



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No. JR1503/22

In the matter between:

TEBOHO VICTOR MAKAU

Applicant

and

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

First Respondent

MATSHEKGA, JN N.O.

Second Respondent

**COMPANIES AND INTELLECTUAL
PROPERTY COMMISSION (CIPC)**

Third Respondent

Heard: 5 June 2025

Delivered: 17 June 2025

JUDGMENT

MAKHURA, J

Introduction

- [1] The applicant launched these review proceedings against an arbitration award that found that his dismissal by the third respondent, the Companies and Intellectual Property Commission (CIPC), was both procedurally and substantively fair.¹ The application is opposed by the CIPC.

Background facts

- [2] The applicant was employed by the CIPC with effect from 1 July 1995. At the time of his dismissal on 13 October 2021, he held the position of Internal Ombud, reporting to Bathabile Kapumha (Kapumha), the Divisional Manager: Risk & Compliance. On 21 October 2020, the CIPC issued a charge sheet against the applicant, alleging that he committed misconduct relating to fraud, insolence, poor work performance and abuse of the CIPC's resources. Following a disciplinary hearing, the applicant was dismissed on 13 October 2021.

The charges

- [3] The genesis of the charges against the applicant is his alleged failure to submit the weekly report for the week of 1 – 5 June 2020, and his response to an email from Kapumha on 8 June 2020 where he informed her that he sent the report from his private email address using his cellphone at 13h05 on 5 June 2020. This report was due on 5 June 2020 by 14h00. The applicant was charged with fraud. The CIPC alleged that the applicant committed fraud as follows:

'On the 10th of June 2020 ... you made false representation by sending a false and/or fabricated email message to your manager, Mrs Bathabile Kapumha with the intention of misleading her into believing that on the 5th of June 2020 you sent her a weekly report.'

- [4] The conduct above was allegedly prejudicial to the CIPC in that it undermined his reporting, supervision and monitoring of his performance.

¹ The application is brought in terms of section 145 of the Labour Relations Act 66 of 1995, as amended (LRA).

- [5] Kapumha had informed the applicant that she did not receive the email, and in her attempt to obtain proof that the applicant did indeed submit the report as alleged, she visited the applicant at his workstation on 10 June 2020 to see the proof from the applicant's cellphone that he sent the email. It was this visit, which led to accusations of lying against each other, that gave rise to the second charge of insolence. The CIPC alleged that the applicant was insolent in that:

'On the 10th of June 2020 ... you conducted yourself in a contemptuous manner and undermined the authority of your Manager Bathabile Kapumha by shouting and insulting her calling her a liar who makes unfounded allegations.'

- [6] The applicant faced another charge of poor work performance. It was alleged that during the months of December 2019, and March, April, June and July 2020 the applicant's performance was poor and below the expected and required standard per his contract of employment or "*common law*" because he failed to submit monthly reports on due dates and that the reports he submitted were of poor quality. The CIPC alleged that this poor work performance was not related to capacity but was due to his negligence.
- [7] The fourth allegation that led to the applicant's dismissal was that on 23 July 2019, he abused the CIPC's resources by printing about 500 pages in preparation for a case against the CIPC. The applicant allegedly benefited from this conduct and caused the CIPC loss of time and resources.

The mainstay of the charges

- [8] At approximately 8h27 on Monday, 8 June 2020, Kapumha addressed an email to the applicant with the subject line "*Outstanding weekly report for week ended 05 June 2020*". Kapumha informed the applicant that she had not received his weekly report for the week ending on 5 June 2020, which was due at 14h00 that Friday. At 9h47, the applicant responded by attaching the weekly report and also indicated that the report was emailed to her on Friday, 5 June 2020, from his private email address.

[9] At 17h02, Kapumha requested that the applicant forward her the email he sent on 5 June 2020. Kapumha informed the applicant that she had no email in her inbox from either his work or private email address. The applicant responded on 10 June 2020 by stating that he was attaching a screenshot of the email he sent on 5 June 2020. He said that his original email was deleted and irretrievable. The email did not contain an attachment, but details of an email that showed that purported to show that the email was sent on 5 June 2020 at 13h05 from the applicant's private email address to Kapumha.

[10] Kapumha replied to the applicant's email at 10h59 and said that if the applicant could get a screenshot, he should send it and that what he had sent was not a screenshot but what he had typed. Although she was not scheduled to be in the office on that day, Kapumha testified that she decided to drive to the office so that she could make it clear to the applicant what she expected from him in terms of the screenshot. At the office, she went to the applicant's workstation and asked the applicant to show her what he had sent from his cellphone and asked him to open his cellphone. The applicant informed her that his emails are irretrievable and that he deleted the email to create memory or space on his cellphone. Kapumha then asked him how he came up with the screenshot, which he sought to use as proof that he sent the email. According to Kapumha, the applicant became irritable and started shouting. The details around the alleged shouting would be dealt with when I deal with the charge of insolence.

[11] Kapumha went back to her workstation and sent an email to the applicant. The email was sent at 12h35, as follows:

'As per our discussion, here's the email I sent you, since you cannot find it again.

I take it that since you can't prove that you sent the report on Friday, that it was not sent as I did not receive it then.

Your explanation to me that you deleted it/or any information relating to it makes no sense if you were able to send "screenshot" this morning.'

- [12] The applicant responded to Kapumha's email at 13h12. He expressed that he took exception to Kapumha's unfounded allegations about him having lied to her about sending the email on 5 June 2020, and he was adamant that he provided proof of the email. The applicant also recorded that he also sent the report that morning. At 13h22, Kapumha insisted that the applicant did not provide proof that he sent the report on 5 June 2020 and that she clarified to him that what he said (verbally) did not make sense. She concluded:

'I take seriously your refusal and continued provision of excuses which seek to divert the attention from the real issue to you attempting to prove that you will not do what I have requested.'

- [13] The applicant sent the last email on this issue at 13h35 where he asked *inter alia* clarification of Kapumha's statement about his refusal and continued provision of excuses.
- [14] The applicant was subsequently charged and dismissed. He referred an unfair dismissal dispute to the first respondent. In terms of the pre-arbitration minute, the applicant challenged, insofar as substantive fairness is concerned, that he breached any rule and the appropriateness of the sanction of dismissal. The first respondent appointed the second respondent (commissioner) to arbitrate the dispute. The commissioner found that the dismissal of the applicant was procedurally and substantively fair and dismissed his claim.

Evaluation

- [15] The applicant raised forty eight grounds of review in his founding affidavit and twenty four grounds in his supplementary affidavit. In his grounds, the applicant has taken issue with almost every line and/or sentence of the award. The result is a 156 pages founding affidavit, 61 page supplementary affidavit and 78 page heads of argument. In the founding affidavit, the applicant criticised the commissioner for making *misleading, unfounded, baseless, speculative, general* and *malicious* statements and for committing gross irregularities, disregarding

evidence, failing to apply his mind to the evidence and issues and acting *ultra vires* his powers. The supplementary affidavit raised irrelevant grounds of review and this Court will not be detained by those issues.

- [16] Despite the unfortunate and unwarranted attacks on parts of the award, and contrary to Mr Mbatha's submissions who appeared for the CIPC that the affidavits raise no grounds of review or legitimate review grounds, a proper reading of the founding affidavit clearly shows that the applicant has indeed raised the grounds upon which he submits the award falls to be reviewed and set aside.
- [17] One of the grounds raised by the applicant is directed at the commissioner's attempts during the arbitration proceedings to guide and direct him on the issues he needed to cross examine on. The applicant, who represented himself in the arbitration proceedings and these proceedings, appeared to misunderstand the commissioner's guidance and direction to constitute interference and effectively accused the commissioner of descending into the arena. There is no merit in this ground. The commissioner had a duty not to allow irrelevant questions being asked nor irrelevant evidence being led and it was within his right to direct the proceedings. Although the commissioner may have misconceived the issues, his interference did not prevent the parties, in particular the applicant, from presenting his case. Any irregularity that he may have committed is not material to vitiate the entire proceedings.

Fraud

- [18] The applicant is alleged to have made false representation by sending a false and/or fabricated email message to Kapumha. The commissioner's finding on this charge was that:

“there is no dispute about the contents of the email communication between the applicant and Kapumha regarding the weekly report that was due on 5 June 2020. It also because (sic) common cause that Kapumha did not receive the weekly report by email on 5 June 2020 as the applicant alleged. It also became

common cause that the proof that the applicant sent the email to Kapumha as a “screenshot” was not a “screenshot”. What remained was proof that the applicant sent the email to Kapumha on 5 June 2020 in the first place. The evidential burden to produce the evidence was on the applicant. The documentary proof that he presented in bundle J was in dispute and he had an obligation to call witnesses to deal with the veracity of the documents. In the absence of those witnesses, the documentary evidence became of no evidential value and was unhelpful to the applicant’s cause. On the parties’ respective versions, I am satisfied that the applicant committed misconduct by making false claims that he sent an email to Kapumha on 5 June 2020 and relying on what he called a “screenshot” as proof when he knew no such “screenshot” existed.’ [Emphasis added]

[19] The applicant’s attack on the above findings appears under the thirty fifth review ground in his founding affidavit. His complaint is that the commissioner ignored the fact that he had sent the email to Kapumha on 5 June 2020, ignored the retrieved original email sent to Kapumha on 5 June 2020, the proof that the message was returned as undeliverable and the MTN report which were part of the bundle of documents and that the CIPC’s *“IT/ICT system rejected the email because [it] was too large for transmission”*. The applicant submits further that the commissioner ignored the fact that what he called a screenshot was part of the original email, which he had cut and pasted from his official email address. The applicant submitted that the commissioner blatantly ignored the relevant evidence in the form of his original email to Kapumha, his emails with MTN and the MTN report (which he allowed the applicant to cross examine on), failed to provide any explanation for ignoring this evidence and *“committed serious irregularity and acted ultra vires”* and that he ought to have been found not guilty.

[20] In his cross-examination of Kapumha, the applicant stated that he sent the report from his private email because the laptop settings were not done. The applicant acknowledged that he had made a mistake by referring to what he sent to Kapumha as a screenshot. Further, the applicant demonstrated that the email contained in what he referred to as a screenshot was a cut and paste from his

original email sent to Kapumha. This original email was retrieved from Mobile Telephone Network (MTN). The applicant acknowledged that he had made a mistake by referring to it as a screenshot.

- [21] The applicant continued to make reference to the MTN report and his correspondence with MTN in his cross-examination of Kapumha. The parties have specifically agreed in the pre-arbitration minute that the contents of the discovered documents were not in dispute unless stated otherwise. It was not disputed that MTN did indeed retrieve the email the applicant sent to Kapumha on 5 June 2020 at 13h05. Further, MTN prepared a report, which was part of the record and entered into evidence. The report stated that:

‘The Mail Delivery Notification indicated that the e-mail dated 5 June 2020 at 13h05 could not be delivered or transmitted to the recipient, Bathabile Kapumha as it was too large and exceeded the size limit for the recipient mailbox.’

- [22] MTN conducted its own test email to Kapumha with four photos as an attachment to the email. The email, similar to the applicant’s email, returned as undeliverable as the message was considered too large. The MTN report concluded that:

‘From my analysis of the above e-mails it is evident that Mr Tebogo Victor Makau did indeed sent (sic) an e-mail containing 4 photos appearing to be screenshots of a PC / Laptop Screen captured approximately at 13h01 and 13h02, respectively on 5 June 2020.’

- [23] With the above evidence, the commissioner still found the applicant guilty. In other words, despite the applicant producing the original email clearly showing that he sent the email at 13h05 on 5 June 2020, the commissioner found that he fabricated the email or made a false representation that he sent the email.

- [24] Fraud² remains fraud and does not change colour or have different elements because of the nature of the proceedings - civil or criminal. That is what the LAC in *Monare v South African Tourism and others*³ confirmed:

‘It was not unreasonable for the Commissioner to rely on the so-called “*criminal law*” definition of fraud. Fraud has the same elements even in a civil law context. The first respondent alleged that the appellant was fraudulent and dishonest and it bore the onus to establish those rather serious allegations “clearly and distinctly”, on a balance of probabilities. The fact that the appellant did not comply with the company procedures did not make him guilty of fraud or dishonesty, or even deceitful, as the Commissioner very reasonably found.’⁴
[Emphasis added]

- [25] In *casu*, the CIPC elected to charge the applicant with fraud, and alleged that the applicant made a “*false representation by sending a false and/or fabricated email message*” with the intention to make Kapumha believe that he had in fact sent the email to her when he knew that no such email was sent. The CIPC therefore bore the onus to prove that the applicant’s representation that he sent the email on 5 June 2020 at 13h05 was false; that he knew that this representation was false or that he knew he did not send the email to Kapumha; that his false representation induced or was intended to induce Kapumha to believe that he sent the email on 5 June 2020; and that Kapumha acted on the false representation.
- [26] It is clear that the email to Kapumha dated 5 June 2020, sent from the applicant’s private email address at 13h05, exists. In this email, the applicant attached 4 photos, which he said were the screenshots of his report from his computer. He sent the email which attached 4 photos to Kapumha. It is common cause that Kapumha did not receive the email because the email was returned as undeliverable due to its size. That the email was returned as undeliverable does

² It is trite that the complainant must establish unlawfulness, intention, misrepresentation and prejudice or potential prejudice.

³ [2016] 2 BLLR 115 (LAC); (2016) 37 ILJ 394 (LAC).

⁴ *Ibid* at para 66.

not detract from the fact that the applicant sent it. The evidence presented by Kapumha fell short of establishing fraud or any form of misrepresentation.

- [27] The applicant was consistent from the first email on 8 June 2020, as he sent the email and the report to Kapumha at 13h05 on 5 June 2020. The original retrieved email written by the applicant is not hearsay evidence, and the applicant needed no further corroboration other than the production of the email. In any event, the applicant attached the report he 'sent' on 5 June 2020 in his email sent at 9h47 on 8 June 2020. The applicant acknowledged that the use of the word screenshot could have been a mistake. Therefore, the applicant did not fabricate any email, nor did he make any false representation that he sent the email. The commissioner's finding of guilt on the face of this evidence is irrational and untenable. The commissioner had misconceived the issue, and the evidence reached an unreasonable finding.

Insolence

- [28] The charge of insolence flows from the interaction or engagement between Kapumha and the applicant, which occurred on 10 June 2020 at the applicant's workstation. The commissioner found that:

'there is no difference between the applicant and Kapumha that on 10 June 2020 shouting took place between the applicant and Kapumha, which shouting occurred in front of the applicant and Kapumha's colleagues. The difference is the parties' respective versions lies at who was shouting at who. To resolve the dilemma, the issues comes down to probabilities. Kapumha had no reason to travel all the way to work to shout at the applicant. Mirrored by the email exchange of the parties, I am satisfied that all she wanted was proof of the "screenshot" that the applicant alleged existed. The applicant, on the other hand, had every reason to shout because he knew that he was cornered and could not back up his "screenshot" version with proof. Instead, he resorted to a screaming match. On the versions before me, I find it probable that it was the applicant that screamed and shouted at Kapumha and not the other way round. I am therefore satisfied that the applicant breached the rule.'

[29] The applicant's criticism of the finding is that the applicant did not understand the evidence and ignored his version of what transpired between him and Kapumha. Kapumha testified that on 10 June 2020, she drove to the office. She went to the applicant's workstation and wanted the applicant to show her what he had sent from his private email. The applicant informed her that the email was irretrievable. She said to him if he could *"get the screen shot then [he] should be able to find the email because it does not make sense for [him] to say it is irretrievable and yet [he] cannot, [he] already ... sent a screen shot so when did it get irretrievable..."*. The upshot of the discussion was that Kapumha wanted to see proof of the email, or that which the applicant said it was, a screenshot, and the applicant said it was irretrievable. With this apparent deadlock, Kapumha then said:

'And so I say to him, Mr. Makau, if you cannot show me you clearly do not have any proof, and as a result I do not have anything I take it that you did not send me the report. Because that which you are saying to me does not make sense at all, it does not make sense that one minute he would have a screen shot that you are able to send to me, and one minute you have all your emails irretrievable. And so I got to my desk, and I write to him to say if you cannot send me any proof then I take it that you did not send me the email.'

[30] Kapumha continued that before she could go back to her work station:

'Mr Makau already very irritable because I am saying to him you cannot prove anything so I take it that you did not have anything and you are refusing to show me any prove (sic) whatsoever, you have got nothing whatsoever, yet you are claiming that you sent me a report on Friday. And that is where Mr. Makau, went haywire ... Mr. Makau, started shouting at me, he is calling me a liar and ... I do not know what I am doing and why would I come and lie and say he did not send an email.'

[31] The applicant disputed that he shouted at her. He said that he responded to Kapumha's accusation by saying that she *"was lying about saying [he was] lying"*.

- [32] As it is clear from the above, the basis upon which the commissioner found that the applicant screamed and shouted at Kapumha is that she had no reason to drive to the office just to shout at the applicant and that the applicant had every reason to shout because he was *cornered*. This reasoning is illogical, irrational and factually and legally unsound.
- [33] First, the CIPC bore the onus of proof. It elected not to call any of the employees who were present at work on that particular day. The applicant had unsuccessfully attempted to subpoena these employees. However, it was not for the applicant to disprove the allegation. The CIPC had to prove the allegation. Second, Kapumha, who allegedly felt disrespected, addressed an email to the applicant shortly after she went back to her workstation. She mentioned no shouting or screaming in that email. It is puzzling that the commissioner would seek to rely on the emails but completely ignore the fact that Kapumha did not mention the shouting in her email sent minutes after her interaction with the applicant. Third, the established facts showed that the applicant did indeed send the email at 13h05 on 5 June 2020, and therefore, the finding that he was “*cornered*” is without any foundation.
- [34] The CIPC failed to discharge its onus on a balance of probabilities that the applicant was insolent. In my view, and considering the record and the observation above, the probabilities favour the applicant’s version that he did not shout, although he conceded that in response to the accusation and shouting that he was lying, he said to Kapumha that she was the one lying.
- [35] In any event, even if the applicant is guilty of insolence, considering the nature of the alleged insolence and the circumstances under which it occurred, the insolence was not serious enough to warrant a dismissal. The disciplinary code, which was ignored by the commissioner, recommends a sanction of a final written warning for a first offender. I discuss this issue later under the appropriateness of the sanction.

- [36] The applicant was alleged to have “*performed poorly and below the standard expected and required*” per his contract of employment or common law. It was further alleged that he failed to submit monthly reports and/or submitted reports which were of poor-quality during December 2019 and March, April, June and July 2020. The CIPC alleged further that this alleged poor work performance was not related to incapacity but negligence.
- [37] Despite the qualification placed on the charge, the substance of the charge and evidence of Kapumha clearly show that the applicant was charged for poor work performance based on incapacity. The applicant was alleged to have failed to meet the standards set out in his contract of employment. In her evidence, Kapumha further referred to the applicant’s failure to perform in terms of the performance agreement and the job description.
- [38] The commissioner found that the applicant failed to submit the reports on the due dates and that the reports that were submitted were of poor quality – they “*were not a model of quality writing and presentation of information*” and some of them were “*littered with grammatical and spelling mistakes*”. He concluded that the applicant was guilty of poor work performance.
- [39] It is trite that misconduct and poor work performance are two distinct concepts and are processed differently in terms of our labour law. This Court has on many occasions set out the difference between the two concepts. In *ZA One (Pty) Ltd t/a Naartjie Clothing v Goldman NO & others*⁵, the distinction between misconduct and poor performance was articulated as follows:
- ‘In my view, the distinction between poor performance and misconduct (negligence) can be established by the asking of two simple questions when it has been established that an employee indeed failed. The first question is ‘Did the employee try but could not?’ and the second question is ‘Could the employee do it, but did not?’ If the first question is answered in the affirmative, then it has to be poor performance, because an employee that honestly (for the want of a

⁵ (2013) 34 ILJ 2347 (LC).

better word) seeks to achieve what is expected of him or her but is unable to do so is incapacitated and would not behave wilfully or indifferently or fail to apply the necessary care. If the second question is answered in the affirmative, then it has to be misconduct, as this would be a situation where the employee is fully able to do what is required not to fail, and such failure could therefore only be because of indifference or wilfulness or a failure to take care.’⁶

[40] In *Midas Group Komatipoort v NUMSA and Others*⁷, this Court, after analysis of the concepts of misconduct and poor performance, held that:

‘...the concepts of a dismissal for misconduct on the one hand, and dismissal for poor work performance (as a species of incapacity) are incompatible. This means, in short, that an employee cannot be ‘charged’ for poor performance, subjected to disciplinary process, and then dismissed applying misconduct considerations. In the case of poor performance, the process has other objectives, which can broadly be described as being to identify the poor performance, establish what is required to resolve it, providing the employee with assistance to resolve it, and then allowing the employee a reasonable opportunity to achieve what is required. It is simply not the case of an employee being ‘guilty’ and a sanction imposed.’⁸

[41] Befuddled by the qualification in the charge sheet that the alleged poor work performance did not relate to the applicant’s incapacity, the commissioner abdicated his responsibility to determine the substance of the allegation and further disregarded the applicant’s case which sought to show that the allegation forms a subject matter that falls squarely within the CIPC’s Performance Management Policy, which was part of the discovered documents. The Performance Management Policy enjoins the CIPC to inform the employee who is performing below par in detail, investigate the reasons for the poor performance, provide the employee with reasonable time to improve, provide

⁶⁶ Ibid at paras 78 – 79.

⁷ [2018] ZALCJHB 83.

⁸ Ibid at para 42; see also *Samson v Commission for Conciliation, Mediation and Arbitration and Others* (JR2023/22) [2025] ZALCJHB 13 at paras 6 – 7.

regular feedback on the employee's performance, provide counselling measures and dismissal is to be applied as the last resort after unsuccessful counselling.

[42] The commissioner made no attempt whatsoever to consider the substance of the allegation and whether the CIPC was entitled to deal with this alleged poor work performance as it did, and not in terms of its Performance Management Policy. Regardless, it is not unreasonable to expect that if the CIPC wanted to charge the applicant of negligence or any other form of misconduct, it would have expressly done so.

[43] In this case, the CIPC dealt with the matter as one of poor work performance, led evidence that sought to justify that the applicant was unable to meet the standard of performance per his contract of employment, job description and/or performance agreement and that the quality of his work did not meet the expected or required standard. Considering the fundamentally flawed process followed by the CIPC in processing a poor work performance issue as misconduct, the commissioner should not have perpetuated this flawed process. He should have dismissed the charge on the basis that the CIPC followed a flawed and therefore unfair process. Accordingly, his findings and decision on this charge are a result of a flawed process and are liable to be reviewed and set aside.

Abuse of CIPC resources

[44] The CIPC alleged that the applicant abused its resources by printing about 500 pages in preparation for his case against the CIPC. The applicant acknowledged that he had printed documents in preparation for the case. He sought to justify his conduct on numerous grounds – the printing was not only for his benefit but was also for the benefit of the CIPC, he was reprimanded by Kapumha on 23 and 24 July 2020, instructed not to do it again and had not repeated the conduct since 23 July 2020, there was no policy on printing of personal material at the time and the policy in this regard only came into effect after the incident. The applicant

also took issue with the delay in charging him and accused the CIPC of effectively conducting a fishing expedition.

- [45] The commissioner noted that the applicant did not dispute using the CIPC's resources. The applicant's evidence that he had previously printed material using CIPC's printing resource was labelled by the commissioner as "*sheer arrogance*". The commissioner further found that the applicant cannot use the CIPC's time and resources to pursue his own interest and that he was required to devote his working time to the advancement of the CIPC's interests. This latter finding was not part of the charge, and the applicant's criticism that the commissioner acted *ultra vires* has merit.
- [46] There was nothing arrogant about the applicant's evidence that he had previously printed material using the CIPC's resources for a case involving the CIPC. The applicant only sought to demonstrate a practice that continued until the CIPC adopted and implemented a policy in this regard.
- [47] The commissioner further found that it is irrelevant that the CIPC "*only adopted a policy on printing after the incident of 23 July 2019*" because the applicant should have known that "*he could not do that*" and further that it is irrelevant that "*the applicant did not engage in the same conduct after the incident of 23 July 2019*". This is a contradiction. The commissioner accepts on the one hand that the evidence that there was no rule that was breached because there was no policy to that effect but on the other hand, he says that the applicant should have known that he was not required to do that, suggesting that he knew that there was a rule prohibiting printing of personal material. Whilst I accept that the applicant should have known better not to print particularly voluminous documents for his personal use, the fact is that there was no such policy in place at the time of the alleged misconduct. It was grossly irregular to ignore the evidence relating to the fact that there was no policy or rule governing the issue at the time of the incident and the fact that the applicant did not engage in the same or similar conduct after the policy was implemented.

[48] The commissioner also ignored the fact that the incident occurred 15 months before the CIPC charged the applicant and that at the time when it occurred, the applicant was reprimanded and did not commit the same conduct again. In my view, the absence of the rule on this issue at the time of the incident means that the applicant could not be found to have breached the rule. Further, the fact that the issue was discussed and he was told not to do it again means that the applicant was reprimanded for this conduct, and the charge amounted to double jeopardy.

[49] Accordingly, the applicant is not guilty of this charge. Even if he is, the CIPC's disciplinary code recommends a sanction of a verbal warning for a first offender.

Appropriateness of sanction

[50] The commissioner, having found the applicant guilty of the charges, said the following:

'There is very little mitigation that can be found in the applicant's conduct. The applicant set himself on a collision path with Kapumha and the respondent. The applicant has no one but himself to blame for the predicament that he finds himself in. He has made his proverbial bed and must therefore lie on it. The respondent cannot be faulted for having dismissed him and his dismissal was an appropriate sanction in the circumstances. I am therefore satisfied that the applicant's dismissal was substantively fair ...'

[51] The applicant had expressly challenged the appropriateness of the sanction of dismissal. He lamented the commissioner's failure to take into account item 3(5) of schedule 8 of the Code of Good Practice: Dismissal, which requires the employer to consider factors such as the employee's length of service, previous disciplinary record, personal circumstances, the nature of the job and the circumstances of the misconduct before resorting to dismissal.

[52] It is trite that substantive fairness comprises of two legs – a finding whether the employee is guilty or not, and if so, whether dismissal is an appropriate sanction.

Item 7(b)(iv) of schedule 8 of the Code of Good Practice: Dismissal enjoins the commissioner to consider, in the event that the employee is found guilty of misconduct, whether dismissal was an appropriate sanction for the misconduct.

- [53] The Constitutional Court in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others (Sidumo)*⁹, per Navsa AJ, listed some of the factors to be taken into account in the determination of the fairness of a dismissal as “*the harm caused by the employee’s conduct, whether additional training and instruction may result in the employee not repeating the misconduct, the effect of dismissal on the employee and his or her long-service record*”.¹⁰ In a separate concurring judgment, Ngcobo J summarised the position as follows:

‘... One of the duties of a commissioner in conducting an arbitration is to determine the material facts and then to apply the provisions of the LRA to those facts in answering the question whether the dismissal was for a fair reason. In my judgment, where a commissioner fails to apply his or her mind to a matter which is material to the determination of the fairness of the sanction, it can hardly be said that there was a fair trial of issues.

It follows therefore that, where a commissioner fails to have regard to material facts, the arbitration proceedings cannot in principle be said to be fair because the commissioner fails to perform his or her mandate. In so doing, in the words of *Ellis*, the commissioner’s action prevents the aggrieved party from having its case fully and fairly determined. This constitutes a gross irregularity in the conduct of the arbitration proceedings as contemplated in s 145(2)(a)(ii) of the LRA. And the ensuing award falls to be set aside not because the result is wrong but because the commissioner has committed a gross irregularity in the conduct of the arbitration proceedings.’¹¹

- [54] The CIPC failed to prove that the applicant is guilty of fraud. Therefore, that marks the end of the enquiry into the fairness of the dismissal. The dismissal on the charge of fraud is therefore substantively unfair.

⁹ [2007] ZACC 22; (2007) 28 ILJ 2405 (CC).

¹⁰ Ibid at para 78.

¹¹ Ibid at paras 267 – 268.

- [55] I have found that the applicant is not guilty of the charge of insolence. However, even if he is guilty, the commissioner was required to consider the gravity of the insolence. There was no allegation that the insolence was gross. In *Palluci Home Depot (Pty) Ltd v Herskowitz and others*¹², the LAC held that the sanction of dismissal should be reserved for instances of gross insolence.¹³
- [56] If indeed there was insolence, it had less, if not zero impact on the trust relationship between the applicant and the CIPC or Kapumha. In addition, the CIPC's disciplinary code recommends a sanction of a final written warning before dismissal for insolence. The CIPC was therefore required to justify a deviation from the recommended sanction, which it dismally failed to do.
- [57] The charge of poor work performance should not have formed part of the arbitration proceedings, or if it did, as it has, should have been dismissed for non-compliance with the procedure. However, even if it is accepted that the charge was pursued in terms of the appropriate procedure, the commissioner was required to consider item 9 of Schedule 8 of the Code of Good Practice: Dismissal¹⁴, which he did not. The LAC in *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others*¹⁵ reiterated the approach to be adopted when considering dismissal for poor work performance as set out in item 9. It held that:

'In order to find that an employee is guilty of poor performance and consider dismissal as an appropriate sanction for such conduct, the employer is required to prove that the employee did not meet existing and known performance

¹² [2015] 5 BLLR 484 (LAC); (2015) 36 ILJ 1511 (LAC).

¹³ Ibid at para 22.

¹⁴ Item 9 provides the following guidelines in cases of dismissal for poor work performance. It provides that "[a]ny person determining whether a *dismissal* for poor work performance is unfair should consider –

- (a) whether or not the *employee* failed to meet a performance standard; and
- (b) if the *employee* did not meet a required performance standard whether or not –
 - (i) the *employee* was aware, or could reasonably be expected to have been aware, of the required standard;
 - (ii) the *employee* was given a fair opportunity to meet the required performance standard; and
 - (iii) *dismissal* was an appropriate sanction for not meeting the required performance standard."

¹⁵ [2013] ZALAC 28; (2014) 35 ILJ 943 (LAC).

standards; that the failure to meet the expected standard of performance is serious; and that the employee was given sufficient training, guidance, support, time or counselling to improve his or her performance but could not perform in terms of the expected standards. Furthermore the employer should be able to demonstrate that the failure to meet the standard of performance required is due to the employee's inability to do so and not due to factors that are outside the employee's control.'¹⁶

- [58] In addition, the CIPC's disciplinary code guides that for unsatisfactory work performance, incompetence or not meeting agreed standards (sub-standard work output) and non-compliance with prescribed procedures and regulations, a written warning and final written warning, respectively, are the recommended sanctions before dismissal. Finally, even if the applicant is found guilty of negligence, there is no evidence that this was sufficiently gross to warrant a sanction of dismissal.
- [59] For the charge of abuse of CIPC resources, the CIPC's disciplinary code recommends the sanction of verbal warning for a first offender, followed by written and then final written warning before dismissal.
- [60] In *casu*, the commissioner not only failed to apply his mind to the material facts relating to the issue of sanction, he disregarded the issue. He made no reference to the nature and/or seriousness of the charges, the circumstances under which the alleged misconduct was committed, had no regard to the CIPC's disciplinary code, the length of service and the fact that the CIPC did not lead evidence at all on the breakdown of the trust relationship (if any). His statements that the applicant made his bed and must therefore lie on it, that the CIPC cannot be faulted for dismissing him, and therefore the dismissal is fair were made in abstract. Having considered the above factors, the commissioner's decision on the appropriateness of the sanction is arbitrary and untenable and falls to be reviewed and set aside.

¹⁶ Ibid at para 25.

Conclusion and relief

- [61] The review test¹⁷ needs no reiteration in this judgment. I am persuaded that the commissioner committed material irregularities and/or errors and/or ignored relevant evidence and/or failed to apply his mind to the issues and evidence. These material errors and irregularities had the distorting effect on his ultimate decision that the dismissal of the applicant was substantively fair. The award is irrational and untenable and falls to be reviewed and set aside.
- [62] The full record of the arbitration proceedings is before this Court. No purpose and justice would be served by referring the matter back to the CCMA. In fact, doing so will be an abdication of the Court's responsibilities to dispense justice and to do so expeditiously. The Court is in as good a position as the commissioner and the dictates of justice require that this Court must determine the dispute.
- [63] For the reasons already dealt with above, the dismissal of the applicant is declared substantively unfair. I am not persuaded that the ruling on procedural fairness is reviewable. The applicant sought reinstatement. The applicant is not guilty of the charges, particularly that of fraud. Even if he is guilty of the other charges, which I found that he is not, these charges are not dismissible. I see no reason to deny an employee who is found not guilty of the charges reinstatement. Further, there was no evidence that a continued employment relationship would be intolerable.
- [64] In the premises, the following order is made:

Order

¹⁷ *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others (Sidumo)* [2007] ZACC 22; (2007) 28 ILJ 2405 (CC) at para 110; *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and others* (2008) 29 ILJ 964 (LAC); [2008] 3 BLLR 197 (LAC) at para 100; *Bestel v Astral Operations Ltd and others* [2011] 2 BLLR 129 (LAC); [2010] ZALAC 19 at para 18; *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)* (2013) 34 ILJ 2795 (SCA); [2013] 11 BLLR 1074 (SCA) at para 25; *Head of Department of Education v Mofokeng and Others* (2015) 36 ILJ 2802 (LAC); [2015] 1 BLLR 50 (LAC) at paras 31 – 33; *Makuleni v Standard Bank of South Africa Ltd and Others* [2023] ZALAC 4; (2023) 44 ILJ 1005 (LAC) at paras 4 and 13.

1. The arbitration award issued by the second respondent dated 15 June 2022 under case number GATW13843-21 is reviewed and set aside.
2. The award is substituted with the following order:
 - ‘2.1. *The dismissal of the applicant by the third respondent on 13 October 2021 is declared substantively unfair.*
 - 2.2. *The third 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.*
 - 2.3. *The third respondent is ordered to pay the applicant backpay from the date of dismissal until the date he reports for duty within 21 calendar days of this judgment and order.*
 - 2.4. *The applicant is ordered to report for duty on 1 July 2025.’*
3. There is no order as to costs.

M. Makhura
Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr TV Makau

For the Third Respondent: Mr HM Mbatha

Instructed by: Kgoroadira Mudau Attorneys