



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

NOT REPORTABLE

Case No: JR1721/22

In the matter between:

PUBLIC PROTECTOR OF SOUTH AFRICA

Applicant

and

SAMUEL, SPHELO HAMILTON

First Respondent

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

Second Respondent

COMMISSIONER JAMES MATSHEKGA N.O.

Third Respondent

Heard: 17 February 2026

Delivered: 18 February 2026

Summary: Review of arbitration award of third respondent dismissed. Criteria not satisfied. Award is reasonable considering the evidence and material presented to the third respondent.

JUDGMENT

DANIELS J

Introduction

- [1] The applicant is the Office of the Public Protector, an institution established by virtue of Chapter 9, section 182, of the Constitution of the Republic of South Africa. The Office of the Public Protector is critical to the functioning of our constitutional democracy, and its primary function involves the investigation any conduct in the State, or public administration, alleged or suspected to be unlawful or improper.
- [2] Until his dismissal, the first respondent was engaged by the Office of the Public Protector as Senior Manager: Provincial Representative, Free State Province. The first respondent referred a dispute about the fairness of his dismissal to the Commission for Conciliation, Mediation and Arbitration (the “CCMA”) and the third respondent (the “commissioner”) found that his dismissal was substantively unfair. The commissioner reinstated the first respondent into his former position, but limited backpay to twelve months’ remuneration.
- [3] The applicant brings this application to review and set aside the arbitration award, delivered on or about 24 June 2022, under case number GATW1336-22. In argument, the first respondent abandoned the preliminary issue it raised regarding the authority of the chief executive officer to depose to the founding affidavit.

Material facts

- [4] On or about 11 February 2020, the first respondent addressed a request to the Speaker of the National Assembly (“the Speaker”) requesting that she investigate the conduct of Advocate Busisiwe Mkhwebane (“Mkhwebane”), who held the office of Public Protector then. The first respondent lodged his request with the Speaker without attempting to resolve his complaint through the internal grievance process. In an affidavit, attached to the request, the first respondent indicated that he wished to rescue the institution from the ‘tyranny’ of Mkhwebane who was engaged in an ‘orchestrated plan to destroy the institution’. The first respondent identified a litany of complaints, some of which are recorded below. The first respondent suggested that Mkhwebane had terminated internal consultative structures because of her inadequate intellectual and legal knowledge. The first respondent suggested that this resulted in reckless litigation, at enormous cost to the institution, in defence of reports that she had authored. The first respondent contended that Mkhwebane neglected certain investigations related to politicians whom she favoured and appointed compromised individuals into positions of authority, including the former chief executive officer, who had been dismissed by the Department of Rural Development and Land Affairs.
- [5] On or about 17 February 2020, the first respondent was interviewed on SABC and Radio 702 in which he explained the contents of his complaint to the Speaker. The applicant contends that the interview was unauthorised and conducted in breach of the media policy and communications policy.
- [6] Soon after the complaint and the media interviews, the first respondent was charged with misconduct, on or about 6 March 2020. Among other things, the first respondent was charged with bringing the Office of the Public Protector into disrepute. The charges included several alternative

charges which are omitted from what follows, given that the first respondent was not dismissed for the alternative charges.

[7] In brief, the applicant alleged that:

- 7.1 The first respondent refused to immediately attend to a complainant, Mr Peter Seabi, thereby contravening the Code of Conduct policy (charge 1),
- 7.2 The first respondent assaulted Mr Peter Seabi by pushing him to the ground in contravention of the Code of Conduct policy (charge 2),
- 7.3 The first respondent brought the organisation into disrepute because he was convicted of assaulting Mr Peter Seabi, because of which the organisation faced a civil suit for damages (charge 3),
- 7.4 The first respondent failed to follow the grievance procedure and instead transmitted his complaint to the Speaker and to the media (charge 4),
- 7.5 The first respondent participated in media interviews in breach of the applicant's policies and procedures (charge 5),
- 7.6 The first respondent participated in media interviews during which he made disparaging remarks about Mkhwebane with the intention of bringing the organisation into disrepute (charge 6),
- 7.7 The first respondent participated in media interviews during which he disclosed confidential, and misleading, information relating to the usage of the budget of the organisation (charge 7),

7.8 The first respondent participated in media interviews in which he leaked confidential information, about financial expenditure, without permission to do so, in contravention of his Declaration of Secrecy, the Code of Conduct policy, and his conditions of employment (charge 8),

7.9 The first respondent participated in media interviews during which he incited other employees to challenge the fitness of Mkhwebane to hold office as Public Protector (charge 9).

[8] Following the disciplinary process, on or about 18 December 2020, the chairperson found the first respondent guilty of the charges and dismissed him with immediate effect.

[9] The chairperson consolidated the nine charges in the following manner: the original charges 1, 2 and 3 were consolidated into a new charge 1, the original charge 4 became charge 2, original charges 5 and 6 became charge 3, original charges 7 and 8 became charge 4 and original charge 9 became charge 5.

New charge 1

[10] The applicant contends that the commissioner erred by finding that it was impermissible to discipline the first respondent for the incident between himself and Mr Seabi, which had occurred almost nine years earlier. The commissioner found that the applicant waived its right to discipline the first respondent because the delay was unreasonable, there was no reasonable explanation for the delay, and first respondent suffered prejudice as a result. The applicant contends that, because the first respondent did not testify, there was no evidence of any prejudice that he had suffered because of the delay.

- [11] The commissioner found that, even if there was no waiver, there was no substance to the charge because the applicant presented insufficient evidence of the assault. The first respondent challenged the finding of the Magistrates Court that he assaulted Mr Seabi and, at the time of the arbitration, the appeal was pending.
- [12] It appears that the applicant's sole witness on the issue accepted that Mr Seabi was the aggressor. Ms Tebogo Nkuna ("Nkuna") testified that Mr Seabi angrily barged into her office and then left just as abruptly without introducing himself or greeting her. Nkuna witnessed Mr Seabi and the first respondent "holding each other by the collars of the shirt" in the first respondent's office. Nkuna witnessed them "going at each other" and they were "... like pulling each other by the collars of their shirts".

New charge 2

- [13] The commissioner noted that the applicant's witnesses could not say whether the first respondent had transmitted his complaint to the media, and they conceded that the first respondent was entitled to submit a complaint to the Speaker. The commissioner found that the first respondent's complaint to the Speaker contained no disparaging remarks about Mkhwebane - apparently because she did not testify.

New charge 3

- [14] The commissioner found that the first respondent had not violated the grievance policy by participating in media interviews because the grievance policy did not deal with media interviews. The commissioner further that the first respondent did not participate in the interviews as a spokesperson of the Public Protector. The commissioner found that the first respondent was exercising his fundamental right to freedom of

expression, which is necessary for the free and open exchange of ideas. The commissioner noted, once again, that Mkhwebane did not testify about why the first respondent's remarks were disparaging or derogatory.

New charge 4

- [15] The commissioner found that use of public money by a public institution could not be considered confidential and, accordingly, first respondent cannot be found guilty of disclosing confidential information or violating his Declaration of Secrecy.

New charge 5

- [16] The commissioner found that the media interviews could not amount to incitement by the first respondent because, in context, 'incitement' refers to the encouragement of others to behave unlawfully. Instead, the commissioner found that the disciplinary action against the first respondent constituted retribution for disclosures he made.

Grounds of review and analysis

Legal principles

- [17] Our Constitutional Court¹ fashioned the test on review applicable to arbitration awards of the CCMA as follows: *is the arbitration award one which no reasonable commissioner could reach on the material before him or her?* A review will succeed only where the outcome is unreasonable based on all the evidence before the commissioner even where this is for different reasons to those contained in the award.²

¹ *Sidumo and another v Rustenburg Platinum Mines Ltd and others* (2007) 28 ILJ 2405 (CC)

² See *Fidelity Cash Management Service v Commission for Conciliation, Mediation & Arbitration & others* (2008) 29 ILJ 964 (LAC) at para 96.

[18] The Supreme Court of Appeal clarified in *Herholdt v Nedbank Ltd (COSATU as Amicus Curiae)*³ that the review test did not extinguish the procedural grounds for reviews contemplated in section 145(2)(a) of the LRA. However, the procedural defects alleged must indicate that the arbitrator misconceived the nature of the enquiry or arrived at an unreasonable result.

[19] In *Head of the Department of Education v Mofokeng and others*⁴ the court confirmed that when an error of fact or law occurs, what matters is its materiality - whether the error had a distorting effect on the outcome.

Grounds of review

[20] The applicant contends that the commissioner's finding that the applicant had waived its right to discipline was irregular primarily because the first respondent failed to testify about the prejudice he suffered because of the delay.

[21] In *Moroenyane v Station Commander of the SAPS – Vanderbijlpark ("Moroenyane")* [2016] ZALCJHB 330 (26 August 2016) Snyman AJ stated:

"[38] In deciding whether a delay could possibly serve to render the institution or continuation of disciplinary proceedings unreasonable and unfair, guidance can be found in referring to the issue of a stay in criminal proceedings due to an undue delay in such proceedings. In *Bothma v Els and Others* the Court considered the question of a permanent stay of a private prosecution due to a delay in the bringing of the prosecution. Sachs J said: '.... the delay in the present matter must be evaluated not

³ (2013) 34 ILJ 2795 (SCA)

⁴ [2015] 1 BLLR 50 (LAC)

as the foundation of a right to be tried without unreasonable delay, but as an element in determining whether, in all the circumstances, the delay would inevitably and irremediably taint the overall substantive fairness of the trial if it were to commence.'

[39] In then considering whether a delay would taint overall substantive fairness, Sachs J referred with approval to the following dictum from the judgment in *Sanderson v Attorney-General, Eastern Cape*:

'.... The critical question is how we determine whether a particular lapse of time is reasonable. The seminal answer in *Barker v Wingo* is that there is a 'balancing test' in which the conduct of both the prosecution and the accused are weighed and the following considerations examined: the length of the delay; the reason the government assigns to justify the delay; the accused's assertion of his right to a speedy trial; and prejudice to the accused.'

Sachs J then added the following:

'A word of caution: these four factors should not be dealt with as though they constitute a definitive check list. A balancing test necessarily compels courts to approach speedy trial cases on an ad hoc basis....'

(own emphasis)

[22] In *Moroenyane* the court highlighted the factors to be considered in relation to waiver of the right to discipline: the length of the delay (which must be unreasonable), the explanation for the delay (which must be poor or non-existent), whether the employee took steps to ensure a speedy process, whether there was material prejudice to the employee, and the nature of the offence. These factors are to be considered and balanced holistically. It is of course important not to lose sight of the fact that employees have a right to a speedy disciplinary process, and employers have a duty to take speedy disciplinary action.

[23] In *Stokwe v Member of the Executive Council, Department of Education, Eastern Cape & others*⁵ the Constitutional Court accepted that there may well be instances where an employer has waived its right to take disciplinary action. Each case must be assessed on their own merits. The Constitutional Court noted that: “*The requirement of promptness not only extends to the institution of disciplinary proceedings, but also to their expeditious completion. If an employee is retained in employment for an extended period after the institution of disciplinary action, it may indicate that the employment relationship has not broken down.*” (own emphasis)

[24] In *National Union of Metalworkers of SA v Intervale (Pty) Ltd & others*⁶ Cameron J held as follows:

“[60] ... Waiver is the legal act of abandoning a right on which one is otherwise entitled to rely. It is not easily inferred or established. The onus to prove it lies with the party asserting waiver. That party is required to establish that the right-holder, with full knowledge of the right, decided to abandon it.

[61] So waiver depends on the intention of the right-holder. That can be proved either through express actions or by conduct plainly inconsistent with an intention to enforce the right. It may be inferred from the outward manifestations of the right-holder's intention: 'The outward manifestations can consist of words; of some other form of conduct from which the intention to waive is inferred; or even of inaction or silence where a duty to speak exists'.

(own emphasis)

[25] The commissioner cannot be faulted for finding that the applicant waived its right to take disciplinary action in relation to an incident that occurred approximately nine years earlier. The applicant gave no indication during this period that it intended to take disciplinary action. The applicant's

⁵ (2019) 40 ILJ 773 (CC) at para [67]

⁶ (2015) 36 ILJ 363 (CC)

inaction was inconsistent with an intention to enforce its right to discipline. With a delay of approximately nine years, the overall substantive fairness of the disciplinary process is inevitably and irremediably tainted. It is inescapable that, with a delay of approximately nine years, necessary witnesses are no longer available, or their memories would have faded.⁷ On the facts, the first respondent discharged the onus of proving waiver. However, even if this is incorrect, the commissioner explained that there was insufficient evidence to justify a guilty finding. A conviction in a criminal court cannot, by itself, suffice to prove misconduct in a different tribunal. More is required. The finding that the alleged misconduct was not proven by the applicant is reasonable on all the evidence. In any event, the applicant, as employer, can hardly contend that, after nine years of knowledge of the alleged assault, the employment relationship had irretrievably broken down.

- [26] The applicant alleges that the first respondent ought to have testified that he acted in self-defence. This misses the point - that the onus is on the employer to prove the misconduct. The conviction in the criminal court is not evidence of misconduct. Nkuna's evidence did not establish that the first respondent assaulted Mr Seabi nor that he behaved inappropriately. Clause 3.2.3 of the Code of Conduct states that staff must be "polite, helpful and reasonably accessible" in their dealings with the public. The applicant conceded that clause 3.2.3 assumes that the public is not unreasonable or aggressive. For example, a member of the public who is threatening to shoot a staff member cannot expect politeness in return. The applicant conceded further that the evidence was insufficient to find the first respondent guilty of assaulting Mr Seabi.

⁷ In *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC) Didcott J stated: "*Inordinate delays in litigating damage (sic) the interests of justice. They protract the disputes over the rights and obligations sought to be enforced, prolonging the uncertainty of all concerned about their affairs. Nor in the end is it always possible to adjudicate satisfactorily on cases that have gone stale. By then witnesses may no longer be available to testify. The memories of ones whose testimony can still be obtained may have faded and become unreliable. Documentary evidence may have disappeared. Such rules prevent procrastination and those harmful consequences of it. They thus serve a purpose to which no exception in principle can cogently be taken.*" (own emphasis)

- [27] The applicant alleges that the award is unreasonable because of the commissioner's finding that it was necessary for Mkhwebane to testify - that first respondent's remarks were disparaging. I agree that this finding was unreasonable. However, by itself, the error does not render the outcome unreasonable. The error was not so significant that it materially affected the outcome. The commissioner correctly referred to the first respondent's right to freedom of expression. The first respondent's remarks and opinions were based in personal observations and well grounded. It is evident, from the contents of the complaint itself, that first respondent, at personal risk, conducted himself in a manner he believed necessary to preserve the integrity of the Office of the Public Protector.⁸ In the complaint, he says so. Even if it is assumed that his remarks about Mkhwebane were disparaging, it is well established that insolence does not attract the sanction of dismissal for a first offence unless such misconduct is serious and wilful.⁹
- [28] The applicant submits that the commissioner failed to apply his mind to the evidence which showed that the first respondent breached the media policy which prevents the unauthorized release of information "*of any kind*" without the prior consent of the Public Protector. I cannot accept the submission. Subject to certain procedural limitations, provincial representatives are permitted to do radio interviews and write articles for publication on the mandate, role, functions, work and events of the Public Protector.¹⁰ The first respondent's letter of appointment¹¹ indicated that his duties and responsibilities included section 3(13) of the Public Protector Act, which required that he act impartially and independently and perform his functions "in good faith and without fear, favour, bias or prejudice". The media policy must be understood in that context. One

⁸ Annexure FA4 to the Founding Affidavit, Pleadings pp95 - 106

⁹ See *Palluci Home Depot (Pty) Ltd v Herskowitz & others* (2015) 36 ILJ 1511 (LAC) at para 22

¹⁰ Clause 6.2.8 of the Media Policy, pleadings bundle p113

¹¹ Pleadings bundle p45

cannot ignore that the Public Protector is a public institution, designed to protect the public interest in good governance. The commissioner carefully balanced the media policy against the fundamental right to freedom of expression. The blanket prohibition envisaged by the media policy is untenable. Our law protects the disclosure of information by employees, made in good faith, which reveals or tends to reveal criminal activity, corruption, or other forms of unlawful conduct. The first respondent submitted that the remarks cannot be considered disparaging unless they are false and, with the benefit of hindsight, the court must accept that his remarks were accurate.

Conclusion

[29] For the reasons set out above, the grounds for review have no substance. The outcome is reasonable in the context of the evidence presented to the commissioner. For the sake of completeness, it bears mentioning that, since the dismissal of the first respondent, Mkhwebane herself was removed from office, by the President, on 13 September 2023, following an enquiry conducted by the National Assembly under s194 of the Constitution. It is a matter of public record that many of the complaints raised by the first respondent featured in the final report of the National Assembly.

Costs

[30] In this court, costs do not follow the result. There is nothing in law or fairness which dictates that a cost order should be made.

Order

[31] In the circumstances, I make the following order:

31.1 The application is dismissed,

31.2 There is no order as to costs.

Reynaud Daniels

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:
Adv Mofokeng
Gildenhuys Malatji Inc

For the First Respondent:
Union Official