



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

Signature

Date

THE LABOUR APPEAL COURT OF SOUTH AFRICA, DURBAN

Case no: DA11/2025

In the matter between:

THE PASSENGER RAIL AGENCY OF

SOUTH AFRICA (PRASA)

Appellant

and

R. C BLOM

First Respondent

B.J. DAVIDS

Second Respondent

R.I. NTHULANE

Third Respondent

S.C. KHATHI

Fourth Respondent

Heard: 26 February 2026

Delivered: 26 March 2026

Coram: TOKOTA AJA; COLLIS AJA and MOSHOANA AJA

JUDGMENT

MOSHOANA, AJA

Introduction

- [1] This is an appeal against the judgment and order of the Labour Court. The appeal comes before this Court following an order of the Labour Court dated 18 February 2025 granting the appellant leave to appeal. The four respondents oppose the appeal namely; Mr RC Blom; Mr BJ Davids; Mr RI Nthulane; and Mr SC Khathi. On 06 November 2024, the Labour Court reviewed and set aside the arbitration award that found that the dismissal of the respondents was fair and replaced it with an order that their dismissals were procedurally and substantively unfair. The Labour Court also ordered the appellant, Passenger Rail Agency of South Africa (PRASA) to reinstate the respondents retrospectively. The Labour Court directed the respondents to report for duty within seven days of its order. The issue of the quantum of the backpay was remitted to the Commission for Conciliation, Mediation and Arbitration for determination.

Background Facts

LABOUR APPEAL COURT

- [2] Briefly, the respondents were full time trade union representatives of two trade unions namely; United National Transport Union (UNTU) and South African Transport and Allied Workers Union (SATAWU). They were employed by PRASA in various positions. Since November 2011, NGM Consultants and Actuaries (Pty) Ltd (NGM) was appointed by PRASA as a medical aid broker for the employees of PRASA.
- [3] Over the years, complaints were raised against NGM. During November 2016, it was agreed that other medical aid brokers must be invited to the Joint Bargaining Forum (JBF) to allow them to make representations with a view to replace NGM. Indeed, two firms were invited; namely, MOSO Consulting Services (MOSO) and Classique Medical Aid Consultants (Classique) to make presentations. The trade union formation at JBF proposed that NGM be replaced by MOSO and Classique as medical aid brokers. The management formation was opposed to the proposal. There was a deadlock over the issue.

- [4] A dispute of mutual interest was referred to the Commission for Conciliation, Mediation and Arbitration (CCMA) for resolution. The dispute was not resolved and no strike action was called in support of the dispute. However, an agreement was reached as part of wage negotiations on 19 May 2017 that MOSO and Classique be appointed as brokers. Prior to the conclusion of the wage agreement, there were road shows that were embarked on in Cape Town and the respondents were part of those road shows. Later on, allegations emerged that the respondents, particularly Mr Davids and Mr Blom received bribes in the amount of R10 000 each in November 2016 in order to influence the appointment of MOSO and Classique as medical aid brokers. Various other allegations of receiving bribes were made against the respondents.
- [5] The respondents were hauled before a disciplinary enquiry to answer to various allegations of misconduct. Advocate Cassim SC chaired the disciplinary enquiry. Ultimately, the respondents were found guilty as charged and were all dismissed on 19 November 2018. Aggrieved by their dismissals, they approached the CCMA and alleged that their dismissals were both procedurally and substantively unfair. The CCMA appointed Madam Commissioner Navie Green-Thompson to resolve the dispute of unfair dismissal through arbitration. The arbitration proceedings were conducted over a lengthy period. The parties to the arbitration proceedings were all legally represented. They concluded an extensive pre-arbitration agreement on 18 June 2019, where certain facts were agreed to be common cause. Those common cause facts are neatly set out by the Commissioner in her arbitration award and do not merit repetition herein.
- [6] On 14 April 2021, the Commissioner issued a detailed award and concluded that the dismissals of the respondents were both procedurally and substantively fair. She dismissed their respective claims. The respondents were aggrieved thereby and launched an application in the Labour Court seeking to review and set aside the award. As already indicated, the award was reviewed and set aside, hence this appeal.

Judgment of the Labour Court

- [7] The Labour Court judgment appears to have engaged in an appeal process as opposed to a review. It speculated that if bribes were to be paid in order to facilitate the appointment of MOSO and Classique, those would have predated the process that commenced early in 2016. The Labour Court also concluded that to the extent that Khumalo and Ndwandwe admitted that they had secured bribes for themselves as a result of the appointment of the brokers that did not necessarily impute guilt *per se* on the respondents.
- [8] The Labour Court went on to conclude that by accepting the evidence of self-confessed liars and in weighing that evidence against the denial of such corrupt activities by the respondents despite the onus lying with the appellant, the Commissioner did not act reasonably and failed to reach a conclusion that another Commissioner could have reached given the evidence before her. In a manner suggestive of an appeal process, the Labour Court concluded that whatever suspicions that may have been held by the Commissioner regarding the participation of the respondents in the “so-called” corrupt activities, it was unreasonable for her to have concluded that the respondents on the probabilities misconducted themselves based on the evidence before her. Carefully considered, this finding of the Labour Court suggests that the Commissioner was wrong when she concluded that the probabilities demonstrated that the respondents were involved. It is difficult to understand what the Labour Court means by the suspicions of the Commissioner.
- [9] A Commissioner cannot hold suspicions. A Commissioner, as a trier of facts would, applying the applicable standard of proof, conclude whether a party who bears the onus, discharged that onus. This Court fails to understand why the Labour Court resorted to label the corrupt activities testified to as the *so-called*. The phrase *so-called*, is used to express one’s view that such a term is inappropriate. The phrase is a modifier used to express doubt, scepticism,

irony, or disapproval regarding accuracy or appropriateness. The corrupt activities were testified to, and there was no objective basis for the Labour Court to have labelled them as the *so-called*. The evidence of the self-confessed liars, as the Labour Court labels them, suggests corrupt activities. The fact that the respondents and the Labour Court considered them to be liars does not and cannot change the texture of their evidence to a point of the evidence being referred to as the *so-called*. The Commissioner accepted their evidence, as she should have, and weighed that evidence, as she should have, together with other available evidence. Such conduct is to be expected from any trier of facts. It is difficult for this Court to appreciate any doubt the Labour Court could have had to the corrupt activities evidence. Unless if the review was treated as an appeal, contrary to the provisions of the LRA.

[10] Regarding procedural unfairness, the Labour Court reached a conclusion that there was procedural unfairness simply because the Commissioner overlooked the impact of the refusal of Advocate Cassim SC to recuse himself. It is unclear what impact is the Labour Court referring to. There is unambiguous evidence in the body of the award that the Commissioner gave attention to the recusal challenge and with reference to binding authorities, she rejected that basis of procedural challenge. Again, it is apparent to me that the Labour Court is suggesting that the Commissioner was wrong in rejecting the challenge. That remains a wrong approach adopted by a Court determining a review of a decision.

[11] A startling finding is one where the Labour Court decided to remit the backpay issue for determination by the CCMA. Concerned by this startling finding, this Court afforded both parties an opportunity to make further submission on the question whether the order made by the Labour Court was competent. Both written submissions were received by the Court on 10 March 2025. This Court extends its gratitude to both counsel for the well-researched and dextrous submissions. The appellant correctly submitted that the order is not competent. On the other hand, the respondent wrongly submitted that the order was competent arising from the powers in section 145(4) of the LRA.

[12] This finding is startling in that section 193(1) of the LRA refers to three types of remedies; namely (i) reinstate; (ii) re-employ; and (iii) compensation. Nowhere in the LRA is there a power appropiated to an arbitrator to order payment of a backpay. According to *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*¹, backpay would arise from a reinstatement order. In any event, a backpay claim is a contractual one that will be available once a reinstatement order is complied with². The CCMA having not made a finding that the dismissal is unfair, it does not have statutory powers to order any of the remedies mentioned in section 193(1). It was the Labour Court that made a finding that the dismissal of the respondents is unfair – the jurisdictional requirement in section 193(1) - then it would be within the powers of the Labour Court to exercise a discretion on the remedies issue. Having chosen to reinstate, if so empowered, the Labour Court ought to have ordered payment of backpay itself and not shift responsibility, as it were, to the CCMA.

[13] The Labour Court in *Department of Public Works v General Public Service Bargaining Council and others*³ had the following to say:

[20] It must be remembered that wages are owed because of the contractual obligation to pay. That being so, the question is on what basis does a commissioner or a judge for that matter make an order for the payment of arrear wages when a contract of employment is not restored by an award or order of reinstatement? Section 193(1)(a) empowers an arbitrator or a Court to, in the exercise of discretion order the employer to reinstate the employee from any date not earlier than the date of dismissal. Nowhere in the section lies the power to order payment of arrear wages. Thus, on literal interpretation of the section, the power is that of ordering the employer to reinstate a dismissed employee on a particular date. In other words, for the purposes of this matter, the power was limited to ordering the DPW to reinstate Ntwana effective from the date of her dismissal. On

¹ (2008) 29 ILJ 2507 (CC).

² See *Kubeka and others v Ni-DA Transport (Pty) Ltd* [2021] 4 BLLR 352 (LAC) at para 41.

³ (JR 1483/18) [2021] ZALCJHB 475 (5 March 2021)

application of the principle of legality a functionary cannot exercise powers it does not have.’

- [14] Therefore, in my considered view, the order made by the Labour Court in paragraph 3 was incompetent. Section 145(4)(b) of the LRA empowers the Labour Court to make an appropriate order about procedures to be followed to determine the dispute. The dispute being one of alleged unfair dismissal. The order in paragraph 3 is not about the procedure to be followed. It is in the form of a *mandamus*, in the circumstances where the CCMA does not have a statutory duty to determine the issue of backpay. It being a contractual claim, the respondents could invoke the provisions of section 77(3) of the Basic Conditions of Employment Act⁴ and institute a civil claim.

The Labour Appeal Court

- [15] Before us, Mr Schuman repeatedly submitted that the arbitrator was faced with a situation where somebody was lying. On the question from the bench, he conceded that in order to resolve the question as to who is lying, the Commissioner had to apply the principle as set out in *Stellenbosch Farmers' Winery Group Ltd. and Another v Martell and Cie SA and Others*⁵. In his submission, the Commissioner improperly applied the principle. On the other hand, Mr Boda submitted that the Labour Court in interfering with the award of the Commissioner failed to apply the correct test. He correctly submitted in our view, that what was required, was to look at the award as a whole, as well as the evidence holistically, in order to determine whether the reasons advanced by the Commissioner pass the constitutional muster.
- [16] Patently, the respondents effectively contend that the Commissioner was wrong in concluding that they were guilty as charged. Mr Schuman forcefully argued that the Commissioner made speculations that were not supported by the evidence. He was heavily critical of the evidence of Khumalo and Ndwandwe. In his submission, a reasonable arbitrator would have rejected their evidence as being unreliable and false.

⁴ Act 75 of 1997.

⁵ 2003 (1) SA 11 (SCA).

Analysis

[17] Recently, the Constitutional Court reverberated the review test in terms of *Sidumo and another v Rustenburg Platinum Mines Ltd and others*⁶ in the matter of *Maleka v Boyce N.O and others*⁷. The majority judgment expressed the following:

[60] It must be emphasised that the purpose of applying the test in *Sidumo* is to ensure that administrative action by the CCMA is lawful, reasonable, and procedurally fair. The test does not concern itself with whether the award is right or wrong. What is of importance is whether that decision, objectively viewed, falls within the spectrum of reasonable decisions that one would make based on the evidence before the decision maker. The enquiry therefore is focused on the outcome and an assessment of whether the decision is capable of reasonable justification. That the decision is unsatisfactory in one or more respects is not enough to deem it unreasonable. It will, however, stand to be reviewable and set aside if it is one that a reasonable decision-maker could not reach.

[Own emphasis]

[18] When regard is had to the judgment of the Labour Court, it is clear that it subjected the award to a correctness test. The award of the Commissioner is lengthy. But what accounts for the length is that the Commissioner carefully recorded each stage of the witnesses that testified before her. The Labour Court or the respondents did not contend that her careful recordal of the evidence of the witnesses was wrong and does not accord with the transcript. When she analysed the recorded evidence, she dealt with each contention of the parties as crystalised in the pre-arbitration minute.

[19] Regarding procedural fairness, she squarely concluded that there was no evidence to support the contention that the Chairperson of the disciplinary

⁶ (2007) 28 ILJ 2405 (CC).

⁷ (CCT 175/23) [2026] ZACC 7 (24 February 2026).

enquiry ought to have recused himself. She also concluded that the perception of bias based on sharing of offices between the representative of the appellant and the Chairperson was not sufficient to justify recusal. She concluded that both parties were afforded equal opportunity to be heard by an independent legal practitioner. This Court is perplexed as to why these findings are not reasonable. The question is not whether she was right that the Chairperson afforded the parties equal opportunity to be heard. In my view, on application of the approved test her findings on procedural unfairness were unassailable. Her decision falls within the bands of reasonableness. In interfering with that decision, the Labour Court erred and its decision ought to be set aside by this Court.

- [20] Regarding substantive fairness, the nub of the appellant's allegations was that the respondents improperly accepted financial and other inducements from the two brokers. Having analysed the evidence before her, the Commissioner reached the following reasonable conclusion:

LABOUR APPEAL COURT

‘If I accept this evidence from the documents before me and the oral evidence of Mr Khumalo and Mr Ndwandwe, then there exists no reason for me to reject the balance of Khumalo and Ndwandwe's overall evidence, subject to my comments under the subheading credibility below.

- [21] When dealing with the credibility issue, she clearly demonstrated that guidance ought to be sought from the *Stellenbosch Farmers Winery* decision. The argument by Mr Schuman that she failed to properly apply the principles of the SCA decision falls to be rejected. Section 138(1) of the LRA impels commissioners to resolve the dispute with the minimum of legal formalities. Whether she misapplied the principles or not, what matters is whether she reached a reasonable decision or not. In my view, she did.

- [22] Her conclusions that the appellant had discharged the statutory onus to prove a fair reason related to the conduct of the respondents cannot be assailed. As an example, the evidence of Khumalo, even if the Labour Court labels him a self-confessed liar, was that at Cape Town Southern Sun Hotel, Mr Davids and Mr Blom received R10 000 each from Classique as a bribe. A further

R10 000 was given to Mr Davids at the Southern Sun Hotel in Pretoria. Evidence of this nature proved that the respondents were guilty as charged. The fact that the Commissioner accepted evidence of this nature cannot be considered to be unreasonable. She was a trier of facts and the evidence was admissible, so she had to assess it together with other evidence. The case of the respondents was that of bare denial. According to them all the witnesses and the documentary evidence lied. It remains the statutory duty of a commissioner to determine the fairness of a dismissal related to conduct. It is not the duty of the Labour Court to do so. As confirmed in *Maleka*, the duty of the Labour Court is circumscribed. Judicial overzealousness has long been discouraged by the Constitutional Court.

Conclusion

[23] It is the view of this Court that the Labour Court followed a wrong approach to the review application. The standard applied by the Labour Court is clearly one that applies in appeals as opposed to a review. The award of the Commissioner was well-reasoned, detailed, and easy to follow. It is clear that she identified the principal issue, assessed that issue, and reached a reasonable conclusion, which is clearly consistent with the evidence presented before her. In interfering with her award, the Labour Court erred and its order is liable to be set aside on appeal.

[24] In the circumstances the following order is made:

Order

1. The appeal is upheld.
2. The order of the Labour Court is set aside, and it is replaced with an order that:

“The application for review is dismissed.”
3. There is no order as to costs.

G. N. MOSHOANA

Acting Judge of the Labour Appeal Court of South Africa

Tokota AJA and Collis AJA concurring.

APPEARANCES:

For the Appellant : Mr *FA Boda SC*

Instructed by: Norton Rose Fulbright SA Inc,
LABOUR APPEAL COURT La Lucia Ridge.

For the Respondent : Mr. *P Schumann*

Instructed by: J Phillips Attorneys, Durban.