IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case Number: JR 1105/21

In the matter between:

MOFOKENG RANTABI JAN	**Applicant**
and	
COMMISSIONER PAUL BOTHA	**First Respondent**
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	**Second Respondent**
GENERATOR AND PLANT HIRE SA (PTY) LTD	**Third Respondent**

Heard: 9 October 2024

Delivered: 14 March 2025

This judgment was handed down electronically by consent of the parties' representatives by circulation to them via email. The date for hand-down is deemed to be 14 March 2025.

JUDGMENT

MILO, AJ

[1] In this application the applicant seeks to review and set aside the arbitration award dated 25 April 2021 issued by the first respondent (the Commissioner) under the auspices of the second respondent, the Commission for Conciliation, Mediation and Arbitration (the CCMA).

[2] The impugned arbitration award found that the applicant's dismissal by the third respondent employer was substantively fair, with the result that his unfair dismissal claim before the CCMA was dismissed.

[3] No opposing papers have been filed by any of the respondents and the application is unopposed. At the hearing of this application Mr Hattingh, who appeared for the third respondent, handed up the third respondent's notice to abide, confirming that the third respondent stands by the reasoning of the Commissioner in his award and that the third respondent will abide by the decision of this Court.

[4] Of course, the mere fact that the review application is not opposed does not, in itself, entitle the applicant to relief as a matter of course. The Commissioner's ruling may be reviewed and set aside only if there are cognizable grounds to justify judicial intervention. The applicant retains the duty to establish that the ruling is reviewable on recognised legal grounds.[1]

[5] The review application has been brought in terms of section 145 and/or section 158 of the Labour Relations Act (the LRA)[2]. The applicant asserts that the Commissioner failed to apply his mind to relevant facts of the dispute before him, he

[1] See, for example, MEC Public Works and Infrastructure Free State Provincial Government v GPSSBC and Others [2019] JOL 43374 (LC).
[2] Act 66 of 1995, as amended.

misconducted himself, and he committed a gross irregularity and/or exceeded his powers by acting unreasonably and/or unjustifiably in various respects. The main thrust of the applicant's grounds of review, and that which featured prominently in argument, is that these alleged defects culminated in the Commissioner, allegedly in conflict with his obligations in terms of the LRA, handing down an arbitration award which falls outside the range of reasonable outcomes that a reasonable decision-maker could reach, based on the evidence that was before him.

Factual Background

[6] Prior to his dismissal on 27 July 2020, the applicant had been employed by the third respondent for almost five years. But for the allegations that ultimately led to the applicant's dismissal, he had a clean disciplinary record with the third respondent.

[7] The applicant was employed as a heavy-duty driver, whose main duties consisted of driving, delivering, collecting and deploying generators at the various premises of the third respondent's customers. It was company policy that whenever fulfilling his duties, the applicant would be accompanied by a truck assistant, being another employee of the third respondent.

[8] One of the generators for which the third respondent was responsible, was that which was deployed at the premises of one of the third respondent's customers at the Bon Accord site.

[9] The generator at this site was fitted with a remote monitoring system which allowed the third respondent to record and track information related to the generator, including its fuel levels, usage, and location. Additionally, a gauge on the generator itself also displayed relevant information including the generator's fuel levels and hours of usage.

[10] During the morning of 11 May 2020 another of the third respondent's employees, one Mr Philip Mojela (Mr Mojela) attended at the Bon Accord site to refuel the generator. Mr Mojela filled the generator with 291 liters of fuel, bringing it to its maximum fuel capacity of 500 liters.

[11] The third respondent's remote monitoring systems reflected that Mr Mojela had filled the generator with the specified amount of fuel. Part of the third respondent's standard protocol requires its employees, additionally, to verify and manually record fuel readings observed on the generator gauge. This process includes, among other things, capturing photographs of the readings using a company-issued mobile device and uploading the information via a software system known as Device Magic. Mr Mojela complied with this procedure and uploaded the relevant data, as required. The evidence presented and relied upon by the third respondent reflected that 291 liters of fuel had been supplied to the generator. However, in Mr Mojela's report to the third respondent at the time, he also noted: "*NB fuel gauge's faulty 89% but it's full*". It was accepted that this message should be taken to mean that despite the generator being filled to capacity, its fuel gauge was faulty such that it incorrectly displayed a reading of 89% full, instead of the correct 100%.

[12] Later that day, when the applicant reported for night shift duty at 18h00, he was instructed by the third respondent to collect the generator from the Bon Accord site and to transport it back to the third respondent's premises. The applicant was duly assigned a truck assistant, Mr James Gumede (Mr Gumede) to accompany and assist the applicant with this task.

[13] The applicant and Mr Gumede proceeded to the Bon Accord site together. Upon arrival at the site, the applicant and Mr Gumede performed routine site inspections, as required by the third respondent's standard protocol. During this inspection it was observed that there was a hole in the fence surrounding the generator, which the applicant reported to the third respondent. In line with company protocol, the applicant also recorded key information from the generator, including its

current fuel levels and the number of recorded usage hours. In the early hours of the morning, at 1h08, and whilst onsite, the applicant reported on Device Magic that at the time of the collection of the generator, the fuel level was 21% and that the hours of usage was recorded as 16,571 hours. At 1h09, the applicant also uploaded a photograph of the generator which indicated a fuel level of 17%.

[14] The applicant, with Mr Gumede, then loaded the generator onto their vehicle and transported it directly to the third respondent.

[15] Upon return to the third respondent's premises, the applicant parked the vehicle together with the generator that had been collected from the Bon Accord site, and went off duty at approximately 6h00 on 12 May 2020.

[16] In the days that followed, both the applicant and Mr Gumede continued to report for duty and perform their respective duties as usual, without incident. However, on 23 June 2022 both the applicant and Mr Gumede were issued with notices of suspension in anticipation of an impending disciplinary hearing. The third respondent's concern at the time was that the applicant and Mr Gumede had allegedly mispresented the fuel level of the generator as reported by the applicant in the early hours of the morning of 12 May 2020, and had been involved in the theft of fuel from the generator while they were onsite.

[17] The applicant and Mr Gumede were subsequently issued with notices to attend a joint disciplinary inquiry. Both were charged with allegations set out in identical terms, namely dishonesty (for allegedly submitting inaccurate information on the third respondent's Device Magic system on 11 May 2020) and theft (of company fuel on 11 May 2020).

[18] During the disciplinary hearing, the third respondent relied upon documentary evidence consisting of reports generated from the remote monitoring system, as well as the information and data uploaded by Mr Mojela and the applicant, as described

above. Substantial reliance was placed on system-generated reports indicating a sudden drop of the generator's fuel levels from 96.2% to 10.5% whilst the applicant and Mr Gumede were at the Bon Accord site attending to the removal of the generator. Based on this documentation, the third respondent inferred that fuel had been removed from the generator whilst it was under the care of the applicant and Mr Gumede. The third respondent further contended that this report supported the inference that the applicant and Mr Gumede had stolen company fuel and had had made dishonest representations to the third respondent regarding the fuel readings observed at the site.

[19] At the joint disciplinary inquiry, both Mr Gumede and the applicant pleaded not guilty. Their testimony was mutually corroborative, with both maintaining that, upon their arrival at the Bon Accord site, the applicant recorded the generator's fuel readings and reported them to the third respondent. Thereafter they, together, proceeded with the removal and transportation of the generator directly to the third respondent's premises. Neither the applicant nor Mr Gumede was able to proffer an explanation for the discrepancy in fuel readings recorded in the system's reports.

[20] Pursuant to the disciplinary hearing, an unusual set of circumstances arose. In the disciplinary inquiry outcome dated 27 July 2020 (the first outcome), the applicant was found guilty of both allegations and it was recommended that he be summarily dismissed. However, Mr Gumede, who faced the same charges supported by the same documentary evidence, was found not guilty as, according to the chairperson, there was "*insufficient evidence*" for such a finding against Mr Gumede. This recommendation was accepted and endorsed by the third respondent and the applicant was summarily dismissed on the same date.

[21] For reasons that were never addressed by the third respondent during the arbitration proceedings, the applicant was later provided with another disciplinary inquiry outcome dated 7 August 2020 (the second outcome). The second outcome maintained the position that the applicant was guilty of the allegations and his

summary dismissal was recommended. However, it reflected a complete about-turn insofar as Mr Gumede is concerned. In this second outcome, it was reflected that both the applicant and Mr Gumede were found guilty of the allegations, and it was recommended that both be dismissed. Despite this second outcome, it is common cause that the third respondent elected to implement the first outcome, treating Mr Gumede as not guilty, uplifting his suspension and, at least at the time of the institution of the review application, allowing him to remain in its employ.

[22] During the subsequent CCMA proceedings, the applicant speculated that the issuance of the second outcome may have been an act of subterfuge by the third respondent, designed to mislead him into believing that both employees had ultimately been dismissed. He surmised that the third respondent, recognising that a finding of guilt against one employee but not the other would expose its actions as irrational and unfair, sought to create the misimpression that it had treated both employees consistently. I shall return to this contention later in this judgment. However, for present purposes, it bears reiteration that the third respondent has acted on the first outcome only.

[23] Aggrieved by the findings of the disciplinary inquiry, the applicant referred a dispute to the CCMA which was arbitrated by the Commissioner.

[24] At the outset of the arbitration proceedings, the applicant advanced two primary contentions in support of his claim that his dismissal was unfair.

[25] First, the applicant denied the allegations against him and disputed the reliability of the evidence relied upon by the third respondent. He contended that the documentary evidence presented was so inconsistent and contradictory that it was rendered wholly unreliable. He denied any wrongdoing by Mr Gumede or himself, and asserted that there was no reliable evidence to demonstrate otherwise. The applicant maintained that he had accurately recorded the fuel readings and that this was

corroborated by the photographs he had captured and uploaded via the Device Magic system.

[26] Second, the applicant challenged the fairness and consistency of the third respondent's actions. He argued that, despite facing identical allegations relied upon by the same documentary evidence presented by the third respondent, he was found guilty and summarily dismissed, whereas Mr Gumede, inexplicably, was found not guilty and retained in his employment.

[27] On these grounds, the applicant alleged that his dismissal was substantively unfair. The applicant did not challenge the procedural fairness of his dismissal.

[28] At the arbitration, the third respondent led the evidence of a single witness, Mr Aaron Molefe (Mr Molefe), a supervisor in its employ and the applicant's line manager. Mr Molefe confirmed that he played no role in the investigation that led to the disciplinary charges against the applicant and Mr Gumede. He had no first-hand knowledge of the alleged fuel loss or theft, as contended by the third respondent. His testimony focused mainly on the monitoring and reporting systems used by the third respondent to track information related to its generators, including fuel levels, usage, and location, as previously outlined. From these reports, he drew inferences which, he asserted, demonstrated that the applicant had been dishonest in his reporting, and had committed theft of fuel.

[29] Mr Molefe also testified about events that took place after the applicant had been suspended, relating mainly to a request for the applicant to return the company-issued mobile device to the third respondent and how the applicant responded thereto, from which certain inferences of wrongdoing, relating to the allegations under consideration, were attributed to the applicant.

[30] On the second day of the arbitration, the third respondent indicated that it intended calling two additional witnesses to testify on its behalf, namely Mr Gumede, who the third respondent confirmed was present with the applicant during the alleged misconduct, and one Mr Bred Gotch, from Datacom. The Datacom system is one of the systems installed on the generator integral to the remote monitoring system. The third respondent's representative informed the Commissioner that Mr Gotch's testimony would be relevant to "*speak to the system itself*." However, neither Mr Gumede nor Mr Gotch were present to give evidence upon the resumption of the arbitration. According to the third respondent, Mr Gotch had apparently become impatient after waiting at the CCMA for the arbitration to commence, and simply left; and although Mr Gumede had allegedly been informed by the third respondent that he was required to attend the arbitration on this date, he thereafter applied for leave, which was granted by the third respondent, such that he was in another province at the time and unavailable to testify. The third respondent sought a postponement of the arbitration due to the unavailability of these witnesses. The Commissioner declined the postponement application, whereupon the third respondent closed its case.

[31] The applicant then testified on his own behalf and did not call any additional witnesses.

[32] The Commissioner then rendered the arbitration award. In the arbitration award, insofar as the postponement application is concerned, the Commissioner stated that:

> "The application was denied on the basis that the CCMA cannot be held hostage to the whims of witnesses and their subjective perceptions of when and how they might testify, and on the basis that the employee [Mr Gumede] who was supposed to testify had been informed of his need to testify on 08/04/2021, yet still applied for leave, which leave was rather astonishingly granted despite the [third] respondent's need to have the employee present to testify."

[33] Insofar as the fairness of the applicant's dismissal is concerned, the Commissioner found that:

> "I cannot conclude that the dismissal was substantively unfair. Evidence points to it being most probable that the fuel in the generator went missing whilst under the control of the applicant, with no explanation for that situation being presented by the applicant. It is therefore fair to conclude that the applicant cannot be trusted."

[34] Aggrieved by the findings and outcome of the Commissioner, the applicant initiated review proceedings in this Court in which, as mentioned above, the applicant contends, that the Commissioner came to a decision that falls outside of the band of reasonable decisions, which is wholly unjustifiable based upon the evidence before the Commissioner.

Evaluation

[35] As mentioned, the applicant brings this review application in terms of section 145 and/or section 158 of the LRA.

[36] Section 145 of the LRA specifically provides for, and regulates, the review of arbitration proceedings under the auspices of the CCMA. Section 158(1)(g) of the LRA provides that the Labour Court may, "*subject to section 145, review the performance or purported performance of any function provided for in the LRA, on any grounds that are permissible in law*."

[37] It is now trite that the review of arbitration awards issued under the auspices of the CCMA are exclusively dealt with in terms of section 145 and should be pursued in terms of section 145, and not section 158(1)(g).[3]

[3] See for example: *Department of Home Affairs v Maloyi NO and Others* (JR2377/19) [2023] ZALCJHB 131 (11 May 2023).

[38] The test to review an arbitration award of the CCMA is now well-established.

[39] This Court's powers of intervention in review proceedings are narrowly circumscribed. Where an applicant brings an application in terms of section 145 of the LRA, the Court may only review and set aside an arbitration award or ruling if it is shown to contain a defect[4] as contemplated by section 145 of the LRA that renders the arbitration award so unreasonable that no reasonable decision-maker could have reached the same conclusion.

[40] Thus, an applicant is required first to establish that there was a defect in the award in the form of, for example, an irregularity, error or omission on the part of the Commissioner. However, the enquiry does not end there. It is only if the Commissioner's award is so unreasonable that no reasonable decision-maker could have reached the same conclusion, that the award may be reviewed and set aside.

[41] This standard of reasonableness, established in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[5], thus places a high threshold on applicants seeking to challenge an arbitration outcome or a ruling.

[42] In *Herholdt v Nedbank Ltd and Another*[6], the Supreme Court of Appeal explained the review test as follows:

> "….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 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."

[4] Section 145(2) of the LRA clarifies that a "defect" contemplated in section 145 means "*that the commissioner (i) committed misconduct in relation to the duties of the commissioner as an arbitrator; (ii) committed a gross irregularity in the conduct of the arbitration proceedings; or (iii) exceeded the commissioner's powers;… or that an award has been improperly obtained*."
[5] [2007] 12 BLLR 1097 (CC)
[6] (2013) 34 ILJ 2795 (SCA) at para 25.

[43] Van Niekerk J (as he then was) in *NUMSA and Another v CCMA and Others*[7] put it thus:

> "The approach to be adopted is well-established and I do not intend to repeat it here. It is sufficient to record that the test for review is a two-stage test that requires an applicant first, to establish the existence of a reviewable irregularity, and then to demonstrate that the outcome of the proceedings is such that it falls outside of a band of decisions to which a reasonable decision-maker could come. Put another way, the first hurdle that an applicant must clear is to demonstrate the existence of a reviewable irregularity on the part of the arbitrator. While the existence of an irregularity will more often than not point to an unreasonable outcome, this is not necessarily so, and it is incumbent on the applicant to demonstrate that the decision to which the arbitrator came is one to which no reasonable decision-maker could come on the available evidence."

[44] This requires the award in question to be assessed against the facts before the arbitrator to determine whether the award meets the reasonableness standard. Whilst a reviewing Court must be mindful not to blur the distinction between an appeal and a review, in applying the reasonable test it is essential for the Court to examine the merits of the matter and to consider the entire evidentiary record (including the transcript of the record of proceedings before the arbitrator) to make a proper determination of whether the award constitutes a reasonable outcome based upon the evidence before the arbitrator. In this regard, the Constitutional Court in *Duncanmec (Pty) Ltd v Gaylard NO and others*[8] held as follows:

> "Sidumo cautions against the blurring of the distinction between appeal and review and yet acknowledges that the enquiry into the reasonableness of a decision invariably involves consideration of the merits. So as to maintain the distinction between review and appeal this Court formulated the test along the lines that unreasonableness would warrant interference if the impugned decision is of the kind that could not be made by a reasonable decision-maker.

[7] Unreported judgment. (Case no. JR 935/2020; Delivered on 10 August 2023) at para 5.
[8] [2018] 12 BLLR 1137 (CC) at paras 41 to 43. (Footnotes omitted)

This test means that the reviewing court should not evaluate the reasons provided by the Arbitrator with a view to determine whether it agrees with them. That is not the role played by a court in review proceedings. Whether the court disagrees with the reasons is not material.

The correct test is whether the award itself meets the requirement of reasonableness. An award would meet this requirement if there are reasons supporting it. The reasonableness requirement protects parties from arbitrary decisions which are not justified by rational reasons."

[45] In *D Lund Farm (Pty) Ltd v FAWU and Others*[9] this Court pointed out that:

"The reasonableness consideration envisages a determination, based on all the evidence and issues before the arbitrator, as to whether the outcome the arbitrator arrived at can nonetheless be sustained as a reasonable outcome, even if it may be for different reasons or on different grounds. This necessitates a consideration by the review court of the entire record of the proceedings before the arbitrator, as well as the issues raised by the parties before the arbitrator. In the end, it would only be if the outcome arrived at by the arbitrator cannot be sustained on any grounds, based on that material, and the irregularity, failure or error concerned is the only basis to sustain the outcome the arbitrator arrived at, the review application would succeed. The task of the reviewing court was succinctly set out in Anglo Platinum (Pty) Ltd (Bafokeng Rasemone Mine) v De Beer and Others where it was held:

'…. the reviewing court must consider the totality of evidence with a view to determining whether the result is capable of justification. Unless the evidence viewed as a whole causes the result to be unreasonable, errors of fact and the like are of no consequence and do not serve as a basis for a review.'

(Own emphasis)

[9] (JR1119/21) [2023] ZALCJHB 337 (22 November 2023) at para 32.

[46] In *Securitas Specialised Services (Pty) Ltd v Commission for Conciliation Mediation and Arbitration and Others*[10] the Labour Appeal Court (LAC) has affirmed these principles and added that:

> "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 justifications for reasons other than those given by the arbitrator. The result will be unreasonable if it is entirely disconnected with the evidence, unsupported by any evidence and involves speculation by the arbitrator.
>
> This court has eschewed a piecemeal approach to a review application by the Labour Court. The proper approach is for the Labour Court to consider the totality of the evidence in deciding whether the decision made by the arbitrator is one that a reasonable decision maker could make."
>
> (Own emphasis)

[47] It is against these principles that the review application *in casu* falls to be determined.

[48] While all of the applicant's grounds of review are collectively raised to support the contention that the Commissioner arrived at an irrational finding that the applicant's dismissal was substantively fair, and these grounds shall be considered wholistically, it is convenient for present purposes to analyse these grounds under two categories, namely (i) whether the evidence supported a reasonable finding that the applicant was guilty of the allegations for which he was dismissed, and (ii) whether there was inconsistent treatment between the applicant and Mr Gumede, which rendered the applicant's dismissal substantively unfair.

Did the evidence reasonably establish a finding of wrongdoing on the part of the applicant?

[10] [2021] 5 BLLR 475 (LAC) at para 19 and 20.

[49] The Commissioner's analysis of the evidence concerning whether the applicant was, on a balance of probabilities, guilty of the alleged misconduct is confined to two paragraphs in the award. The Commissioner's reasoning is captured as follows in his award:

> "11. In assessing the evidence, I considered the aspects of credibility of each witness. The [third] respondent's witness was credible…I could not see any reason not to accept his evidence as probable. The applicant was not able to explain the differences between the reasons he gave at the disciplinary hearing and at arbitration regarding the deletion of data on the phone. The applicant also offers, in essence, a blank denial of allegations, and did not produce a version to be tested that might explain the undisputed drop in fuel levels whilst the generator was in his possession. A vague reference to a reported hole in the fence does not constitute a version.
>
> 12. If not able to at least offer a version to explain the incident, one indeed wonders how the applicant can be trusted as an employee. There was no evidence offered by the applicant of any tampering with the fuel system, neither does he posit that the fuel must have been stolen by someone else. The bottom line is that there was a massive drop in fuel level that does not correspond with the hours run by the generator, whilst the generator was in the hands of the applicant, with no explanation to explain the loss of fuel being offered by the applicant."

[50] Having regard to the grounds of review raised by the applicant, it is necessary for this Court to assess the evidence before the Commissioner as part of the assessment into the reasonableness of these findings and the award.

[51] As a starting point, the Commissioner's assertion in the arbitration award that it was "*undisputed*" that there was a drop in fuel levels while the generator was in the applicant's possession reflects a misapprehension and misinterpretation of the evidence before him.

[52] It was not common cause that there was an actual fuel reduction in the generator. Throughout the proceedings, the applicant consistently maintained that he had no personal knowledge of the generator's actual fuel levels at the relevant time, nor could he comment on whether there was a fuel loss or, if so, whether this was due to theft or a leak. His position was that he simply recorded and reported the fuel readings as reflected on the generator itself, submitting this data via Device Magic, which included a photograph depicting a fuel level of 17%.

[53] The applicant's case before the Commissioner was not one of explaining the fuel discrepancies as reflected in the documentary reports because, as he stated, he simply could not do so. The applicant however pertinently challenged the reliability of the documentary evidence. The applicant pointed out inconsistencies in the system-generated data, which were not limited to the period when he and Mr Gumede were attending to the generator, but were also evident earlier that day, when another employee, Mr Mojela, attended to fueling the generator. Given these anomalies, the applicant contended that no reasonable reliance could be placed on the data, and consequently, the inferences drawn by the third respondent were irrational and unfounded.

[54] While the applicant acknowledged that the documentary records reflected a drop in fuel levels on 11 May 2020, he did not concede that such a drop actually occurred. Rather, he maintained that neither he nor the third respondent could adequately explain the data inconsistencies, precisely because the documentary evidence itself was unreliable. This unreliability, he contended, was supported by data uploaded by Mr Mojela, which confirmed the existence of a faulty fuel gauge as a possible contributing factor.

[55] Although the third respondent maintained its position that the documentary evidence supported the allegations against the applicant, a thorough assessment of its evidence before the Commissioner reveals that the third respondent itself could not

assert confidence in the reliability of the data presented. As alluded to earlier, the sole witness for the third respondent, Mr Molefe, testified that the third respondent's generators, including the generator at the Bon Accord site, are fitted with Datacom and DSE systems, which record and transmit data remotely, providing the third respondent with real-time access to this information.

[56] Although Mr Molefe did not hold himself out as an expert on these systems, he nevertheless sought to explain and interpret the data reflected in the system-generated reports relied upon by the third respondent during the arbitration. The transcript of the record of the arbitration proceedings reveals that by the conclusion of Mr Molefe's evidence, inclusive of cross examination by the applicant's representative and questions raised by the Commissioner, the following key aspects of Mr Molefe's testimony relevant to the proof of the allegations emerged:

56.1 A faulty gauge will provide fluctuating and inaccurate fuel readings. If the fuel gauge is faulty, it will provide inaccurate readings to the remote monitoring system. Mr Molefe confirmed that due to this fact, it would be inappropriate to assert that one – whether the fuel gauge or the monitoring system – was more accurate than the other.

56.2 The documents reflected that although Mr Mojela refueled the generator to full capacity on the morning of 11 May 2020, the generator's fuel gauge reflected only 89% capacity at that time instead of the 100% recording that should have been reflected. This evidence supports Mr Mojela's report that the generator gauge was faulty.

56.3 By that evening, despite the generator being used for only two hours, the remote monitoring system recorded a fuel level of 96.2%.

56.4 Another system-generated report reflected a drop in fuel levels from 96.2% to 10.5% that occurred between the hours of 22h00 and 23h49 on 11 May 2020. This was at a time that the applicant and Mr. Gumede were at the Bon Accord site. However, this data conflicts with (i) the fuel readings manually recorded by the applicant from the generator itself approximately 80 minutes later, at 1h08, which reflected a fuel level of 21% as reported by the applicant,

and (ii) the photographic evidence uploaded by the applicant at 1h09, reflecting a fuel level of 17%.

56.5 Another of the third-respondent's reports indicated that the generator's fuel level actually dropped to 0%. This report conflicts both with a system-generated report (reflecting 10.5% fuel levels) and the photographic evidence submitted by the applicant (reflecting a gauge reading of 17%).

56.6 Mr Molefe was questioned by the applicant's representatives on these discrepancies and anomalies. Specifically, when asked to explain the discrepancy in the third respondent's own records which reflected a fuel level of 10.5% while another reflected 0% at the same time, Mr Molefe was unable to provide a definitive explanation, other than speculating that it may have been the result of a "*finger typing error*".

56.7 The third respondent never conducted a physical inspection of the generator or its fuel levels upon its return to its premises, leaving its condition and actual fuel content unverified.

56.8 Mr Molefe confirmed that a drop in a generator's fuel level may be occasioned by a leak or other damage. Mr Molefe asserted that he did not think that the fuel level drops could be explained by a leak because a leak would have revealed fluctuating fuel level readings. He further stated that the applicant did not report a leak in the generator.

[57] The third respondent did not provide any evidence of the actual amount of fuel contained in the generator upon its return, that may have been discerned through, for example, a physical inspection of the generator or through records of the amount of fuel that was required to refuel the generator to maximum capacity after it had been transported by the applicant and Mr Gumede to the third respondent's premises in the early hours of the morning on 12 May 2020. Additionally, although it was accepted that a drop in a generator's fuel level may be occasioned by a leak or other damage, since no inspection of the generator was conducted, there was no evidence to confirm or refute the existence of a leak or other damage.

[58] During cross-examination of Mr Molefe, the applicant's representative sought to confirm with Mr Molefe that the third respondent's case was entirely dependent on the documentary evidence presented. In response, Mr Molefe affirmed this to be the case. This exchange occurred in the context of the applicant's representative drawing attention to discrepancies in the documentation relied upon by the third respondent. It was put to Mr Molefe that, given these anomalies, the documents could not be regarded as reliable. While Mr Molefe acknowledged the third respondent's reliance on the documentation, he did not expressly concede that the identified inconsistencies rendered the documents unreliable.

[59] Hence, it is clear that both the third respondent, in dismissing the applicant, and the Commissioner, in finding that the applicant's dismissal was substantively fair, drew and relied upon inferences based upon, primarily, the documentation discussed above.

[60] In the determination of disputes, it is acceptable and sometimes necessary to draw inferences. However, inferences must be based on proven facts and arrived at through logical reasoning. Inferences should not be mere conjecture or speculation.[11] In the oft-cited judgment in *Caswell v Powell Duffryn Associated Collieries Ltd*[12] it was put thus:

> "Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish... But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture."

[11] See: *EN obo SN v MEC for Health: Gauteng Provincial Government* [2024] JOL 67362 (GJ), at para 35.
[12] (1939) 3 All ER 722 at 733.

[61] As mentioned, in *Securitas*[13] the LAC pointed out that an arbitration award will be unreasonable if it is entirely disconnected with the evidence, unsupported by any evidence and involves speculation by the arbitrator.

[62] Were the inferences in this matter reasonably drawn? A proper evaluation of the evidence before the Commissioner requires a step-by-step analysis of the inferences drawn by the third respondent, in dismissing the applicant, and by the Commissioner in finding that the dismissal was substantively fair. Specifically, three critical questions arise: (i) was there an actual fuel loss? (ii) if so, can it reasonably be attributed to theft? (iii) if so, what evidence establishes that the applicant, rather than Mr Gumede or someone else, was responsible?

[63] On the available evidence, it cannot reasonably be inferred that a fuel loss occurred at all. The third respondent's case rested entirely on remote monitoring system data, and data uploaded by the applicant and by Mr Mojela, yet these very records contained material inconsistencies that cast serious doubt on their reliability.

[64] Despite Mr Mojela refueling the generator to full capacity, the fuel gauge reflected only 89% instead of 100%, confirming that the gauge was faulty.

[65] The alleged drop from 96.2% to 10.5% conflicts with the applicant's own recorded readings (21%) and photographic evidence (17%).

[66] Further inconsistencies arose when one report reflected 10.5% fuel levels, while another suggested 0%, with no reasonable explanation provided by Mr Molefe, aside from speculation that it may have been a "*finger typing error*."

[67] These anomalies in the documentary evidence render the documents entirely unreliable. In my view, no facts relevant to the issues *in casu* are proven by these documents, and no reasonable inferences of fuel loss could thus be made from these

[13] Id fn 12.

reports. The only reasonable inference to be drawn from this documentary evidence is that the data inconsistencies, unexplained fluctuations in fuel levels, and contradictions among system-generated reports and uploaded data, indicate fundamental flaws in the reliability of the third respondent's monitoring mechanisms. The evidence does not support a clear, objective, or verifiable record of the generator's fuel levels at any given time.

[68] Crucially, the third respondent never conducted a physical inspection of the generator upon its return nor did it present any other evidence such as, for example, subsequent refueling reports, to verify its actual fuel levels. Without direct evidence of a fuel shortage, it is unreasonable to infer that fuel was missing at all. Given the inherent contradictions in the documentary evidence, any conclusion that fuel was lost would be based on assumption rather than factual proof.

[69] Even if it were accepted, despite the unreliable evidence, that fuel was missing, the next logical question is whether this could reasonably be attributed to theft. The third respondent failed to exclude alternative reasonable explanations, such as a mechanical leak or other fuel system failure, which was not investigated despite Mr Molefe's own concession that a leak could cause a drop in fuel levels. Given the contradictory data throughout the relevant period, the more reasonable explanation, is that there were errors in the monitoring system itself.

[70] The third respondent's case rested entirely on the assumption that a drop in fuel levels must equate to theft. This was a leap unsupported by evidence. The absence of any independent verification of the fuel levels makes it impossible reasonably to conclude that fuel was in fact stolen, rather than simply appearing to be lost due to technical malfunctions or inaccuracies in the system-generated data.

[71] However, even if there was a fuel loss, caused by theft, what evidence establishes that the applicant, rather than Mr Gumede or someone else, was responsible? The evidence does not point exclusively to the applicant, nor does it

distinguish his culpability from that of Mr Gumede, who was with him at all relevant times. Both the applicant and Mr Gumede were assigned to collect the generator. According to the reporting data relied upon by the third respondent, both were present at the Bon Accord site at the time the alleged fuel loss occurred. Both transported the generator, together, to the third respondent's premises.

[72] On the evidence before the Commissioner, there was no basis upon which Mr Gumede was found not guilty of theft, yet the same evidence was deemed sufficient by the third respondent to find the applicant guilty of the very same misconduct. The third respondent provided no explanation for its decision in this regard.

[73] If the documentary evidence was indeed unreliable, then neither the applicant nor Mr Gumede should have been found guilty. Conversely, if the evidence was considered reliable, then it follows that one or both of them may have been responsible for the alleged theft. There was simply no evidence before the third respondent that the applicant, instead of Mr Gumede, was guilty of theft, if indeed any theft occurred at the time. However, given that they were together at all relevant times, it was illogical and unfair for the theft to be attributed to the applicant alone.

[74] The third respondent's decision to attribute guilt solely to the applicant was irrational and unreasonable, as it reflects an arbitrary or selective application of the evidence, which cannot withstand scrutiny on a balance of probabilities. To the extent that the Commissioner has perpetuated this irrationality in his analysis and findings, his outcome is likewise irrational and unreasonable.

[75] The Commissioner's conclusion that the applicant failed to provide an alternative version that could be tested and that this counted against him, is in my view misconceived and unreasonable in the circumstances of this case.

[76] It is so that our courts have long held that once an employer has made out a *prima facie* case of misconduct, the burden of rebuttal shifts to the employee to

present a reasonable alternative explanation. In *Federal Cold Storage Co Ltd v Angehrn and Piel*[14], the Court held:

> "Once the appellants had proved a prima facie case of misconduct on the part of the respondents in taking, in violation of their duty, a secret profit of the kind described, the dismissal stood prima facie justified, the burden of proof was shifted, and it lay upon the respondents … to prove the righteousness of the transaction. If they failed to discharge that burden satisfactorily, then the prima facie case against them must prevail and their guilt, justifying dismissal, must be taken to be established."

[77] Similarly, in *National Union of Mineworkers and Another v Commission for Conciliation, Mediation and Arbitration and Others*[15], the Court emphasised:

> "… the third respondent had at least made out a prima facie case. That meant that there was a duty on the second applicant to advance and provide a reasonable alternative explanation. His failure to do so in my view counts heavily against him. …"

[78] While it is accepted that when an employer establishes a *prima facie* case of misconduct, an employee may have a duty to provide a reasonable alternative explanation, this principle only applies where a *prima facie* case has indeed been established. The key distinction in the present case is that a proper analysis of the evidence before the Commissioner reveals that the third respondent failed to establish even a *prima facie* case of wrongdoing on the part of the applicant in the first place. The Commissioner, therefore, erred in suggesting that the applicant bore an evidentiary burden to provide an alternative explanation, when no case had been made out against him to begin with.

[79] The infirmities in the evidence were such that a reasonable arbitrator should have found that the third respondent's case was based on assumptions rather than

[14] 1910 TS 1347 at 1352.
[15] (2013) 34 ILJ 945 (LC) at para 41

proof. The Commissioner, however, proceeded from the flawed premise that a theft had in fact occurred and then unreasonably placed an evidentiary burden on the applicant to disprove this assumption.

[80] The applicant expressly stated that he did not know whether fuel was missing, whether a theft occurred, or whether a leak had caused any perceived discrepancy. Notably, he also stated that he was unable to speculate as to the discrepancies in the system-generated reports.

[81] Given the contradictory documentary evidence and lack of independent verification, the applicant could not, in my view, have been expected to speculate about missing fuel or offer explanations for something of which he had no knowledge.

[82] Had the Commissioner properly applied his mind to the evidence, he would have recognised that the applicant's version was not an unreasonable evasion of responsibility, but rather a logical response in the circumstances. The Commissioner mischaracterised the applicant's response. What was in reality a rational statement of fact (i.e., that the applicant did not know whether there was theft) was wrongly construed as a failure to provide an explanation. Instead of recognising the inherent flaws in the third respondent's case, the Commissioner, in my view, placed an unfair evidentiary burden on the applicant to disprove an unsubstantiated assumption of guilt rather than requiring the employer positively to prove misconduct. This burden was both logically and legally inappropriate. By treating the applicant's inability to speculate about a theft as evidence against him, the Commissioner effectively reversed the burden of proof, an approach that is wholly inconsistent with established principles of fairness.

[83] The Commissioner's finding that the applicant presented inconsistent versions at the disciplinary hearing and arbitration regarding the deletion of data on his company-issued phone is also fundamentally flawed. There is no rational basis upon which the Commissioner could have reasonably concluded that the applicant's

versions were inconsistent, given the absence of any objective record from which to draw such a conclusion. There was no transcription or recording of the disciplinary hearing setting out *verbatim* what the applicant had stated on this issue and the third respondent did not lead any first-hand evidence from the chairperson of the disciplinary hearing or any other witness to establish what the applicant had actually said during the disciplinary proceedings. The Commissioner relied solely on the wording of the disciplinary outcome, which itself was a summary and, as was conceded in other respects, possibly contained errors.

[84] The unreliability of the disciplinary outcome as an accurate reflection of the evidence was apparent from the Commissioner's own acceptance of an admitted error in another aspect of the outcome, where it incorrectly recorded that the applicant reported a hole in the ground rather than a hole in the fence.

[85] The Commissioner further erred in allowing speculation to take the place of evidence, by suggesting that the applicant's deletion of data from his phone supported an inference that he was trying to hide information relevant to the alleged fuel loss. However, this inference is unfounded for several reasons, including that:

85.1 No evidence was led that the deletion was related to the fuel issue;

85.2 The third respondent never presented any evidence before the Commissioner linking the deleted data to the fuel discrepancies or the alleged misconduct;

85.3 Although there were suggestions that the deletion of data supported an inference of concealment, this was never properly articulated or substantiated by evidence. The third respondent itself never directly relied on this issue to prove misconduct on the part of the applicant, yet the Commissioner appears to have elevated this aspect as though it carried probative value;

85.4 The issue of deletion was wholly peripheral. Whether the applicant formatted the phone or simply deleted photos was not material to the actual allegations of misconduct. There was no logical connection between this issue and the core allegations of fuel theft or misrepresentation of fuel levels.

[86] On a wholistic view of the evidence in totality, in my view the inferences drawn by the Commissioner were not drawn on the basis of proven facts or reliable evidence before him. His inferences were irrational and amounted to nothing more than speculation and conjecture. There was simply no evidence before the Commissioner to establish that the applicant was guilty of the misconduct for which he was dismissed. On this basis, the applicant's dismissal could not reasonably be found to have been substantively fair.

[87] However, quite apart from assessment of the evidence in relation to the guilt or otherwise of the applicant, and even if the documentary evidence had been considered by the Commissioner to support a rational finding that the applicant had committed theft, an additional ground pertinently advanced by the applicant in the arbitration was that his dismissal was substantively unfair on account of the further reason that he had been inconsistently treated as compared to Mr Gumede, and thus unfairly dismissed.

[88] It is to this issue that I now turn.

Consistency

[89] It is well established that employers must be consistent in their application of discipline. All things being equal, it is generally unfair for an employer to dismiss only some of a number of employees guilty of the same infraction and, if a court were to condone this stance, it would effectively condone capricious or arbitrary conduct by an employer. This parity rule is an element of disciplinary fairness.

[90] The parity principle is endorsed and given expression in the Code of Good Practice: Dismissal[16] (the Code) which provides as follows:

"Dismissals for misconduct

[16] Schedule 8 to the LRA.

6. The employer should apply the penalty of dismissal consistently with the way in which it has been applied to the same and other employees in the past, and consistently as between two or more employees who participate in the misconduct under consideration…

7. Guidelines in cases of dismissal for misconduct. – Any person who is determining whether a dismissal for misconduct is unfair should consider –

a) whether or not the employee contravened a rule of standard regulating conduct in, or are relevant to, the workplace; and

b) if a rule of standard was contravened, whether or not - …

(iii) the rule or standard has been consistently applied by the employer…" [Emphasis supplied]

[91] The LAC in *National Union of Mine Workers, obo Botsane v Anglo Platinum Mine (Rustenburg Section)*[17] has stated that, in respect of the requirement of consistency:

"Mainly, it is a recognition of the unfairness of the condemnation of one person for genuine misconduct when another indistinguishable case of misconduct by another person is condoned."

[92] In *Southern Sun Hotel Interests (Pty) Limited v CCMA and Others*[18] this Court stated the following:

"The legal principles applicable to consistency in the exercise of discipline are set out in Item 7 (b) (iii) of the Code of Good Practice: Dismissal establishes as a guideline for testing the fairness of a dismissal for misconduct whether 'the rule or standard has been consistently applied by the employer'. This is often referred to as the 'parity principle', a basic tenet of fairness that requires like cases to be treated alike. The courts have distinguished two forms of inconsistency – historical and contemporaneous inconsistency. The former requires that an employer apply the penalty of dismissal consistently with the

[17] (2014) 35 ILJ 2406 (LAC) at para 26.
[18] (2010) 31 ILJ 452 (LC) at para 10. (Footnotes omitted)

way in which the penalty has been applied to other employees in the past; the latter requires that the penalty be applied consistently as between two or more employees who commit the same misconduct. A claim of inconsistency (in either historical or contemporaneous terms) must satisfy a subjective element - an inconsistency challenge will fail where the employer did not know of the misconduct allegedly committed by the employee used as a comparator (see, for example, Gcwensha v CCMA and others [2006] 3 BLLR 234 (LAC) at paras 37-38). The objective element of the test to be applied is a comparator in the form of a similarly circumstanced employee subjected to different treatment, usually in the form of a disciplinary penalty less severe than that imposed on the claimant. (See Shoprite Checkers (Pty) Ltd v CCMA and others [2001] 7 BLLR 840 (LC), at para 3.) Similarity of circumstance is the inevitably most controversial component of this test. An inconsistency challenge will fail where the employer is able to differentiate between employees who have committed similar transgressions on the basis of inter alia differences in personal circumstances, the severity of the misconduct or on the basis of other material factors."

[93] In *Minister of Correctional Services v Mthembu N.O. and Others*[19] this Court held as follows:

"When two or more employees engaged in the same or similar conduct at more or less the same time but only one or some of them are disciplined, or where different penalties are imposed, unfairness flows from the principle that like cases should, in fairness, be treated alike."

[94] Where an employee establishes a credible factual basis for a claim of inconsistent disciplinary treatment, or where it is common cause that other employees involved in similar or identical misconduct were treated differently, the employer bears the onus to provide a rational and justifiable explanation for the differential treatment.[20]

[19] (JR953/04) [2006] ZALCJHB 30 (24 March 2006) at para 8.
[20] See: *SAPS v SSSBC and Others* [2010] JOL 26427 (LC).

In *Sappi Fine Papers (Pty) Limited t/a Adamas Mill v Lallie and Others*[21] this Court explained the duty of an employer in such circumstances quite clearly:

> "As regards the onus, the onus of proving that the dismissal was fair, and thus of rebutting the allegation of any inconsistency, is one which rests squarely on the employer."

[95] In rebutting an allegation of inconsistency, where an employer is able to demonstrate a justifiable and objective basis for differentiating between employees, whether based on, for example, seniority, individual circumstances, the gravity of the misconduct, the existence of prior warnings, or other material factors, it may well be that the claim of inconsistent treatment will not be sustained. However, it obviously remains incumbent upon the employer to justify disparate treatment, and in the absence of material distinguishing features, equity requires parity of treatment.

[96] In *Absa Bank Limited v Naidu and Others*[22], the LAC pointed out that the parity principle must be applied with a measure of caution, and quoted with approval the following observations of Professor John Grogan:

> "[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."

[97] This is necessarily so. I am also mindful that it does not axiomatically follow that inconsistent treatment will necessarily render an otherwise substantively fair dismissal unfair. Consistency is one of the factors to be taken into account when wholistically assessing the particular circumstances of a matter. However, where there are credible

[21] (P235/98) [1998] ZALC 117 (24 November 1998) at para 5.
[22] (2015) 36 ILJ 602 (LAC) at para 36. Grogan, J *Dismissal, Discrimination and Unfair Labour Practices* (Juta, 2007) at 273-274.

claims of inconsistency, the employer is required to provide a rational justification therefor.

[98] In addressing the issue of consistency, the Commissioner stated as follows in his arbitration award:

> "In respect of consistency, I did not hear any evidence form the applicant (or from the respondent) to the effect that the truck assistant Gumede was involved in working with the generator in any way on the day and at the time in question. If there is no evidence to show that his subordinate, who follows the applicant's instructions, was even involved in the incident in question, it becomes impossible to assess the aspect of inconsistency raised. I cannot simply conclude by way of subjective extrapolation that Gumede played any role in the events at the time in question. This problem of course arises as a result of the applicant's essential lack of version of events. He does not deny the massive drop in fuel, but simply says he did not steal it."

[99] The Commissioner's reasoning reflects a fundamental misapprehension of the evidence before him and a failure to apply the correct legal principles governing disciplinary consistency.

[100] Contrary to the Commissioner's assertion, there was ample, clear, and largely uncontested evidence before him on the issue of inconsistent disciplinary treatment, which included the following:

100.1 The applicant and Mr Gumede attended the Bon Accord site together to remove the generator.

100.2 They were together at all times while handling the generator and transporting it back to the third respondent's premises.

100.3 The documentary evidence relied upon by the third respondent reflected that the alleged fuel loss occurred while both the applicant and Mr Gumede were present at the Bon Accord site.

100.4 Both the applicant and Mr Gumede were charged in a joint disciplinary hearing on identical charges, including theft of fuel from the generator.

100.5 During the disciplinary hearing, their evidence was mutually corroborative.

100.6 The disciplinary chairperson issued two different disciplinary outcomes, one of which acquitted Mr Gumede while the second (dated after the applicant's dismissal) found him guilty.

100.7 It was common cause that despite these two outcomes the third respondent acted upon the first outcome, thereby retaining Mr Gumede in employment while dismissing the applicant.

100.8 The applicant raised concerns that the second outcome may have been an act of subterfuge designed to mislead him into believing that discipline had been applied consistently, when in fact it had not done so.

[101] These concerns were squarely raised and repeatedly emphasised in the arbitration proceedings.

[102] It is therefore patently incorrect for the Commissioner to state that the applicant led no evidence to suggest that Mr Gumede was involved in handling the generator. To the contrary, the record of proceedings reflects that, even when directly questioned by the Commissioner, the applicant explained what both he and Mr Gumede had done together over the relevant period. The applicant further stated that neither he nor Mr Gumede should have been dismissed because:

"What we did on the date of the incident was straight to the line."

[103] This was consistent with the applicant's evidence throughout the arbitration, where he repeatedly expressed his surprise that he had been found guilty and dismissed, while Mr Gumede, who had been with him at all material times, was acquitted.

[104] Moreover, the Commissioner unreasonably disregarded the submissions of the third respondent's own representative, who had explicitly stated that Mr Gumede was a relevant witness precisely because he had been present with the applicant and would be able to testify about what had occurred on the night in question.

[105] The Commissioner's stated reluctance to conclude that Mr Gumede played any role in the alleged theft is misconceived in light of the evidence before him. The Commissioner erroneously placed the burden on the applicant to provide some form of additional evidence of Mr Gumede's involvement beyond that which he had provided, rather than requiring the third respondent to justify its differential treatment of two employees who were accused of the same misconduct under the same circumstances.

[106] On the evidence before the Commissioner, the applicant clearly established a credible factual basis for his claim of inconsistent disciplinary treatment.

[107] Once a *prima facie* case of inconsistency is made out, the onus rests with the employer to provide a rational justification for the differential treatment. As the Commissioner himself acknowledged, the third respondent failed to do so. It remained entirely unexplained why Mr Gumede was acquitted, while the applicant was singled out for dismissal.

[108] The Commissioner appeared to attach some significance to the fact that Mr Gumede was the applicant's subordinate and therefore followed his instructions. However, this is both factually and legally irrelevant in the absence of evidence that the applicant issued any instructions whatsoever to Mr Gumede relating to the alleged misconduct. There was no evidence before the Commissioner explaining how, if at all, their different positions influenced the assessment of their culpability. Similarly, there was no evidence that the applicant had directed or instructed Mr Gumede in a manner that could justify treating him differently.

[109] In any event, where two employees are jointly accused of theft, and both plead innocence, their respective levels of seniority are irrelevant unless a material distinction exists that would justify different disciplinary outcomes. Theft is a serious offence, and all employees, regardless of rank, are expected to understand that it constitutes egregious misconduct. In this case, the third respondent failed to demonstrate any legitimate reason why Mr Gumede was treated differently from the applicant.

[110] Ultimately, the Commissioner accepted that the documentary evidence reflected a drop in fuel at a time when both the applicant and Mr Gumede were present onsite which, he inferred, indicated theft of the fuel at that time. However, he found that this evidence was sufficient to infer that the applicant was guilty of theft, but not Mr Gumede. The third respondent failed to justify this disparity. In the absence of a rational and objective explanation for this selective application of discipline, the applicant was clearly subjected to disparate and unfair treatment.

[111] The Labour Appeal Court's judgment in *Cape Town City Council v Masitho and Others*[23] is particularly apposite in this matter. Here the LAC held:

> "There may be valid grounds in a particular case to distinguish one employee from another, albeit that they have engaged in the same conduct, on the basis of their respective records, or on the basis of other material factors … but in the absence of material distinguishing features, equity would generally demand parity of treatment…
>
> Fairness, of course, is a value judgment, to be determined in the circumstances of the particular case, and for that reason, there is necessarily room for flexibility, but where two employees have committed the same wrong, and there is nothing else to distinguish them, I can see no reason why they ought not generally to be dealt with in the same way … Without that, employees will inevitably, and in my view justifiably, consider themselves to be aggrieved in consequence of at least a perception of bias." (Emphasis supplied)

[23] (CA9/1999) [2000] ZALAC 15 (28 June 2000) at p.5.

[112] In this case, the applicant was justifiably aggrieved by the disparate treatment he received at the hands of the third respondent, further exacerbated by the arbitration award which irrationally upheld the third respondent's stance. The Commissioner's failure properly to apply the parity principle and his failure to interrogate the fairness of the third respondent's conduct constitutes a material misdirection, which has rendered the award unreasonable.

[113] On this ground too, the finding of the Commissioner falls outside of the bands of reasonableness.

[114] Ultimately, on a full conspectus of all issues raised in this matter and having carefully assessed the totality of the evidence before the Commissioner, as well as the reasoning underpinning his findings, it is clear that the award is fundamentally flawed. The Commissioner misconceived material aspects of the evidence, failed properly to apply the principles of disciplinary consistency, and unreasonably shifted the burden onto the applicant to explain matters that were not proven by the third respondent. His conclusion that the applicant was guilty of theft was not rationally supported by the evidence, and his reasoning on the issue of consistency reflects a failure to apply the well-established parity principle. The defects in the award are, in my view, so profound and materially unreasonable that no reinterpretation, generous reading, or remedial approach can render the outcome justifiable. The fundamental flaws in reasoning and evidentiary assessment are beyond salvage, leaving no basis on which the award can be upheld. In short, the Commissioner's award does not meet the standard of reasonableness required for it to stand, as it falls outside the bounds of decisions that a reasonable decision-maker could reach. In the circumstances, there is merit in the review application, and the arbitration award falls to be set aside.

Relief

[115] Having found that the arbitration award falls to be set aside, it falls on this Court to determine whether the relief of substitution, as claimed by the applicant, is appropriate rather than a remittal of the matter to the CCMA for a hearing *de novo* before another commissioner.

[116] The recent decision of the LAC in *Phakoago v SANCA Witbank Alcohol and Drug Help Centre and Others*[24] provides useful guidance on the circumstances in which the Labour Court should remit a matter for a rehearing or, alternatively, substitute its own decision for that of a commissioner. The LAC held as follows:

> "[40] In terms of section 145 (4) (a) of the LRA, the Labour Court has the broadest powers to determine a dispute in whatever manner it considers appropriate. In exercising this power, the Labour Court may, after reviewing the proceedings, and if it finds in favour of the applicant by upholding the review, either substitute its decision for that of the commissioner or remit the matter to the CCMA.
>
> [41] In *National Union of Metalworkers of South Africa v Commission for Conciliation, Mediation and Arbitration and Others,* the Constitutional Court, after noting the wide discretion the Labour Court has in determining a dispute, cautioned against the Labour Court readily substituting its decision for that of the commissioner. The underlying consideration of the caution relates to the risk of the hasty use of discretion undermining the doctrine of separation of powers. The doctrine of separation of powers is critical in this regard because otherwise, the Labour Court could usurp the powers assigned to commissioners of the CCMA. It was for this reason that the Constitutional Court held that the Labour Court should exercise a measure of judicial deference and only substitute decisions in exceptional circumstances." It went further and stated that "judicial deference should not be interpreted to mean that the Labour Court does not have the power to substitute… arbitration awards".

[24] [2024] 12 BLLR 1271 (LAC) at para 40 onwards.

[42] In Trencon Construction (Pty) Ltd v Industrial Development Cooperation of South Africa Ltd and Another, the Constitutional Court held that the factors to take into account in considering whether to exercise the discretion to substitute the decision of an administrator are the following:

'To my mind, given the doctrine of separation of powers, in conducting this enquiry there are certain factors that should inevitably hold greater weight. The first is whether a court is in as good a position as the administrator to make the decision. The second is whether the decision of an administrator is a foregone conclusion. These two factors must be considered cumulatively. Thereafter, a court should still consider other relevant factors. These may include delay, bias or the incompetence of an administrator. The ultimate consideration is whether a substitution order is just and equitable. This will involve a consideration of fairness to all implicated parties. It is prudent to emphasise that the exceptional circumstances enquiry requires an examination of each matter on a case-by-case basis that accounts for all relevant facts and circumstances.'

[43] In Southern Sun Hotel Interests (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others, the court set out the circumstances in which the Labour Court would rather correct the decision than refer it back to the CCMA as being:

'(i) where the end result is a foregone conclusion and it would merely be a waste of time to order the CCMA to reconsider the matter;

(ii) where a further delay would cause unjustified prejudice to the parties;

(iii) where the CCMA has exhibited such bias or incompetence that it would be unfair to require the applicant to submit to the same jurisdiction again; or

(iv) where the court is in as good a position as the CCMA to make the decision itself.'

[44] In Auto Industrial Group (Pty) Ltd and Others v Commission for Conciliation, Mediation and Arbitration and Others, the Court held that:

'A court will ordinarily substitute the decision of a commissioner where all of the available evidence is before the court and little purpose would be served in a rehearing.'"

[117] In this matter, the record before this Court is sufficient to allow for a proper determination of the dispute. The Commissioner's award, by which the third respondent stands, arises from a misappreciation of the evidence before him and the misapplication of appropriate legal principles. This Court is in as good a position as another commissioner of the CCMA to determine the fairness of the applicant's dismissal based on the record before it. Furthermore, a remittal of the matter for a rehearing will prolong its determination and not be in the interests of expeditious dispute resolution and justice. I am mindful that the applicant has already endured the consequences of an unfair dismissal perpetrated over four years ago. The delay in obtaining redress has been exacerbated by an unreasonable and irrational arbitration award. Requiring him to undergo yet another arbitration would, in my view, be unnecessary and unjust in the circumstances of this matter.

[118] I am satisfied that a direct substitution of the Commissioner's award is appropriate, rather than remitting the matter for a *de novo* hearing.

[119] The applicant seeks the primary remedy of retrospective reinstatement, relief which he has sought since the outset of his claim. Section 193(2) of the LRA *obliges* this Court or an arbitrator to reinstate or re-employ an employee whose dismissal is unfair unless:

'(a) The employee does not wish to be reinstated or re-employed;

(b) The circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable;

(c) It is not reasonably practicable for the employer to reinstate or re-employ the employee; or

(d) The dismissal is unfair only because the employer did not follow a fair procedure.'

[120] Where an employee seeks reinstatement for a substantively unfair dismissal, it is incumbent upon the employer to demonstrate why the primary remedy of retrospective reinstatement should not apply, or should be limited.[25] In this matter, the third respondent had the opportunity to demonstrate that continued employment with the applicant would be intolerable, or that it would not be reasonably practicable to reinstate him. The third respondent has not done so.

[121] It is now trite that when it comes to the retrospectivity of any order for reinstatement, this Court exercises a discretion in terms of section 193(1) of the LRA, which must be exercised judicially. In this respect, the pronouncements of the Constitutional Court in *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*[26] are apposite:

> "[36] The ordinary meaning of the word "reinstate" is to put the employee back into the same job or position he or she occupied before the dismissal, on the same terms and conditions. Reinstatement is the primary statutory remedy in unfair dismissal disputes. It is aimed at placing an employee in the position he or she would have been but for the unfair dismissal. It safeguards workers' employment by restoring the employment contract. Differently put, if employees are reinstated they resume employment on the same terms and conditions that prevailed at the time of their dismissal. As the language of section 193(1)(a) indicates, the extent of retrospectivity is dependent upon the exercise of a discretion by the court or arbitrator. The only limitation in this regard is that the reinstatement cannot be fixed at a date earlier than the actual date of the dismissal. The court or arbitrator may thus decide the date from which the reinstatement will run, but may not order reinstatement from a date earlier than the date of dismissal. The ordinary meaning of the word "reinstate" means that the reinstatement will not run a date from after the arbitration award. Ordinarily then, if a Commissioner of the CCMA order the reinstatement of an employee

[25] See: *Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile and Others* (2010) 31 ILJ 273 (CC) at para 28; *Moni v Phiko Security Services (Pty) Ltd and others* [2024] JOL 63415 (LC) at para 25.
[26] (2008) 29 ILJ 2507 (CC) at para 36.

that reinstatement will operate from the date of the award of the CCMA, unless the Commissioner decides to render the reinstatement retrospective. The fact that the dismissed employee has been without income during the period since his or her dismissal must, among other things, be taken into account in the exercise of the discretion, given that the employee's having been without income for that period was a direct result of the employer's conduct in dismissing him or her unfairly."

[122] In exercising the discretion on whether to limit backpay, this Court must consider all relevant factors, including the hardship suffered by the employee on account of the unfair dismissal, and any hardship to an employer who may be burdened by a retrospective reinstatement order.

[123] Once again, there is no evidence before this Court to demonstrate why the applicant should not be paid full backpay in the event of reinstatement.

[124] Having regard to the totality of circumstances in this matter, I see no reason not to order the primary remedy of reinstatement with full retrospectivity.

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

Order

1. The arbitration award issued by the first respondent dated 25 April 2021 under case number GAJB1489-20 is reviewed and set aside.
2. The arbitration award is substituted with the following order:

"1. The dismissal of the applicant by the respondent on 27 July 2020 was substantively unfair.

2. The respondent is ordered to reinstate the applicant retrospectively from the date of his dismissal, on the same terms and conditions of employment that existed prior to his dismissal, and without any loss of benefits.

3. The respondent is ordered to pay the applicant backpay from the date of his dismissal until the date he reports for duty, within 14 days of this order.

4. The applicant is ordered to report for duty within 14 days of receipt of this order."

3. There is no order as to costs.

S. Milo

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr Wilson Khoza, HICRAWU

For the Third Respondent: Mr Justin Hattingh, GPHSA