



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

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Signature

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Date

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

Not Reportable

Case no: JR1179/19

In the matter between:

**ERGO MINING (PTY) LTD**

Applicant

and

**UASA obo SIBONGISENI BLESSING NGCOBO**

First Respondent

**COMMISSION FOR CONCILIATION, MEDIATION  
& ARBITRATION**

Second Respondent

**DUMISANI JOHANNES NGWENYA N.O &  
SUZAN SELZER N.O**

Third Respondent

Decided in Chambers

**This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email. The date for hand-down is deemed to be 28 May 2026.**

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**LEAVE TO APPEAL JUDGMENT**

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## MOSIKILI, AJ

### Introduction

- [1] The applicant, ERGO Mining (Pty) Ltd, seeks leave to appeal against my order in the above matter, whereby I reviewed and set aside the third respondent's award dated 23 April 2019 with case number GAEK2629, under the of the Commission for Conciliation, Mediation & Arbitration "**CCMA**". While the applicant was partially successful in the reviewing and setting aside the award, the applicant has qualms with the remedy(the order) because I remitted the matter back to the CCMA for a fresh hearing of the matter, *de novo*, before a commissioner other than the second respondent.
- [2] It has been at times difficult to discern the basis on which leave to appeal has been sought, primarily because the grounds of appeal appear to be directed at the dissatisfaction with only the remedy of remittal and not the core reasoning behind the judgment.
- [3] In essence, the employee was faced with three(3) charges of misconduct before the CCMA, and he was exonerated on chargers 1 and 2, and only found guilty on charge 3. The applicant brought a review because they were not satisfied with the not guilty verdict on charges 1 and 2. It is this award; I reviewed and set aside and remitted the matter.

### The Merits

- [4] The applicant accepts, as it should, that once the award is reviewed and set aside, the issue of the remedy is a discretionary one. In the judgment, this Court critiqued the award on how the second respondent misdirected herself in applying the incorrect legal principles while evaluating the evidence put before her. Something the applicant agrees with. However, the applicant wants approbate and reprobate. At one hand, it contends that I must not interfere with part of the award that it agrees with(charge3) and only

substituted the ones that they have targeted in review application ( charge 1 and 2). The real concern for the applicant is that remitting the matter has a net-effect of upsetting the second respondent's guilty finding on charge 3. No legal authority has been furnished as to why I should prefer this narrow approach and not consider the conduct of the second respondent in totality in dealing with the evidence before her, and part of her incompetence in handling the matter *in toto*. Applying criminal standard in labour matter, as opposed to a civil standard by the second respondent, does demonstrate an element of incompetence and renders the award reviewable.

- [5] In the circumstances, it is apparent that leave to appeal is not pointing at the errors of law and/ or errors of facts committed. It is not clear what basis, if at all, is it suggested that I failed to exercise my discretion judiciously in deciding the just and equitable remedy in remitting the matter. There is no suggestion that this Court exercised the discretion capriciously or arbitrarily.
- [6] The apogee of the applicant's case is that because I have found the decision of the arbitrator wanting and reviewable, therefore it is a foregone conclusion that the first respondent must be found guilty on the two charges, which are a bone of contention, charges 1 and 2.
- [7] In essence, having found that the commissioner's award was reviewable, the this Court had to exercise its discretion in determining whether to substitute the award or remit it to the CCMA for a rehearing.

### The law

- [8] In *Trencon Construction (Pty) Ltd v Industrial Development Cooperation of South Africa Ltd and Another*<sup>1</sup>, the Constitutional Court held that the factors to

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<sup>1</sup> 2015] ZACC 22; 2015 (5) SA 245 (CC) at para 47.

take into account in considering whether to exercise the discretion to substitute the decision of an administrator are the following:

*“ To my mind, given the doctrine of separation of powers, in concluding this inquiry there are certain factors that should inevitably hold greater weight. The first is whether a court is in as good position as the administrator to make the decision. The second is whether the decision of an administrator is a foregone conclusion. These two factors must be considered cumulatively. Thereafter, a court should still consider other relevant factors. These may include delay, bias or the incompetence of an administrator. The ultimate consideration of fairness to all implicated parties. It is prudent to emphasise that the exceptional circumstances enquiry requires an examination of each matter on case-by-case basis that accounts for all facts and circumstances”.* (footnotes omitted)

[9] In *Southern Sun Hotel Interests (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*<sup>2</sup>, the court set out the circumstances in which the Labour Court would rather correct the decision than refer it back to the CCMA as being:

- “(i) where the end result is a foregone conclusion and it would merely be a waste of time to order the CCMA to reconsider the matter;*
- (ii) where a further delay would cause unjustified prejudice to the parties;*
- (iii) where the CCMA has exhibited such bias or incompetence that it would be unfair to require the applicant to submit to the same jurisdiction again;*  
*or*
- (iv) where the court is in as good a position as the CCMA to make the decision itself”.* (footnotes omitted)

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<sup>2</sup> [2009] ZALC 68; (2010) 31 ILJ 452 (LC) at para 33.

[10] In *Auto Industrial Group (Pty) Ltd and Others v Commission for Conciliation, Mediation and Arbitration and Others*,<sup>3</sup> the Court held that:

*“A court will ordinarily substitute the decision of a commissioner where all of the available evidence is before the court and little purpose would be served in a rehearing.”*

[11] The above ratio has been quoted with approval by the Labour Appeal Court in *Phakoago v SANCA Witbank Alcohol and Drug Help Centre and Others* (JA60/23).<sup>4</sup>

[12] The crux of the matter before the commissioner in the present case was whether the commissioner had appreciated and applied the correct standard of proof in evaluating the evidence before her. It must be said that the commissioner was required to have consideration of the evidence before her and cast a critical eye over the shortcomings of the evidence presented before her.

[13] In this case, one of the most important evidence placed before her was a video footage of the first respondent carrying a duffel bag. This evidence seems to have been persuasive in her final determination. It is common cause that the applicant failed to place the relevant video footage before the Labour Court as part of the review record; no cogent reasons were given why the record was incomplete. Despite best efforts, the video footage remained unavailable to the court to make a determination of the contents or the veracity of the video and what evidentiary weight, if at all, to place on such evidence.

[14] The upshot of it is that in the absence of a complete review record, it cannot be seriously suggested that this court was in as good a position as the CCMA to

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<sup>3</sup> [2018] ZALCPE 41; (2019) 40 ILJ 550 (LC) at para 60.

<sup>4</sup> [2024] ZALAC 44; [2024] 12 BLLR 1271 (LAC) (18 September 2024) at para 42 – 44.

make the decision itself. Differently put, it would rather be amiss of this Court to make a ruling of substitution whereby it was not presented with a full record of the evidence that was placed before the commissioner.

[15] In addition to that, it would be remiss of the Court, having exposed elements of incompetence on the part of the commissioner, to uphold parts of her ruling simply because there is “*no cross-appeal*” on charge 3. This Court’s ruling is not concerned with the guilty or not guilty findings, but rather the judgment rested on the obvious errors of law committed by the commissioner. This is well articulated in the main judgment and I defer to the reasoning there.

[16] Apropos, I am not persuaded that a Court of Appeal would adopt a different approach and grant the applicant a license to cherry-pick what good of the arbitration award to preserve and which to discard, especially where the ultimate error committed by the commissioner was the very essence (tool) of evaluating the evidence before her (an error of law). A piecemeal approach will only contribute to a further delay in resolving this matter. Further, because the Court was not presented with the full record that set before the commissioner, I was not in a position to substitute the award with my own. The only justice this Court could do is to confine itself to the obvious errors of law and remit the matter back to the CCMA.

[17] Accordingly, the grounds of appeal are unsustainable. I am disinclined to agree with the appellant that there are prospects that a Court of Appeal would adopt a different approach in resolving this dispute.

### Conclusion

[18] The test for leave to appeal is whether “the appeal would have reasonable prospects of success” or whether “there is some compelling reason why the appeal should be heard...”. I have not been persuaded that a case has been

made for either. Where a commissioner demonstrated part-incompetence in applying the obviously incorrect legal principles and an incomplete review record was placed before this Court, I am of the view that the appeal would have no prospects of success. No exceptional facts have been drawn to my attention which would constitute compelling reason/s. In the circumstances, the appeal would have no prospects of success in that respect, as well.

For all these reasons, I make the following order:

1. The application for leave to appeal is dismissed.
2. No order as to costs.

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T Mosikili

Acting Judge of the Labour Court of South Africa

Submissions:

For the Applicant: Alan Jacobs & Associates Inc

For the First Respondent: S Mabaso Inc Attorney