mixture would not appear in the results after a grace period of 20 minutes was not challenged.

[45] It was disputed that the Applicant was not aware of the rule and/or the policy, as she had attended induction sessions upon her employment. As a supervisor, she was responsible for disciplining junior employees within her section, and she had

previously pleaded guilty to breaching the same Alcohol Policy and was given a final written warning. Her testimony was that it took about 15 to 16 minutes for the alcohol in the cough mixture to dissipate in the mouth, and this evidence was not challenged.

[46] The third respondent submitted that the Commissioner was correct to reject the evidence that the Applicant was denied an opportunity to do blood tests. Ms Mdletshe had indicated that she was not aware that the Applicant had requested such, and this was never challenged any further by her representative. However, Mr Mbatha had dealt with this aspect and submitted that blood tests in the mine are only conducted when there is an incident underground.

[47] The third respondent further argued that the Applicant was correctly dismissed, and the third respondent had applied corrective discipline when she was given a final written warning in 2019. The existence and application of the Alcohol and Drug Policy has been in place since 2008, as per the evidence of Mbatha. He referred to two separate documents, the Alcohol and Drug Testing Procedure, which sets out the process to be followed by officers testing employees on arrival, and the Policy on Alcohol and Drug Related Behaviour, which provides for the first offender to be given a final written warning, and the second offender to be dismissed.

[48] It was further disputed that the Applicant was not afforded the full 20-minute grace period. The record confirms that the Applicant was first tested at 20h40, she requested to go to the bathroom at 20h41, the first test using Alcometer 500 was conducted inside the Guardhouse at 20h44, at 20h54 the Applicant was seen drinking Tropika and Grand-Pa, and the final test was taken at 21h00.

[49] The Applicant is seeking an order that the arbitration award be reviewed and set aside. On the other hand, the third respondent is seeking the dismissal of the review application on the basis that there is no evidence that another reasonable commissioner could have come to a different conclusion, taking into account the nature of the misconduct and the evidence presented by both parties.

The test for review

[50] The Constitutional Court in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*¹⁰ (*Sidumo*) held that ‘the reasonableness standard should now suffuse s 145 of the LRA¹¹’, and that the threshold test for reasonableness of an award ‘...is [whether] the decision reached by the commissioner one that a reasonable decision maker could not reach?’¹²

[51] The Supreme Court of Appeal in *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)*¹³ (*Herholdt*) held 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 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.’

[52] In this matter, the Applicant has listed a number of grounds for review which have been summarised above. The third respondent submitted that the award, viewed holistically, falls within the band of reasonableness in that the Commissioner arrived at a decision that a reasonable decision-maker could have arrived at based on the evidence presented by both parties.

[53] The debate on the right to review an arbitration award on process-related grounds as opposed to result-related grounds was finally settled by the LAC in *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others*¹⁴.

[54] In a review of an arbitration award, the Labour Court is required to apply the test, ‘is the decision reached by the commissioner one that a reasonable decision-maker could not reach?’¹⁵ In determining whether the result of an arbitrator’s award is unreasonable, the Labour Court must broadly evaluate the merits of the dispute and consider whether, if the arbitrator’s reasoning is found to be unreasonable, the

¹⁰ (2007) 28 ILJ 2405 (CC) (*Sidumo*).

¹¹ *Ibid* at para 106.

¹² *Ibid* at para 110.

¹³ 2013 (34) ILJ 2795 (SCA) at para 25.

¹⁴ (2014) 35 ILJ 943 (LAC) at paras 13 - 18.

¹⁵ See: *Sidumo supra* at para 110.

result is nevertheless capable of justification for reasons other than those given by the arbitrator.¹⁶ The result will, however, be unreasonable if it is entirely disconnected from the evidence, unsupported by any evidence and involves speculation by the arbitrator.¹⁷

[55] The Supreme Court of Appeal in *Herholdt*¹⁸ held 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 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.’

[56] In *Head of the Department of Education v Mofokeng & Others*¹⁹, the LAC held that the failure by the arbitrator to apply her mind to the issue which are relevant would ordinarily constitute an irregularity, but for an award to be susceptible to being set aside, it must, in addition to the irregularity, result in the misconception of the real inquiry to be determined or the ultimate outcome must be unreasonable.

[57] In *CUSA v Tao Ying Metal Industries and others*²⁰, the Constitutional Court held that it is now axiomatic that a commissioner of the CCMA (or an arbitrator of a bargaining council) is required to apply his or her mind to the issues before him or her and that failure to do so may result in the ensuing award being reviewed and set aside. The irregularity must, however, result in an unreasonable outcome or misconception of the true enquiry, resulting in no fair trial of the issues. A review court is not at liberty to pick and choose certain aspects of the award and evaluate them independently, as such a piecemeal approach will defeat the requirements in section 138 of the LRA.

Evaluation

¹⁶ See: *National Union of Mineworkers & another v Samancor Ltd (Tubatse Ferrochrome) & others* (2011) 32 ILJ 1618 (SCA).

¹⁷ *Herholdt supra*

¹⁸ *Ibid* at para 25.

¹⁹ (2015) 36 ILJ 2802 (LAC) at para 30 to 33.

²⁰ [2009] 1 BLLR 1 (CC) at paras 76 and 134.

[58] It is common cause between the parties that the Applicant reported for work on 2 March 2022, and upon arrival, she followed the procedure prescribed for all employees, and she presented herself for screening. The third respondent relies on Security Officers who are stationed at the entrance to ensure that all persons entering the mine have been screened and are not suspected of having consumed alcohol and/or drugs.

[59] In order to carry out this screening process, there are two machines used by Officers, namely, Lion AlcoBlow Rapid Test and Lion Alcometer 500. The AlcoBlow Rapid Test is used at the gate upon entering the mine, and the Alcometer is used once the employee has tested positive after being screened with the AlcoBlow Rapid Test. The Applicant was screened at 20h40, and her results indicated that she had alcohol in her breath/system. This necessitated Ms Mdletshe to invite her to the guard room, where she was now tested with the Alcometer 500, and the machine confirmed that she had alcohol in her breath. In line with the procedure, she was given a grace period of 20 minutes as outlined above. However, at 21h00, when she was tested again, her results confirmed that she had alcohol in her breath. As a result of this positive test, she could not be allowed to resume her duties.

[60] The Applicant does not dispute that she had tested positive for alcohol on more than one occasion. Her version, however, is that the alcohol in her breath was from the Alcophyllex cough mixture, which she had consumed prior to starting her shift. The third respondent's argument is that as a mining business, it has a zero-tolerance approach to alcohol and drug usage on its premises, as this places many lives at risk.

[61] In review proceedings, the court is required to determine whether the commissioner complied with the requirements prescribed in section 138 of the LRA. The Court is satisfied that in this matter, the Commissioner identified the nature of the dispute he was required to arbitrate, he afforded both parties an opportunity to lead and adduce evidence, and he gave reasons for his award. The award succinctly demonstrates that he fully understood the nature of the enquiry before him, which was to determine the fairness of a dismissal of the Applicant for breaching the alcohol policy.

[62] The third respondent's policy on Alcohol and Drug Related Behaviour provides for the first offender to be given a final written warning and the second offender to be dismissed. The Applicant had already been given the final written warning in 2019, although it had expired at the time when she was charged on 2 March 2022. What the Applicant seems to have lost sight of is the fact that no employee is permitted to report for duty under the influence of drugs or alcohol, regardless of whether that alcohol is as a result of medication or not. Alcohol is strictly prohibited in the workplace, and the Commissioner accepted this to be a zero-tolerance policy.

[63] In *Shoprite Checkers (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and others*²¹, the LAC outlined principles applicable to the zero-tolerance policy as follows:

[17] It is also necessary to make some further remarks as regards dismissal for a first offence i.e. a "zero tolerance" policy. A dismissal will only be fair if it is procedurally and substantively fair. A commissioner of the CCMA or other arbitrator is the initial and primary judge of whether a decision is fair. As the code of good practice enjoins, commissioners will accept a zero tolerance if the circumstances of the case warrant the employer adopting such an approach.

[18] But the law does not allow an employer to adopt a zero-tolerance approach for all infractions, regardless of its appropriateness or proportionality to the offence, and then expect a commissioner to fall in line with such an approach. The touchstone of the law of dismissal is fairness and an employer cannot contract out of it or fashion, as if it were, a "no go area" for commissioners. A zero-tolerance policy would be appropriate where, for example, the stock is gold but it would not necessarily be appropriate where an employee of the same employer removes a crust of bread otherwise designed for the refuse bin...

...

²¹ (2015) 36 ILJ 2273 (LAC).

[22] Even assuming that the appellant was pursuing a zero-tolerance policy, it was not one that is appropriate for an infringement of this rule without further evidence from appellant for the justification of such an inflexible policy. In any event, the commissioner is required to consider whether the circumstances of the case warrant dismissal. If it does not, then irrespective of the company's policy, the commissioner is at large to set the dismissal aside and replace it with an appropriate sanction.'

[64] In this matter, the Applicant had been pardoned on the previous occasion when she transgressed the rule in 2019, and she was given a final written warning. Although the warning had lapsed at the time of her second transgression, the policy made provision for habitual transgressors to be dismissed. The third respondent also led evidence confirming that the rule and the policy were applied strictly and consistently. It cannot, therefore, be said that the third respondent's zero-tolerance policy infringed on her rights not to be dismissed unfairly. The applicant was aware of the existence of the rule, the compulsory screening at the entrance and the fact that other employees had been dismissed for having transgressed the same policy.

[65] In *Builders Trade Depot v Commission for Conciliation, Mediation and Arbitration and Others*²², the Labour Court held that commissioners must consider whether there was a workplace rule, if the employee was aware of it and whether the rule was willfully broken. Additionally, a commissioner is required to evaluate the nature and responsibilities of the job, the significance of the rule, the employee's disciplinary record, the process of progressive discipline, and the potential harm caused by the misconduct.

[66] The Applicant argued that the third respondent had not led any evidence demonstrating that the working relationship had irretrievably broken down, and the Court does not believe that it was necessary for the Commissioner to first get that evidence in order to uphold the dismissal. Item 3(4) of the Code of Good Practice: Dismissals²³ (the Code) provides *that 'generally, it is not appropriate to dismiss an*

²² (2012) 33 ILJ 1154 (LC) at para 43.

²³ Schedule 8 of the LRA.

employee for a first offence, except if the misconduct is serious and of such gravity that it makes a continued employment relationship intolerable’.

[67] Item 7 of the Code provides that any person who is determining whether a dismissal for misconduct is unfair should consider:

- ‘(a) whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the workplace; and
- (b) if a rule or standard was contravened, whether or not –
 - (i) the rule was a valid or reasonable rule or standard;
 - (ii) the employee was aware, or could reasonably be expected to have been aware, of the rule or standard;
 - (iii) the rule or standard has been consistently applied by the employer; and
 - (iv) dismissal was an appropriate sanction for the contravention of the rule or standard.’

[68] The Commissioner was satisfied that there was a rule in the workplace, the rule was reasonable and valid, the Applicant was aware of the rule since she had previously pleaded guilty to the same misconduct, the rule had been applied consistently in the workplace, and dismissal was an appropriate sanction. In *Sidumo*²⁴, the Constitutional Court listed a number of factors (which is not a closed list) that an arbitrator must consider when deciding on the fairness of a dismissal. These factors are:

- (i) the importance of the rule that was breached;
- (ii) the reason the employer imposed the sanction of dismissal;
- (iii) the basis of the employee’s challenge to the dismissal;
- (iv) the harm caused by the employee’s conduct;
- (v) whether additional training and instruction may result in the employee not repeating the misconduct;
- (vi) the effect of dismissal on the employee; and
- (vii) the long-service record of the employee.

²⁴ Ibid at para 78.

[69] Having regard to the evidence in totality, this Court finds that the decision of the arbitrator was one that a reasonable decision maker could make. Although the late filing of the review application has been condoned, the review application cannot succeed and stands to be dismissed.

Costs

[70] The first respondent sought costs in the event that the application is dismissed. It is trite that the awarding of costs in the Labour Court is discretionary as envisaged in section 162 of the LRA. The Constitutional Court in *Long v SA Breweries (Pty) Ltd and Others*²⁵ held as follows:

[27] It is well accepted that in labour matters, the general principle that costs follow the result does not apply. This principle is based on s 162 of the LRA, which reads:

“(1) The Labour Court may make an order for the payment of costs, according to the requirements of the law and fairness.

(2) When deciding whether or not to order the payment of costs, the Labour Court may take into account —

(a) whether the matter referred to the Court ought to have been referred to arbitration in terms of this Act and, if so, the extra costs incurred in referring the matter to the Court; and

(b) the conduct of the parties —

(i) in proceeding with or defending the matter before the Court; and

(ii) during the proceedings before the Court.”

[28] The relationship between the general principle of costs and section 162 was considered and settled by this Court in *Zungu*:

“In this matter, there is nothing on the record indicating why the Labour Court and Labour Appeal Court awarded costs against the applicant. Neither court gave reasons for doing so. It seems that both courts simply followed the rule that costs follow the result. This is not correct.

²⁵ (2019) 40 ILJ 965 (CC).

[71] Based on the above authorities, this court comes to the conclusion that it is in the interests of the law and fairness that each party be burdened with their own costs.

[72] In the result, I make the following order:

Order

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

G C Phakedi

Acting Judge of the Labour Court of South Africa.

Appearances:

For the Applicant:	W Ojemekere of Mudau & Netshipise Attorneys
For the Respondent:	M Maeso of Shepstone & Wylie Attorneys