

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR374/24

In the matter between:

SELLO STEVENS MOKGWANKGWA

Applicant

and

**COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION**

First Respondent

LINDOKUHLE DLAMINI N.O.

Second Respondent

THOMPSON SECURITY GROUP

Third Respondent

**UBUNTU SERVICES WORKER
CO-OPERATIVE LTD**

Fourth Respondent

Heard: 30 July 2025

Delivered: 14 October 2025

JUDGMENT

SASS, AJ

Introduction

- [1] The applicant seeks to review and set aside, in terms of section 145 and 158(1)(g) of the Labour Relations Act No. 66 of 1995, as amended (the LRA), a Point *in Limine* Ruling dated 19 February 2024 issued by the second respondent (the arbitrator) under the auspices of the first respondent (the

CCMA) under CCMA case reference number GAJB26522-23 (the jurisdictional ruling).

- [2] In the jurisdictional ruling, the arbitrator found that the CCMA has no jurisdiction to hear the matter (an unfair dismissal dispute).
- [3] The third respondent (Thompson Security) and the fourth respondent (Ubuntu Co-operative) filed a notice of opposition in response to the review application but did not file an answering/opposing affidavit.
- [4] Thompson Security and Ubuntu Co-operative also filed a notice in terms of Rule 6(5)(d)(iii) of the Uniform Rules of Court, in which they raise a 'question of law' in relation to the commissioning of the founding affidavit deposed to by the applicant on 25 March 2024 in respect of the review application. I will deal with the question of law as a preliminary issue.

Preliminary issue

- [5] Thompson Security and Ubuntu Co-operative contend that the applicant did not take the prescribed oath in the presence of the Commissioner of Oaths when deposing to the founding affidavit.
- [6] Thompson Security and Ubuntu Co-operative made, *inter alia*, the following two submissions in their Rule 6(5)(d)(iii) notice: (i) Firstly - *It is clear, ex facie the affidavit, that it is unsigned apparently did not received.* (ii) Secondly - *There is no evidence ex facie the affidavit that the oath was taken in the presence of the Commissioner of Oaths.*
- [7] Thompson Security and Ubuntu Co-operative did concede during argument that if the Court was satisfied that a proper affidavit was before it then they would have nothing further to argue before the Court and this matter may then proceed as an unopposed review application.
- [8] The applicant's legal representative confirmed that the applicant had deposed to the founding affidavit before the Commissioner of Oaths and did take the prescribed oath in the presence of the Commissioner of Oaths when deposing to the founding affidavit. The Court was referred to what appeared for all

intents and purposes to be the original signed founding affidavit, which *ex facie* appears to have been deposed to by the applicant in the presence of the Commissioner of Oaths, and which both the applicant and the Commissioner of Oaths signed. It does, however, appear that the Commissioner of Oaths did not initial the page of the affidavit which the applicant signed and that the applicant did not initial the page of the affidavit on which the Commissioner of Oaths signed. Other than that one anomaly, everything else appears to be in order with the founding affidavit and it cannot be said that there has not been substantial compliance with the requirements of the Regulations promulgated in terms of the Justices of the Peace and Commissioners of Oaths Act, No. 16 of 1963.

- [9] In the circumstances, the question of law is not upheld. I now turn to the merits of the review application, which proceeds as an unopposed application.

The proceedings before the CCMA giving rise to the jurisdictional ruling

- [10] The arbitration proceedings in the unfair dismissal dispute between the parties under CCMA case reference number GAJB26522-23 was enrolled for hearing at the CCMA on 7 February 2024.
- [11] Thompson Security and Ubuntu Co-operative raised a jurisdictional point at the commencement of the arbitration, relying on a document signed by the applicant on 23 March 2023 which stated that “*he was not an employee but a member of the cooperative*”, and contending that the CCMA lacks jurisdiction to determine the dispute relating to the alleged unfair dismissal of the applicant as, in accordance with section 6(1) of the Co-operative Act No. 14 of 2005 (the Co-operative Act – 2005), he was not an employee (as defined in section 213 of the LRA) but a member of the Ubuntu Co-operative.
- [12] It was then agreed that the point *in limine* raised would be pursued and concluded in terms of Rule 31(1)(b) of the CCMA Rules and by way of the filing of written submissions. The arbitrator recorded the ‘*Issue in Dispute*’ as follows - *Whether the CCMA lacks jurisdiction to hear a matter involving a member of the cooperative who challenges his/her termination on the basis that it was a dismissal as contemplated in the LRA.*

The jurisdictional ruling

[13] The arbitrator's reasoning is apparent from the following paragraphs in the jurisdictional ruling (paragraphs 5 and 6 thereof):

[5] ***Submissions by the parties***

The Respondent submitted a bundle of documents which contained its argument why the applicant is not their employee. The submission included rulings made by CCMA commissioners on the issue, including Labour Court judgments. The applicant on the other hand, did not make any submissions. This is despite the fact that it was placed on record that he was given five days within which to respond to the point in limine in writing. In this regard, he had until 12 February 2024 to make the submissions. Thereafter, Thompsons Security and Ubuntu Co-Operative were given three days to reply (if the need arises). This meant that the latter had until 15 February 2024. Nothing has been received since the day of the proceedings.

[6] ***Analysis of arguments***

The Respondents' main argument is contested. Invariably, I accept their version that the applicant was a member of Ubuntu Co-Operative. Consequently, in terms of section 6.1 of the Co-Operative Act, he is excluded from the definition of an employee as found in section 213 of the LRA. It therefore follows that the CCMA lacks jurisdiction to hear the allegation of unfair dismissal referred by the Applicant.

[14] For all of these reasons, the arbitrator found that the CCMA has no jurisdiction to hear the matter (i.e., to arbitrate the applicant's unfair dismissal dispute).

The grounds for review

[15] The applicant contends, *inter alia*, that the arbitrator: (i) misconducted himself; (ii) failed to consider all the evidentiary material and thus deprived him of a fair hearing; (iii) issued an irregular award; (iv) arrived at a conclusion that was

unreasonable; and (v) exceeded his powers. Each of these contentions were supported by any number of further submissions in respect of the reviewability of the jurisdictional ruling.

[16] The most salient contention/submission is set out in paragraph 14.2 of the founding affidavit, that the arbitrator misdirected himself as to the law. Most of the other contentions/submissions relate to the arbitrator not being in possession of the applicant's opposing affidavit in respect of the point *in limine* raised. It appears that the applicant did file an opposing affidavit with the CCMA. However, it would also appear that by the time of the deadline for the applicant to file his written submissions opposing the point *in limine* (by 12 February 2024) and at the time of that the jurisdictional ruling was made (by 19 February 2024), the arbitrator was not in possession of the applicant's opposing affidavit and was of the view that the point *in limine* was not being contested. These contentions/submissions would probably more relevant to an application to rescind the jurisdictional ruling in terms of section 144 of the LRA.

[17] In my view, this review application turns on whether the arbitrator determined the question of law correctly or wrongly.

Applicable legal principles

[18] It is trite that the generally accepted view is that this Court has a bifurcated review standard when exercising its review function.¹ Given the bifurcated review standard, it is important to determine the applicable threshold/test in any review application. The threshold/test to be applied depends on the nature of the award or ruling against which review is sought.

[19] The 'reasonableness threshold/test' ordinarily applies where the outcome of the arbitration proceedings is challenged, either in relation to a finding of misconduct or incapacity, or the sanction that the arbitrator considers fair. The 'correctness threshold/test' applies to findings on matters of jurisdiction.

¹ *Jonsson Uniform Solutions (Pty) Ltd v Brown* [2014] ZALAC 79

Jurisdictional issues include territorial jurisdiction, rulings on whether the applicant is an 'employee' as defined, and the existence of a dismissal.

[20] As a result, in a review application relating to a jurisdictional ruling of the CCMA, it is trite that the 'correctness threshold/test' must be applied instead of the 'reasonableness threshold/test' which applies in review applications.²

[21] The Labour Appeal Court (LAC) in the matter of *SA Rugby Players Association and others v SA Rugby (Pty) Ltd and others*,³ held that:

'The CCMA is a creature of statute and is not a court of law. As a general rule, it cannot decide its own jurisdiction. It can only make a ruling for convenience. Whether it has jurisdiction or not in a particular matter is a matter to be decided by the Labour Court ...'

[22] In the case of *Jonsson Uniform Solutions (Pty) Ltd v Brown and others*,⁴ the Court said the following:

'[33] The generally accepted view is that we have a bifurcated review standard viz reasonableness and correctness.' The test for reasonableness of a decision was stated in Sidumo and another v Rustenburg Platinum Mines Ltd and others as follows: "Is the decision reached by the commissioner one that a reasonable decision maker could not reach".

'[34] In assessing whether the CCMA or Bargaining Council had jurisdiction to adjudicate a dispute, the correctness test should be applied. The court of review will analyse an objective fact to determine whether the CCMA or bargaining council had the necessary jurisdiction to entertain the dispute.'

[23] The correctness threshold/test is also applicable to review applications where the review ground relates to an arbitrator committing a gross irregularity or involving any alleged material error of law. The material error of law in *casu* being whether the CCMA lacks jurisdiction to arbitrate the unfair dismissal

² *South African Rugby Players Association (SAPRA) and Others v SA Rugby (Pty) Limited and Others; SA Rugby Pty Limited v South African Rugby Players Union and Another* (2008) 29 ILJ 2218 (LAC) (12 May 2008); *Fidelity Cash Management Service v Commission for Conciliation, Mediation & Arbitration and others* (2008) 29 ILJ 954 (LAC); *Trio Glass t/a The Glass Group v Molapo NO and Others* (2013) 34 ILJ 2662 (LC); *Eskom Holdings SOC Ltd v NUM obo N Coetzee and Others* (C727/16) [2017] ZALCCT 75 (14 November 2017); *Goliath v SA Broadcasting Corporation SOC Ltd and Others* (2023) 44 ILJ 185 (LC).

³ (2008) 29 ILJ 2218 (LAC) at para 40.

⁴ (DA10/2012) [2014] ZALCJHB 32 (13 February 2014) at paras 33 and 34.

dispute as the applicant is excluded from the definition of an employee in terms of section 213 of the LRA if one has regard to and applies section 6(1) of the Co-Operative Act - 2005.

Analysis

- [24] This Court is required to determine if the arbitrator was correct or wrong when he found, courtesy of his jurisdictional ruling, that the CCMA lacks jurisdiction because of the applicability of section 6(1) of the Co-Operative Act - 2005 which, according to Thompson Security and Ubuntu Co-Operative, excluded the applicant from the definition of an 'employee' as defined in section 213 of the LRA.
- [25] Errors of law arise in relation to questions of law. To qualify as a question of law, the issue must constitute neither a question of fact nor the exercise of judicial discretion. An error of law traditionally refers to a wrong or mistaken interpretation of a legislative provision.⁵ More broadly, questions of law are all issues that are determined by authoritative legal principles and include questions which a court is bound to answer in accordance with a particular rule or law, and questions as to what the law is.⁶ Questions of interpretation and construction are clearly questions of law.⁷ The arbitrator's finding that section 6(1) of the Co-operative Act - 2005 applied is a legal conclusion, which is challenged on the ground that it is a material error of law.
- [26] In *MacDonald's Transport Upington (Pty) Ltd v Association of Mineworkers and Construction Union and others*⁸, the Labour Appeal Court (LAC) referred to *Democratic Nursing Organisation of SA on behalf of Du Toit and Another v Western Cape Department of Health and Others*⁹, and held that:

'[21] Since the advent of the Constitution of the Republic of South Africa 1996 (the Constitution), the concept of review is sourced in the justifications provided for in the Constitution and, in particular, that courts are given the

⁵ Hoexter and Penfold at 389.

⁶ *Media Workers Association of SA and others v Press Corporation of SA Ltd* (1992) 13 ILJ 1391 (A); [1992] 2 All SA 453 (A) at 1396F-H.

⁷ *General Life Assurance Co v Moyle* 1919 AD 1 at 9; *Coertzen v Gerard NO and Another* 1997 (2) SA 836 (O) at 845H.

⁸ *MacDonald's Transport supra*.

⁹ [2016] ZALAC 15; (2016) 37 ILJ 1819 (LAC).

power to review every error of law provided that it is material; that is that the error affects the outcome ...

[22] To recap, Navsa AJ said in Sidumo at para 105 that the review powers in terms of s 145 “must be read to ensure that administrative action by the CCMA is lawful, reasonable and procedurally fair”. Given that the section must be interpreted to be in compliance with the Constitution, it would appear that the concept of error of law is relevant to the review of an arbitrator’s decision within the context of the factual matrix as presented in the present dispute; that is a material error of law committed by an arbitrator may, on its own without having to apply the exact formulation set out in Sidumo, justify a review and setting aside of the award depending on the facts as established in the particular case.’

[27] The question of material errors of law committed by an arbitrator was also considered by the Labour Appeal Court (LAC) in *National Bargaining Council for the Road Freight and Logistics Industry v Deyssel NO and Others*¹⁰. The LAC considered the test or the standard to be applied when the subject of the review admitted a single, correct answer and where the enquiry on review is not whether the arbitrator’s ruling was justifiable rational or reasonable, but whether objectively speaking, it was correct.

[28] The LAC held that:

[39] In the constitutional era, the proper basis for a correctness challenge brought in terms of section 145 of the LRA is section 33 of the Constitution of the Republic of South Africa 1996, and in particular, the right to administrative action that is lawful. Section 6 of PAJA establishes a material error of law as a ground for the review of administrative action. Sidumo holds that PAJA does not apply to arbitration awards issued in terms of the LRA – at least in the case of the CCMA and bargaining councils, the permitted grounds for review are those reflected in section 145 of the LRA. But Sidumo also holds that section 145 is to be read subject to section 33 of the Constitution.

¹⁰ Unreported judgment under case no: DA 19/2023, delivered on 7 April 2025 (Deyssel).

*In that instance, the Constitutional Court held that “... section 145 is now suffused by the constitutional standard of reasonableness”. But reasonableness is not a universal standard, nor should it be applied as such. Section 33 (1) treats lawfulness separately from reasonableness.¹¹ In *Duncanmec (Pty) Ltd v Gaylard NO and others*¹² the Constitutional Court held:*

‘Since an award like the one we are concerned with here constitutes administrative action, the Constitution requires it to be procedurally fair, lawful and reasonable. This means that an award that fails to meet these requirements is liable to be set aside on review. These requirements are in addition to the grounds of review listed in s 145 of the LRA. However, to some extent the latter grounds may overlap ...’ (own emphasis)

[40] Reading down section 145 to incorporate a requirement of reasonableness is wholly appropriate in a case such as Sidumo, concerned as it was with the exercise of a value judgment by an arbitrator in relation to fairness as a penalty for misconduct, a judgment that by definition admits a range of responses. Matters such as the present, where the administrative action in issue involves a question of law that can produce a single correct answer, are best understood and assessed when section 145 of the LRA is read as suffused by the constitutional standard of lawfulness. Put another way, just as the constitutional standard of reasonableness was found in Sidumo to have suffused section 145, the constitutional standard of lawfulness does likewise.’¹³

[29] The LAC concluded that:

‘[42] What this approach recognises is that the right to review established by s 145, where the applicant seeks to review an

¹¹ Hoexter and Penfold (supra) at 400.

¹² (2018) 39 ILJ 2633 (CC); [2018] 12 BLLR 1137 (CC) at para 40.

¹³ Myburgh and Bosch *Reviews in the Labour Courts* (LexisNexis 2016) at 244.

arbitration award on the basis of a material error of law committed by an arbitrator, is not limited to circumstances where the alleged error resulted in an unreasonable award.¹⁴ A material error of law is a discrete, substantive ground for review under s 145 of the LRA. It follows that a reviewing court, when faced with what is alleged to be an error in law in relation to the interpretation of an instrument, is empowered to interpret the relevant text itself, rather than assessing whether the arbitrator's decision was reasonable.¹⁵

[43] In short: although a material error of law may previously have been viewed as no more than a side car on the motorcycle of reasonableness,¹⁶ the constitutional right to administrative action that is lawful requires that the grounds for review established by s 145 of the LRA be understood as admitting a material error of law as a discrete, legitimate ground for review.'

[30] The LAC confirmed that a material error of law is a discrete, substantive ground for review under section 145 of the LRA and that a reviewing court, faced with what is alleged to be a material error in law in relation to the interpretation and application of a statute, is empowered to interpret the relevant statute itself rather than assessing whether the arbitrator's decision was reasonable.

Conclusion

¹⁴ At least in relation to an irregularity in the conduct of arbitration proceedings, this Court has, reasonableness aside, previously acknowledged the remaining s 33 requirements as suffusing s 145 of the LRA. In *Arends & others v SA Local Government Bargaining Council & others* (2015) 36 ILJ 1200 (LAC); [2015] 1 BLLR 23 (LAC) at para 19, Murphy AJA found: "*the undertaking of the enquiry in the wrong or in an unfair manner by an arbitrator is an irregularity in the conduct of the proceedings reviewable in terms of s 145 of the LRA as suffused by the constitutional right to administrative action that is lawful and procedurally fair*".

¹⁵ Hoexter 3 ed at 400.

¹⁶ The image is drawn from Alan Hyde "What is Labour Law?" in Davidov and Langille (eds) *Boundaries and Frontiers of Labour Law* (Hart 2006) at p 60, in relation to the relationship between subordinate employment and labour law as a collection of regulatory techniques.

- [31] When making the jurisdictional ruling, the arbitrator clearly relied on section 6(1) of the Co-operative Act 2005 being applicable.
- [32] The Co-Operative Act – 2005 was, however, amended in 2013 by the Co-Operatives Amendment Act No. 6 of 2013 (the Co-Operatives Amendment Act - 2013). The Co-Operative Amendment Act – 2013 became effective on 1 April 2019.
- [33] By February 2024, section 6 [including section 6(1)] of the Co-Operatives Amendment Act – 2005 had been repealed by section 71 of the Co-Operatives Amendment Act – 2013, and replaced with the following:

“[6] ‘Application of Labour Legislation

6(1) An employee of a worker co-operative is any member or non member of a co-operative who satisfies the definition of ‘employee’ as defined in the Labour Relations Act, 1995.

6(2) All worker co-operatives must comply with labour legislation.

6(3) Despite sub-section (1) a co-operative may apply to a bargaining council with jurisdiction over the sector within which the co-operative operates or, where there is no such bargaining council to the Minister of Labour for full or partial exemption from the need to comply with applicable labour legislation in respect of employees of the co-operative.

6(4) The bargaining council or Minister of Labour, as the case may be, may only grant an exemption in terms of sub-section (3) if reasonably satisfied that there are good grounds for doing so.

6(5) The Minister must, in consultation with the Minister of Labour, within six months from the date of commencement of the Co-Operatives Amendment Act, 2013, and thereafter from time to time, make regulations determining what constitutes good grounds for the purposes of sub-section(4).”

- [34] The jurisdictional ruling was based on repealed legislation. In terms of the Co-Operatives Amendment Act - 2013, it is clear that the Co-Operative Act - 2005 was no longer applicable when the jurisdictional ruling was made. The new provisions of the Co-Operatives Amendment Act – 2013 specifically and categorically state that an employee of a Worker Co-Operative is any member

or non-member of a Co-Operative who satisfies the definition of 'employee' as defined in the LRA. It goes on to state that all Worker Co-Operatives must comply with labour legislation.

- [35] The only exception that exists, is when the worker co-operative has applied to a bargaining council with jurisdiction over the sector within which the co-operative operates or, where there is no such bargaining council, to the Minister of Labour for full or partial exemption from the need to comply with applicable labour legislation in respect of employees of the worker co-operative. There is no evidence before this Court that Thompson Security and/or Ubuntu Co-Operative has applied for any such exemption and accordingly, the LRA is applicable in relation to the applicant regardless of whether he is a member of a co-operative or not.

Conclusion

- [36] All of this indicates that the Co-Operative Act – 2005 as not applicable at the time that the jurisdictional ruling was made, that the Co-Operatives Amendment Act – 2013 was applicable, and that accordingly, the CCMA does not lack the jurisdiction to arbitrate the applicant's unfair dismissal dispute because he is not excluded from the definition of an employee in terms of section 213 of the LRA by operation of any legislation. The Co-Operatives Amendment Act - 2013 expressly includes a member of a co-operative within the definition of an employee as defined in the LRA.
- [37] The ground for review in relation to a material error of law succeeds, and in my view, it is dispositive of the entire review application, and it is not necessary to consider the other grounds for review.
- [38] The arbitrator's finding that the CCMA lacks jurisdiction to hear the matter (i.e., arbitrate the unfair dismissal dispute) due to the application of the Co-Operative Act – 2005 is wrong and the jurisdictional ruling stands is to be reviewed and set aside.

Costs

- [39] This court has a broad discretion in terms of section 162 of the LRA to make an order for costs according to the requirements of the law and fairness.
- [40] In relation to exercising this judicial discretion, the Constitutional Court in *Long v South African Breweries (Pty) Ltd and Others*¹⁷ reaffirmed the principle set in *Zungu v Premier of the Province of Kwa-Zulu Natal and Others*¹⁸ with regard to costs in employment disputes and stated that '*when making an adverse costs order in a labour matter, a presiding officer is required to consider the principle of fairness and have due regard to the conduct of the parties.*'
- [41] Taking account of all the relevant facts and circumstances and having regard to the requirements of the law and fairness, I do not consider it appropriate to make a costs order, and I exercise my discretion as to costs accordingly.
- [42] In the circumstances, and in light of the aforementioned authorities and the evidence and submissions that served before me, I make the following order:

Order

1. The jurisdictional ruling is reviewed and set aside.
2. The applicant's unfair dismissal dispute under CCMA case reference number GAJB26522-23 is remitted back to the CCMA for an arbitration *de novo*, before an arbitrator other than the second respondent, in relation to whether the applicant was dismissed by Thompson Security and/or Ubuntu Co-Operative, and if so, whether his dismissal was procedurally and/or substantively unfair.
3. The CCMA is directed to enrol the arbitration proceedings in the unfair dismissal dispute under CCMA case reference number GAJB26522/23 as soon as possible.
4. There is no order as to costs.

¹⁷ (2019) 40 ILJ 965 (CC) at para 30.

¹⁸ (2018) 39 ILJ 523 (CC) at para 25.

Mendel Sass

Acting Judge of the Labour Court of South Africa

Appearances:

For the applicant:

Advocate DH Golele

For the third respondent and

the fourth respondent:

Attorney LW Dixon (of Dixon Attorneys)