



- (1) Reportable: NO
(2) Of interest to other Judges: Yes

Signature

Date

THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Case no: A2025-092122

In the matter between:

THEMBANI BANDA

Appellant

and

GENERAL PUBLIC SERVICE SECTOR

BARGAINING COUNCIL

First Respondent

COMMISSIONER MMELI DANISA N.O.

Second Respondent

DEPARTMENT OF PLANNING, MONITORING

AND EVALUATION

Third Respondent

Heard: 3 March 2026

Delivered: 15 April 2026

Coram: Nkutha-Nkontwana JA, Djaje et Collis AJA

JUDGMENT

NKUTHA-NKONTWANA JA

Introduction

- [1] The appeal is with the leave of the Court *a quo* against the judgment and order delivered on 1 August 2024. The Court *a quo* refused to interfere with the second respondent's (arbitrator) arbitration award dated 16 October 2022, which found the appellant's (Ms Banda) precautionary suspension to constitute an unfair labour practice in terms of section 186 (2)(b) of the Labour Relations Act¹ (LRA) but refused to award compensatory relief in terms of section 194 (4)². In the review application that served before the Court *a quo*, Ms Banda impugned the arbitrator's exercise of discretion in failing to award compensation, notwithstanding a finding that the suspension was unfair and punitive in nature. The third respondent (the Department) did not oppose the review application.

Background

- [2] The facts in this matter are mostly common cause. Ms Banda was employed by the Department as the Chief of Staff (Chief Director) in the office of the Minister in the Presidency with effect from 22 October 2021. On 24 February 2022, she was placed on precautionary suspension pending an investigation into allegations of serious misconduct against her. The suspension was effected in terms of clause 2.7(2)(a) of the Senior Management Service (SMS) Handbook, which provides:

"Precautionary suspension or transfer

- (a) The employer may suspend or transfer a member on full pay if -

¹ Act 66 of 1995, as amended.

² Section 194(4) provides: "*The compensation awarded to an employee in respect of an unfair labour practice must be just and equitable in all the circumstances, but not more than the equivalent of 12 months remuneration.*"

- the member is alleged to have committed a serious offence; and
- the employer believes that the presence of a member at the workplace might jeopardise any investigation into the alleged misconduct, or endanger the well being or safety of any person or state property.

- (b) A suspension or transfer of this kind is a precautionary measure that does not constitute a judgment, and must be on full pay.
- (c) If a member is suspended or transferred as a precautionary measure, the employer must hold a disciplinary hearing within 60 days. The chair of the hearing must then decide on any further postponement." (Own emphasis)

[3] Much was made of the interpretation of 60 days in clause 2.7 (2)(c) despite the evident guideline provided in the Public Service Precautionary Suspensions Guide (Suspension Guide) promulgated by the Department of Public Service and Administration (DPSA) that 60 days refer to calendar days. In fact, the Department's initial understanding was that, at the end of the 60 calendar days, Ms Banda's suspension would lapse. Hence, on 22 April 2022, two days before the lapse, the Department convened a disciplinary hearing to seek an extension of the 60-day period.

[4] The chairperson of the disciplinary hearing rejected the parties' computation of the 60 days in clause 2.7(2)(c). She took the view that it referred to weekdays rather than calendar days. Seemingly, her construction was derived from the Public Service Act³ (PSA). As a result, she ruled that the application for extension was premature as the 60 days would have lapsed on 31 May 2022. However, she extended the period by 30 days, effective from 1 June 2022, only if the investigation and disciplinary hearing were still pending at that time. Armed with the chairperson's findings, the department did not uplift Ms Banda's suspension on 24 April 2022.

³ Act 103 of 1994, as amended.

At arbitration

- [5] Displeased with the Department's failure to uplift her suspension, Ms Banda referred an unfair labour practice dispute to the first respondent (GPSSBC). The conciliation yielded no fruit and the matter proceeded to arbitration. Ms Banda's suspension had not been uplifted at the time the arbitration proceedings concluded on 3 October 2022. That meant the suspension was prolonged for eight months, of which six months were impugned as unfair.
- [6] The Department defended its decision not to uplift Ms Banda's suspension based on the chairperson's interpretation of the 60-day period in clause 2.7(2)(c) as alluded to above. Ms Banda, on the other hand, contended that the interpretation was not only untenable but futile to the Department's case because, in any event, no further extension was granted after 30 June 2022, being the last day of the extension granted by the chairperson.
- [7] The arbitrator preferred the construction accorded to clause 2.7(2)(c) of Ms Banda that the 60-day period refers to calendar days. However, he found that the SMS Handbook does not permit the extension of this period. In essence, he found the chairperson's alleged extension of the 60-day period to be flawed and punitive towards Ms Banda. As a result, the suspension was found to be unfair, and the department was ordered to uplift it with immediate effect. Still, the arbitrator was disinclined to award compensation, stating:

'I do not see it fit to award [Ms Banda] compensation for the invalid suspension from 25 April 2022 which is a 6 month period as [Ms Banda] was receiving her salary and [the Department's] rationale was due to an incorrect reading of the SMS Handbook subject to bad advice from the chairperson as they had originally believed the SMS Handbook illustrated calendar days before they were misled.'⁴

At the Court *a quo*

⁴ See: Arbitration award, para 46, Caselines p 004-373.

[8] It is the above finding that Ms Banda assailed at the Labour Court. The main ground for review was that the arbitrator committed a reviewable irregularity by refusing to award compensation, despite having found her suspension unfair and punitive.

[9] The Court *a quo*, having referred extensively to authorities dealing with various grounds for interference with the exercise of a discretion, found:

[23] It follows that the arbitrator's decision to not award compensation falls within the band of reasonable decisions that could have been reached on the facts. While I would probably have awarded one month's compensation, a court sitting on review of the exercise of an arbitrator's strict discretion under section 194, cannot simply interfere if it would have reached a different conclusion. The authorities quoted above make it clear the court's powers on review are quite limited.

[24] Ultimately, the arbitrator considered the issue of compensation with reference to both the interests of the employee and the employer and performed a balancing act. He took into account the fact that suspension had been on full pay, and the fact that the employer had not acted with malice, and in the application of his discretion, decided not to award compensation.'

[10] As a result, the Court *a quo* found that the arbitrator exercised his discretion judicially and that the award was unassailable.

In this Court

[11] In this court, Ms Banda contends that the Court *a quo* erred in refusing to interfere with the arbitrator's exercise of discretion, as it was unreasonable in light of all relevant facts and legal principles. That is so, she further contends, because the arbitrator premised his finding on irrelevant facts while ignoring the relevant facts on record.

- [12] Mr Mogane, Ms Banda's counsel, submitted that the arbitrator unreasonably failed to consider the unrefuted evidence of Ms Banda that the unlawfully prolonged suspension was prejudicial to her in the following respects: (i) She had to consult a psychologist and take medication as a result of the anxiety; (ii) her children were also affected; and (iii) she missed career-advancing opportunities. On the contrary, the arbitrator was fixated on issues extraneous to the enquiry, namely, that she received full salary while on suspension and that the Department's refusal to uplift the suspension was not malicious, as it had been misled by the chairperson, so the submission further went.
- [13] The greater part of the Department's written submissions is dedicated to the interpretation of clause 2.7(2)(c). Mr Basson, the Department's counsel, sought to persuade this Court to address this issue, given what he considers to be a continuous misconstruction of clause 2.7(2)(c) by the arbitrators and the Labour Court. That is so contrary to the trite tenet that appellate courts are constrained to address only issues that were properly served and ventilated in the court *a quo*.⁵ To entertain the argument on the interpretation of clause 2.7(2)(c), which was not part of the live controversy in the Court *a quo* and when the Department stood aloof then, would require this Court to exceed the bounds of the current record and the issues decided by the Court *a quo*. We are disinclined to take that path. Accordingly, the interpretation of clause 2.7(2)(c) is not properly before this Court and is disallowed and will not be further considered.

Discussion

- [14] At heart in this appeal is whether the arbitrator misdirected himself in exercising his discretion to withhold compensation and whether the Court *a quo* was correct in refusing to interfere. The legal position regarding the exercise of discretion in awarding or not awarding compensation in terms of section 194 is now crystallised as the Constitutional Court (CC) settled this polemic in *McGregor v*

⁵ See: *DB v CB* 2024 (5) SA 335 (CC) at paras 50-55; *BLK Monitoring and Inspectorate CC v Maduka and Others* [2026] 3 BLLR 203 (LAC) at para 30; *Coin Security Group (Pty) Ltd v SA National Union for Security Officers and others* 2001 (2) SA 872 (SCA) at para 9.

Public Health and Social Development Sectoral Bargaining Council and Others,⁶ quoted generously by the Court *a quo*, which aptly dealt with the circumstances in which an appeal court may interfere with a decision reached by the Labour Court or arbitrator in the exercise of its discretion.

[15] *McGregor* differentiated between the discretion exercised in terms of section 193 and the one exercised in terms of section 194, *albeit* within the context of unfair dismissal, stating that while the review court or an appeal court's power to interfere in an award for compensation in terms of section 193 is not circumscribed, as the decision to do so is a matter of a broad judicial discretion. The converse is true when determining the amount of compensation under section 194 (1), which involves the exercise of a narrow discretion and a choice between legitimate alternatives. As a result, the power of a review or appeal court to interfere is constrained unless it can be shown that the arbitrator, *inter alia*, exercised their discretion capriciously, or exercised their discretion upon a wrong principle, or reached a decision in which the result could not reasonably have been made by an arbitrator properly directing itself to all the relevant facts and principles.⁷

[16] I accept, as correctly expressed by the Court *a quo*, that the exercise of a narrow discretion accentuates the threshold for interference by the review court. However, interference is warranted if it can be shown, as is the case here, that, based on the totality of pertinent facts that served before the arbitrator, the discretion not to award compensation was premised on an incorrect legal principle or ignored the relevant facts, which resulted in him making an unreasonable decision.

[17] The Department defends the arbitrator's findings and, in turn, the impugned judgment. It contends, on the strength of *McGregor*, that compensatory relief is never guaranteed and, accordingly, it is not injudicious for the arbitrator to have

⁶ (2021) 42 ILJ 1643 (CC); [2021] 9 BLLR 861 (CC) at paras 25-27.

⁷ Id. See also *National Coalition for Gay and Lesbian Equality and others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC) at para 11, referred to with approval in *McGregor*; *Aspen Pharmacare v Makhari* (2025) 46 ILJ 295 (LAC) at para 12.

declined to award compensation. I disagree. The arbitrator clearly misconstrued the difference between patrimonial damages and *solatium*, as explained by this Court in *Johnson & Johnson (Pty) Ltd v CWIU*,⁸ as follows:

‘The compensation for the wrong in failing to give effect to an employee’s right to a fair procedure is not based on patrimonial or actual loss. It is in the nature of a *solatium* for the loss of the right, and is punitive to the extent that an employer (who breached the right) must pay a fixed penalty for causing that loss. In the normal course a legal wrong done by one person to another deserves some form of redress. The party who committed the wrong is usually not allowed to benefit from external factors which might have ameliorated the wrong in some way or another. So too, in this instance.’ (Emphasis added)

- [18] The factors to be considered when determining the amount of compensation are well accepted, and as reiterated in *Edumbe Municipality v Putini and Others*,⁹ include the following:

“...the nature and seriousness of the iniuria, the circumstances in which the infringement took place, the behaviour of the defendant (especially whether the motive was honourable or malicious), the extent of the plaintiff’s humiliation or distress, the abuse of the relationship between the parties, and the attitude of the defendant after the iniuria had taken place...”

- [19] The arbitrator, therefore, misdirected himself by solely considering the extraneous factors, namely, the fact that Ms Banda was on paid suspension and the Department’s reliance on the incorrect interpretation of clause 2.7(2)(c) by the chairperson. While he ignored Ms Banda’s unrefuted evidence on the prejudice she suffered because of the prolonged unfair suspension, which went as follows:

“RESPONDENT REPRESENTATIVE: Common cause, yes. So what prejudice did you suffer as a result of you being on suspension...?”

⁸ [1998] 12 BLLR 1209 (LAC) at para 41, referred with approval in *Le Grange v Dr Visser t/a Skukuza Medical Practice and Another* [2025] 2 BLLR 152 (LAC); (2025) 46 ILJ 947 (LAC) at para 23.

⁹ (2020) 41 ILJ 891 (LAC); [2020] 5 BLLR 496 (LAC) at paras 56-57.

MS. THEMBANI BANDA:

Joh, a lot of things and as we speak now I'm on depression tablets. This thing has caused me so much, so much hurt and so much sorrow Chairperson, in that I still don't understand what wrong did I do. But that is something that we will deal with in the, when we deal with in the DC. And also for me, I felt that it's something like, okay no, let me not talk about feeling and whatever. What prejudice, I got sick. I ended up having, I'm now living on depression tablets. I had to see my psychologist now and again about this thing, and also the fact that this thing is not coming to an end. There were opportunities, but because of this thing hanging over my head, I couldn't proceed you know. So this has caused so much sorrow in my life and in my family. It has even affected my kids." (Emphasis added)

[20] I find it curious that the arbitrator, notwithstanding his absolute reservations about the length of the suspension, which she found punitive, failed to interrogate the effect of that penal conduct on Ms Banda. That flaw led to a skewed decision which clearly gave undue weight to factors that favoured only the Department, while ignoring what was fair to Ms Banda.¹⁰ As a result, Ms Banda was deprived of *solatium* to address the wrong occasioned by her unfair suspension, and there was no deterrent for future contraventions by the Department.¹¹ So untenable an award should not have received a stamp of approval by the Court *a quo*.

¹⁰ Id.

¹¹ *South African Post Office Limited v Jansen van Vuuren NO and Others* [2008] 8 BLLR 798 (LC); (2008) 29 ILJ 2793 at para 39

- [21] The Court *a quo* erred, in my view, in failing to appreciate that the arbitrator did not apply his mind to what constitutes a just and equitable compensation in the circumstances.

Conclusion

- [22] It follows that the Court *a quo* erred in failing to appreciate that there were grounds to interfere with the narrow discretion, as the arbitrator misconstrued the pertinent legal tenets and ignored the undisputed facts proving the prejudice suffered by Ms Banda due to the unfair suspension. To that extent, the award falls to be reviewed and set aside.
- [23] Ms Banda is entitled to some form of compensation. There is, however, no good reason to refer the matter back for a decision on an appropriate award of compensation, as all the necessary facts are before us to enable us to substitute the arbitrator's decision with our own.
- [24] I have taken into consideration that the arbitrator found the suspension substantively justified but only vitiated by a prolonged period in breach of clause 2.7(2)(c). There is nothing on record to justify compensation equivalent to three months' salary, as submitted by Mr Mogane. In my view, compensation equivalent to one month's salary, which Mr Basson concedes to, is just and equitable.

Costs

- [25] In my view, the Department's opposition to this appeal and the basis thereof is lamentable and deserves censure. There is no reason why Ms Banda must be out of pocket for vindicating her right to fair labour practice. Therefore, it accords with the requirements of the law and fairness that the Department be ordered to pay the costs of the appeal.
- [26] In the premise, the following order is made:

Order

1. The appeal is upheld, and the order of the Court *a quo* is set aside and substituted with the following order:
 - 1.1 *"The arbitrator's decision not to award compensation is reviewed and set aside.*
 - 1.2 *The third respondent shall pay the appellant compensation equivalent to a month's salary, calculated at the appellant's rate of pay at the time of suspension.*
 - 1.3 *There is no order as to costs."*
2. The third respondent shall pay the appellant's costs of appeal.

Nkutha-Nkontwana JA

Judge of the Labour Appeal Court of South Africa

Djaje AJA et Collis AJA concur.

APPEARANCES:

For the appellant : Mr C. Mogane of Sanqela Attorneys

For the third respondent : Adv. J.L. Basson

Instructed by : State Attorney Pretoria