



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case No: JR1770/23

In the matter between:

NTEBALELE NYAKA

First Applicant

THABO TLAKA

Second Applicant

TABANG TANGI

Third Applicant

And

S J LOMBARD NO

First Respondent

GENERAL PUBLIC SERVICE SECTORAL

Second Respondent

BARGAINING COUNCIL (GPSSBC)

LIMPOPO DEPARTMENT OF TRANSPORT

Third Respondent

& COMMUNITY SAFETY

Heard: 27 March 2025

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email and publication on the Labour Court's website. The date and time for hand-down is deemed to be on 20 October 2025

JUDGMENT

MAFA-CHALI, AJ

Introduction

- [1] The Applicants seeks to review and set aside an arbitration award issued on 20 July 2023, under case number GPBC1684/2022 wherein the first Respondent (arbitrator) dismissed their unfair labour practice dispute.
- [2] The Third Respondent has opposed the review application but did not file the answering affidavit on time and therefore filed the condonation application in that regard. The Applicants have opposed the Third Respondent's condonation application.
- [3] I will therefore consider the condonation application first before entertaining the merits of the review application, which is also opposed by the Third Respondent.

Condonation Application

Third Respondent's Submissions

- [4] The Third Respondent submitted that it was served with the review application by the Applicants on 11 September 2023.
- [5] The first consultation was done on 24 November 2023, and it was postponed until the Applicants provided the records. On 6 June 2024, after the receipt of records, the second consultation was held, and it was realized that there was other information needed from the offices in the Third Respondent's college. The consultation was postponed again until receipt of the supplementary affidavit.

- [6] The supplementary affidavit was received on 6 June 2024, and the third consultation was held on 21 June 2024. The application is not late by 114 days. The only delay was when the Third Respondent's Counsel sent the affidavit through an email that was not knowing.
- [7] The Applicants' appealed against their dismissal sanction and the dismissal was suspended pending the appeal. The Applicants were then placed with other colleagues as traffic officers while waiting for the appeal to be finalized.
- [8] The Applicants admitted that they committed an offence when they took alcohol on the way to the college and there was no need to ask for the witness.
- [9] The Third Respondent prioritized the matter. The Third Respondent took 5 days to file the affidavit after it was signed, as the person who was to sign the affidavit was at the time not in Polokwane.
- [10] The delay is only 58 days from the date of filling the answering affidavit. Counsel miscalculated the days by mentioning that it is late by 114 days, as she calculated from the first consultation not from the date of the submission of the supplementary affidavit. The delay in the adjudication of the matter was caused by the absence of the records' bundles.
- [11] The answering affidavit was supposed to be filed on or before 2 December 2024, but it was only received from Third Respondent to Counsel on 28 February 2025.
- [12] After consultation on 6 March 2025, Counsel was admitted at the hospital and was discharged on 9 March 2025 and medical certificate was submitted. There is a further seven days' delay in filing the replying affidavit, which cannot prejudice the Applicants. The delay was caused by service through email.

Submissions by Applicants

- [13] The Third Respondent submitted that the consultation meeting took place on 8 October 2023 as the main witnesses were not available. It was asserted that

a follow-up consultation meeting took place on 6 July 2024. This consultation meeting took place eight months and eight days later. If the Third Respondent had prioritized this matter, such a long lapse of time from the first consultation on 28 October 2023 to the second consultation on 6 July 2024 would have been avoided no matter any form of situation that may seem to be out of control as claimed by the Third Respondent.

- [14] The Third Respondent further asserted that on 11 July 2023, an answering affidavit was sent by Counsel for pre-processing but due to the recipient's email, which was out of order, caused lack of delivery of same. It was submitted that a continuous engagement in relation to the answering affidavit among handlers of same would have averted an unnecessary and untenable situation.
- [15] But the update and discussion of whether the answering affidavit was sent and received started only in the beginning of August 2024 only when those involved in the matter accidentally met in court. This can only be described as lack of urgency in the matter which has caused unnecessary delays to get the matter litigated in court on time, although the Third Respondent admitted that it was a cause of delay on their side.
- [16] As an act of collegiality, the Third Respondent never reached out to the Applicants to request an extension of time for filing an already extremely late answering affidavit, hence the Applicants opposed the condonation application. It is also noted that each aspect of the Third Respondent's answering affidavit was delayed for one reason or another which cannot be validly substantiated. The affidavit was commissioned on 15 August 2024 and forwarded to the attorney of records of the Third Respondent on 20 August 2024. A signed affidavit does not have days before it gets filed on notice to parties. A total of six days had lapse in this case to file the answering affidavit. A sense of urgency would have necessitated a quick release of an already late commissioned affidavit.

- [17] The Rules of the Labour Court¹ are explicit that any person wishing to oppose the granting of the order prayed for in the notice motion must within ten days after receipt of the notice of amendment or notice that the Applicants stand by their notice of motion, deliver an affidavit in answer to the allegations made by the Applicant. The submission of the Third Respondent is demonstrative that the Third Respondent does not admit that filing of an answering affidavit was done late.
- [18] It was submitted that 114 days is to the extreme, and the Court cannot be expected to accept such reason which will be a travesty of justice and cannot even be substantiated in every respect. There is absolutely no good cause advanced by the Third Respondent which may warrant any condonation.
- [19] The submission that the situation of the Third Respondent was not uncontrollable, is without any substance, as it was self-created. The witnesses of the Third Respondent are in the control of the Third Respondent at all material times as it is its own employees. It is clear that the Third Respondent did not identify people with knowledge relating to allegations in preparation of consultation, and such consultation can also not be far from each other, as it has happened with the Third Respondent in this case taking eight (8) months.
- [20] It is trite to do due diligence to identify such witnesses for meaningful consultation to avoid futile exercise of consultation which may result in long delay in litigation, but Third Respondent failed dismally to do such due diligence.
- [21] It was also submitted that the process of requesting quotation, approval and appointment of Counsels for State matters even though sometimes it may be a laborious process, but such cannot in whatever situation cause a length delay of 114 days for late filing of the answering affidavit. To claim the situation is due to unforeseen circumstances by Third Respondent has an element of a misleading connotation because the situation was a self-created one, which should not be used to legitimize reasons for condonation.

¹ GN 4775 of May 2024: Rules Regulating the Conduct of the Proceedings of the Labour Court (effective 17 July 2024).

- [22] Since 28 October 2024 when the Third Respondent had a futile exercise for failing to secure main witnesses, it was a threshold of beginning of a destined prejudice against the Applicants to obtain their relief in the main matter, as the Third Respondent was expected to file the answering affidavit in March 2024 but filed it on 30 August 2024. The matter would have long been ventilated in Court and Applicants obtained judgment and without such it is prejudicial to the Applicants.
- [23] Justice unnecessarily delayed as a result of the conduct of the party to litigation undoubtedly causes prejudice to the other litigant of the case. Finality of the case is an important part of litigation without which the party who did not cause the delay suffers prejudice not only on the delay for relief but, also being denied to put the matter to rest on time and more with the challenges of life.
- [24] The Third Respondent suggested that as long as cost order will ameliorate the prejudice already suffered, it reduces this matter to an issue of costs over the imperative and or desire need of finality to rest the matter, and the Applicants will continue to suffer regardless of being awarded costs.
- [25] No articulation of prospects of success has been made in this application. Therefore, the Third Respondent does not have any prospects of success in the matter and has not shown any good cause was warranting condonation of the filing of the answering affidavit. The Third Respondent did not account for prospects of success nor valid reasons for delay. The Labour Appeal Court in the case of *NUM v Council for Mineral Technology*² ruled that without an acceptable and reasonable explanation for the delay, the prospects of success are immaterial and without prospects of success, no matter how good the explanation for the delay, the application must be refused.
- [26] The Courts have endorsed the principle that where there is a delay with no reasonable satisfactory and acceptable explanation for such delay, condonation may be refused without considering prospects of success.

² [1999] 3 BLLR 209 (LAC).

Therefore, the Applicants prayed that condonation application of the Third Respondent be dismissed with costs.

Evaluation

- [27] The requirements that must be satisfied to succeed in an application for condonation are well-known³. An applicant in a condonation application must set out the degree of the delay and show good cause for the delay; further, the applicant must deal with the prospects of success on the merits and prejudice to the Respondent. It is trite that condonation is not for the mere asking. An applicant for condonation seeks an indulgence from the Court and is to show sufficient cause to succeed in the grant of condonation by the Court.
- [28] The answering affidavit was filed extremely late by the Third Respondent. Regardless of whether it was 114 days or 58 days late as it was submitted that the Counsel did not calculate the days of lateness correctly, it is nevertheless late and it required condonation. The Third Respondent has not

³ *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A). In *Grootboom v National Prosecuting Authority and another* (2014) 35 ILJ 121 (CC) at para 50, the Constitutional Court stated that the factors that are to be considered, in the interests of justice, in determining a condonation application include the following:

- '(a) the length of the delay;
- (b) the explanation for, or cause for, the delay;
- (c) the prospects of success for the party seeking condonation;
- (d) the importance of the issue(s) that the matter raises;
- (e) the prejudice to the other party or parties; and
- (f) the effect of the delay on the administration of justice.'

The Constitutional Court went on further to state at para 51 that: *'The interests of justice must be determined with reference to all relevant factors. However, some of the factors may justifiably be left out of consideration in certain circumstances. For example, where the delay is unacceptably excessive and there is no explanation for the delay, there may be no need to consider the prospects of success. If the period of delay is short and there is an unsatisfactory explanation but there are reasonable prospects of success, condonation should be granted. However, despite the presence of reasonable prospects of success, condonation may be refused where the delay is excessive, the explanation is non-existent and granting condonation would prejudice the other party. As a general proposition the various factors are not individually decisive but should all be taken into account to arrive at a conclusion as to what is in the interests of justice.'*

at any stage requested the Applicant an indulgence to file the answering affidavit late.

- [29] In *Allround Tooling (Pty) Ltd v NUMSA and others*⁴, the Labour Appeal Court (LAC) restated the well-established principle that a condonation application must be filed without delay and/or as soon as an applicant becomes aware of the need to do so. This did not occur in the present case.
- [30] The reasons advanced by the Third Respondent for failure to file the answering affidavit clearly demonstrated that the Third Respondent did not take the matter seriously and did not prioritize it as correctly argued by the Applicants. From 11 July 2023 to August 2024, when the Third Respondent's representative coincidentally met with the Counsel at Court, it was only realized that the answering affidavit had been sent to the wrong email address. This is one year later after the Third Respondent had already delayed the filing of the answering affidavit with postponed consultations.
- [31] The manner and the time taken to do the consultation to draft the answering affidavit are also indicative that the Third Respondent did not deal with the matter with the urgency it deserved. The first consultation was on 28 October 2023. The second consultation was on 6 June 2024, eight months later. The third consultation was on 21 June 2024. This is another two weeks later. But even after the records were received from the Applicants, the Third Respondent still delayed to consult for the filing of the answering affidavit. The answering affidavit was only filed by the Third Respondent on 30 August 2024, when the records were filed on 27 May 2024 and this was after the Applicants have requested the Court to set down the matter. The delay and every period of the delay remain unexplained.
- [32] The issue of arranging witnesses is a very lame excuse by the Third Respondent as it cannot clearly take such a long period to identify and arrange a consultation with appropriate witnesses in a matter that is already under litigation with timeframes set by the Court to file the answering affidavit. The Applicants are correct that the situation was not an unforeseeable one

⁴ [1998] 8 BLLR 847 (LAC) at para 8.

but a self-created one. There are no valid reasons advanced by the Third Respondent to file the answering affidavit so extremely late.

[33] Review applications are urgent applications. The delay in filing the answering affidavit is excessive taking into consideration all the unjustified reasons advanced for the delay by the Third Respondent. The Third Respondent was very well aware all the time that it was required to launch an application for condonation. In *Toyota SA Motors (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration*⁵, the Constitutional Court stated that one of the purposes of the LRA is expeditious dispute resolution and this must be borne in mind when considering the reasonableness of delay in a condonation application.

[34] The Third Respondent has failed dismally in its founding affidavit in the condonation application to make out a case for condonation and to show good cause for the delay. The reasons for the delay are unsound and amount to no reasons. It is now accepted that in the absence of any reasons for the delay, the prospects of success are immaterial.

[35] The prejudice to the Applicants is obvious. Following their dismissals for allegations of misconduct relating to drinking alcohol in a taxi whilst on the way to the traffic training college in October 2019, the Applicants who were learner traffic officers at the time lodged their appeals immediately thereafter. The Third Respondent issued a demotion sanction for the Applicants on 16 September 2022, almost three years later after the receipt of the appeals. It is now six years down the line and the Third Respondent has been tardy in the manner in which it has proceeded with this review application.

[36] In view of the afore-going, condonation application for the late filing of the answering affidavit is dismissed.

[37] The review application shall be entertained on an unopposed basis.

Review application

⁵ (2016) 37 ILJ 313 (CC).

- [38] The Applicants were appointed in the positions of Learner Traffic Officers at the Limpopo Traffic College at Mutale, Vhembe District, Limpopo for a period of 12 months from 7 January 2018. Their learner contracts were extended for a further eight months in 2019. They were charged for misconduct of consumption of alcohol while on duty travelling to Limpopo Provincial Training College in Venda on 20 May 2019. The charge is in relation to contravention of the Road Traffic Standing Order as per clause 8.3.3.7.3 in terms of the provisions of the Public Service Regulation 16 as well as the provisions of the PSCBC Resolution 1 of 2003.
- [39] The Applicants' disciplinary hearings were conducted in July and August 2019 and the Applicants were subsequently dismissed. They appealed against the dismissal sanction in October 2019, and the dismissal sanction was reduced to a sanction of demotion on 16 September 2022 effective 01 December 2022, which demotion the Applicants referred to the GPSSBC for unfair labour practice in terms of section 186 (1) (a) of the Labour Relations⁶ (the LRA). In terms of the Disciplinary Code and Procedure of 01 of 2003, the appeal must be finalised within a period of 30 days from the date of the lodging of the appeal. It took the Third Respondent almost three years to finalise the appeal.
- [40] On 1 December 2019, the Third Respondent issued Applicants with offers of permanent contracts in the positions of Provincial Inspectors, and the Applicants accepted the offers. The Applicants continued to work and rendered services to the Third Respondent for a period of two years and ten months until they were demoted on 01 December 2022. The Applicant's demotion referral was heard by the arbitrator under the auspices of the Second Respondent, and an arbitration award was issued on 20 July 2023, dismissing the Applicants' dispute of unfair labour practice.
- [41] It is this award that is the subject of review. The Applicants submitted that the arbitrator was mute or never applied his mind to the material facts on whether the Third Respondent's decision to demote the Applicants was arrived at with fair process given the period of time which lapsed while the Applicants had already been settled into the position of Provincial Inspector.

⁶ Act 66 of 1995, as amended.

Grounds for review

- [42] It was further submitted that due to the effluxion of time of nearly three years, the Third Respondent had abandoned its desire to exercise the process of deciding on the appeal as the Third Respondent continued to benefit the labour of service from the Applicants, in the positions of Provincial Inspectors, and the arbitrator ignored that.
- [43] The Applicant also argued that the arbitrator never applied his mind to the material facts and committed gross irregularity in determining whether the Third Respondent was fair in demoting the Applicants under the circumstances for which such decision was made. The arbitrator ignored the provisions of the Disciplinary Code and Procedure 01 of 2003, and in particular clause 8.7 which provides that the employer shall immediately implement the decision of appeal authority where the appeal authority decides to reduce the sanction. These provisions were presented to the arbitrator at the arbitration hearing to highlight the importance of facts, but the arbitrator ignored them.
- [44] The arbitrator ignored the Applicants' evidence that on 21 May 2019, the Applicants were called to the office of the college manager at the Provincial Training College in Venda and informed that they were reported to be drunk on duty on the way to the college which they denied, but they were forced to make second statements to admit that they were drunk contrary to the first statements because they were influenced and were told that nothing will happen.
- [45] The Applicants submitted that a reasonable arbitrator could have realized that they were just interns who could have succumbed to the authorities through undue influence to have their way as the authorities were in control of the situation. Instead, the arbitrator had the wrong expectation to find that the Applicants failed to call the person who informed the Third Respondent that they consumed alcohol, when the duty was on the Third Respondent to call the person as a witness as its informer. The arbitrator believed this person was a key witness for the applicants which may never have been. This led to

the arbitrator finding that the Third Respondent's evidence was more probable, and on that basis the arbitrator committed a gross irregularity and/or misdirected himself in view of the facts presented to him at the arbitration proceedings, and the review application must be granted.

The test on review

[46] The legal framework for review of arbitration awards is sourced from s 145(2) of the LRA. The test for review has been set out in various authorities. As a general principle, the applicant in a review application must make out his or her case in the founding affidavit, as may be supplemented in the supplementary affidavit, if necessary, after the transcribed record becomes available.

[47] The role of the reviewing Court is limited to deciding issues that are raised in the applicant's founding (and supplementary) affidavit. This was confirmed by the Constitutional Court in *Commercial Workers Union of SA v Tao Ying Metal Industries and Others*⁷ (*Tao Ying*) where it was held that:

'...the role of the reviewing court is limited to deciding issues that are raised in the review proceedings. It may not on its own raise issues which were not raised by the party who seeks to review an arbitral award. There is much to be said for the submission by the workers that it is not for the reviewing court to tell a litigant what it should complain about. In particular, the LRA specifies the grounds upon which arbitral awards may be reviewed. A party who seeks to review an arbitral award is bound by the grounds contained in the review application. A litigant may not on appeal raise a new ground of review. To permit a party to do so may very well undermine the objective of the LRA to have labour disputes resolved as speedily as possible.'

[48] In *Gold Fields Mining South Africa v CCMA and Others*⁸, the Labour Appeal Court held that:

⁷ (2008) 29 ILJ 2461 (CC) at para 67.

⁸ [2013] ZALAC 28 at para 16.

‘a reviewing court must ascertain whether the arbitrator considered the principal issue before him/her; evaluated the facts presented at the hearing and came to a conclusion that is reasonable’.

[49] The Labour Appeal Court (LAC) in *Fidelity Cash Management Services v CCMA and Others*⁹ (Fidelity Cash) held that:

‘... there can be no doubt now that under *Sidumo* that the reasonableness or otherwise of a commissioners’ decision does not depend - at least not solely - upon the reasons that the commissioner gives for the decision. In many cases the reasons which the commissioner gives for his decision, finding or award will play a role in the subsequent assessment of whether or not such decision or finding is one that a reasonable decision-maker could or could not reach. However, other reasons upon which the commissioner did not rely to support his or her decision or finding but which can render the decision reasonable or unreasonable can be taken into account. This would clearly be the case where the commissioner gives reasons A, B and C in his award but, when one looks at the evidence and other material that was legitimately before him or her, one finds that there were reasons D, E. and F upon which he did not rely but could have relied which are enough to sustain that decision.’

[50] The LAC in *Fidelity Cash* concluded that:

‘Whether or not an arbitration award or decision or finding of a CCMA commissioner is reasonable must be determined objectively with due regard to all the evidence that was before the commissioner and what the issues were that were before him or her. There is no reason why an arbitration award or finding or decision that, viewed objectively, is reasonable should be held to be unreasonable and set aside simply because the commissioner failed to identify good reasons that existed which could demonstrate the reasonableness of that decision or finding or arbitration award.’¹⁰

[51] It is critical that the factual foundation of the review application, including the relevant evidence or reference thereto, be canvassed in the founding or supplementary affidavit and that it be linked to the applicant’s grounds for review. *In casu*, the grounds for review as set out in the Applicant’s founding

⁹ (2008) 29 ILJ 964 (LAC) at para 102.

¹⁰ Ibid at para 103.

affidavit are that the arbitrator failed to apply his mind to the facts and argument presented and that he did not consider relevant material facts, his reasoning in terms of the factual, legal findings and his assessment of the facts are inexplicable and as such he had reached a decision that a reasonable decision maker could not have reached and that he committed a reviewable gross irregularity.

- [52] This matter concerns a referral of an alleged unfair labour practice relating to the applicant's demotion. Section 186(2)(a) of the LRA states:

'Unfair labour practice means any unfair act or omission that arises between an employer and an employee involving –

'unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits.'

- [53] The Applicants were charged and dismissed for alleged acts of misconduct for drinking on duty whilst on the way to the Traffic Training College. The Applicants lodged appeals against their dismissal and their dismissals were suspended pending their appeals. The appeal outcome reversed the dismissal and imposed the sanction of demotion. It is this demotion that is being contested. There is no dispute that the demotion took place. Rather, there is a dispute over whether the demotion was fair. Demotion in this case was unilaterally imposed as an alternative sanction to a dismissal.

- [54] It is clear from the evidence of the Applicants before the arbitrator, who had the onus to prove their claim during the arbitration proceedings, that they denied the commission of the offence and testified that they were called to the office of the Manager Nthakeni and informed that their colleague Manganyi was drunk when they arrived at the College, and implicated them by reporting that they were also drinking with him on the way to the training college.

- [55] The Applicants furthermore testified that Nthakeni instructed them to write the statements that they took a sip of alcohol with Manganyi and must apologize

for the misconduct committed. The evidence of the Applicants corroborated each other in the most material respects in that regard.

[56] The Third Respondent also led evidence through Nthakeni who testified that he received a report that the Applicants arrived drunk at the college and their statements were brought to him by his colleague Tshabuse, and the Applicants came to his office to offer their apologies for the misconduct and he was never involved with taking statements; and then escalated the matter to labour relations based on the contents of the Applicants' statements. Another witness of the Respondent, Mugagadeli also testified confirming the evidence that Manganyi arrived seriously intoxicated at the college and the following morning he apologized for his drunkenness and reported that he was drinking with the Applicants on the way to the college; and the Applicants subsequently made the statements in Nthakeni's office being told to admit that they drank alcohol on the way to the college. Tshabuse also testified that the Applicants were brought to her at her office by Mugagadeli on 21 May 2019 and deposed the statements which she handed over to Nthakeni.

[57] Based on the above evidence of the parties, the arbitrator was required to determine the fairness of the demotion sanction imposed by the Third Respondent following the appeal by the Applicants on their dismissal. The arbitrator was not required to determine the parties' evidence of whether the Applicant's dismissal was fair or not. That was not the dispute before the arbitrator.

[58] The arbitrator in his reasoning in the arbitration award, specifically paragraphs 49 to 55, analysed the version of the parties on whether the Applicant committed the offence or not. The Commissioner further dealt with the credibility and probabilities of the parties' versions, on whether or not the Applicants drank alcohol on 20 May 2019, and the evidence relating to the Applicants statements. In paragraph 53, the arbitrator said that it was clear from the testimonies that alcohol was indeed present and consumed in the taxi which led to the college on 20 May 2019. The arbitrator further held that the applicants made no effort to possibly secure the testimony of Manganyi at

arbitration which may have offered some justification for possibly concluding that Manyani may have provided a false report.

[59] It becomes inconceivable how the arbitrator arrived at this finding that there was alcohol consumed by the Applicants and it in the taxi as Manganyi, the informer was not called as a witness during the proceedings by either the applicants or the Third Respondent. Indeed, as correctly argued by the Third Respondent this version remained hearsay evidence in terms of the law of evidence¹¹, as no justification was given by the Third Respondent why Manganyi was not called as a witness, and the Third Respondent bore the evidentiary burden to prove the Applicants were drunk, not the Applicants; the Respondent's witnesses never led evidence that the Applicants were drunk and to what extent or level. Their testimonies were purely based on what they were informed by Manganyi.

[60] The arbitrator furthermore in paragraph 57 of the award stated the following:

'The content of paragraph 14(o) of the Public Service Regulations as considered remains uncontested and clearly prohibits the consumption of any alcohol whilst on duty. I have also taken note of the initial dismissal sanctions issued against the applicants issued against the applicants which seem to have been overturned and replaced with demotion sanctions under discussion.'

[61] In paragraphs 58 to 60 of the arbitration award, the arbitrator stated:

'[58] I am effectively required to determine on a balance of probabilities considered, whether or not the applicants consumed alcohol whilst on duty on 20 May 2021. The probabilities considered and specifically the manner in which the applicants deposed to their handwritten statements only to thereafter reject the contents thereof in *toto*, is considered in light of the proven fact that the applicants never previously complained of, nor reported the alleged threats made by very Senior Officials to change their statements.

¹¹ Section 3 of Law of Evidence Amendment Act 45 1998.

[59] I have considered the totality of the evidence presented and conclude that the applicants most probably consumed alcohol on their way to the college. Their initial reports made in the form of written statements are in line with the testimonies presented by the respondent's witnesses and I am furthermore satisfied that the misconduct committed is very serious on nature.

[60] The applicants ultimately failed to shift the required onus in establishing upon a balance of probabilities considered, that their written statements were indeed brought by the otherwise inadequately proven allegations relating to being forced to do so or in further contradiction, that they changed their statements after Nthakeni offered the alleged assurance that nothing would happen after admitting to drinking alcohol in the taxi.'

[62] The arbitrator finally concluded in paragraphs 61 and 62 of the arbitration award as follows:

[61] 'The aforesaid findings justified a conclusion that the sanctions of demotion were indeed appropriate in the light of the serious misconduct committed and that the respondent did not commit an act of constituting an unfair labour practice by demoting the applicants to their current posts.

[62] The applicants' unfair labour practice dispute is dismissed'.

[63] The Courts have clarified the test for review to be based on whether the decision reached by the commissioner is one that a reasonable decision-maker could not reach. In applying this test, a reviewing Court will not interfere with an award easily, but will consider whether the commissioner considered the principal issue before him/her, whether or not he/she evaluated the facts presented at the hearing and came to a reasonable conclusion.

[64] The Supreme Court of Appeal (SCA) in *Herholdt v Nedbank Ltd and Another*¹² (*Herholdt*) concluded as follows:

¹² [2013 (6) SA 224 (SCA) at para 25.

'In summary, the position regarding the review of CCMA awards is this: A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in s 145 (2) (a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2) (a) (ii), the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to the particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of consequence if their effect is to render the outcome unreasonable.'

[65] In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*¹³, the Constitutional Court held that :

"Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?"

[66] The Constitutional Court in *Minister of Health and Another v New Clicks South Africa(Pty) Ltd and Others (Treatment Action Campaign and Another as amici curiae)*¹⁴ held as follows:

"A consideration of the factors that a decision-maker is bound to take into account is essential to a reasonable decision. If a decision-maker fails to take into account a factor that he or she is bound to take into consideration, the resulting decision can hardly be said to be that of a reasonable decision-maker."

[67] It follows, that where a commissioner fails to have regard to material facts, the arbitration proceedings cannot, in principle, be said to be fair because the commissioner fails to perform his or her mandate. In so doing, the commissioner's action prevents the aggrieved party from having its case fully and fairly determined. This constitutes a gross irregularity in the conduct of the arbitration proceedings, as contemplated in section 145(2)(a)(ii) of the LRA, and the ensuing award falls to be set aside not because the result is

¹³ [2007] 12 BLLR 1097 (CC).

¹⁴ 2006 (2) SA 311 (CC) at para 511.

wrong but because the commissioner has committed a gross irregularity in the conduct of the arbitration proceedings and this in itself serves as a basis to set aside the award on review, provided only that the applicant establishes that the result of the award may have been different if the commissioner had considered the material facts which were ignored, referring to 'the test for prejudice'; and, thirdly, a gross irregularity or act of dialectical unreasonableness may well culminate in the result of the award being substantively unreasonable, as per the *Sidumo* test. But an applicant who brings a review based on a gross irregularity or act of dialectical unreasonableness need not go this far in order to succeed.

- [68] In *casu*, it is my view that the arbitrator misconceived the nature of the enquiry he had to determine. The arbitrator clearly analyzed the evidence of the parties and made findings on the probabilities and credibility of their evidence on whether or not the Applicant committed the offence of drinking alcohol on their way to the college. The arbitrator went to a great extent on assessing the evidence of whether or not the Applicants made the statements admitting that they were with their colleague Manganyi and also drank with him, in the taxi. The arbitrator concluded that the Applicants committed the misconduct and it was serious in nature. The approach the arbitrator followed is the one to be used when determining the fairness of a dismissal in terms of section 191 of the LRA, and therefore departed from the real nature of the dispute which is the unfair labour practice challenging the fairness of the demotion sanction. There were facts which were common cause issued as recorded by the arbitrator in the background of the award that the appeal outcome took almost three years to be issued, and that at the time the Applicants were already promoted to Principal Inspectors some nine months after the alleged incident had taken place, which evidence the arbitrator ignored and did not deal with at all. The appeal was lodged in October 2019 against the sanction of dismissal, and the Third Respondent issued the appeal outcome on 16 September 2022, almost three years later. A reasonable arbitrator would have applied his mind to the above facts and considered the principles of fairness in arriving at his decision.

- [69] It was important for the arbitrator to have considered such an excessive delay in issuing an appeal outcome of demotion when the Applicants were already promoted to traffic officers (Principal Inspectors) on 1 December 2019 when the appeal outcomes were still pending. The Respondent has not tendered any evidence on justification for this excessive period.
- [70] During the disciplinary hearing the Chairperson was seized with the determination of whether or not the Applicants committed the offence as charged and if found guilty to recommend or impose the appropriate sanction, which was a dismissal. In this matter the challenge by the Applicants is the fairness of the demotion sanction imposed by the Third Respondent on appeal after their promotion, as I indicated above, this fact was a common cause issue between the parties. The evidence presented by the parties before the arbitrator on the commission of the offence, was merely to assist him in the determination of the demotion dispute but it was not a central issue for his determination to determine whether or not the sanction was commensurate to the offences the Applicants were dismissed for initially.
- [71] Nevertheless, from the evidence presented by the parties, it is clear that the Respondent relied largely on the information given by Manganyi to charge the Applicants without any tangible evidence that the Applicants also drank with Manganyi on their way to the training college, and another hearsay evidence presented by Nthakeni, who was not on duty on the date of the incident but obtained information from the facilitators Mabasa and Tshubase, who also rendered hearsay evidence based on information they testified was obtained from Manganyi; yet the arbitrator accepted this piece of evidence by the Third Respondent and adverse findings against the Applicants. The evidence of Mabasa, who was also called as a witness for the Third Respondent was clear that the Applicants did nothing wrong. His testimony was also clearly reliant on what Manganyi told him. Manganyi's absence in the proceedings could not be blamed on the Applicants but on the Third Respondent as he was the Third Respondent's main source of information. The arbitrator's reasoning in accepting the versions of the Third Respondent regarding the Applicants being drunk is also very much flawed as he did not consider the

contradiction by the Third Respondent's witnesses on the issue of how statements were obtained from the Applicants. It seems the arbitrator was not alive to these facts and clearly ignored the principles of the law of evidence.

[72] The arbitrator made reference of the provisions of paragraph 14(o) of the Public Service Regulations that it supports the uncontested version by the Third Respondent's prohibiting the consumption of alcohol whilst on duty. However, the Third Respondent's witnesses have not led any evidence on the provisions of the said regulation but the arbitrator without any supporting evidence made findings in that regard. This is a gross irregularity on the part of the arbitrator resulting in an unreasonable decision that a reasonable commissioner could not have arrived at given the material evidence that was placed before him.

[73] That test involves the reviewing court examining the merits of the case determining whether, in light of the issues raised by the dispute under arbitration, the outcome reached by the arbitrator was not one that could reasonably be reached on the evidence and other material properly before the arbitrator. The reasons are still considered in order to see how the arbitrator reached the result. That assists the court to determine whether that result can reasonably be reached by that route. If not, however, the court must still consider whether apart from those reasons, the result is one that a reasonable decision maker could reach in light of the issues and the evidence. Misconceiving the whole enquiry leads to an irregularity on the part of the arbitrator.

[74] In *Assmang Limited v CCMA and Others*¹⁵, the Court, per Voji AJ held that as the commissioner misconceived the nature of the enquiry and his duties in the proceeding before him, the outcome of the decision was one that no reasonable decision maker could have reached.

[75] In *Palabora Copper (Pty) Ltd v Motlokwa Transport and Construction (Pty) Ltd*¹⁶, the SCA held that:

¹⁵ [2015] 6 BLLR 589 (LC).

¹⁶ 2018 (5) SA 462 (SCA) at para 8.

[8] ... It suffices to say that where an arbitrator for some reason misconceives the nature of the inquiry in the arbitration proceedings with the result that a party is denied a fair hearing or a fair trial of the issues, that constitutes a gross irregularity. The party alleging the gross irregularity must establish it. Where an arbitrator engages in the correct enquiry, but errs either on the facts or the law, that is not an irregularity and is not a basis for setting aside an award.'

- [76] Where an arbitrator fails to have regard to the material facts it is likely that he or she will fail to arrive at a reasonable decision. It is clear that the arbitrator did not understand the nature of the dispute he was required to arbitrate and his decision is not one that another decision-maker could reasonably have arrived at based on the evidence.
- [77] It therefore follows that in approaching the dispute as if it was an unfair dismissal, the arbitrator committed a gross irregularity in the conduct of the proceedings. The conclusion he arrived at was influenced by his wrong categorization of the dispute, this led to the arbitrator's award being one that could not be made by a reasonable decision-maker. The award is therefore reviewable.
- [78] This matter has taken a number of years and in the interests of justice, fairness and expeditious dispute resolution, the matter shall not be remitted back to the Second Respondent for rehearing. The record of the proceedings was placed before the Court to finalise the dispute and the Court is in as good a position to make an appropriate order on the merits of the review application.

Costs

- [79] The last issue to be decided is the issue of costs. This Court has a wide discretion in respect of costs, considering the requirements of law and fairness. In *Zungu v Premier of the Province of KwaZulu-Natal and Others*¹⁷, the Constitutional Court confirmed that the rule that costs follow the result does not apply in labour matters. The Court should seek to strike a fair

¹⁷ (2018) 39 ILJ 523 (CC) at para 24.

balance between unduly discouraging parties from approaching the Labour Court to have their disputes dealt with and, on the other hand, allowing those parties to bring to this Court cases that should not have been brought to Court in the first place.

[80] In considering the law and fairness, bearing in mind the provisions of section 162(1) of the LRA, and consideration of the requirements of the law and fairness no costs order will be made herein.

[81] In the premises, the following order is made:

Order

1. The Third Respondent's condonation for late filing of the replying affidavit is dismissed.
2. The arbitration award is reviewed and set aside.
3. The arbitrator's award is substituted with an order that the Applicants' demotion is unfair, and the Applicants must be reinstated in the promoted positions of Principal Inspectors with immediate effect without loss of benefits.
4. No order as to costs.

G. Mafa-Chali

Acting Judge of the Labour Court of South Africa

LABOUR COURT

Appearances:

For the Applicant : Advocate M Mulovhedzi

Instructed by : Walter Thobejane Attorneys

For the Third Respondent : Advocate E A Thete

Instructed by : State Attorneys

LABOUR COURT