IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JR2032/19

In the matter between:

DEPARTMENT OF HOME AFFAIRS **Applicant**

and

COMMISSIONER LINDIWE MAKHANYA N.O. **First Respondent**

GENERAL PUBLIC SERVICE SECTORAL BARGAINING COUNCIL **Second Respondent**

PSA obo MGOZA **Third Respondent**

Heard: 7 July 2023
Delivered: 27 March 2024

Summary: CCMA arbitration proceedings – Test for review considered – appropriate test is that of the existence of an irregularity and unreasonable outcome.

Dismissal – evidence considered – evaluation of evidence by the Commissioner reasonable and justifiable – findings of the Commissioner on the evidence reasonable – no basis to interfere with the Commissioner's conclusions.

Dismissal – substantive fairness - allegations of dishonesty relating to an irregular registration of Mncwabe as a biological child of Ludwayi on 4 July 2008 – the evidence revealed that the Employee was 3 months into her internship at the time the irregular registration took place. The Applicant's

LABOUR COURT

contention that registration was completed when an intern signed the BI-24 is untenable. At best, the evidence revealed that the Employee failed to pick up discrepancies on the ID book and date of birth. The Commissioner's conclusion that the dismissal would be inappropriate for the Employee's failure to pick up the discrepancies is reasonable.

Procedural fairness – the failure to institute and finalise disciplinary process promptly damages the administration of justice. The Commissioner's conclusion on this aspect cannot be faulted.

JUDGMENT

CITHI, AJ

LABOUR COURT

Introduction

[1] This is an application in terms of section 145 of the Labour Relations Act[2] (LRA), brought by the Department of Home Affairs (Applicant) to review and set aside an arbitration award issued by Commissioner Lindiwe Makhanya (Commissioner) dated 11 June 2019 under case number GPBC2295-17 (Award), under the auspices of the Second Respondent (Bargaining Council). In terms of her Award, the Commissioner found that the Employee's dismissal was both substantively and procedurally unfair. The Commissioner ordered the Applicant to reinstate the Employee to her previous position on the same terms and conditions applicable before her dismissal. The Third Respondent opposes the review application.

[2] On 31 August 2021, the Applicant was granted condonation for the late filing of its review application and Rule 7A(6) notice in terms of the Labour Court Rules[3].

Background facts

[3] The background facts will only be recounted to the extent that they are relevant to

[2] Act 66 of 1995, as amended.

[3] GN 1665 of 14 October 1996: Rules for the conduct of proceedings in the Labour Court.

this application and the Applicant's grounds of review.

[4] The Employee joined the Applicant on 31 March 2008 as an intern serving in the National Youth Service Program. The National Youth Service Program (Program) is a government initiative aimed at exposing young graduates to training that is necessary for them to gain employment in the relevant sectors. The duration of the Program was for a period of 12 months. The Program commenced on 31 March 2008 and ended on 31 March 2009. Between 1 April 2009 and 30 June 2010, the Employee was engaged on a fixed-term contract. On 1 July 2010, the Employee was employed on a permanent basis as an Administrative Clerk. The Employee was based at the Applicant's Pietermaritzburg office at all material times.

[5] On or about 4 November 2015, the Employee was issued with a notification to attend a disciplinary hearing scheduled for 26 November 2015 to answer to allegations of gross dishonesty in that on 4 July 2008, she registered the birth of Mvuselelo Thumimi Kwanele Mncwabe (Mncwabe) under the name of Jabulile Ludwayi (Ludwayi). Mncwabe was not Ludwayi's biological child, nor was she related to her in any manner.

[6] The facts underpinning the Employee's misconduct are briefly as follows: in 2008, Ludwayi attempted to register her biological child, Nolwazi Ludwayi (Nolwazi), on the National Population Register (NPR); Ludwayi was unable to register Nolwazi because Nolwazi's birth date was within 6 months of Mncwabe's registration on the NPR as Ludwayi's biological child; Mncwabe's birth certificate was issued on 9 October 2008; Mncwabe was registered for a child social grant with the South African Social Security Agency (SASSA); Ludwayi could not obtain a birth certificate for Nolwazi nor register her for a child social grant.

[7] The Applicant launched an investigation to ascertain the circumstances surrounding the irregular registering of Mncwabe on the NPR as Ludwayi's biological child. The evidence was that when registering a child, a parent is required to complete the BI-24 application form[4]. The documents required when completing the BI-24 application form are the ID copy of the mother, the mother's clinic card and the mother's maternity card. The BI-24 application form for the registration of Mncwabe was

[4] The BI-24 form is now referred to as DH 24 form.

LABOUR COURT

completed on 4 July 2008.

[8] On that day, the Employee, whilst still an intern, assisted the person purporting to be Ludwayi with the BI-24 application form. The Employee's signature and PERSAL number appear on the BI-24 application form. It is worth noting, however, that in part E of the BI-24 application form, the mother of Mncwabe is recorded as Nompumelelo Mncwabe, but the ID number which appears in parts C and E belongs to Ludwayi. Crucially, the ID number recorded on the BI-24 form and date of birth did not correspond.

[9] It is common cause that the Employee had no access to the Applicant's 062 and 192 functions. The 062 function is used to check the validity of the mother's identity number. On the other hand, the 192 function is used to check whether the mother has other children registered under her name.

[10] The Employee handed over the BI-24 application form together with the supporting documents to Marianne Du Preez (Du Preez), the Chief Administration Clerk/Supervisor of the Birth, Marriage and Death Section for quality control and/or checking. Du Preez appended her signature to the BI-24 form, presumably after doing quality control. The undisputed evidence was that Du Preez had access to the Applicant's 062 and 192 functions. The BI-24 application form was then handed over to Cheryl Ahrens (Ahrens), a Data Capturer, to capture the application on the system. Once captured on the system, an ID number is generated and then a birth certificate is issued. The common cause evidence before the Commissioner was that Ahrens also had access to the Applicant's 062 and 192 functions.

[11] The Employee's disciplinary hearing did not proceed as scheduled on 26 November 2015 for reasons that are not clear and not reflected in the record. Nonetheless, the disciplinary enquiry was conducted on 1 March 2017. On 23 March 2017, the Chairperson of the disciplinary hearing found the Employee guilty of dishonesty and directed the parties to file submissions in mitigation and aggravation by the end of business on 31 March 2017. The Chairperson's outcome on the sanction was communicated to the Employee on 3 August 2017. The Employee filed an ill-fated appeal which was summarily dismissed on 11 October 2017. The Employee acknowledged receipt of the outcome on 13 October 2017.

[12] It is common cause that the Employee is the only employee that was charged for the incident relating to the irregular registration of Mncwabe as a biological child of

LABOUR COURT

Ludwayi. Neither Du Preez nor Ahrens were charged.

[13] For the sake of completeness, it must be pointed out that in 2014, the Employee, together with two colleagues, were subjected to disciplinary hearing processes on allegations of gross dishonesty and/or gross negligence in that they had processed the DHA-9 application form without following proper departmental procedures. The chairperson of that disciplinary hearing found the employees not guilty of the allegations levelled against them.

Arbitration Award

[14] The arbitration between the parties that resulted in the Award being issued was held on 29 August, 26, 27 and 28 November 2018, 15 February, 11 April and 28 May 2019. The Applicant called Ludwayi, the investigator, Sbongiseni Chamane (Chamane), Nokulunga Cebekhulu from SASSA (Cebekhulu), Thamsanqa Luthuli (Luthuli), Du Preez and Ahrens as witnesses. The Employee testified and did not call any witness.

[15] In her Award, the Commissioner concluded that the Employee’s dismissal was procedurally unfair as a result of the Applicant’s failure to comply with its own Disciplinary Code, PSCBC Resolution 1 of 2002, which required that disciplinary hearings must be instituted within a reasonable time. The Commissioner reasoned that the Applicant failed to provide a plausible explanation for the delay in instituting disciplinary proceedings against the Employee despite being aware of the allegations against the Employee from at least 2013.

[16] The Commissioner further reasoned that the delay in instituting the disciplinary proceedings prejudiced the Employee in that the Applicant could not provide her with the necessary supporting documents that accompanied the BI-24 application. The Employee’s contention was always that the information on the BI-24 form corresponded with the supporting documents that were provided to her in 2008.

[17] In dealing with the question of substantive fairness, the Commissioner took issues with the Applicant’s failure to produce the Standard Operational Procedure (SOP) that was applicable in 2008 which set out the procedure and responsibilities of everyone who was involved in the registration of Mncwabe as a biological child of Ludwayi. The Commissioner rejected the notion that was advanced by Chamane and Du Preez that the Employee’s signature and PERSAL number on the BI-24 application completed the registration of the child in question.

LABOUR COURT

[18] The Commissioner accepted Luthuli's and Ahrens' evidence that registration is only completed once the Supervisor (in this case Du Preez) had checked and approved the application form and the information had been captured on the system by the Data Capturer (in this case Ahrens) and that this completion then results in the birth certificate being issued. The Commissioner was of the view that the Employee's role was minimal in this process. Crucially, the Commissioner reasoned that it was not possible for the Employee to verify whether or not Mncwabe was Ludwayi's child because she did not have access to the Applicant's 062 and 192 functions at that time. Accordingly, the Commissioner concluded that the Employee did not breach the Applicant's Rule.

[19] The Commissioner accepted the Employee's version that the BI-24 application form was accompanied by supporting documents. It is common cause that the Applicant failed to place before the Commissioner the supporting documents that accompanied the BI-24 application form to disprove the Employee's version that the information on the BI-24 form corresponded with the supporting documents that were provided to her in 2008. The Commissioner drew a negative inference from the Applicant's failure to produce the supporting documents.

[20] The Commissioner further found that the Applicant failed to consistently apply discipline because Du Preez (who was the Employee's Supervisor) was not charged. The Commissioner reasoned that Du Preez ought to have picked up the obvious discrepancies on the BI-24 application form. The Commissioner rejected Du Preez's contention that she was not required to check whether the information contained on the BI-24 application form corresponded with the supporting documents provided.

[21] As a general proposition, the Commissioner accepted that misconduct was committed which resulted in the irregular registration of Mncwabe as a biological child of Ludwayi. Nonetheless, the Commissioner reasoned that, on a balance of probabilities, the Applicant failed to adduce evidence to show that the Employee was responsible for the irregular registration of Mncwabe as a biological child of Ludwayi.

[22] The Commissioner found that the Employee conceded that she failed to pick up that the mother's ID number and date of birth on the BI-24 application form did not correspond. The Commissioner reasoned, however, that the Applicant failed to adduce evidence to show that the Employee's failure to pick up this discrepancy (incorrect date of birth and ID number) led to the irregular registration and issue of

LABOUR COURT

the impugned birth certificate. Accordingly, reasoned the Commissioner, even if the Employee was charged and found guilty of this conduct, dismissal would be inappropriate in the circumstances of this case.

[23] The Commissioner concluded that the Applicant had not led evidence on the breakdown of the employment relationship. The Commissioner had regard to the fact that the Employee was charged in 2015 and never suspended until the conclusion of her disciplinary hearing on 1 March 2017.

[24] Ultimately, the Commissioner concluded that the Employee's dismissal was substantively and procedurally unfair. It is this conclusion that is the subject of these review proceedings.

The Review Test

[25] The parties made no real submissions on the test of review, and I do not think they have differing contentions as to what the applicable test on review is. Nevertheless, it is worthwhile outlining the applicable test as the proper application of the test permeates the entirety of this judgment.

[26] In *Head of the Department of Education v Mofokeng and others*[5] the Labour Appeal Court (LAC) stated as follows:[6]

'[31] The determination of whether a decision is unreasonable in its result is an exercise inherently dependant on variable considerations and circumstantial factors. A finding of unreasonableness usually implies that some other ground is present, either latently or comprising manifest unlawfulness. Accordingly, the process of judicial review on grounds of unreasonableness often entails examination of inter-related questions of rationality, lawfulness and proportionality, pertaining to the purpose, basis, reasoning or effect of the decision, corresponding to the scrutiny envisioned in the distinctive review grounds developed casuistically at common law, now codified and mostly specified in s 6 of the Promotion of Administrative Justice Act (PAJA); such as failing to apply the mind, taking into account irrelevant considerations, ignoring relevant considerations, acting for an ulterior purpose, in bad faith, arbitrarily or capriciously, etc. The court must nonetheless still consider whether, apart from the flawed reasons of or any irregularity by the arbitrator, the result could be reasonably

[5] [2015] 1 BLLR 50 (LAC); (2015) 36 ILJ 2802 (LAC).
[6] Ibid at paras 31 – 32.

LABOUR COURT

reached in the light of the issues and the evidence. Moreover, judges of the Labour Court should keep in mind that it is not only the reasonableness of the outcome which is subject to scrutiny. As the SCA held in *Herholdt*, the arbitrator must not misconceive the enquiry or undertake the enquiry in a misconceived manner. There must be a fair trial of the issues.

[32] However, sight may not be lost of the intention of the legislature to restrict the scope of review when it enacted s 145 of the LRA, confining review to "defects" as defined in s 145(2) being misconduct, gross irregularity, exceeding powers and improperly obtaining the award. Review is not permissible on the same grounds that apply under PAJA. Mere errors of fact or law may not be enough to vitiate the award. Something more is required. To repeat: flaws in the reasoning of the arbitrator, evidenced in the failure to apply the mind, reliance on irrelevant considerations or the ignoring of material factors etc must be assessed with the purpose of establishing whether the arbitrator has undertaken the wrong enquiry, undertaken the enquiry in the wrong manner or arrived at an unreasonable result. Lapses in lawfulness, latent or patent irregularities and instances of dialectical unreasonableness should be of such an order (singularly or cumulatively) as to result in a misconceived enquiry or a decision which no reasonable decision maker could reach on all the material that was before him or her.' (footnotes omitted)[7]

[27] Shortly thereafter, in *National Union of Mineworkers and another v Rustenburg Platinum Mine (Mogalakwena Section) and others*[8], the LAC stated as follows:

'[25] … In *Heroldt v Nedbank* it was said:

"In summary, the position regarding the review of CCMA awards is this: A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in section 145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by section 145(2)(a)(ii) the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached

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[7] Throughout this judgment, the footnotes of all extracts of other judgments are omitted.
[8] [2015] 1 BLLR 77 (LAC); [2014] ZALAC 62.

LABOUR COURT

to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.'

[26] A reasonable award is not necessarily a right or correct award. As long as it falls within the range of reasonable decisions that could be made based on the evidence before the decision-maker, there would be no reason to set the award aside. The reviewing court should always guard against substituting its views for those of the decision-maker. It is pre-eminently the task of the CCMA or Bargaining Council commissioners to determine the fairness or otherwise of the dismissal. Commissioners are not expected to give awards that are akin to judgments of the Supreme Court of Appeal or the Constitutional Court. Awards are not meant to be perfect or satisfactory in all respects. The mere fact that an award is unsatisfactory in one or more respects does not mean that it is unreasonable.'

<u>Grounds for Review</u>

[28] The Applicant contends that the Award is reviewable on the following grounds:

28.1 The Commissioner did not properly, rationally or justifiably apply her mind to the facts and/or law in this case;

28.2 The Award is not justifiable in relation to the reason given for such an award;

28.3 The Commissioner failed to properly, justifiably, or reasonably determine and assess the evidence properly before her in this matter;

28.4 The Commissioner has not given thought to relevant considerations and/or has taken irrelevant considerations into account; and

28.5 The decision reached by the Commissioner is not a decision that a reasonable decision-maker would have reached in the same circumstances.

[29] Ultimately, the Applicant assailed the Commissioner's conclusion on substantive and procedural fairness.

<u>Analysis</u>

<u>Finding on Guilt</u>

[25] The Applicant submits that the Commissioner's conclusion on guilt was unreasonable and reviewable. In support of this contention, the Applicant takes issue with the Commissioner's reasoning that the Applicant failed to produce evidence to prove, on a balance of probabilities, that the Employee dishonestly registered Mncwabe as Ludwayi's biological child on 4 July 2008.

LABOUR COURT

[26] The evidence before the Commissioner indicates that three employees, namely, the Employee, Du Preez and Ahrens handled the processing and registration of Mncwabe on the NPR as a biological child of Ludwayi on 4 July 2008. The common cause evidence was that the Employee had been 3 months into her internship at that time and had no access to the 062 and 192 functions to verify the authenticity of the mother's ID book and whether she had other children registered under her name within a 6-month period. The Employee's evidence was that she only checked whether part A, B, C, E and F of the BI-24 form was completed.

[27] The Employee's version was that she handed the BI-24 application form together with the supporting documents over to her supervisor, Du Preez, for checking, verification, and approval. Du Preez had access to the 062 and 192 functions. The common cause evidence is that Du Preez failed to use the 062 and 192 functions to verify the information provided in the BI-24 form. The BI-24 form was then handed over to Ahrens for capturing on the NPR. Ahrens also had access to the 062 and 192 functions. It was only after the information on the BI-24 form was captured on the NPR that a birth certificate was issued.

[28] Seen thus, on the objective evidence, the Employee, Du Preez and Ahrens were all intrinsically involved in the process that led to the registering and issuing of a birth certificate for Mncwabe. Du Preez conceded under cross-examination that it was her responsibility to do quality control on the Employee's work. Du Preez further testified that she had previously picked up errors on the application forms completed by juniors. In my view, Du Preez's failure to use the 062 and 192 functions to verify the information on the BI-24 application form constituted a serious dereliction of her duty as a supervisor. As the Employee's supervisor, Du Preez was aware that the Employee had no access to the 062 and 192 functions to verify the information provided by the person who completed the BI-24 form. The evidence before the Commissioner revealed that the Employee only attended orientation programs from 7 to 11 July and 21 to 25 July 2008, which was after the date in question (4 July 2008).

[29] The Applicant's witnesses appeared to have accepted that the Employee had no access to the 062 and 192 functions. However, their contention was that the Employee ought to have approached other colleagues who had access to the 062 and 192 functions for help or to check discrepancies on the application. In my view,

LABOUR COURT

this argument overlooks the fact that the BI-24 form was handed over to Du Preez (the Employee's supervisor) for this exact reason. It is inexplicable that Du Preez approved the BI-24 form without doing the necessary quality checks using the 062 and 192 functions. Luthuli's and Ahrens's evidence was that the supervisor was obliged to use the 062 and 192 functions to verify the information provided on the application form.

[30] At best for the Applicant, the evidence revealed that the Employee failed to pick up the discrepancies on the ID number and date of birth and that the Employee ought to have picked up these obvious discrepancies by simply comparing the information recorded in part C of the BI-24 form. The Commissioner observed, in my view correctly so, that the Applicant failed to produce evidence showing that the Employee's failure to pick up this discrepancy was the sole reason that resulted in the issuing of the birth certificate in respect of Mncwabe.

[31] I am of the view that the Commissioner's conclusion in this regard is sufficiently connected to the objective facts. The objective evidence revealed that the processing and capturing of the information on the NPR resulted in the issuing of the birth certificate. The Applicant's contention that registration of Mncwabe was completed when the Employee appended her signature and PERSAL number on the BI-24 form is not supported by the objective evidence. The Commissioner's reasoning that, even if the Employee was found guilty of failing to pick up the discrepancies as mentioned above dismissal would have been inappropriate, is eminently reasonable.

[32] The Employee's version was that the information provided on the BI-24 form was supported by the documents provided to her. It is common cause that the Applicant only produced the BI-24 form that was submitted on 4 July and not the supporting documents. The Applicant submits that the fact that there were no supporting documents to the application is, in and of itself, evidence of fraud on the part of the Employee. This was never the Applicant's version during the arbitration nor was this version put to the Employee. The Employee's undisputed evidence was that the BI-24 form was accompanied by supporting documents.

[33] The Applicant provided no explanation for its failure to produce the supporting documents during the arbitration proceedings. This factor was not missed by the Commissioner. In this regard, the Commissioner drew a negative inference against

LABOUR COURT

the Applicant and accepted the Employee's version that the BI-24 application form was accompanied by supporting documents. I am of the view that the Commissioner's approach to this aspect cannot be faulted. The onus was on the Applicant to produce evidence to prove, on a balance of probabilities, that the Employee was guilty of the allegations levelled against her. The Applicant's failure to produce evidence that was relevant was a weighty factor that affected its onus of proof. In any event, even if the Applicant's contention is accepted, it would mean that Du Preez approved the BI-24 application form without having sight of the supporting documents. Similarly, it would also mean that Ahrens captured the information on the NRP without having sight of the supporting documents, in particular the ID book of the mother.

[34] The Applicant further takes issue with the Commissioner's conclusion that there was no SOP regarding the birth registration process in 2008. The evidence of Chamane and Du Preez during the arbitration proceedings was that registration was completed when the Employee appended her signature and PERSAL number on the BI-24 application form. On the other hand, Ahrens and Luthuli suggested that registration was completed after the BI-24 form was approved by the supervisor (in this case Du Preez), the information was captured by a Data Capturer (in this case Ahrens) on the NPR, and a birth certificate was issued.

[35] It is common cause that the Applicant failed to place before the Commissioner the SOP that supported its contention that registration was completed when the Employee (an intern) appended her signature and PERSAL number to the BI-24 application form. In my view, the Applicant's failure to produce the relevant SOP had a significant impact on the question of onus. Put differently, there was nothing before the Commissioner that could contradict the objective facts which indicated that the approval and capturing of the information on the NPR completed the registration.

[36] The SOP would have shed some light on the birth registration procedures which was applicable at that time, the roles and responsibilities of all employees involved in the process of birth registration, and their respective levels of accountability. This Court is of the view that the Applicant's contention that the Employee was solely responsible for the irregular registration of Mncwabe as a biological child of Ludwayi is plainly untenable having regard to the objective facts. The Commissioner's conclusion that the Employee played a minimal role in the registration of Mncwabe is

LABOUR COURT

sufficiently connected to the evidence. On the objective evidence, the Employee was an intern and acted as the receiving clerk who handled the BI-24 form on 4 July 2008 before it was handed over to Du Preez for quality control. As the Commissioner correctly observed, the only blame attributable to the Employee was her failure to identify discrepancies on the BI-24 application form relating to the ID number and date of birth of the mother. Accordingly, this Court is of the view that the conclusion reached by the Commissioner is reasonable.

[37] The Applicant further contends that the Commissioner's findings on inconsistency were made without any evidence led during the arbitration proceedings. This contention is patently without merit. The undisputed evidence before the Commissioner indicates that the Employee, Du Preez and Ahrens were involved in the application process that led to the irregular registration of Mncwabe as a biological child of Ludwayi. The common cause evidence was that the Employee was 3 months into her internship.

[38] The further common cause evidence was that the Employee's supervisor, Du Preez, was not subjected to any disciplinary processes for her failure to exercise quality control when handling the BI-24 application form. The Employee was the only employee that was selected for attention in this matter. In paragraph 97 of the Award, the Commissioner concluded that the failure to subject Du Preez to a disciplinary process demonstrated that the Applicant applied discipline inconsistently. The evidence before the Commissioner disclosed that Du Preez failed to perform her obligations as a supervisor when she failed to use the 062 and 192 functions to verify the information contained in the BI-24 form. Self-evidently, had Du Preez performed her duties, she would have noticed that the ID number recorded on the BI-24 form belonged to Ludwayi and not Nompumelelo Mncwabe as recorded in part C of the application form.

[39] In *ABSA Bank Limited v Naidu and others*[9], the LAC, per the late Ndlovu JA, made the following observations on the factor of inconsistency in employee discipline:

[9] [2014] ZALAC 60; (2015) 36 ILJ 602 (LAC) at paras 32 and 42.

LABOUR COURT

'[36] However, it ought to be realised, in my view, that the parity principle may not just be applied willy–nilly without any measure of caution. In this regard, I am inclined to agree with Professor Grogan when he remarks as follows:

"[T]he parity principle should be applied with caution. It may well be that employees who thoroughly deserved to be dismissed profit from the fact that other employees happened not to have been dismissed for a similar offence in the past or because another employee involved in the same misconduct was not dismissed through some oversight by a disciplinary officer, or because different disciplinary officers had different views on the appropriate penalty.'

[40] At paragraph 42, the Court held that:

'[42] Indeed, in accordance with the parity principle, the element of inconsistency on the part of an employer in its treatment of employees is an important factor to take into account in the determination process of the fairness of a dismissal. However, as I say, it is only a factor to take into account in that process. It is by no means decisive of the outcome on the determination of reasonableness and fairness of the decision to dismiss. In my view, the fact that another employee committed a similar transgression in the past and was not dismissed cannot, and should not, be taken to grant a licence to every other employee, willy-nilly, to commit serious misdemeanours, especially of a dishonest nature, towards their employer on the belief that they would not be dismissed. It is well accepted in civilised society that two wrongs can never make a right. The parity principle was never intended to promote or encourage anarchy in the workplace. As stated earlier, I reiterate, there are varying degrees of dishonesty and, therefore, each case will be treated on the basis of its own facts and circumstances.'

[41] The legal position is that the notion of inconsistency in employee discipline is but one of the factors that a commissioner is required to take into account when assessing whether the sanction of discipline imposed is fair. However, as correctly pointed out in the *ABSA* judgment (*supra*), it is by no means decisive of the outcome on the determination of reasonableness and fairness of the decision to dismiss. In *casu*, the Commissioner considered inconsistency as one of the factors she was required to consider when dealing with the question of an appropriate sanction. This approach is correct in law. On the facts, the Commissioner's reasoning that the Applicant acted inconsistently is reasonable and beyond reproach. The role played by Du Preez was

significant in the processing of the BI-24 form. The Applicant provided no plausible explanation for its failure to take disciplinary actions against Du Preez.

[42] In the final analysis, the Commissioner's conclusion that the Applicant failed to discharge its onus to prove, on a balance of probabilities, that the Employee acted dishonestly on 4 July 2008 when she allegedly registered Mncwabe as a biological child of Ludwayi, is reasonable for reasons stated above. The evidence, at best, revealed that the Employee failed to pick up discrepancies on the ID book and date of birth. For this infraction, dismissal would be grossly inappropriate taking into account that the Employee was only 3 months into her internship when the incident occurred, and that the Applicant turned a blind eye to the role played by Du Preez in the registration process.

[43] The Applicant's failure to discipline the supervisor who was required to do quality control on the Employee's work reveals an inconsistent approach to disciplining employees who were involved in the irregular registration of Mncwabe as a biological child of Ludwayi on 4 July 2008. I am of the view that the conclusion reached by the Commissioner on guilt is reasonable having regard to the material properly before her.

<u>Finding on procedural fairness</u>

[44] The Applicant contends that the Commissioner's findings that it failed to comply with its disciplinary code, PSBC Resolution 1 of 2003 (Resolution 1 of 2003), are not supported by evidence on procedural fairness. Clause 2.2 of Resolution 1 of 2003 states that discipline must be applied in a prompt, fair, consistent, and progressive manner. Clause 7.1 states that the employee must be given notice at least five working days before the date of the hearing. Lastly, clause 7.3 states that the disciplinary hearing must be held within ten working days after the notice referred to in paragraph 7.1 (a) is delivered to the employee.

[45] In *casu*, it is common cause that Ludwayi approached the Applicant in 2008 seeking to register Nolwazi as her biological child. Ludwayi was informed that she could not register another child because she had a child (Mncwabe) who had been registered within 6 months of her attempt to register Nolwazi. In her evidence, Ludwayi stated that she informed the Applicant that Mncwabe was not her biological child. The Applicant escalated the matter to Chamane for investigation in 2013. It is not clear on the evidence why the matter was only escalated to Chamane in 2013 in

LABOUR COURT

circumstances where the Applicant's officials at the Pietermaritzburg branch were fully appraised of the irregular registration of Mncwabe as a biological child of Ludwayi in 2008.

[46] On 4 November 2015 (2 years later), the Applicant issued the Employee with a notice to attend a disciplinary hearing that was scheduled for 26 November 2015. However, for reasons that are not entirely clear on the record, the hearing did not proceed on 26 November 2015. The hearing was reconvened on 1 March 2017. The outcome of the disciplinary hearing was communicated to the Employee on 3 August 2017. In paragraph 90 of the Award, the Commissioner concluded that the hearing was not in compliance with Resolution 1 of 2003 in that it was not conducted promptly upon the Applicant knowing of the allegations.

[47] In *Passenger Rail Authority of South Africa v Tale N.O and Others*[10], this Court per Snyman AJ referred to all the relevant authorities and summarised the legal position as follows:

'[37] This brings me to the issue of procedural unfairness. The first respondent had proper regard to the disciplinary code that required disciplinary proceedings to be concluded within 30 days, and was highly critical of the applicant taking two years and four months to finalise those proceedings. The first respondent also referred to the fact that the applicant presented no evidence to explain why it had taken so long to finalize the disciplinary hearing. Mainly for these reasons, the first respondent accepted the dismissal of the third respondent was procedurally unfair.

[38] In my view, the aforesaid conclusions arrived at by the first respondent on the issue of procedural unfairness is not only reasonable, but undoubtedly correct. It is true that the applicant did apply for an extension of the 30 days' time limit in terms of the disciplinary code, and this extension was granted on 15 May 2018 before the time limit expired. It is also true that this extension is not coupled to a further deadline, and the disciplinary code is silent on this. However, I believe that the fact that the applicant obtained an extension and the disciplinary code being silent on the period of extension, cannot serve as some kind of open licence for the applicant to conclude the disciplinary proceedings when the applicant felt the need or motivation

[10] [2023] ZALCJHB 199; [2023] JOL 59866 (LC).

LABOUR COURT

to do so, no matter how long it takes. And certainly, where there is a substantial delay in the finalisation of the disciplinary proceedings, the applicant was always duty bound to prove to the first respondent, as arbitrator, that it has a proper explanation and cause for this delay. In *Moroenyane v Station Commander of the South African Police Services, Vanderbijlpark*[11] the Court held:

'In summary, I do not believe that what may be considered to be a lengthy delay in the institution, and then conclusion, of disciplinary proceedings, can *per se* lead to a conclusion of unreasonableness and unfairness. A disciplinary hearing cannot be directed to be aborted just because there is a long delay. More is needed. What must always be considered, in deciding whether to finish off disciplinary proceedings because of an undue delay, is the following:

42.1 The delay has to be unreasonable. In this context, firstly, the length of the delay is important. The longer the delay, the more likely it is that it would be unreasonable.

42.2 The explanation for the delay must be considered. In this respect, the employer must provide an explanation that can reasonably serve to excuse the delay. A delay that is inexcusable would normally lead to a conclusion of unreasonableness.

42.3 It must also be considered whether the employee has taken steps in the course of the process to assert his or her right to a speedy process. In other words, it would be a factor for consideration if the employee himself or herself stood by and did nothing.

42.4 Did the delay cause material prejudice to the employee? Establishing the materiality of the prejudice includes an assessment as to what impact the delay has on the ability of the employee to conduct a proper case.

42.5 The nature of the alleged offence must be taken into account. The offence may be such that there is a particular imperative to have it decided on the merits. This requirement however does not mean that a very serious offence (such as a dishonesty offence) must be dealt with, no matter what, just because it is so serious. What it means is that the nature of the offence could in itself justify a longer period of further investigation, or a longer period in collating and preparing proper evidence, thus causing a delay that is understandable.

42.6 All the above considerations must be applied, not individually, but holistically.'

[11] [2016] JOL 36595 (LC); [2016] ZALCJHB 330 at para 42. See also *Independent Communications Authority of South Africa v Malapane* [2022] ZALCJHB 90; [2022] JOL 53890 (LC) at para 33.

LABOUR COURT

[39] The Constitutional Court in *Stokwe v Member of the Executive Council, Department of Education, Eastern Cape and Others*[12] applied the aforesaid *dicta* in *Moroenyane supra*. The Court further had the following to say:[13]

'This also accords with the general principles of how delay impacts the fairness of disciplinary proceedings. The question whether a delay in finalisation of disciplinary proceedings is unacceptable is a matter that can be determined on a case-by-case basis. There can be no hard and fast rules. Whether the delay would impact negatively on the fairness of disciplinary proceedings would thus depend on the facts of each case …'

[48] In *casu*, the Employee protested about the delay in instituting and finalising the disciplinary proceedings against her. The Employee complained that because of the delay, the Applicant was unable to provide her with the supporting documents that accompanied the BI-24 application form in 2008. On the objective evidence, the Employee's protestations are well founded. The Applicant provided no evidence to explain why it only escalated the matter to Chamane in 2013, despite being made aware of the issue in 2008. In respect of the further delay, the Applicant attempted to attribute the delay of 2 years (2013 – 2015) to an investigation that was conducted by Chamane. The explanation was that the documents were housed in some warehouse and it took long to obtain them.

[49] This explanation is unconvincing. In this matter, an investigation would have entailed obtaining the BI-24 application form and supporting documents, and interviewing the Employee, Ludwayi, Du Preez and Ahrens. It is inexplicable that this process took 2 years to finalise. A single act of misconduct relating to an irregular registration of a child cannot reasonably take 2 years to investigate. Worse still, the Applicant provided no explanation as to why the Employee's disciplinary hearing could not proceed from 27 November 2015 (after the postponement) until the end of February 2017. This inordinate delay damaged the interests of the administration of justice. The delay is extremely prejudicial to the witnesses who were required, in March 2017, to testify about an incident that happened 9 years prior. It unsurprisingly also appears that the supporting documents which accompanied the BI-24 application

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[12] (2019) 40 ILJ 773 (CC) at para 72.
[13] Ibid at para 71.

LABOUR COURT

form could not be located. This situation is clearly undesirable and underscores the fact that disciplinary hearings ought to be instituted and finalised promptly without delay.

[50] Seen thus, the Commissioner's conclusion that the disciplinary hearing was procedurally not in compliance with Resolution 1 of 2003 is supported by the objective facts and, therefore, eminently reasonable.

<u>Costs</u>

[51] It has recently been reiterated by the Constitutional Court that, in labour matters, costs do not follow the result.[14] There is nothing in law or fairness which in my view warrants a departure from this.

<u>Order:</u>

[52] Accordingly, I make the following order:

1. The Applicant's application to review the arbitration award issued under case number GPBC2295/2017 dated 11 June 2019 is dismissed; and
2. there is no order as to costs.

Doctor Cithi
Acting Judge of the Labour Court

<u>Appearances:</u>

For the Applicant: Adv M H Mhambi

Instructed by: The State Attorney, Pretoria.

For the Third Respondent: Mr S Hlongwane from Mhlanga Incorporated.

LABOUR COURT

[14] *Union for Police Security and Corrections Organisation v South African Custodial Management (Pty) Ltd* [2021] ZACC 41; (2022) 43 ILJ 341 (CC).