



THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Reportable

Case no: C287/2023

In the matter between:

SAMWU OBO LOTZ

Applicant

and

HESSEQUA LOCAL MUNICIPALITY

First Respondent

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

Second Respondent

COMMISSIONER MOSES N.O.

Third Respondent

Heard: 19 August 2025

Delivered: 2 October 2025

JUDGMENT

MacKENZIE, AJ

Introduction

[1] On behalf of Mr T Lotz, the applicant seeks an order reviewing and setting aside the third respondent's award, and substituting it with one that Mr Lotz's dismissal was unfair. The applicant also seeks condonation for the

late filing of the review application, it having fallen due for delivery on 27 January 2023 but was only delivered on 6 June 2023.

- [2] While the first respondent delivered a notice of opposition, it failed to deliver an answering affidavit.
- [3] Mr Geldenhuys appeared for the applicant. Mr Jansen appeared on a watching-brief basis only, and accordingly did not address the Court.
- [4] Despite not delivering any answering affidavit, on the morning of the hearing, the first respondent delivered heads of argument. It argues that the rules contemplate participation by a respondent even absent an answering affidavit. This is so, it argues, since the *“enquiry is in essence based on the record and further consist of an investigation into the reasonableness of the Commissioner’s decision, not a re-hearing on the affidavits”*. Moreover, it argues that there is no prejudice to Mr Lotz.
- [5] Whilst it is not acceptable that the first respondent delivered its heads of argument on the hearing date, I accept the first respondent’s submissions. At any rate, the Court ought to consider the submissions of counsel where they are of assistance to the court.
- [6] The Court appreciates the helpful submissions by Mr Geldenhuys as well as those in the first respondent’s heads of argument.

Condonation

- [7] Condonation is a discretionary, fact- and fairness-based enquiry. The court must weigh the respondent’s interest in finality against the importance of the case, the extent of the delay, the explanation offered, and the prospects of success. These factors are interrelated: weak explanation or merits weigh against condonation, while strong explanation or merits may offset delay.¹

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

- [8] The applicant delivered a separate and substantive affidavit in support of condonation. The explanation offers an update about once a month over the entire period. In essence, the applicant blames its bureaucracy in considering the award and appointing attorneys to pursue the review.
- [9] In opposing condonation, the first respondent argues that the delay is excessive since it was instituted after 95 calendar days (62 court days).
- [10] I agree that the explanation is less than satisfactory. Even considering any bureaucratic delays and since review proceedings must be brought without delay since they are inherently urgent, a delay of three months is unacceptable. This is the more where the matter is uncomplicated, the record is short, and the award is attacked on grounds of obvious irregularities.
- [11] However, for the reasons given hereinbelow, I am of the view that require that condonation is in interests of justice.

The facts

- [12] For almost ten years Mr Lotz was employed by the municipality as a handyman and driver, based at Heidelberg. Mr Lotz was required to have a plumbing certificate and driver's license. It is common cause that Mr Lotz did not have a driver's license at the commencement of his employment.
- [13] During 2017, in terms of certain draft regulations, the municipality was required to formulate personal development plans (PDP) for employees, including Mr Lotz. This was done by Mrs Marcelle Cronje, the municipality's head of employee relations. As part of finalising his PDP, Mrs Cronje discovered that Mr Lotz did not have a driver's license.
- [14] On 22 April 2021, the municipality's director of technical services issued a letter to Mr Lotz informing him that he was to obtain a learner's license by 30 July 2021. When he failed to do so, Mr Lotz was given notice to attend an incapacity meeting, which was ultimately convened on 3 November 2021. However, Mr Lotz obtained his learner's license on 27 October 2021 and submitted it at the incapacity meeting.

- [15] Mr Lotz informed the municipality that he needed new glasses in order to obtain his driver's license, for which he would only qualify in February 2022. He also asked for financial assistance in the sum of R3 000 which the Municipality declined on the basis that it does not offer advances on salaries.
- [16] The municipality subsequently issued an ultimatum for Mr Lotz to obtain his driver's license by 30 April 2022.
- [17] On 22 April 2022, the municipality offered Mr Lotz an alternative T-level post – lower than the level on which he had been – which Mr Lotz was required to accept by 29 April 2022. Mr Lotz did not accept that offer.
- [18] On 4 May 2022, at the resumed disciplinary hearing, Mr Lotz was dismissed.

The proceedings before the commissioner

- [19] The arbitration was conducted virtually on 24 October 2022. The municipality called only Mrs Cronje. The applicant called Mr Lotz but, at the close of proceedings on that day, Mr Lotz had finished being examined in chief, and the matter was then postponed. No date was set. The municipality's position was that it needed time to consider whether it would cross-examine Mr Lotz. Importantly, the record bears out that the commissioner gave two options to the parties, postpone for closing arguments or *'rather schedule this matter for another day'* – the latter option being preferred by the municipality's representative, Mr Clark. In other words, the impression was that the postpone was for the matter to resume, and not for closing arguments.
- [20] The matter resumed on 1 December 2022. The commissioner recorded that the matter was *'scheduled to continue with cross-examination'*. However, there was no appearance by either the applicant's representative or Mr Lotz. According to the record, the commissioner said that he had personally forwarded the Teams link. The commissioner also indicated that he had contacted the applicant's case management officer,

Mr Gondani Sithole who had apparently tried to contact Mr Bozo and Mr Lotz without success. The commissioner indicated that he was informed by Mrs Cronje that she too had tried unsuccessfully contacting Mr Bozo.

[21] Consequently, the commissioner considered that the applicant had closed its case and simply moved on to closing arguments. The municipality proceeded to make its closing argument.

[22] On 8 December 2022, the commissioner delivered the award, confirming Mr Lotz's dismissal was both procedurally and substantively fair.

Grounds of review

[23] The applicant argues that the commissioner failed to apply his mind, misconducted himself, committed a gross irregularity and/or acted unreasonably, unjustifiably, and irrationally (i) in failing to take into consideration the evidence before him, and (ii) in finding that Mr Lotz's dismissal was fair.

Analysis and discussion

[24] In light of the procedural irregularities mentioned below, it is unnecessary to consider the merits of this matter.

Failure to receive evidence under oath

[25] Evidence is normally given under oath.² The administration of the oath is governed by the Justices of the Peace and Commissioners of Oaths Act, 1963; specifically Regulation 1 of the regulations promulgated thereunder, which provides as follows:

'1(1) An oath is administered by causing the deponent to utter the following words: "I swear that the contents of this declaration are true, so help me God".

² Schmidt *Law of Evidence* at para 9.2.2.1.

- (2) *An affirmation is administered by causing the deponent to utter the following words: "I truly affirm that the contents of this declaration are true".*
- 2(1) *Before a commissioner of oaths administers to any person the oath or affirmation prescribed by regulation 1 he shall ask the deponent*
- (a) whether he knows and understands the contents of the declaration;*
 - (b) whether he has any objection to taking the prescribed oath; and*
 - (c) whether he considers the prescribed oath to be binding on his conscience.*
- (2) *If the deponent acknowledges that he knows and understands the contents of the declaration and informs the commissioner of oaths that he does not have any objection to taking the oath and that he considers it to be binding on his conscience the commissioner of oaths shall administer the oath prescribed by regulation 1(1).*
- (3) *If the deponent acknowledges that he knows and understands the contents of the declaration but objects to taking the oath or informs the commissioner of oaths that he does not consider the oath to be binding on his conscience the commissioner of oaths shall administer the affirmation prescribed by regulation 1(2).'*

[26] The record reflects that none of the witnesses took the oath. The commissioner simply asked Ms Cronje to 'confirm' her testimony. Similarly, he asked Mr Lotz to 'confirm that everything that he would say is the truth'. There was no attempt to administer the oath or affirmation, whether properly or at all.

[27] The question is whether the commissioner's failure to administer the oath, or affirmation, constitutes a gross procedural irregularity. In *Morningside Farms*,³ Revelas J held:

'[12] Even though a commissioner, appointed by the CCMA, must deal with the substantial merits of a dispute with a minimum of legal formalities during arbitration proceedings (section 138(1) of the Act), certain basic principles cannot be breached. It is trite that in courts, witnesses who give evidence are required to take the oath or affirm as a witness.

[13] In terms of section 31(1) of the Supreme Court Act 59 of 1959, a person who refuses to be sworn or who refuses to make an affirmation as a witness, may be committed to gaol for a period not exceeding eight days. In terms of section 142(8)(c) of the Act a person commits contempt of the Commission if he or she refuses to take the oath or to make an affirmation as a witness.

[14] It therefore must follow that a commissioner who fails to administer the oath or fails to ensure that an affirmation is made by a witness, commits a gross irregularity.' (emphasis added)

[28] The above *dictum* is at odds with the decision in *Aitken*,⁴ where Stein AJ held:

'[11] Section 142 of the Act defines the powers of commissioners when attempting to resolve disputes. In relation to the receiving of evidence a commissioner is given a power under section 142(1)(e) as follows:

"A commissioner who has been appointed to attempt to resolve a dispute may –

³ *Morningside Farm v Van Staden NO & another* [1998] 5 BLLR 488 (LC); *Portnet (A division of Transnet Ltd) v Finnemore & others* [1999] 2 BLLR 151 (LC) at para 9.

⁴ *Aitken v Khoza & others* [2000] 9 BLLR 1011 (LC) at paras 12–13.

(e) administer an oath or accept an affirmation from any person called to give evidence or be questioned.”

[12] It is not a statutory requirement of the Act that evidence placed before a commissioner should be sworn evidence, unlike section 162 of the Criminal Procedure Act, which provides that a witness's evidence must be under oath. Neither party gave sworn evidence. The proceedings were informal and in keeping with the spirit of the Act. Much of the relevant evidence to determine who the employer was, was common cause, ie that the employee was assigned by an employment agency to do a special project in the bank, that on the completion of the project the employee was advised of such, that the employee was paid her salary by Intersearch, that when they defaulted, FNB paid the salary. The only area of disagreement appears to be the employee's allegation that during the course of her attendance at FNB a verbal contract of employment was entered into between her and the bank. The commissioner, weighing up the evidence found there was no proof of this.

[13] The fact that the evidence relied upon by the commissioner in the making of his determination was unsworn oral evidence, from both parties, does not constitute reviewable misconduct on behalf of the commissioner. The applicant has failed to state why sworn evidence was necessary and would have made a difference. The unsworn evidence of the employee constitutes evidence, which the commissioner was allowed to rely on in coming to his determination. Further, the determination was rationally justifiable on the facts presented to him.’ (emphasis added)

[29] While not referring to *Aitken*, in *Rowmore*,⁵ Molahlehi J echoed Stein AJ’s view:

“[51] The other issue raised by the applicant concerns the complaint that the commissioner failed to administer an oath or

⁵ (2008) 29 ILJ 2275 (LC).

affirmation before taking evidence from the witness of the employee.

[52] In Morningside Farm v Van Staden NO & another (1998) 19 ILJ 1204 (LC), the court disagreed with the employee's contention that the failure to swear in a witness did not amount to an irregularity. In arriving at this conclusion the court relied on the provisions of s 31(1) of the Supreme Court Act 59 of 1959, which provides for committal F to prison for a person who refuses to take an oath or who refuses to make an affirmation as a witness. The court also relied on the provisions of s 142(1)(e) of the Labour Relations Act 66 of 1995 (LRA), which provides that a commissioner who has been appointed to resolve a dispute may administer an oath or accept an affirmation from any person called to give evidence. To this extent the court held:

"It therefore must follow that a commissioner who fails to administer the oath or fails to ensure that affirmation is made by a witness, commits a gross irregularity."

[53] In criminal cases it has been held that the testimony of a witness which had not been properly placed under oath or properly affirmed or properly admonished to speak the truth as provided for in s 162 read with s 163 and s 164 of the Criminal Procedure Act 51 of 1977, lacks the status and character of evidence and can therefore not support a conviction in a criminal trial.

[54] It is clear that in criminal matters there is a statutory duty imposed on the presiding officer to administer an oath or admit an affirmation. In the context of the LRA the commissioner has a discretion in terms of s 142(1)(e) whether or not to administer an oath or require an affirmation. However, refusal to take an oath or make an affirmation when required to do so by the commissioner constitutes contempt of the CCMA in terms of s 142(8)(c) of the LRA.

[55] The issue of oaths and affirmations in private arbitrations is governed by s 14(1)(b) (ii) of the Arbitration Act 42 of 1965.

[56] *In Portnet, A Division of Transnet Ltd v Finnemore & others (1999) 20 ILJ 1104 (LC), the court after noting the decision in Morningside Farm that failure to administer an oath is an irregularity which justifies the intervention of the court, held that in private arbitration proceedings evidence need not be led under oath where there is an agreement between the parties or where no objection is taken at any stage, [and] a party cannot subsequently approach the court and cry foul. The court went further to say:*

“Accordingly, I do not think that the arbitration award is reviewable because of failure to administer the oath.”

[57] *It is interesting to note that rule 24 of the American Arbitration Association provides:*

“Oaths — ... the Arbitrator may, in his discretion, require witnesses to D testify under the oath administered by any duly qualified person, and if required by law to or requested by either party, shall do so.”

See Frank Elkour et al How Arbitration Works (5 ed) at 263.

[58] *In my view the correct approach is the one adopted in Portnet and should apply to both private and compulsory arbitration proceedings. Because of the adversarial nature of the arbitration proceedings, there can be no doubt that taking an oath or making an affirmation by witnesses will always be preferred. However, failure to have a witness take an oath or make an affirmation before testifying, does not in my view automatically amount to a gross irregularity. In such cases the issues turn on the weight [attached to] and the manner in which the commissioner approaches the evidence tendered without taking an oath or making an affirmation.*

[59] *Turning to the facts of the present case, the evidence of the witness who did not take an oath had no bearing on the decision of the commissioner. It can also not be said that failure to administer an oath on the witness denied the applicant a fair hearing.” (emphasis added)*

[30] In addition to finding the reasoning of Revelas J to be persuasive and fully aligning myself with it, I respectfully disagree with the reasoning of Stein AJ and Molahlehi J for the following reasons.

[31] Firstly, the admissibility of unsworn or unaffirmed testimony is governed by section 41 of the Civil Proceedings Evidence Act, 1965 which provides as follows:

'(1) Any person who, from ignorance arising from youth, defective education or other cause, is found not to understand the nature or to recognize the religious obligation of an oath or affirmation, may be permitted to give evidence in any civil proceedings without being upon oath or affirmation, if, before any such person proceeds to give evidence, the person presiding at the proceedings in which he is called as a witness, admonishes him to speak the truth, the whole truth and nothing but the truth and administers or causes to be administered to him any form of admonition which appears, either from his own statement or from any other source of information, to be calculated to impress his mind and bind his conscience, and which is not, as being of an inhuman, immoral or irreligious nature, obviously unfit to be administered.

(2) Any person to whom an admonition has been administered as aforesaid, who in evidence wilfully and falsely states anything which, if sworn, would have amounted to the offence of perjury or any statutory offence punishable as perjury, shall be deemed to have committed that offence, and shall upon conviction be liable to such punishment as is by law provided as a punishment for that offence.' (emphasis added)

[32] Accordingly, unsworn testimony is permissible only if:

32.1 The witness who does not understand the nature or obligation of an oath/affirmation due to youth, poor education, or other cause;

32.2 The presiding officer first admonishes the witness to speak the truth, the whole truth, and nothing but the truth;

32.3 An appropriate form of admonition is administered that impresses the witness's mind and binds their conscience; and

32.4 The admonition must not be inhuman, immoral, or irreligious.

[33] The record shows that none of the above requirements were met.

[34] Secondly, while it is trite that proceedings in the CCMA are intended to be speedy and informal,⁶ section 138(1) of the LRA expects that the commissioner dispose of a matter with "*the minimum of legal formalities*". It seems to me that the proper taking of evidence to be such a minimum formality. Indeed, administering the oath or affirmation is a simple and straightforward matter. I can see no possible reason or justification why a commissioner would ever be placed in a situation where they cannot do so. What is more, there is already provision in section 41, excerpted above, to deal with a situation where unsworn testimony is admissible.

[35] In my respectful view, a commissioner does not have a discretion whether or not to receive evidence under oath. It constitutes a minimum legal formality. A commissioner must adhere to the requirements framed in the LRA, the Justices of the Peace and Commissioners of Oaths Act, its regulations and – when all else fails – the Civil Proceedings Evidence Act. To allow such a discretion permits an unreasonable degree of informality.

[36] Accordingly, I conclude that the commissioner's failure to receive evidence under oath constitutes a material procedural irregularity as contemplated in section 145(2)(a)(ii) of the LRA.

[37] Whilst neither party canvassed this defect in their written submissions, when this was queried with him, Mr Geldenhuys indicated that, if this indeed constitutes a reviewable irregularity vitiating the award, then it is appropriate to remit the matter. Regrettably, since he was on a watching

⁶ *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus and Others* (2017) 38 ILJ 527 (CC) at para 33.

brief only, Mr Jansen did not address the court on this issue. To the extent that the first respondent might have been prejudiced in not addressing the Court on this aspect, I am of the view that that prejudice was of its own making given its conscious decision to brief counsel on a watching brief basis only.

Proceeding in the applicant's absence and failure to allow the applicant to make submissions

[38] In the supplementary founding affidavit, Mr Lotz claims that he was unaware of the set down date of the hearing on 1 December 2022. Given the absence of an answering affidavit, that averment is not disputed by the municipality. I accept that averment. This is the more so considering that the commissioner did not, at the close of the hearing on 24 October 2022, specify a date upon which the hearing would resume. Moreover, the object of the postponement was not for closing argument, but for cross-examination.

[39] The question is whether the commissioner ought to have erred on the side of caution and *mero motu* postponed the hearing given the absence of Mr Bozo and Mr Lotz in order to allow the applicant to finalise its case.

[40] In this regard, there is no evidence in the record that Mr Bozo and Mr Lotz were aware that the hearing was set to resume on 1 December 2022. The record shows only that both the commissioner and the municipality's representative unsuccessfully attempted to contact them.

[41] The first respondent argues that since section 138(1) of the LRA affords great latitude to the commissioner to conduct proceedings quickly, the commissioner cannot be criticised for continuing in their absence. It relies heavily upon what the commissioner says in the record regarding both his attempts and that of the first respondent to contact the applicant's representative and Mr Lotz. However, that does not constitute evidence for the same reasons given above.

[42] Moreover, the first respondent overlooks the fact that Mr Lotz, under oath, explains their absence. That explanation is entirely unchallenged. It is trite that if the respondent's affidavit in answer to the applicant's founding affidavit fails to admit or deny, or confess and avoid, allegations in the applicant's affidavit, the court will, for the purposes of the application, accept the applicant's allegations as correct.⁷

[43] In my view, the commissioner ought to have *mero motu* postponed the hearing in order to ensure that Mr Bozo and Mr Lotz were properly notified when the arbitration would resume. Proceeding in their absence, violated the applicant's right to *audi alterem partem* and thus procedurally unfair.

[44] Regarding the commissioner's failure to allow the applicant the opportunity to make submissions, in *Mutual & Federal Insurance Co Ltd*,⁸ Jali AJ held that the commissioner committed a reviewable irregularity in failing to allow a party the opportunity to present closing argument. That is the case here.

[45] In my view, fairness dictates that the commissioner ought to have, at the very least, adjourned proceedings to afford the applicant an opportunity to make closing submissions. His failure to do so likewise violated the applicant's right to *audi*.

[46] Accordingly, the commissioner's decision to proceed in the absence of the applicant and Mr Lotz, constitutes a gross irregularity as contemplated in section 145(2).

[47] In all the circumstances, the award cannot stand.

Appropriate remedy

[48] Since the proceedings are tainted by gross procedural irregularities, the dispute has not been properly unresolved. Accordingly, the appropriate

⁷ *Moosa v Knox* 1949 (3) SA 327 (N) at 331.

⁸ *Mutual & Federal Insurance Co Ltd v The Commission for Conciliation Mediation & Arbitration & others* [1997] 12 BLLR 1610 (LC) at 1616.

remedy is to remit this matter for hearing *de novo* before a new commissioner.

Costs

[49] Neither the applicant nor the first respondent are to blame for the defects vitiating the award. Accordingly, it is fair that there be no order as to costs.

Order

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

1. The third respondent's arbitration award under case number WCP062221 dated 8 December 2022 is reviewed and set aside;
2. The dispute is remitted to the second respondent for hearing *de novo* before a commissioner other than the third respondent;
3. There is no order as to costs.

PS MacKenzie
Acting Judge of the Labour Court of South Africa

Appearances:

For the applicant: Mr E Geldenhuys of MacGregor Erasmus Attorneys
Inc

For the first respondent: A Jansen (watching brief only)
(Heads of argument prepared by A Montzinger)

Instructed by: S A Hofmeyr & Son Attorneys