

DELETE V ... ER IS NOT APPLICABLE

- (1) REPORT ... YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.

30/10/2025

DATE



SIGNATURE



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case No JR 705/21

In the matter between:

THE MINISTER OF THE DEPARTMENT OF

HOME AFFAIRS

Applicant

and

PSA OBO NKOSI N S

First Respondent

SIVUYILE TSHINGANA N.O.

Second Respondent

GENERAL PUBLIC SERVICE SECTOR

BARGAINING COUNCIL

Third Respondent

Decided: In Chamber

Delivered: 30 October 2025

JUDGEMENT: LEAVE TO APPEAL

ORR, AJ

Introduction

- [1] The applicant, the Department of Home Affairs (the DHA) seeks leave to appeal against the whole judgement in which I dismissed their application to review and set aside an award issued by the second respondent (the Commissioner). In his award the Commissioner found that the dismissal of Nkosi by the DHA was substantively unfair and ordered her to be reinstated.
- [2] The DHA also seeks condonation for the late filing of the Notice of Leave to Appeal, an issue I will address first.

Condonation

- [3] The Notice of Leave to Appeal was filed approximately 40 days late and condonation is sought. This is a significant period. Although the explanation for the delay is not particularly compelling the application for condonation is not opposed, and I am of the view that the interests of justice are better served by dealing with the application for leave to appeal on its merits. I accordingly grant condonation.

Leave to Appeal

- [4] In its Notice the DHA sets out three grounds of appeal:
- 4.1. *“The Court erred by failing to apply the correct evidentiary test regarding the assessment of circumstantial evidence. The Court erred by failing to draw the most probable inference from the facts.”*

- 4.2. *“The Court erred in holding that the arbitrator’s view that the taxi drivers’ evidence was not necessary- because Nkosi did not challenge any of the facts relating to the apprehension of the taxi driver – is not reviewable. The arbitrator’s refusal to allow the DHA to call the taxi driver as a witness amounted to an act of misconduct which is also reviewable.”*
- 4.3. *“The Court erred in its failure to appreciate that in the assessment of evidence the arbitrator misdirected himself by applying a criminal law standard of proof instead of a civil standard of proof (on a balance of probabilities)”.*

- [5] The DHA submits that in respect of each ground there is a reasonable chance that the Labour Appeal Court (LAC) would come to a different conclusion that was reached by this Court. I will address each ground of appeal in turn.

Circumstantial Evidence

- [6] In the arbitration proceedings the Commissioner had to choose between the direct evidence of Nkosi that she did not commit the misconduct which she was accused of and the circumstantial evidence presented by the DHA to the effect that she did. After considering both, the Commissioner chose to accept the direct evidence of Nkosi. He provided reasons for the conclusion he came to. In the review papers the very broad contention was made that the arbitrator reached a decision which no reasonable decision maker could reach. The contention is taken no further than that in the papers. Nor was this point pursued with any force in oral argument before me.
- [7] The DHA contends that I erred by failing to apply the correct evidential test regarding the assessment of circumstantial evidence. This ground of appeal appears to be a complete misunderstanding of the role of the Court on review. The issue before me was whether the Commissioner’s decision fell within a range of reasonable outcomes, not to assess the evidence at the arbitration as if sitting as a Court of appeal.

[8] The submissions on appeal also appear to be based on the premise that this Court sat as a Court of appeal rather than review. The submissions set out the common cause facts and then state that this Court erroneously rejected these facts. This is not so, as I did no more than conclude that, in the absence of any specific engagement with the reasoning of the Commissioner by the DHA, his decision to prefer the direct evidence of Nkosi over that of the circumstantial evidence of the DHA, such as it was, fell within a range of reasonable outcomes. No attempt at all is made to suggest how this Court erred in this finding.

[9] There is no merit to this ground of appeal.

The Evidence of the Taxi Driver

[10] As set out in my judgement there was no refusal by the Commissioner to allow the DHA to call the taxi driver as a witness. The Commissioner did no more than express his view that the evidence of the taxi driver might not take the issues for determination any further. The representative from the DHA appears to have accepted this view at the arbitration. No attempt was made to actually call the taxi driver nor was any ruling made that he could not be called. This ground of appeal, as articulated in the Notice, is not in accord with what occurred at the arbitration.

[11] In their submissions in support of the application to appeal the DHA seems to accept that factual situation as set out in paragraph 10 above. The contention developed in the submissions is that the Commissioner committed a reviewable irregularity in expressing his view on the relevance of the taxi driver's evidence. In essence the DHA contends that a commissioner is precluded from expressing any view at all on the potential relevance of a witness.

[12] As authority for this somewhat extraordinary contention the DHA relies on the case of *Pick 'n Pay (Bloemgate) v Rampai NO and Others*¹. The reliance is unfounded. In the *Bloemgate* matter the employer had indicated that they wished for a postponement of the matter to call a witness, which was refused. Nothing of the

¹ (JR108/15) [2018] ZALCJHB 132 (28 March 2018).

sort occurred in this matter. I am unable to find any authority which suggests that a commissioner is precluded from expressing a view on the potential relevance of a witness. Indeed, it seems to me that a commissioner is obliged to do so in fulfilling the duties to run proceedings expeditiously and with a minimum of formalities. What is not permissible, as a general rule, is to exclude evidence when a party, having considered the Commissioner's views, still elects to call a witness. That is not what occurred in the current matter.

[13] There is no merit to this ground of appeal.

A Criminal Standard of Proof

[14] No ground of review to the effect that the Commissioner applied the criminal standard of proof was raised in the review papers. Unsurprisingly this was not argued before me either. Also, unsurprisingly it was not dealt with in my judgement for these reasons.

[15] What is surprising is that the DHA now contends that I erred in failing to uphold a ground of review that was neither pleaded nor argued. I fail to understand how it can possibly be contended that the LAC would conclude that I erred in that regard.

[16] This ground of appeal is equally without merit.

Costs

[17] I am of the view that there is no prospect that the LAC would come to a conclusion different to mine in respect of all of the grounds of appeal raised. The application for leave to appeal must therefore be refused. The only outstanding issue is costs. In its submissions the first respondent has strongly urged me to dismiss the application with costs for a range of reasons.

[18] It is trite that costs awards in labour matters are only made in exceptional circumstances. I am of the view that raising a ground of review for the first time on appeal and then contending that a Court erred in not considering it amounts to a special circumstance. This type of conduct is to be discouraged.

[19] In the premise the following order is made:

Order

1. The late filing of the notice of leave to appeal is condoned.
2. The application for leave to appeal is dismissed,
3. The applicant is ordered to pay the first respondents costs occasioned by the opposition to the application for leave to appeal.

Chris Orr

R. Orr

Acting Judge in the Labour Court South Africa