



- (1) Reportable Yes
- (2) Of interest to other Judges: Yes
- (3) Revised


Signature

19/02/2026

Date

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Case no: C419/2024

In the matter between:

IMATU obo BRONWIN FORTUIN

Applicant

and

THE CITY OF CAPE TOWN

First Respondent

SOUTH AFRICAN LOCAL GOVERNMENT

BARGAINING COUNCIL

Second Respondent

COMMISSIONER F VAN DER MERWE N.O.

Third Respondent

Heard: 6 November 2025

Delivered: 19 February 2026

Summary: (Review application - whether this Court differs with the outcome or the finding of fact or law made by the arbitrator is not sufficient for the Court to interfere, something more is required for thus is the dividing line between the Court's powers on review versus appeal – where the result can reasonably be reached by the route followed by the arbitrator, the Court cannot intervene – arbitrator's award reasonable and application dismissed)

JUDGMENT

MAY, AJ

Introduction

- [1] This is an opposed application to review and set aside an arbitration award in which the third respondent (the arbitrator) determined that the Applicant's member, Bronwin Fortuin's (Fortuin), dismissal was substantively and procedurally fair.

Background

- [2] Fortuin was employed with the First Respondent as an Administrative Officer within the Library and Information Services Department, Community services Directorate since January 2023. On 16 November 2023 she was served with a notice of a disciplinary hearing related to an alleged charge of dishonesty in terms of which it was alleged that she had lied when asked whether she had ever been convicted at a disciplinary hearing when she allegedly answered in the negative and when her SAP record reflects that she was in fact disciplined and found guilty during June to October 2019 of serious misconduct relating to gross insubordination, insubordination and/or the abuse of sick leave.
- [3] She was found guilty after the disciplinary hearing and dismissed on 5 March 2024. She subsequently instructed her Union, IMATU, to refer the matter to the Second Respondent who appointed the Third Respondent to arbitrate the dispute.

The award

- [4] At the arbitration, as with the Disciplinary hearing, the material issue in dispute was whether Fortuin had disclosed her previous disciplinary infraction to the interviewing panel. She maintained consistently that she had disclosed it with

a clear memory of what had transpired whilst the First Respondent contended that she had answered no to the question posed whether she had previously faced disciplinary action.

- [5] The First Respondent called Ms Annelie Scholtz as their relevant witness in this respect. She is employed in the Human Resources Department, recruitment and selection. She is assigned to library and information service who is her client and she does the human resources function for them. She was the human resources practitioner assigned to the post in question and she interviewed the candidates for the position including Fortuin. She interviewed her on 2 November 2002 via Skype.
- [6] She testified that she asked Fortuin whether she was ever convicted at a disciplinary hearing or whether she had ever faced any departmental action against her that they should be aware of, then she wrote down the answer and then she asked, do you have a criminal record. She wrote down as answers to the questions no and no meaning no to any disciplinary actions and no to criminal record.
- [7] During cross-examination, she confirmed that there is no recording available of the interview and that the only record of the interview is her notes. The other panellists, Tania Alcox Smith and Malusi Radebe, didn't keep record of Fortuin's answers to the standard questions as they thought it was an HR function. It was put to her that she had no independent recollection of the answers given by Fortuin but that she solely relied on her notes as a recollection of what was said. It was further put to her that Fortuin disputes that she had answered no but that she in fact did disclose that she had been through a previous disciplinary hearing but that she couldn't recall the date and that she had asked her for the details. Ms Scholtz disputed this and said that if this was so, both she and Ms Smith, who was Fortuin's direct supervisor, would have had follow up questions the answers to which would have been recorded by both.
- [8] Fortuin's evidence was that she answered the question posed in the positive and that the answer was followed with follow up questions by Ms Scholtz in terms of her asking around the time period.

- [9] The arbitrator concluded that it is more probable than not that the applicant had committed the misconduct complained of, that it constituted dishonesty, that the penalty of dismissal falls within a band of reasonableness and consequently held the dismissal to be substantively and procedurally fair.

Grounds of review and evaluation

- [10] Applicant contends that the award is reviewable on the basis that the Commissioner committed gross irregularities in that he was faced with two mutually destructive versions and did not weigh up the evidence as is required, he ignored vital and material successful challenges to the evidence especially the handwritten notes of Ms Scholtz, he failed to consider that material witnesses were not called, he made biased and predetermined findings regarding Fortuin's credibility, he failed to apply his mind to the applicable legal standard when dealing with the standard or onus in unfair dismissal matters and his overall conclusion was one that no other reasonable decision maker would have reached.

- [11] The First Respondent, on the other hand, contends that the arbitrator duly and correctly, after consideration of all the evidence presented, weighed up the versions proffered by the respective parties when making a determination as to the issue of the second question in the interview process and had due regard to the two mutually destructive versions when assessing the evidence of Scholtz against Fortuin's. They contend therefore that the arbitrator's reasoning was sound.

- [12] In assessing the conduct of the arbitrator, the Court is enjoined to ask:

12.1 In terms of his or her duty to deal with the matter with the minimum of legal formalities, did the process that the arbitrator employed give the parties a full opportunity to have their say in respect of the dispute?

12.2 Did the arbitrator identify the dispute he was required to arbitrate (this may in certain cases only become clear after both parties have led their evidence)?

12.3 Did the arbitrator understand the nature of the dispute he or she was required to arbitrate?

12.4 Did he or she deal with the substantial merits of the dispute? and

12.5 Is the arbitrator's decision one that another decision-maker could reasonably have arrived at based on the evidence?¹

[13] Our courts have repeatedly stated that in order to maintain the distinction between review and appeal, an award of an arbitrator will only be set aside if both the reasons and the result are unreasonable. In determining whether the result of an arbitrator's award is unreasonable, the Labour Court must broadly evaluate the merits of the dispute and consider whether, if the arbitrator's reasoning is found to be unreasonable, the result is, nevertheless, capable of justification for reasons other than those given by the arbitrator. The result will, however, be unreasonable if it is entirely disconnected with the evidence, unsupported by any evidence and involves speculation by the arbitrator.² An award will no doubt be considered to be reasonable when there is a material connection between the evidence and the result or, put differently, when the result is reasonably supported by some evidence.

[14] The enquiry into the reasonableness of the decision arrived at by the arbitrator requires an examination of the merits of the case. This task is informed by the standard review test as enunciated in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*³, as it was explained in *Herholdt v Nedbank Ltd (COSATU as amicus curiae)*⁴ in the following terms:

... That test involves the reviewing court examining the merits of the case 'in the round' by determining whether, in the light of the issue 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

¹ See: *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA and Others* (2014) 35 ILJ 943 (LAC) at para 20.

² See: *Herholdt v Nedbank Ltd (COSATU as amicus curiae)* [2012] 11 BLLR 1074 (SCA) at paras 12 and 13.

³ (2007) 28 ILJ 2405 (CC).

⁴ [2012] 11 BLLR 1074 (SCA) at paras 12.

arbitrator. On this approach the reasoning of the arbitrator assumes less importance than it does on the SCA test, where a flaw in the reasons results in the award being set aside. 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 a reasonable decision maker could reach in the light of the issues and the evidence.'

[15] The Court must also be mindful to avoid 'judicial overzealousness' in setting aside an award which does not coincide with its own views.⁵ In other words, whether this Court differs with the outcome or the finding of fact or law made by the arbitrator is not sufficient for the Court to interfere, something more is required for thus is the dividing line between the Court's powers on review versus appeal. It assists therefore to restate that where the result can reasonably be reached by the route followed by the arbitrator, the Court cannot intervene. If not, however, the court must still consider whether, apart from those reasons, the result is one a reasonable decision maker could reach in light of the issues and the evidence. In other words, whether the result reached falls within the so-called band of reasonableness. Differently put, whether the outcome accords with the material properly before the arbitrator.

[16] As far as assessing probabilities, in *Solidarity obo Van Zyl v KPMG Services (Pty) Ltd and Others*⁶, Fourie JA held that:

"While arbitrators should always aspire to meet the exacting standard set by the Supreme Court of Appeal in *Stellenbosch Farmers' Winery* for the proper assessment of conflicting versions by a finder of fact, an arbitration award that does not live up to this standard will not automatically be subject to review. Arbitrators are empowered to deal with the dispute with a minimum of legal formalities, their decisions are immune from appeal, and the legislature has set a high bar for reviewing arbitration awards. Errors committed by an arbitrator in the assessment thereof will not necessarily vitiate an award.'

⁵ See also: *Assmang Limited (Assmang Chrome Dwarsriver Mine) v Commission for Conciliation Mediation and Arbitration and Others* [2015] 6 BLLR 589 (LC) at para 54.

⁶ (2014) 35 ILJ 1656 (LC) at para 17.

[17] In adopting this approach to the merits before it the Court found that, by failing to assess the credibility of any of the witnesses, the arbitrator *in Solidarity* fell short of the standard aspired to in *Stellenbosch Farmers Winery Group Limited and other v Martell et Cie and others*⁷. However, this alone did not render the award reviewable without first considering whether his decision fell within the band of reasonableness. Further to this it was not necessary for the arbitrator to have found the applicant and his or her witnesses unreliable for him or her to find their version improbable.⁸

[18] The Court ultimately held that the arbitrator's findings, despite the shortcomings in the award, were findings that a reasonable commissioner could make on the totality of the evidence before him and for that reason the Court was barred from intervening.⁹

Application

[19] There is no doubt that both parties had the chance to have their say in relation to the matter, the arbitrator correctly identified the dispute as determining whether the probabilities favoured the evidence of the employer or the employee and the arbitrator understood the nature of the dispute clearly, as is apparent from the award. The applicant challenges the fact and disputes that the arbitrator dealt with the substantial merits of the dispute and accordingly challenges that the decision is one that a reasonable decision-maker could reasonably have arrived at.

[20] In the Court's view, it is apparent that the arbitrator was acutely aware of his duties. He assessed the evidence before him in its totality; he considered the reliability and credibility of each witness as well as the probabilities of their versions. Whether this Court agrees with those findings or not, is not sufficient for this Court to interfere. After all this is a review and not an appeal and the Court on review is not concerned with factual or legal findings unless the outcome

⁷ 2003 (1) SA 11 (SCA).

⁸ See: *Transnet Ltd v Gouws and Others*. Unreported decision. Case no: JR206/09. Delivered on 25 April 2012 at paras 11 to 20.

⁹ See: *Transnet* (ibid) at paras 19 to 21.

reached by the arbitrator was not one that could reasonably be reached on the evidence and other material properly before the arbitrator. There is a material connection between the evidence and the result, and the result is reasonably supported by some evidence. As such the award is reasonable and the application for review falls to be dismissed.

Costs

[21] The most appropriate order as to costs is that both parties remain responsible for their own costs.

[22] In the premise the following order is made:

Order

1. The application is dismissed.
2. Each party will pay their own costs.



C. May

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant : Ms N Weber (Union Official – IMATU)

For the first respondent : Adv Ayden Jansen

Instructed by : Regan Brown Inc, Cape Town

LABOUR COURT