



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

Signature

Date

**THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG**

Case no: A2025-117691

In the matter between:

**SOLIDARITY obo ROBERTS**

**Appellant**

and

**D NGWENYA N.O.**

**First Respondent**

**THE SAFETY AND SECURITY SECTORAL**

**BARGAINING COUNCIL**

**Second Respondent**

**THE NATIONAL COMMISSIONER OF THE SOUTH**

**AFRICAN POLICE SERVICE**

**Third Respondent**

**BRIGADIER NF VAN GRAAN N.O.**

**Fourth Respondent**

Heard: 7 May 2026

Delivered: 21 May 2026

Coram: Van Niekerk JA, Djaje AJA et Masipa AJA

---

## JUDGMENT

---

**VAN NIEKERK, JA**

### Introduction

[1] This is an appeal against a judgment delivered by the Labour Court on 10 August 2022, when that Court dismissed an application for review filed on behalf of Colonel Roberts (to whom I shall refer as ‘the appellant’) in respect of both a decision by the fourth respondent (Van Graan) to dismiss him, and a jurisdictional ruling issued by the first respondent (the arbitrator) in a dispute that concerned the fairness of his dismissal.

### Material facts

[2] On 14 January 1988, the appellant commenced employment with the South African Police Service (SAPS). At the time of his dismissal on 7 January 2017, he had attained the rank of colonel and maintained a clean disciplinary record during his almost 30 years of service.

[3] The dispute concerning the appellant’s dismissal stems from events that occurred more than ten years ago, on the night of 16 October 2015, when the appellant responded to a call from a community patroller who had reported a suspected vehicle hijacking. The appellant was accompanied by warrant officer Goldblatt, a police reservist, who requested assistance from other police vehicles in the vicinity. When the appellant and Goldblatt arrived on the scene, the community patroller had parked in front of the suspected vehicle, a Ford Everest. A number of SAPS vehicles had already arrived. As the appellant got out of his vehicle, shooting broke out. The appellant ordered a cease-fire. When the shooting ceased, the appellant approached the Ford Everest and discovered that it was not the hijacked vehicle. The occupant of the vehicle, an innocent civilian,

had been wounded during the shooting and died at the scene. All but one of the police vehicles hurriedly left the scene, but the appellant prevented a vehicle used by Constables Machabaphala and Makgamatha from leaving. Subsequent ballistics tests revealed that the appellant had not fired any shots but that the firearms of the two constables could be linked to the body of the deceased.

- [4] Machabaphala and Makgamatha were charged with culpable homicide and failing to verify the details of the hijacked vehicle before using deadly force. The appellant was charged with witnessing the shooting, failing to assist the victim of the shooting, and exercising his powers irresponsibly. A disciplinary hearing commenced in February 2016 and concluded on 27 September 2016, when Machabaphala, Makgamatha, and the appellant were found guilty of the misconduct alleged against them. The chairperson of the disciplinary hearing recommended dismissal in each case.
- [5] On the same day, 27 September 2016, the appellant lodged an internal appeal against his dismissal in terms of Regulation 17 of the South African Police Service Regulations 2006. On 29 September 2016, Brigadier Rambachan-Naidoo, the section head: legal support services, recommended that the dismissals be confirmed. The outcome of the disciplinary hearing and the brigadier's opinion were forwarded to the provincial commissioner for Gauteng for determination in terms of Regulation 16.
- [6] On 19 October 2016, the provincial commissioner for Gauteng, Lt Gen de Lange (De Lange), acting under Regulation 16 of the Police Regulations, upheld the dismissals of Makgamatha and Machabaphala but varied the appellant's sanction, reducing the dismissal to a final written warning. On 20 October 2016, Lt. Colonel CL Booysen, Section Head: Employee Relations Gauteng, forwards a letter to the Divisional Commissioner: Personnel Management, attaching the appellant's internal appeal and De Lange's Regulation 16 variation of the dismissal.

- [7] The appellant learned of the variation on 21 October 2016 and resumed his duties the same day.
- [8] On 29 December 2016, more than two months after resuming duty and despite the variation in sanction determined by De Lange, the appeals authority, in the form of Van Graan, decided to confirm the sanction of dismissal imposed at the disciplinary hearing. On 7 January 2017, the appellant was informed by Van Graan of the outcome of the appeal and was summarily dismissed.
- [9] On 17 January 2017, the appellant referred a dispute to the bargaining council under section 191 of the Labour Relations Act<sup>1</sup> (LRA) contending that he had been unfairly dismissed and seeking reinstatement. After a failed attempt at conciliation, the dispute was referred to arbitration. The arbitration hearing extended over 20 days and concluded only on 7 April 2019. The arbitrator issued an award dated 15 April 2019. In his award, in relation to submissions made by the parties' representatives on the determination by De Lange, the arbitrator concludes:

'16. It is apparent from the aforementioned arguments that both parties required of the Council to consider and pronounce on the validity of the Determination. It is trite law that an administrative tribunal such as the Council has no power to pronounce on the validity of an administrative act. The power to declare an administrative act a nullity vests with a court of law. I thus determine that the proper course of action available to either of the parties is to refer the matter for review as the Council has no jurisdiction to entertain the dispute.'

- [10] On this basis, the arbitrator ruled that *'the Council lacks jurisdiction to entertain the dispute as the matter falls within the preserve of the Labour Court'*.

Labour Court

---

<sup>1</sup> Act 66 of 1995.

[11] On 20 May 2019, the appellant filed an application to review and set aside both the decision of Van Graan dismissing his appeal against his dismissal and the arbitrator's jurisdictional ruling. The application before the Labour Court thus comprised two parts. In Part A, the appellant sought, in terms of section 158(1)(h) of the LRA, to review and set aside the decision by Van Graan, made on 29 December 2016 in his capacity as the SAPS appeal authority, to confirm the appellant's dismissal, and, to the extent necessary, to condone the late filing of the review application. The review was sought on the basis that the impugned decision constituted a breach of the principle of legality. In particular, the appellant contended that Van Graan's decision was *ultra vires* and unlawful. In Part B, in the alternative, the appellant sought, in terms of sections 145 and 158(1)(g) of the LRA, to review and set aside the arbitrator's jurisdictional ruling issued on 15 April 2019.

[12] The Labour Court dealt first with the merits of the application for condonation for the late filing of the legality review. The Court noted the appellant's submission that the arbitrator's jurisdictional ruling '*had the effect of promoting the fourth respondent's Appeal Authority to centre stage*' and that the '*a review of the Appeals Authority decision has now emerged as the most convenient and effective way of disposing of the underlying unfair dismissal dispute.*' The Labour Court held that it was incumbent on the appellant to provide a full explanation for the inordinate delay in filing the review application and that he had failed to do so. The Court concluded that the appellant had failed to make out a proper case for the grant of condonation and granted an order in the following terms:

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

[13] The Court's reasoning is apparent from the following paragraph:

'[19] Given his failure to lodge the review application within a reasonable time following the 29 December 2016 confirmation of outcome, it was incumbent upon the applicant to make a full explanation for the inordinate

delay in launching the review application. Instead, condonation is sought by means of a remarkable superficial and unconvincing explanation that paints a picture of a litigant who was not really serious about pursuing his remedy. I need hardly state that condonation is not there for the asking. Due to the fact that an applicant seeking condonation seeks an indulgence, he bears the onus to show good cause and make a proper case before the indulgence may be granted.

[20] As I have already indicated, the applicant's shortcoming is plain from his own words when he explains that a review of the appeals authority's decision has now emerged as the most convenient and effective way of disposing of the underlying dismissal dispute. The applicant fails to make out a proper case for the grant of condonation'.

[14] The Labour Court's reasoning in support of the order dismissing the application for condonation can only relate to Part A of the notice of motion, i.e. that which sought to review the decision made by Van Graan. There is no dispute that the review of the arbitrator's jurisdictional ruling sought in Part B of the notice of motion was filed within the time limit established by section 145 of the LRA. It is not disputed that the Labour Court gave no consideration to the relief sought in Part B.

[15] In respect of Part A, the appellant contends that proper grounds to condone the late filing of the review application had been established, and that the Labour Court erred in refusing to condone the late filing of the application. In respect of Part B, the appellant contends that the Labour Court erred by failing to consider the grounds for the review sought of the jurisdictional ruling issued by the arbitrator on 15 April 2019, that application having been timeously delivered.

[16] The appellant seeks an order on appeal condoning the late filing of the review application under section 158 (1)(h), setting aside Van Graan's decision made on 29 December 2016 in his capacity as the appeal authority, and ordering the SAPS to reinstate the appellant with effect from the date of his dismissal. In the alternative, the appellant seeks to review and set aside the jurisdictional ruling

issued by the arbitrator on 15 April 2019 and to have the matter referred for arbitration with reference to the proceedings already conducted, alternatively, for a fresh arbitration hearing before another arbitrator.

### Discussion

[17] I first address the appellant's submissions regarding Part A of the notice of motion and the refusal to condone the late filing of the legality review. A review sought under s 158(1)(h) must be brought within a reasonable time. The guideline for what constitutes a reasonable time is the six-week time limit established by section 145 for review applications filed under that section. The principles governing condonation applications are well established. They were reaffirmed by the Constitutional Court in *Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae)*,<sup>2</sup> where the Court held that the applicable standard is the interests of justice. While each case must be decided on its own facts, the interests of justice enquiry encompasses the nature of the relief sought; the extent and cause of the delay; the effect of the delay on the administration of justice and other litigants; the reasonableness of the explanation for the delay; the importance of the issue to be raised in the intended appeal; and finally, the prospects of success. In this Court, the approach has long been to place less emphasis on the prospects of success where there is no satisfactory explanation for an inordinate delay.<sup>3</sup> In *Van Wyk*, the Constitutional Court affirmed that the prospects of success in the main proceeding pale into insignificance when an inordinate delay is coupled with the absence of a reasonable explanation for that delay.<sup>4</sup>

---

<sup>2</sup> 2008 (2) SA 472 (CC). See also *Grootboom v National Prosecuting Authority and Another* (2014) 35 ILJ 121 (CC); *Government Printing Works v Public Service Association and Another* (2025) 46 ILJ 915 (LAC).

<sup>3</sup> *NUM v Council for Mineral Technology* [1999] 3 BLLR 209 (LAC).

<sup>4</sup> Fn 2 at para 68.

- [18] When a court balances the factors relevant to the seeking of the indulgence of condonation, it does so in the exercise of inherent discretion. Unless that discretion is exercised arbitrarily or capriciously, or some manifest injustice otherwise results, an appeal court should be slow to interfere with the conclusion reached by the court *a quo*.<sup>5</sup>
- [19] In the present instance, the decision sought to be reviewed was issued on 29 December 2016, and the review application was filed on 17 May 2019. The Labour Court cannot be faulted for refusing to condone the late filing of the application to review and set aside Van Graan's ruling. On his own version, the appellant became aware of the ruling immediately after it was made on 29 December 2016, and there was no substantive bar to his then seeking to set aside the decision by filing a review application within a reasonable time. The delay in filing the section 158 (1)(h) review application was inordinate. The explanation for the delay was unsatisfactory. To suggest that the delay was attributable to the pending unfair dismissal dispute before the bargaining council, which related directly to the fairness of the dismissal that the section 158(1)(h) review sought to challenge, is a suggestion that finds no basis in logic or in law. While the outcome of both proceedings may have resulted in a setting aside of the appellant's dismissal, the application for review and the referral of the unfair dismissal dispute to the bargaining council, respectively, were brought on entirely different legal grounds, the outcome of one proceeding not dependent on the outcome of the other. In short, there was no bar to the appellant filing the review within a reasonable period of Van Graan having made the decision to uphold his dismissal.
- [20] Insofar as counsel for the appellant submitted that it was in the public interest to grant condonation, if only to lay bare what he submitted was incompetence and negligence by the SAPS appeals authority in overruling the provincial commissioner's decision to vary the sanction of dismissal to a final written

---

<sup>5</sup> See: *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another* 2015 (5) SA 245 (CC).

warning, this is not a sufficient basis to outweigh an unsatisfactory explanation for an inordinate delay. The same consideration applies to the appellant's prospects of success in the review application.

[21] There is thus no basis to interfere with the Labour Court's refusal to condone the late filing of that portion of the review application reflected in Part A of the notice of motion.

[22] I turn next to the appeal against the Labour Court's dismissal of the relief sought in prayer B of the notice of motion, i.e., the review of the arbitrator's jurisdictional ruling. It is not disputed that the relief sought in Part B was an alternative to the review of Van Graan's decision. There is also no dispute that the Labour Court simply omitted to consider the alternative presented by Part B, notwithstanding that the review of the arbitrator's jurisdictional ruling had been timeously filed.

[23] It is no answer to suggest, as did counsel for the respondent, that there is nothing against which the appellant might appeal. It is trite that an appeal is directed against the substantive order of the court *a quo*, not against the reasons for judgment. In the present instance, the Labour Court's order that the review application be dismissed. The order is not limited to Part A of the notice of motion – it extends to the entire application. The fact that the review application was brought in two parts and that the Court dealt only with the first and not the second is of no consequence. The fact that the Labour Court articulated no reasons for its decision to dismiss Part B is not a basis on which to find that the order granted is in part not appealable, or that, as counsel submitted, the appropriate remedy is to remit the matter to the Labour Court with a directive to give consideration to Part B. The Labour Court's order dismissing both Parts of the review application effectively upheld the arbitrator's jurisdictional ruling, a ruling that properly served before the Labour Court and which serves before us on appeal.

[24] Insofar as the merits of the application to review are concerned, it is well-established that the threshold for a review application challenging a jurisdictional

ruling is correctness, not the *Sidumo*<sup>6</sup> test of reasonableness.<sup>7</sup> The Labour Court was thus required to determine whether the arbitrator's ruling was correct.

- [25] After hearing evidence for 20 days, the arbitrator concluded that the parties had in effect requested the bargaining council to pronounce on the validity of De Lange's variation of the sanction of dismissal originally imposed on the appellant, and that since the council lacked the power '*to pronounce on the validity of an administrative act*', the '*proper course of action available to either of the parties*' was to refer the matter to the Labour Court for review.
- [26] There are at least two reasons why the arbitrator's decision is wrong. First, the dispute referred to arbitration concerned Van Graan's decision to uphold the appellant's dismissal (and particularly the fairness of that decision), and not De Lange's prior decision to reduce the sanction to a final written warning. The validity of De Lange's variation of the sanction of dismissal originally imposed was never a matter referred to arbitration. Secondly, contrary to what the arbitrator held, De Lange's decision did not constitute administrative action.
- [27] The dispute referred to the bargaining council on 17 January 2017 concerned the fairness of the appellant's dismissal. As I have indicated, the dispute was not concerned with the validity of De Lange's variation of the sanction of dismissal. Specifically, the appellant contended that his dismissal was substantively unfair and that there were '*several discrepancies regarding procedures in the Disciplinary Investigation and hearing*'. This is manifestly a dispute that falls within the bargaining council's jurisdiction. It was thus incumbent on the arbitrator to determine the substantive and procedural fairness of the appellant's dismissal by applying section 192(2) of the LRA and requiring the SAPS to prove that the dismissal was fair. Although it may on occasion be necessary for an arbitrator to identify the real dispute between the parties after considering all the facts, it is not for arbitrators to recast a clearly defined dispute referred to arbitration in

---

<sup>6</sup> *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (2007) 28 ILJ 2405 (CC).

<sup>7</sup> *SA Rugby Players Association (SARPA) and Others v SA Rugby (Pty) Ltd & Others; SA Rugby (Pty) Ltd v SARPA and Another* [2008] 9 BLLR 845 (LAC) at paras 39-40.

entirely different terms and dictate to the parties how it should be litigated. In the present instance, the dispute referred to arbitration was unequivocally framed as an alleged unfair dismissal for misconduct. That is a dispute over which the bargaining council had jurisdiction.<sup>8</sup>

[28] In any event, contrary to the arbitrator's finding, De Lange's decision did not constitute administrative action. In *Chirwa v Transnet Ltd and Others*<sup>9</sup> and *Gcaba v Minister of Safety and Security and Others*<sup>10</sup> the Constitutional Court made clear that employment-related decisions by the state in its capacity as employer do not constitute administrative action capable of review under Promotion of Administrative Justice Act<sup>11</sup>, and must be challenged in terms of the rights of recourse established by the LRA.<sup>12</sup> Moreover, the fact remains that even if De Lange's decision is completely removed from the equation, the decision subject to challenge by the appellant is that made by Van Graan, i.e., the decision to uphold the appellant's dismissal. That was the only decision under consideration and scrutiny at the arbitration hearing.

[29] In short, the arbitrator committed an error of law by declining jurisdiction to entertain the unfair dismissal dispute that served before him. His ruling was incorrect and stands to be set aside. The Labour Court erred by failing to consider the appellant's submissions on the jurisdictional ruling and failed to set aside that ruling. The appeal succeeds to this extent.

[30] Finally, it should be recalled that the incident that gave rise to the appellant's dismissal occurred in October 2015. The appellant was dismissed on 7 January 2017. The arbitration hearing was completed in April 2019, and the review application was filed in May 2019. The review was finalised only in August 2022

---

<sup>8</sup> Section 191(5)(a)(i).

<sup>9</sup> 2008 (4) SA 367 (CC).

<sup>10</sup> [2009] 12 BLLR 1145 (CC).

<sup>11</sup> Act 3 of 2000.

<sup>12</sup> See also *PSA obo De Bruyn v Minister of Safety and Security and another* (2012) 33 ILJ 1822 (LAC). A state employee is not precluded, though, from seeking the review of an employment-related decision under section 158(1)(h) based on the principle of legality – see *Hendricks v Overstrand Municipality and another* [2014] 12 BLLR 1170 (LAC); *Minister of Police and Another v Kgopa and Another* [2019] 1 BLLR 16 (LAC).

and comes before this Court in May 2026. The inordinate delays in this matter run completely counter to the fundamental principle of expeditious dispute resolution that underlies the LRA. The delay, largely attributable to the bargaining council and the inefficiency of the arbitration proceedings, has left unresolved a dispute rooted in events more than ten years ago.

[31] Given the conclusion reflected above, this Court has little option but to remit the matter to the bargaining council for a determination of the merits of the unfair dismissal dispute. While it remains for the appointed arbitrator to conduct the arbitration hearing in a manner he or she considers appropriate, consideration might be given to determining the dispute based on the existing record, subject to any further submissions that may be invited. The record of the 20-day arbitration hearing is complete, and little purpose would be served by a *de novo* hearing.

[32] In the premise, the following order is made:

Order

1. The appeal is upheld to the extent that the Labour Court's order is varied to read:
    - “1. *Condonation for the late filing of the application to review the fourth respondent's decision in terms of s 158 (1)(h) is refused.*
    2. *The first respondent's jurisdictional ruling issued on 15 April 2019 is reviewed and set aside.*
    3. *The unfair dismissal dispute between the appellant and the third respondent is remitted to the second respondent for arbitration before an arbitrator other than the first respondent, to be heard on terms determined by the appointed arbitrator”*
  2. There is no order as to costs.
-

A van Niekerk

Judge of the Labour Appeal Court of South Africa

Djaje AJA and Masipa AJA concur.

APPEARANCES:

For the Applicant : Adv PH Kirstein

Instructed by: Serfontein Viljoen & Swart Attorneys

For the Respondent : Adv MH Mhambi

Instructed by: State Attorney