



- (1) Reportable Yes: Yes
(2) Of interest to other Judges: Yes
(3) Revised: yes


Signature

27 MARCH 2026
Date

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Case no: C25/2023

In the matter between:

THOMAS MATTHEE

Applicant

and

OUDTSHOORN LOCAL MUNICIPALITY

First Respondent

SOUTH AFRICAN LOCAL GOVERNMENT

BARGAINING COUNCIL Second Respondent

COMMISSIONER W RIEKERT Third Respondent

Heard: 11 March 2026

Delivered: 27 March 2026

Summary: (Review and condonation application - whether this Court differs with the outcome or the finding of fact or law made by the arbitrator is not sufficient for the Court to interfere, something more is required for thus is the dividing line between the Court's powers on review versus appeal – If there are two competing constructions of the evidence that are both plausible and reasonable, the arbitrator's choice of one of them cannot give rise to a review)

JUDGMENT

MAY, AJ

Introduction

[1] This is an opposed application to review and set aside an arbitration award in which the third respondent (the arbitrator) determined that the Applicant's dismissal was fair. The application is brought in terms of section 145 of the Labour Relations Act¹ (LRA) which requires that an application of this nature be brought within six weeks of receipt of the award. The application was due on or before 26 December 2022. The application was delivered on 18 January 2023 and filed on 20 January 2023 and is therefore filed 17 days late.

[2] The Applicant seeks condonation for the late filing which is not opposed by the First Respondent.

Condonation

[3] This Court must consider the well-known principles laid down in *Melane v Santam Insurance Co Ltd*² and *Grootboom v National Prosecuting Authority and Another*³.

[4] In the exercise of its discretion, a Court cannot consider a delay in a vacuum but in light of all of the relevant facts including the prejudice to the parties, the possible consequences of granting, or of not granting the relief sought in respect of the merits, the prospects of success and ultimately the interests of justice.⁴

¹ Act 66 of 1995, as amended.

² 1962 (4) SA 531 (A).

³ 2014 (2) SA 68 (CC) at paras 50 and 51.

⁴ See: *SAMWU obo Shongwe and Others v Moloj N.O. and Others* [2021] 5 BLLR 464 (LAC) at para 26.

- [5] Even in circumstances where a delay has not been adequately explained, such a delay cannot be evaluated in a vacuum but must be evaluated taking into account the potential prejudice to the parties, the possible consequences of granting the relief sought or not granting it or not dealing with the matter on its merits. The nature of the application and the strength of the merits may also either favour or not favour overlooking a delay.⁵
- [6] In other words, and whilst not necessarily being a closed list, the factors a Court must consider are:
- 6.1 the length of the delay;
 - 6.2 the explanation for, or cause for, the delay;
 - 6.3 the prospects of success for the party seeking condonation;
 - 6.4 the importance of the issue(s) that the matter raises;
 - 6.5 the prejudice to the other party or parties in granting or not granting the relief requested and not considering the merits of the dispute;
 - 6.6 the effect of the delay on the administration of justice;
 - 6.7 the litigant's rights in terms of section 34 of the Constitution of the Republic of South Africa, 1996, to have any dispute that can be resolved by the application of law decided in a fair public hearing before a Court; and ultimately
 - 6.8 the interests of justice.
- [7] Sight also cannot be lost of the fact of the now trite proposition that where there is a flagrant or gross failure to comply with the rules of court condonation may be refused without considering the prospects of success.⁶ In addition, it is now trite that condonation cannot be had for the mere asking. A party seeking

⁵ *City of Johannesburg Metropolitan Municipality and Others v Independent Municipal and Allied Trade Union and Others* (2017) 38 ILJ 2695 (LAC) at paras 55, 56 and 76.

⁶ *Colett v Commission for Conciliation, Mediation and Arbitration and Others* [2014] 6 BLLR 523 (LAC) at para 38.

condonation must make out a case entitling it to the court's indulgence. It must show sufficient cause. This requires a party to give a full explanation for the non-compliance with the rules or court's directions. Of great significance, the explanation must be reasonable enough to excuse the default⁷.

Period of delay and explanation

- [8] The Applicant advises that he was represented by his Union, IMATU, at the time that the award was handed down. He met with his Union representative on 24 November 2022 to discuss challenging the award. He was advised at this meeting that approval from IMATU's head office would need to be sought. He was only advised on 13 January 2023 that IMATU would not be assisting him and met with his current attorneys of record on 16 January 2023 who shortly thereafter launched the application.
- [9] The Court is therefore satisfied that the explanation for the delay is satisfactory and covers the entire period of the delay.
- [10] Mindful, however, of the other factors listed above, especially the consequences to the parties should the merits not be considered, this Court must nevertheless consider the remaining factors including prospects of success. The Court will accept that the matter is important to both parties and takes into account the effects the delay has had and continues to have on the administration of justice. This Court also accepts that both parties stand to be prejudiced with a finding either way. This Court will weigh those carefully.

Prospects of success

- [11] The Applicant was dismissed for failing to disclose the full particulars of his disciplinary hearing in 2013 at the Drakenstein Municipality where he had been charged and found guilty of 15 charges of serious misconduct resulting in the decision by the Chairperson that his services be terminated with immediate effect. It was disputed whether the Applicant was aware of the fact that the disciplinary process had proceeded in his absence as at the time, the Applicant,

⁷ *Grootboom* (Id fn 4) at para 23.

through his legal representative, had raised a point *in limine* contending that the chairperson had been appointed without the employer having consulted the Applicant. The applicant's contract was for a fixed term of five years commencing 1 May 2008 and terminating on 30 April 2013. The disciplinary hearing was set to proceed on 29 April 2013 when the Applicant's legal representative raised the *point in limine* and proceedings were adjourned. On 30 April 2013 Applicant received notice that his contract had ended.

- [12] It is common cause that the disciplinary proceedings reconvened subsequent to 30 April 2013 in the absence of the Applicant. The Chairperson indicates that he issued a ruling on the point *in limine* on 11 May 2013 and the hearing was thereafter rescheduled to proceed on 12 July 2013. The Chairperson noted that notice of the proceedings was sent to the Applicant's legal representative who did not send notice that he had withdrawn from the matter. On the contrary, he addressed a letter to the Chairperson on 6 June 2013 in which he warned against the continuation of the hearing and the alleged unqualified jurisdiction of the disciplinary hearing.
- [13] Inasmuch as the Applicant contends that he had no personal knowledge of the proceedings continuing and as it is common cause that he informed the interviewing panel that he had been suspended, that disciplinary proceedings ensued but could not conclude due to his contract ending, this Court concludes that he does have reasonable prospects of success and thus that a proper case for condonation has been made.

The award

- [14] At the arbitration, as with the Disciplinary hearing, the material issue in dispute was whether Applicant had disclosed the extent and details of his previous disciplinary proceedings to the interview panel. As indicated above, it was common cause that he disclosed that he had been suspended, that disciplinary proceedings had commenced but could not be concluded because his contract had come to an end. He did not disclose what the nature of the charges were nor did he disclose that the disciplinary proceedings had continued on 12 July

2013 or that the Chairperson had recommended that he be dismissed notwithstanding the fact that his contract had come to an end.

- [15] The arbitrator's findings were that the Applicant, as a Senior Manager, was aware that he had a duty to disclose under Regulation 17 (4)(o) of the Disciplinary Regulations that he had been charged with serious misconduct and the fact that he had failed to disclose this was a deliberate and wilful act, or rather omission. The arbitrator states, at paragraph 31, that the Applicant had testified that when he had raised the disciplinary process in previous interviews, his applications would inevitably be unsuccessful. The arbitrator makes further findings but the aforesaid are what is the nub of the contentions. This Court agrees with the submissions of Mr Bosch, who appears for the First Respondent, that the rest of his findings are not really relevant for purposes of the award or this review.

Grounds of review and evaluation

- [16] Applicant contends that, the award is reviewable on the basis that the Commissioner committed gross irregularities in that he failed to make a finding on whether the Drakenstein Municipality (the erstwhile employer) was permitted to proceed with the disciplinary enquiry after the Applicant's contract had come to an end, the fact that the arbitrator found it strange that no one asked the Applicant questions about his previous employment, that the arbitrator continuously referred to the documents that appeared in the bundle as the union's bundle, that the finding that the failure to fully disclose was a deliberate and wilful act or omission, the arbitrator's finding that it is inconceivable that the employer would not have contacted the erstwhile employer was not supported by the evidence, that the arbitrator made credibility findings of Mr Pause without him having given evidence, that the finding that Applicant's appointment was due to his friendship with Pause was without foundation and that the finding of guilt and confirmation of the sanction of dismissal was not reasonable and not based on the evidence before him.

[17] The First Respondent, on the other hand, contends that the award is not reviewable and that the grounds raised by the Applicant do not constitute reviewable irregularities.

[18] In assessing the conduct of the arbitrator, the Court is enjoined to ask:

18.1 In terms of his or her duty to deal with the matter with the minimum of legal formalities, did the process that the arbitrator employ give the parties a full opportunity to have their say in respect of the dispute?

18.2 Did the arbitrator identify the dispute he was required to arbitrate (this may in certain cases only become clear after both parties have led their evidence)?

18.3 Did the arbitrator understand the nature of the dispute he or she was required to arbitrate?

18.4 Did he or she deal with the substantial merits of the dispute? and

18.5 Is the arbitrator's decision one that another decision-maker could reasonably have arrived at based on the evidence?⁸

[19] Our courts have repeatedly stated that in order to maintain the distinction between review and appeal, an award of an arbitrator will only be set aside if both the reasons and the result are unreasonable. In determining whether the result of an arbitrator's award is unreasonable, the Labour Court must broadly evaluate the merits of the dispute and consider whether, if the arbitrator's reasoning is found to be unreasonable, the result is, nevertheless, capable of justification for reasons other than those given by the arbitrator. The result will, however, be unreasonable if it is entirely disconnected with the evidence, unsupported by any evidence and involves speculation by the arbitrator.⁹ An award will no doubt be considered to be reasonable when there is a material

⁸ *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA and Others* (2014) 35 ILJ 943 (LAC) at para 20.

⁹ *Herholdt v Nedbank Ltd (COSATU as amicus curiae)* [2013] 11 BLLR 1074 (SCA) at paras 12 and 13.

connection between the evidence and the result or, put differently, when the result is reasonably supported by some evidence.

- [20] The enquiry into the reasonableness of the decision arrived at by the arbitrator requires an examination of the merits of the case. This task is informed by the standard review test in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*¹⁰, as it was explained in *Herholdt*¹¹ in the following terms:

‘...That test involves the reviewing court examining the merits of the case ‘in the round’ by determining whether, in the light of the issue raised by the dispute under arbitration, the outcome reached by the arbitrator was not one that could reasonably be reached on the evidence and other material properly before the arbitrator. On this approach the reasoning of the arbitrator assumes less importance than it does on the SCA test, where a flaw in the reasons results in the award being set aside. The reasons are still considered in order to see how the arbitrator reached the result. That assists the court to determine whether that result can reasonably be reached by that route. If not, however, the court must still consider whether, apart from those reasons, the result is one a reasonable decision maker could reach in the light of the issues and the evidence.’

- [21] The Court must also be mindful to avoid ‘judicial overzealousness’ in setting aside an award which does not coincide with its own views.¹² In other words, whether this Court differs with the outcome or the finding of fact or law made by the arbitrator is not sufficient for the Court to interfere, something more is required for thus is the dividing line between the Court’s powers on review versus appeal. It assists therefore to restate that where the result can reasonably be reached by the route followed by the arbitrator, the Court cannot intervene. If not, however, the court must still consider whether, apart from those reasons, the result is one a reasonable decision maker could reach in the light of the issues and the evidence. In other words, whether the result reached

¹⁰ [2007] 12 BLLR 1097 (CC).

¹¹ *Herholdt* at para 12

¹² *Assmang Limited (Assmang Chrome Dwarssriver Mine) v Commission for Conciliation Mediation and Arbitration and Others* [2015] 6 BLLR 589 (LC) para 54.

falls within the so-called band of reasonableness. Differently put, whether the outcome accords with the material properly before the arbitrator.

- [22] Mr Bosch referred to the decision by Sutherland JA in *Makuleni v Standard Bank of South Africa Ltd and Others*¹³ that puts the standard required aptly:

“The court asked to review a decision of a commissioner must not yield to the seductive power of a lucid argument that the result could be different. The luxury of indulging in that temptation is reserved for the court of appeal. At the heart of the exercise is a fair reading of the award, in the context of the body of evidence adduced and an even-handed assessment of whether such conclusions are untenable. Only the conclusion is untenable is a review and setting aside warranted.”

- [23] Further:

“To meet the review test, the result of the award has to be so egregious that, as the test requires, no reasonable person could reach such a result.”¹⁴ Are the commissioner's credibility and probability findings egregious? My reading of the award is that the references by the commissioner to 'credibility and probability elides reliability under that rubric, a not uncommon feature the judgments of the courts, no less than in awards. The critical issue in his analysis is what the commissioner found “acceptable evidence upon which he could safely rely”. The high points are addressed.”¹⁵

- [24] And finally:

“The evaluation of factual disputes is hard work and different triers-of-fact often have different assessments. The less coherent the evidence, the more likely it is that there will be divergences in the assessments. The degree of robustness which characterises the reality of CCMA arbitrations is exactly the rationale for subjecting them to a review and not an appeal. The courts must be cautious not to undermine the legislative intent.”¹⁶

¹³ (2023) 44 ILJ 1005 (LAC) at para 4.

¹⁴ Ibid at para 13.

¹⁵ Ibid at para 24

¹⁶ Ibid at paras 30 and 31.

Application

- [25] There is no doubt that both parties had the chance to have their say in relation to the matter, the arbitrator correctly identified the dispute as determining whether the probabilities favoured the evidence of the employer or the employee and the arbitrator understood the nature of the dispute clearly, as is apparent from the award. The applicant challenges the fact and disputes that the arbitrator dealt with the substantial merits of the dispute and accordingly challenges that the decision is one that a reasonable decision-maker could reasonably have arrived at.
- [26] In the Court's view, it is apparent that the arbitrator was acutely aware of his duties. He assessed the evidence before him in its totality; he considered the reliability and credibility of each witness as well as the probabilities of their versions. Whether this Court agrees with those findings or not, is not sufficient for this Court to interfere. After all this is a review and not an appeal and the Court on review is not concerned with factual or legal findings unless the outcome reached by the arbitrator was not one that could reasonably be reached on the evidence and other material properly before the arbitrator.
- [27] The arbitrator found that the Applicant, because of the fact that he had been unsuccessful in so many interviews before, knew that if he had disclosed the fact that he had been in a disciplinary process before, he would likely not be successful. The arbitrator therefore found that he had deliberately concealed the details of the charges.
- [28] If there are two competing constructions of the evidence that are both plausible and reasonable, the arbitrator's choice of one of them cannot give rise to a review. There is a material connection between the evidence and the result, and the result is reasonably supported by the evidence. As such the award is reasonable.

Conclusion

[29] It follows therefore that the application should be dismissed. The most appropriate order as to costs is that both parties remain responsible for their own costs.

Order

1. Condonation is granted for the late filing of the application.
2. The application is dismissed.
3. Each party will pay their own costs.

[REDACTED]

C. May

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant : Mr. E Geldenhuys, Macgregor Erasmus Attorneys

For the first respondent : C Bosch

Instructed by : Ms L Harker, Harker Attorneys, Oudtshoorn

LABOUR COURT