

SOUTH AFRICA / JUDGMENT

# Khumalo v Safety and Security Sectoral Bargaining Council and Others

## (D638/22) [2024] ZALCD 19 (17 July 2024)

[2024] ZALCD 19

COURT  
Labour Court Durban

BEFORE  
T Govender

CASE / FILE NUMBER  
D638/22

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IN THE LABOUR COURT OF  
SOUTH AFRICA, DURBAN

Not Reportable

Case No: D638/22

In

the matter between:

MALI  
THAMSANQA KHUMALO  
Applicant  
and  
SAFETY AND SECURITY  
SECTORAL  
BARGAINING  
COUNCIL  
First Respondent  
HUMPHREY  
NDABA N.O  
Second Respondent  
COMMISSIONER OF  
NATIONAL SOUTH  
AFRICAN  
POLICE SERVICE  
Third Respondent  
MINISTER OF  
POLICE  
Fourth Respondent  
Heard: 23 November  
2023  
Delivered: 17 July 2024

Summary: Review in terms of section 145 of the LRA. Principles concerning review and condonation restated. The Commissioner read common cause facts in a pre-arbitration minute as a stated case in the absence of a stated case being agreed between the parties and ultimately deprived the parties of the opportunity to lead any evidence. In so doing, the Commissioner committed misconduct in the conduct of the proceedings, deprived the applicant of a fair hearing and reached a decision that a reasonable decision-maker could not reach.

## JUDGMENT

GOVENDER, AJ

### Introduction

- [1] The matter before the Court is a review application in terms of section 145 of the Labour Relations Act 66 of 1995, as amended (LRA), wherein the applicant seeks to review and set aside the arbitration award issued by the second respondent on 5 September 2022, which was received by the applicant on 7 September 2022.
- [2] Because the review application was issued on 6 December 2022, outside of the requisite 6-week period is contemplated by section 145(1)(a) of the LRA, the applicant also seeks condonation for the late lateness of the review application.
- [3] Prior to addressing the pertinent legal principles, it is necessary to canvass the material background of the matter.

### Background facts

- [4] During November 2020 a complaint of corruption was made against the applicant. The complainant, a fellow police officer, alleged that the applicant had approached the accused in a drunk driving matter to solicit a bribe in exchange for the applicant derailing the criminal investigation.
- [5] An investigation ensued and the applicant alleges that the investigation was finalised prior to him providing a statement on the matter.
- [6] The applicant was served with a notice to attend a disciplinary hearing on 23 April 2021 in terms of the SAPS Disciplinary Regulations of 2016.

- [7] The applicant subsequently attended an internal disciplinary hearing, was found guilty of the misconduct alleged on 12 November 2021 and the sanction of dismissal was imposed on 24 November 2021.
- [8] The applicant referred an unfair dismissal dispute to the first respondent on 7 December 2021 concerning both procedural and substantive fairness.
- [9] On 25 April 2022, the parties convened for the first sitting of the arbitration proceedings. It appears that all that was agreed on this day was that the parties would hold a pre-arbitration conference and conclude a pre-arbitration minute.
- [10] On 27 May 2022, the arbitration proceedings convened for the second time. The applicant was represented by a union official from POPCRU, and the South African Police Service (SAPS) as the employer party was also represented. The arbitration proceedings did not proceed on this day either because the Afrikaans interpreter which had been requested by the SAPS had not been arranged by the first respondent. The matter was accordingly postponed.
- [11] On 23 June 2022, the parties concluded a pre-arbitration minute.
- [12] When considering the pre-arbitration minute, it is apparent that the document consists of typed text as well as manuscript. The typed section appears to have been completed by the representative of the SAPS, whereas the manuscript appears to have been completed by the applicant's union representative.
- [13] The following portion of the common cause facts recorded in the pre-arbitration minute was relied upon by the Commissioner:

‘... it is further common cause that the applicant is charged with Corruption in the criminal court, it is further common cause that the applicant argued that he can be sanctioned two months without salary, the applicant further argued in mitigation circumstances that he is a first time offender and must be given a second chance, the applicant further argued that the sanction of two months without salary can correct the applicant's behaviour, Section 205(3) of the Constitution of the Republic of South Africa (Act 108 of 1996) outlined the core functions of the South African Police Service. ...’

- [14] However, the parties recorded the following issues which the Commissioner was required to determine:

‘Whether there is an element of dishonesty, whether the Applicant has committed a serious offence, whether the transgression amounts to a criminal conduct, whether the image of the SAPS has been compromised by the actions of the applicant.’

- [15] Concerning the relief sought by the applicant, the following is stated in the pre-arbitration minute in manuscript:

‘THE APPLICANT NEEDS TO BE RE-INSTATED TO HIS JOB IN SAPS. THE APPLICANT TO BE COMPENSATED WITH ALL BENEFITS HE LOST FROM THE DAY OF HIS DISMISSAL TO THE DATE OF HIS RE-INSTATEMENT. AMOUNT TO BE CALCULATED AS PER THE APPLICANT’S LAST PAY SLIP IN HIS JOB.’

[16] The parties further agreed that documents are what they purport to be, the SAPS bore the duty to begin, and each party would be responsible for securing the presence of their witnesses. An Afrikaans to English translator was also required for the arbitration proceedings as foreshadowed above.

[17] It bears emphasis that the pre-arbitration minute demonstrates that the parties understood that there were factual disputes and evidence would be led by each party in support of their respective case.

[18] The next sitting of the arbitration proceedings was held on 27 July 2022. Both parties were again represented.

[19] The Commissioner commenced the proceedings by reading the pre-arbitration minute into the record.

[20] It then appears that the Commissioner formed the view that the matter only turned on the issue of sanction and evidence beyond the sanction was unnecessary. The following exchange is relevant in this regard:

‘MR JOHANNES: No, Commissioner, it is not in ... [intervenes]

ARBITRATOR: Ja, I need to get it if you are going to argue through papers to me, you see. Now, this is clear to me that the issue is the sanction. Ja, you see, and witnesses must talk to the sanction if you call witnesses. Not whether the applicant says I am not guilty, he would not talk to a sanction of two months without pay. That sanction is imposed on someone who is not guilty, not innocent. Now, these are pre-ab [arb] minutes for this arbitration, they are signed by both parties, they bind me. If there is a misunderstanding, the parties will write the re-niche[?] from the pre-ab [arb] and then we call witnesses, we hear

the matter. That is if these minutes are not there. That is what you need to decide now.’

[21] From the above exchange, it is apparent that the Commissioner formed the view that the applicant proposing a sanction of two months suspension, once he was found guilty of the misconduct alleged automatically deprived the applicant of the opportunity to dispute the finding on guilt.

[22] The exchange between the Commissioner and the applicant’s representative continues as follows:

‘MR JOHANNES: Commissioner, no, we understand what you are saying, but in our minds, we thought as much as we have got these pre-ab [arb] minutes, we thought now we are going to be dealing with this whole process as a trial de nova in this platform, which ...[intervenes]

ARBITRATOR: The minutes are de nova. Remember, do not confuse the pre-ab [arb] minutes with the disciplinary enquiry. Once you do the pre-ab [arb] minutes, it is for

this arbitration, so these minutes are de nova. That is what you have agreed de nova.

MR JOHANNES: Mmm.

ARBITRATOR: Ja, forget about the disciplinary hearing, the pre-ab [arb] are not for the disciplinary hearing. They are for this arbitration and that is what ...[indistinct] say to you if there are no pre-ab [arb] minutes, the arbitration cannot continue, the arbitration because they are part of the arbitration. How to shorten proceedings.

MR JOHANNES: Mm.

ARBITRATOR: Mm, so they are binding you.

MR JOHANNES: Commissioner, can I request for just a few minutes? I just need to have ... [intervenes]

ARBITRATOR: Yes, please.

MR JOHANNES: ...with the applicant. Thank you, Commissioner. No Commissioner, I think here, there was somewhere, somehow a misunderstanding. The issue of the common cause on the pre-ar [arb]

emanated from the, what you call, the outcome of the or through the process of the departmental hearing whereby the employee had to be, had to mitigate on the sanction now. Yes, Commissioner, yes, it was said that he is requesting for a, what you call it, two months suspension without a salary. It is not, that it is not disputed. That is why it is also appearing on the pre-ab [arb] minutes that he applied for a two month suspension because he was already found guilty on the departmental case, which is the charge was a corruption one, so he had to ask for that two months suspended at least as a first time offender on the allegation of corruption.

ARBITRATOR: It is not only about that. Those minutes say to me that the... [indistinct], way you do not see eye to eye is the sanction. You get what I am saying?

ARBITRATOR: Ja, that is what it says. Now, I must deal with that. Why must I listen to witnesses who are not disputed in what they are saying?

MR JOHANNES: NO, Commissioner, remember, the witnesses, the witnesses, it was disputed by that process, nut ... [intervenes]

ARBITRATOR: On which?

MR JOHANNES: On that disciplinary hearing

ARBITRATOR: No, I am not, forget about the disciplinary... [talking simultaneously]

MR JOHANNES: Okay, okay, we talk about this now.

ARBITRATOR: At the pre-ab [arb], when I look at those minutes... [talking simultaneously]

MR JOHANNES: Yes.

ARBITRATOR: ... there is no dispute.

MR JOHANNES: Yes, there is no dispute about the cause and all other things ... [intervenes]

ARBITRATOR: Ja.

MR JOHANNES: ...that... [indistinct] and that the applicant met up with them ... [intervenes]

ARBITRATOR: Ja, so why must I hear the evidence? I only listen to evidence where there is a dispute so that I decide who I agree with. In this one on the facts, there is no dispute. The only dispute is the sanction... [talking simultaneously]

MR JOHANNES: The sanction, yes.

ARBITRATOR: ... how can you arrive at the dismissal?

MR JOHANNES: Okay.

ARBITRATOR: So I must deal with that.

MR JOHANNES: Okay, ja. No, that is fine. I think I will [intervenes].’ (Emphasis added)

[23] It is apparent from the above exchange that the Commissioner had decided that he was not going to hear any evidence in the matter, despite the applicant’s representative’s confusion on the way forward and protest in this regard.

[24] It also appears that even the SAPS representative attempted to explain or understood that there were factual issues in dispute, but the Commissioner was adamant that the pre-arbitration minute confined the issues to such an extent that evidence was unnecessary. The following exchange between the SAPS representative and the Commissioner bears emphasis.

‘MR STANDER: Commissioner, sorry, during the initial referral document, the applicant placed in dispute this Regulation 4E of the South African Police Disciplinary Regulations stating that the chairperson was biased. I know it is ... [indistinct] but this is the referral now.

ARBITRATOR: Ja.

MR STANDER: And secondly, that the other witnesses contradict one another

ARBITRATOR: Mm.

MR STANDER: Ja, that is what his initial, what was on the initial referral, but did not per se said Sergeant Kunene, he is disputing Sergeant Kunene ... [intervenes]

ARBITRATOR: Ja, but we start our way from the pre-ab [arb]. I am sketched what is in the pre-ab [arb]. What I am saying, if I write an award, I will summarise the background on these facts, not to say they are accepted or disputed.

MR STANDER: I understand, Commissioner.

ARBITRATOR: So that somebody who is not here understands where the pre-ab [arb] comes from. It is a background.

MR STANDER: Yes, yes.

ARBITRATOR: Ja, I must say it so that you are not surprised when you look at the award, there is this background. Ja, you see. It does not suggest that anyone accepts or denies the background, but it is a background which was, the bundle is part of the hearing, page 126, ja, it is the background, ja. Okay, and then the stated case is those common cause issues. We call them a stated case because they are signed by both parties and then you do your argument then. So how do you want to do it? Do you want to do it, I give you seven days, seven days, or I give you seven days, seven days, you exchange, and then after the seven days, you have another seven days, to reply to each other, then I make an award, or there is no need for that, I just give you seven days, seven days to make your submissions in writing.

MR STANDER: Commissioner, it will be fine with the respondent, seven days.'

[25] But for the applicant's representative enquiring whether the parties would re-convene for mitigation premised on what the Commissioner was saying, it is clear that the remainder of the arbitration record concerned logistical arrangements for the exchange of written submissions because the Commissioner had determined that the common facts reflected in the pre-arbitration minute constituted a stated case.

[26] The SAPS filed submissions with the first respondent on 3 August 2022 and the applicant filed his submissions on 11 August 2022.

[27] It is clear from the submissions filed by the applicant that he raised material disputes of fact concerning the evidence led at the disciplinary proceedings and asked the Commissioner to determine whether the finding on guilt and sanction implemented were appropriate. This again demonstrates that the applicant was not in agreement that the matter turned on sanction alone.

[28] The SAPS's submissions touched on the factual background which it believed supported the finding of guilt, the sanction implemented and then why the sanction of dismissal was appropriate. The remainder of the submissions deal with corruption in general and a consideration of certain case law.

[29] No evidence was led at the arbitration proceedings, and this is the primary ground of review advanced by the applicant.

- [30] As stated, the arbitration award is dated 6 September 2022. The Commissioner ultimately found that the SAPS had successfully demonstrated that the applicant's dismissal was fair.
- [31] The review application was issued on 6 December 2022 and the applicant's condonation application is unopposed.
- [32] The applicant deposed to a supplementary affidavit on 18 March 2023, while it is unclear when the supplementary founding affidavit was filed.
- [33] An answering affidavit was filed on 11 August 2023 on behalf of the fourth respondent, and while having a broad summary of the opposition upfront, this answering affidavit only seems to address the applicant's supplementary founding affidavit in the ad seriatim section.
- [34] The answering affidavit filed on behalf of the fourth respondent is some 65 days late and condonation is also sought in this regard. The applicant has opposed the condonation application for the late filing of the answering affidavit.
- [35] The arbitration award consists of some four pages, two of which include the cover page with the parties' details and the last page being blank. The substance of the arbitration award is covered in a mere two pages.
- [36] Notwithstanding what was stated in the pre-arbitration minute, the Commissioner defined the issue in dispute in the arbitration award as being the harshness of the sanction and the applicant allegedly having submitted that two month's suspension would be fair in the circumstances.
- [37] I now turn to address the law.

#### The test on review

- [38] The test to be applied is that as enunciated in *Sidumo & another v Rustenburg Platinum Mines Ltd & others*[1].
- [39] The Labour Appeal Court in *Goldfields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation & Arbitration & others*[2] affirmed the test on review as follows:

'In short: A review court must ascertain whether the arbitrator considered the principal issue before him/her; evaluated the facts

presented at the hearing and came to a conclusion which was reasonable to justify the decisions he or she arrived at.'

- [40] The review court is not required to consider every factor individually, to consider how the arbitrator treated and dealt with each of those factors and then determine whether a failure by the arbitrator to deal with it is sufficient to set the award aside. A piecemeal approach in considering the award is inappropriate because the reviewing court must consider the totality of the evidence and then decide whether the decision made by the arbitrator is one that a reasonable decision-maker could reach[3].

## The test for condonation

[41] In *Melane v Santam Insurance Co. Ltd*[4] the Court found that in determining whether good cause has been demonstrated for condonation to be granted, the following must be

considered:

‘In deciding whether sufficient cause has been shown, the basic principle is that the court has a discretion to be exercised judicially upon a consideration of all the facts and, in essence, is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation

therefore, the prospects of success, and the importance of the case. Ordinarily these facts are inter-related; they are not individually

decisive, for that would be a piecemeal approach incompatible with a true discretion ...’ (Emphasis added)

[42] In *National Union of Mine Workers v Council for Mineral Technology*[5] the Court stated as follows concerning the interplay between the various factors when considering condonation:

‘The approach is that the Court has a discretion, to be exercised judicially upon a consideration of all facts, and in essence, it is a matter of fairness to both sides. Among the facts usually relevant are the degrees of lateness, the explanation therefore, the prospects of success and the importance of the case. These facts are interrelated: they are not individually decisive. What is needed is an objective conspectus of all the facts. A slight delay and a good explanation may help to compensate for prospects of success which are not strong. The importance of the issue and strong prospects of success may tend to compensate for a long delay. There is a further principle which is applied and that is that without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused.’ (Underlining added.)

## Analysis

[43] The starting point in this matter is to determine the applicant’s condonation application because this directly impugns the Court’s jurisdiction.

[44] As set out above, the applicant is required to demonstrate good cause for condonation to be granted. One of the considerations in determining good cause is the prospects of success. As such, the merits will also be considered.

[45] When considering the degree of delay, the review application was brought some 5 weeks late. This is significant because an applicant in a review application has a period of 6 weeks to bring a review application as per section 145(1)(a) of the LRA.

- [46] The reason for the delay concerns, what appears to be, internal bureaucracy at the applicant's union, POPCRU. While the applicant contends that the review application ought to have been brought by no later than 17 October 2022, it is clear that POPCRU only referred the matter to one of the attorneys on its panel on 1 November 2022, well after the review application should have been brought.
- [47] Between 1 November 2022 and 18 November 2022, the applicant consulted with the attorneys so appointed and papers were prepared for his signature by 18 November 2022. The review application was signed by the applicant on 23 November 2022 and was only issued in this Court on 6 December 2022. The applicant provides no explanation for the delay between 18 November 2022 and in signing the review application on 23 November 2022.
- [48] There is no affidavit from the applicant's attorneys to explain the period between 24 November 2022 and the date when the review application was issued on 6 December 2022.
- [49] When considering the prospects of success, and from what is summarised above, it is clear that the Commissioner committed misconduct in the conduct of the proceedings, because:
- 49.1 The Commissioner firstly interpreted the pre-arbitration minute in a selective fashion and failed to consider the pre-arbitration minute in its entirety, or in its proper context;
- 49.2 The Commissioner refused to allow evidence to be led, despite both parties to the proceedings having highlighted the material disputes of fact that were evident in the matter.
- [50] In so doing, the Commissioner read the common cause facts in an unreasonable fashion and engaged in the incorrect enquiry, i.e. only determining and allowing submissions on sanction.
- [51] The Commissioner also read a portion of the common cause facts as a stated case, when this is not what was contemplated by the parties.
- [52] In *Minister of Police v Mzingeli and Others*[6], the Supreme Court of Appeal restated the following principles regarding a stated case:
- [7] I now turn to the merits of the appeal. Rule 33(1) and (2) of the Uniform Rules provides:
- ‘(1) The parties to any dispute may, after institution of proceedings, agree upon a written statement of facts in the form of a special case for the adjudication of the court.
- (2)(a) Such statement shall set forth the facts agreed upon, the questions of law in dispute between the parties and their contentions thereon. Such statement shall be divided into consecutively numbered paragraphs and there shall be annexed thereto copies of documents necessary to enable the court to decide upon such questions. It shall be signed by an advocate and an attorney on behalf of each party, or where a party sues or defends personally, by such party.

(b) Such special case shall be set down for hearing in the manner provided for trials or opposed applications, whichever may be more convenient.

(c) ...'

[8] It is important to restate the approach to be adopted whenever litigants request a court to invoke rule 33 and determine the issues by way of a stated case. It is incumbent upon the parties to ensure that the stated case contains adequate facts as agreed upon between them. Further, the statement ought to also contain the question of law in dispute between the parties and their contentions regarding these questions of law. Wallis JA reaffirmed this in *Minister of Police v Mboweni and Another*:

'It is clear therefore that a special case must set out agreed facts, not assumptions. The point was re-emphasised in *Bane v D'Ambrosi*, where it was said that deciding such a case on assumptions as to the facts defeats the purpose of the rule, which is to enable a case to be determined without the necessity of hearing all, or at least a major part, of the evidence. A judge faced with a request to determine a special case where the facts are inadequately stated should decline to accede to the request. The proceedings in *Bane v D'Ambrosi* were only saved because the parties agreed that in any event the evidence that was excluded by the judge's ruling should be led, with the result that the record was complete and this court could then rectify the consequences of the error in deciding the special case.[7]

[53] There was no agreement between the parties to proceed by way of a stated case and this being thrust upon the parties by the Commissioner was irregular. Common cause facts in a pre-arbitration minute cannot be elevated to a stated case by any stretch of the imagination. This is because such an approach completely ignores the facts in dispute.

[54] While the pre-arbitration minutes was not articulated with perfection, the Commissioner was seized with determining what the real dispute between the parties was, and he failed in this regard.

[55] While section 138(1) of the LRA provides that a Commissioner may conduct the arbitration in a manner that he or she considers appropriate in order to determine the dispute fairly and quickly, and must deal with the substantial merits of the dispute with the minimum legal formalities, it appears that the Commissioner elevated expediency above all else.

[56] In *Country Fair Foods (Pty) Ltd v Theron NO & others*[8] the court held that:

'[E]ven though a commissioner has the power to conduct arbitration proceedings in a manner that the commissioner considers appropriate

in order to determine the dispute fairly and quickly", it was held, "this does not give him the power to depart from the principles of natural justice. Thus, further, although it clearly lies within the commissioner's powers to decide whether to adopt an inquisitorial or adversarial mode of fact finding, once this decision has been made it ought to be consistently applied to both parties.'

[57] Section 138(2) of the LRA provides that subject to the discretion of the Commissioner as to the appropriate form of the proceedings, a party to the dispute may give evidence, call witnesses, question the witnesses of any other party and address concluding arguments to the Commissioner.

[58] In *Naraindath v Commission for Conciliation, Mediation and Arbitration and Others*[9] the court held as follows:

‘[27] ... A failure to conduct arbitration proceedings in a fair manner, where that has the effect that one of the parties does not receive a fair hearing of their case, will almost inevitably mean either that the commissioner has committed misconduct in relation to his or her duties as an arbitrator or that the commissioner has committed a gross irregularity in the conduct of the arbitration proceedings. (See sections 145(2)(a)(i) and (ii) of the LRA; McKenzie, *The Law of building and Engineering Contracts and Arbitration*, 5th Ed. pp 188-189).’

[59] The Commissioner misunderstood the common cause facts in the pre-arbitration minute to be a stated case and the manner in which he conducted the proceedings deprived the applicant of a fair hearing.

[60] Interestingly, the Commissioner recorded in his arbitration award that the issue in dispute was the harshness of the sanction and that the applicant submitted that two month’s suspension would be fair in the circumstances. Whereas he recorded the issues which he was required to determine as follows:

‘9. Whether there is an element of dishonesty, whether the applicant has committed a serious offence, whether the transgression amounts to a criminal conduct, whether the image of the SAPS has been compromised by the actions of the applicant.’

[61] It is abundantly clear that the arbitrator was not called upon to determine whether the applicant had committed criminal conduct but was seized with a determination on whether the applicant’s dismissal was fair or not.

[62] On the objective facts, the parties had certainly not agreed to a stated case and the Commissioner simply decided that the matter proceed by way of argument. This constitutes a gross irregularity in the conduct of the proceedings, among other things as set out above.

[63] The applicant accordingly has good prospects of success in the review application.

[64] As to the prejudice to the fourth respondent emanating from condonation being granted, while the 5-week delay is significant, the prejudice in these circumstances is minimal, particularly when considering the good prospects of success and while the explanation provided for the delay is a common explanation that is seen in this Court and not necessarily a good one, this does not render the explanation for the delay unreasonable.

- [65] Moreover, the interests of justice favour the granting of the condonation application because the manner in which the proceedings were conducted has the invariable effect of compromising the applicant's right to be heard.
- [66] For all of the above reasons, condonation for the late issuance of the applicant's review application is granted.
- [67] Regarding the condonation application for the late filing of the answering affidavit filed on behalf of the fourth respondent, the delay is egregious, the reason for the delay is internal bureaucracy and the State Attorney responsible for the review application having been on maternity leave. The matter was only dealt with when the State Attorney concerned returned from maternity leave.
- [68] It was further contended on behalf of the fourth respondent that the fourth respondent had good prospects of success because the applicant didn't understand and lacked knowledge concerning the conclusion of a pre-arbitration minute. I find this difficult to fathom when considering the transcript and the fourth respondent's own representative's submissions, part of which is captured above.
- [69] It was further submitted that it is in the interests of justice for condonation to be granted concerning the late filing of the answering affidavit because the judgment would bring the matter to finality or a step closer.
- [70] While many of the requirements for condonation have not been individually satisfied by the fourth respondent, when holistically considered and particularly having regard to the interests of justice, condonation for the late filing of the answering affidavit is granted.
- [71] In considering the merits of the matter as set out above, it is only fitting that the review application succeeds. The decision reached by the Commissioner is certainly not one that a reasonable decision maker could reach and was marred by irregularity in the conduct of the proceedings.
- [72] Because no evidence was led at the arbitration, the matter must be remitted to the first respondent for a fresh hearing before another Commissioner.

#### Costs

- [73] The final consideration is costs.
- [74] It is trite that in labour matters, costs do not follow the result[10].
- [75] In order for costs to be granted the Court's judicial exercise of its discretion to award costs must be engaged and there must be a justification for the departure from the ordinary rule that costs should not be ordered. The dictates of fairness in terms of section 162 of the LRA and the constitutional and statutory imperatives that underpin it, must be considered[11].

[76] The fourth respondent's opposition of this matter, when considering the objective facts, is regrettable. However, I am not satisfied that such opposition is mala fide or fitting of a costs order to be granted.

[77] In the premises, the following order is made:

Order

1. The applicant's condonation application is granted;
2. The fourth respondent's condonation application is granted;
3. The arbitration award issued by the second respondent is reviewed and set aside;
4. The matter is remitted to the first respondent for a fresh hearing before a commissioner other than the second respondent;
5. There is no order as to costs.

T. Govender

Acting Judge of the Labour Court of South Africa

Appearances:

For the applicant: S Mbatho

Instructed by:

Mboto & Associates Inc

For the fourth respondent: S Njambatha

Instructed by: The

State Attorney

[1] (2007) 28 ILJ 2405 (CC); [2007] 12 BLLR 1097 (CC).

[2] (2014) 35 ILJ 943 (LAC); [2014] 1 BLRR 20 (LAC) at para [16].

[3] Goldfields at paras [18] and [19].

[4] 1962

(4) SA 531.

[5] [ 1998] ZALAC 22 at para [10].

[6]

[2022] ZASCA 42.

[7] Minister of Police v Mboweni and Another [2014] ZASCA 107, 2014

- (6) SA 256 (SCA) at para [8]; Bane and Others v D'Ambrosi [2009] ZASCA 98; 2010
- (2) SA 539 (SCA) at para [7].
- [8] [2001] 2 BLLR 134 (LC); (2000) 21 ILJ 2649 (LC).
- [9] [2000] ZALC 15.
- [10] See: MEC for Finance: Kwazulu-Natal and Another v Dorkin NO and Another
- [2008] 6 BLLR 540 (LAC); [2007] ZALAC 34 and Zungu v Premier of the Province of KwaZulu-Natal and Others
- [2018] ZACC 1; (2018) 39 ILJ 523 (CC).
- [11] Union for Police Security and Corrections Organisation v South African Custodial Management (Pty) Ltd and Others
- [2021] ZACC 41; (2021) 42 ILJ 2371 (CC), specifically at para [35], read with Goba v Rand West City Local Municipality and Another
- [2021] ZALCJHB 301; [2021] JOL 51406 (LC) specifically at para [30] and [31].

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