



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


Signature

15 April 2026
Date

**THE LABOUR COURT OF SOUTH AFRICA
AT CAPE TOWN**

Case no: C457/2023

In the matter between:

NQABA ALBERTUS MPAHLWA

Applicant

and

**PUBLIC HEALTH AND SOCIAL
DEVELOPMENT SECTORAL BARGAINING
COUNCIL**

First Respondent

COMMISSIONER TERESA ERASMUS N.O.

Second Respondent

**DEPARTMENT OF HEALTH: WESTERN
CAPE**

Third Respondent

Heard: 29 January 2026

Delivered: 15 April 2026

Summary: (Review – misconduct – various charges – Authenticity of documents – onus – Belated request to lead expert medical evidence – arbitrator entitled to refuse to admit such evidence in the circumstances)

JUDGMENT

LAGRANGE, J

Nature of the application

- [1] This is an opposed application for the reinstatement of a review application and the determination of the merits of the review application if it proceeded. There were a couple of other interlocutory points raised by the parties, which are dealt with in the course of the judgment.
- [2] The matter originally was enrolled for hearing on 13 August 2025 but had to be postponed to 19 August 2025 owing to the unavailability of an interpreter. At the postponed hearing the application had to be postponed again to allow the applicant to deal with an *in limine* objection and a condonation application for the late filing of its heads of argument. After that hearing and the filing of further affidavits by the parties, the applicant requested that the matter be re-enrolled for an oral hearing. Thereafter, the applicant applied to file a further affidavit, which the respondent opposed.
- [3] At the hearing on 29 January 2026, some of the preliminary matters were disposed of on in terms of rulings handed down orally in court, after hearing argument. The reasons for the rulings are set out briefly below. Thereafter, the remaining interlocutory matter and the merits of the review are addressed.

Ex tempore rulings

- [4] The *ex tempore* rulings made were that:
- 4.1 The late filing of the third respondent's supplementary heads of argument contrary to the court order requiring it to file supplementary

heads of argument ten days before the hearing on 29 January 2026 is condoned.

4.2 The *in limine* objection that the review application was deemed withdrawn in terms of the clause 11.2.2 read with clause 11.2.3 of the Labour Court Practice Manual ('the practice manual') is dismissed.

- [5] The supplementary heads of argument of the third respondent (the 'department' or 'employer') were filed on 23 January 2026, six calendar days before the hearing, whereas they should have been filed 10 court days beforehand. The applicant is right to take the department to task for its non-compliance, but he did not file a notice of objection prior to the hearing on 29 January. In terms of Rule 40(5) of the Labour Court Rules a court may make a punitive cost order against a party in default or may strike a matter off the roll. In this instance the supplementary heads concerned limited issues and the applicant was able to deal with them by the time the matter was heard. I am not persuaded that this is an instance where the deviation from the order was serious enough to warrant a punitive cost award, considering also that the applicant is representing himself and the inconvenience was not significant.
- [6] The department argued that the review application as deemed withdrawn because the entire record had not been filed within 60 court days of it being made available by the court. The last tranche of the record was received by the applicant's erstwhile attorney on 15 January 2024, but the record was then partly filed by 9 April 2024 and the balance by 10 April 2025. The primary difficulty with the department's objection is that the 60-day period only commences running when the applicant party in the review proceedings receives notice from the registrar that the record has been received.
- [7] It is apparent that the In this instance, even though it is reasonable to assume that such a notice was issued by the registrar when portions of the record were received, there is no evidence in the court file that a Rule 7A(5) notice, which was date stamped 15 January 2024, was actually communicated to the applicant's erstwhile attorneys of record. Even if it had been sent on that date, 60 court days from that date expired on 10

April 2024, which would mean the record was completely filed only one day late. In any event, as there was no evidence when the notice was sent out by the Registrar, it cannot be confidently said it was sent on the date appearing on the notice. Accordingly, it cannot be said with certainty that the 60-day rule was not complied with and, consequently, it cannot be said that the provisions of the practice manual deeming the review application withdrawn were triggered.

- [8] In short, the review application did not elapse despite the long delay and it was not necessary for the applicant to apply for condonation for the filing of the record, nor to bring a reinstatement application.

Other interlocutory issues

- [9] For the sake of clarity to the extent that other interlocutory issues were not expressly pronounced on during the course of the proceedings, I address them below.

Condonation of late answering affidavit

- [10] The department's answering affidavit in the review application was two days late. This delay occurred in the context of the applicant having taken 19 months to finalise his review application. Even in the absence of a good explanation for the delay, it would be absurd to penalise the department for a delay of 48 hours given the length of time taken by the applicant to finalise his application. The administrative delays mentioned by the department are not implausible and did not result in any great inconvenience to the applicant, quite apart from the fact that the department had already succeeded in the arbitration proceedings and therefore had shown it had successfully defended the applicant's dismissal once, which indicates it had some prospect of defeating the review. For these reasons the late filing of the answering affidavit in the review application should be condoned.

Admission of applicant's further affidavit in response to the department's replying affidavit

- [11] The applicant sought leave to file a replication to issues he claims were raised for the first time in the department's replying affidavit in its condonation application and *in limine* objection. The introduction of a further affidavit was opposed by the respondent. I am not persuaded that the applicant's further affidavit is justified, but whether admitted or not it does not affect the merits of the issues raised. As I have already mentioned, the late filing of the answering affidavit ought to be condoned for the reasons stated above and further replying affidavit does not affect that conclusion, so does not prejudice the respondent. Accordingly, I accept it may be admitted as part of the record.
- [12] With the interlocutory matters disposed of, the merits of the review application can be addressed.

Introduction

- [13] The applicant, Mr N Mphalwa ('Mphalwa') was employed by the department since 2015 as a Central Processing Operator at the Red Cross Hospital. He was originally found guilty of six charges of misconduct and dismissed at the end of April 2023 following an unsuccessful internal appeal hearing.
- [14] By the time the arbitration hearing took place it had been discovered that the first charge concerned misconduct which had previously been dealt with in another disciplinary process, so the arbitrator only had to consider the remaining five charges of alleged misconduct, namely:
- 14.1 Charge 2 concerned Mphalwa's absence without permission from work from 17 September to 15 October 2021.
- 14.2 Charge 3 concerned his failure to follow a lawful instruction from his supervisor by failing to submit a medical center certificate within a reasonable time when requested to do so.

14.3 Charge 4 concerned an email sent to his supervisor on 10 August 2021 in which he was derogatory and grossly disrespectful. In the email he had responded to an email from Itumeleng as follows:

'Don't get frustrated I have responded but not with a (fist emoji).

Let's pray they don't hit you again!'

The reference to Itumeleng being hit was to an unrelated incident in which other staff had assaulted him. Itumeleng had complained to his superior about this email mentioning that Mphalwa had previously described dealing with Itumeleng as if he was dealing with an elephant rather than a lizard. Itumeleng had also testified that working with Mphalwa presented a lot of challenges of that he was a very difficult person who was always trying to put someone down with his disrespectful attitude and he never listened to his supervisor. He also did not work with other staff in the department and was not punctual. Efforts to accommodate him did not work. He testified how Mphalwa's conduct reduced him to tears and his decision to apply to move to another hospital because of the bad relationship with Mphalwa made him fearful and uncomfortable and disrespected in front of other staff.

14.4 Charge 5 concerned a separate failure to carry out orders and another derogatory and disrespectful email directed at his supervisor on 7 December 2021. In that email concerning incapacity leave application forms, the following statement appeared in the text of the email:

'You are warned and advised to refrain from taking unlawful instructions from so called nursing management'

14.5 Charge 6 concerned his failure to carry out orders of supervisors by leaving the workplace on Friday 4 February 2022 contrary to an express instruction from the Head of Nursing Ms M Franken

(‘Franken’) conveyed to him by the Senior Labour Relations Officer, Ms Absalom, in the presence of Jekels.

Summary of the award

- [15] The issue before the arbitrator was whether the dismissal of the Applicant was procedurally and substantively fair, as contemplated in section 188 of the Labour Relations Act 66 of 1995.
- [16] The disciplinary hearing was postponed on several occasions, largely at the Applicant’s instance, due to claims of ill health supported by medical certificates. Ultimately, after four postponements, the hearing proceeded on 9 March 2023 in the Applicant’s absence. The Applicant was dismissed following the outcome of the disciplinary process, and his internal appeal was unsuccessful. At the time of dismissal, the Applicant earned R12 756.00 per month gross.
- [17] The Applicant challenged his dismissal on both procedural and substantive grounds. Procedurally, he contended that it was unfair for the disciplinary enquiry to have proceeded in his absence while he was ill, and that the Respondent had subjected him to double jeopardy by charging him for misconduct in respect of which he alleged he had already been warned. Substantively, he denied the misconduct, maintained that his absenteeism was medically justified, and asserted that his email communications had been misunderstood and were not intended to be disrespectful. He sought retrospective reinstatement and compensation equivalent to twelve months’ remuneration.
- [18] The Respondent maintained that the Applicant had a persistent and excessive pattern of absenteeism; that he repeatedly failed to comply with clear and reasonable instructions relating to the submission of medical certificates; that his written communications to supervisors and managers were grossly disrespectful, offensive, and unprofessional; and that his conduct had irreparably damaged the employment relationship. The Respondent further argued that the disciplinary chairperson acted fairly in eventually proceeding with the hearing in the Applicant’s absence after

numerous postponements and clear warnings regarding the consequences of further non-attendance.

- [19] As mentioned above, during the arbitration it emerged that the Applicant had in fact previously received a written warning relating to one of the charges. As a result, the Respondent withdrew charge 1 at the commencement of the arbitration proceedings. Nonetheless, the arbitrator was satisfied that the remaining five charges were independently established and were sufficiently serious to warrant dismissal.
- [20] In assessing procedural fairness, the arbitrator found that the disciplinary chairperson had exercised his discretion properly. The Applicant had been granted multiple postponements over an extended period, each of which accommodated his requests. Before proceeding in the Applicant's absence, the chairperson clearly informed him that further postponements would not be granted without objective medical confirmation, either by way of an affidavit or the attendance of the Mphahlela's medical practitioner. However, the Applicant neither attended the hearing nor furnished the required supporting medical documentation to justify a further postponement. The arbitrator concluded that the chairperson had bent over backwards to accommodate him. The arbitrator found that the chairperson's decision to proceed was fair, reasonable, and consistent with the need for disciplinary processes to reach finality. The dismissal was therefore procedurally fair.
- [21] Regarding substantive fairness, the arbitrator accepted the Respondent's evidence that the Applicant contravened the Code of Conduct by absenting himself without proper authorisation, failing to follow lawful instructions, and directing emails to management that were derogatory, disrespectful, and upsetting. The arbitrator found that the Applicant demonstrated no insight into his misconduct, showed no remorse, and was an unreliable witness. Of some significance was the finding that the Applicant attempted to mislead the arbitrator by submitting a falsified document purportedly authorising him to leave the workplace. The document was purported to be agreement between himself and Ms Jekels ('Jekels'), a supervisor, which supposedly gave him permission to leave

the workplace, whereas she neither signed nor drafted the document. The arbitrator held that the Applicant's sustained disregard for authority, his pattern of misconduct since at least 2021, and the breakdown of trust rendered continued employment intolerable.

- [22] The arbitrator concluded that dismissal was an appropriate and proportionate sanction in the circumstances. Accordingly, the Applicant's dismissal was found to be both procedurally and substantively fair, and the Applicant was held not to be entitled to any relief.

Grounds of review

- [23] In his founding affidavit grounds of review were merely stated in the most general terms without any factual references. It is only in his supplementary affidavit that Mphalwa set out grounds of review based on specific factual averments.

First ground (alleged fraudulent documents)

- [24] This ground concerned the authenticity of certain contested documents. Mphalwa had been asked to produce the originals a couple of documents in his bundle, as the purported management signatories to the documents disputed signing such documents.
- [25] The first was a written warning of six months' duration, issued on 8 April 2021, in which he had been found guilty of unprofessional behavior towards his line manager on 1 February 2021 and posted disparaging remarks about him in an 'impudent' manner. At the start of the arbitration, it was agreed that the original version of the written warning was no longer required because the employer agreed that it had indeed been issued. This was the reason the first charge was withdrawn.
- [26] The second document was an alleged 'verbal' warning, recorded in writing, issued on 10 December 2021 for writing emails to Mr T Itumeleng ('Itumeleng'), his supervisor, on 10 August 2021 and 7 December 2021, in which it is alleged he communicated disrespectfully and threateningly on the first occasion and disrespectfully on the second. The third document was the purported agreement between Mphalwa and Jekels. The

document stated, amongst other things, that after a face-to-face meeting on 4 February 2022, they had agreed to Mphalwa being absent on that day for one day's annual leave to see his psychiatrist. It contained an extraordinary final paragraph stating:

'If signed by both parties, then contents of this document will be binding and may be used as evidence in the near future.'

(sic)

- [27] In answer to the commissioner's queries, Mphalwa confirmed that he did not have the originals of the two contentious documents. The arbitrator asked how he was going to deal with that issue. Mphalwa claims the arbitrator did not entertain what Mphalwa wanted to say but said she would hear the evidence and make a ruling on the admissibility of the two pages, when writing his award. He then proceeded to ask the parties for their opening statements. When Mphalwa said he wanted to submit something in relation to the documents the arbitrator said that she could not deal with it at that point and pressed him to provide his opening statement.
- [28] Mphalwa claims that he wanted to respond to the *in limine* objection about the authenticity of documents he had provided, but the arbitrator would not allow him to submit an affidavit in support of the authenticity and denied him an opportunity to submit an affidavit at a later stage. However, the arbitrator nevertheless took account of the objection when she stated in the award that the substantive fairness of the dismissal related to "the alleged fraudulent documents handed in by him.
- [29] Mphalwa also contends that the arbitrator committed misconduct by not attaching any weight to his evidence about the documents from the outset.
- [30] He argues that, in the absence of expert evidence disputing the authenticity of the two documents, the arbitrator could not have made a finding against him on the balance of probabilities and in so doing misconstrued the evidence.

- [31] The employer agrees that Mphalwa wanted to produce an affidavit to respond to its objection about the admissibility of the two documents. Notwithstanding the commissioner's failure to admit the affidavit, the employer contends that Mphalwa had an ample opportunity to question its witnesses when they gave evidence on the documents. When they gave evidence, he did not attempt to introduce any document to discredit their version that they were neither the authors nor signatories of the documents they purportedly signed. Moreover, even in his evidence in chief he did not raise the issue of the affidavit in his evidence, nor did he attempt to explain the origin of the supposed agreement with Jekels. It contends that the department's witnesses' version that the documents in question were never produced nor ever signed by them was consistent and was neither discredited nor refuted.
- [32] The department further argues that the arbitrator's view of the documents was determined by Mphalwa's failure to produce the originals and the employer's evidence they were fraudulent. Accordingly, the arbitrator's conclusion that he had attempted to mislead her by relying on them was a reasonable conclusion based on the evidence. Consequently, she did not misconstrue the evidence relating to the documents.
- [33] The respondent also points out that the arbitrator agreed to provisionally admit the documents despite the absence of the originals, subject to making a final decision on their admissibility later and that there was nothing untoward about that. Moreover, it was Mphalwa who was responsible for proving the authenticity of the documents and accordingly he failed to appreciate that the arbitrator was entitled to doubt their authenticity in the absence of the purported authors of the documents confirming them. Not only did he fail to discredit the employer witness's testimony discrediting the authenticity of the documents, but he also failed to deal with that issue in his own evidence in chief. Accordingly, there was nothing unreasonable about the arbitrator's findings on the status of the documents. In particular, the arbitrator's finding that the supposed agreement signed by Jekels was probably falsified was a finding a reasonable arbitrator could have reached.

- [34] I cannot find fault with the submissions of the department set out above and, consequently, the first ground of review must fail.
- [35] Another criticism made by Mphalwa of the arbitrator's findings about the authenticity of the affected documents, relates partly to the discussion above. It concerned the absence of expert evidence on the authenticity of the document. He argued that without expert evidence the arbitrator was in no position to make a finding on the authenticity of the documents. The department retorts that the arbitrator was entitled to make a finding on the authenticity of documents based on the evidence which was presented. Had Mphalwa obtained an expert's report on the authenticity of the documents, then that evidence would have been relevant, but the absence of expert testimony did not preclude the arbitrator from making findings on the evidence presented.
- [36] I cannot find any fault with the arbitrator's approach in determining if Mphalwa had established the authenticity of the disputed documents as a matter of probability. The evidence presented was sufficient for the arbitrator to conclude that Mphalwa had failed to discharge his onus in regard to the documents¹. The finding to the effect that the 'agreement' purportedly concluded with Jekels was a fabrication was not an unreasonable one to draw, especially given the peculiar wording of the last sentence in the agreement which appears to have been premised on the likelihood of a disciplinary enquiry being held relating to the whether or not she had granted the permission recorded in the agreement. It begs the question, why willing parties to such an agreement, would have anticipated an imminent dispute about their written agreement and felt it was still necessary to augment it with such a provision. It is perfectly plausible to infer that the provision was inserted in the knowledge that there would be a dispute about whether Mphalwa was given permission to leave the premises, because no permission had, in fact, been given.

¹ See *CRC Engineering (Pty) Ltd v JC Dunbar and Sons (Pty) Ltd* 1977 (1) SA 710 (W) at page 712: 'When the execution or authenticity of a document is put in issue, the onus rests on the party relying on that document to prove it, and that he does by calling the person who signed it or someone who saw him sign it.'

Sick certificate finding

- [37] Mphalwa takes issue with the finding of the arbitrator that Itumeleng, had indicated that a sick certificate on page 29 of his bundle was not the same certificate that was attached to an email sent on 20 September 2021. He contends that his supervisor did not testify to that effect and accordingly the arbitrator misconstrued the evidence in finding that Itumeleng had testified to the difference in the certificates.
- [38] The employer points out that much of Itumeleng's evidence was recorded as '*inaudible*' in the transcript. From the transcript it appears that his evidence was given on MS Teams and the connection was poor. Consequently, the department could not directly address this allegation in the absence of the missing portions of his evidence being properly reconstructed. Moreover, it contends that even if the arbitrator might have incorrectly summarised the evidence, it would not have amounted to a reviewable irregularity that would vitiate the entire award.
- [39] In my assessment, even if Mphalwa's contention on this point is correct, it does not follow that his ultimate findings are unsustainable.

Failure to consider the applicant's bundle of documents

- [40] In a somewhat vague statement Mphalwa claims that the arbitrator committed misconduct by not attaching enough weight to the evidence presented in his bundle.
- [41] The employer argues that the statement is too vague to respond to but, in any event, he does not provide any reason why the arbitrator should have attached more weight to the documents in his bundle than the oral evidence of the department's witnesses and its bundle.
- [42] Apart from the vagueness of this ground, it must be stressed that the mere fact a document is part of a litigant's bundle, does not make that document part of the evidence², unless it is admitted as evidence by agreement or unless it is introduced in the course of a witness's testimony. In most

² *Swissborough Diamond Mines (Pty) Ltd v Government of the RSA and Others* 1999 (2) SA 279 (T) at paragraphs 12 and 13.

proceedings where oral testimony is given, many of the documents in a bundle will never be introduced as part of the evidence given in the course of that testimony.

The scheduling of the disciplinary inquiry

- [43] Whereas the arbitrator acknowledged that Mphalwa testified that the chairperson deliberately scheduled the disciplinary hearing on a day when he knew that he was booked off, namely 6 and 9 March 2023, the arbitrator should have found that the respondent acted in bad faith in doing so.
- [44] The department disputes that the arbitrator accepted Mphalwa's contention that the chairperson of the inquiry had sabotaged the inquiry and contends that in any event the allegation is not supported by the evidence which showed that the inquiry had been postponed on numerous occasions at Mphalwa's request and that he was pertinently warned the inquiry would be proceed in the absence of a supporting affidavit from Mphalwa's doctor confirming why he would be unable to attend the disciplinary proceedings.

Admission of irrelevant evidence

- [45] Mphalwa complains the arbitrator did not address his objection to the relevance of certain evidence led by Franken and had advised him to save his objection for cross-examination. He argues that because this irrelevant evidence was led the arbitrator committed a gross irregularity in the conduct of the arbitration proceedings.
- [46] Before Mphalwa raised his objection, Franken was testifying about the sixth charge, which related to him leaving the workplace on Friday 4 February 2021. She was testifying that Mphalwa had come back on duty that day and he had indicated he was going to leave again as he had an appointment. However, she instructed the supervisors and the Labour Relations Officer to inform him that he cannot leave the premises because the appointment he wanted to attend was not an emergency. She believed this was another instance of his repetitive conduct of coming to work,

leaving early, and then staying away for three or more months from the workplace, which management had discussed with him on several occasions. It was when she was detailing how few days he had worked in a year that he objected.

[47] The department retorts that the evidence of the pattern of his prior absenteeism and habit of appearing and then leaving work was highly relevant in informing Franken's decision to forbid him to leave the premises that Friday. Moreover, the arbitrator's direction that he could deal with that matter in cross-examination was not prejudicial to him. Accordingly, there is nothing irregular about the way the arbitrator handled his objection.

[48] I agree with the department's submissions in this regard.

Opportunity to call a doctor to testify

[49] Mphalwa also claims that the arbitrator committed an irregularity by failing to give him an opportunity to call a doctor to testify about his inability to defend himself in the disciplinary enquiry on account of his illness. The arbitrator had refused his request to call the doctor because no doctor's evidence had been put to any of the department's witnesses. Mphalwa contends that the arbitrator should not have dismissed his request out of hand without knowing what evidence the doctor was going to lead and the employer would still have had an opportunity to cross-examine the doctor and lead any additional evidence in rebuttal.

[50] The department points out that it was explained at the commencement of the arbitration how important it was for Mphalwa to put his version to the employer's witnesses and that, if it was not done, that evidence could not be led by Mphalwa after the employer had presented its case. No version of any doctor's evidence was put to any of the department's witnesses. It also pointed out that Mphalwa was familiar with the way evidence was led, because he had previously represented other employees in disciplinary hearings.

[51] It is a time honoured legal principle that a party who is going to lead its own evidence after its opponent has done so, must put its version of the

evidence it is going to lead to the opponent's witnesses³. If that is not done, the evidence it subsequently leads is protected from contradiction by the opponent's witnesses and is necessarily devalued on account of not having been tested with witnesses who might have been able to dispute that evidence. It would also not alert the opponent of the need to call its own witnesses to rebut that version before closing its case.

[52] In this instance, it is correct that if Mphalwa intended to call a medical expert to give evidence of his inability to have attended the enquiry, the doctor's evidence should have been put to the chairperson of the enquiry. In that case, the department would have been alerted to the need to summon its own medical expert to deal with that evidence. It is true that it is possible that the department could have been given an opportunity to lead such evidence by way of calling a medical expert in rebuttal but the arbitrator was not obliged to make a ruling to that effect. Mphalwa should have given the department prior notice of his intention to lead such evidence. More importantly, the issue concerns whether it was fair of the chairperson of the disciplinary enquiry to proceed in Mphalwa's absence. Mphalwa was specifically invited to either produce an affidavit from his doctor or to call the doctor to testify about his inability to attend the enquiry, but he declined to do so. Leading evidence after the enquiry to establish his incapacity at the time of the hearing, could not have advanced Mphalwa's argument that it was unfair of the chairperson to proceed with the enquiry, when he had not taken up the chairperson's invitation at the time to support his claim that he was too incapacitated to participate in the enquiry.

[53] Thus, evidence given in the arbitration by an expert, would not have been relevant to determining whether the chairperson acted fairly *at the time* in refusing to postpone the enquiry yet again, on the information that was before him then. Accordingly, this ground of review must also fail.

³ *President of The Republic of South Africa and Others V South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) at paragraphs 61 to 65.

Conclusion

[54] I cannot find any gross irregularity of the arbitrator in the handling of the proceedings or her handling of the evidence and the inference she drew from it resulted in her reaching an outcome that no reasonable arbitrator could have reached.

Order

1. The late filing of the Third Respondent's answering affidavit in the review application is condoned.
2. The Applicant's further supplementary affidavit is admitted as part of the record.
3. The review application is dismissed.
4. No order is made as to costs.



R Lagrange

Judge of the Labour Court of South Africa.

LABOUR COURT

Appearances:

For the Applicant:

---In Person

For the Respondent:

--- C Davids

Instructed by:

--- State Attorney Cape Town