



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

25/03/2026

Signature

Date

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case No: JR374/2023

In the matter between:

CITY OF MBOMBELA MUNICIPALITY

Applicant

and

SIPHO WILBERFORCE MASHELE

First Respondent

KUVHANGANANI SELBY RATSHIEDANA

Second Respondent

Heard: 3 December 2025

Delivered: 25 March 2026

This judgment was handed down electronically by circulation to the parties' representatives by email. The date for hand-down is deemed to be on 25 March 2026.

JUDGMENT

HORN, AJ

Introduction

- [1] This is a review application in terms of section 158(1)(h) of the Labour Relations Act.¹
- [2] The applicant (the Municipality) seeks to review and set aside the disciplinary appeal ruling of the second respondent (the appeal chairperson) in terms of which he altered the disciplinary finding and sanction imposed on the first respondent (the employee) by the initial disciplinary chairperson.
- [3] The Municipality does not pray for the substitution of the disciplinary findings made by the appeal chairperson, but rather the remittance of the appeal to be heard by an alternative appeal chairperson.

Non-appearance of first respondent's legal representatives

- [4] Before turning to the review, it is necessary to briefly deal with what transpired when the matter was called on 3 December 2025.
- [5] Suffice it to say that Advocate M. Gwala SC appeared on behalf of the Municipality together with attorneys from the offices of his instructing attorneys. There was, however, no appearance on behalf of the employee, nor were any of his legal representatives present.
- [6] When the Court enquired why the employee and/or or his legal representatives were not present,² Counsel for the Municipality advised as follows:
- 6.1 the review application was initially enrolled for hearing before Savant AJ on 5 November 2025;
- 6.2 on that date, there was also no appearance on the part of the employee or his legal representatives;
- 6.3 also on that date, the Municipality's legal representatives had made contact with the employee's attorneys who had advised them that they would not be appearing, but they confirmed that they had

¹ Act 66 of 1995, as amended

² Mngomezulu Attorneys have represented the first respondent from the inception of the matter.

communicated the Court date with the employee on at least two prior occasions;

- 6.4 prior to 5 November 2025, no notice of withdrawal of attorneys of record had been filed, notwithstanding that the employee's attorneys had no intention of attending Court;
- 6.5 in the meantime, there was a concern raised by Savant AJ concerning the potential of a conflict of interest, resulting in the need for an alternative presiding officer;
- 6.6 the Municipality sought costs for the proceedings on 5 November 2025; and
- 6.7 the upshot of all of the above was an Order by Savant AJ postponing the matter to 3 December 2025, an alternative Judge being appointed, and the costs of 5 November 2025 being reserved for subsequent determination.

[7] Given that the employee and/or his legal representatives were again not present on 3 December 2025, the matter stood down so that the Municipality's legal representatives could again reach out to the employee's attorneys telephonically. After doing so, the Court was informed of the following:

- 7.1 an email was sent by the Municipality's attorneys to the employee's attorneys on 18 November 2025 containing a notice of set down for 3 December 2025. It is possible that this email might not have been received by them;
- 7.2 the Municipality's attorneys had, however, managed to make contact with the employee's attorney (Mr Mngomezulu) on 3 December 2025;
- 7.3 Mr Mngomezulu had indicated that he was indeed aware that the matter was proceeding on 3 December 2025. He had, in the meantime, not received any further instructions from the employee prior to the initial hearing of the matter on 5 November 2025 and he therefore proposed that the matter should proceed in their absence. It was

suggested that the employee's argument in opposition to the review, encapsulated in the employee's prior heads or argument,³ be considered by this Court.

- [8] The above is obviously an entirely unsatisfactory set of developments. It is trite that an attorney must either withdraw from a matter or continue to act.⁴ A legal representative cannot remain on record and decline to attend Court when a matter is enrolled. This has now transpired on two consecutive occasions in this matter.
- [9] The impression that this Court is left with, albeit open to some doubt given the non-appearance, is that the employee's attorneys were unable to secure instructions from the employee and had therefore decided that they would not attend Court but would also not withdraw in the hope of receiving such instructions at the eleventh hour. If true, this would be incongruous with the ethical obligations of a legal representative.
- [10] The Court has nevertheless proceeded to determine the matter with reference to the papers and the respective heads of argument as proposed. It has, unfortunately, not enjoyed the benefit of the employee's attorneys' oral argument in that regard.
- [11] In relation to costs, it appears to me that the employee's attorneys ought to be afforded the opportunity to file an affidavit with the Registrar of this Court indicating why an order of costs *de bonis propriis* would not be appropriate given their non-attendance on two occasions. This is set out below.

Background to Review

- [12] In summary, the employee was charged by the Municipality for allegedly failing to disclose his interest in a company owned by his wife, namely The Art Crew (Pty) Ltd, notwithstanding that he was involved in the Municipality's

³ Filed on 7 August 2024 and apparently prepared by Advocate LP Zwane at the instruction of the employee's attorneys

⁴ See: *Sayed NO v Road Accident Fund* 2021 (3) SA 538 (GP) (4 March 2021) at paras 18 and 19

procurement process in terms of which that company ultimately secured a contract with the Municipality.⁵

[13] According to the Municipality, prior to the institution of the charges, the appeal chairperson had assisted the Municipality in preparing the employee's charge sheet. It is worth mentioning that the employee and the appeal chairperson both dispute this.

[14] After a disciplinary hearing presided over by an independent chairperson, the employee was found guilty of all charges. The disciplinary chairperson imposed the sanction of summary dismissal.

[15] Being aggrieved with the above, the employee lodged an appeal in terms of section 17 of the South African Local Government Bargaining Council: Disciplinary Procedure and Collective Agreement ("*the SALGA Disciplinary Procedure*").⁶

[16] The appeal form submitted by the employee on 9 November 2022 states as follows:

1) 'PROCEDURAL UNFAIRNESS

The chairperson has drawn inferences and conclusions on matters that were not substantiated by testimony, he add and rely on hearsay evidence.

2) HARSHNESS OF THE SANCTION

The sanction applied by the Presiding Officer does not match the offence, even though I showed remorse by apologizing for both myself and my wife in question, however the Presiding Officer continued and gave me a very harsh sanction. Moreover at no stage did the employer testify that the relationship between the employer and the employee was broken beyond repair.

⁵ There were three separate charges proffered against the employee alleging *inter alia* various breaches of the Code of Conduct for Municipal Staff Members, the SALGBC: Disciplinary Procedure and Collective Agreement (failing to complete the requisite conflict of interest form provided to him)

⁶ Circular No 01/2018

Lastly could I be furnished with the recordings or transcripts of the case to assist me in substantiating my appeal.'

- [17] Whilst item 1 under the above appeal is entitled 'Procedural Unfairness', it is debatable as to whether the complaint embodied under that heading actually speaks to the substance of the outcome, being related, as it is, to the alleged misapplication of the evidence by the chairperson.
- [18] The appeal chairperson was subsequently appointed on 10 November 2022. He directed the parties to file written submissions in support of the appeal.
- [19] In a subsequent email concerning the appeal sent by the Employee's Union representative on 6 December 2022, reference was again made to the harshness of the sanction and to the employee's personal circumstances (including his three dependents and the employee being the sole breadwinner). The aforesaid email does not, however, include any challenge in respect of the finding of guilt on any of the charges.
- [20] In the ensuing appeal outcome issued on 10 February 2023,⁷ the appeal chairperson nevertheless found the employee guilty of charge 1 but not guilty of charges 2 and 3.
- [21] In respect of the findings of not guilty, the thrust of the decision was that the requirement for the completion of declaration of interest forms only applies to Senior Managers and therefore the employee was not required to make such a disclosure concerning his wife's company. The Municipality disputes this and says that the Code of Conduct for Municipal Staff Members, including its relevant conflict of interest provisions, apply to the employee.
- [22] In respect of the appropriate sanction for the finding of guilt on charge 1, this was altered from summary dismissal to reinstatement. This decision was based *inter alia* on the application of the principle of consistency with reference to other employees who had been purportedly found guilty of similar offenses but where a sanction short of dismissal was applied.

⁷ The Municipality says that it only became aware of the outcome on 13 February 2023

[23] The Municipality is bound by the appeal chairperson's finding until these are set aside by a Court. The reasons for this were recently summarised by this Court in *National Lotteries Commission v Mafonjo and Another*.⁸ The binding nature of the appeal outcome is also confirmed in section 17.15 of the SALGA Disciplinary Procedure.⁹

[24] The Municipality raises the following grounds of review:

- 24.1 the appeal chairperson was conflicted and ought not to have presided over the appeal hearing;
- 24.2 the appeal chairperson failed to take into account material evidence, took into account irrelevant considerations and exceeded his powers by going beyond the scope of the appeal and altering findings of guilt in circumstances where the employee only appealed against sanction; and
- 24.3 the result of the above errors was that the appeal chairperson arrived at an unreasonable result.

The Conflict

[25] Counsel for the Municipality urged this Court to draw an inference that the subsequent conduct of both respondents (employee and appeal chairperson), including through the filing of a confirmatory affidavit by the appeal chairperson together with the employee's answering affidavit, suggests an improper relationship between them.

[26] This argument was advanced by the deponent to the replying affidavit *inter alia* in the following terms:

'I submit that the fact that the respondents have always had a relationship may now be inferred from their conduct. In fact, a collusion is glaring between them hence they have a guilty conscious (sic) which compels them to half-

⁸ (2023) 44 ILJ 1991 (LC) (23 June 2023) at para 18. See also: *Bergrivier Local Municipality v Swartz and Another* (2026) 47 ILJ 339 (LC) at para 3

⁹ The clause states as follows: - "*The determination of the Presiding Officer of the Disciplinary Appeal Hearing cannot be altered by the Municipal Manager or any governing structure and shall be final and binding on the Employer subject to any remedies permitted by law*".

heartedly explain their relationship. They deliberately failed to disclose to the Honourable Court that they both worked for the applicant at some stage before the second respondent joined SALGA.'

and

'I submit that the inference may be drawn that the respondents actually knew each other prior to the appeal. This is so because they both worked for the applicant and at the same time prior to the second respondent joining SALGA. As stated above, the second respondent was a labour relations office (sic) employed as such by the applicant at the same time when the first respondent was also employed by the applicant. The applicant is not a big organisation. Its employees, current and former, know each other.'

and

'It is suspicious that the respondents will feel a need to explain their relationship. The fact that they are collaborating and supporting each other in this application is indicative of the fact that they know each other. Further they do not take the court into their confidence by explaining how it is that now they have the engagements if they did not know each other at all. They do not explain how they have come into contact so much so that they can share information as they have done in these proceedings.'

[27] In relation to the threshold for such an inference to be drawn, the Court's attention was drawn to the Judgment of the Supreme Court of Appeal in *Cooper and Another v Merchant Trade Finance Ltd*¹⁰. Here the Court held as follows:

'It is not incumbent upon the party who bears the onus of proving an absence of an intention to prefer to eliminate by evidence all possible reasons for the making of the disposition other than an intention to prefer. This is so because the court, in drawing inferences from the proved facts, acts on a preponderance of probability. The inference of an intention to prefer is one which is, on a balance of probabilities, the most probable, although not necessarily the only inference to be drawn. In a criminal case, one of the "two cardinal rules of logic" referred to by Watermeyer JA in *R v Blom* is that the

¹⁰ 2000 (3) SA 1009 (SCA) (1 December 1999) at para 7

proved facts should be such that they exclude every reasonable inference from them save the one to be drawn. If they do not exclude other reasonable inferences then there must be a doubt whether the inference sought to be drawn is correct. This rule is not applicable in a civil case. If the facts permit of more than one inference, the court must select the most “plausible” or probable inference. If this favours the litigant on whom the onus rests he is entitled to judgment. If on the other hand an inference in favour of both parties is equally possible, the litigant will have not discharged the onus of proof. Viljoen JA put the matter as follows in AA Onderlinge Assuransie-Assosiasie Beperk v De Beer:-

‘Dit is, na my oordeel, nie nodig dat ‘n eiser wat hom op omstandighedsgetuienis in ‘n siviele saak beroep, moet bewys dat die afleiding wat hy die Hof vra om te maak die enigste redelike afleiding moet wees nie. Hy sal die bewyslas wat op hom rus kwyf indien hy die Hof kan oortuig dat die afleiding wat hy voorstaan die mees voor-die-hand liggende en aanvaarbare afleiding is van ‘n aantal moontlike afleidings.’

Selke J expressed the matter in Govan v Skidmore thus:-

‘..... in finding facts or making inferences in a civil case, it seems to me that one may, as Wigmore conveys in his work on Evidence, (3rd ed. para 32), by balancing probabilities select a conclusion which seems to be the more natural, or plausible, conclusion from amongst several conceivable ones, even though that conclusion be not the only reasonable one.’

Holmes JA in Ocean Accident and Guarantee Corporation Limited v Koch explained that he understood “plausible”, in the context of the remarks of Selke J, to mean “acceptable, credible, suitable”. (emphasis added, footnotes omitted)

- [28] Even on the less strenuous test applicable to the drawing of inferences in civil matters, this Court is not prepared to conclude that the more plausible inference to be drawn from the fact that the appeal chairperson put up a confirmatory affidavit is that there existed a prior collusive relationship between the appeal chairperson and the employee.

- [29] It is the practice of this Court that Commissioners of the Commission for Conciliation, Mediation and Arbitration (CCMA) and Bargaining Councils are cited in review applications in their official capacities. This ensures not only that records of proceedings are timeously dispatched to the Court, but also importantly affords those presiding Commissioners the opportunity to file a supporting affidavit should they wish to do so.
- [30] Whilst presiding Commissioners generally do not take such a step, where allegations of bias or other impropriety are made, it is not uncommon for them to assist this Court by filing supporting affidavits ventilating issues dealing with their alleged improper behaviour.
- [31] Given the status of the finding of the appeal chairperson, being binding on the employer, as it is, and the allegations concerning an alleged conflict of interest on his part, it does not appear to me particularly untoward that the appeal chairperson might have sought to submit to this Court an affidavit correcting certain allegations pertaining to him which he contends are incorrect.
- [32] The confirmatory affidavit filed by the appeal chairperson does no more than confirm that he did not know the employee prior to the appeal and that he did not assist with the preparation of the charges against the employee as alleged in the Municipality's founding affidavit.
- [33] It is, in my view, at least equally as probable that there was a genuine reason for the appeal chairperson to file a supporting affidavit together with the answering papers as it is that there was some nefarious conspiratorial reason for him doing so.
- [34] The same is true in respect of the allegations that the employee and the appeal chairperson must have known one another because they both worked at the Municipality at roughly the same time.
- [35] An insufficient factual basis is put up to allow this Court to draw such an inference. To the extent that such an inference was available at all, one would have expected the Municipality's papers to present a more detailed case, including by advising of the number of employees employed at the

Municipality, the proximity of the employee's and appeal chairperson's work, any shared tasks or work events, etc... Instead, all that is put up is that they were both employed by the Municipality at some stage, and therefore that they must have known one another to some extent, thereby purportedly rendering the appeal chairperson conflicted. This Court cannot draw such a conclusion without something more.

[36] There are also significant difficulties with the suggestion that there was a conflict of interest given the appeal chairperson's involvement in discussing the charges to be brought against the employee.

[37] For one thing, this is emphatically denied by the confirmatory affidavit put up by the appeal chairperson. His denial is moreover consistent with annexure FA2 to the founding affidavit, being an email from him to the Municipality enclosing the draft charges in which he was involved. The attachments to that email are charges in respect of Messrs. Sammy Knosi and Sibusiso Sumbane (not the employee).

[38] Whilst subject to a dispute of fact, the denial by the appeal chairperson that he discussed the employee's charges with Mesdames. Kgomommu and Phiri of the Municipality is not so far-fetched or clearly untenable as to warrant rejection. This Court must accordingly accept the respondent's version.¹¹

[39] For all of these reasons, the first ground of review must fail.

Exceeding Scope of Authority

[40] In relation to the second ground of review, however, the Municipality's case is more compelling.

[41] In *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration and Others* ("SARS")¹² the Constitutional Court was faced with the review of an arbitration award that found that the employer had acted

¹¹ See *Plascon-Evans Paints (TVL) Ltd v Van Riebeck Paints (Pty) Ltd* [1984] 2 All SA 366 (A)

¹² [2017] 1 BLLR 8 (CC)

unlawfully by unilaterally altering the outcome of an independent chairperson and changing the sanction to dismissal.¹³

[42] In SARS the Court made a number of obiter remarks that are of persuasive value in this matter. These include the following:

[16] He pleaded guilty and a favourable sanction was successfully negotiated by the Chairperson of the disciplinary enquiry with Mr Moodley, an employee and a representative of SARS in those proceedings. Presumably after a discussion with Mr Kruger and his representatives, the sanction was imposed. It reads:

‘9.5.1 Final written warning valid for six months as well as suspension without pay for ten (10) days.

9.5.2 Furthermore he should undergo counselling.’

[17] Upon receipt of the report on the outcome of the disciplinary enquiry, the SARS Commissioner changed it from a final written warning to a dismissal. This was however done without affording Mr Kruger the opportunity to contest the appropriateness of the higher and terminal sanction. As a result, Mr Kruger challenged the fairness of his dismissal. He referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) for conciliation and later arbitration. The issues to be decided by the CCMA arbitrator (Arbitrator) were as follows—

‘2.1 Whether the dismissal of [Mr Kruger] was procedurally and substantively unfair.

2.2 Whether a Commissioner of [SARS] had powers to convert a sanction of final written warning, and suspension without pay to dismissal.’

[18] Mr Kruger was understandably aggrieved by the SARS Commissioner’s alteration of the sanction, from a final written warning to a dismissal. Understandably because of the non-observance of his

¹³ The Judgment related to the reinstatement of an employee who had used vile racial slurs and the refusal of the employer to accept the disciplinary chairpersons finding in that regard.

right to be heard prior to making a decision detrimental to his interests and in circumstances where the Commissioner did not appear to have the legal authority to do so...' (emphasis added).

- [43] The above remarks represent a trite position, namely that parties with a direct and substantial interest in the outcome of a matter ought at least be afforded the opportunity to be heard before a decision is taken that implicates their rights, more especially in the broader context of employment disputes.
- [44] In a similar vein, in the Municipality's heads of argument reliance is placed on the Judgment of the Constitutional Court in *Morudi and Others v NC Housing Services and Development Co Limited and Others* ("Morudi")¹⁴
- [45] In *Morudi*, an attorney was prevented from representing his clients because he was purportedly not properly before the Court. This was so, according to the Court *a quo*, because his clients were cited incorrectly in their capacity as directors of the relevant company, and because the company had withdrawn from the dispute. The wider dispute, however, was related to their shareholding in that company, with his clients and a number of other persons being present in Court on the day claiming such a shareholding.
- [46] The attorney in *Morudi* subsequently withdrew, but before doing so advised the Court *a quo* that the many other shareholders present wished to address the Court. The Court did not permit this. A later rescission application failed because the persons were indeed present in Court, and therefore the requirements for rescission were, according to the court *a quo*, not met.
- [47] In setting aside the Supreme Court of Appeal's subsequent decision not to rescind the Order, the Constitutional Court held as follows:

'[33] It must follow that when the High Court granted the order sought to be rescinded without being prepared to give audience to the applicants, it committed a procedural irregularity. The Court effectively gagged and prevented the attorney of the first three applicants – and thus these applicants themselves – from participating in the proceedings. This

¹⁴ 2019 (2) BCLR 261 (CC).

was no small matter. It was a serious irregularity as it denied these applicants their right of access to court.' (emphasis added)

[48] The Municipality submits that the same consideration apply in this matter. The employee's appeal was narrow in ambit, the appeal chairperson directed that it be heard with reference to written submissions and the employee's written submissions confirmed that the issue was with the sanction, and not with the finding of guilt. The Municipality was not afforded the opportunity to deal with the other issues in the appeal *mero motu* raised by the appeal chairperson.

[49] The above argument is indeed persuasive. The appeal chairperson proceeded to set aside the finding of guilt on two charges and alter the sanction applicable to the employee. It is apparent that he did so without forewarning or allowing the Municipality to make any submissions in relation to the employee's purported innocence in respect of those charges.

[50] In addition, the appeal chairperson also placed emphasis on alleged inconsistency in discipline. There was evidently no evidence in relation to this issue placed before him (same being absent from the appeal record) and he appears to have drawn this information from other cases in which he was involved. He also did so without asking the Municipality for a response to the consistency issue.

[51] The collective agreement provides as follows:

"17.8 the appeal shall be heard on the grounds of appeal submitted by the employee and any amendment thereto by having regard to the record of the disciplinary hearing proceedings and the submissions and argument of the parties thereof.

17.9 the appeal shall not entail the re-hearing of the matter".

[52] In *Riekert v Commission for Conciliation Mediation and Arbitration and Others*¹⁵ the Court noted that a significant departure from a disciplinary code and procedure could render a dismissal procedurally unfair. Fairness applies

¹⁵ [2006] 4 BLLR 353 (LC).

equally to employees and employers in relation to sanctions in disciplinary matters.¹⁶

- [53] For all of the reasons set out above, the appeal chairperson did not comply with the clauses of the SALGA Disciplinary Code when going beyond the grounds of appeal cited by the employee and taking into account evidence outside of the record the disciplinary hearing.
- [54] Even in the event that the appeal chairperson was empowered to do this at all (i.e. given the fairly wide wording of the employee's initial appeal complaint 'on procedure'), then at the very least he ought to have advised the Municipality that the scope of the appeal would be extended to cover the findings on the merits (in addition to sanction) as well as the issues of consistency in relation to sanction. This was critical to afford the Municipality the right to be heard and the opportunity to make any submissions that it may wish to in that regard.
- [55] By not informing the Municipality of the expanded scope of the appeal, the appeal chairperson effectively deprived the Municipality of a proper opportunity to be heard in relation to critical aspects of the appeal. This included the legal issues related to the applicability of the Code of Conduct for Municipal Staff Members insofar as the employee was concerned.
- [56] The appeal chairperson therefore acted outside of the ambit of his powers in terms of the SALGA Disciplinary Procedure related to appeals. This resulted in an appeal process that was manifestly unfair to the Municipality, and a consequent unfair outcome which is now binding upon it.
- [57] The Municipality's second ground of review must accordingly prevail and the employee's appeal must be remitted for a *de novo* appeal hearing.
- [58] In the premise the following order is made:

Order

¹⁶ See *National Union of Metalworkers of SA v Vetsak Co-operative Ltd* 1996 (4) SA 577 (A) at 589b.

1. The second respondent's internal disciplinary appeal finding dated 10 February 2023 is reviewed and set aside.
2. The disciplinary appeal is remitted back to the applicant for a hearing before an appeal chairperson other than the second respondent. In terms of the SALGA Disciplinary Procedure, the parties retain the right to agree to appoint an arbitrator from the panel of arbitrators existing in the relevant division of the South African Local Government Bargaining Council.
3. The appeal hearing is to commence *de novo* with the first respondent being entitled to raise any issues on appeal by way of new appeal submissions and the applicant being entitled to respond thereto in accordance with the SALGA Disciplinary Procedure.
4. The first respondent's attorneys, Mngomezulu Attorneys, are directed to deliver an affidavit within fifteen (15) days of receipt of this Judgment explaining why an Order of costs *de bonis propriis* should not be made as a result of their non-attendance on 5 November 2025 and 3 December 2025 respectively. That affidavit must address, in detail, whether Mngomezulu Attorneys received proper notice of the proceedings on 5 November 2025 and 3 December 2025 respectively as well as the specific reasons for their non-attendance.
5. The applicant shall, within ten (10) days after receipt of the affidavit referred to in paragraph 4 of this Order, deliver an answering affidavit in response to any of the allegations made should it dispute any of the allegations contained therein.
6. The first respondent shall, within five (5) days of receipt of any such affidavit referred to in paragraph 5 of this Order, have the opportunity to deliver a replying affidavit to the extent it considers this necessary.
7. The question of costs is reserved pending receipt and consideration of the aforementioned affidavits.

J. Horn

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Advocate M. Gwala SC

Instructed by: Mzuzu Attorneys

For the First Respondent: Mngomezulu Attorneys - no attendance

LABOUR COURT