



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

Signature

Date

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case no: JR2929/2019

In the matter between:

S & D PLANTS (PTY) LTD

Applicant

and

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

First Respondent

COMMISSIONER MATLHODI MOLEBOGENG MOLEKE N.O.

**(Cited in her capacity as Commissioner for the Commission
for Conciliation, Mediation and Arbitration)**

Second Respondent

MEDWUSA obo UNARINE MANYAMA & 3 OTHERS

Third

Respondent

Heard: 20 January 2026

Delivered: 13 February 2026

JUDGMENT

MUNSAMY, AJ

Introduction

- [1] This is an application to review and set aside the Arbitration Award of the Second Respondent under the auspices of the First Respondent dated the 25th of November 2019.
- [2] The Applicant instituted an application to review and set aside the Arbitration Award of the Second Respondent insofar as the Second Respondent ordered that the dismissals were procedurally unfair.
- [3] The Third Respondent filed a “cross-review” on the 6th of May 2020. In that application it seeks condonation for the late filing of the cross-review, granting the Third Respondent leave to file the “cross-review” and that the Arbitration Award of the Second Respondent be reviewed and set aside insofar as she found that the dismissals were substantively fair.
- [4] It is necessary to set out the consolidated facts of this matter prior to dealing with the individual applications. The “cross-review” was not filed as a separate case but under the same case number and will be determined accordingly.

Brief Background

- [5] The Applicant operated a wholesale nursery business and employed approximately 100 employees. The Third Respondents’ members were employed by the Applicant. No recognition agreement existed between the Applicant and the Third Respondent. Prior to the issues which arose in the current proceedings, the individual respondents were dismissed and reinstated by way of a settlement agreement on the 26th of June 2019 with final written warnings. The final written warnings were for similar misconduct, that is, unauthorised absence from the workplace.

12 August 2019

- [6] The individual Respondents were notified on the 8th of August 2019 that the short time would no longer apply from the 12th of August 2019 onwards. The individual Respondents decided that they would not work the full hours as instructed on the basis that a dispute had been referred to the CCMA regarding a unilateral change to terms and conditions of employment, which

was set down for conciliation on the 15th of August 2019. In that referral, the relief sought was to “*restore their normal working hours and or reinstate back to normal working hours*”. The individual respondents did not work the full hours prescribed for the 12th of August 2019 and left the workplace at 15h00.

13 August 2019

- [7] On this date, the individual Respondents left the workplace, again, at approximately 15h00, prior to the end of the working day, which ordinarily concluded at 16h30.
- [8] The Applicant regarded this conduct as a failure to comply with a lawful and reasonable instruction to remain at work until the end of the shift.
- [9] The individual Respondents contended that they were unaware that they were required to remain at work beyond 15h00 and disputed that they had acted without authorisation.

14 August 2019

- [10] The individual Respondents reported for duty as usual.
- [11] They were issued with final written warnings for leaving the workplace early on the 12th of August 2019 and notices to attend disciplinary hearings for their misconduct on the 13th of August 2019, the hearings were scheduled for 19th of August 2019.
- [12] The charge sheets were for gross insubordination, in that the individual Respondents had failed to obey a lawful and reasonable instruction to work until 16h30 on 13 August 2019 and had left the workplace without permission.
- [13] On the same day, the individual Respondents were also issued with final written warnings and/or suspension notices.
- [14] A dispute arose during the arbitration proceedings as to the sequence, timing and purpose of these documents, including whether the warnings were issued before or after the notices of disciplinary hearing.

16 August 2019

- [15] The Third Respondent addressed correspondence to the Applicant, indicating that it intended to represent the individual Respondents at the disciplinary hearings scheduled for 19 August 2019.

19 August 2019 – Disciplinary Hearings

- [16] Disciplinary hearings were convened on this date before an appointed chairperson. The individual Respondents sought representation by MEDWUSA officials. The chairperson ruled that, in the absence of a recognition agreement, the individual Respondents were not entitled to external union representation. The chairperson advised the individual Respondents that they were entitled to representation by a fellow employee or shop steward.
- [17] The disciplinary hearings proceeded on this basis.
- [18] Evidence was led by the Applicant in support of the charges of gross insubordination.
- [19] The individual Respondents were afforded an opportunity to state their case, call witnesses and make submissions. Save for one individual respondent, the rest of the individual respondents elected to walk out of the proceedings.

21 August 2019

- [20] Following the conclusion of the disciplinary hearings, the chairperson found the individual Respondents guilty of gross insubordination.
- [21] The sanction of dismissal was imposed, and the individual Respondents' employment with the Applicant was terminated with effect from this date.
- [22] The Third Respondent referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) on behalf of the individual Respondents. The arbitration proceedings commenced before the Second Respondent (the Commissioner). Evidence was led by both parties, including testimony from the Applicant's representatives, the chairperson of the

disciplinary hearings, and the individual Respondents. On the 25th of November 2019, the Second Respondent issued an arbitration award in which she found that the dismissals of the individual Respondents were substantively fair but were procedurally unfair, primarily arising from concerns relating to representation being during the disciplinary hearings and the resultant effect it had on the employees ability to proceed with the matter thereafter.

- [23] Compensation was awarded to the individual Respondents in respect of the procedural unfairness finding.

“Cross-review”

- [24] The Labour Court has long since determined that there is no such “*animal*” as a cross-review. In *SABC Limited v Grogan NO and Another*¹, the Labour Court held:

‘Rule 7A makes no provision for an animal such as a “counter review”. This is in contradistinction to Rule 5(5) of the Rules of the Labour Appeal Court, that provides for a Notice of Cross Appeal to be delivered within ten (10) days, or such longer period as may on good cause be allowed close, after receiving Notice of Appeal from an Appellant. The absence of a similar provision in Rule 7A relating to a counter-review does not, to my mind, mean the Respondent in the review application can sit on his hands and then, only after the Applicant has filed a Rule 7A(8) Notice, file a counter-review without further ado. On the contrary, it appears to me that what is styled as a “counter-review” is simply an application for a review by a different name. The Second Respondent seeks to review different aspects of the findings of the Arbitrator, and on different grounds. That would usually be the case where a Respondent seeks to bring an application for a counter-review. He has to file a proper application for review and has to do so within six (6) weeks after publication of the Award.’

- [25] Whilst the Third Respondent has sought condonation for the late filing of its cross-review its explanation for the delay consists of two paragraphs:

¹ [2006] 2 BLLR 207 (LC) paras 15 to 16.

‘14. The Third Respondent on the 20th April 2020, served the Applicant with notice in terms of Rule 7A(8)(a) with attachment, including the transcribed record of Arbitration. Having read the transcribed record and together with CCMA content of documents, I submit to the above Honourable court that the Applicant to be granted leave to brought (sic) this cross-review application.

15. Under this affidavit I attach the condonation application in terms of section 145(1A) read together with Rule 12 of Labour Court Rules of which the Applicant seeks the Honourable Court to condone the late filing of applicant’s leave for application for cross-review.’ (Own emphasis)

[26] It is concerning that there is no attached condonation application in terms of Section 145(1A) of the LRA. Be that as it may, the Notice of Motion does seek condonation, and the Court is obliged to determine such application based on the Supporting Affidavit.

[27] The test for condonation is set out in *Melane v Santam Insurance Co Ltd*² as follows:

‘In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent’s interest in finality must not be overlooked.’

² 1962 (4) SA 531 (A) at 532 B-F.

[28] In *Independent Municipal & Allied Trade Union obo Nathan v Polokwane Local Municipality*³ it was held that:

[15] The Constitutional Court has developed this test and has ruled that in determining an application for condonation, what must be considered is whether or not it is in the interests of justice that condonation be granted. In doing so, various factors must be taken into account. The Constitutional Court held as follows in *Grootboom v National Prosecuting Authority & another*:⁴

[22] [T]he standard for considering an application for condonation is the interests of justice. However, the concept “interests of justice” is so elastic that it is not capable of precise definition. As the two cases demonstrate, it includes: the nature of the relief sought; the extent and cause of the delay; the effect of the delay on the administration of justice and other litigants; the reasonableness of the explanation for the delay; the importance of the issue to be raised in the intended appeal; and prospects of success. It is crucial to reiterate that both *Brummer* and *Van Wyk* emphasise that the ultimate determination of what is in the interests of justice must reflect due regard to all the relevant factors but it is not necessarily limited to those mentioned above. The particular circumstances of each case will determine which of these factors are relevant.

[23] It is now trite that condonation cannot be had for the mere asking. A party seeking condonation must make out a case entitling it to the court’s indulgence. It must show sufficient cause. This requires a party to give a full explanation for the non-compliance with the rules of court’s directions. Of great significance, the explanation must be reasonable enough to excuse the default.”⁵

³ (2020) 41 ILJ 937 (LC); [2019] ZALCJHB 290.

⁴ 2014 (2) SA 68 (CC) at paras 22-23.

⁵ In *Grootboom v National Prosecuting Authority and another* 2014 (2) SA 68 (CC) at para 51 it was held that: “The interests of justice must be determined with reference to all relevant factors. However, some 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

[29] As pointed out by the Applicant, the Third Respondent's cross-review was one hundred and twenty-one (121) days late without any explanation for the delay. Furthermore, it did not inform this Court of the extent of the delay. Absent a clear indication of the duration of the delay and an explanation provided to the Court, such delay is considered egregious and fatal to the condonation application.

[30] In *NUM v Council for Mineral Technology*⁶, the Labour Appeal Court held as follows:

'...without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial and without prospect of success, no matter how good the explanation for the delay, an application for condonation should be refused.'

[31] Section 145 of the Labour Relations Act⁷ (LRA) clearly stipulates that any party seeking to bring a review application under this section is required to do so within a six-week period. If this deadline is missed, the party must then apply to the Labour Court and demonstrate good cause why a delay should be condoned. Given that it has long since been held that "*cross-reviews*" do not exist within the Labour Court, the conduct of the Third Respondent is inexcusable.

[32] Therefore, where the aforementioned explanation for the delay is non-existent, it is not relevant to consider the Applicant's prospects of success. In any event, the individual Respondent's conduct in this matter, being of such a nature that they were on perpetual warnings for their misconduct and continued to commit misconduct of a similar nature, the prospects of success are minimal insofar as this Court would be required to set aside the reasonableness of the Second Respondent's award.

to consider prospects of success. If the period of delay is short and there is unsatisfactory explanation but there are reasonable prospects of success, condonation should be granted. However, despite the presence of reasonable prospect 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".

⁶ [1999] 3 BLLR 209 (LAC); [1998] ZALAC 22 at para 10.

⁷ Act 66 of 1995, as amended.

- [33] It is for the aforementioned reasons that the cross-review is dismissed with costs.

The Review Application

- [34] The review application is on one point, that being whether or not the Second Respondent's finding that the dismissals were procedurally unfair should be reviewed and set aside.
- [35] In this regard, the material facts as summarised above are applicable.
- [36] Notably, the finding in respect of Manyama being immediately reviewable in circumstances where her case was dealt with identically to that of Netshivhazwaulu, Tsikundamalema and Netshiheni, who did not participate in their hearing. As recorded above, the other three individuals elected not to participate in their disciplinary hearing, whereas Manyama was represented by Netshiheni and participated fully in her disciplinary hearing. Even though the Second Respondent did not distinguish between these individuals it is not the most pertinent reason insofar as the challenge to the procedural unfairness finding itself.
- [37] The Commissioner's findings in relation to procedural fairness are recorded in the Arbitration Award as follows:
- '53. The period for preparation or that the applicants understood the allegations put against them has not been disputed. The applicants have however disputed that they were allowed to present their version and allowed to call a representative. It is common cause that the applicants had applied to have MEDWUSA to represent them and Ms Kotze ruled that the MEDWUSA was an external party and did not have a recognition agreement with the respondent and on this basis ruled that it could not represent the applicants. Given that the Union

was not allowed to represent the applicant and the applicants' were to be given an opportunity to find an alternative representative and prepare with the representative, I do not believe that a reasonable chairperson would have not adjourned the matter for the day, to allow the applicants an opportunity to find someone else to assist them. The respondent version is that the applicants should have requested a postponement in this regard but given that it was clear that the Applicants were not comfortable with proceeding with the hearing, this should have been taken into consideration.

54. The principle of equity and justice is paramount to all employee relations dispute, especially those resulting to the dismissal of employees. It is not merely a requirement of ensuring that it is a tick box exercise but requires that the procedure followed is fair. Having taken into consideration the respondent's version that the respondent did not allow MEDWUSA to represent the applicant despite their plea that there was a language barrier, an inability to proceed without a representative, a short adjournment would not have sufficed to bring a new representative up to board in order to adequately represent the applicants. I therefore find that the dismissal was not procedurally fair.'

[38] It is accepted that the Award of the Second Respondent warrants interference insofar as she reached a decision that no reasonable decision maker could have reached.

[39] Given that the Third Respondent did not have Section 14(4)(a)⁸ rights to represent the employees in internal disciplinary proceedings. It did not have a recognition agreement and was aware of this throughout the preceding months, during which it had been at loggerheads with the Applicant. It should not have taken the risk of being prepared to represent the individual Respondents only, who should have been well aware that in the event that the application is refused for representation by the Third Respondent, they would be required to proceed with the hearing. This was not their first issue of misconduct in the preceding months.

⁸ Labour Relations Act No. 66 of 1995

- [40] The Second Respondent could not come to the aid of the Third Respondent and individual Respondents who did not apply for a postponement after being denied representation. They elected to proceed with the disciplinary hearing of Manyama. They then decided not to participate in the enquiry any further after the proceedings, as Manyama had concluded.
- [41] Absent an application for a postponement, it is wholly unreasonable for a Commissioner to find that an internal Chairperson should independently adjourn proceedings. While the Chairperson may possess the authority to do so, it would be highly prejudicial to the Applicant, who was given five (5) days' notice of the hearing and adequate time to prepare to face the charges. The charges themselves were straightforward, pertaining to the decision to refuse work during the period from 15h00 to 16h30. The individual Respondents were required to provide an explanation for their decision to do so. This determination should have been carefully evaluated by the Second Respondent, but she failed to do so.
- [42] The Second Respondent also accepted evidence from the individual Respondents that was never put to the Applicants when their witnesses testified, this evidence being that:
- 42.1 Kotze chased Shabalala out of the hearing, and therefore there was nothing that they could say as they did not understand English; and
- 42.2 Kotze informed them that they could stand up and leave if they had nothing to say.
- [43] The aforementioned version was never put to the Applicant's witnesses. It is trite that in order for a party to rely on a version and for a presiding officer to determine the issue of fairness based on such version, it must be put to the Applicant's witnesses in order to have responded. Against this, the Second Respondent found that there was a language barrier and an inability to proceed without a representative. Therefore, the Second Respondent found that a short adjournment would not have sufficed to bring a new representative. However, I must accept the Applicant's version that this was

never an issue properly raised before the Second Respondent and she ought not to have relied on same in coming to her findings.

- [44] I have considered the decision and principles set out by the Constitutional Court in *Sidumo and Another v Rustenburg Platinum Mines Limited and Others*⁹. In particular, the Court held that:

[110] ...s 145 of the LRA was suffused by the then constitutional standard that the outcome of an administrative decision should be justifiable in relation to the reasons given for it. The better approach is that s 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.'

- [45] In assessing the reasonableness of the Second Respondent's finding, I am of the view that she reached a decision based on an issue and evidence that was not before her; that is, there was no application to postpone the internal disciplinary proceedings. Further, she relied on the individual Respondent's utterances regarding the internal proceedings, which were never put to the Applicant's witnesses.
- [46] It is for these reasons that the Second Respondent reached a decision that no reasonable decision-maker could have reached.

Costs

- [47] Whilst the Applicant sought costs only in the event of any of the Respondents opposing this application, I have considered the Third Respondent's opposition and do not believe that it was of such a nature so as to warrant an adverse costs order. Fairness and equity dictate in this matter that, in respect of the Applicant's review application, there is no order as to costs. However, as pointed above and for the reasons stated in the reasons for dismissing the application itself, the Third Respondents' cross review stands to be dismissed

⁹ [2007] 12 BLLR 1097 (CC); [2007] ZACC 22.

with costs on the basis of its complete disregard for the rules and procedures of this Court.

[48] It is hereby ordered as follows:

Order

1. The Third Respondent's cross review application is dismissed with costs on a party and party scale C;
2. The Applicant's review application is granted. The arbitration award issued by the Second Respondent under GAJB21601-19 is hereby reviewed, set aside and replaced with the following order:
 - 2.1 The dismissals of Unarine Manyama, Reginah Netshiheni, Mulalo Netshivhazwalu and Sylvia Tsikundamalema were procedurally fair.
3. There is no order as to costs in respect of the review application.

K. R. Munsamy

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: J. Du Randt

DDP Attorneys

For the Respondent: G.Sebola (Union Official)

Instructed by: MEDWUSA

LABOUR COURT