THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR 101/2023

In the matter between:

JOHANNA RAMATSOBANE MPE **Applicant**

and

POLOKWANE LOCAL MUNICIPALITY **First Respondent**

XANDER WEHNKE *N.O* **Second Respondent**

SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING COUNCIL **Third Respondent**

Heard: **5 November 2024**

Delivered: **7 November 2024**

This judgment was handed down electronically by consent of the parties' legal representatives by circulation to them via email. The date for hand-down is deemed to be November 7 2024.

JUDGMENT

PRINSLOO, J

Introduction

[1] The Applicant seeks to review and set aside a jurisdictional ruling dated 1 December 2022 wherein the Second Respondent (arbitrator) found that the

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Third Respondent (SALGBC) did not have jurisdiction to determine the dispute. The Applicant also seeks condonation for the late filing of the review application.

[2] The First Respondent (Respondent) opposed both applications.

[3] I have considered the application for condonation and applying the relevant principles, I am inclined to grant condonation, as the review application was filed only one day late. The review application is to be decided on its merits.

Background facts

[4] The Applicant is employed by the Respondent as an assistant manager in the fleet management business unit. In 2018, the Applicant was charged with misconduct and suspended on full pay. In 2019, the Applicant referred an unfair labour practice dispute relating to suspension to the SALGBC and on 4 February 2019, her case was dismissed after the presiding arbitrator found that the Respondent did not commit any unfair conduct.

[5] In February 2022, the Respondent lifted the Applicant's suspension and she returned to work. Upon returning to work, the Applicant referred an unfair labour practice dispute to the SALGBC. It is evident from the pre-arbitration minute prepared for the said unfair labour practice dispute that the relief claimed by the Applicant was calculated as R 642 046 and it was made up from her claim for legal fees (R 72 607), compensation (R 271 819), leave days (R 112 532) a notebook allowance (R 30 000) and promotion loss of earnings (R 155 087). It is evident that a material portion of the Applicant's claim is for monetary losses or expenses she believed she suffered and was entitled to, which has little to do with a claim for unfair suspension, where she would be entitled to no more than a *solatium.*

[6] Be that as it may, at the arbitration of the second unfair labour practice dispute, the Respondent raised a point *in limine* to the effect that the SALGBC lacked jurisdiction because the matter was *res iudicata.* The arbitrator considered the principles of *res iudicata* and he upheld the Respondent's special plea of *res iudicata.* The arbitrator found that although the Applicant sought different relief,

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her claim was based on the same cause of action, between the same parties and the dispute was finally adjudicated.

[7] The jurisdictional ruling is the subject of this application for review.

[8] Before I deal with the grounds for review and the merits of this application, I deem it prudent to set out the relevant principles applicable to review applications.

General principles

[9] Affidavits filed in review applications serve two primary purposes: to define the issues between the parties and to place the essential averments and evidence before the other parties and the court. Rule 7A of the Labour Court Rules (Rules[1]) in terms of which this application was brought, provides for the delivery of four sets of affidavits in review applications namely a founding, supplementary, answering and replying affidavit.

[10] Rule 7A(2)(c) of the Rules provides that the notice of motion must be supported by an affidavit, setting out the factual and legal grounds upon which the applicant relies to have the decision or proceedings corrected or set aside. As to the requirement of setting out the legal grounds upon which the applicant relies in the founding affidavit, this requires of the applicant to set out, with sufficient precision and detail, the grounds for review and the bases on which such grounds are relied upon.

[11] 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 necessary averments were omitted, Rule 7A(8)(a) permits the applicant to deliver a supplementary affidavit within 10 days after the record is made available. This affords the applicant the opportunity to supplement and/or amend the factual and legal grounds upon which he or she relies in light of the record. A weak founding affidavit can be augmented by a supplementary affidavit.[2]

[1] Now repealed but applicable at the time this application was filed.
[2] A Myburgh and C Bosch, '*Reviews in the Labour Courts'*, LexisNexis at pp 438 – 441.

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[12] 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 becomes available.

[13] 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 *Commercial Workers Union of SA v Tao Ying Metal Industries and Others*[3] *(Tao Ying)* 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.'

[14] 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 papers.[4]

[15] In short: it is critical that the factual foundation of the review application, including the relevant evidence or reference thereto, be canvassed in the founding or supplementary affidavit and that it be linked to the applicant's grounds for review.

[16] Grounds for review cannot be formulated for the first time in heads of argument. In *Northam Platinum Ltd v Fganyago NO and others*[5]*,* it was held that:

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[3] [2008] ZACC 15; (2008) 29 ILJ 2461 (CC) at para 67.
[4] *Ibid* at para 68.
[5] [2009] ZALC 146; (2010) 31 *ILJ* 713 (LC) at para 27.

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> '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.'

The test on review

[17] It has been confirmed on numerous occasions that the review test as laid down in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[6] does not find application in the review of a jurisdictional ruling or finding[7].

[18] In *De Milander v Member of the Executive Council for the Department of Finance: Eastern Cape and others*[8] the Labour Appeal Court held that:

> 'Thus the issue before the commissioner, whether or not there had been a dismissal, was a jurisdictional issue. This means that if there was no dismissal the bargaining council did not have jurisdiction to entertain the dispute referred to it by the appellant (*SA Rugby Players Association & others v SA Rugby (Pty) Ltd & others; SA Rugby (Pty) Ltd v SARPU & another* (2008) 29 *ILJ* 2218 (LAC); [2008] 9 BLLR 845 I (LAC) at para 39). The question whether, on the facts of the case, a dismissal had taken place within the ambit of s 186(1)*(b)* involves the determination of the jurisdictional facts. A jurisdictional ruling is subject to review by the Labour Court on objectively justifiable grounds and not on the reasonableness test approach as enunciated in *Sidumo*. The test is whether, objectively speaking, the facts which would give the GPSSBC jurisdiction to entertain the dispute existed.'

[19] This Court has to decide whether the arbitrator was right or wrong in finding that the SALGBC had no jurisdiction to adjudicate the Applicant's case. The question is not whether the conclusion reached by the arbitrator was one that a reasonable decision maker could not reach. It is within the ambit of the

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[6] [2007] ZACC 22; (2007) 28 ILJ 2405 (CC) at para 78 - 79.
[7] *SA Rugby Player's Association and others v SA Rugby (Pty) Ltd and others* (2008) 29 ILJ 2218 (LAC), *Member of the Executive Council, Department of Health, Eastern Cape v Odendaal and others* [2008] ZALC 161; (2009) 30 ILJ 2093 (LC), *Asara Wine Estate & Hotel (Pty) Ltd v Van Rooyen & others* [2011] ZALCCT 21; (2012) 33 ILJ 363 (LC), *Majatladi v Metropolitan Health Risk Management & others* [2013] ZALCCT 15; (2013) 34 ILJ 3282 (LC).
[8] [2012] ZALAC 37; (2013) 34 ILJ 1427 (LAC) at para 24.

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aforesaid principles and the test to be applied on review, that the Applicant's application for review is to be considered.

Analysis of the grounds for review

[20] *In casu,* the Applicant filed a founding affidavit and no supplementary affidavit was filed. The grounds for review as set out in the Applicant's founding affidavit are that the arbitrator failed to apply his mind to the facts and argument presented and that he had erred on and/or misinterpreted the facts, his reasoning process in terms of the factual and legal findings and his assessment of the facts are inexplicable and as such he had reached a decision that a reasonable decision maker could not have reached and that he committed a reviewable irregularity and thereby arrived at a conclusion which no reasonable decision maker could have reached in finding that the matter was *res iudicata* and that the SALGBC lacked jurisdiction.

[21] This is the sum total of the grounds for review raised by the Applicant.

[22] I will deal with the difficulties in the Applicant's grounds for review.

[23] The first difficulty relates to the test to be applied. The test to be applied *in casu* is the one of correctness. The Applicant must show that ultimately, considering the evidence placed before him, the arbitrator arrived at a wrong result.

[24] The case pleaded is that the arbitrator's decision is one that a reasonable decision maker could not reach, given the evidence that was placed before him. The grounds for review raised by the Applicant are firmly based on reasonableness.

[25] 'Reasonableness' finds no application *in casu*. I already alluded to the test to be applied in an application such as this one *supra.*

[26] In *NUMSA obo Zahela and 3 others v Volkswagen SA (Pty) Ltd and others*[9] *(Zahela),* an application for review was dismissed where the applicant

[9] Unreported judgment case no: PR 137/13, delivered on 18 November 2016 at paras 6 – 8.

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incorrectly relied on ‘reasonableness’ instead of ‘correctness’ and it was held that:

> ‘[6] In other words, reasonableness ordinarily has no place in a review where the enquiry is whether or not the CCMA had jurisdiction. This is an assessment that must be made objectively, having regard to the facts placed before the commissioner. It amounts to a determination of whether the commissioner’s decision was correct.
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> [7] It follows that in a matter such as the present, where the proper right of review is one based on correctness that is the case that must necessarily be pleaded. The applicant, mistakenly, has pleaded on the basis of an attack on the reasonableness of the arbitrator’s decision. Mr Niehaus, who appeared for the applicant, did not dispute that the applicant had sought intervention on a basis that was incorrect. He requested the court to postpone the matter and to grant the applicant leave to file amended papers in order to address the error.
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> [8] There are a number of considerations that compelled me to conclude that a postponement and the concomitant further delay in the resolution of these proceedings was not appropriate in the circumstances. First, as I have indicated, the fact of the matter is that the applicant has approached this court on the basis of pleadings that posit the incorrect test. All of the submissions in the founding papers, to the extent that they suggest that the arbitrator failed to appreciate the nature of the enquiry that she was to conduct and that her decision fell outside of the band of decisions to which reasonable people could come on the available material, are irrelevant. The applicant would be obliged to make out an entirely new case for review. The present situation is not dissimilar to that where a plaintiff elects the wrong cause of action to pursue his or her claim. It is not open to a plaintiff, generally speaking, in those circumstances simply to seek to remove the matter from the trial roll and introduce a new cause of action.’

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[27] This Court has followed the *dicta* in *Zahela* in *SA Post Office SOC Ltd v Commission for Conciliation, Mediation and Arbitration and others*[10] and I see no reason not to follow same in this instance.

[28] In *Gcaba v Minister for Safety and Security and others*[11], the Constitutional Court held that an applicant's pleadings are the determining factor and stated that:

> 'They contain the legal basis of the claim under which the applicant has chosen to invoke the court's competence. While the pleadings – including in motion proceedings, 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, it is not for the court to say that the facts asserted by the applicant would also sustain another claim….'

[29] The application before me is interspersed with allegations relating to reasonableness and the grounds for review are clearly seeking a review of the jurisdictional ruling because it falls short of 'reasonableness'. All those allegations are irrelevant as the test to be applied is correctness.

[30] It is trite that an applicant's case should be made out in the founding affidavit and in a review, that case can be supplemented in a supplementary affidavit. *In casu,* the case made out is for the review of a jurisdictional ruling on the basis that it is unreasonable. This application was based firmly on the reasonableness test and it admits no scope for a correctness argument. In fact, there is not a single averment made to support a case on the basis that the arbitrator was incorrect.

[31] I re-iterate: reasonableness has no place in a review such as this one and the grounds for review relating to reasonableness cannot be considered. The Applicant has failed to make allegations to sustain this application as she clearly approached this Court on the basis of the incorrect test. This is fatal to the Applicant's case and on this ground alone, the application should be dismissed.

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[10] (2018) 39 ILJ 1350 (LC).
[11] [2009] ZACC 26; (2010) 31 ILJ 296 (CC) at para 75.

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[32] The second difficulty is that the grounds for review are extremely vague, unsubstantiated, not supported by any evidence and bereft of any detail. The attack on the jurisdictional ruling as set out in the founding affidavit, is evidently one which little thought went into.

[33] I already alluded to the fact that it is required that an applicant sets out, with sufficient precision and detail, the facts and the bases relied upon in support of its grounds for review. There is not a single factual averment made to enable this Court to comprehend or assess the Applicant's grounds for review. There is not one statement to support the grounds for review.

[34] In *Moraka v National Bargaining Council for the Chemical Industry and others*[12], the Court held that:

> '[21] … 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:
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> "2.1 The Commissioner committed misconduct by making findings not justified on the evidence;
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> 2.2 Gravely misunderstood evidence presented before her…" (sic)
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> [22] 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

[12] [2010] ZALC 139; (2011) 32 ILJ 667 (LC) at paras 21 – 23.

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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.

[23] 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.'

[35] In *Tao Ying,* 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 in order to find facts or evidence to support the Applicant's grounds for review. It is the Applicant's duty to tell this Court why the jurisdictional is wrong, what evidence was not properly appraised and why the arbitrator's legal findings were 'inexplicable'.

[36] The Applicant did no more than launch a vague and unsubstantiated 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 were rather legal conclusions or statements.

[37] The Applicant failed to set out the factual foundation of the review application, with relevant evidence or reference thereto, in the founding affidavit and as such, failed to make out a case for review. The Applicant referred to authorities in her founding affidavit, which is inappropriate as it is not facts that fall within her personal knowledge and such references better belong in heads of argument

[38] The Applicant dismally failed to make out a case for review and it follows that the application for review has to fail.

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Costs

[39] In so far as costs are concerned, this Court has a broad discretion in terms of section 162 of the Labour Relations Act[13] to make orders for costs according to the requirements of the law and fairness.

[40] The requirement of law has been interpreted to mean that the costs would follow the result. In considering fairness, the conduct of the parties should be taken into account and *mala fides*, unreasonableness and frivolousness are factors justifying the imposition of a costs order.

[41] In *Zungu v Premier of the Province of KwaZulu-Natal and Others*[14], the Constitutional Court confirmed that the rule that costs follow the result does not apply in labour matters. The Court should seek to strike a fair balance between unduly discouraging parties from approaching the Labour Court to have their disputes dealt with and, on the other hand, allowing those parties to bring to this Court (or oppose) cases that should not have been brought to Court (or opposed) in the first place.

[42] Mr Nwedo for the Respondent submitted that a cost order should be awarded in favour of the Respondent as the Applicant came to Court with an application without merit. The Applicant's suspension has been lifted and she is back at work, yet she is continuing to harass her employer by pursuing vexatious, meritless litigation. The Respondent is dragged to litigation at the SALGBC and this Court, but the Respondent should not have spent so much money to defend this hopeless case, where even the test on review is mischaracterised. The only way to bring the Applicant's opportunistic litigation to an end, is by an order that she be liable for the cost.

[43] Mr Young for the Applicant on the other hand submitted that there should be no order as to costs as the Applicant already suffered financially and she never acted maliciously in bringing this application for review. The Applicant has suffered financially, but she is back at work and the employment relationship

[13] Act 66 of 1995, as amended.
[14] [2018] ZACC 1; (2018) 39 ILJ 523 (CC) at para 24.

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continues. A cost order would not be in the best interest of the ongoing employment relationship.

[44] This is a case where the Court has to strike a balance, considering the requirements of law and fairness. The generally accepted purpose of awarding costs is to indemnify the successful litigant for the expense he or she has been put through by having been unjustly compelled to initiate or defend litigation. In *Public Servants Association of SA on behalf of Khan v Tsabadi NO and Others*[15]*,* it was emphasised that:

> '…unless there are sound reasons which dictate a different approach, it is fair that the successful party should be awarded her costs. The successful party has been compelled to engage in litigation and compelled to incur legal costs in doing so. An appropriate award of costs is one method of ensuring that much earnest thought and consideration goes into decisions to litigate in this court, whether as applicant, in launching proceedings or as respondent opposing proceedings.'

[45] In my view, this is a case where it is appropriate to make a cost order. A cost order is a method of ensuring that decisions to litigate in this Court are taken with due consideration of the law and the prospects of success. This is more so as the Applicant was legally represented and did not approach this Court as an unrepresented layperson. The Applicant has filed a review application which had no merit. This application compelled the Respondent to oppose it and the Respondent is entitled to the cost incurred in doing so – minding the fact that the costs incurred by the Respondent are paid from public funds. The ratepayers of the municipality should not be burdened to pay the costs of defending meritless applications and the Respondent's funds should rather be utilised to deliver services and to fulfil its mandate.

[46] The Applicant was indeed within her rights to bring an application to review an arbitration award, but this right cannot be divorced from the obligation to set out the factual foundation of the review application and the relevant evidence linked to the grounds for review, supported by the evidence adduced at the arbitration

[15] [2012] ZALCJHB 17; (2012) 33 ILJ 2117 (LC) at para 176.

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proceedings. The Applicant dismally failed in this regard and presented grounds for review which are too vague and unsubstantiated, without any factual averment made to enable this Court to comprehend or to assess the grounds for review. Furthermore, a review application is not the automatic next step after the bargaining council did not find in favour of the Applicant. She had to consider the prospects of success in pursuing her case after her suspension was lifted and she returned to work before she commenced with litigation.

[47] Fairness dictates that the Respondent cannot be expected to endure enormous costs defending litigation where more thought and consideration had to be put in when the Applicant approached this Court to review the jurisdictional ruling. The interests of justice will be best served by awarding a cost order in favour of the Respondent.

[48] I am alive to the fact that the Applicant is an individual, but I cannot ignore the fact that she ultimately initiated a review application without merit and that she was legally represented throughout the proceedings. This Court is ordinarily reluctant to make orders for costs against individual litigants, for whom the prospect of an adverse costs order may serve to inhibit the exercise of what they perceive as their rights. This is however not an immutable or inflexible rule.

[49] Mr Young submitted that a cost order would not be in the best interest of the ongoing employment relationship. In my view, there is no merit in this argument. *In casu,* the Applicant sought a cost order against the Respondent, if the application was opposed and she had no hesitation to institute legal proceedings against her employer, which is indicative of the fact that the Applicant never considered the possibility of a cost order to be harmful to the employment relationship. The Applicant is employed and no case was made out that she would not be in a position to pay the Respondent's costs.

[50] In the present circumstances, the interests of justice require that the Applicant pays at least a portion of the First Respondent's costs. In my view, a sum equivalent to 50% of the Respondent's costs will best serve those interests.

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

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Order

1. The late filing of the review application is condoned;
2. The review application is dismissed;
3. The Applicant is to pay the First Respondent's costs, limited to 50% of the taxed costs, on a party and party scale.

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Connie Prinsloo

Judge of the Labour Court of South Africa

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Appearances:

On behalf of the Applicant:	Advocate Young
Instructed by:	Stemmet & Osman Inc Attorneys
On behalf of the First Respondent:	Advocate Nwedo
Instructed by:	Lebea & Associates Attorneys

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