



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

Signature

Date

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case No: JR 1260/24

In the matter between

TSHOKOLO PAULOS LEKHOABA

Applicant

and

COMMISSION FOR CONCILIATION MEDIATION

First Respondent

AND ARBITRATION

COMMISSIONER: MASHOODA PATEL

Second Respondent

SOUTH AFRICAN POLICE SERVICES

Third Respondent

Heard: 04 December 2025

Delivered: 20 April 2026

JUDGMENT

MONONYANE, AJ

Introduction

- [1] This is a review application launched in terms of section 145 of the Labour Relations Act¹ (the LRA) to have the arbitration award issued under case: PSSS 23-17/18 dated 02 May 2024 reviewed and set aside. The award was issued by the Second Respondent, M Patel (the commissioner), acting under the auspices of the First Respondent, the Commission for Conciliation, Mediation and Arbitration (the CCMA).

Background facts

- [2] The Applicant's promising career as a police officer, was torpedoed for appropriating a meagre R50.00 which was a part of the change due to one Mr. Jonker who gave the Applicant R300.00 as an admission of guilt fine for his arrested employee, Mr Bushy Pone.
- [3] Here follows the anecdote. Mr. Pone was arrested for planting dagga on his employer's farm. Empathising with him, Mr. Jonker, went to the police station to pay the acknowledgement of guilt fine for him.
- [4] Mr. Jonker found no joy at the police station. Frustrated by the inefficiency at the police station or being a victim of his impatience for not wanting to wait for his turn at the queue, he ended up quarrelling with one Constable Biko. To defuse the situation, the Applicant stepped in and assisted Mr. Jonker. The importance of this will be clearer later in this judgment.
- [5] Mr. Jonker then gave the Applicant R300 towards Mr. Pone's admission of guilt fine and left without the receipt as he was allegedly in a hurry. The Applicant noted the R300 payment on a piece of paper.
- [6] The Applicant released Mr. Pone on the admission of guilt fine of R200.
- [7] Upon his arrival at the farm, Mr. Pone gave Mr. Jonker the R50 change and the fine receipt. When asked about the other R50, he explained, in a

¹ Act 66 of 1995.

statement made under oath before Colonel Theunissen, that the Applicant gave him only R50 as change and kept the other R50 for himself.

- [8] Infuriated, Mr. Jonker then called Colonel Theunissen who was off duty. Upon his arrival at the farm, the Colonel took down a statement from Mr. Pone. It was done under oath.
- [9] Mr. Pone testified in the disciplinary hearing but unfortunately passed on before the arbitration could sit. May his soul rest in peace.

The arbitration award

- [10] The commissioner found the Applicant's dismissal substantively fair. She found the misconduct serious and the Applicant's long service as an aggravation. She accepted the evidence of Mr. Pone as reasonable. In her reasoning, it was improbable that Mr. Pone would have cheated himself of the R50. About the Colonel, she found that he had no personal vendetta against the Applicant and thus had no basis to testify against the Applicant.

Grounds of review

- [11] Dissatisfied with the award, the Applicant launched a review application, citing several grounds, which are summarized as follows:
- 11.1 that the commissioner rejected the Applicant's version and accepted the untested and contradictory hearsay evidence in the form of a deceased's statement.
- 11.2 that the commissioner accepted Mr. Pone statement as truthful even when it was probable that Mr. Pone used the money for himself knowing that it will be deducted from his salary.
- 11.3 that she accepted the evidence of Col. Theunissen without considering the close relationship Col. Theunissen has with Mr. Jonker.
- 11.4 that the matter be remitted to the CCMA due to the incomplete record.

The test for review

- [12] The test for review is settled. In *Sidumo and Another v Rustenburg Platinum Mines Limited and Others*² the Constitutional Court held that the review grounds set out in section 145 of the LRA have been suffused by the standard of reasonableness, and that an arbitration award of the CCMA / a bargaining council is reviewable if the decision reached by the commissioner was one that a reasonable decision-maker could not reach.

Analysis

- [13] This review application engages two types of grounds: the external (post-award) and internal grounds. The external grounds in that the Applicant seeks this court to remit the matter to the CCMA to be heard afresh because the CCMA filed an incomplete arbitration record and that a reconstruction of the missing record, in the circumstances, was impossible.
- [14] The interior grounds are the irregularities and/or misconduct the Applicant alleged the commissioner committed in the determination of the dispute before her. I will start with the post-award grounds

The incomplete record

- [15] In his supplementary grounds of review, the Applicant relied extensively on the incomplete record to have the matter remitted to the CCMA for a fresh hearing. He contended that Mr. Jonker's evidence was missing and only his summary of evidence is captured in the award. He could not reconstruct the missing record because the matter was apparently inherited from the bargaining council by the CCMA and that the commissioner who heard the matter is no longer with the council.
- [16] *Ex facie*, the record is indeed incomplete as the award clearly states that the Third Respondent led evidence of two witnesses, viz Mr. Jonker and Colonel Theunissen.

² 2008 (2) SA 24 (CC)

- [17] However, the remittal of the matter to the CCMA due to the incomplete record engages, at the least, two substantive factors. First, the arbitration record must be incomplete and second, the missing record must be material to the case. In other words, it is not in all cases that the matter will be remitted to the CCMA or bargaining council simply because the arbitration record is missing.
- [18] I am mindful of the procedural route the Applicant should have traversed of approaching the Judge President for a directive on the way forward in respect of the incomplete record. I do not think, however, for the interest of justice, to lament the Applicant's failure to have traversed that route at this stage of the proceedings. In any event, as it will be apparent shortly, the Applicant failed to meet the substantive threshold set out above.
- [19] Most importantly, in dealing with the question, I am alive to the general rule expounded in *Papane v van Aarde NO and Others*³ that the court would not ordinarily allow a review application to be considered on the merits without a complete record of the evidence that had been before the arbitrator whose award was sought to be reviewed. This is because the missing parts of the record could well throw light, one way or another, on the material question properly before the presiding judge.
- [20] In *Doornpoort Kwik Spar v Odendaal and Others*⁴ the court held:
- “An applicant has a right to a reasoned award in respect of the dispute that was adjudicated before the CCMA. When an award is the subject of a review application, the record of the proceedings before the statutory body will also become important. In fact, once a party had filed its Notice of Motion and founding affidavit, he or she has the right to the record of the proceedings in so far as it may be necessary for the purposes of the review.”
- [21] The authorities are telling. There is, however, also clear authority to the effect that the mere fact that there is no complete record does not necessarily imply that the matter should, as a matter of course, be remitted to the CCMA. Even

³ (2007) 28 ILJ 2561 (LAC) (20 March 2007) par. 3 & 4

⁴ (2008) 29 ILJ 1019 (LC) at para 4

where parties have endeavored to reconstruct the record and it is not possible, the Court will, likewise, not as a matter of course, remit the dispute back to the CCMA if the review can be determined with the existing record.

- [22] In *Nathaniel v Northern Cleaners Kya Sands (Pty) Ltd and Others*⁵ the court declined to remit the matter to the CCMA but decided to proceed to determine the case on all the available evidential material before the court. The court said:

“I agree with Mr Barrie that it is not legally permissible in the circumstances of the present case to remit the matter to the CCMA for a rehearing due to the defective record. The applicant cannot contend that the award of the commissioner is not rationally justifiable merely because the evidence which was adduced before him (and which presumably influenced him in his decision) cannot be placed before this court. In the present circumstances, then, the court must look at the award of the commissioner together with all the documentary and other evidence before him (including a clandestine tape recording of certain important discussions between the employee and employer's representatives) as well as the available transcript of proceedings, and then decide whether the award passes muster in accordance with the jurisprudence set out in para 9 above.”

- [23] In *Fidelity Cash Management Services (Pty) Ltd v Muvhango NO and Others*⁶ the Applicant contended, in the first instance, that the award should be set aside and referred back to the CCMA on the ground of the incomplete record alone. The court, however, relying on *Kya Sands (supra)*, was disinclined to refer the matter back simply because of the record being incomplete.

- [24] As adumbrated in the above judgments, incomplete record does not automatically result in remittal.

- [25] I was able to glean, among others, from the award itself and the existing record, especially the Applicant's own testimony, the role Mr. Jonker's evidence would have played to assist in the fair and proper determination of

⁵ (2004) 25 ILJ 1286 (LC) at para 16.

⁶ (2005) 26 ILJ 876 (LC).

this review application. It would have been negligible. No so much would have tilted on it.

[26] Hereunder is the summary of the Applicant's testimony in relation to Mr. Jonker:

Mr. Lekhoaba: On that particular morning...I was officially on duty as assistant to Const... So De Jonker came to... as he as already furious because he had an altercation with Const. Biko. I do not know what they talked about, but they exchanged some other words⁷.

...

Mr. Lekhoaba: ... I then enquired to help Mr. Jonker. He then insisted to leave the money and said, I think he had other errands to run at the farm. So, by the time I did not know how much he can leave, then I just checked that ... be up to R300. He left R300, then I made him a note...⁸

...

Mr Lekhoaba: I think he came earlier when I heard about that matter, by the time he was already angry and aggressive with the Const. Biko...had maybe interacted some other ways, but there were an exchange of words, because he was already angry and fuming by that time. So, I calmed him down, I said, explain the situation, because already by that time, he had called the Station Commander. I could hear that he called the Station Commander.

...

Mr Lekhoaba: The reason to come to this police station, as he explained to me, it was to come to hear what is happening to the accused who was arrested last night, ... which is the employee of his⁹.

⁷ Page 24 lines 17 -22 of the Transcribed record.

⁸ Page 25 lines 17-21 of the Transcribed record.

⁹ Page 28 lines 11-23 of the Transcribed Record.

...

Col Satsetsi: And did you assist him with admission, the guilty admission?

Mr Lekhoaba: Yes, I did assist. As I acknowledged that I took the money, insisted on leaving the money, because he has going somewhere, he was in a rush already, so he insisted that I must take the money so that when the officer comes to charge him, he must use that money for admission of guilt."¹⁰

[27] Axiomatically, Mr. Jonker played a very little role in the determination of the core issue that was before the commissioner. He gave the Applicant R300 and left. And later, as explained by Col. Theussen, Mr. Jonker reported the incident to Col. Theunissen after receiving a change short of R50 from Mr. Pone.

[28] The Applicant tried to make a mountain out of the mole hill about Mr. Jonker's temperament on the day in question. It is misplaced. An altercation was with the Applicant's colleague and not him. From the Applicant's own version, he was the intervenor. He defused the situation by assisting Mr. Jonker. Therefore, it would be unprecedented for Mr. Jonker, out of nowhere, to now aim at the Applicant who came to his aid when he did not find joy, rightfully or wrongly so, from Const. Biko.

[29] It is on this background that I find that there is enough evidence to determine this review application notwithstanding the truncated record.

[30] I proceed to deal with the inherent irregularities and/or misconduct as contended by the Applicant.

Inherent irregularities and/or misconduct

[31] This is a review application and not an appeal. The dividing line is at times overstepped. I find it important to state right away what I am expected to do

¹⁰ Page 29 lines 7-13 of the Transcribed Record.

and not to do in my determination whether grounds raised in this review application are sustainable.

- [32] The Constitutional Court in *Duncanmec (Pty) Ltd v Gaylard NO and others*¹¹ held as follows:

“Sidumo cautions against the blurring of the distinction between appeal and review and yet acknowledges that the enquiry into the reasonableness of a decision invariably involves consideration of the merits. So as to maintain the distinction between review and appeal this Court formulated the test along the lines that unreasonableness would warrant interference if the impugned decision is of the kind that could not be made by a reasonable decision-maker.

This test means that the reviewing court should not evaluate the reasons provided by the Arbitrator with a view to determine whether it agrees with them. That is not the role played by a court in review proceedings. Whether the court disagrees with the reasons is not material.

The correct test is whether the award itself meets the requirement of reasonableness. An award would meet this requirement if there are reasons supporting it. The reasonableness requirement protects parties from arbitrary decisions which are not justified by rational reasons.”

- [33] In *D Lund Farm (Pty) Ltd v FAWU and Others*¹² this Court pointed out that:

“The reasonableness consideration envisages a determination, based on all the evidence and issues before the arbitrator, as to whether the outcome the arbitrator arrived at can nonetheless be sustained as a reasonable outcome, even if it may be for different reasons or on different grounds. This necessitates a consideration by the review court of the entire record of the proceedings before the arbitrator, as well as the issues raised by the parties before the arbitrator. In the end, it would only be if the outcome arrived at by the arbitrator cannot be sustained on any grounds, based on that material, and the irregularity, failure or error concerned is the only basis to sustain the outcome the arbitrator arrived at, the review application would succeed. The

¹¹ [2018] 12 BLLR 1137 (CC) at paras 41 to 43. (Footnotes omitted).

¹² (JR1119/21) [2023] ZALCJHB 337 (22 November 2023) at para 32.

task of the reviewing court was succinctly set out in *Anglo Platinum (Pty) Ltd (Bafokeng Rasemone Mine) v De Beer and Others* where it was held:

‘.... the reviewing court must consider the totality of evidence with a view to determining whether the result is capable of justification. Unless the evidence viewed as a whole causes the result to be unreasonable, errors of fact and the like are of no consequence and do not serve as a basis for a review.’

- [34] Axiomatically, I am not called to evaluate the reasons provided by the commissioner with a view to determining whether I agree with them. Instead, I am called to test whether the award itself meets the requirement of reasonableness. An award would meet this requirement if there were cogent reasons supporting it. It is against these principles that the review application *in casu* falls to be determined.
- [35] The Applicant lamented the commissioner’s admission of the statement of a witness who did not testify on the contents of the statement. The Third Respondent, at the start of the arbitration hearing, applied, in terms of Section 3 of the Law of Evidence Amendment Act¹³ (LEAA), for the admission of Mr. Pone’s statement. The Applicant protested. He attacked the authenticity of the signature. He contended that it was not Mr. Pone’s statement taken in 2014. He also challenged the accuracy of the contents of the statement. Because the authenticity of the statement was challenged, the commissioner accepted the statement pending the testimony of the relevant witness who would deal with the authenticity of the statement.
- [36] I cannot quarrel with the commissioner for invoking this approach. The provisions of section 138 of the LRA gives a commissioner a discretion to conduct an arbitration in a manner that she, or he, considers appropriate to determine a dispute fairly and quickly, and to do so with a minimum of legal formalities. This also did not offend *Exxaro Coal Pty Ltd v Chipana and Others*¹⁴ which directs when and how the hearsay evidence challenged must be dealt with. As I would show later, the commissioner dealt with admissibility of the hearsay evidence during the arbitration hearing.

¹³ Act 45 of 1988.

¹⁴ [2019] 10 BLLR 991 (LAC).

[37] The provisions of section 3 of the LEAA are readily straightforward and the factors to be considered under subsection 3 (1) (c) are not a closed list. Section 3 provides:

‘3 Hearsay evidence

- (1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless –
 - (a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;
 - (b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or
 - (c) the court, having regard to –
 - (i) the nature of the proceedings;
 - (ii) the nature of the evidence;
 - (iii) the purpose for which the evidence is tendered;
 - (iv) the probative value of the evidence;
 - (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;
 - (vi) any prejudice to a party which the admission of such evidence might entail; and
 - (vii) any other factor which should in the opinion of the court be taken into account, is of the opinion that such evidence should be admitted in the interests of justice...”

[38] Although the commissioner did not, blow by blow, deal with each requirement of the test, her overall conclusion conforms to the test. The statement was

relevant as it dealt with issues pertinent to the case. The person who made the statement is deceased. I do not find her admission of the hearsay evidence, in the circumstances, unreasonable.

[39] Having dealt with the hearsay evidence, the commissioner turned to deal with the authenticity of the statement. Colonel Theussen was cross-examined as follows on the subject:

“Mr. Mampane: “...Now you at that time, as a police commander, a friend of, you wanted to impress there. Unfortunately, you have to satisfy...Now paragraph five, you see now, there you are saying:

“I do not believe that the Constable action was justified and I am not unders...(indistinct) be paid R50.00”

Do you know that the first three lines, that person there at the farm, that farm worker, never even have a knowledge to can even think about what, about justifiable things here. This was your imagination, as a friend who is a dear friend of that person. Now, you are talking about justifying actions... that is why there is no way a ...worker will know about the justifiable story. He was going to put his allegations the way it is. You want to say something”

...

Mr. Mampane: “...I am the only one, the first person, who is telling you the truth that these content, the contents’ of this statement, it was you, it was about you, yourself, not the complainant.¹⁵ (own emphasis)

“Mr. Mampane: Ja. Okay. No, I put it to you that, no your attempts has failed. Your attempts to assist your friend, that you loved so much, with this statement to deal with the applicant has drastically

¹⁵ Page 16 lines 4-15 of the transcribed record.

failed and I appreciate the time you have given us to answer the question".¹⁶

- [40] As adumbrated in the above extracts, it was the gist of the Applicant's challenge that the statement was more of Colonel Theussen narration trying to assist his friend to deal with the Applicant, than Mr. Pone's narration.
- [41] The commissioner dismissed the narrative. Relying on the evidence of the Colonel, the commissioner accepted the statement as authentic. This is how the commissioner evaluated and accepted Colonel's evidence:
- "Even if the Colonel is known to the Applicant there has been no indication that there is any personal vendetta against each other".
- [42] The Applicant laid no basis for Colonel's and Mr Jonker's animosity against him. I promised elsewhere *supra* to expand on the assistance the Applicant gave to Mr. Jonker. This discounts any narrative that Mr. Jonker was out and about to incriminate the Applicant. From the Applicant's own testimony, Mr. Jonker had issues with Const. Biko and not him. The Applicant defused the situation by stepping in to assist Mr. Jonker.
- [43] Likewise, there was also no allegation that the Colonel did not see eye to eye with the Applicant and appropriated the opportunity to grind the axe with him. The narrative was, therefore, farfetched and unprecedented.
- [44] Axiomatically, the commissioner dealt with both the hearsay evidence and authenticity issues raised. She did not leap to conclusions. She provided reasons. Her conclusion is not outside the bands of reasonableness. I find no cause to interfere with the commissioner's conclusion in this regard.
- [45] The commissioner accepted Mr. Pone's version that the Applicant released Mr. Pone on R200 admission of guilt fine and gave him only R50 change and kept the other R50 for himself.

¹⁶ Page 20 lines 22-25 and page 21 line 1

[46] This is the same version Mr. Pone gave in the Applicant's disciplinary hearing before passing on.

[47] During the Applicant's cross-examination the following was put:

"Col Satsetsi: You see, the problem is now, this allegation is so, it was so serious that eventually you were dismissed and these two people, Mr. Jonker and Mr. Pone testified in your departmental case. Am I correct?

Mr. Lekhoaba: Yes, they did so.

Col Satsetsi: And the chairperson of that disciplinary hearing accepted their version of what happened and hence, you were dismissed.

Mr Lekhoaba: Ja That is how it was..."

[48] During his examination-in-chief, the Applicant did not testify about the contradictions in Mr. Pone's statements. Neither were the alleged contradictions put to Colonel Theunissen who testified at length about the authenticity of the statement. The challenge appeared to be on the probabilities of the allegations in the statement.

[49] The commissioner dealt with Mr. Pone's statement. She stated:

"I find no reason why Mr. Bushy (the deceased) would falsely accuse the Applicant of having taken an amount of R100.00. The argument that Mr. Bushy took the money for his own accord would be improbable and be completely nonsensical as the amount of the admission of guilt was to be deducted from Mr. Bushy's salary. It would thus not make common sense that Mr. Bushy wanted to cheat himself out of money that he in fact would have to pay back. The Applicant in fact agreed that he was to charge the person first and then take the money".

[50] Clearly, the commissioner was alive to the issues before her. She reasoned her conclusion which is within the bands of reasonableness. As stated earlier,

judges' roles are somewhat circumscribed when dealing with reviews as opposed to appeals.

[51] Having found that the Applicant appropriated for himself the R50 that was meant to be part of the change due to Mr. Jonker, the commissioner found that the dismissal was substantively fair.

[52] In *Sidumo*¹⁷ the court gave a clear direction to commissioners on their duties when dealing with the sanction:

"In approaching the dismissal dispute impartially a commissioner will take into account the totality of circumstances. He or she will necessarily take into account the importance of the rule that has been breached. The commissioner must of course consider the reason the employer imposed the sanction of dismissal. There are other factors that will require consideration. For example, the harm caused by the employee's conduct, whether additional training and instruction may result in the employee not repeating the misconduct, the effect of dismissal on the employee and his or her long-service record. This is not an exhaustive list..."

[53] In *Ikwezi Municipality v South African Local Government and Others*¹⁸ this Court set out what a review court should take into consideration in adjudicating a penalty review and it is this: whether the commissioner's assessment of the sanction was reasonable; the gravity of the misconduct, the reason the rule was put into place, mitigating factors and balancing of the parties' interests. The ultimate test is whether the commissioner applied his or her mind in determining whether the sanction is appropriate having regard to, amongst other factors, the misconduct committed.

[54] In response to the call, the commissioner stated:

"The misconduct committed by the Applicant is serious in nature as corruption has a serious impact on the operations of the Respondent. The Applicant has a long service record and should be well aware of the implications of such conduct"

¹⁷ Id fn 2 at para 78.

¹⁸ [2012] 4 BLLR 403 (LC).

[55] Clearly, the commissioner applied her mind to the pertinent factors in the determination of the appropriate sentence.

[56] Accordingly, the following order is made:

Order

1. The review application is dismissed.
2. There is no order as to costs.

M. S. Mononyane

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant : Mongei Adoong
Instructed by : Baloyi Attorneys.
Respondent : Unopposed

LABOUR COURT