(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: JR661/19

In the matter between:

BUSBAR SERVICES AND DYNAMICS WELD (PTY) LTD **Applicant**

and

SEKILA ERNEST LEBALA **First Respondent**

EUGENE MTILENI N.O. **Second Respondent**

MEIBC **Third Respondent**

Heard: **16 April 2026**

Delivered: 23 April 2026

Summary: Opposed review application – existence of dismissal in dispute – jurisdiction of the Bargaining Council – termination of employment agreement concluded by the parties

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JUDGMENT

MKWIBISO, AJ

Introduction

[1] In this matter, the applicant (the employer) seeks to have an arbitration award issued by the second respondent (the Commissioner) under the auspices of the third respondent (the Bargaining Council) set aside on review. The employer contends that the Commissioner declared the first respondent (the employee) to have been dismissed when he was not dismissed.

[2] The issue is whether the employee was dismissed, which is a jurisdictional issue.

Relevant facts and evidence

[3] The employee was employed by the employer in September 2013 as an Installer. He communicated in English with the General Manager throughout his employment with the employer and did not require an interpreter when so communicating. He experienced hardship travelling to and from work because he lived in Randburg and the employer was based in Kempton Park, Gauteng. As a result, he would regularly intimate to his colleagues including the General Manager that he wanted to resign due to the long distance he had to travel to work, and that he wanted to work close to his home.

[4] Though the employee was late for work on a regular basis, the General Manager did not insist on him complying with the rule regarding punctual time and attendance and did not charge him for misconduct, as he understood that the employee had to travel from far.

[5] The employer's business operations required it to work on its client's construction sites, which sometimes required employees to work at heights. Due to the dangers that are inherent in working at heights, the employer's clients required it to ensure that its employees underwent routine medical tests to ensure that they were fit to work at heights, in order to curtail unnecessary injuries on duty.

[6] During October 2017, the employer required the employee to undergo routine medical tests. On 23 October 2017, the employee delivered the results of the

medical tests to the employer, which results revealed that the employee had tested positive for cannabis. The employee was declared unfit to work due to the results of the medical tests, and he was to return to the Occupational Health Practitioner after 45 days for the tests to be conducted again. In the meantime, the employee could not work due to being declared unfit, and he was granted unpaid leave by the employer which meant that he would not be paid in line with the no-work no-pay principle.

[7] The employee approached the General Manager and inquired as to whether the employer could not "make a plan" for him, to avoid the hardship that would befall him as a result of having to sit at home without remuneration for such a long period of 45 days. The General Manager then approached the employer's attorney and a termination of employment agreement was drafted, which was presented to the employee in the General Manager's office on 31 October 2017.

[8] The General Manager explained the draft termination of employment agreement to the employee, and it was only the two of them in the office when this happened. In terms of the agreement, the employee's employment with the employer would be terminated by voluntary agreement and the employee would be paid certain amounts of money including an *ex-gratia* amount of R3 823.21. The employee was happy with the agreement and the two of them signed the agreement. They then walked to the office of the employer's Human Resources official for her to sign the agreement as a witness. During this process, the employee only had two concerns, namely receiving the payment in terms of the agreement and whether he would receive his UIF benefits.

[9] The employee then waited for approximately one hour in order to receive the payment that was to be made in terms of the termination of employment agreement. The employee received his UIF documents.

[10] A few days later, during November 2017, the employee referred an unfair dismissal dispute to the Bargaining Council. The matter was allocated to the Commissioner to arbitrate.

[11] The arbitration hearing proceeded on 28 June 2018 and 23 January 2019. On the first day, the employee presented his case and he was a single witness. On the second day, the employer presented its case through the testimony of its General Manager, who was also a single witness.

[12] The employee did not dispute that he signed the termination of employment agreement. Instead, he said he did not understand what he was signing as he thought he was signing in order for him to get paid while on leave.

[13] On the other hand, the General Manager's testimony was in line with the background I have set out above. When he was cross-examined, the employee did not dispute his testimony nor put his version to him regarding material issues. In particular, the employee did not state that he lacked an understanding of the agreement he signed, in order to give the General Manager an opportunity to respond to that version. The employee did not say that he disagreed with the General Manager's testimony that on several occasions he had said he wanted to resign, or that he had difficulty travelling between work and his home due to the long distance. The employee did not dispute that he had been paid in terms of the agreement and that there was a discussion about UIF on the day he signed the agreement.

[14] Despite the employee's failure to put his version to the employer's witness, the Commissioner issued the arbitration award that is the subject of the review application in this matter, finding that the employee had been dismissed. The Commissioner found that the employee had been induced by misrepresentation into concluding the agreement and that the employee did not understand the agreement due to his low level of education. The Commissioner further found that the employee's dismissal was unfair both substantively and procedurally. The Commissioner ordered the employer to reinstate the employee with back-pay.

[15] Unsatisfied with the arbitration award, the employer has launched an application for an order reviewing and setting aside the arbitration award on the ground that the Commissioner effectively should have found that the

employee was not dismissed. The employer alleges that the Commissioner's decision was unreasonable.

[16] During argument before me, the employer argued that the termination of employment agreement has never been set aside and the employee would have to approach a Court of law if he wanted to set it aside. Further, in argument before me the employee did not take issue with the adequacy of the record in circumstances where the entire testimony of the employer's witness given on the second day of the arbitration hearing was properly transcribed but the parties had to reconstruct the evidence of the employee given on the first day of the arbitration hearing. The reconstruction took place two years after the arbitration hearing and the parties had to rely on the Commissioner's handwritten notes which, when it came to the employer's cross-examination of the employee, only recorded the answers that the employee gave and not the questions that were asked.

Analysis

[17] Despite the fact that the record in this matter is sufficient for me to make a final determination of the issues, it is concerning to me that this is yet another matter in which the parties had to reconstruct the record. Clearly the parties did not have their own recordings of the arbitration proceedings, which would have significantly improved the quality of the record. In my experience, there are still some Commissioners who do not allow parties to record arbitration proceedings despite their knowledge of the difficulties of having to reconstruct arbitration records in cases where their recordings have been lost. The recording of arbitration proceedings by litigants who appear before Commissioners ought to be a matter of entitlement as they are party to those proceedings, and Commissioners ought to encourage litigants who appear before them to record and store their recordings in order to ensure that there are back-up recordings when the official recordings of the Commissioners become destroyed or lost. Perhaps the rules for the conduct of arbitrations should be amended to include this right of litigants to record as this may get rid of the problem of having to remit cases to the CCMA or Bargaining

Councils due to inadequate records caused by the loss or destruction of official recordings by Commissioners or the said dispute resolution *fora*.

[18] The test for review in cases where the existence of dismissal is in dispute is whether the Commissioner's decision was correct. In the current matter the issue is whether the Commissioner was correct when he found that the employee was dismissed, despite a termination of employment agreement that was concluded between the parties. This position has recently been confirmed by the Constitutional Court in *Maleka v Boyce NO and Others*[1] where the following was stated:

> "[53] The Labour Court and Labour Appeal Court have, with great consistency, held that whether there has been a dismissal speaks directly to the jurisdiction of the CCMA to entertain the dispute. The CCMA, as a general rule, cannot determine its own jurisdiction. It can, however, make a determination for its convenience. This position can be traced back to the old Labour Appeal Court in respect of the then Industrial Court. It is only a court of law that can determine whether the CCMA has jurisdiction in a particular matter, the effect of which is that a decision by the CCMA which implicates its jurisdiction is subject to review by the Labour Court on objectively justifiable grounds".

[19] The Court in this current matter is, thus, empowered to determine afresh the issue of the existence of dismissal, based on the evidence contained in the record. It matters not that the employer's grounds of review refer to the standard of reasonableness, as in truth the employer challenges the existence of dismissal which is by nature a jurisdictional issue.

[20] Section 192 of the Labour Relations Act (LRA)[2] provides that "*in any proceedings concerning any dismissal, the employee must establish the existence of the dismissal*". This means that the onus rests on the employee to prove that he was dismissed.

[1] *Maleka v Boyce NO and Others* (CCT 175/23) [2026] ZACC 7 (24 February 2026) at para 53.
[2] Act 66 of 1995.

[21] As the arbitration proceedings were conducted in the form of a trial in this matter, factual disputes had to be determined based on the balance of probabilities.[3]

[22] The arbitration award reflects the following reasoning:

> "29. The parties had divergent versions in as far the way the dismissal or termination of employment occurred. It was the applicant's argument that he did not understand what he was signing for as Gouws had misrepresented the facts by informing him that he was signing for his leave days and he was going to be paid for staying at home, as initially he had been informed that he would be placed on an unpaid leave of 45 days. The respondent on the other hand argued that dismissal never occurred but that the applicant signed a voluntary settlement agreement. It was explained to him and he was happy to sign. A question that arises is which of the two versions is more probable".

[23] It is not probable that the General Manager informed the employee that the agreement that was being signed was about the employer changing its mind and deciding to pay the employee while he would be sitting at home and not tendering his services due to having tested positive for cannabis at no fault of the employer. Indeed, it would not have been businesslike for the employer to conduct its affairs in this manner. There was absolutely no reason for the General Manager to lie to the employee by informing him that he was signing for his leave days to be paid for the 45 days' period while he would not be rendering his services to the employer, as the General Manager could simply have allowed him to sit at home without pay for that period at no cost to the employer. There was no evidence that the General Manager or the employer wanted the employee out at all cost, by hook or by crook. On the contrary, the evidence was that the employee's consistent failure to arrive on time at work was tolerated and more or less accepted over a long period of time. What makes this version of the employee even more improbable is that it is

[3] See: *Workforce Staffing (Pty) Ltd v Mjoli and Another* (JA32/23) [2024] ZALAC 9 (11 April 2024) at paras 23 and 24. See also: *SFW Group Ltd and another v Martell et Cie and others* 2003 (1) SA 11 (SCA) at para 5.

undisputed that there was a discussion about UIF around the time of the signing of the agreement, which discussion could only relate to the termination of employment.

[24] It is more probable that the employee was in favour of a termination of his employment, consistent with his communicated desire to resign. It seems he knew that he would not receive UIF benefits if he resigned and he was happy to sign the termination of employment agreement as it would help him receive his UIF benefits over and above the payment he would receive in terms of the agreement he signed.

[25] The Commissioner correctly referred to the following passage from the Labour Court matter of *Masilela v Leonard Dingler (Pty) Ltd*,[4] where it held that :

> "the credibility of the witnesses and the probability and improbability of what they say should not be regarded as separate enquiries to be considered piecemeal. They are part of a single investigation into the acceptability or otherwise of the respondent's version, an investigation where questions of demeanour and impressions are measured against the contents of a witness' evidence, where the importance of any discrepancies or contradictions is assessed and where a particular story is tested against facts that cannot be disputed and against the inherent probabilities, so that at the end of the day one can say with conviction that one version is more probable and should be accepted, and that therefore the other version is false and may be rejected with safety".

[26] However, the Commissioner failed to have regard to the part of that judgment that relates to the duty of a litigant to put his version to his opponent's witnesses. In this regard, the Court stated the following:

> "[28] … It is trite that if a party wishes to lead evidence to contradict an opposing witness, he should first cross-examine him upon the facts that he intends to prove in contradiction, to give the witness an opportunity for explanation. Similarly if the court is to be asked to disbelieve a witness, he should be cross-examined upon the matters

[4] *Masilela v Leonard Dingler (Pty) Ltd* [2004] 4 BLLR 381 (LC); (2004) 25 ILJ 544 (LC). at para 29.

> that it will be alleged make his evidence unworthy of credit. In *Small v Smith* 1954 (3) SA 434 (SWA) Claassen J said at 438:
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> "… It is grossly unfair and improper to let a witness's evidence go unchallenged in cross-examination and afterwards argue that he must be disbelieved".[5]

[27] In *President of the Republic of South Africa and Others v SARFU and Others,*[6] the Constitutional Court held that:

> "[61] … If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct. This rule was enunciated by the House of Lords in *Browne v Dunn* and has been adopted and consistently followed by our courts".

[28] The employee in this current matter failed to put his version to the employer's witness. As stated above, the employee did not put to the General Manager that the latter had informed him that the agreement was about the payment of leave days during the 45 days' period when he would be away from work. The employee did not put to the General Manager that there was no discussion about UIF around the time the agreement was signed. The employee did not put to the General Manager that he did not mention any desire to resign due to the long distance he was travelling between is home and the workplace. Any version regarding these propositions cannot be accepted as it was not put to the employer's witness.

[29] Rejecting the employee's version due to it not being put to the employer's witness and it being improbable means the parties are left with the settlement agreement that they signed. I agree with the employer's contention that the settlement agreement is binding on the parties as it was never set aside.

[30] The agreement could only be set aside by a Court with competent jurisdiction. The Bargaining Council did not have the power to set the agreement aside, and the Commissioner acting under the auspices of the Bargaining Council

[5] Ibid at para 28.

[6] *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 11999 (10) BCLR 1059 (CC), 2000 (1) SA 1 at para 61.

did not in fact set aside the agreement. This means that the Commissioner had to abide by the well-established principle that agreements are binding until validly set aside on grounds recognised by the law of contract. As the Constitutional Court held in *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd*,[7] "*[t]he courts alone, and not public officials, are the arbiters of legality*". Indeed, there are many reported judgments of matters where litigants have approached the Courts to set aside agreements concluded in the context of labour relations.[8]

[31] In light of the above, the employee and the employer signed a termination of employment agreement that is binding on them, which means the employee was not dismissed. The facts that the employer's Human Resources official did not initial each page of the agreement and only signed after the General Manager and the employee had signed in her absence are not relevant because a contract is not concluded with a witness and the employee did not dispute that he signed the agreement.

[32] The employer's review application, thus, stands to be upheld.

<u>Costs</u>

[33] The general rule is that costs do not follow the result in this Court, and there are no exceptional grounds that justify a deviation from this rule in this matter.

[34] In the premises, the following order is made:

<u>Order</u>

[7] *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* 2014 (3) SA 481 (CC) at para 103.

[8] For example: *Gbenga-Oluwatoye v Reckitt Benckiser South Africa (Pty) Ltd and Another* (2016) 37 ILJ 2723 (CC).

1. The arbitration award of the second respondent, issued under the auspices of the third respondent and bearing case number GAJB24745-17 is reviewed and set aside.

2. The said arbitration award is replaced by an order that:

   "1. The first respondent was not dismissed by the applicant; and

   2. The first respondent's referral of an unfair dismissal dispute against the applicant is dismissed."

3. There is no order as to costs.

VG Mkwibiso

Acting Judge of the Labour Court of South Africa

<u>Appearances:</u>

For Applicant	:	Ms Lynsey Foot of Crawford Attorneys (Correspondent Attorney)
Instructed by	:	Lancaster Kungoane Attorneys
For Third Respondent	:	Mr Rudolf Kuhn
Instructed by	:	SASLAW Pro Bono Office, Johannesburg