IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JR281/17

In the matter between:

DEPARTMENT OF HOME AFFAIRS **Applicant**

and

GENERAL PUBLIC SERVICES SECTORAL

BARGAINING COUNCIL **First Respondent**

MARTIN SAMBO N.O. **Second Respondent**

PUBLIC SERVICES ASSOCIATION OBO

M.A. NESENGANI **Third Respondent**

Heard: **16 July 2019**

Delivered: **14 August 2019**

Summary: Application to review and set aside arbitration award – condonation ruling – condonation granted in the interests of justice and to bring finality – late filing of heads - incomplete records filed - reviewed the merits of the application – Arbitrator afforded hearsay evidence appropriate weight – punitive costs not awarded – Review Application dismissed.

JUDGMENT

DEANE AJ

Introduction

[1] This is an application to review and set aside an arbitration award, handed down by the Second Respondent (hereinafter "the Commissioner" and/or "Arbitrator") under case number GPBC 1747/2015 and dated 6 November 2016. In terms of this award, the Commissioner held that the dismissal of the individual Third Respondent (the Employee) by the Applicant (the Employer) was substantively unfair, and awarded reinstatement with retrospective effect to the date of dismissal, with back pay in the sum of R284 128.00. The Applicant seeks to review and set aside this award.

[2] In the answering affidavit, the Third Respondent raises a number of preliminary points. The Third Respondent opposes the review application on a basic starting point premised upon the Applicant's failure, firstly, in filing their Heads of Argument timeously; secondly, in the Applicant's failure to file a complete record required in terms of Rule 7A(6) of the Labour Court Rules and thirdly, the Third Respondent argues that the chronology and the common cause facts reflect that the Applicant failed to file a full record, alternatively the relevant portions thereof.

[3] It is common cause that the Review Application to this court is late and that the Applicant filed the application outside the prescribed six-week period within which an application for review has to be filed. The Applicant, therefore, seeks condonation for the late filing of the Review Application.

[4] The Application for Condonation and Review is opposed only by the Third Respondent.

Preliminary Issues

Failure to file Heads of Argument timeously

[5] The Third Respondent filed the required Heads of Argument in compliance with a directive from the Registrar of the Labour Court (received by the Third Respondent's attorneys of record on 12 July 2018), requiring the parties to file Heads of Argument and calling upon the Applicant to file its Heads of Argument within 15 days of the directive and the Third Respondent to deliver Heads of Argument within 10 court days upon receipt of the Applicant's Heads of Argument.

[6] Despite this Directive, the Applicant failed to file its Heads of Arguments on 02 August 2018.

[7] The Third Respondent further argues that they were not properly served with the Heads of Argument when it was eventually filed.

[8] The Third Respondent further maintains that the Applicant failed to attend to the required Index and Pagination of the court file, which was duly attended to by the Third Respondent's attorneys.

[9] The Applicant was called upon to provide reasons for both the late filing of the Heads of Argument and for not effecting proper service of the Heads of Argument on the Third Respondent. The Applicant replied that this failure was due to an administrative error on their part and that they were extremely sorry.

[10] Having due regard to process and this Court's mandate to deal with matters expeditiously and fairly, Counsel for the Third Respondent was afforded the opportunity of a recess to peruse the Heads of Argument. After a short recess, the Third Respondent's Counsel confirmed that the Applicant's Heads of Argument were very similar to the previous Heads of Argument filed and he could, therefore, continue with his arguments. I am indebted to Counsel for his consideration in the avoidance of unnecessary delays in the administration of justice.

Failure to file a full/complete record, alternatively the relevant portions thereof

[11] The Third Respondent maintains that the Applicant failed to file a complete record as required in terms of Rule 7A(6) of the Labour Court Rules;[1] that the Applicant failed to file the full record of the disciplinary proceeding despite having being informed of same by the Third Respondent's Attorney of record and that the Applicant proceeded to file an incomplete record at the Arbitration hearing.

[12] The Applicant argues that "*initially the record was incomplete to the extent that it did not fully set out the evidence of Mr Cairo Mabala, who was the presiding officer at the internal disciplinary hearing as well as that of Mr Aaron Dubazana, who is the security officer who heard of the sexual harassment from the complainant and referred the matter to his superiors*".[2] The Applicant maintains that the review application *"can still be determined without the evidence of the two witnesses due to the fact that the record of the disciplinary hearing was not only before the commissioner, but the entire case hinges on what happened in the room and none of the two witnesses (Mabala and Dubazana) were present in that room*."[3]

[13] The parties assisted in the compilation and reconstruction of a transcribed record of the Arbitration hearing, which the parties, inclusive of the Third Respondent, confirmed the correctness thereof.

[14] The subsequent reconstructed transcribed record of the arbitration hearing was incomplete/missing. It was meant to contain 24 pages (1-24) but instead contained 20 pages (1-20). Four pages are not included in the transcription of the reconstructed record.

[15] No explanation for the missing parts of the record was provided to this Court, but what is clear is that both parties did attempt to reconstruct the record.

[16] The Applicant maintains that the evidence missing from the transcribed report is that of re-examination of Mr Aaron Dubazana, that the re-examination is

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[1] Rule 7A(6) provides that: The applicant must furnish the registrar and each of the other parties with a copy of the record or portion of the record, as the case may be, and a copy of the reasons filed by the person or body.
[2] Applicant's Heads of Argument dated 14 August 2018 at pg 2 para 3.
[3] *Ibid* at para 4.

not pertinent to the case; and that none of the grounds for this review turns on his evidence.

[17] In respect of the status of the record, as filed, the Third Respondent sets out that the record, even though reconstructed, is incomplete and that the Court should have been provided with a more complete record. He further sets out that the missing parts of the record are material.

[18] The Applicant argues that the evidence that is missing pertains to the re-examination of Mr Dubazana. I cannot say exactly what is missing from the record but if one takes into account that the last page (page 20) starts with the re-examination of a witness one is inclined to accept the Applicant's version that the missing pages pertain to the re-examination of Mr Dubazana. The full record of the referral to Disciplinary Hearing remains missing from the bundle of documents provided to this Court.

[19] The Applicant maintains that despite this and having regard to the fact that the review turns on the evidence of the complainant and the Third Respondent, this Court can still hear the merits of the case.

[20] In respect of the late filing of the record on review, the Practice Manual of the Labour Court reads as follows:

> '11.2.3 If the applicant fails to file a record within the prescribed period, the applicant will be deemed to have withdrawn the application, unless the applicant has during that period requested the respondent's consent for an extension of time and consent has been given.'

[21] It is common cause that this was not done by the Applicant.

[22] Based on this, the Applicant's Review Application is accordingly deemed to have been withdrawn in that he failed to file the record on review within sixty (60) days from the date he was notified by the Registrar in terms rule 7A(5) that the record had been received by the Court and that it may be uplifted. Further, the Applicant was meant to apply to reinstate his review application but he only seeks condonation in this regard. No explanation was given or pardon requested from this Court in this regards.

[23] The Third Respondent consistently maintains that the Applicant "*falls foul of the provisions and requirements of the practice manual applicable, specifically 11.2.7 thereof*" and that the "*review application is therefore "fatally defective and stands to be dismissed with punitive costs*".[4]

[24] Quoting from *Makhoba v Eskom Holdings (SOC) Ltd,*[5] the Third Respondent maintains that a similar factual scenario was considered wherein "*the third respondent sets out that the applicant has not made out a proper case for condonation of the late filing of the record of proceedings; that the applicant has no prospects of success on review and that the applicant has not demonstrated to the Court that he has grounds for review*"[6] and that because of this "*the filing of a supplementary affidavit by the Applicant should in this light be regarded as irregular, without leave from the court being requested or granted to the Applicant to do so which renders the supplementary affidavits to be struck*".[7]

[25] The Applicant failed to seek leave from the Court in this regard. As such, his supplementary affidavit is irregular; a party seeking to act as such should specifically apply both in its papers and in Court for such an indulgence. The Applicant's supplementary affidavit should be struck from the record of pleadings.

[26] It should, however, be noted that in the *Makhoba* case, the court went on further to state that "*despite this and in the interest of finally disposing of this matter and because the Third Respondent answers thereto I have taken the applicant's supplementary affidavit into account*".[8] In this, I also concur.

[27] Furthermore, and despite the record being incomplete, I believe that the review application can still be decided upon based on the arbitration award, the common cause issues, the transcribed portions of the record and the affidavits filed.

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[4] Third Respondents Heads of Argument dated 30 August 2018 at pg 6 para 18-19.
[5] *Makhoba v Eskom Holdings (SOC) Ltd* JR 1820/2012 ZALCJHB 390 (25 October 2017). (*Makhoba*).
[6] Third Respondents Heads of Argument dated 30 August 2018 at pg 6 para 20.
[7] *Ibid* at para 21.
[8] *Makhoba* at para 57.

The Condonation Application

[28] Regarding the Condonation Application, the principles applicable to applications for condonation are trite and as enunciated in *Melane v Santam Insurance Co Ltd*.[9] The following was said about the factors that will be taken into account when considering a Condonation Application:

> '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 it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success and the importance of the case. Ordinarily these facts are interrelated, they are not individually decisive, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation may help to compensate prospects which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent's interests in finality must not be overlooked'.[10]

[29] The court in *Melane* emphasised that any attempt to formulate a rule of thumb should be avoided. These factors are not necessarily cumulative, but they are interrelated, and the court or tribunal has a judicial discretion in deciding whether or not in any given case these factors have been canvassed.[11]

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[9] *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A). (*Melane*).
[10] *Ibid* at 532B-E.
[11] *Minister of Justice and Constitutional Development v General Public Service Sectoral Bargaining Council and Others* 2017 (38) ILJ 213 at paras 3-4. (*Minister of Justice and Constitutional Development).*

[30] The Supreme Court of Appeal in *Mulaudzi v Old Mutual Life Assurance Company (South Africa) Limited*[12] reiterated the applicable principles as follows:

> 'A full, detailed and accurate account of the causes of the delay and their effects must be furnished so as to enable the Court to understand clearly the reasons and to assess the responsibility. Factors which usually weigh with this court in considering an application for condonation include the degree of non-compliance, the explanation therefor, the importance of the case, a respondent's interest in the finality of the judgment of the court below, the convenience of this court and the avoidance of unnecessary delay in the administration of justice.'[13]

[31] Condonation may be refused where there has been a flagrant breach of the rules especially where no explanation is proffered.[14]

The degree of lateness

[32] The Applicant maintains that the review application was lodged 26 days out of time whilst the Third Respondent maintains that the application is at least 31 days late, calculated from the 11th of January 2017 to the date of the Notice of Motion issued, being the 23rd of February 2017.

[33] The Notice of Motion whilst dated 21st February 2017 was received and stamped by this Court on 23rd February 2017, and if one accepts that the Notice of Motion was issued on 23rd February then the Review Application becomes 31 days late.

The explanation for the delay

[34] The Applicant is required to provide a "*full, detailed and accurate account of the causes of the delay and their effects … It must be obvious that, if the non-*

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[12] *Mulaudzi v Old Mutual Life Assurance Company (South Africa) Limited* 2017 (6) SA 90 (SCA). (*Mulaudzi*).
[13] *Ibid* at para 26.
[14] *Erasmus v Absa Bank Ltd and Others*, Unreported, Case No: A/982/13, Gauteng Provincial Division, Pretoria at para 11.

compliance is time-related then the date, duration and extent of any obstacle on which reliance is placed must be spelt out."[15]

[35] Whilst the arbitration award was dated 06 November 2016, the Applicant argues that the same was only received by their offices on 30 November 2016.

[36] The Applicant maintains that the internal procedure dictates that upon receipt of an award, the Applicant is required to discuss it with the Chief Director, Mr Sello Malaka as well with the Assistant Director of labour relations, Ms Ngobese. This discussion is done in order to determine the appropriate course of action going forward.

[37] The Applicant argues that this discussion was not forthcoming due to the intervening holidays with Ms Ngobese being away on leave. Essentially, the Applicant's reason for not filing the review application timeously is given as being administrative in nature in that its Assistant Director of labour relations, Ms Ngobese was on leave from 18 December 2016 to 19 January 2017.

[38] Ms Ngobese, however, only advised the Department's Legal Services to launch an application for review on 2 February 2017 and the State Attorney, who is the Applicant's representative herein, opened the file on 7 February 2017.

[39] The date of the Notice of Motion incorporating an Application for Condonation was dated 21 February 2017. Ms Ngobese deposed to an affidavit in support of the Application for Condonation.

[40] The Third Respondent opposes the Application and argues that the Applicant fails to provide any acceptable explanation for the delay incurred in bringing the review application. It is further argued that the Applicant has failed to provide an acceptable explanation on "*how*" and "*why*" the default occurred,

[15] *Uitenhage Transitional Local Council v South African Revenue Service* 2004 (1) SA 292 (SCA) at para 4.

and that the explanation provided by the Applicant "*evidences wilful default or gross negligence*".[16]

[41] The Applicant, whilst providing some explanation, clearly fails to provide an explanation for the entire period of the delay. In the Condonation Application, the Applicant fails to account for firstly: the delay between 30 November 2016 (when the award was received) to 18 December 2016 (when the Assistant Director went on leave); secondly: neither the Applicant nor the Deponent to the affidavit, Ms Ngobese, gives a proper account for the delay between 20 January 2017 to 7 February 2017 (when the file was eventually opened); and thirdly: no reasonable explanation is given for the delay in the review application from 7 February 2017 to 21 February 2017 (when it is provided that the Applicant's representative then attended to the drafting of the Review Application).

[42] It is my opinion that the time delay is not so egregious or the explanation so unsatisfactory or incomplete that condonation should be refused out of hand. A fuller picture would have been desirable, but the court is still able from the facts presented by the deponent to determine in broad terms the reasons for the delay. I do not consider it appropriate, in the circumstances of the case, to refuse condonation without first considering the prospects of success and whether there is some other compelling reason for leave to be granted.

Prospects of Success

[43] In respect of prospects of success, the Applicant sets out that "*as far as the prospects of success are concerned, I draw the attention of this Honourable Court to the contents of the founding affidavit and respectfully submit that the respondent has good prospects*".[17] The Third Respondent maintains in his Answering Affidavit that "*it is not sufficient for an Applicant to submit that the Founding Affidavit would reflect the prospects of success*"[18]; further that "*it is simply unsatisfactory for the Applicant to submit that the Founding Affidavit*

[16] Third Respondent's Heads of Argument dated 30 August 2018 at pg 10 para 35.
[17] Founding Affidavit of Lungile Cecilia Ngobese at pg 4.
[18] Third Respondent's Answering Affidavit at pg 13 para 45.

would reflect the prospects of success" [19] and further submits that the prospects of success for the Applicant are non-existent.

[44] I am in agreement that it is wholly unsatisfactory to merely direct the Court's attention to the Founding Affidavit without setting out in detail the prospects of success, but this is not reason in itself to disregard the prospects of success in its entirety. This Court has a duty to take into consideration whether or not it would be in the best interests of justice to grant condonation whilst having regards to the various other factors as enunciated in *Melane*.

[45] In *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others*,[20] it was held that:

> 'it was appropriate that an application for condonation be considered and granted if that is in the interests of justice and refused if it is not. The interests of justice must be determined by reference to all relevant factors including the nature of the relief sought, the extent and cause of the delay, the nature and cause of any other defect in respect of which condonation is sought, the effect on the administration of justice, prejudice and the reasonableness of the applicant's explanation for the delay or defect'.[21]

[46] In *Grootboom v National Prosecuting Authority and Another*[22] Zondo J held that:

> 'The interests of justice must be determined with reference to all relevant factors. However, some of the factors may justifiably be left out of consideration in certain circumstances. For example, where the delay is unacceptably excessive and there is no explanation for the delay, there may be no need to consider the prospects of success. If the period of delay is short and there is an unsatisfactory explanation but there are reasonable prospects of success, condonation should be granted.'

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[19] *Ibid* at para 46.
[20] *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others* 2000 (5) BCLR 465; 2000 (2) SA 837 (CC). (*Brummer*).
[21] *Ibid* at para 3.
[22] *Grootboom v National Prosecuting Authority and Another* 2013 (5) ZACC 37; 2014 (2) SA 68 (CC); 2014 (1) BCLR 65 (CC); 2014 (1) BLLR 1 (CC); 2014 (35) ILJ 121 (CC). (*Grootboom*).

[47] In *Num v Council for Mineral Technology*[23] the Court restated the position that: "the approach is that the Court has a discretion, to be exercised judicially upon consideration of all the facts, and in essence, it is a matter of fairness to both sides."[24]

[48] In this case, the Applicant maintains, in his Heads of Argument dated 8 August 2018, that the prospects of success are good and in favour of the Applicant. The Third Respondent disagrees.

[49] One must not lose sight of the interest of the Third Respondent in the finality of the judgment. The Third Respondent was dismissed in July 2015 and it is now July 2019, four years have passed since his dismissal, he, therefore, has an interest in the finality of a judgment.

[50] Taking into account the interests of justice herein, I am satisfied that the delay is not excessive and, in view of the evaluation on the merits of the Review Application, I am satisfied that, considering all factors relevant to condonation applications, condonation for the late filing of the review should be granted.

[51] I will now proceed to consider the Applicant's Review Application on the merits thereof, starting with the setting out of the relevant factual background.

Material Background Facts

[52] The Third Respondent was employed by the Applicant as a Control Immigration Officer from 1 January 1998 and was stationed at the Lindela Holding Facility for illegal immigrants. As part of his duties, he was required to ensure that detentions do not exceed 30 days without the court having granted an extension.

[53] The Third Respondent was charged with misconduct arising from an allegation of sexual harassment against one Ms LYR Perez, the complainant in the matter and a female illegal immigrant from Bolivia.

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[23] *Num v Council for Mineral Technology* 1999 (3) BLLR 209 (LAC). (*Num*).
[24] *Ibid* at 211-213.

[54] It is common cause that the complainant gave statements at the disciplinary hearing which differed from her written statement.

[55] Ms Perez was not fluent in the English language. Her statement was taken down by her Bolivian friend who acted as interpreter, but who was also not fluent in English. The friend did not give evidence at the disciplinary or at the arbitration hearing.

[56] Following a disciplinary process, the Third Respondent was dismissed from employment on 28 April 2015. The sanction of dismissal was upheld by the Appeal's authority on 15 July 2015.

[57] Ms Perez was deported to Bolivia shortly after the conclusion of the disciplinary hearing.

[58] The Applicant referred an unfair dismissal dispute to the First Respondent, wherein the case was arbitrated upon by the Commissioner. The Arbitration Award dated 6 November 2016 was received by the Applicant on 30 November 2016.

[59] At the arbitration hearing, the parties submitted a joint bundle of documents and transcripts of the initial disciplinary hearing. The Commissioner admitted the transcripts as hearsay evidence.

[60] In the matter at hand, the Commissioner only had the benefit of the Employee's testimony with the main witness, Ms Perez, being unavailable due to her having been deported.

[61] Neither the disciplinary record nor Ms Perez's statement on charges against the Employee forms part of the record of evidence provided to this Court.

<u>Grounds for Review</u>

[62] In terms of the Applicant's grounds, the award is mainly attacked for the Commissioner's failure to apply rules of evidence most particularly in relation

to hearsay. The Applicant argues that the Commissioner "*failed to apply the rules of evidence*" and "*thus misconceived the nature of the enquiry*".[25]

[63] The Applicant argues that the Commissioner committed an irregularity in that he failed to consider material evidence that was put before him by witnesses of the Third Respondent.

[64] The Commissioner committed a misconduct in that he failed to have regard to the fact that a misconduct has been committed by the Third Respondent.

[65] The Applicant further maintains that the Commissioner did not apply his mind to the material evidence and/or ignored crucial circumstances in the case in that "*the commissioner appears not to have considered the evidence led at the disciplinary hearing, more particularly the transcript despite having admitted such as part of the evidence to be considered in the determination of the arbitration*",[26] and that because of this, the decision reached by the Commissioner is not a decision that a reasonable arbitrator would be able to come to.

[66] The Third Respondent denies that the Commissioner committed any irregularity or that the Commissioner failed to consider material evidence that was placed before him and further argues that the Applicant "*is in fact attempting to launch an Appeal cloaked in the guise of an application to review the award*".[27]

[67] The Third Respondent denies that the Commissioner failed to apply his mind to the evidence or that the Commissioner failed in any meaningful manner to deal with the evidence before him.

Legal Considerations

The Test on Review

[25] Applicants Heads of Argument dated 14 August 2018 at pg 24 paras 52 – 52.3.
[26] *Ibid* at pg 25 para 52.7.
[27] Third Respondents Heads of Argument dated 30 August 2018 at pg 10 para 36.

[68] The test that the Labour Court is required to apply in a review of an arbitrator's award is, "is the decision reached by the commissioner one that a reasonable decision-maker could not reach?"[28]

[69] In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others,*[29] the Constitutional Court very clearly held that the arbitrator's conclusion must fall within a range of decisions that a reasonable decision-maker could make, and the reasonableness test is still aptly described in the pre-*Sidumo* case of *Computicket v Marcus NO and Others*[30] where it was held that "the question I have to decide is not whether [the arbitrator's] conclusion was wrong but whether ... it was unjustifiable and unreasonable."

[70] As the Court rightly pointed out in *The National Commissioner of the South African Police Service v Myers and Others*[31] "….whatever one's personal view may be, the test as set out in *Sidumo* ... is whether or not the arbitrator's decision that dismissal is an appropriate sanction is a decision that a reasonable decision-maker could reach."

[71] In this regard, the Supreme Court of Appeal has reminded this Court that the test is that of review and not appeal.[32] Our courts have therefore repeatedly stated that in order to maintain the distinction between a review and an appeal, an award of an arbitrator will only be set aside if both the reasons and the result are unreasonable. In determining whether the result of an arbitrator's award is unreasonable, the Labour Court must broadly evaluate the merits of the dispute and consider whether, if the arbitrator's reasoning is found to be unreasonable, the result is, nevertheless, capable of justification for reasons other than those given by the arbitrator. The result will, however,

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[28] *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 (CC) at para 110. (*Sidumo*).
[29] *Ibid* at paras 118-119.
[30] *Computicket v Marcus NO and Others* 1999 (20) ILJ 343 (LC) 346.
[31] *The National Commissioner of the South African Police Service v Myers & Others* CA 4/09 (unreported), Labour Appeal Court, Cape Town (2 March 2012) at paras 103-104. (*Myers*).
[32] See *National Union of Mineworkers & Another v Samancor Ltd (Tubatse Ferrochrome) & Others* 2011 ZASCA 74 (25 May 2011).

be unreasonable if it is entirely disconnected with the evidence, unsupported by any evidence and involves speculation by the arbitrator.[33]

[72] An award will no doubt 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. Unreasonableness is, thus, the threshold for interference with an arbitrator's award on review.

[73] In *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA and Others*,[34] the Court rejected a piecemeal or fragmented approach to reviews, where each factor that the commissioner failed to consider is analysed individually and independently, for principally two reasons. The first is that it "assumes the form of an appeal" and not a review, and the second is that it is mandatory for the reviewing court to consider the totality of the evidence and then decide whether the decision made by the arbitrator is one that a reasonable decision-maker could make. To evaluate every factor individually and independently, it observed, is to defeat the requirements in s 138 of the Labour Relations Act[35] (LRA) in terms of which the arbitrator is required to deal with the substantial merits of the dispute between the parties with the minimum of legal formalities, albeit expeditiously and fairly.[36]

[74] On this approach, therefore, the failure of a commissioner "to mention a material fact in his or her award", or "to deal in his/her award in some way with an issue which has some material bearing on the issue in dispute", or "commits an error in respect of the evaluation or consideration of facts presented at the arbitration" [37] would not, in itself, render the award reviewable. Having considered the evidence at arbitration, the Court held

[33] *Herholdt v Nedbank Ltd* (701/2012) 2013 ZASCA 97; 2013 (6) SA 224 (SCA); 2013 (11) BLLR 1074 (SCA); 2013 (34) ILJ 2795 (SCA) (5 September 2013). (*Herholdt*).
[34] *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA* 2014 (1) BLLR 20 (LAC). (*Gold Fields*).
[35] Labour Relations Act 66 of 1995.
[36] *Gold Fields* at paras 18-21.
[37] *Ibid* at para 20.

"….I cannot accept that the arbitrator's decision fell outside of the band of decisions to which reasonable people could come."[38]

[75] In *Fidelity Cash Management Service v CCMA and Others*[39] Zondo JP applied the *Sidumo* test thus:

> 'It will often happen that, in assessing the reasonableness or otherwise of an arbitration award or other decision of a CCMA commissioner, the court feels that it would have arrived at a different decision or finding to that reached by the commissioner. When that happens, the court will need to remind itself that the task of determining the fairness or otherwise of such a dismissal is in terms of the Act primarily given to the commissioner and that the system would never work if the court would interfere with every decision or arbitration award of the CCMA simply because it, that is the court, would have dealt with the matter differently.'

And that:

> 'The test enunciated by the Constitutional Court in *Sidumo* for determining whether a decision or arbitration award of a CCMA commissioner is reasonable is a stringent test that will ensure that such awards are not lightly interfered with. It will ensure that, more than before, and in line with the objectives of the Act and particularly the primary objective of the effective resolution of disputes, awards of the CCMA will be final and binding as long as it cannot be said that such a decision or award is one that a reasonable decision-maker could not have made in the circumstances of the case. It will not be often that an arbitration award is found to be one which a reasonable decision-maker could not have made but I also do not think that it will be rare that an arbitration award of the CCMA is found to be one that a reasonable decision-maker could not, in all the circumstances, have reached.'

[76] The test that this Court must apply in deciding whether the arbitrator's decision is reviewable is whether the conclusion reached by the arbitrator was so unreasonable that no other arbitrator could have come to the same conclusion.

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[38] *Myers* at paras 103-104.
[39] *Fidelity Cash Management Service v CCMA & Others* 2008 (3) BLLR 197 (LAC) at paras 98-100. (*Fidelity Cash Management Service*).

[77] It is on this basis that I proceed with the merits of the application below.

De Novo Proceedings

[78] It is trite that arbitration proceedings are conducted *de novo.* Section 138 of the LRA stipulates that the Commissioner can use his discretion as to the manner in which he would like to conduct the hearing. Therefore, it is said that arbitration cases are considered as hearings *de novo*. The Commissioner is tasked with determining the fairness or otherwise of the employer's decision and is not meant to reconvene a disciplinary hearing. This begs the question of whether the record of a disciplinary proceeding is necessary for the fair determination of the dispute at the CCMA, in light of the fact that the arbitration is hearing *de novo*?

[79] In *Sidumo,* the Constitutional Court explained how the discretion contained in section 138 of the LRA should be understood, as follows:

> 'Equally true is that when an employer determines what is an appropriate sanction in a particular case, the employer may have to choose among possible sanctions ranging from a warning to dismissal. It does not follow that all transgressions of a particular rule must attract the same sanction. The employer must apply his or her mind to the facts and determine the appropriate response. It is in this sense that the employer may be said to have discretion'.[40]
>
> 'But recognising that the employer has such discretion does not mean that in determining whether the sanction imposed by the employer is fair, the Commissioner must defer to the employer. Nor does it mean that the Commissioner must start with bias in favour of the employer. What this means is that the Commissioner … does not start with a blank page and determine afresh what the appropriate sanction is. The commissioner's starting point is the employer's decision to dismiss. The commissioner's task is not to ask what the appropriate sanction is but whether the employer's decision to dismiss is fair.'[41]

[40] *Sidumo* at paras 177-178.
[41] *Ibid*.

[80] The Commissioner cannot disregard the record of disciplinary proceedings purely because he is hearing the matter for the first time. The record of disciplinary proceeding could also be used to assess whether the dismissal of the employee was effected in accordance with a fair procedure. Most importantly, the commissioner must test the totality of the evidence submitted by the employer against the guidelines on dismissal set out in the LRA Code of Good Practice: Dismissal.[42]

Hearsay Evidence

[81] The current position with regards to hearsay evidence is that hearsay evidence may generally be admissible, but the weight afforded to that evidence should be considered in light of the nature of the evidence. In other words, due to the evidence being hearsay, the weight given to such evidence will be affected. Ultimately, its reliability will, to a large extent, determine the weight that will be given to the evidence.

[82] In the *Minister of Police v M*[43] case, the court was tasked with considering, in the absence of the complainant, the weight that should be attached to the transcribed record of an internal disciplinary hearing. According to section 3(4) of the Law of Evidence Amendment Act,[44] hearsay is defined as "evidence, whether oral or in writing, the probative value of which depends on the credibility of any person other than the person giving such evidence". Ordinarily, in the absence of the presence of witnesses, a recordal of oral testimony would not hold much weight or value.

[83] The Labour Court pointed out that, while it may be an error or irregularity to attach too much weight to hearsay evidence, not giving hearsay evidence sufficient weight may also constitute a material error or irregularity.[45] According to the Judge, the *M* case represented an example of a case in which the hearsay evidence was not afforded sufficient weight, in that the Commissioner did not seem to realise that the transcripts were no ordinary

[42] See *Sidumo* and *Palluci Home Depot (Pty) Ltd v Herskowits* 2015 (5) BLLR 484 (LAC).
[43] See *Minister of Police v M* 2017 (38) IJL 402 (LC). (*M* case).
[44] Law of Evidence Amendment Act 45 of 1988.
[45] *M* case at para 35-37.

hearsay, but were "hearsay of a special type".[46] This distinctiveness could be attributed to the fact that the transcripts comprised a bilateral and comprehensive record of earlier proceedings in which the child victim's evidence was corroborated by at least two other witnesses, with the evidence withstanding rigorous cross-examination and in which the employee's own defence was "ventilated and exposed as being implausible".[47] The court went on to say that transcripts such as the ones in the present case must be afforded greater intrinsic weight than simple hearsay (such as a witness statement handed up during the course of a hearing), because they constitute a comprehensive and reliable record of a prior quasi-judicial encounter between the parties.[48]

[84] The Court concluded that "in appropriate factual circumstances" hearsay, such as a transcript of a properly run internal hearing, might carry enough weight to require of the accused employee to rebut the allegations contained in the hearsay. According to the Judge, a reasonable decision-maker would have appreciated that the transcripts did not contain mere allegations, but rather tested allegations and a contested denial. As such, the transcripts constituted *prima facie* evidence of the employees' wrongdoing.[49]

[85] A number of guidelines for what would constitute appropriate factual circumstances to depart from the norm, as in this case, were set out by the court. In terms of these guidelines, the hearsay should: be contained in a record which is reliable accurate and complete; be tendered on the same factual dispute; be bilateral in nature; be in respect of the allegations; demonstrate internal consistency and some corroboration at the time the hearsay record was created; show that the various allegations were adequately tested in cross-examination; and have been generated in procedurally proper and fair circumstances.[50]

Analysis

[46] *Ibid* at para 37.
[47] *Ibid*.
[48] *Ibid* at para 40.
[49] *Ibid* at para 43.
[50] *Ibid* at para 45.

[86] The dispute came before the Commissioner, who was tasked with determining the substantive and procedural fairness of the dismissal, without having access to the complete record of the disciplinary proceedings. In his evaluation of what his duties were, the Commissioner in his award clearly states that the issue to be decided was if the dismissal of the Third Respondent by the Applicant was both procedurally and substantively unfair. The Commissioner, therefore, had a clear understanding of what his duty in this matter was.

[87] In his award, he sets out the issues to be decided, background to the issues, a summary of both the Third Respondent's and Applicant's evidence, an analysis of the evidence and arguments, the process, substance, testing of the totality of the evidence submitted by the employer against the guidelines on dismissal set out in Article 7 of the Code of Good Practice.

[88] With regards to the evidence, the Commissioner correctly admitted the transcripts as hearsay evidence, since they were plainly relevant to the issue in dispute and the Applicant had a good reason for the absence of the complainant, in that she was deported to her country, Bolivia.

[89] The *M* case highlights the difficulty experienced by presiding officers in evaluating hearsay evidence once they have exercised their discretion to introduce hearsay evidence in a given situation.

[90] The Employer called two witnesses to testify in support of its case, namely, Cairo Mabala (Mabala) who was the presiding officer in the disciplinary hearing of the employee, and Aaron Dubazana (Dubazana) a security officer who took the statement from the complainant. Dubazana is tasked with "*looking after the illegal immigrants (inmates). When an incident occurs in the centre they investigate by calling inmates to explain their concern, make an entry, take a statement and then escalate the matter to superiors*".[51]

[91] The Third Respondent called Mr Emmanuel Maswanganyi in support of his case. He was not a witness to the alleged incident but was called mainly to

[51] Arbitration Award dated 6 November 2016 at pg 4.

corroborate the Third Respondent's version that he was "*having his meals whilst Ms Perez was on the phone and that they all went out without any sign of any incident*".[52]

[92] The Commissioner's award is primarily challenged for his decision not to accept evidence contained in the affidavits submitted during arbitration proceedings.

[93] It is common cause that the Complainant was deported by the Applicant. The Third Respondent argues that "*it is therefore of no use for the Applicant to complain about the lack of the Complainant's evidence at a later stage while it was in fact the authority that has deported the Complainant in the matter*".[53]

[94] The *M* case and the difficulty faced by the Commissioner herein, in the face of admitting hearsay evidence,[54] has highlighted the importance of having a comprehensive and reliable record of internal hearings where the complainant is not available to give evidence at an arbitration hearing. It also highlights that where the transcripts constitute a comprehensive and reliable record of a prior quasi-judicial encounter between the parties, it must be afforded greater intrinsic weight than simple hearsay evidence.

[95] The importance of striking a balance between giving hearsay evidence too much or too little weight is highlighted once again.[55] This becomes even more difficult when the hearsay is admitted in terms of s 3(1)(c).[56] When hearsay is admitted in the interest of justice, the general rules of evidence should be applied in deciding how much weight to afford to the hearsay evidence. These factors include the nature of the proceedings; the nature of the evidence; the purpose for which the evidence is tendered; the reason why the evidence is not being given by the person upon whose credibility the probative value of such evidence depends; any prejudice to a party which the

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[52] *Ibid* at pg 7.
[53] Third Respondent's Further Answering Affidavit at pg 10 para 41.
[54] See pg 98 of para 15 of the transcribed proceedings on 8 September 2016 where the Arbitrator states: "*These are difficult cases. These ones are not easy cases*".
[55] *M* case at para 36.
[56] Of the Law of Evidence Amendment Act.

admission of such evidence might entail and any other factor which should in the opinion of the court be taken into account.[57]

[96] Three of these factors received specific attention in the *M* case and is particularly relevant for the case before me. These included the nature of the evidence; the prejudice to the party which the admission of such evidence might entail and the reason why the evidence was not being given by the person upon whose credibility the probative value of such evidence depended.

[97] With regard to, *inter alia*, the nature of the evidence in the *M* case was that it was specific hearsay evidence and it was "of a special type" in that it comprised a bilateral and comprehensive record of earlier proceedings. This evidence was furthermore corroborated and survived competent testing by way of cross-examination.[58] The court stressed that the main argument against affording any weight to hearsay evidence is the fact that it cannot be subjected to cross-examination as the source of the evidence is not present and is it thus prejudicial to the party against whom the hearsay evidence should be tendered.[59] In the *M* case, the hearsay evidence was a record of the source actually being cross-examined in quasi-judicial proceedings.[60] In that case, the main argument against affording weight to the evidence was thus addressed by the fact that the hearsay evidence was subjected to cross-examination and that the cross-examination was also recorded.

[98] On the evidence before me and from the Arbitration Award, Mabala testified that the Applicant did in fact have an opportunity to cross-examine the complainant. The disciplinary recordings of what the cross-examination or examination in chief entailed are not before the court.

[99] Also, the Court found in the *M* case that the prejudice to the party against whom the hearsay record was to be tendered was reduced, in that the party was not deprived of an opportunity to cross-examine the witness but of a

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[57] See s 3(1)(c) of the Law of Evidence Amendment Act.
[58] *M* case at para 37.
[59] *M* case at para 41.
[60] *Ibid*.

second opportunity to cross-examine the witness.[61] The finding by the court that such evidence should in appropriate circumstances be afforded greater intrinsic weight than simple hearsay evidence (such as a witness statement) is supported.

[100] In the current case, the Third Respondent was afforded the opportunity to question/examine and cross-examine the complainant at the initial hearing, however the intrinsic details of the cross-examination remain vague. It is not properly recorded nor does it form part of the bundle of evidence before the court.

[101] Furthermore, it is contended by the Applicant that various versions were not put to the complainant during cross-examination and that various issues were not denied by the Third Respondent.[62] Whilst the Third Respondent was cross-examined at the arbitration to gain clarity, the complainant could not be questioned to gain clarity on the fact that the complainant's oral evidence contradicted her written statement of the incident.

[102] The Commissioner was, as he has rightly put it, faced with two versions.

[103] The issue then turns to the credibility of the witnesses and the weight to be afforded to the hearsay evidence. The weight of hearsay evidence can be enhanced by the production of other evidence that corroborates the hearsay. In this case, the Commissioner found that there was not enough forthcoming in support of the Applicant's case but found that the Third Respondents witness (Maswanganyi) corroborated the Third Respondent's version[63] and that therefore the Third Respondent's version of what happened on the day in question was more probable than the version provided by the Applicant.

[104] The Applicant argues that because the hearsay evidence was accepted by the Commissioner that it should have been afforded more weight. However, the fact that hearsay evidence is admitted does not mean that it is

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[61] *M* case at para 42.
[62] See Founding Affidavit, Supplementary Affidavit, Further Supplementary Affidavit and Heads of Argument of the Applicant.
[63] To the extent that "the Applicant was having his meals whilst Ms Perez was on the phone and that they all went out without any sign of incident". See pg 6 of the Arbitration Award.

automatically true or even particularly persuasive. It is still open to the arbitrator to find that certain evidence, which he admitted, is untrue, unreliable or improbable and should be rejected. Alternatively, the arbitrator may find that certain admitted evidence, while constituting proof, does not carry much weight. Once the evidence and concluding arguments have been presented, the arbitrator must evaluate all the evidence together to determine the facts of the case. In other words, the arbitrator must evaluate which relevant facts have been admitted or proved, and what inferences he or she can draw from these facts. In addition, the arbitrator must evaluate whether the party who bore the *onus* of proof has sufficiently proved all the elements of its case and has a more probable version than the other party.

[105] The Commissioner recognised that there were contradictions in the complainant's oral testimony and written statement. He took into account that English was not her first language. The Commissioner could not, because of her absence, question/examine, cross-examine nor qualify discrepancies in the complainant's version of events. The Commissioner was also, as far as this Court can tell, not privy to a comprehensive and complete record of the disciplinary hearing, and even if the Commissioner were privy to such details, this Court could not comment on the completeness and/or reliability of the evidence led therein due to such record not being filed in this Review Application. The Commissioner, therefore, could not afford the transcript and statement more weight than the oral evidence of the Third Respondent. If this happened, then it becomes difficult not to see the prejudice against the Third Respondent. One of the glaring differences between this case and the *M* case is that whilst vulnerable victims do not have to give evidence more than once in circumstances where a formal hearing took place and the victim's evidence as well as the cross-examination of the evidence has been tested and is properly recorded, that is clearly not the case herein.

[106] As to the absence of the complainant, the Applicant's key witness, I am inclined to agree with the Third Respondent that the Applicant is the author of its own fate, having deported its own crucial witness upon which the charges and this review application is premised.

[107] Furthermore and in addition, the Applicant did not provide the Commissioner with the complete record of the disciplinary hearing and failed to provide adequate reasons to this Court for the failure to do so. It would make more sense then that since the Applicant was obviously the author of its own woes that it should have been more diligent in procuring the records in order to support its case at the arbitration hearing and the subsequent review application.

[108] Even after requests from the Third Party Respondents, the Applicant's further and continued non-compliance with the rules of this Court in terms of the filing of records and the filing of heads etcetera is of concern.[64] The Applicant's inadequate response and reasons show a lack of respect and regard for the rules of this Court, and is unacceptable. This non-compliance, without any reasonable and acceptable reasons, goes against the grain of dealing with matters expeditiously and fairly.

The reasonableness of the Arbitrators award

[109] In this case, the employer decides to dismiss the employee after a hearing. The Commissioner conducts an arbitration *de novo.* In the award the Commissioner, whilst finding the dismissal procedurally fair found the dismissal to be substantively unfair and ordered reinstatement with back pay.

[110] In the light of the totality of circumstances, established by the evidence at arbitration, the Commissioner must then decide whether the decision to dismiss was fair. In doing so, it is the Commissioner's own sense of fairness that must prevail.[65] One must also take into account that in assessing the reasonableness and fairness of the decision to dismiss one may interfere with the employer's decision only if that decision is found to be unreasonable and unfair when assessed against an independent standard.

[111] The Commissioner in his award[66] tested the substantive nature of the dismissal against an agreed rule/standard, the validity of which was not

[64] See the Third Respondents Heads of Argument dated 30th August 2018.
[65] *Fidelity Cash Management Services* at paras 98-100.
[66] See page 6 of the Arbitration Award.

disputed.[67] The Commissioner found that based on the evidence placed before him, it was more probable that the Third Respondent did not contravene a standard and therefore dismissal was not an appropriate sanction in this instance.

[112] Furthermore, the Commissioner was faced with a situation where the hearsay evidence was found wanting and in this Court's view the Commissioner attached the correct weighting to the hearsay in the assessment of the case as a whole. The Commissioner considered the principle issue before him; evaluated the facts presented at the hearing, and came to a conclusion that this Court considers to be reasonable taking into account that the determination of whether a sanction is fair entails making a value judgment.

[113] The Commissioner's award passes the test for reasonableness set out in *Herholdt* in that, it cannot be said to be entirely disconnected with, or unsupported by the evidence. The evidence led at the arbitration clearly bears out the fairness and reasonableness of overturning the sanction of dismissal imposed by the Applicant at the disciplinary hearing.

[114] In light of these considerations, the decision of the Commissioner to reinstate the Third Respondent does not in my view, fall outside of a range of reasonable responses to the Applicant's case.

[115] Having due regard to the reasoning of the Commissioner on the evidence before him at the arbitration, it is clear from an analysis of the award that the Commissioner properly weighed up all of the evidence before him – the totality of the circumstances, in the parlance of *Sidumo* – and it is in the light of all those circumstances that he found that dismissal was not a fair sanction.

[116] The conclusion that the Commissioner reached is one that a reasonable decision-maker would have come to and I am therefore unable to conclude that his decision was one that a reasonable decision-maker could not reach.

Costs

[67] The Arbitration Award at pgs 6-7.

[117] The final issue to be decided upon is the issue of costs.

[118] Insofar as costs are concerned, this Court has a broad discretion in terms of section 162 of the LRA to make orders for costs according to the requirements of the law and fairness.

[119] The Third Respondent maintains that it is entitled to punitive costs mainly because of the Applicants non-compliance with Rule 7A(5) and (6) of the Labour Court Rules.

[120] The Constitutional Court in *Zungu v Premier of Kwazulu-Natal and Others*[68] confirmed that the rule of practice that costs follow the result does not apply in labour matters, but that the Court should seek to strike a fair balance between unduly discouraging parties from approaching the Labour Court and have their disputes dealt with and, on the other hand allowing those parties to bring to this Court cases that should not have been brought to Court in the first place. That is a balance that is not always easy to strike but, if the court is to err, it should err on the side of not discouraging parties to approach these courts with their disputes.'[69]

[121] In this matter I have a duty to strike a fair balance and in doing so I have considered the fact that there is a continued or maybe an ongoing relationship after the dispute has been resolved, and that an order of costs may damage the employment relationship and thereby affect labour peace and conciliation.

Order:

[122] In the premises, I make the following order:

(1) Condonation for the late referral of the review application is granted.

(2) The Review Application is dismissed.

(3) There is no order as to costs.

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[68] *Zungu v Premier of Kwazulu-Natal and Others* 2018 (39) ILJ 523 at para 24.
[69] *Member of the Executive Council for Finance, KwaZulu-Natal and Another v Dorkin NO and Another* 2008 (29) ILJ 1707 (LAC) at para 19.

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T Deane

Acting Judge of the Labour Court

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