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

Signature — 9 JUNE 2026 Date

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Case no: C396/2024

In the matter between:

CITY OF CAPE TOWN **Applicant**

And

SOUTH AFRICAN MUNICIPAL WORKERS UNION (“SAMWU”) OBO KEEGAN MANTIS **First Respondent**

SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING COUNCIL (‘SALGBC”) **Second Respondent**

ORLANDO MOSES N.O. **Third Respondent**

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

MAY, AJ

<u>Introduction</u>

[1] This is an opposed application for leave to appeal against the judgment and the order handed down on 19 February 2026. The Applicant seeks leave to appeal to the Labour Appeal Court. The application is opposed by the First Respondent.

[2] The grounds for review can be summarised thus:

2.1 The Court went beyond its powers when it ordered the reinstatement and employment of Mr Mantis beyond what would have been the agreed termination date of his contract;

2.2 The Court endorsed the arbitrator's reliance on *Enever*[1] as establishing that proof of intoxication or impairment is required before dismissal may be sustained following a positive cannabis test in circumstances where another Court may conclude that *Enever* is not authority for any blanket rule condoning employees' cannabis use, it calls for a fact-specific, contextual approach and that the high – risk environment in which law enforcement officers are required to work more than justifies the zero tolerance policy relied upon by Applicant to alcohol and drug use;

2.3 Another Court may reasonably conclude that an incorrect characterisation of the level of risk informed the arbitrator's assessment of sanction and that, in those circumstances, the resulting award falls outside the range of reasonable decisions; and

2.4 Even if the Court is not persuaded that the appeal enjoys reasonable prospects of success, there are compelling reasons why the appeal should be heard given the apparent divergent decisions in *SGB*[2] and *Nhlabathi*[3].

[3] The First Respondent on the other hand contends that the Court correctly concluded that the arbitration award was reasonable and that the arbitrator applied his mind to the facts before him.

<u>The test for leave to appeal</u>

[4] Leave to appeal is governed by section 17(1)(a) of the Superior Courts Act, 2013 and may only be granted where the Court is of the opinion that either (i) the

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[1] *Enever v Barloworld Equipment South Africa (Pty) Ltd* (2024) 45 ILJ 1554 (LAC).
[2] *SGB Cape Octorex (Pty) Ltd v MEIBC and Others* (2023) 44 ILJ 179 (LAC).
[3] *NUMSA obo Nhlabathi v PFG Building Glass (Pty) Ltd* (2023) 44 ILJ 231 (LC)

appeal would have a reasonable prospect of success; or (ii) there is some other compelling reason why the appeal should be heard.

[5] The main principles governing leave to appeal are:

5.1 The threshold is that a different court '*would*' come to a different conclusion, not that it '*could*' do so. The test is thus a stringent one.[4]

5.2 An applicant for leave to appeal must demonstrate, on proper grounds, a realistic prospect of success. It is not enough that the case is arguable or not hopeless. There must be a sound and rational basis to conclude that another court would likely reach a different result.[5]

5.3 A compelling (meaning '*cogent; strong; convincing*'[6]) reason may lie in an important question of law or a discrete issue of public importance with wider impact, but the merits nevertheless remain vitally important and often decisive.[7] There is, however, no closed list and each case turns upon its own facts.

<u>Analysis and discussion</u>

[6] The arbitrator's findings were that:

6.1 Even though the employer had adopted a zero-tolerance policy to employees testing positive for having alcohol or drugs in their system, the Labour Appeal Court (LAC) in *Enever* reiterated that the law does not allow an employer to adopt a zero-tolerance approach to all infractions, regardless of the appropriateness or proportionality of the offence and then expect the commissioner to fall in line with such an approach. He confirmed that the Court's position was that a valid benchmark for the

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[4] *Seatlholo and Others v Chemical, Energy, Paper, Printing, Wood and Allied Workers' Union and Others* (2016) 37 ILJ 1485 (LC) at para 3.

[5] *Member of the Executive Council for Health, Eastern Cape v Mkhitha and Another* [2016] ZASCA 176 (25 November 2016) at para 16; *City Tshwana Metropolitan Municipality v Kleinot N.O. and Others* (Leave to Appeal) [2025] ZALCJHB 314 (15 July 2025) at para 8.

[6] *Erasmus Superior Court Practice* RS 5, 2025, D-108.

[7] *Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd* 2020 (5) SA 35 (SCA) at para 2.

zero-tolerance policy should be intoxication and whether the employee was impaired and could not perform his duties. He found that the employer did not lead any evidence showing that the employee was in fact intoxicated or that he was in any way unable to perform his duties assigned on the particular day or any additional functions given to him.

6.2 He held further that it was common cause that the employee at the time was not required to perform any tasks which had any implication of risk, he was not required to wear a firearm at the time and also not required to drive a vehicle. The commissioner found, perhaps incorrectly in my view, that the fact that he could be asked to carry the firearm or drive the vehicle could not be considered high-risk.

6.3 The commissioner also considered that using cannabis (dagga) is not unlawful. Using cannabis could therefore not be in conflict as his duties as a law enforcement officer.

6.4 The arbitrator ultimately held that dismissal as a first offence was too harsh under the circumstances, accordingly, found that the dismissal was substantively unfair and ordered his reinstatement from 31 October 2023 by 1 September 2024 and ordered that he be paid full backpay.

[7] The Court was required to determine whether:

7.1 In terms of his or her duty to deal with the matter with the minimum of legal formalities, did the process that the arbitrator employed give the parties a full opportunity to have their say in respect of the dispute?

7.2 Did the arbitrator identify the dispute he was required to arbitrate (this may in certain cases only become clear after both parties have led their evidence)?

7.3 Did the arbitrator understand the nature of the dispute he or she was required to arbitrate?

7.4 Did he or she deal with the substantial merits of the dispute? and

7.5 Is the arbitrator's decision one that another decision-maker could reasonably have arrived at based on the evidence?[8]

[8] As held a *quo, o*ur courts have repeatedly stated that in order to maintain the distinction between review and appeal, an award of an arbitrator will only be set aside if both the reasons and the result are unreasonable. The result will be unreasonable if it is entirely disconnected with the evidence, unsupported by any evidence and involves speculation by the arbitrator.[9] The corollary to this is that an award will be considered to be reasonable when there is a material connection between the evidence and the result or, put differently, when the result is reasonably supported by some evidence.

[9] In *Enever* the LAC distinguished *SGB* and *Marasi v Petroleum, Oil and Gas Corporation of South Africa (SOC) Ltd*[10] on the basis that in *Marasi* the employee was required to operate heavy and dangerous equipment and in *SGB* the employee smoked cannabis whilst on duty[11].

[10] The consideration was whether the employee concerned was stoned (intoxicated) at work and thus impaired. In *Enever,* the court held that[12]:

> "Although no medical evidence was led, the Respondent conceded that, unlike alcohol, cannabis stays in the blood system for longer than is the case with alcohol. This underscores the point that a mere positive test for cannabis does not address the sobriety of the user or indicate whether they are impaired from carrying out their duties. A further consideration, as pointed out above, is that the Appellant does not operate or work with any heavy or dangerous machinery. Her job is plainly an office desk job. I do not accept that because the Respondent has a generally dangerous workplace the rule is justified or that, that is an inherent requirement of the job."

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[8] *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA and Others* (2014) 35 ILJ 943 (LAC) at para 20.
[9] *Herholdt v Nedbank Ltd (COSATU as amicus curiae)* [2012] 11 BLLR 1074 (SCA) at paras 12 and 13.
[10] [2023] 10 BLLR 1043 (LC); (2023) 44 ILJ 2261 (LC).
[11] *Enever* (id fn 3) at para 43.
[12] *Enever* (id fn 3) at para 44.

[11] The Applicant's contention therefore that *Enever* is authority for a blanket rule condoning cannabis use or that it requires proof of intoxication in all circumstances is incorrect. In fact, the Court in *Enever* was at pains to point out that this was not to be the case.[13]

[12] Ultimately, the arbitrator concluded, like in *Enever,* that there was no evidence led that that the employee acted in any manner which showed that he was unable to perform his duties at the time that the test was taken. He considered the arguments by the employee that dismissal remains a measure of last resort and all circumstances should be considered before a decision is made to dismiss. Also, that there was no reason to believe that the employee will repeat the misconduct.

[13] In the Court's view, the arbitrator was acutely aware of his duties, assessed the evidence before him in its totality, considered the zero-tolerance policy as against the law as it was and considered the evidence against it to determine whether dismissal was appropriate as in the *SGB* matter or whether the facts are similar to those in *Enever.* As indicated *a quo,* the arbitrator may have incorrectly found that the risk was no longer high. This however is not sufficient to establish a reviewable irregularity. The arbitrator's outcome therefore is not one a reasonable decision-maker could not reach. The findings by the arbitrator are not divorced from the material before him and he did not misconceive what was required of him.

[14] The arbitrator ordered that Mantis should be reinstated by 1 September 2024 and receive backpay from the date he was dismissed. His fixed term contract remained extant at that stage. *Toyota SA Motors*[14] is distinguishable from the facts herein in the circumstances as the order of reinstatement was not preceded by the fixed term contract expiring.

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[13] See paragraphs 49 to 50 thereof.
[14] *Toyota SA Motors (Pty) Ltd v CCMA and Others* (2023) 44 ILJ 1038 (LAC).

[15] In *Equity Aviation Services*[15] the Constitutional Court held that:

> *"It is trite law that the power to grant a remedy in section 193 is by its nature discretionary and that the discretion must be exercised judicially by a court that enjoys that unfettered discretion….*
>
> *…The Labour Court made an order replacing the award of the Commissioner's. The Labour Court's decision thus operated automatically from the date of the Commissioner's award. In determining whether the Labour Court correctly reviewed the award, the Labour Appeal Court interpreted the order of the Labour Court and rightly found that the order reinstating Mr Mawelele was correct. The Labour Appeal Court then assumed, correctly in my view, that it could not consider the question whether the reinstatement order should be made effective to a date later than the award as the issue of the discretion in respect of the retrospectivity of the reinstatement had not been raised, either in the notice of appeal or, seemingly, in argument before that Court. The Labour Appeal Court concluded that properly interpreted the order of the Labour Court meant that reinstatement should operate from the date of the award. It then made an order reflecting that position as it was not open to it to deal with the extent of the retrospectivity of the reinstatement."*

[16] Unlike the position that the LAC was in above, the arbitrator did consider retrospectivity and made the award retrospective to the date of dismissal. The Court was therefore entitled to amend the award accordingly. No evidence was placed either before the arbitrator or the Court as to any impediment in ordering reinstatement nor were any submissions made by either party as to amending the relief granted by the arbitrator. This is therefore not an issue that was before this Court.

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[15] *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (CCT 88/07) [2008] ZACC 16; [2008] 12 BLLR 1129 (CC); 2009 (1) SA 390 (CC); (2008) 29 ILJ 2507 (CC); 2009 (2) BCLR 111 (CC)

[17] Having considered the judgment and the submissions of both parties, I am not persuaded that the Applicant's grounds of appeal warrant a conclusion that the appeal would have any reasonable prospects of success. There must be a sound and rational basis to conclude that another court would likely reach a different result. I am not convinced that such a basis has been established.

[18] The arbitrator's application of *Enever* does not establish a precedent that proof of impairment is required in all instances. The arbitrator set out the factors that he deemed appropriate to justify why the zero-tolerance policy should not apply in Mr Mantis' case. It obviously cannot be said to apply to every other law enforcement officer employed by the Applicant. The question remains fact-specific. Whilst this is an important question of law and a discrete issue of public importance with wider impact, the merits nevertheless remain vitally important and often decisive. The merits in Mr Mantis' case are decisive.

[19] I am accordingly not convinced that there are compelling reasons why the appeal should be heard.

Conclusion

[20] It follows therefore that the application should be dismissed.

Order

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

C May

Acting Judge of the Labour Court of South Africa

9 June 2026