



(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: JR 610/23

In the matter between:

GLORY MLAMBO

Applicant

and

DELL COMPUTER (PTY) LTD

First Respondent

PAUL PHUNDU N.O

Second Respondent

THE COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION

Third Respondent

Heard: 30 July 2026

Delivered: 7 August 2026

This judgment was handed down electronically by consent of the parties' representatives by circulation to them via email. The date for hand-down is deemed to be 7 August 2026.

JUDGMENT

PRINSLOO, J

Introduction

[1] The Applicant seeks to review and set aside an arbitration award dated 13 March 2023. The Second Respondent (the arbitrator) found that her dismissal

was fair in all respects and dismissed her case. The First Respondent (Dell) opposed the application.

Background facts

- [2] The Applicant was employed by Dell as an IT Analyst since 2002. Following a performance improvement plan and incapacity inquiry for poor performance, the Applicant was dismissed. She subsequently referred an unfair dismissal dispute to the Third Respondent (CCMA).
- [3] The matter was arbitrated, and the issue the arbitrator had to decide was whether the Applicant had been unfairly dismissed. The arbitrator concluded that the Applicant's dismissal was both substantively and procedurally fair.
- [4] The Applicant filed an application to review and set aside the arbitration award in terms of section 145 of the Labour Relations Act¹ (LRA), which is opposed by Dell.
- [5] Before I deal with the merits of the review application, I deem it prudent to address a few specific topics.

Affidavits in a review application

- [6] In *Elegant Line Trading 257 CC v MEC for Transport, Eastern Cape*², the Court confirmed that:

‘In motion proceedings the affidavits constitute both the pleadings and the evidence and the issues and averments in support of the parties’ cases should appear clearly therefrom. It is trite that an applicant must make out its case in the founding affidavit which must contain sufficient facts in itself upon which a court may find in the applicant’s favour.’

- [7] It is trite that an applicant’s case must be made out in the founding affidavit. In *Airports Company of South Africa (SOC) Ltd v Tswelokgotso Trading Enterprise CC*³ the court held that:

‘Consequently, the applicant must set out sufficient facts in the founding affidavit to disclose a cause of action, that is, the founding affidavit must be

¹ Act 66 of 1995, as amended.

² [2022] ZAECHC 45 at para 2.

³ [2022] ZAGPJHC 410 at para 9.

self-contained. The replying affidavit (and in this instance the supplementary affidavit) cannot be used to augment the applicant's case.'

- [8] As was stated in *Business Partners Ltd v World Focus 754 CC*⁴, in application proceedings the affidavits constitute not only the pleadings but also the evidence, and an applicant must therefore make out his or her case in the founding affidavit and must stand or fall by the allegations contained therein.
- [9] Affidavits in review applications serve two primary purposes: one, to define the issues between the parties, and two, to place the essential averments and evidence before the court and alert other parties about those. Rule 37 (previously 7A) of the Labour Court Rules (the Rules) provides for the delivery of four sets of affidavits in review applications, to wit a founding, supplementary, answering and replying affidavit.
- [10] In recognition of the fact that the record obtained by an applicant in a review application may reveal that averments made in the founding affidavit were erroneously made or omitted, Rule 37 (20) and (21) (previously 7A(8)(a)) permits the applicant to deliver a supplementary affidavit within 5 days after the transcribed record has been filed. This affords the applicant the opportunity to supplement and amend the factual and legal grounds upon which he or she relies considering the record. A weak founding affidavit can be augmented by a supplementary affidavit.⁵
- [11] As a general principle, the applicant in a review application must make out his or her case in the founding affidavit, as may be supplemented by a supplementary affidavit, if necessary, after the transcribed record became available. The supplementary affidavit may do no more than supplement the grounds for review recorded in the founding affidavit or abandon any of them.
- [12] The principle nonetheless remains that a case must be made out in the founding papers. Its rationale promotes legal certainty. This is evident from the approach adopted by the Constitutional Court in *South African Transport and Allied Workers Union and another v Garvas and others*⁶, where it held that:

⁴ 2015 (5) SA 525 (KZD) at para 8.

⁵ A Myburg, C Bosch *Reviews in the Labour Courts*, 1st ed (2016) at pp 438 – 441.

⁶ 2013 (1) SA 83 (CC) para 114.

'Holding parties to pleadings is not pedantry. It is an integral part of the principle of legal certainty which is an element of the rule of law, one of the values on which our Constitution is founded. Every party contemplating a constitutional challenge should know the requirements it needs to satisfy and every other party likely to be affected by the relief sought must know precisely the case it is expected to meet.'

- [13] An applicant's pleadings contain the legal basis of the claim under which an applicant has chosen to invoke the court's competence. In other words, not only the formal terminology of the notice of motion, but also the contents of the supporting affidavits must be interpreted to establish what the legal basis of the applicant's claim is.
- [14] Rule 37 (3) (previously 7A(2)(c)) provides that the notice of motion must be supported by an affidavit, setting out the grounds upon which the applicant relies to have the decision or proceedings reviewed, corrected or set aside.
- [15] As to the requirement of setting out the grounds for review, it requires the applicant to set out, with sufficient precision and detail, the grounds for review and the bases upon which such grounds are relied on.
- [16] The role of the reviewing Court is limited to deciding issues that are raised in the applicant's founding (and supplementary) affidavit. This was confirmed by the Constitutional Court in *CUSA v Tao Ying Metal Industries and Others (Tao Ying)*⁷ where it was held that:

'...the role of the reviewing court is limited to deciding issues that are raised in the review proceedings. It may not on its own raise issues which were not raised by the party who seeks to review an arbitral award. There is much to be said for the submission by the workers that it is not for the reviewing court to tell a litigant what it should complain about. In particular, the LRA specifies the grounds upon which arbitral awards may be reviewed. A party who seeks to review an arbitral award is bound by the grounds contained in the review application. A litigant may not on appeal raise a new ground of review. To permit a party to do so may very well undermine the objective of the LRA to have labour disputes resolved as speedily as possible.'

⁷ (2008) 29 ILJ 2461 (CC) at para 67.

[17] A party who seeks to review an arbitration award is bound by the grounds for review contained in the review application, subject to one qualification, namely that the Court is obliged to deal with a point of law apparent from the papers⁸.

[18] In short: it is critical that the legal foundation of the review application be canvassed in the founding or supplementary affidavit and that it be linked to the applicant's grounds for review, which must be set out in sufficient particularity. Abstract statements or generic conclusions, lacking detail, do not constitute grounds for review.

[19] Grounds for review cannot be formulated for the first time in heads of argument. In *Northam Platinum Ltd v Fganyago NO and others*⁹ it was held that:

'In my view the law is very clear that a ground for review raised for the first time in argument cannot be sustained. The basic principle is that a litigant is required to set out all the material facts on which he or she relies in challenging the reasonableness or otherwise of the commissioner's award in his or her founding affidavit.'

A section 145 review

[20] In *National Bargaining Council for Road Freight and Logistics Industry v Deyse N.O and Others*¹⁰ (*Deyse*) the Labour Appeal Court (LAC) considered the test to be applied in review applications, pursued in terms of section 145 of the LRA. The LAC held:

'While the intention of the drafters of section 145 may have been to limit the scope of review (as evidenced by the limitation of the grounds for review in s 145 to those recognised by section 33 of the Arbitration Act, the subsequent enactment of section 33 of the Constitution, which guarantees the right to administrative action that is lawful, reasonable and procedurally fair, has had the effect of considerably expanding the scope for review. In *Sidumo and another v Rustenburg Platinum Mines Ltd and others* (*Sidumo*), the Constitutional Court held that a CCMA arbitration constituted administrative action but was not subject to the Promotion of Administrative Justice Act (PAJA), and that section 145 of the LRA was to be interpreted as

⁸ Ibid.

⁹ (2010) 31 ILJ 713 (LC) at para 27.

¹⁰ (2025) 46 ILJ 1679 (LAC); [2025] 8 BLLR 790 (LAC) at paras 30-31.

encompassing the constitutional standard of reasonable administrative action. The test for reasonableness to be applied in an application for review under section 145 is whether the decision reached by the arbitrator is one that a reasonable decision-maker could not reach.

It should be recalled that the issue that served before the court in *Sidumo* was the “moral or value judgment to established facts and circumstances” applied by a commissioner when determining the fairness of the penalty of dismissal. The “threshold of reasonableness” established by the judgment recognises that in relation to the penalty of dismissal, value choices may differ in relation to the same factual matrix but nonetheless fall within a range of decisions to which a reasonable decision-maker could come. The metaphor of an elastic band has been usefully employed to illustrate the applicable threshold – the function of the review court is to determine the point to which the elastic of reasonableness can stretch without snapping.’

[21] In *MacDonald’s Transport Upington (Pty) Ltd v Association of Mineworkers and Construction Union and others*,¹¹ referring to *Democratic Nursing Organisation of SA on behalf of Du Toit and another v Western Cape Department of Health and others*,¹² the LAC said that:

‘Since the advent of the Constitution of the Republic of South Africa 1996 (the Constitution), the concept of review is sourced in the justifications provided for in the Constitution and, in particular, that courts are given the power to review every error of law provided that it is material; that is that the error affects the outcome...

To recap, Navsa AJ said in *Sidumo* at para 105 that the review powers in terms of s 145 “must be read to ensure that administrative action by the CCMA is lawful, reasonable and procedurally fair”. Given that the section must be interpreted to be in compliance with the Constitution, it would appear that the concept of error of law is relevant to the review of an arbitrator’s decision within the context of the factual matrix as presented in the present dispute; that is a material error of law committed by an arbitrator may, on its own without having to apply the exact formulation set out in *Sidumo*, justify a review and setting aside of the award depending on the facts as established in the particular case.’ (own emphasis)

¹¹ (2016) 37 ILJ 2593 (LAC) at para 23.; [2017] 2 BLLR 105 (LAC).

¹² (2016) 37 ILJ 1819 (LAC) at paras 21-22.

[22] In *Deyse*¹³ the LAC distinguished between review applications where the applicant seeks to review an arbitration award on the basis of a material error of law committed by an arbitrator and where the review is sought because the arbitration proceedings resulted in an unreasonable award.

[23] The difference is explained as follows:

‘Reading down section 145 to incorporate a requirement of reasonableness is wholly appropriate in a case such as *Sidumo*, concerned as it was with the exercise of a value judgment by an arbitrator in relation to fairness as a penalty for misconduct, a judgment that by definition admits a range of responses. Matters such as the present, where the administrative action in issue involves a question of law that can produce a single correct answer, are best understood and assessed when section 145 of the LRA is read as suffused by the constitutional standard of lawfulness. Put another way, just as the constitutional standard of reasonableness was found in *Sidumo* to have suffused section 145, the constitutional standard of lawfulness does likewise.’

[24] What this approach recognises is that the right to review established by section 145, where the applicant seeks to review an arbitration award on the basis of a material error of law committed by an arbitrator, is not limited to circumstances where the alleged error resulted in an unreasonable award. The LAC confirmed that a material error of law is a discrete, substantive ground for review under section 145 of the LRA and that a reviewing court, when faced with what is alleged to be an error in law, does not have to assess whether the arbitrator’s decision was reasonable.

[25] The LAC confirmed that:

In short: although a material error of law may previously have been viewed as no more than a side car on the motorcycle of reasonableness, the constitutional right to administrative action that is lawful requires that the grounds for review established by s 145 of the LRA be understood as admitting a material error of law as a discrete, legitimate ground for review.¹⁴

¹³ Id fn 10 at para 40.

¹⁴ Id fn 10 at para 43.

- [26] Where the test to be applied is the one of reasonableness, the applicant must show that ultimately, considering the evidence placed before him or her, the arbitrator arrived at an unreasonable result.

The review application: analysis

- [27] The Applicant must make out her case in the founding affidavit, as may be supplemented by a supplementary affidavit, and she has to set out, with sufficient precision and detail, the grounds for review and the bases upon which such grounds are relied on.
- [28] In the Applicant's founding affidavit, the grounds for review are recorded as that the arbitrator erred when he accepted evidence, that he made a fatal error, and that he made legal and factual errors. She stated that *'another person in the position of the second respondent would have arrived at a different decision than that the second respondent had arrived at.'*
- [29] In her supplementary affidavit, the Applicant supplemented her grounds for review and, in summary, her case is that the arbitrator *'made an error of law and facts when he failed to take the body of evidence that was put before him'* and *'when he made the ruling, he made an error of law'*. The remainder of the averments contain statements such as that the management of Dell did not tell her how to compile a report or did not show interest in her improvement, which the arbitrator ignored to her prejudice. It is also contended that it was the arbitrator's *'duty to ensure that expectations are communicated to the employees in a fair manner'* and that he failed to do so in this regard.
- [30] In *Moraka v National Bargaining Council for the Chemical Industry and others*¹⁵ the Court held that:

'In setting out the grounds of review in his founding affidavit, the applicant did not set out any factual basis for those grounds, but merely set them out in the form of conclusions. Examples of this are the first two grounds of review he mentions, namely:

"2.1 The Commissioner committed misconduct by making findings not justified on the evidence;

¹⁵ (2011) 32 ILJ 667 (LC) at paras 21 – 23.

2.2 Gravely misunderstood evidence presented before her;...” (sic)

The Labour Appeal Court has made it clear in the unreported case of *Comtech (Pty) Ltd v Commissioner Shaun Molony N.O. & Others* (Case no DA 12/05, dated 21 December 2007) that it is not sufficient for a party simply to relate conclusions of law in the founding papers for a review application. A party must set out the factual grounds on which it seeks to base its review. While it may be excusable in a founding affidavit to state limited grounds of review and in less detail, by the time an applicant has the record of proceedings it must then make up for the deficiencies in the founding affidavit and set out the factual basis for its grounds of review in full. When it came to his supplementary affidavit, the applicant did not supplement or amend the grounds of review set out in the founding affidavit, nor did he lay a factual foundation for the grounds set out in the founding affidavit. On the approach of the LAC in the *Comtech* case, no factual basis was provided for the review application. It was only in his heads of argument that the applicant for the first time set out a factual basis for his claim.

I am bound to follow the approach of the LAC in regard to the assessment of the prospects of success and conclude that the applicant failed to provide any factual basis for his grounds of review in his founding papers. Accordingly, it is not necessary, on the basis of the *Comtech* approach, to consider the merits of the case set out later, and for the first time, in the applicant’s heads of argument.’

[31] In *Tao Ying*¹⁶ it was confirmed that the role of the reviewing court is limited to deciding issues that are raised in the review proceedings. This Court, sitting as a review Court, is not to embark on a fact-finding mission to find facts or evidence to support the Applicant’s grounds for review. It is the Applicant’s duty to tell this Court what evidence was not properly considered, why the arbitrator’s findings were made in error and why the award was reviewable.

[32] In its opposing affidavit, the Respondent took issue with the Applicant’s grounds for review and submitted that it was difficult to glean from the founding and supplementary affidavits what the basis of the application is. The Respondent submitted that the purported grounds for review are no more than a list of evidentiary material which the Applicant alleges was not taken into

¹⁶ Id fn 7.

account, or they are an impermissible attempt to re-plead her version of events, and further it amounts to an attempt to appeal the arbitration award.

[33] There are obvious difficulties with the Applicant's grounds for review.

[34] First, and let it be clear: this is an application for review and not an appeal. This is a difference which this Court must maintain. In *Bestel v Astral Operations Ltd and others*,¹⁷ the LAC considered the limited scope possessed by this Court to review an arbitration award and accepted that an arbitrator's finding will be unreasonable if the finding is unsupported by any evidence, if it is based on speculation by the arbitrator, if it is disconnected from the evidence, if it is supported by evidence that is insufficiently reasonable to justify the decision or if it was made in ignorance of evidence that was not contradicted. The LAC held that:

'...the ultimate principle upon which a review is based is justification for the decision as opposed to it being considered to be correct by the reviewing court; that is whatever this Court might consider to be a better decision is irrelevant to review proceedings as opposed to an appeal. Thus, great care must be taken to ensure that this distinction, however difficult it is to always maintain, is respected.'

[35] Second, it is evident that the Applicant does not have a proper understanding of what would constitute grounds for review. The grounds for review in her founding and supplementary affidavits are not properly articulated. In fact, they amount to no more than statements regarding evidentiary material she alleges the arbitrator did not consider.

[36] The statements, or purported grounds for review, are extremely vague and unsubstantiated. The Applicant did no more than launch a vague and unsupported attack on the arbitrator's findings and make bald allegations which were not linked to the evidence or substantiated at all. The grounds for review are rather legal conclusions or statements or simply the Applicant's personal disagreement with the arbitrator's findings.

[37] The heads of argument filed by the Applicant were of little assistance, as they contained no more than a paraphrasing of the averments set out in the

¹⁷ [2011] 2 BLLR 129 (LAC) at para 18.

Applicant's affidavits. No submissions were made either on the reasonableness test or the errors of law allegedly committed by the arbitrator.

[38] Third, as alluded to, the Applicant must make out her case in the founding and supplementary affidavits. If the Applicant were to pursue the review application on the premise that the outcome of the arbitration was unreasonable, the review test as laid down in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others (Sidumo)*¹⁸ must be applied, and the Applicant's grounds for review in accordance with the *Sidumo* test should have been set out in her affidavits.

[39] The Applicant must show that the arbitrator arrived at an unreasonable result. In fact, the Applicant must show that the decision is one that a reasonable decision maker could not make, based on the evidence presented. The test is not whether the arbitrator came to the best decision or a decision acceptable to the Applicant. A review is not an appeal. Unless the Applicant can show that an error or misdirection caused the result of the award to be unreasonable, it will be of no consequence, even if it exists. The ultimate question is whether, holistically viewed, the decision taken by the arbitrator was reasonable based on the evidence placed before him. This Court must consider the totality of the evidence placed before the arbitrator and cannot embark on a process whereby every minute detail of the arbitration award is assessed and analysed - this will constitute a piecemeal approach which must be avoided.

[40] Where the proper right of review is one based on reasonableness, that is the case that must necessarily be pleaded. An award will only be set aside on review if both the findings and the result are unreasonable. If the result is capable of justification and therefore reasonable, it will not be interfered with on review.

[41] *In casu*, the Applicant did not make a single averment to the effect that the arbitrator's findings were unreasonable, and she failed to show how the arbitrator's factual findings distorted the outcome and how it ultimately rendered the arbitration award unreasonable. What the Applicant failed to state was how the arbitrator's factual findings (or errors) influenced the outcome and how it rendered the arbitration award ultimately unreasonable.

¹⁸ (2007) 28 ILJ 2405 (CC) at paras 78 and 79.

- [42] Fourth, it is evident from the affidavits that the Applicant's case is premised on errors that the arbitrator committed. Factual errors would fall under a reasonableness review, which I already dealt with *supra*. What remains is the Applicant's grounds for review, relating to errors of law.
- [43] Errors of law arise in relation to questions of law and refer to a wrong or mistaken interpretation of a legislative provision. Questions of law are issues determined by authoritative legal principles and include questions a court is bound to answer in accordance with a particular rule or law, and questions as to what the law is.¹⁹
- [44] The LAC explained that a question of law involves a question that can produce a single correct answer and is best understood and assessed when section 145 of the LRA is read as suffused by the constitutional standard of lawfulness.
- [45] The Applicant did not identify any specific error of law made by the arbitrator and none was alluded to during argument.
- [46] The Applicant simply failed to make out a case for review.

Costs

- [47] This Court has a wide discretion in making a cost order, considering the requirements of law and fairness.
- [48] In addressing the issue of costs, Mr Kent for Dell argued that this is a hopeless case and that Dell should not be expected to bear the costs of an application that had no merit. Mr Sadike for the Applicant submitted that there should be no costs order.
- [49] Although this is a case where a cost order would be justified, I am mindful of the fact that the Applicant is an unemployed individual and that a cost order would in all probability not be capable of execution. Therefore, I am of the view that the interest of justice will be best served by making no order as to costs.
- [50] In the premises, I make the following order:

¹⁹ *Media Workers Association of SA and others v Press Corporation of SA Ltd* (1992) 13 ILJ 1391 (A) (Press Corp) 1396F-H, 1397J.

Order

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

C. Prinsloo

Judge of the Labour Court of South Africa

Appearances:

For the Applicant : Advocate T M Sadike

Instructed by : Oosthuizen, Du Toit, Berg & Boon Attorneys

For the First Respondent : Mr J Kent of Solomon Holmes Inc Attorneys

LABOUR COURT