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

_____ _____
Signature Date

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case No: JR1798/23

In the matter between:

AVBOB MUTUAL ASSURANCE SOCIETY (PTY) LTD **Applicant**

and

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION **First Respondent**

COMMISSIONER MUKOVHE RAVHURA N.O **Second Respondent**

MEGAREE NARAIDOO **Third Respondent**

Heard: **28 August 2025**

Delivered: **29 May 2026**

JUDGMENT

SIDZUMO, AJ

Introduction

[1] The applicant seeks condonation for the late delivery of the review application. The applicant not only seeks condonation but also seeks to review and set aside two rulings dated 3 July 2023 and 25 August 2023 under case number GATW 3506-23.

[2] The impugned ruling of 3 July 2023 concerns the refusal of a postponement by the second respondent. In this ruling, the second respondent also found that the applicant committed an unfair labour practice within the meaning of section 186(2)(b) of the Labour Relations Act[1] (LRA). It was further the finding of the second respondent that the suspension of the third respondent was unfair.

[3] The second respondent directed the applicant to compensate the third respondent in the amount of R940,293.69 (Nine Hundred and Forty Thousand, Two Hundred and Ninety-Three Rand and Sixty-Nine Cents), payable no later than 17 July 2023.

[4] The second respondent in the ruling of 25 August 2023, dismissed the rescission application and confirmed his finding of 3 July 2023.

Condonation

[5] Section 145(1A) of the LRA provides that this Court may condone the late filing of a review application. Rule 42(3) of the Rules Regulating the Conduct of the Proceedings of the Labour Court[2] (the rules) provides that this "*court may, on good cause shown, condone non-compliance with any period prescribed by these rules'*.

[6] The applicant at the hearing of this review application, sought condonation for the late filing of the review application of both findings of 3 July and 29 August 2023.

[7] The condonation application is unopposed. In the absence of any opposition, the application falls to be determined on the papers as they stand, and the Court is entitled to proceed on the basis that the relief sought is uncontested.

[1] Act 66 of 1995, as amended.
[2] Published 3 May 2024 (GN 50608). Effective 17 July 2024.

[8] The applicant's explanation for the late filing of its review application rests on the chronology of the rescission proceedings. It contends that it had initially sought the rescission of the impugned award delivered on 6 July 2023. The ruling on rescission was only communicated to the applicant on 29 August 2023. The applicant submits that, mindful of the six-week period prescribed for lodging a review application, it elected to pursue the internal remedies in full before approaching this Court. In its view, piecemeal reviews are undesirable and should be avoided, hence the delay in filing.

[9] The applicant further submits that it was only able to arrange a consultation on 11 September 2023 and gave instructions to prepare an application for review.

[10] Although the applicant submits that that the delay in the delivery of this review application in respect of the postponement ruling and the default arbitration award is not excessive and that a reasonable explanation has been provided, the application for review was filed on 9 October 2023.

[11] The LRA makes it clear that a review application must be filed within six weeks of the date the award was served on the applicant. Should the applicant fail to file its review application within the six week's period it is trite that the applicant should seek condonation.

[12] The applicant's explanation on its decision to pursue rescission of the award before instituting review proceedings was prudent and consistent with the principle that litigants should exhaust available remedies before approaching this Court. The explanation for the delay is reasonable and no prejudice has been demonstrated. I also cannot find that the applicant has engaged in any dilatory conduct and good cause has been shown by the applicant.

Factual background

[13] Prior to her resignation on 10 May 2023, the third respondent was employed by the applicant on 1 December 2019 in the capacity of Enterprise Architect, classified at Paterson Code D2 level. In or about July 2020, the third

respondent applied for the position of Application Development Manager and was subsequently promoted to that role.

[14] On 13 February 2023, the third respondent was placed on precautionary suspension following her final written warning of 5 December 2022.

[15] On 2 March 2023, the third respondent referred an unfair labour dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA), which dispute remained unresolved, the arbitration was set on 20 June 2023.

[16] On the day of the arbitration, 20 June 2023, present at the hearing was the third respondent and her representatives, but there was no representative for the applicant.

[17] The second respondent took it upon himself to call the applicant's representative Ms Prudence Ndlovu ('Ms Ndlovu') about the non-attendance. The second respondent was informed by Ms Ndlovu that she is attending a compulsory class for the Advanced Management Programme for Future Leaders at Wits Business School.

[18] Ms Prudence Ndlovu informed the second respondent that an application for postponement was filed on 5 June 2023. However, it was discovered that in fact the email that was sent on the 5 June 2023 was a notice of set down and not an application for postponement.

[19] The second respondent discovered that the attached application in the papers before him for postponement was filed on 13 June 2023 and not on the 5th as alleged by the Ms Ndlovu. The third respondent on 14 June filed her papers opposing the application for a postponement. There was no response from the applicant.

[20] The second respondent proceeded to determine the matter before him in the absence of the applicant.

Test for review

[21] The test for review is whether the decision reached is one that no reasonable decision-maker could have made. In terms of section 145 of the LRA, an arbitration award or ruling may be set aside if it contains a defect contemplated by the section, rendering the outcome so unreasonable that it falls outside the bounds of reasonableness.

[22] In Herholdt *v Nedbank Ltd*[3], the Supreme Court of Appeal (SCA) made it clear that the review of an arbitration award is permissible if the defect in the proceedings falls within one of the grounds in section 145(2)(a) of the LRA. The following was stated:

> "The height of the bar set by the provisions of s 145(2)*(a)* of the LRA is apparent from considering the approach to reviews of arbitral awards under the corresponding provisions of the Arbitration Act 42 of 1965. The general principle is that a 'gross irregularity' concerns the conduct of the proceedings rather than the merits of the decision. A qualification to that principle is that a 'gross irregularity' is committed where decision-makers misconceive the whole nature of the enquiry and as a result misconceive their mandate or their duties in conducting the enquiry.*"*

[23] The question before this Court is whether the second respondent misconceived the nature of the enquiry before him and consequently made an arbitration award so unreasonable that no reasonable decision-maker could have reached the same conclusion.

Postponement ruling

The award to the postponement ruling

[24] The second respondent's reasoning of the evidence concerning whether to postpone the arbitration hearing of 20 June 2023 is captured as follows:

> '9. Subsequent to Ms. Ndlovu noticing that that the application was never served on the 05 June 2023 as she stated, she advised that it would appear that the application (file 13 June 2023) was not in line with the CCMA rules and thus the proceedings can continue as the application

[3] (2013) 34 ILJ 2795 (SCA) at para 10.

was not properly before the Commission. Based on that advise, the application was not even considered as it did not comply with the rules.

10. I must also add that I expressed a view that the respondent could have also acted differently when they received the opposing submissions. The opposing submissions outright pointed out the shortcomings of the applications that had been filed by the respondent. Now, for the respondent to simply ignore such, and still harbor a view that their application was proper, such was unreasonable. A reasonable official would have gone back and checked whether their application was in order. If that was done, then the respondent would have seen that they had not served the application and probably made arrangements or applied to condone the non-compliance with the time frames in terms of the rules.

11. To this end, the application was disregarded / dismissed for want of compliance with the rules.'

Analysis

Postponement ruling

[25] Rule 23 of the Rules for the Conduct of Proceedings before the Commission for Conciliation, Mediation and Arbitration (CCMA rules) regulates the postponement of arbitration proceedings. It provides that a postponement may be secured either by written agreement between the parties or, failing that, by way of a formal application on notice in terms of subrule (3).

[26] Subrule (3) stipulates that, where the conditions of subrule (2) are not met, any party may apply in terms of Rule 31 to postpone an arbitration by delivering such application to the other parties and filing a copy with the Commission prior to the scheduled date of the arbitration. Further, the application for a postponement must be brought at least 14 days prior to the date of the hearing on notice to all persons who have an interest in the application.

[27] Section 138 (5) of the LRA provides that where a party to the dispute fails to appear or to be represented at arbitration proceedings, the commissioner is empowered either to dismiss the matter if the absent party was the referring party, or, if the absent party is not the referring party, to continue with the arbitration in that party's absence or to adjourn the proceedings to a later date. This rule embodies the principle that proceedings must not be unduly delayed by non-attendance, while at the same time preserving the commissioner's discretion to ensure fairness in the conduct of the arbitration.

[28] Rule 23(5) of the CCMA rules, provides that there is no right to postponement and arbitration will proceed as scheduled unless the Commission or Commissioner notifies the parties that the matter has been postponed.

[29] In Free *State Gambling and Liquor Authority v Motane NO and others*[4] the Court held:

> 'In *Carephone (Pty) Ltd v Marcus NO and Others*, Froneman DJP (as he then was) reiterated that an application for postponement was not a matter of right. It is an indulgence granted by the court to a litigant in the exercise of a judicial discretion… Emanating from the above and other jurisprudence, it is apparent that:
>
> a) postponements at arbitration hearings are not to be readily granted.
>
> b) postponements in arbitrations should be granted on "less generous basis." This approach is informed by the recognition that the LRA requires that labour disputes need to be resolved expeditiously and thus arbitrators have a wide discretion in granting or refusing to grant a postponement;
>
> c) where fundamental fairness and justice justifies a postponement, the arbitrator may in appropriate cases, allow such an application even if it was not timeously made;
>
> d) the Labour Court sitting in review will adopt a stringent and restricted approach to interfering with the refusal to grant postponements by arbitrators;

[4] (JR1130/16; J23/15) [2017] ZALCJHB 88 (10 March 2017) at paras 15 and 16.

e) it is only when a compelling case has been made for interfering with the exercise of the discretion of the arbitrator, will the court interfere with the refusal to grant a postponement. This can be in instances where the arbitrator was influenced by wrong principles or misdirection on the facts, or where the decision reached could not reasonably have been made by an arbitrator properly directing him/herself to all the relevant facts and principles.'

[30] It is clear from the facts before the second respondent, that there were circumstances that ought to have alerted the applicant to the likelihood that the application for a postponement will be decided upon by the second respondent at the hearing. Thus, attending the proceedings and seeking a postponement was pivotal in ensuring that the employer's version could be heard. These circumstances include:

30.1 The second respondent had not notified the applicants regarding the postponement in terms of rule 23 (5) of the CCMA rules.

30.2 By her own admission, Ms Ndlovu made several follow-up calls and visits to the CCMA seeking the Commissioner's ruling on the application for postponement, but received no response from the first respondent.

30.3 The filing of opposing papers by the third respondent on 14 June 2023 should have indicated to the applicant that the application for postponement was contested and likely to proceed as anticipated.

30.4 The applicant being aware of the late filing of the application for postponement failed to serve a condonation application. The applicant could not have relied on the email of 5 June that an application for postponement was made as it had a wrong attachment on it.

30.5 Commissioners receive bundles on the day of arbitrations when parties exchange bundles.

30.6 Ms Ndlovu acknowledges in her founding affidavit to the rescission application that '*the respondent is aware that an application for*

postponement is not a right but an indulgence granted by the CCMA in the exercise of its judicial discretion'.

[31] These factors, taken together, ought to reasonably have prompted the applicant to arrange for an alternative representative to attend in her place. It must be observed that the consequences now complained of are of the applicant's own making. On the facts presented, the second respondent correctly noted that the applicant could have acted differently upon receipt of the opposing submissions, which clearly identified the deficiencies in the application for postponement filed.

[32] The second respondent was vested with a discretion to grant or refuse a postponement. I am satisfied that such discretion was properly exercised. The record does not reveal that the second respondent failed to consider all relevant facts. The refusal to postpone was a decision that a reasonable commissioner, properly directing himself to the facts and applicable CCMA Rules, was entitled to make. Nothing before him suggests that a reasonable arbitrator would have reached a different conclusion, nor is there evidence of any misdirection on the facts

<u>The rescission ruling of 25 August 2023</u>

[33] Rule 31 and 32 of the CCMA rules provides amongst others for the rescission of arbitration rulings. Section 144 of the LRA provides for the variation and rescission of arbitration awards and rulings. It is stated that:

> 'any commissioner who has issued an arbitration award or ruling, or any other commissioner appointed by the director for that purpose, may on that commissioner's own accord or, on the application of any affected party, vary or rescind an arbitration award or ruling-
>
> (a) erroneously sought or erroneously made in the absence of any party affected by that award;
>
> (b) in which there is an ambiguity, or an obvious error or omission, but only to the extent of that ambiguity, error or omission;

(c) granted as a result of a mistake common to the parties to the proceedings; or

(d) made in the absence of any party, on good cause shown.

[34] It is common cause that the applicant's representatives were absent from the arbitration proceedings. The application for rescission therefore arises from a ruling made in the applicant's absence and, in terms of section 144 (d) of the LRA, can only succeed if the applicant establishes good cause.

[35] The Labour Appeal Court in *Mohube v CCMA and others*[5] stated that:

> 'there is no precise definition of the term "good cause", but it is accepted that this entails that the applicant for such relief must show at least the following: (a) an absence of wilfulness; (b) that it has a reasonable explanation for the default; (c) that the application for rescission is bona fide and not made with the intention to delay; and that (d) (i.e. as in the case of the appellant here who referred the dispute) that it has a bona fide claim against the other party/ies. All these elements must be considered and weighed and for example, proof of a bona fide claim may make up for a weaker explanation'

[36] The explanation tendered to the second respondent does not establish good cause for the applicant's failure to attend the arbitration. An applicant cannot assume that proceedings will not continue merely because a postponement application has been lodged, in this matter it was filed late and not in compliance with the CCMA Rules.

[37] There was no evidence presented of an uncontrollable emergency, in this instance the attendance at the Wits Business school with the timetable known by Ms Ndlovu well in advanced cannot be said to fall under such emergency. nor was there any suggestion that the notice of set-down from the CCMA was not received. In these circumstances, I cannot fault the second respondent's decision to proceed with the matter after having looked at all the facts before him.

[5] (JA 18/2022) [2023] ZALCJHB 162 (18 May 2023) at para 25.

[38] The conduct of the applicant amounts to negligence. The second respondent recorded that a grace period of thirty minutes was afforded to the applicant's representatives to present themselves. Upon the lapse of that period, the second respondent initiated a call. It is evident that, but for this call, Ms Nldovu would have continued with her attendance at the business school without making any effort to ascertain whether the arbitration was proceeding. This underscores the applicant's disregard for the process and supports the conclusion that no *bona fide* explanation was advanced for the failure to attend.

[39] Further, it is recorded by the second respondent that Ms Ndlovu, upon realising her non-compliance with the prescribed timeframes for the postponement application, requested an opportunity to take instructions and revert. She subsequently returned and confirmed that the arbitration could proceed in her absence, which constitutes a wilful absence.

[40] This raises the question of what the second respondent was expected to do after being expressly authorised to continue. It is particularly concerning that Ms Ndlovu, at that juncture, neither sought condonation for the late filing of the postponement application nor pursued any procedural remedy available to her, but instead accepted the proceedings and later sought rescission of the ruling. Such conduct demonstrates a lack of good faith.

[41] Therefore, the application for review of the rescission application fails.

<u>Whether the applicant committed an unfair labour practice in terms of section 186(2)(b) of the LRA</u>

[42] I now turn to deal with the second leg of the impugned award of July 2023. The issue before the second respondent was whether the applicant, by suspending the third respondent, committed an unfair labour practice as contemplated in section 186 (2)(b) of the LRA.

[43] The second respondent had to consider the third respondent submission that, upon being issued with a letter of suspension, the applicant failed to afford her an opportunity to respond or to provide reasons why she should not be

suspended. It is contended that the applicant's policy prescribes that the third respondent ought to have been granted such an opportunity prior to the suspension being effected.

[44] The second respondent placed reliance on the Constitutional Court's judgment of *Long v South African Breweries (Pty) Ltd and others*[6]. According to the second respondent, this authority clarified that the making of prior representations is not a prerequisite for the imposition of a precautionary suspension, save where such a requirement is expressly stipulated in a disciplinary policy or collective agreement. The second respondent reasons this further and state that '*in the employer's Disciplinary Code and Procedure at clause 10.3 there is a requirement to afford an employee some form of an opportunity to make representations, which was clearly not done'*.

[45] Clause 10.3 provides as follows:

> 'Prior to any decision to suspend an employee, the employee shall be given an opportunity to make submissions regarding the employer's intention to suspend. Should management find that there is still cause to suspend after such submissions have been made by the employee, the employee shall be informed of the suspension in writing.'

[46] The second respondent also considered the applicant's letter, dated 13 February 2023, suspending the third respondent, which document expressly records the following:

> "You are hereby suspended from work on full pay pending investigation into allegations of improper behaviour in your capacity as a manager and bringing the company's name and image into disrepute."

[47] In his consideration of the letter, the second respondent took issue of the fact that Ms Ndlovu was responsible for drafting the suspension letter, which was to be signed by N Nxumalo, both of whom were also the authors of the Disciplinary Code and Procedure. The second respondent contended that, in doing so, they disregarded and acted in contravention of their own policy.

[6] [2019] 6 BLLR 515 (CC).

[48] The second respondent concluded that the code required the employee to be given an opportunity to make representations before being suspended which were clearly not done. Further, that the letter of suspension does not say what the third respondent is accused of. He found the suspension to be unfair and amounted to an unfair labour practice as contemplated in section 186(2)(b) of the LRA.

[49] The applicant submits that the second respondent committed a gross irregularity, or alternatively misconceived the nature of the enquiry, by importing a requirement of compliance with a disciplinary policy or collective agreement into the Constitutional Court's decision in *Long v SAB*. The Constitutional Court held unequivocally that where a suspension is precautionary and not punitive, there is no obligation to afford the employee an opportunity to make representations. This principle was not qualified. Accordingly, an employer is not required to provide such an opportunity prior to imposing a precautionary suspension.

[50] The Constitutional Court made it clear that an employer is under no obligation to afford an employee an opportunity to make representations when effecting a suspension, unless the suspension is punitive in nature. This is clearly due to the fact that precautionary suspension is a holding operation which does not generally require a pre-suspension hearing.

[51] In the present matter, the applicant's Disciplinary Code expressly provides that an employee must be afforded an opportunity to make representations prior to suspension. As the Code forms part of the employment contract, the employer is bound to comply with its provisions. Accordingly, the third respondent was entitled to be heard before any precautionary suspension could be imposed. While the Constitutional Court held that prior representations are not generally a prerequisite for precautionary suspension, that principle cannot be interpreted as permitting an employer to disregard its own binding disciplinary framework. To hold otherwise would render the Disciplinary Code ineffectual and undermine the very purpose of such policies, which is to regulate the employment relationship with fairness and consistency.

Compensation

[52] The second respondent awarded compensation equivalent to seven months' remuneration, reasoning that the suspension of the third respondent was procedurally unfair. This conclusion was drawn from the circumstances surrounding the suspension, particularly the evidence and submissions advanced by the third respondent. It was contended that the line manager, dissatisfied with being overruled in relation to both the final written warning previously issued and the performance rating, acted in a manner that reflected this discontent.

[53] The second respondent observed that the suspension was affected immediately after the grievance meeting in which the final written warning and performance rating had been overturned, with the third respondent being instructed to wait in the boardroom before being informed of her suspension. In the view of the second respondent, these events demonstrated that the suspension was tainted by improper motive and thus unfair.

[54] Section 193 (4) of the LRA provides that an arbitrator may determine any unfair labour practice dispute referred to the arbitrator in terms that the arbitrator may deems reasonable which may include ordering, reinstatement, re-employment or compensation.

[55] It is trite that compensation for unfair suspension is a *solatium* designed to compensate employees for non-patrimonial loss. It must be just and equitable and certain factors have to be considered. What is considered by the court amongst others, is whether the suspension was malicious, whether the award was punitive, whether was for a valid reason and unduly prolonged.

[56] The court in *IMATU obo Senkhane v Emfuleni Local Municipality and Others*[7] when considering whether to award compensation or not said that it was not

[7] (JR1871/14) [2016] ZALCJHB 296 (29 July 2016).

unreasonable to take into account, the employee's failure to pursue her rights expeditiously and thus attempt to or mitigate the adverse impact of suspension. In essence, the second respondent should take into account all relevant facts including whether the suspension adversely affected the dignity of the employee.

[57] In *Daniels v Eskom SOC Ltd*[8], the CCMA awarded five months' compensation, having found that the suspension had adversely affected the employee's dignity. By contrast, in the present matter no evidence was led to demonstrate that the suspension impacted the third respondent's reputation or dignity, yet compensation of seven months was awarded.

[58] The second respondent confined his reasoning to the circumstances surrounding the suspension. The third respondent, in her third month of suspension, elected to resign rather than acting promptly to challenge her suspension. In these circumstances, I am satisfied that the award of seven months' compensation was neither just nor equitable, as the relevant considerations outlined above were not taken into account. The suspension was effected with pay, having regards to Long, *supra*, the suspension was precautionary in nature and the third respondent has not suffered any patrimonial loss.

Conclusion

[59] Having read and considered the submissions made, pleadings and the record filed herein and in the absence of evidence that the first respondent's discretion was arbitrary or unreasonable, I am therefore satisfied that the first respondent's award was reasonable in light of the evidence that was placed before her by the parties in the arbitration proceedings.

[60] Consequently, I make the following order.

Order

[8] (GAJB21883-17) [2018] ZACCMA 1 (6 March 2018).

1. The late delivery of the review application is hereby condoned.

2. The application for review is dismissed.

3. The award of seven months' compensation made by the second respondent is reviewed and set aside.

4. There is no order as to costs.

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W. N. Sidzumo

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant	:	Adv. Riaan Grundlingh
Instructed by	:	Bester & Rhoodie Attorneys
For the third Respondent:		Adv. D Moodliyar
Instructed by	:	Moodliyar & Bedhesi Attorneys