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

Signature Date

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case No: 2026-049354

In the matter between:

MAKANYA ANNA MTHINI **Applicant**

and

COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION **First Respondent**

SEELE MOKWENA *N.O.* **Second**
Respondent

STANDARD BANK (PTY) LTD **Third Respondent**

Heard: **12 March 2026**

Delivered: **19 March 2026**

Labour law – Review in terms of s 158(1B) of the LRA – Urgent intervention in incomplete arbitration proceedings - Exceptional circumstances – Applicant failing to show exceptional circumstances - Review grounds – Errors of law and gross irregularity alleged – no irreparable harm, illegality, grave injustice or unattainable substantial redress established – Application dismissed with costs on punitive scale.

JUDGMENT

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MAKHURA, J

Introduction

[1] The applicant, a former Branch Manager employed by the third respondent at its Rustenburg and Brits branches, approaches this Court on an urgent basis to review a ruling issued by the second respondent, a commissioner appointed by the Commission for Conciliation, Mediation and Arbitration (CCMA) to arbitrate her unfair dismissal dispute. In terms of that ruling, the commissioner dismissed the applicant's application in terms of rule 29 of the CCMA rules[1] to compel the third respondent to disclose the investigation report, including emails, recordings and transcripts generated during the investigation process.

[2] The review application is brought in terms of section 158(1B) of the Labour Relations Act[2] (LRA) and is opposed by the third respondent.

Factual background

[3] The factual matrix giving rise to the dispute is largely common cause. The applicant faced charges of gross negligence for allegedly failing to conduct monthly surprise checks, neglecting to inspect the recyclers during quarterly audits, and not verifying a discrepancy of R748 490.00 identified and allocated by her subordinate. According to the third respondent, these omissions enabled the applicant's subordinate to misappropriate funds without detection, ultimately resulting in a financial loss of R1 880 310.00.

[4] The applicant was dismissed on 8 February 2023 and referred an unfair dismissal dispute to the CCMA in March 2023. The arbitration was set down for 12 February 2026, after delays which are irrelevant for the purpose of this application. At the commencement of the arbitration, the applicant applied in

[1] *Rules for the Conduct of Proceedings before the Commission for Conciliation, Mediation and Arbitration*, GG48445 of 21 April 2023.
[2] Act 66 of 1995, as amended.

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terms of rule 29 of the CCMA rules for disclosure of the investigation and associated material, which was allegedly relevant to the dispute.[3] The applicant submitted that the report was central to the deliberations leading to her being charged and that it contained further material, including audio recordings and witness statements. The third respondent opposed the application, contending that it neither relied on the report during the disciplinary hearing nor intended to rely on it during arbitration, that the report contained privileged information, and that the arbitration, being a *de novo* process, would focus on the fairness of the dismissal based on evidence actually led before the commissioner, where it bears the onus of proof.

<u>The ruling</u>

[5] From the facts above, the commissioner was required to determine whether the investigation report was relevant to the issues before him. Specifically, he had to consider whether the third respondent's reliance on the report when deciding to charge the applicant entitled her, in the arbitration, to its disclosure, and particularly where the third respondent expressly disavowed any reliance on the report in the arbitration proceedings.

[6] In his analysis of the application, the commissioner noted that the parties had identified in their pre-arbitration minute the relevance of the investigation report as a factual issue in dispute. The pre-arbitration minute recorded:

> 'That the investigation report is indispensable to any proper determination of whether there is a rational connection between the deliberations to charge the Applicant with misconduct and the decision and the reasons to "slap the wrists" of Ms Monokwa and Ms Mokgale with final written warnings. The Respondent

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[3] Rule 29(1) and (3) provides that:

> '(1) At any time after the certificate of outcome is issued or the expiry of the 30-day conciliation period but not less than fourteen (14) days prior to the hearing date, either party may, on application, request the other party to disclose any documents or material relevant to the dispute…
>
> (3) A commissioner may either before or during the proceedings at the commissioner's own accord, or on application, make an order as to the disclosure of relevant documents or material relevant to the dispute.'

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contends that the investigation report is not relevant or necessary in these proceedings.

That the deliberations contained in the investigation report are relevant and essential for the exercising of the applicant's fair process rights in terms of rule 29 in the ongoing arbitration proceedings. The request for the investigation report is a legitimate endeavour "to determine objectively what considerations were probably operative in the minds of the Bank (the decision-maker) when they passed the resolution in question" to charge the Applicant with misconduct. The Respondent contends that the investigation report is not relevant or necessary in these proceedings.'

[7] The commissioner referred to the legal principles, emphasising that the key test is whether the information sought is relevant to the dispute. He held that the applicant's request was speculative, resting on what the report might contain, and that such speculation fell short of the threshold required under rule 29. He also found that the alleged deliberations in the report, which the applicant believed could expose an improper motive for charging her, were irrelevant, particularly as no substantive basis for alleging an ulterior motive had been provided.

[8] The commissioner then turned to the applicant's further submission that the investigation report would demonstrate inconsistency in the disciplinary action taken by the third respondent. He held that the third respondent bears the onus of proving the fairness of the dismissal, which includes providing a reasonable explanation for any alleged differential treatment of employees. The commissioner further emphasised that arbitration proceedings constitute a *de novo* inquiry where the third respondent must justify the fairness of the dismissal. He then dismissed the disclosure application.

<u>The section 158(1B) review application</u>

[9] Dissatisfied, the applicant now challenges that ruling on an urgent basis under section 158(1B) of the LRA, which provides that:

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> 'The Labour Court may not review any decision or ruling made during conciliation or arbitration proceedings conducted under the auspices of the Commission or any *bargaining council* in terms of the provisions of *this Act* before the *issue in dispute* has been finally determined by the Commission or the *bargaining council,* as the case may be, except if the Labour Court is of the opinion that it is just and equitable to review the decision or ruling made before the *issue in dispute* has been finally determined.'

[10] Section 158(1B) discourages piecemeal litigation, and only in limited circumstances may the Court intervene in ongoing arbitration proceedings. In this matter, the applicant seeks not only to review the interlocutory ruling, but she wants to do so on an urgent basis and to obtain final relief. This raises the bar considerably. The enquiry is no longer confined to whether intervention would be just and equitable; the applicant must demonstrate the existence of exceptional circumstances justifying immediate judicial interference.[4] Such an assessment necessarily includes whether the matter is genuinely urgent and whether the applicant will be deprived of substantial redress if she waits until the arbitration is finalised.

[11] Although section 158(1B) refers to intervention if it is *"just and equitable"*, in *Moolman v Commission for Conciliation, Mediation and Arbitration and Others*[5] *(Moolman)*, the Labour Appeal Court (LAC) adopted the position from its previous judgments and the judgments of this Court that judicial interference in incomplete arbitration proceedings is warranted only in exceptional circumstances. The LAC held that section 158(1B) seeks to prevent piecemeal litigation and to ensure that challenges to interlocutory rulings are deferred until the conclusion of the main dispute. This approach, so the LAC emphasised, is grounded in the legislative imperative for the swift resolution of labour disputes,

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[4] *Booysen v The Minister of Safety and Security & others* [2011] 1 BLLR 83 (LAC); (2011) 32 ILJ 112 (LAC) at para 54.
[5] [2024] ZALAC 339.

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which favours allowing arbitration proceedings to run their full course before the Court intervenes.[6]

[12] The LAC further held that intervention in pending arbitration proceedings may be justified only where allowing the ruling to stand would cause irreparable harm to the applicant and where such harm could not be remedied after the arbitration has been finalised. The Court also reaffirmed that rule 29 affords commissioners a broad procedural discretion, consistent with the LRA's purpose of achieving expeditious and informal dispute resolution.

[13] In *Moolman*, this Court had reviewed and set aside an interlocutory ruling granted in favour of the employee in a dispute concerning the alleged reasonable expectation of renewal of a fixed-term contract, where the employee bore the onus of establishing dismissal. The LAC overturned that decision. In its most recent decision on section 158(1B), *South African Cabin Crew Association obo Members v South African Airways (SOC) Ltd and Others*[7] *(SA Cabin Crew)*, the LAC upheld this Court's urgent intervention in respect of jurisdictional and condonation rulings and emphasised the narrow circumstances that may justify judicial interference in ongoing arbitration proceedings. In *SA Cabin Crew*, this Court heard the matter on an urgent basis and granted relief. The LAC, upholding that outcome, reaffirmed that section 158(1B) embodies the principle that judicial intervention should generally await the final determination of the underlying dispute. The LAC emphasised that only in truly exceptional cases, such as those involving *"illegality"*, *"grave injustice"*, or circumstances *"where justice could not otherwise be achieved"*, will early intervention be warranted. The LAC further underscored that intervention is particularly justified where the impugned ruling rests on a material error of law, given the constitutional right to lawful, reasonable, and procedurally fair administrative action.[8]

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[6] Ibid at paras 42 - 45.
[7] [2025] ZALAC 45; [2025] 10 BLLR 1048 (LAC).
[8] Ibid at paras 27 – 28.

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[14] In *City of Johannesburg Metropolitan Municipality v Mphefo and others*[9] *(Mphefo),* this Court granted interim relief pending the determination of a review application against a jurisdictional ruling that effectively disposed of the dispute. Similarly, in *South African Sports Confederation and Olympic Committee (SASCOC) v Commission for Conciliation, Mediation and Arbitration and Others*[10], this Court intervened and set aside the commissioner's ruling compelling disclosure of an investigation report that was patently irrelevant. In *SASCOC*, as in the present case, the employer had expressly disavowed reliance on the investigation report during both the disciplinary hearing and the arbitration. The Court held that, because arbitration is a *de novo* inquiry concerned with the fairness of the dismissal based on evidence led before the commissioner, the employer's internal investigation report was irrelevant to that enquiry and therefore not subject to disclosure.

<u>Analysis of the application</u>

[15] Against the above jurisprudential backdrop, the question in the present application is whether exceptional circumstances exist that justify the Court's intervention at this stage - specifically, whether urgent review proceedings are necessary to prevent irreparable harm, an illegality, or a grave injustice, and whether substantial redress would be unattainable if the arbitration proceeds without interruption.

[16] In her attempt to persuade the Court that intervention is warranted at this stage, the applicant advances three grounds of review, as set out in her founding and supplementary affidavits. Apart from the commissioner's ruling, the only other document before the Court is the pre-arbitration minute. The review must therefore be determined on the basis of that minute and the summary of the parties' submissions as recorded in the commissioner's ruling.

[9] [2024] ZALCJHB 287.
[10] [2021] ZALCJHB 23.

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[17] The applicant's first ground is that the commissioner committed an error of law by misapplying the test for relevance, particularly by reaching a conclusion on relevance without having sight of the investigation report. She submits that this rendered the ruling unreasonable[11]. Intertwined with this is the third ground of review, raised in the contested supplementary affidavit[12], in which the applicant contends that the commissioner exceeded his powers and committed a gross irregularity by proceeding to determine the disclosure application without first having sight of and examining the report.

[18] The second ground of review concerns the applicant's allegation that the commissioner improperly relied on what she describes as the third respondent's *"arbitrary submissions"*. Her argument is that the third respondent should not be permitted to determine unilaterally what material ought to be disclosed, nor to shield itself behind assertions of irrelevance. She contends that the investigation report contains the reasons and findings underlying the decision to charge her, and that this necessarily renders it relevant to the issues in dispute.

[19] At the core of all three grounds of review lies the complaint that the commissioner erred in finding that the investigation report was irrelevant to the arbitration. The applicant argues that he reached this conclusion without sight and examination of the investigation report and therefore could not properly assess its contents or potential value. She contends that this approach resulted in an improper rejection of her disclosure application.

[20] In *Moolman*, the LAC reaffirmed the well-established test for relevance adopted from the English jurisprudence. It held that:

> 'The test to apply in determining whether a document called upon to be disclosed or discovered is relevant to any matter under consideration was set out in the English case of *Compagnie v Finance et Commerciale du Pacifique v Peruvian*

[11] Reasonableness has no place in a section 158(1B) review application.
[12] I have decided to permit the supplementary affidavit in the interest of justice and having considered that the third respondent would suffer no prejudice, particularly because the supplementary affidavit did not, in my view, raise any new issue.

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Guano Co (1882), which was subsequently adopted and accepted as part of the South Africa law.

The test to apply in determining the relevancy of a document called upon to be disclosed is set out in *Peruvian Guano* as follows:

> "It seems to me that every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which *may* – not which *must* – either directly or indirectly enable the party requiring the affidavit (the document) either to advance his own case or to damage the case of his adversary. I have put in the words "either directly or indirectly," because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry, which may have either of these two consequences."

The process underlying the discovery and disclosure of relevant documents is underpinned by the consideration of ensuring a fair trial…'[13]

[21] It was accordingly incumbent upon the applicant to demonstrate that the investigation report, and/or the material it allegedly contains, could assist her in advancing her case or undermining that of the third respondent, or lead to a train of inquiry that may advance her case or undermine the third respondent's. However, her submission rested largely on irrelevant conjecture. She asserted that the report might reveal deliberations leading to the charges against her, or that it might contain other material such as audio recordings or witness statements, yet there is no record before this Court to suggest that she identified the nature of the alleged information, the witnesses involved, or how such material could support her defence or weaken the third respondent's case. The commissioner, therefore, correctly characterised the disclosure request as speculative and short of meeting the rule 29 relevance threshold.

[13] *Moolman* at paras 58 – 60.

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[22] The applicant's reliance on the alleged deliberations contained in the investigation report, which are said to reveal the motive behind the decision to charge her, was also correctly rejected by the commissioner. The issue before the CCMA is not why the third respondent charged the applicant, but whether the applicant's dismissal was substantively and procedurally fair. That enquiry is conducted *de novo*, and the third respondent bears the onus of proving fairness based on the evidence it elects to present during arbitration. The reasons for the dismissal are set out in the disciplinary outcome and/or the dismissal letter, and it is on that basis that the fairness enquiry proceeds. To the extent that the applicant suggests an ulterior motive on the part of the third respondent to charge her, that case was not made out before the commissioner, or at least on the record before this Court.

[23] Similarly, the applicant's contention that the investigation report might contain audio recordings or statements from unnamed witnesses was not supported by any detail. She did not identify the witnesses in question, explain what information their statements might contain, or demonstrate how such material could assist her defence or undermine the third respondent's case. She also failed to articulate her defence to the allegations of misconduct. On this basis, the commissioner was correct in dismissing the application.

[24] The applicant further argued that the report was relevant to her claim of inconsistent discipline. This argument, too, was fully addressed by the commissioner. Since the applicant has raised inconsistency as a defence, it is the third respondent that must provide a reasonable explanation for any differential treatment of employees involved in comparable misconduct. The applicant did not explain the roles played by the two colleagues to whom she compared herself, nor did she demonstrate that they faced similar allegations, and how the investigation report will assist her case or undermine the third respoindent's. Ultimately, the third respondent bears the onus of justifying any alleged inconsistent treatment of its employees, and the applicant retains her

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right during arbitration to challenge that explanation through cross-examination and by putting her version to the third respondent's witnesses.

[25] During argument, Mr Kufa, who appeared for the applicant, submitted that the commissioner ought to have directed the third respondent to provisionally disclose the investigation report to him alone so that he could examine it for the limited purpose of assessing relevance. Although the applicant raised in her papers a complaint that the commissioner had not had sight of the report, the request for provisional disclosure was advanced for the first time from the bar. It did not feature in either the submissions or application before the commissioner nor the founding or supplementary affidavits. On this basis alone, the argument cannot succeed. In any event, the submission lacks a legal foundation and is untenable.

[26] To support this argument, Mr Kufa relied on paragraph 68 of the LAC judgment in *Moolman*, which states that:

> 'There is no dispute that the documents in question did not serve before the commissioner or the Labour Court. Instead of allowing the issue of the documents' relevancy to be fully ventilated during the arbitration hearing, the Labour Court prematurely and erroneously found the documents to be irrelevant without seeing the contents or hearing evidence as to their relevancy.'

[27] In *Moolman*, the employer opposed disclosure on grounds of confidentiality, not relevance. That distinction is material and dispositive of the argument. In any event, I do not understand the LAC's reasoning in *Moolman* to establish a general rule requiring provisional disclosure to commissioners or judges of the requested information for the purpose of determining every application brought under rule 29 or the Court's discovery rules.

[28] Accepting the applicant's submission would lead to an untenable conclusion that all disclosure applications should be provisionally granted, obliging commissioners to examine documents (which could be voluminous) in order to determine relevance, regardless of whether the applicant has made out a *prima*

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facie case for disclosure. Such an approach would undermine the evidentiary principles underpinning rule 29, impose unwarranted burdens on commissioners, and promote speculative fishing expeditions.

[29] Rule 29 requires that an application for disclosure be directed at material that is relevant to the dispute, and empowers the commissioner to order disclosure only where such relevance is established. It was therefore incumbent upon the applicant, considering the nature of the dispute before the CCMA, to demonstrate relevance through, among other things, the reasons for dismissal advanced by the third respondent, her defence to the allegations, and the third respondent's intended evidence. These factors (the list is not exhaustive), together with the *de novo* nature of arbitration proceedings and the issue of the onus of proof, form essential components of the relevance enquiry. For the reasons already outlined, I am unable to agree that the commissioner committed any procedural irregularity or material error of law in refusing the disclosure application.

[30] Mr Kufa further submitted that the Court should offer general guidance to commissioners on how disclosure applications ought to be approached. This submission is misplaced. It effectively invites the Court to provide abstract advisory opinions on matters already governed by the CCMA Rules. The Court's function is to adjudicate live disputes, not to issue general directives where there is no live dispute. There is no issue before the Court that requires such guidance, and the rules already provide a clear framework for addressing disclosure application. This invitation is rejected.

[31] The dispute concerns the fairness of the dismissal, a matter in which the third respondent bears the onus of proof. The arbitration proceedings will be conducted afresh, with evidence led and interrogated afresh, and the third respondent has expressly disavowed reliance on the investigation report, maintaining that it is irrelevant for the purpose of discharging its onus. That stance should bring the matter to an end.

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[32] Although I have decided that the application must fail, it is necessary to address what is plainly a misinterpretation of section 158(1B) on the applicant's part. She contends that the matter is urgent because a review under section 145, brought in the ordinary course, would not be finalised before the arbitration proceedings concluded. She argues further that such a delay would infringe her constitutional right of access to courts under section 34, as she would be *"denied the remedy"* of properly ventilating the rule 29 ruling before the CCMA. The applicant also asserts that by the time a section 145 review is heard, the arbitration will already have been finalised and she may have been deprived of the opportunity to obtain reinstatement or, alternatively, that the matter may need to be remitted for a rehearing at the CCMA, causing what she characterises as significant prejudice. She concludes that she would not obtain substantial redress if the rule 29 ruling is left unchallenged until the arbitration ends.

[33] This reasoning reflects a fundamental misunderstanding of section 158(1B). as already stated above, the provision discourages interlocutory, piecemeal litigation in ongoing arbitration proceedings and requires parties to defer challenges to preliminary rulings until the final determination of the main dispute. It does not contemplate a fragmented litigation process in which each interlocutory ruling becomes the subject of a stand-alone review. The applicant's interpretation would undermine the statutory objective of expeditious dispute resolution and cannot be sustained.

[34] Indeed, she will not be left without substantial remedy or reinstatement as she seeks to argue. Should the third respondent fail to discharge its onus and her dismissal is found to be substantively unfair, reinstatement remains the primary available remedy under the LRA. If she is reinstated, she would have no reason to challenge a favourable award. Conversely, if the award goes against her and she challenges it and the Court finds that there are sustainable grounds for review, she will have adequate redress through the review process, where the award may be substituted with an order of reinstatement. On this reasoning, the issue is resolved without intervention in the pending arbitration.

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[35] There are, accordingly, no exceptional circumstances warranting the Court's intervention in the uncompleted arbitration proceedings. The applicant will not suffer irreparable harm if the arbitration is allowed to proceed; nor is there any suggestion of illegality or grave injustice that would justify disrupting the statutory scheme regulating such proceedings. The application falls to be dismissed.

Costs

[36] In her founding papers, the applicant sought costs on attorney and own client's scale, including the costs of two counsel, in the event of opposition. She maintained this position in her heads of argument, after she had considered the opposition by the third respondent. The third respondent in turn sought costs on a punitive scale, including that of senior counsel.

[37] Although the applicant argued in her papers that the importance of the matter justified the employment of two counsel and sought costs on that basis, she submitted later at the stage of oral argument that each party should bear its own costs. The third respondent, however, persisted in seeking a punitive costs order during the hearing.

[38] The matter was plainly without merit and constitutes, in my view, an abuse of the court process. The issue for determination was neither novel nor complex, and even on the applicant's interpretation of *Moolman*, any argument regarding provisional disclosure could properly have been advanced after the arbitration had run its course, rather than in *medias res*. The parties' original wishes, for costs to be granted on a punitive scale, should prevail.

[39] In the premises, the following order is made:

Order

1. The application is dismissed.

2. The applicant is ordered to pay the costs of the third respondent on attorney and own client's scale, including the costs of a senior counsel.

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M. Makhura

Judge of the Labour Court of South Africa

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Appearances:

For the Applicant:	Mr M. Kufa with Mr E. Jacobus
Instructed by:	Machaba Attorneys
For the Respondents:	Mr L.M. Malan SC
Instructed by:	Webber Wentzel

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