



THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable

Case no: C484/2023

In the matter between:

**SOUTH AFRICAN MUNICIPAL WORKERS UNION
(SAMWU) OBO SHABANGU THSOLOFELO GERT**

Applicant

and

KGATELOPELE LOCAL MUNICIPALITY

First Respondent

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

Second Respondent

MADONGENI FOBOTYI

Third Respondent

Heard: 12 August 2025

Delivered: 2 October 2025

JUDGMENT

MacKENZIE, AJ

Introduction

- [1] On behalf of Mr T Shabangu, the applicant seeks the review and setting aside of the arbitration award issued by the third respondent in his

capacity as a commissioner acting under the auspices of the second respondent. The commissioner upheld the decision by the first respondent, the Kgatelopele Local Municipality, to dismiss Mr Shabangu on charges of, *inter alia*, the theft of three hollow core doors.

- [2] The applicant also seeks condonation for the failure to file the review application timeously and, by way of a separate substantive application, condonation for the failure to file the record timeously.
- [3] All of the applications are unopposed.
- [4] Mr Du Preez, who appeared on behalf of the applicant, submitted short heads of argument and offered helpful submissions regarding the merits of this matter. The Court is indebted to counsel.

Condonation

- [5] Condonation must be considered first. It is well established that condonation is a fact- and fairness-based enquiry in terms of which the court exercises a judicial discretion. The court must weigh the lateness, explanation, prospects of success, and the importance of the case in a flexible, interrelated way. Whereas a weak explanation or weak merits militate against condonation, a good explanation or strong merits can offset delay. Finality for the respondent must also be considered.¹

Late filing of the review application

- [6] Section 145(1)(a) requires an application for review to be filed within six weeks of the award being served upon the applicant. Section 145(1A) empowers the court to condone the late filing thereof on good cause shown.
- [7] The applicant received the award on 3 August 2023. The application fell due by 15 September 2023. It was brought on 29 September 2023 – a delay of only two weeks. The applicant's explanation in the founding

¹ *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at 532C–E.

affidavit covers the entire period of delay. It is satisfactory. Moreover, as dealt with more fully hereunder, the applicant has reasonable prospects for success. The interests of justice therefore weigh in favour of granting condonation for the late filing of the application.

[8] Accordingly, the late filing of the application is condoned.

Late filing of the record

[9] Paragraph 11.2.2 of this Court's erstwhile practice directives² provides that the record of proceedings must be filed within 60 days of being made available to the applicant by the Registrar, failing which the application is deemed to be withdrawn.

[10] In *Mashiya*, Molahlehi J held that the practice directives are a "*tool to facilitate the management of a review application*".³ I agree. They are not an end to themselves. Nor do they derogate from this Court's inherent power to regulate its own procedure under section 151(2) of the LRA.

[11] The record in this matter fell due for delivery on 18 January 2024, but was delivered just over two months later on 27 March 2024. It appears that there was some difficulty in transcribing the record of proceedings on 24 July 2023. Thus, on 18 December 2023, by way of formal correspondence, the applicant prevailed upon the second respondent for assistance. That request went unanswered.

[12] On 29 January 2024, the applicant prevailed upon the first respondent in writing for an indulgence to file the record and its consent to reconstruct the missing part of the record. That request also went unanswered.

[13] On 9 February 2024, the applicant brought a substantive application to reinstate the review. The applicant's attempts to ensure the timeous delivery of the record are narrated in the founding affidavit. Despite some

² The practice directives have effectively been subsequently subsumed by the new rules regulating proceedings in this Court which commenced on 17 July 2024.

³ *Minister of Justice And Correctional Services v Mashiya and Others* (J16/14) [2015] ZALCJHB 68 (5 March 2015) at para 16.

gaps in its explanation, the applicant was clearly proactive. Moreover, as stated above, there are reasonable prospects for success. The interests of justice therefore weigh in favour of condonation.

- [14] Accordingly, the late filing of the record is condoned, and the review application is reinstated.

The common cause facts

- [15] Until his dismissal, Mr Shabangu was employed by the municipality as a foreman community services.

- [16] The incident that led to Mr Shabangu's dismissal transpired over the weekend of 09–11 December 2022, when three hollow core doors were stolen from the municipal workshop and garage situated at Daniëlskuil in the Northern Cape. Mr Shabangu had been, at that time, on standby from 9 until 16 December 2022.

- [17] The municipality accused Mr Shabangu. It suspended him on 12 January 2023. It preferred three serious charges against him: (i) gross dishonesty; (ii) unauthorised removal of council property; and (iii) theft. On 27 February 2023, he was found guilty on all three counts and summarily dismissed.

- [18] The applicant referred a dispute to the CCMA concerning both the procedural and substantive fairness of Mr Shabangu's dismissal. After conciliation failed, arbitration commenced on 19 June 2023, but was postponed for the hearing of evidence on 24 and 25 July 2023, including an inspection *in loco*.

The arbitration proceedings

- [19] The existence of Mr Shabangu's dismissal is common cause. Accordingly, the municipality bore the onus, under section 192(2) of the LRA to prove, on a balance of probabilities, that Mr Shabangu's dismissal was fair.

- [20] Considering that the review is aimed at the commissioner's appraisal of the evidence in totality and the inferences drawn from it, it is necessary to consider the evidence in some detail.

The municipality's evidence and witnesses

- [21] The municipality relied upon a written statement (not made under oath) by Ms Gloria Louw, a security guard who was on duty at that time, and it called four witnesses.
- [22] In her statement, Ms Gloria Louw alleged that she had seen Mr Shabangu arrive with a bakkie, reverse into the garage, and load 'goods', which she, in a subsequent statement – also not made under oath – identified as the hollow doors. She stated that she had not logged the entry as she believed the 'items' would be returned. However, Ms Louw did not testify at arbitration as a subpoena had apparently not been served on her.
- [23] Mr Cornelissen, also a security guard on duty at the time, testified that he had last seen the doors on 09 December 2022 when he and Mr Buntsi had fetched a hammer near them in the workshop. He testified that he had been on duty on 11 December, but had been away at lunch at the time Mr Shabangu arrived at the workshop at 11:00. He testified that he had only heard of the missing doors on 12 December. He confirmed that tools had to be checked out, though spanners were often exempt. He confirmed that Mr Shabangu had been on standby that weekend. Mr Cornelissen conceded that Ms Louw had never told him directly what was said in her statement. Finally, he testified that Ms Louw and Mr Shabangu were romantically involved and had a child together.
- [24] Ms Likotsi, the Municipality's strategic manager, confirmed that she had conducted the internal investigation before the disciplinary hearing. She testified that she had interviewed Mr Pule Gagora, who alleged that Mr Shabangu had taken the doors and given them to Mr George Eland. She admitted that she did not verify this with Mr Eland and dismissed it as mere hearsay. She testified that she considered the tracing of the doors to be a matter for the police and did not attempt to trace them herself.
- [25] Mr Buntsi, an assistant foreman, confirmed that the doors were still present on 09 December 2022 when he had collected a hammer near them in the workshop. He testified that he had been informed on 12 December 2022 by a subordinate that the doors were missing, which he

had reported to his superior. He testified that Mr Shabangu's standby form referred only to cleaning blockages in the sewerage pumps, and not to repair burst pipes. He commented that taking spanners for blockages was unusual. He testified that the municipality's suspicion of Mr Shabangu was based largely on his failure to report the missing doors. He confirmed that only two bakkies had entered the workshop on 11 December 2022. He testified that the security cameras were inoperative, as had been the case on a prior occasion when a tyre had been stolen whilst Mr Shabangu had been on duty and Ms Louw has inexplicably paid for it. He confirmed that Mr Shabangu and Ms Louw had been in a romantic relationship.

- [26] Mr Davids, a security supervisor, testified that he had been informed of the missing doors by Mr Buntsi and had reported this to his superior, Mr Mokoena. He testified that Mr Mokoena spoke to Ms Louw, who initially was vague about what Mr Shabangu had loaded but later specified that it was the doors. He testified that he had accompanied her to the police station to make a sworn statement, during which she had appeared confused. He confirmed that Ms Louw had stated that Mr Shabangu had not stopped at the entrance gate when leaving. He confirmed that he had learned of the theft from Mr Buntsi, and reported it up the chain. He testified that his superior Mr Mokoena had spoken to Ms Louw, who initially was vague but later said Mr Shabangu had loaded the doors. He testified that he had accompanied Ms Louw to police station where she seemed confused about what had been loaded. He confirmed that Ms Louw had said Mr Shabangu had not stopped at the gate on his departure.

The applicant's witnesses

- [27] The applicant called three witnesses.
- [28] Mr Shabangu testified that he had commenced his standby shift on Friday, 09 December 2022. He testified that he had forgotten to load spanners into his bakkie that day. He stated that on Sunday, 11 December 2022, he and his subordinates had attended to a blockage. At 10:30, when it began raining, he had instructed his subordinates that he would return to the workshop to collect spanners as a precaution to fix any burst pipes. He

had driven to the workshop, inspected the water pumps *en route*, and had arrived at the workshop at 11:00. He testified that he had loaded the spanners and returned to site, taking only five minutes to do so. He stated that because of the rain, he and his subordinates had remained in their vehicles until the end of their shift at 12:30. He testified that he had seen only Mr Cornelissen at the workshop. He confirmed that he and Ms Louw had a child together but stated that their romantic involvement had ended long ago. He testified that he had not seen the doors because his toolbox was immediately accessible at the workshop entrance, while the doors were kept elsewhere near the mayor's car. He testified that the doors were '*store items*' and he therefore had no need to enter that area. He confirmed that his standby shift continued until 16 December 2022.

[29] In response to a question from the commissioner, Mr Shabangu confirmed that the workshop remained open at all times with security present 24 hours a day. He testified that on 11 December 2022 the speaker's car had been parked in the garage, thus blocking him from pulling entirely into the garage.

[30] Mr Kruger, one of Mr Shabangu's subordinates, testified that he too had been on standby with Mr Shabangu from 09 until 16 December 2022. He confirmed that Mr Shabangu had left for the workshop just before 11:00 to collect spanners and returned at around 11:30. He testified that he had never seen the doors.

[31] Mr Lottering, another of Mr Shabangu's subordinate, corroborated Mr Kruger's testimony in full.

The award

[32] The commissioner delivered the award of eleven pages, with commendable alacrity, less than a week after conclusion of the evidence, on 01 August 2023. The commissioner found Mr Shabangu's dismissal was procedurally unfair, but substantially fair. Since there is no challenge to it, the finding relating to procedural unfairness remains undisturbed.

[33] The gravamen of the commissioner's finding on the substantive fairness of Mr Shabangu's dismissal may be summarised thus.

- 33.1 Messrs Cornelissen and Buntsi undisputed evidence was that the doors had been present in the garage on Friday, 09 December 2022 when they had collected the hammer placed by them.
- 33.2 On Sunday, 11 December 2022, only two vehicles had entered the workshop; but that, according to Ms Louw's statement, only Mr Shabangu's vehicle had been loaded with 'goods'.
- 33.3 Mr Shabangu had two chances to load the spanners in his vehicle – on both the Friday and Saturday – but had only done so that Sunday, during the rain, about an hour before the end of his shift.
- 33.4 The commissioner considered Mr Shabangu's justification for fetching the spanners for potential burst pipes during the rain to be implausible. This is so since, firstly, it is difficult to identify burst pipes in the rain and *'the situation is unworkable because of the water that needs to be drained'*. Secondly, the undisputed evidence of Mr Buntsi was that burst pipes occur only when the pumps are not working properly. Thirdly, the closing of valves on the water pumpers does not require spanners.
- 33.5 He likewise criticised Mr Shabangu's explanation for reversing into the workshop. He considered there to be only three possible scenarios. Either Mr Shabangu did not wish to get wet, or he did not wish to get the spanners wet, or he did not wish anyone to see what he was loading. Since, according to Ms Louw's statement, Mr Shabangu had not stopped at the gate, he considered the third scenario to be the most plausible. Moreover, despite the evidence revealing that it was not a practice to do so, *'as a responsible senior personnel (sic) ... it was still important to be known (sic) what was taken out of the workshop for accountability purposes'*.
- 33.6 The commissioner criticised Mr Shabangu's response to the municipality's evidence that only Ms Louw had been present when he returned to the garage – namely that he had seen only Mr

Cornelissen – as incoherent. This is so since Mr Shabangu did not challenge Mr Cornelissen's evidence that he had not seen Mr Shabangu when he had gone on lunch at 11:00. Nor was Mr Shabangu's version put to Mr Cornelissen.

33.7 Mr Shabangu did not dispute Ms Louw's statements to her employer and to the police. The commissioner relied upon the decision in *Prestige*,⁴ which held (according to the commissioner) that *'it is not necessary for a party to continue leading evidence on a point or documentation that is not contested, the fact that such evidence is not - corroborated by further evidence does not warrant its exclusion'*.

33.8 Mr Shabangu did not dispute the evidence of Messrs Cornelissen and Buntsi that the hammer had been placed behind the doors.

[34] The commissioner made two damning adverse credibility findings against Mr Shabangu. First, the commissioner found that Mr Shabangu went to extreme lengths to create favourable evidence, citing his reliance on a deleted reference in the worksheet to a pipe burst to justify fetching any spanners. This, the commissioner held, supported the charge of dishonesty amounting to dismissible misconduct. Second, he noted that, although there was no eyewitness evidence of Mr Shabangu loading the doors, his testimony was untrustworthy and, on the probabilities, he was therefore guilty of all three charges. The commissioner considered Mr Shabangu's emphasis on rainy conditions to be a weak cover, as rain made identifying and repairing pipe bursts impractical, and concluded that his disregard for procedural standards was habitual.

[35] The commissioner concluded as follows:

'[59] I am not persuaded by any of the advanced defences by the Applicant [sc. Mr Shabangu] because the planning and execution of this malfeasance have the hallmarks of a person that cannot be trusted. At all material times the Applicant knew what he was

⁴ *Prestige Cleaning Services (Pty) Ltd v Commissioner JO Sello NO and others* (JR 604/12) [2016] ZALCJHB 166.

doing. Waiting for Cornelliseun (sic) to go on lunch before he goes to the workshop, going alone, reversing into the building and not stopping at the exit afterwards for verification of what was in the vehicle. The worst is the fact that he does not think that his conduct was wrong which gives the impression that given another opportunity this conduct might be perennial.' (emphasis added)

[36] I turn to set out the grounds of review.

Grounds of review

[37] Relying upon section 145(2) of the Labour Relations Act, 1995 (LRA), the applicant advanced four grounds of review:

- 37.1 The commissioner relied upon speculation and circumstantial evidence;
- 37.2 The commissioner erred in allowing into evidence the written statement made by Ms Louw since it constitutes inadmissible hearsay evidence;
- 37.3 The commissioner made no attempt to determine the credibility of the witnesses who testified; and
- 37.4 The commissioner gave no consideration to the Applicant's witnesses.

The test on review

[38] The central question posed in review of this kind is whether the decision reached by the commissioner is one that a reasonable decision-maker could not reach.⁵ In other words, was the commissioner's decision so unreasonable that it cannot at all be sustained on all the evidence.⁶ It is an outcomes-based assessment. It is not competent for a court to review and set aside an award merely because it disagrees with the outcome on the

⁵ *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others* (2007) 28 ILJ 2405 (CC) at para 110.

⁶ *Ludick Financial Services v Commission for Conciliation, Mediation and Arbitration and Others* [2022] ZALCCT 58 (18 November 2022) at para 21.

merits. For the court to interfere with it, the award must be ‘*so egregious ... no reasonable person could reach such a result*’.⁷

[39] Material errors of law may constitute a gross irregularity under section 145(2)(a)(ii).⁸ However, material errors of fact as well as the weight and relevance to be attached thereto, are not *per se* sufficient to impugn an award on review. It is only where their cumulative effect is to render an award unreasonable.⁹

Analysis and evaluation

[40] Mr Du Preez argued that the commissioner had, in accepting Ms Louw’s statement as uncontested evidence, committed a material error of law. He relies upon the decision in *Tshishonga* where Pillay J held that an adverse inference must be drawn where a party fails to call a witness who is available to testify, namely that their testimony will expose adverse facts.¹⁰ Since the award was based upon critical aspects of Ms Louw’s statement, the effect of the commissioner’s error was material, he argued, thus rendering the award unreasonable.

[41] I agree that the commissioner relied materially upon Ms Louw’s statement in finding that Mr Shabangu had ‘*loaded goods*’ in his vehicle, and that he had not stopped at the gate when leaving the workshop. Those two findings are vital to the commissioner’s finding of Mr Shabangu’s guilt. However, the municipality did not call Ms Louw to testify. Her statement constitutes *per se* inadmissible hearsay evidence.¹¹

[42] Significantly, the municipality had procured the issue of a subpoena for her, but did not to have served it upon her. The municipality’s

⁷ *Makuleni v Standard Bank of South Africa Ltd and Others* (2023) 44 ILJ 1005 (LAC) at para 13.

⁸ *Eskom Holdings Ltd v Fipaza and others* [2013] 4 BLLR 327 (LAC) at para 62.

⁹ *Herholdt v Nedbank Ltd (Congress of South African Trade Unions as amicus curiae)* [2013] 11 BLLR 1074 (SCA) at para 25.

¹⁰ *Tshishonga v Minister of Justice & Constitutional Development & another* (2007) 28 ILJ 195 (LC) at para 112.

¹¹ Section 3(1) of the Law of Evidence Amendment Act, 1988.

representative merely indicated that its attempts to procure Ms Louw would be unsuccessful but offer any substantive reason why. In the absence thereof, the commissioner, in my view, erred materially in regarding her statement as uncontested and inadmissible hearsay evidence. This is the more so since the municipality bore the onus.¹² Accordingly, the commissioner committed an error of law constituting a gross irregularity within the meaning of section 145(2)(a)(ii) of the LRA

[43] The commissioner also materially erred upon his assessment of the factual evidence, all materials aspects of which were circumstantial. In assessing irregularities of this kind, the evidence must be assessed cumulatively, and not piecemeal.¹³ Where inferences are drawn from circumstantial evidence, they must be consistent with all the proved facts and must be the most natural or plausible one when measured against the probabilities.¹⁴ In this regard, there are two significant aspects in respect of the evidence.

[44] Firstly, Mr Cornelissen testified that he had last seen the three doors that Friday (09 December 2022). His evidence was that he had accompanied Mr Buntsi into the workshop to find a hammer, at which time he had seen the doors. He testified that he was only subsequently informed the following Monday (12 December 2022) that the doors were missing. Mr Shabangu, on the other hand, testified that he had never seen the doors. Nor had Mr Kruger and Mr Lottering since they had never entered that part of the workshop where the doors had been kept. Mr Shabangu testified that he had only collected the spanners at the entrance to the workshop. The commissioner appears to have drawn the inference that the doors had remained in the workshop from the Friday to the Sunday. Yet, the municipality – which bore the onus – adduced no evidence to that effect. Moreover, the undisputed evidence was that the workshop remained open 24 hours a day with the only security measure in place being the guards

¹² Section 192 of the LRA.

¹³ *SA Nylon Printers (Pty) Ltd v Davids* [1998] 2 BLLR 135 (LAC) at 136G.

¹⁴ *Minister of Safety and Security & another v Madikane & others* (2015) 36 ILJ 1224 (LAC) at para 44.

posted and (on the municipality's version) unreliable closed-circuit surveillance cameras. Thus, the inference that Mr Shabangu had stolen the doors was not the only probable one to be drawn. It is an equally probable inference that the doors were stolen between that Friday and the Monday when the theft was discovered.

[45] Secondly, the commissioner's criticism that Mr Shabangu had waited until Mr Cornelissen had gone on lunch "*before he goes to the workshop, going alone*" is unfounded. There is no way that Mr Shabangu could have known that Mr Cornelissen went on lunch at 11:00; nor was there any evidence to that effect.

[46] Thirdly, Mr Shabangu's undisputed evidence was that he had omitted to collect the spanners that the Friday and had only done so that Sunday, after it had started raining, shortly before his shift would end. The commissioner considered that explanation suspicious. That suspicion is unfounded. The undisputed evidence was that Mr Shabangu remained on standby for the remainder of that week until 16 December 2022. It is therefore an equally probable inference that he had collected the spanners to keep them in his vehicle for the remainder of his standby duty.

[47] Since the probabilities, as they appear from the evidence, are equipoised in all material respects, the municipality failed to discharge its onus. The commissioner erred materially in his conclusion to the contrary which constitutes a gross irregularity within the meaning of section 145(2)(a)(ii) of the LRA.

[48] Accordingly, I am persuaded that the award is not one which a reasonable commissioner could reach based upon the all of evidence before him. Mr Shabangu's dismissal was therefore unfair.

[49] It follows that the award falls to be reviewed and set aside.

Appropriate remedy

[50] The applicant asked that the matter either be remitted or the award be substituted with one reinstating Mr Shabangu.

[51] Although the discretion conferred upon it in this regard appears unlimited, the court will not automatically determine the dispute itself, but will follow the principles laid down by the High Court in ordinary review applications. These permit the court to correct a defective administrative decision rather than remit it to the decision-maker when *inter alia*:¹⁵

51.1 the result is a foregone conclusion, and it would be a waste of time to require the commissioner to reconsider the decision since the court is therefore in as good a position as the commissioner to decide the matter; and

51.2 remission would cause a further delay that would prejudice the applicant.

[52] Based upon the evidence and applicable legal principles, I consider that the result is indeed a foregone conclusion. Moreover, given that almost three years have passed since the theft of the doors, and two years have passed since the award was delivered, remittal is inappropriate and would serve only to unduly protract this matter. Furthermore, since the entirety of the record is before it, the Court is in a position to substitute the award.

[53] Accordingly, I consider that the appropriate award is one declaring that Mr Shabangu's dismissal was unfair and to reinstate him from the date of his dismissal on 27 February 2023.¹⁶

Costs

[54] The applicant seeks an order for costs. The first respondent did not oppose this application for that relief.

[55] In labour disputes, costs do not automatically follow the result.¹⁷ Costs are awarded only when required by law and fairness. The court must balance two considerations: avoiding the discouragement of parties from bringing

¹⁵ *CSO Valuation (Pty) Ltd v CCMA & others* [1998] 12 BLLR 1271 (LC); *Tedco Plastics (Pty) Ltd v NUMSA & others* (2000) 21 ILJ 2710 (LC).

¹⁶ Section 193(1)(a) of the LRA.

¹⁷ *Union for Police Security and Corrections Organisation v South African Custodial Management (Pty) Ltd and Others* [2021] 12 BLLR 1173 (CC) at para

legitimate disputes, and preventing frivolous or abusive cases.¹⁸ In not opposing this review, the municipality implicitly concedes the legitimacy of this dispute. Nor is this matter, for the reasons given above, abusive.

[56] In all the circumstances, it is fair that municipality pay the applicant's costs.

Order

[57] In the result, the following order is made:

1. The late filing of the review application is condoned.
2. The late filing of the record is condoned, and the review application is reinstated.
3. The award of the third respondent under case number NCD032308 dated 1 August 2023 is reviewed and set aside.
4. It is declared that the dismissal of Mr Thsolofelo Gert Shabangu was substantively unfair.
5. The first respondent is ordered to reinstate Mr Thsolofelo Gert Shabangu with effect from 27 February 2023.
6. The first respondent will pay the applicant's costs of suit.

PS MacKenzie

Acting Judge of the Labour Court of South Africa

¹⁸ *MEC for Finance: Kwazulu-Natal and Another v Dorkin NO and Another* [2008] 6 BLLR 540 (LAC) at para 19.

Appearances:

For the applicant: T Du Preez
Instructed by: Kramer Weihmann Inc

For the first respondent: No appearance
Instructed by: No appearance

LABOUR COURT