(1) Reportable: No
(2) Of interest to other Judges: No

17 March 2026
Signature Date

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Case no: C155/2024

In the matter between:

NEHAWU obo MNINAWA NTSHONGWANA — **Applicant**

and

DEPARTMENT OF EMPLOYMENT AND LABOUR (WESTERN CAPE) — **First Respondent**

COMMISSIONER KW SCHOEMAN NO — **Second Respondent**

GENERAL PUBLIC SERVICE SECTOR BARGAINING COUNCIL — **Third Respondent**

I DE VLIEGER-SEYNHAEVE N.O — **Third Respondent**

Heard: **11 March 2026**

Delivered: **17 March 2026**

Summary: A review application to set aside a compensation award on the grounds that the amount is not linked to monthly remuneration, and therefore is not just and equitable.

JUDGMENT

GANDIDZE, J

Introduction

[1] The applicant, Mr Ntshongwana, assisted by his trade union, NEHAWU, seeks an order reviewing and setting aside an arbitration award ordering that he be paid R15,000 as compensation for an unfair labour practice committed against him by his employer, the Department of Employment and Labour (Western Cape). The award, dated January 2024, was issued by Commissioner Schoeman in case number GPBC16/2023, under the auspices of the General Public Service Sector Bargaining Council. The application was brought under section 145(1) of the Labour Relations Act[1] (LRA), in conjunction with section 158(1)(g).

[2] The grounds of review relied upon are that the commissioner committed misconduct in relation to his duties and committed an irregularity, firstly by failing to record Ntshongwana's remuneration, and secondly, by not clarifying how the R15,000 compensation is linked to Ntshongwana's remuneration. Therefore, the submission was that the compensation granted is not just and equitable as contemplated in section 194(4) of the LRA.

[3] As the review application was filed 44 days late, the applicants also sought condonation. Having considered the explanation for the delay provided, which is that the union official who assisted Ntshongwana during the arbitration proceedings resigned following the award and failed to do a proper handover of the matter when requested, I am persuaded that Ntshongwana did not lose interest in the matter and that he took all the necessary steps to ensure the union was attending to it. Granting condonation will also not prejudice his employer, as the application must still be determined on its merits.

[4] Although no opposing papers were filed, on the hearing date, Ms Qaba appeared for the employer, instructed by the State Attorney. She sought a short postponement of the matter from the bar, submitting that the drafting of the answering papers and heads of argument was at an advanced stage. The employer had had more than enough time since September 2024 to file its

[1] Act 66 of 1995, as amended.

answering affidavit if it had a version in the review application. In the *ex tempore* judgment issued in Court, denying the postponement application, I stated that no notice of opposition had been filed. This is incorrect because there is a notice of opposition in the Court file. The point is that after filing the notice to oppose, the employer took no further steps in the matter until the set-down date. This occurred even though, days before the hearing date, the employer was contacted regarding its heads of argument, if any. No response was received to the communication. The employer could not simply appear at the hearing and seek a postponement. Those are the reasons the postponement application was refused.

[5] Ms Xaba made submissions on behalf of the employer based on the papers before the Court, and her submissions regarding facts that were not pleaded have not been considered in preparing the judgment.

<u>Events post the issue of the award</u>

[6] Before addressing the merits or otherwise of the review application, the Court, upon perusing the Court file, noted that the award to be reviewed and set aside is dated 24 January 2025. The review application was filed on 23 April 2025. What the applicant has not disclosed to the Court is that, after the award was issued and after this review application was launched, he applied for a variation of the compensation award on the same grounds on which the award is sought to be reviewed. After considering the case authorities relied upon to challenge the compensation award of R15,000, the Commissioner found as follows:

> 'I have once again applied my mind to the submissions made by the applicant and came to the conclusion that R15 000 is just and equitable compensation for the unfair labour practice dispute which resulted in the applicant not being shortlisted for an interview.'

[7] The Commissioner dismissed the application in a ruling dated 14 May 2024.

[8] The question is whether the award issued in January 2024 was overtaken by the ruling dismissing the application for variation, and whether the applicant

ought to have filed an application to review the variation ruling, rather than the January 2024 award.

[9] Nevertheless, the Court proceeds to consider the merits of the review application for these reasons. First, the Court raised the issue *mero motu*, which had not been addressed in the papers. Had the matter been opposed, the employer might have raised this issue. Secondly, there was also the consideration that the Commissioner ought not to have entertained the variation application as he was *functus officio*. Lastly, where a party unsuccessfully applies for rescission of an award, this Court would usually consider a review application in respect of both the award and the rescission ruling.

[10] As I recorded above, the award is sought to be reviewed on the grounds that the Commissioner did not know the applicant's remuneration and that the compensation award is not linked to it.

<u>The commissioner did not know the applicant's remuneration</u>

[11] It is evident that nowhere in the review record is the applicant's remuneration reflected. If anyone is to blame for this state of affairs, it is the applicant's representative in those proceedings. That information ought to have been presented to the Commissioner, but this did not happen.

[12] Perhaps more troubling is that the founding affidavit states that, because the issue of the applicant's remuneration was not addressed during the arbitration proceedings, the Commissioner telephoned him afterwards to inquire about it. If there is any truth to the allegation, then on the face of it, this appears irregular. The information should have been requested through the union official who represented the applicant, and the employer's representatives should have been copied. I will return to this issue when I discuss the second ground of review.

Should compensation be linked to monthly remuneration?

[13] The applicants' main submission is that unless an award for compensation is linked to monthly remuneration, it is neither just nor equitable as outlined in section 194(4) of the LRA, which states as follows:

> **'194 Limits on compensation**
>
> (4) The compensation awarded to an *employee* in respect of an unfair labour practice must be just and equitable in all the circumstances, but not more than the equivalent of 12 months *remuneration*.'

[14] Section 194(4) does not specify the minimum compensation that may be awarded to an employee if it is found that an employer committed an unfair labour practice against such employee. However, the provision limits the maximum compensation to 12 months' remuneration. Does this imply that a compensation award must be based on the employee's remuneration?

[15] In *Minister of Justice & Constitutional Development & another v Tshishonga*[2] *(Tshishonga),* the employee was awarded compensation equivalent to 12 months' remuneration, after the Court found that he had been subjected to an unfair labour practice for making protected disclosures, as contemplated in the Protected Disclosures Act, 26 of 2000. The employer appealed against the compensation award, arguing that it was excessive. The Labour Appeal Court stated this:

> '[15] In summary, once it has been found that an employee has been subjected to an occupational detriment on account of having made a protected disclosure, a court must determine what compensation is just and equitable in the circumstances, which amount is capped at 12 months' remuneration. <u>In the present case the judge in the court a quo appeared to conflate the award of compensation with an amount of remuneration. As already noted s 194(4) of the LRA employs remuneration purely as a means of capping the amount of the award</u>

[2] (2009) 30 ILJ 1799 (LAC); [2009] ZALAC 5.

> <u>so ordered. By contrast, the court a quo employed remuneration as the basis for the quantification of the award. Accordingly, the court a quo erred in its interpretation of s 194(4) of the LRA</u> and this court is thus at large to determine the appropriate amount of compensation. (Own emphasis)

[16] Therefore, even though section 194(4) of the LRA refers to remuneration, this is solely for the purpose of capping the amount to be awarded, and remuneration is not a basis for determining the quantum of the award. When a Commissioner or this Court determines the compensation award, it need not, and should not, refer to remuneration to determine the quantum of compensation, but must ensure that the award does not exceed an employee's 12 months' remuneration. The applicants are challenging the award on the same basis that the Labour Appeal Court identified as the wrong basis for determining the compensation award.

[17] In addition, in *Tshishonga*, the Court held that compensation includes both patrimonial and non-patrimonial loss. Patrimonial loss is that which can be quantified, whereas non-patrimonial loss is a solatium. For the non-patrimonial loss suffered by Mr Tshishonga, the Court reduced the compensation award from 12 months' remuneration of a Director-General to R100,000 for non-patrimonial loss plus R177,000 for patrimonial loss (legal fees).

[18] Regarding a compensation award for non-patrimonial loss, the Court stated that the actual amount to be awarded is a discretionary decision of the Court (or Commissioner), and that *"there is no tariff to which recourse can be made"*[3]. Therefore, an employee's remuneration is not a tariff that should be used to determine the quantum of compensation to be awarded.

[19] The unreported decision of this Court in *South African Post Office Ltd v Soman NO and Others*[4], which the applicants relied upon,[5] stated this:

[3] Ibid at para 20.

[4] (JR1368/12) [2016] ZALCJHB 68 (25 February 2016).

[5] The judgment does not have a paragraph 23, referred to in the applicants' heads of argument. The paragraph quoted is from *ARB Electrical Wholesalers (Pty) Ltd v Hibbert* (2015) 36 ILJ 2989 (LAC),

> '[10] This judgment indicates to me that the reliance on a salary when compensation is arrived at is a complex matter. It is merely a guide but one should not base a review merely because of how a salary has been used as means of compensation and the complexity involved in the computation of compensation is clearly indicated in paragraph 24 of this judgment.'

[20] It is clear from the above paragraph that the Court also concluded that using salary to determine the compensation to be awarded is a complex matter and that salary is merely a guideline. The law, according to *Tshishonga*, is not to use salary to decide the compensation to be awarded, but to use salary to establish the maximum compensation that can be awarded. As the applicant's ground of review is contrary to the LAC's decision in *Tshishonga*, that should conclude the review application.

[21] The review application would also fail because this court's powers, when asked to review a compensation award, are circumscribed. In *McGregor v Public Health & Social Development Sectoral Bargaining Council & others*[6], the Court outlined the test that applies when an appeal court is called upon to interfere with the discretion to grant compensation and the amount of the compensation. The Court stated this:

> '[27] So, when can an appellate court interfere? The department correctly relies on *Kemp* as authority on when an appeal court can interfere with another court's judicial discretion, in relation to the award and amount of compensation. In *Kemp*, the Labour Appeal Court was faced with the question of whether the Labour Court should have awarded compensation on establishing the dismissal to be substantively unfair, and if so, whether the amount awarded was excessive. The court drew a careful distinction between the discretion exercised in granting relief in terms of s 193(1)*(c)* and the discretion that an arbitrator or the Labour Court has in terms of s 194(1). The court said that the decision to award compensation (in terms of s 193(1)*(c)*) is a matter of judicial discretion which means that an appeal

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which does not take the applicant's submission any further than that compensation awarded cannot be a token amount.

[6] (2021) 42 ILJ 1643 (CC); [2021] ZACC 14.

court's power to interfere in such an award is not circumscribed: 'in such a case an appeal court is at large to come to its own decision on the merits.' However —

> 'in regard to the determination of the amount of compensation [in terms of s 194(1)] the Labour Court or arbitrator exercises a *true or narrow discretion…* [which means that] this court's power to interfere is circumscribed and can only be exercised on the limited grounds…. In the absence of one of those grounds this court has no power to interfere with the amount of compensation'.

Those limited grounds include where the tribunal or court:

(a) did not exercise a judicial discretion; or
(b) exercised its discretion capriciously; or
(c) exercised its discretion upon a wrong principle; or
(d) has not brought its unbiased judgment to bear on the question; or
(e) has not acted for substantial reasons; or
(f) has misconducted itself on the facts; or
(g) reached a decision in which the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles'.

The distinction between the discretion exercised in terms of ss 193(1)*(c)* and 194(1) is important as it defines how the reviewing court will consider the matter.'

[22] Therefore, when this Court is asked to review the amount of compensation awarded for an unfair labour practice, it can only intervene if one or more of the specified errors are present. This Court cannot interfere merely because it would have reached a different decision.[7] In this case, the applicants argued that the commissioner committed misconduct and irregularity by awarding compensation unrelated to Ntshongwana's remuneration. I have already established that the Labour Appeal Court found that linking compensation to

[7] *Edumbe Municipality v Putini & others* (2020) 41 ILJ 891 (LAC); [2019] ZALAC 74 at para 51.

remuneration constitutes an error, and therefore, the Commissioner's approach was correct.

[23] In exercising discretion over the compensation to be awarded, the Commissioner knew Ntshongwana's remuneration, as Ntshongwana had told him during the telephone call. Knowing what that remuneration was, the Commissioner considered that the maximum permissible amount is 12 months' remuneration, noted that the Courts had warned against granting excessive compensation awards, referred to the decision of the Labour Appeal Court in *Tshishonga*, which I have mentioned above, and stated that the monetary relief granted is a *solatium*, not payment for the unfair labour practice. Therefore, the Commissioner was aware of the relevant legal principles and applied them correctly. He also knew Ntshongwana's remuneration. Consequently, there are no grounds for interfering with the compensation award.

[24] In the result, the following order is made:

<u>Order</u>

1. Condonation for the late filing of the review application is granted.

2. The review application is dismissed.

3. There is no order as to costs.

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T. Gandidze

Judge of the Labour Court of South Africa

Appearances:

For the Applicant	:	Mr T Malulele (NEHAWU Legal Officer)
For the First Respondent	:	Advocate K Qaba
Instructed by	:	Ms C Bailey of the State Attorney