



- (1) Reportable: NO
 (2) Of interest to other Judges: Yes/No
 (3) Revised

Signature

Date

04/02/26

IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Case no: C434/2023

In the matter between:

THE SOUTH AFRICAN POLICE SERVICE

Applicant

and

**THE SAFETY AND SECURITY SECTORAL
BARGAINING COUNCIL**

First Respondent

PAUL BOTH, N.O.

Second Respondent

SOLIDARITY obo ERNST VAN SCHALKWYK

Third Respondent

Heard: 30 October 2025

Delivered: 4 February 2026

Summary: Review and condonation application, Applicant not shortlisting the Third Respondent allege the same tantamount to an unfair labour practice. Applicant's stance being failure to shortlist was because of Third Respondent's failure to comply with policies: **National Instruction 3 of 2015 and the Safety and Security Sectoral Bargaining Council Agreement 3 of 2011**, Labour Relations Act and South African Police Act. The common cause the applicants were allowed to make type – written applications, Applicant used the wrong year/phase indication on the application, although the correct post number was used; portion regarding re-enlistment; the Applicant put in code of his driver's licence next to the word yes; next to the driver's licence question. Applicant had never left employment nor re-enlisted. Thus, Applicant

was not shortlisted as a result of these errors. R280 000.00 quantum granted, application of reduction, if this court finds that indeed Applicant committed an unfair labour practice.

JUDGMENT

GURA AJ

Introduction

- [1] This is an opposed review application. The Applicant seeks to review the Commissioner's award under case number SSS341-22/23 dated 17 May 2023 in terms of section 145 of the Labour Relations Act¹ (LRA). The same was delivered by the Second Respondent (The Commissioner) under the auspices of the First Respondent namely the Safety and Security Sectoral Bargaining Council (the Bargaining Council). The applicant's point of departure, commences with an application for condonation of the late filing of the supplementary affidavit. The application is opposed by the Third Respondent, Solidarity Labour Union acts on behalf of Mr Ernest van Schalkwyk.
- [2] The contention by the Third Respondent is that the award by the Commissioner is not at all unreasonable as it is clear that the Commissioner properly applied his mind to the evidence and came to a correct conclusion, that the Third Respondent was subjected to an unfair labour practice in relation to promotion. The Third Respondent denies any unfairness in this regard.
- [3] The Third Respondent is employed by the Applicant as a Lt Colonel, with a gross salary of R45 152,37 per month, and was appointed on 27 December 1985. The Third Respondent claims an unfair labour practice in respect of the fact that he was not shortlisted for the position of Colonel in post number 418 Flash Commander Phase 2021 in the Western Cape.

¹ Act 66 of 1995, as amended.

[4] The Third Respondent was still in agreement that the portion in the award that was noted under common cause were not contested in the review application and that the same is incorporated in this review application, with the Third Respondent's emphasis.

4.1. The Applicants for the position were allowed to make word-processed (type written) applications.

4.2. The Applicant used the wrong year/phase indication on the application, although the correct post number was indicated.

4.3. The Applicant did not complete the portion on the application regarding re-enlistment, and added the code of his driver's licence next to the word "yes", in response to the question as to whether he had a license.

4.4. The Applicant had never left employment nor re-enlisted.

4.5. The Applicant was not shortlisted for interviews as a result of these errors on his application form.

[5] The argument by the Applicants in not shortlisting the Third Respondent was placed on record as an act of compliance with:

5.1. The instructions which are in the very first page of the application form at the issue. The same which was argued by the Applicant was written: *"READ SSSBC AGREEMENT 3 OF 2011 and National Instruction Of 2015..."*

5.2. The instructions genetically flow from the policy; and

5.3. The policy genetically flows from the South African Police Service Act² (SAPS Act) and the Labour Relations Act (LRA);³

5.4. The policy in question is the National Instruction 3 of 2015 handed into court and marked Exhibit E and the Safety and Security Sectoral

² Section 48 of the South African Police Service Act, No 68 of 1995.

³ Section 23 and 30 of the Labour Relations Act, No 66 of 1995.

Bargaining Council Agreement 3 of 2011 (Agreement Number 3 of 2011)⁴, handed into Court and marked Exhibit D.

Condonation application for late filing of the Supplementary Affidavit by the Applicant

[6] The Applicant brought the evidenced form from paragraph 14 to 22 of its Heads of Argument, served on the Third Respondent on 24 October 2025 and 27 October 2025, the morning of the Set Down herein. That the Court grant leave to the Applicant to withdraw its Rule 7 A(8)(b) notice (the precursor of Rule 37(20)(b) so that the Applicant will have its Rule 37(20)(b). The Supplementary Affidavit late filing condoned, and thereafter the review application was framed on the hallmark of the Supplementary Affidavit.

[7] The Applicant placed on record the case of *Nadaseen v Laragh Courseware (Pty) Ltd*⁵. In that the Court relied on *Steenkamp and Others v Edcon Ltd*, the Constitutional Court case, to say:

'The standard of considering an application for condonation is the interests of justice.'⁶

[8] The Constitutional Court in delineating what the interests of justice are, held that the meaning of 'interests of justice' includes the nature of relief sought; the extent and cause of delay; the effect of the delay on administration of justice and other litigants; the reasonableness of explanation for the delay; the importance of the issue to be raised in the intended appeal (in the intended supplementary affidavit for this case's context) and the prospects of success⁷.

[9] The Applicant placed on record the legal principles following from *Academic and Professional Staff Association v Pretorius NO and Others*⁸, the Honourable Court relied in the matter of *Robin*⁹ that the Applicant must explain:

⁴ Page 2 at para 4 of the Applicant's heads of argument.

⁵ [2025] ZALCCT 57 at para 7.

⁶ Ibid.

⁷ [2019] ZACC 17 at para 36.

⁸ [2007] ZALCJHB 4.

⁹ *Supra*, note 1 at para 9.

- 9.1. The degree of lateness or non-compliance with the prescribed time frame; the Applicant argued that it sufficed to place on record that, when the Rule 37(20)(a) Supplementary Founding Affidavit became due, the Applicant *bona fide* delivered a Rule 37(20)(b). The Applicant thus argued that in the light of re-characterizing and correctly bringing the grounds of review to their proper context and adding more relevant grounds, the Applicant relied on the principle that former Justice Sisi Khampempe held in the case of *University of Johannesburg v Auckland Park Theological Seminary and Another* [2021]ZACC 13-that “I make bold to say it is not just for the sake of poetry that the old adage, context is everything, holds true. In so many scenarios, words alone ring hollow. Context gives life and meaning to what is said or written ...”. Thus argued that in the event of this court granting leave to file Supplementary Affidavit, the review application will be cured; brought to its proper context and correctly re- characterized all for the fount of justice to remain untainted.
- 9.2. The explanation of or failure to comply with time frames; this court interprets the Applicant's argument above as synonymous with the explanation of lateness, the degree of lateness, or non-compliance with the prescribed time frame.
- 9.3. The prospects of success or *bona fide* defence in the main case; the Applicant argued that the interests of justice demand that this case, whether won or lost, must be factually and legally well-reasoned and well explained to the losing party. Further that in the Commissioner's Arbitration Award, the same has not happened. That the Commissioner's decision is one which no reasonable Commissioner, in his reasonable sense, could have arrived at. Thus, vital to prune the evidence that the Court should focus on and the same raises the prospects of success, and/or at least setting a precedent that adds guidance to the jurisprudence of this Honourable Court.
- 9.4. The importance of the case; the Applicant argued that the importance of the case is crucial as it will bring clarity and or certainty, or will rule out

between following the law, the policy, the regulations and subjecting employees to unfair labour practice. In other words, whether the employer can be accused of having practiced unfair labour practice when the employer's Human Resource Management's prescriptions are or were an incident of legislative uniformity, policy adherence and/or regulation uniformity and compliance with the law. Argued that this case is *sui generis* as the Commissioner failed to deal with the evidence pertaining to this dispositive aspect of the matter hence the matter remains unresolved.

9.5. Avoidance of unnecessary delay in the administration of justice that if the Court were to refuse to grant the condonation, the administration of justice would be delayed because the Court would still preside over a matter whose grounds for review have not been ventilated and contextualised.

9.6. Prejudice; the Applicant placed on record that they greatly apologize to the Respondent for the prejudice that this may cause. However, the Respondent argued that the Respondent was in possession of the record and that the supplementary additions would be based on the record. Thus, the Respondent at liberty to file a further supplementary answering affidavit. That Applicant was open to a postponement to the extent same will be occasioned by the necessity of the supplementary founding affidavit being allowed to ventilate the grounds of review effectively and further offered costs for the postponement.

Grounds for Review as per the Applicant

First Ground :The Commissioner's view of the kernel of the issue between the parties lacked focus; particularity; and the point of departure

[10] The Applicant placed on record that the centrality and or the stem of the issue between the employee and the employer is the application form and the instructions therein. Had it not been for the application form parties would not have gone to the Arbitration hearing, and the Commissioner would not have had to preside over the proceedings under case number: PSSS341-22/23.

Thus, if the application form and the instructions therein were to be thought away, the dispute before the Commissioner would have disappeared into thin air as well. Thus, the Commissioner, in being fair and reasonable, would have had to zoom in on the application form and its instructions, a device used to exert the unfair labour practice. The common cause is that the application form is the root cause of the dispute and was one of the primary pieces of evidence before the Commissioner in both bundles of the litigants and in their evidence in chief and in cross-examination. That the application form speaks for itself with a bold inscription on it: **"Important notice (read before you complete application)"**. Argued further that the very first bullet of the instructions in the application form reads as follows: *"Read SSSBC Agreement 3 of 2011 and National Instruction of 2015 ..."*.

- [11] The Third Respondent's contention is that the outcome of the arbitration award is not unreasonable. Further submitted to this Court that the Commissioner after properly considering evidence before the Commissioner, could not find other than that the Applicant committed an unfair labour practice against the Third Respondent, in relation to promotion. Thus, the Third Respondent placed on record the specific words or phrase used in paragraph 11 of the award¹⁰, argued that the Commissioner expressed himself in what he perceived were the submissions and provided context in his reasoning. Quoted and cited the full paragraph likewise does this court:

'I am aware that the respondent holds the view, apparently based on other decisions of other presiding officers in other fora, that even a minor error in an application somehow disqualifies an application for promotion. I am not convinced that even if the arcane approach of the respondent in this matter is what other presiding officers supported, that this is the correct approach in employment law. I find this approach to be slavishly pedantic and not supportive of the general notion of fairness. All this approach of the respondent does is include for consideration for promotion, applicants who happened to fill in the form precisely the way the panel wants it done, and exclude applicants who made incorrect entries on the form that are insignificant in the overall context of evaluating the appropriateness of a candidate for review. As far as I

¹⁰ Amended Pleadings, page 53, paragraph 11 of the award.

can tell from evidence, the respondent knew who the applicant was, what post he was applying for, and could assess the form to allow screening and consideration. The applicant was however, excluded from short-listing over a few trifling , finicky , non -decisive entries or lack thereof on an application form.'

- [12] The Third Respondent conceded that they filed in an incorrect post number on the application form, same was a *bona fide* mistake. Thus held:

'There is no substance to the bald statement that acceptance of the applicant's application would have been unfair to the other applicants for the position. The peculiar view that applicants should not be alerted to obvious errors on their application forms, if indeed these minor errors might prejudice the applicant, is also absurd. It is most probable that the applicant has been the victim of an unfair labour practice in this regard. Minor errors should not disqualify a candidate¹¹. The common cause factor also argued by the Third Respondent being fact that Applicant used a type written form and not the original form, irrelevant as it was agreed during the arbitration¹². Third Respondent argued that it stood uncontested that they did not comply with requirements or instructions. However, submitted that it was not material in nature or prevented the Applicant from considering short listing the Third Respondent in the scope of fairness.'

- [13] Third Respondent conceded that they filed in an incorrect post number on the application form, same was a *bona fide* mistake. Thus held:

'There is no substance to the bald statement that acceptance of the applicant's application would have been unfair to the other applicants for the position. The peculiar view that applicants should not be alerted to obvious errors on their application forms, if indeed these minor errors might prejudice the applicant, is also absurd. It is most probable that the applicant has been the victim of an unfair labour practice in this regard. Minor errors should not disqualify a candidate¹³. The common cause factor also argued by the Third Respondent being fact that Applicant used a type written form and not the original form, irrelevant as it was agreed during the arbitration¹⁴. Third Respondent argued

¹¹ Amended Pleadings , page 53, at para 12 of the award.

¹² Transcript , page 56 , from line 16-20.

¹³ Amended Pleadings , page 53, at para 12 of the award.

¹⁴ Transcript , page 56 , from line 16-20.

that it stood uncontested that they did not comply with requirements or instructions. However, submitted that it was not material in nature or prevented the Applicant from considering short listing the Third Respondent in the scope of fairness.'

Second Ground: The shortlisting panel was complying with the law

[14] The Applicant argued that the Commissioner's finding that the panelists were slavishly pedantic is an inevitable misdirection that the Commissioner had subjected himself to when he failed to scrutinize the evidentiary document, the application form. The Commissioner practically observed and saw that the parties relied on this application form, as to establish *policy-relatedness to this application form and the instructions therein*. The Applicant argued further that, hence, it is written in the application form's instructions that the National Instruction 3 of 2015 must have been read first, it is only 26 pages. Further, the SSSBC agreement must have been read it is only 8 pages. Thus, placed on record that the panelists followed the law by rejecting an application form that was either not prescribed or not filled out accordingly.

[15] The Third Respondent conceded that they filed in an incorrect post number on the application form, same was a *bona fide* mistake. Thus held:

There is no substance to the bald statement that acceptance of the applicant's application would have been unfair to the other applicants for the position. The peculiar view that applicants should not be alerted to obvious errors on their application forms, if indeed these minor errors might prejudice the applicant, is also absurd. It is most probable that the applicant has been the victim of an unfair labour practice in this regard. Minor errors should not disqualify a candidate¹⁵. The common cause factor also argued by the Third Respondent being fact that Applicant used a type written form and not the original form, irrelevant as it was agreed during the arbitration¹⁶. Third Respondent argued that it stood uncontested that they did not comply with requirements or instructions. However, submitted that it was not material in nature or prevented

¹⁵ Amended Pleadings , page 53, at para 12 of the award.

¹⁶ Transcript , page 56 , from line 16-20.

the Applicant from considering short listing the Third Respondent in the scope of fairness.'

Third Ground: Shortlisting the Applicant would have been at odd with the principle of legal certainty

[16] The Applicants argued the Constitutional Court, in *Le Roux and Another v Johannes G Coetzee and Seuns and Another*¹⁷, held that the law must have a sense of certainty, predictability and uniformity, which are inseparable components of the rule of law. The Applicants argued that they have chronologically sourced the evidence pointing to the policy which begets the application form and the instructions therein. Thus, the Applicants argued that it is difficult to understand why the Applicant must have deviated from the order of doing things, because this could have created legal uncertainty. This Court cannot find any submissions from the Third Respondent's Heads of Argument, directed specifically and or in relation to this ground.

Fourth Ground The Commissioner failed to apply his mind to the policy that was before him and relied upon by the parties

[17] As a point of departure, the Applicant argued and placed on record that the Commissioner is heard or read about at page 1 of the record, saying that arbitration proceedings are taking place under the auspices of the Safety and Security Bargaining Council. The Third Respondent also had the benefits of the application form, which was the genesis of the contention between the parties, thus, the same invited the Commissioner to have regard to the Agreement 3 of 2011 and the National Instruction 3 of 2015. I thus quote the Agreement as quoted by the Third Respondent, telling the latter that. The Agreement at paragraph 1:

'The implementation of the Promotion and Grade Progression Policy will be effected through issuing of National Instruction. Such National Instruction will be consulted at the Safety and Security Bargaining Council. Harmoniously, The National Instruction 3 of 2015 says, this national Instruction 3 of 2015 says,

¹⁷ [2023] ZACC 46 at para 162.

"this National Instruction must be read in conjunction with the aforementioned Agreement".

Paragraph 4.1.1 of the Safety and Security Sectoral Bargaining Council (SSSBC) says "*Grade Progression for member appointed in terms of the South African Police Service Act must be handled in terms of this policy...*".

Paragraph 4.2.2 (b) of the SSSBC Agreement says that Post Promotions are based on the following principles: (b) Advertisement and selection process...

Paragraph 5.1 says, Requirements for grade Progression "*A member may only be considered for grade progression if he or she applied ...*".

Paragraph 1 of the National Instruction 3 of 2015 says "*the purpose of this National Instruction is to regulate the promotion and grade progression of employees...*".

The paragraph immediately below this one above says that "*this National Instruction is applicable to all employees of the Service who have been appointed in terms of the South African Police Service Act...*".

Paragraph 3 (a) says a member who qualifies for grade progression must:

Complete any form prescribed by the National Commissioner...

Paragraph 3 (a)(iv) says "*failure by the member to submit the prescribed form ...may result in the member being not considered for grade progression during the specific process*".

- [18] The Third Respondent argued that their suitability remained uncontested, citing the Commissioner who found that: "*The respondent is unable to establish that the applicant was not a qualified contender*"¹⁸. Argued further that it was common cause that the Third Respondent never left the service of Applicant, and failure to mark or tick the box for this category is superfluous,¹⁹ argued that same included marking the license box with the specific license. That transcript,

¹⁸ Amended index to pleadings, page 53, paragraph 13 of the award.

¹⁹ Transcript, page 12, from line 22.

page 58, Major General Dyantyi confirmed that the SAPS system also record whether an employee has a driver's license. Thus argued, the Commissioner's determination cannot be deemed as unreasonable.

- [19] The Third Respondent argued that the averment by the Applicant that other candidates were disqualified for the same reason as the Third Respondent should be rejected, for no substantive evidence was put forward during the arbitration. The Third Respondent quoted the case of the Labour Appeal Court of *Head of Department of Education v Mofokeng & Others*²⁰ submitting that a comparison was made involving other employees, thus arguing and submitting that the Commissioner must have embarked upon an evaluation of the probabilities. Third Respondent highlighted the following paragraphs :

[32] ... Mere errors of fact or law may not be enough to vitiate the award. Something more is required. To repeat: flaws in the reasoning of the arbitrator, evidenced in the failure to apply the mind, reliance on irrelevant considerations or the ignoring of material factors etc must be assessed with the purpose of establishing whether the arbitrator has undertaken the wrong enquiry, undertaken the enquiry in the wrong manner or arrived at an unreasonable result...

[33] Irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide a compelling indication that the arbitrator misconceived the inquiry.'

- [20] The Third Respondent thus placed on record that the award for compensation was just and equitable and that the Applicant failed to articulate that the relief awarded was arbitrary in nature or excessive. Further, the matter of *Adams v General Public Service Sectoral Bargaining Council and Others*²¹ - not reportable case in paragraph 22 stated the following:

'This matter, properly considered, was a dispute about an unfair selection (shortlisting) process for promotional post in the Public Service. The applicant was denied a fair opportunity to compete (*Minister of Police v Safety and Security Sectoral Bargaining Council & Others* (JR2339/15) [2018] ZALCJHB

²⁰ (2015) 36 ILJ 2802 (LAC).

²¹ [2021] ZALCCT 46.

136). Neither the Commissioner, nor the Court was able to compare the applicant's qualifications against others who applied for the post, because the Department was not prepared to disclose these. However, I am of the view that on the advertisement properly construed, and on employment equity principles properly applied, the applicant should have been among those shortlisted for the post. I am also of the view that he should receive compensation on account of the unfair procedure he was subjected to (*Noonan v SSSBC & Other* (2012) 33 ILJ (LAC) P2608. Compensation must be fair and equitable and not exceed 12 months' remuneration. I am of the view, taking all the circumstances into account, including the extent of the breach of the rules of fairness, that six months' compensation would be fair and equitable.'

Fifth Ground: Confusion that was caused by not writing the word "Not Applicable (N/A)".

- [21] The common cause is that the Third Respondent's response in relation to the above was to the effect that there was no need for him to respond thereto because the employer knew that his service was terminated. The Third Respondent argued that clearly the Third Respondent's reasoning flows from a misdirected understanding of the needs of the question. Paragraphs 56.1 until 56.5 of the Third Respondent's Heads of Argument in incorporated herein.²²

The Law

- [22] Arbitration awards are reviewable in terms of section 145 of the LRA. In terms of Section 145:

(1) Any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award-

(2) A defect referred to in subsection (1), means-

- (i) committed misconduct in relation to the duties of the commissioner as an arbitrator;

²² Pages 24 to 25 of the Third Respondent's Heads of Argument.

- (ii) committed a gross irregularity in the conduct of the arbitration proceedings; or
- (iii) exceed the commissioner's powers; or
- (b) that an award has been improperly obtained.'

[23] The Applicant placed on record that for them to succeed herein, they thus have to establish one of the defects above. Thus, their bone of contention being that the Commissioner herein committed misconduct in relation to his duties as an arbitrator by not considering all the evidence, did not take all the evidence into consideration, or the arbitrator made a decision a reasonable decision maker could not have reached.

[24] The Sidumo test, as per the Applicant argued that the better approach is that section 145 is now suffused by the constitutional standard of reasonableness²³. The test in deciding whether to review and set aside an arbitration award is well established. It is the reasonableness test as postulated by the Constitutional Court²⁴:

'The better approach is that section 145 is now suffused by the constitutional standard of reasonableness. That standard is the one explained in *Bato Star*. Is the decision reached by the commissioner one that a reasonable decision-maker could not reach? Applying it will give effect not only to the constitutional right to fair labour practices, but also to the right to administrative action which is lawful, reasonable and procedurally fair.'

The test for determining whether arbitration awards are reasonable or unreasonable is whether the commissioner's decision or finding "*is one that a reasonable decision-maker could not reach*".²⁵

The Third Respondent quoted Ngcobo J at paragraph 254, page 134 with emphasis that: "...It is therefore for a party alleging a defect in the arbitration proceedings to show that the facts alleged constitute gross irregularity or

²³ *Sidumo* at para 110.

²⁴ *Sidumo & another v Rustenburg Platinum Mines Ltd & others (Sidumo)* [2007] 12 BLLR 1097 (CC) at para 110 of Navsa AJ's judgment.

²⁵ (At para 110 of the *Sidumo* case).

misconduct or show that the power conferred has been exceeded, as the case may be. This will require litigants to specify the grounds relied upon and the facts alleged as constituting the ground of review relied upon”.

- [25] The proper application of the test on review is summarized by the Supreme Court of Appeal in the *Herholdt* judgment²⁶. For an award to be reviewable, the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. Most importantly, a result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator.

Third Respondent in their Heads of Argument quoted at paragraph 3.3 and summarized *Sidumo* as follows:

- [14] After *Sidumo* the position in regard to reviews of CCMA arbitration awards should have been clear. Reviews could be brought on the unreasonableness test laid down by the Constitutional Court and the specific grounds set out in ss 145 (2)(a) and (b) of the LRA. The latter had not been extinguished by the Constitutional Court but were to be ‘suffused’ with the constitutional standard of reasonableness. What this meant is that a gross irregularity in the conduct of the arbitration proceedings’ as envisaged by s 145 (2)(a)(ii) of the LRA, was not confined to a situation where the arbitrator misconceives the nature of the enquiry, but extended to those instances where the result was unreasonable in the sense explained in that case. Beyond that there was no reason to think that their meaning had been significantly altered provided they were viewed in the light of the constitutional guarantee of fair labour practices.²⁷

- [26] *Herholdt* further held as follows:

‘In summary, the position regarding the review of CCMA awards is this: A 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

²⁶ *Herholdt v Nedbank Ltd (Herholdt)* [2013] 11 BLLR 1074 (SCA).

²⁷ *Ibid* at para 14.

irregularity as contemplated by s 145(2)(a), 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 the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable. (Own emphasis)

- [27] The Labour Appeal Court has further confirmed that where a gross irregularity in the arbitration proceedings is alleged, the enquiry extends to whether the result was unreasonable. If the decision arrived at by arbitrator is one that falls within a band of decisions to which a reasonable decision-maker could come on the available material, then the award is not reviewable²⁸. In short: 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. The review Court is not required to take into account every factor individually, consider how the arbitrator treated and dealt with each of those factors and then determine whether a failure by the arbitrator to deal with it is sufficient to set the award aside. This piecemeal approach of dealing with the award is improper, as the reviewing Court must consider the totality of the evidence and then decide whether the decision made by the arbitrator is one that a reasonable decisionmaker could make. Held further that a reviewing court must ascertain whether the commissioner considered the principal issue before him/he, evaluated the facts presented at the hearing and came to a reasonable conclusion. The Third Respondent's argument in relation to the *Gold Fields* case argued that a review based solely on the fact that the Commissioner did not take certain factors into account, or placed undue importance on certain factors (process related factors) does not comply with the *Sidumo* test and will likely therefore not succeed.

- [28] A CCMA (or bargaining council) arbitrator must conduct an arbitration in a manner that he or she considers appropriate in order to deal with the dispute

²⁸ *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA and Others (Gold Fields)* [2014] 1 BLLR 20 (LAC).

fairly and quickly but must deal with the substantial merits of the dispute with the minimum of legal formalities²⁹. The Labour Appeal Court has held that a court must be careful not to pass an award by a commissioner of the CCMA in the same fashion as one would an elegant judgment of the Supreme Court of Appeal or the Constitutional Court. Awards must be read for what they are, awards made by arbitrators, who are not judges. *"When all the evidence is taken into account, when there is no irregularity of a material kind in that evidence was ignored, or improperly rejected, or where there was not a full opportunity for an examination of all aspects of the case, then there is no gross irregularity..."*³⁰. It is trite that the test applicable in arbitrations conducted under the auspices of the CCMA is the balance of probabilities³¹. According to the test, where the evidence permits more than one reasonable inference, the selected inference must, by the balancing of probabilities, be the more natural and plausible conclusion of the possible inferences. The credibility of witnesses and the probability of what they say should not be regarded as separate enquiries to be considered piecemeal. They are part of a single investigation into the acceptability or otherwise of the employer version³².

[29] In *Bestel v Austral Operations Ltd and Others*³³ the LRA considered the limited scope possessed by the Labour Court to review an arbitration award and accepted that an arbitrator's finding will be unreasonable if the finding is unsupported by any evidence, if it is based on speculation by the arbitrator, if it is disconnected from the evidence, if it is supported by evidence that is insufficiently reasonable to justify the decision or if it was made in ignorance of evidence that was not contradicted.

[30] In *Stocks Civil Engineering (Pty) Ltd v Rip NO and another*³⁴, the court held that; *"The Labour Court has no inherent common law powers of review. Its powers are to be found within the confines of its enabling act. In the case of*

²⁹ Section 138 (1) of the LRA.

³⁰ *Ellerine Holdings Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2008) 29 ILJ 2899 (LAC), at 2906 D to F.

³¹ *Potgietersrus Platinum Ltd v Commission for Conciliation, Mediation & Arbitration & others* (1999) 20 ILJ 2679 (LC).

³² *Marapula & others v Consteen (Pty) Ltd* (1999) 20 ILJ 1837 (LC) at para 33.

³³ [2011] 2 BLLR 129 (LAC) at para 18.

³⁴ [2002] 3 BLLR 189 (LAC) at para 30.

reviews of awards of commissioners of the CCMA it is section 145 of the LRA, in the review of functions, acts and omissions under the LRA section 158 (1)(g) of that Act, and in the case of private arbitrations section 33(1)".

- [31] 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 & others (CUSA)*³⁵ 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.'

- [32] The issue which this court must thus decide is as to whether or not to grant the Applicant's prayers as enumerated in Applicant's Notice of Motion, in lieu of the Commissioner's reasoning in his award. In so doing, apply the jurisprudence above in relation to reviews, and as argued by the litigants. Beforehand, pivotal to the court's ruling is whether the court has granted condonation for the late filing of the Applicant's Supplementary Affidavit, which the court has accordingly granted. Moreover, the same is in furthering the interests of justice.

- [33] This court, in applying the law to the facts, will have to deal with all five grounds for review raised by the Applicant. In so doing, this court will not categorically list the grounds as per the Applicant and as listed above in this judgment. The Constitutional Court held in the case of *CUSA* that:

'In deciding what the real dispute between the parties is, a commissioner is not necessarily bound by what the legal representatives say the dispute is. The

³⁵ (2008) 29 ILJ 2461 (CC).

labels that parties attach to a dispute cannot change its underlying nature. A Commissioner is required to take all the facts into consideration, including the description of the nature of the dispute, the outcome requested by the union and evidence presented during the arbitration. What must be borne in mind is that there is no provision for pleadings in the arbitration process, which helps to define disputes in civil litigation. Indeed, the material that a commissioner will have prior to a hearing will consist of standard forms which record the nature of the dispute and the desired outcome.'

- [34] The Commissioner must have made a point of his departure, the Agreement 3 of 2011 of the SSSBC and National Instruction 3 of 2015, with focus and particularity. The same being the motherboard of the application form and the instructions therein. From the Commissioner's reason and outcome of the award, clearly and to a large extent, the Commissioner missed this point of departure. Further, in so doing, the Commissioner arrived at a decision which another Commissioner could not have arrived at; therefore, unreasonable. It is common cause that the Third Respondent did not complete the application form, even though the wrong application form he completed had the same instructions as the National Instruction 3 of 2015 and the SSSBC Agreement 3 of 2011.
- [35] The Commissioner failed to appreciate that the application form is a requirement in terms of the SAPS policy as mentioned above and in the preceding paragraph, which flawed his decision. This is further evidenced by the common cause fact in relation to the Applicant's failure to fill in the word 'Not Applicable (NA)'. The argument by the Third Respondent that the same implied that the Third Respondent was expecting his application form to be dealt with personally, that is, his personal circumstances must have been at the prefrontal cortex - the personal memory of whosoever was shortlisting him, moreover, at the Pretoria head office. That people are going through their own life problems to specifically check in the system the work history of a certain employee. Argued further that the same can be viewed as a trigger for nepotism, all to cure a defect for not following an instruction on an application form. Further, responding negatively or positively to the question whether one's service was once terminated or not, was material as the same was a

requirement for the post for the employer-Applicant to verify if the Third Respondent has rendered services for an uninterrupted number of years. In this regard, the Applicant correctly quoted the case of *South African Police Service v Solidarity obo Gibbons and Others*³⁶:

'It is not in dispute that Mr Gibbons did not have four years of continuous uninterrupted service as a Warrant Officer at the date of his application to be promoted to the post of Captain. It is common cause that he had a break in service, and he had less than four years of continuous service after re-enlistment in the position of Warrant officer. Having regard to the plain meaning of the words, the language used in the light of the ordinary rules of grammar and syntax and the context in which the words are used, it is apparent that uninterrupted service meant that Mr Gibbons had to have four years after re-enlistment at the time of application.'

[36] The shortlisting panel followed the law, by not shortlisting an employee who had not followed the law. The Third Respondent had not filled in the correct form, moreover, on more than one occasion had not filled in the form accordingly. It would be a miscarriage of justice to define same as falling under the umbrella of unfair labour practices. It is the common cause that the Third Respondent did not run the race did not end up at the interviews. It can thus not be argued as to whether he would have qualified for the post or not qualified for the post.

[37] The R280 000,00 (Two Hundred and Eighty Thousand Rand) compensation is submitted by the Applicant as being quite excessive and unreasonable. Thus, in the event that this court finds that not shortlisting the Third Respondent is an unfair labour practice, the amount of R50 000,00 (Fifty Thousand Rand) or the amount the court deems fit, lesser than the R28 000,00, would be fair. The Applicant argued for the reduction of the quantum awarded, only if this court finds that the Applicant committed the irregularity.

[38] The Applicant has not at all committed an irregularity, and I thus grant the Applicant the prayers prayed for in their Heads of Argument that:

³⁶ [2024] ZALCCT 72 at para 34.

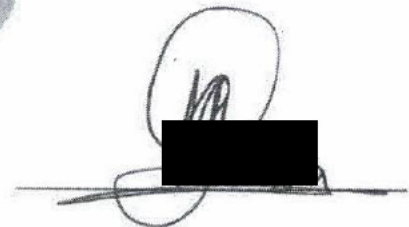
Order

1 . The Applicant's late filing of this review is condoned in terms of section 145 (1 A) of the Labour Relations Act 66 of 1995

2. That the findings and or ruling handed down by Second Respondent on 17 May 2023 under the auspices of the First Respondent bearing case number PSSS42-22/23 are set aside.

3. The said ruling is substituted with a finding that Applicant did not commit an unfair labour practice in terms of section 186 (2) (a) of the Labour Relations Act 66 of 1995

4. No order as to costs



L. Gura

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Adv Zithulele

Instructed by: State Attorney per Mr Mawethu Dyalivae

For the Respondent :Mr Ian Stockenstrom

Instructed by: SOLIDARITY

LABOUR COURT