



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

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case no: JR628/22

In the matter between:

PHINDILE RAYMOND MSAULE

Applicant

and

UNIVERSITY OF LIMPOPO

First Respondent

**COMMISSION FOR CONCILIATION MEDIATION
AND ARBITRATION (CCMA)**

Second Respondent

COMMISSIONER MAFA-CHALI N.O

Third Respondent

Heard: 23 November 2025

Delivered: 17 April 2026

JUDGMENT

TSHISEVHE, AJ

Introduction

- [1] This is an application for review in terms of Section 145(1)(a) of the Labour Relations Act¹ (LRA).
- [2] This is an application to review and set aside the arbitration award made under case number LP6302-21 dated 10 February 2022 in terms of which the Third Respondent found that the conduct of the First Respondent did not constitute an unfair labour practice.

Material background facts

- [3] The Applicant (Phindile Raymond Msaule) was employed by the First Respondent since 1 August 2013, occupying the position of Lecturer.
- [4] On 10 October 2021, Professor SL Rapulana, the Head of Department (the HOD) of Jurisprudence, Legal Pluralism, Criminal Law and Procedure, as a person responsible for module allocation, advised all staff members of module allocations in his department.
- [5] The HOD allocated General Principles of Criminal (CJUA021) to the Applicant and himself as co-lecturers of the module.
- [6] On 16 February 2021, the Applicant wrote an email to the HOD asking him what aspects of the module would he (the HOD) be lecturing on since he had allocated himself the module as a co-lecturer.
- [7] The HOD advised the Applicant that he will only intervene when necessary and contribute when it comes to assessment papers; however, the Applicant will remain the primary facilitator.
- [8] The HOD further indicated that the module has previously been flagged due to poor performance by the students, and that is the reason behind the intervention, so that he can oversee it.
- [9] On 19 February 2021, the Applicant then reported the matter to the Director of the School, Adv. Rapatsa, who is also the direct supervisor of Professor

¹ Act 66 of 1995, as amended.

Rapulana, asking that he be removed from lecturing the module and Adv Rapatsa indicated that there is nothing wrong with the intervention.

- [10] On 28 February 2021, the Applicant reported the matter to the Dean, Professor O. Sibanda who according to the Applicant he did not respond despite several reminders.
- [11] On 16 March 2021, the HOD asked the Applicant to provide him with complete assessment papers for the module, but the Applicant indicated that he would not participate in the activities of the module because he had escalated his grievance to the Dean.
- [12] On 25 March 2021, Professor Rapulana provided the Applicant with a summative assessment and accompanying memorandum, also asking the Applicant to make the necessary changes should he deem it appropriate.
- [13] Professor Rapulana also asked the Applicant to provide him with the supplementary exam so that he could make inputs, but nothing happened.
- [14] The Applicant at the hearing indicated that he cannot be charged because he lodged a grievance, and as per the disciplinary code, he cannot be charged on the same facts, as the code does not permit.
- [15] The Applicant requested a postponement so that he could call Prof. Sibanda and Adv. Rapatsa as witnesses to demonstrate that he lodged a grievance, as he is of the view that he cannot be charged if he lodged a grievance on the same facts.
- [16] It was alleged that he refused to take a reasonable instruction from his supervisor and neglected his duties.
- [17] The Applicant disputed all the allegations; however, he was summoned to a hearing where he was found guilty of all the charges and a sanction of 2 months suspension without pay was meted out, which was increased to 3 months suspension without pay, including a final written warning on appeal.
- [18] The Third Respondent dismissed the Application, citing that it lacked merit.

- [19] Aggrieved by the dismissal, the Applicant referred a dispute of unfair dismissal to the Second Respondent with the Third Respondent as an arbitrator.

The arbitration award

- [20] The Third Respondent in her arbitration award set out the evidence adduced by the witnesses, which is well documented therein and therefore, there is no need to burden this judgment with a repetition of same.
- [21] In her analysis of the evidence and arguments, the arbitrator identified the issue to be decided, which was whether the First Respondent committed acts of unfair labour practice against the Applicant in terms of section 186 (2)(b) of the LRA.
- [22] The Third Respondent found that the Applicant failed to comply with a reasonable and lawful instruction from his supervisor and the sanction was appropriate under the circumstances.
- [23] The Third Respondent found that the Applicant did not lodge a grievance in terms of the grievance policy.
- [24] The Third Respondent further found that there are no procedural defects in the disciplinary hearing.
- [25] The Third Respondent found that the Applicant failed to discharge his onus of proof that the employer committed acts of labour practice against him, and she dismissed the claim.

The Issue to be decided

- [26] I am required to determine whether the finding of the Third Respondent that the Applicant failed to discharge his onus of proof on his allegations that the First Respondent committed acts of unfair labour practice against him is a reasonable one.

If I find that it was unreasonable within the totality of evidence before her, I am required to interfere with such a decision and substitute it with an appropriate

one. On the other hand, if I find it to have been a reasonable decision, that will be the end of the matter.

Grounds for review

[27] The Applicant's grounds of review are essentially that the arbitrator:

- 27.1. Mischaracterised the issues before her, she was also selective in her approach to evidence and in many respects, her reasoning does not accord with the evidence led at the arbitration hearing.
- 27.2. That he challenged both the fairness of the verdict and the sanction, however, the arbitrator mischaracterised the issues and only dealt with the sanction.
- 27.3. The arbitrator found that he was charged with gross insubordination, whereas the charge is only insubordination, and this error influenced her determination of the sanction.
- 27.4. The arbitrator was wrong in finding that he did not lodge a grievance against his supervisor.
- 27.5. That the arbitrator's finding that the Applicant was not entitled to a postponement was wrong, as it was the only way he could prove that he lodged a grievance. Therefore, she failed to determine if the Applicant was given a fair opportunity to prove that he lodged a grievance.
- 27.6. That the arbitrator accepted the evidence of the First Respondent witnesses, which was full of contradictions.
- 27.7. That the arbitrator failed to consider that the grievance policy only requires a formal grievance at stage (4), where he ought to have completed a grievance form and just concluded that there was no grievance lodged, but merely an employment dissatisfaction query.

27.8. That the fact that he sent several emails to Professor Rapulana, Adv. Rapatsa and Professor Sibanda should be considered as a grievance in an informal stage, as defined by the grievance policy.

27.9. That the Applicant ought to have known that there is a difference between a query and a grievance, since he is a law lecturer.

27.10. That the arbitrator was wrong in concluding that he did not lodge a grievance because Professor Sibanda regarded his emails as a grievance and he promised to address same. She was also wrong in concluding that the issue of calling the query a grievance was an after thought.

27.11. That the instruction of Professor Rapulana was unreasonable, as he ought to have allocated the module to him alone or to both of them, where he was to contribute to teaching.

27.12. That the arbitrator ignored his clean record until he was found guilty.

[28] On the other hand, the First Respondent submitted that the award is reasonable and the Third Respondent did not commit any reviewable irregularity, as a result the application be dismissed.

Test for Review

[29] The Constitutional Court settled the issue of test for review of an arbitration award in the case of *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*.² The Court at paragraph 110 held that the test for review is whether the decision reached by the Commissioner is one that a reasonable decision maker could not reach in relation to the totality of evidence before him or her.³

² 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 (CC) at para 110.

³ In *CUSA v Tao Ying Metal Industries and others* [2009] 1 BLLR 1 (CC); [2008] ZACC 15 at paras 76 and 134 the Constitutional Court held that it is now axiomatic that a commissioner of the CCMA (or an arbitrator of a bargaining council) is required to apply his or her mind to the issues before him or her and that failure to do so may result in the ensuing award being reviewed and set aside. The irregularity must however result in an unreasonable outcome or misconception of the true enquiry resulting in no fair trial of the issues. See also *Sidumo and Another v Rustenburg Platinum Mines Ltd* 2008 (2) SA 24 (CC).

[30] The test that the Labour Court is required to apply in a review of an arbitrator's award is, "*is the decision reached by the commissioner one that a reasonable decision-maker could not reach within the totality of evidence at his disposal?*".

[31] The test to be applied is one that recognises and reinforces the distinction between a review and an appeal. This Court is entitled to intervene if and only if the arbitrator's decision is one that falls outside of a band of decisions to which a reasonable decision-maker could come to on the available material evidence before him.

[32] As the Court rightly pointed out in the *National Commissioner of the South African Police Service v Myers and Others*:⁴

‘whatever one’s personal view may be, the test as set out in Sidumo... is whether or not the arbitrator’s decision that dismissal is an appropriate sanction is a decision that a reasonable decision-maker could reach.’

[33] Pursuant to the above case law, in order for this Court to interfere with the decision of the arbitrator, I must be convinced that such decision is unreasonable based on the totality of material evidence before her. If such decision falls outside the band of reasonableness, this Court would therefore be left with no option but to correct it.

[34] In *Telcordia Technologies Inc v Telkom SA Ltd*,⁵ the Supreme Court of Appeal (SCA) held that:

‘an irregularity or error material to the determination of the dispute may constitute a misconception of the nature of the enquiry so as to lead to no fair trial of the issues, with the result that the award may be set aside on that ground alone. The arbitrator however must be shown to have diverted from the correct path in the conduct of the arbitration and as a result failed to address the question raised for determination.’

⁴ (*Myers*) [2012] ZALAC 4; [2012] ZALAC 4 at paras 103-104.

⁵ 2007 (3) SA 266 SCA; [2007] 2 All SA 243 (SCA) at paras 52-78 and 85-88.

- [35] The fact that the arbitrator erroneously referred to the charge as gross insubordination instead of an ordinary insubordination does not negate her findings, more so considering that there is still another charge where the Applicant was found guilty of neglecting his duties.
- [36] In *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others*⁶, the Court rejected a piecemeal or fragmented approach to reviews, where each factor that the commissioner failed to consider is analysed individually and independently, for principally two reasons. The first is that it “*assumes the form of an appeal*” and not a review, and the second is that it is mandatory for the reviewing court to consider the totality of the evidence and then decide whether the decision made by the arbitrator is one that a reasonable decision-maker could make. To evaluate every factor individually and independently, it observed, is to defeat the requirements in s 138 of the Labour Relations Act⁷ in terms of which the arbitrator is required to deal with the substantial merits of the dispute between the parties with the minimum of legal formalities, albeit expeditiously and fairly. In the matter *in casu*, that is not the case, the decision of the First Respondent falls within the ambit of reasonableness and therefore, there is no need to interfere with it.
- [37] On this approach, therefore, the failure of a commissioner “*to mention a material fact in his or her award*”, or “*to deal in his/her award in some way with an issue which has some material bearing on the issue in dispute*”, or “*commits an error in respect of the evaluation or consideration of facts presented at the arbitration*”⁸ would not, in itself, render the award reviewable. Having considered the evidence at arbitration, the Court held “*....I cannot accept that the arbitrator’s decision fell outside of the band of decisions to which reasonable people could come*”.⁹

⁶ [2013] ZALAC 28; (2014) 35 ILJ 943 (LAC).

⁷ Act 66 of 1995, as amended.

⁸ 2008 (2) SA 24 (CC) at para 110.

⁹ *National Commissioner of the South African Police Service v Myers and Others* (CA 4/09) (unreported) [2012] ZALAC 4; (2012) 33 ILJ 1417 (LAC), Labour Appeal Court, Cape Town (2 March 2012) at paras 103-104, (*Myers*).

[38] It is my considered view that arbitrators are human, they may also commit errors or irregularity, however, in order for the said error or irregularity to constitute reviewable conduct, such error has to be material.

[39] The critical approach to reviews that turn on 'unreasonableness' was articulated by Murphy AJA in *Head of the Department of Education v Mofokeng and Others*¹⁰ at paragraphs 30 to 33. The significant passages are emphasised:

[30] The failure by an arbitrator to apply his or her mind to issues which are material to the determination of a case will usually be an irregularity. However, the Supreme Court of Appeal ("the SCA") in *Herholdt v Nedbank Ltd*¹¹ and this court in *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA and others*¹² have held that before such an irregularity will result in the setting aside of the award, it must, in addition, reveal a misconception of the true enquiry or result in an unreasonable outcome.

[31] The determination of whether a decision is unreasonable in its result is an exercise inherently dependent on variable considerations and circumstantial factors. A finding of unreasonableness usually implies that some other ground is present, either latently or comprising manifest unlawfulness. Accordingly, the process of judicial review on grounds of unreasonableness often entails examination of inter-related questions of rationality, lawfulness and proportionality, pertaining to the purpose, basis, reasoning or effect of the decision, corresponding to the scrutiny envisioned in the distinctive review grounds developed casuistically at common law, now codified and mostly specified in section 6 of the Promotion of Administrative Justice Act ("PAJA"); such as failing to apply the mind, taking into account irrelevant considerations, ignoring relevant considerations, acting for an ulterior purpose, in bad faith, arbitrarily or capriciously, etc. The court must nonetheless still consider whether, apart from the flawed reasons of or any irregularity by the arbitrator, the result could be reasonably reached in the light of the issues and the evidence.

¹⁰ [2014] ZALAC 50; [2015] 1 BLLR 50 (LAC).

¹¹ (2013) 34 ILJ 2795 (SCA); 2013 (6) SA 224 (SCA).

¹² [2014] 1 BLLR 20 (LAC); [2013] ZALAC 28.

Moreover, judges of the Labour Court should keep in mind that it is not only the reasonableness of the outcome which is subject to scrutiny. As the SCA held in *Herholdt*, the arbitrator must not misconceive the inquiry or undertake the inquiry in a misconceived manner. There must be a fair trial of the issues.

[32] However, sight may not be lost of the intention of the legislature to restrict the scope of review when it enacted section 145 of the LRA, confining review to “defects” as defined in section 145(2) being misconduct, gross irregularity, exceeding powers and improperly obtaining the award. Review is not permissible on the same grounds that apply under PAJA. Mere errors of fact or law may not be enough to vitiate the award. Something more is required. To repeat: flaws in the reasoning of the arbitrator, evidenced in the failure to apply the mind, reliance on irrelevant considerations or the ignoring of material factors etc must be assessed with the purpose of establishing whether the arbitrator has undertaken the wrong enquiry, undertaken the enquiry in the wrong manner or arrived at an unreasonable result. Lapses in lawfulness, latent or patent irregularities and instances of dialectical unreasonableness should be of such an order (singularly or cumulatively) as to result in a misconceived enquiry or a decision which no reasonable decision maker could reach on all the material that was before him or her.

[33] Irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide a compelling indication that the arbitrator misconceived the inquiry. In the final analysis, it will depend on the materiality of the error or irregularity and its relation to the result. Whether the irregularity or error is material must be assessed and determined with reference to the distorting effect it may or may not have had upon the arbitrator's conception of the inquiry, the delimitation of the issues to be determined and the ultimate outcome. If but for an error or irregularity a different outcome would have resulted, it will *ex hypothesi* be material to the determination of the general nature of the decision in issue; the range of relevant factors informing the decision; the nature of the competing interests impacted upon by the decision; and then ask whether a

reasonable equilibrium has been struck in accordance with the objects of the LRA. Provided the right question was asked and answered by the arbitrator, a wrong answer will not necessarily be unreasonable. By the same token, an irregularity or error material to the determination of the dispute may constitute a misconception of the nature of the enquiry so as to lead to no fair trial of the issues, with the result that the award may be set aside on that ground alone. The arbitrator however must be shown to have diverted from the correct path in the conduct of the arbitration and as a result failed to address the question raised for determination.'

Analysis of submissions

- [40] The *Sidumo* test, however, justify setting aside an award on review if the decision is “*entirely disconnected with the evidence*” or is “*unsupported by any evidence*” and involves speculation by the commissioner.
- [41] The Applicant’s verbosity in the grounds for review made it difficult to comprehend, more especially considering the test for review. This is not to say that the grounds for review have to be laconic but just succinct and well thought.
- [42] The Applicant in this matter did not challenge the charge where he is alleged to have neglected his duties and only challenged the insubordination charge.
- [43] I find it abhorrent that a lecturer can refuse to carry out his lecturing duties to the detriment of students, well knowing that “*time wasted never regain*” and therefore the finding of the arbitrator cannot be out of kilter in that regard.
- [44] The Applicant refused to carry out an instruction, and on the other hand, he expects not to be punished for that.
- [45] Counsel for the First Respondent argued that the Applicant refused to carry out his duties for a period of three (3) months, being February, March and April 2021.

- [46] I am convinced that the finding of the arbitrator is a reasonable one which a reasonable decision maker could have arrived at within the totality of evidence before him.
- [47] This court further agrees with the finding of the arbitrator that even if the Applicant could have lodged a grievance, which he did not do, he ought to have carried out his duties and continued to have his issues addressed in any manner he deems appropriate, whilst working.
- [48] This court does not wish to imagine the frustration caused to students as a result of the Applicant withdrawing his services. The Applicant argues that he could not have lodged a formal grievance because the informal grievance process was inchoate, which reasoning is unmeritorious.
- [49] In terms of the *Sidumo* test, the Applicant is not only required to prove a defect in arbitration proceedings as set out in section 145, but also to prove that the decision in itself was unreasonable, which this Court is not convinced that he has done so.
- [50] 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 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.¹³ The result will, however, be unreasonable if it is entirely disconnected from the evidence, unsupported by any evidence and involves speculation by the arbitrator.
- [51] This court cannot find any irregularity or misconduct to have been committed by the Third Respondent that warrants interference with her award/decision. In this regard, the Applicant failed to buttress his application.
- [52] As stated above, this court, in concurring with the finding of the arbitrator as well as an argument by Counsel for the Respondent, it is pernicious for a lecturer to withdraw his services in an academic institution where there is

¹³ See *National Union of Mineworkers and Another v Samancor Ltd (Tubatse Ferrochrome) and Others* [2011] ZASCA 74; (2011) 32 ILJ 1618 (SCA) (25 May 2011).

limited time for teaching and learning, more especially where the reason for same is to ensure that a dispute about co-lectureship is resolved.

- [53] In *casu*, the Applicant refused to lecture as instructed, but complained when suspended for 3 months without pay. The Applicant is a very lucky employee, if it were another employer, he would have been dismissed due to the prejudice his conduct caused or likely to be suffered. The Applicant refused to carry out his duties for a period of three (3) months, being February, March and April 2021.
- [54] As stated above, the Applicant's conduct is inexcusable under the circumstances, even if it could have been found that he lodged a grievance.
- [55] The employer cannot be expected to pay an employee who refuses to discharge his duties, and as a result, the Applicant failed to discharge his evidentiary burden.
- [56] There is no reason to interfere with the decision of the arbitrator, which appears to be sagaciously arrived at.

Conclusion

- [57] Having considered the evidence adduced at the arbitration proceedings, the findings made by the arbitrator and the grounds for review as raised by the Applicant, this Court find that the arbitrator's award is reasonable under the circumstances.
- [58] The reasons provided by the arbitrator are, in my view, correct and certainly substantiated by evidence in the transcript, as well as the law.
- [59] Having due regard to the reasoning of the arbitrator on the evidence before him at the arbitration, it is clear from an analysis of the award that the arbitrator properly weighed up all the evidence before her, the totality of the circumstances, in the parlance of *Sidumo*, and it is in the light of all those circumstances that she found that dismissal was a fair sanction, more so, also considering the charge that the Applicant did not challenge.

[60] There are no grounds or reasons for me to interfere with the decision of the arbitrator, as it falls within the band of reasonableness.

Costs

[61] The last issue to be decided is the issue of costs. This Court has a wide discretion in respect of costs, considering the requirements of law and fairness.

[62] In *Zungu v Premier of the Province of KwaZulu-Natal and Others*,¹⁴ the Constitutional Court confirmed that the rule that costs follow the result does not apply in labour matters.

[63] The Court should seek to strike a fair balance between unduly discouraging parties from approaching the Labour Court to have their disputes dealt with and, on the other hand, allowing those parties to bring to this Court cases that should not have been brought to Court in the first place.

[64] This is a case where the Court must strike a balance, and in my view, the interest of justice would be best served by making no order as to cost.

[65] In the premises, I make the following orders:

Order

1. The application for review is dismissed.
2. No order is made as to costs.

N Tshisevhe

Acting Judge of the Labour Court of South Africa

¹⁴ (2018) 39 ILJ 523 (CC); [2018] ZACC 1 at para 24.

Appearances

For the Applicant: Mr Phindile Raymond Msaule

Self-representing

For the Respondent: Adv A Ngidi

Instructed by: Mokgara Attorneys

LABOUR COURT