THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR599/21

In the matter between:

MERAFONG CITY LOCAL MUNICIPALITY	**Applicant**
and	
SAMWU obo CLIVE WOODRIDGE SPEEK	**First Respondent**
SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING COUNCIL ("SALGBC")	**Second Respondent**
COMMISSIONER PHUMLA NONDLALA N.O.	**Third Respondent**

Heard: **11 June 2025**

Delivered: **11 June 2025**

Reasons: **24 June 2025(This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing-down is deemed to be 10h00 on 24 June 2025.)**

REASONS FOR ORDER

PHEHANE, J

Introduction

[1] On 11 June 2025, this Court, hearing an opposed application in terms of section 145 of the Labour Relations Act,[1] (LRA) issued an order dismissing a preliminary point, reviewing and setting aside the arbitration award by the third respondent dated 24 February 2021 and substituting the award with an order that the dismissal of the first respondent is substantively fair, with no order as to costs.

[2] The reasons for the order follow.

Background

[3] The first respondent member, Mr Speek was employed as a cashier by the applicant. It is not disputed that Mr Speek was extensively trained in his role, responsibilities and duties as a cashier.

[4] It is also not disputed that cashiers had rules applicable to their job, recorded in various prescripts, including the Basic Rules and Guidelines for Cashiers: Procedures for Daily Cashing Up,[2] sections 2(a), (b), (d) and 9 of Schedule 2[3] of the Local Government: Municipal Systems Act[4] (MSA) and clause 8.7 of the Municipal Policies for Cashiers entitled "*Cashing up the cashiers and banking thereof*"[5].

[5] Section 2(a), (b) and (d) of Schedule 2 of the MSA read thus:

> '**2. General conduct.**—A staff member of a municipality must at all times—
> (*a*) loyally execute the lawful policies of the municipal council;

[1] Act 66 of 1995, as amended.
[2] Documentary records bundle at pp 80 to 85.
[3] Code of Conduct for Municipal Staff Members.
[4] Act 32 of 2000.
[5] Documentary records bundle at pp 73 to 74.

(*b*) perform the functions of office in good faith, diligently, honestly and in a transparent manner;

(*c*) …

(*d*) act in the best interest of the municipality and in such a way that the credibility and integrity of the municipality are not compromised'.

[6] Section 9 of Schedule 2 of the MSA reads as follows:

'**9. Council property.**—A staff member of a municipality may not use, take, acquire, or benefit from any property or asset owned, controlled or managed by the municipality to which that staff member has no right.'

[7] Clause 8.7 of the cashing up rules provides, in essence, that where there is a cash shortfall at cashing up, the cashier must pay it in immediately or the following morning at the latest and a note of shortfall must be indicated on the cash analysis form. With a special request, the Chief Financial Officer can extend the payback date to not later than the following salary date and a journal entry must be recorded. The supervisor is responsible for the collection of shortages from the cashiers under their supervision.

[8] At the cash reconciliation at the end of the day on 19 May 2017, Mr Speek's supervisor, Ms Henning, discovered that Mr Speek's takings were short by the amount of R1 220.00. According to Ms Henning, Mr Speek informed her that he had taken the money as he needed it for his family in Bloemfontein. She told him to immediately return the money. He refused.

[9] Mr Speek's conduct was subsequently investigated, and he was called to a disciplinary hearing to answer the following charges of misconduct:[6]

'CHARGE 1 -

1. MISCONDUCT

[6] Documentary records bundle at pp 52 to 53.

1.1 You are guilty of misconduct in that, you violated the provisions of Section 2(a), (b), (d) and section [9] of schedule 2 of [the] Local Government Municipal Systems Act 32 of 2000, Code of Conduct for Municipal Staff Members and the Municipal Policies on Cashiers and Banking, particularly clause [8] in that:

1.1.1 On or about 19 May 2017 you had a system total of R30 959.00 and total takings of R29 739.00 and a shortfall of R1220.00 and after a demand that you pay it back immediately you refused to pay it back and no special arrangements were made with the Chief Financial Officer.

CHARGE 2:

2.1 You are guilty of a misconduct of theft in that on 19 May 2017 you unlawfully and intentionally took an amount of R1220.00 belonging to the municipality with the intention of depriving the municipality of the said amount permanently.'

[10] Mr. Speek was dismissed following a disciplinary hearing where he was found guilty as charged of charge 1 and was not found guilty of theft on charge 2, but was found guilty of having contravened section 2(a), (b) and (d) and section 9 of Schedule 2 of the MSA.[7]

[11] After considering the outcome of the disciplinary hearing, the then Municipal Manager dismissed Mr Speek in a letter dated 23 April 2018.[8] As the first respondent's opposition to this review application in the main hinges on the content of this letter, it is pertinent to set it out in full. It reads:

'**DISCIPLINARY ENQUIRIES: CONFIRMATION OF DISMISSAL: C SPEEK**

1. Following the disciplinary hearings [sic] held on 19 February 2018, 26 February 2018, 6 March 2018 and 13 March 2018 and in view of the seriousness of this matter, the decision has been made to terminate your employment with Merafong City Local Municipality by reason of your misconduct.

[7] See: outcome of disciplinary hearing at para 5.9 on p 43 of the documentary records bundle.
[8] Pleadings, annexure "MLM3" at pp 58 to 59.

2. The reason for this decision is that the hearing has found that your conduct was unsatisfactory in the following respects:

2.1 You have wrongfully and unlawfully taken an amount of R1 220,00 from the employer without authorisation, and after a lawful instruction from the supervisor refused to return the money. In so doing you have violated Sections 2(a), 2(b), 2(d) and 9 of Schedule 2: CODE OF GOOD CONDUCT FOR MUNICIPAL STAFF MEMBERS and Clause 8.7 of the Revenue Management: Cashier Processes.

2.2 You demonstrated lack of respect for authority, disregard rules and policies of the Municipality and jeopardise the employer's business, which resulted that the relationship between you and the Municipality have been severely tarnished [sic].

3. These are particularly serious issues for the Municipality because your core function as a cashier is to handle cash, collecting and handling public money and requires utmost honesty, trust and reliability.

4. This conduct is serious enough to merit dismissal in its own right. This is the case even though we have taken into account the fact that you do not have an active warning on your disciplinary record.

5. The arrangements in regards of your dismissal [sic] are:

- Your dismissal is effective immediately and your final day of employment is therefore **30 April 2018**.
- You are not entitled to any period of notice or payment in lieu of notice.
- We will pay you in lieu of any accrued but untaken leave, less tax and normal statutory deductions.
- You must return in good condition any property which belongs to the Municipality.
- Your final payment of salary shall be made on 31 May 2018, less tax and normal statutory deductions and/or contributions.

6. You have the right to appeal against your dismissal or waive your right to appeal and proceed directly to refer a dispute as provided for in the Labour Relations Act, 66 of 1995.

7. If you wish to appeal, you should inform the Municipal Manager in writing within seven (7) days of receipt of this notification, stating your

grounds/reasons of appeal in full. The dismissal will still take effect as described above, but if you appeal is successful, you will be reinstated with retrospective effect to the termination date and any lost remuneration will be reimbursed.'

[12] Mr Speek subsequently referred an unfair dismissal dispute to the second respondent, which was arbitrated by the third respondent. Procedural fairness was not in dispute. The third respondent found the dismissal of Mr Speek to be substantively unfair and ordered retrospective reinstatement and back pay.

[13] The applicant approached this Court to review and set aside the arbitration award.

Preliminary issues

[14] Three preliminary issues served before the Court. The first preliminary point related to a jurisdictional issue – the first respondent alleged that the review application was filed out of time, and without an application for condonation for its late filing, this Court lacked jurisdiction to adjudicate this application. The second preliminary point concerned an application by the applicant for condonation for the late filing of its replying affidavit. The third preliminary point was the doctrine of peremption raised by the first respondent.

[15] As is gleaned from the notice of motion filed by the applicant in two parts, Part A concerned a review application in terms of the provisions of section 145 of the LRA and Part B concerned an application to stay the enforcement of the arbitration award in terms of the provisions of section 145(3) of the LRA and ancillary relief in the review application.[9]

[16] The application to stay the enforcement of the arbitration award was determined by this Court in August 2021 and prior to the hearing of this application. In that application, Baloyi AJ ordered on 6 August 2021 *inter alia*, that the

[9] Notice of Motion, notices bundle at pp 1 to 3.

enforcement of the arbitration award is stayed pending the outcome of this review application and the applicant was to pay security in terms of the provisions of section 145(7) and (8) of the LRA.[10]

First preliminary point: jurisdiction

[17] From the pleadings in the application to stay the arbitration award, it transpired that the first respondent had also raised the same jurisdictional issue that the review application was launched out of time. In brief, the first respondent contended that the *dies* within which to file the review application expired on 19 April 2021, as the applicant alleged that it received the arbitration award on 8 March 2021. Although the respondents were served with the review application before the expiry of the *dies*, the first respondent contended that the applicant failed to comply with the provisions of Rule 7A(1) read with Rule 1 of the former Rules of this Court[11] in that it failed to deliver the review application to this Court timely. The review application was delivered to this Court on 23 April 2021.

[18] Given that this same jurisdictional issue served before Baloyi AJ in an application to stay the arbitration award that is the subject-matter of this review application, this Court required the parties to make submissions as to whether this jurisdictional issue was determined finally before Baloyi AJ.

[19] Mr van Graan, for the applicant, handed up heads of argument filed on behalf of the applicant that were before Baloyi AJ and submitted that the jurisdictional issue was raised before the Court. At that stage, the applicant's submission before Baloyi AJ was that the review application was emailed to the Registrar of this Court on 19 April 2021, and a copy of this e-mail was attached to the aforesaid heads of argument. As was required by the provisions of the former Rule 5(5) of this Court, the original application was filed in this Court five days following the service by e-mail. In the premises, Mr van Graan submitted that the review application was filed

[10] Pleadings, pp158 to 159.
[11] GN 1665 in GN 17495 of 1996 (repealed on 17 July 2024). Rule 7A(1) provided that a party desiring to review a decision or proceedings of a body or person performing a reviewable function must deliver a notice of motion to the personal body and to all other parties. Rule 1 define "deliver" to mean service on the parties an file with the Registrar.

timely and therefore condonation was not necessary. Further, this must have been the impression formed by Baloyi AJ on hearing the applicant's aforesaid submissions.

[20] Mr Gwebu, for the first respondent, submitted that the jurisdictional issue was deferred to the review Court, and if the applicant was at that stage, found to have filed the review application out of time, the applicant would, in such circumstances, be required to launch an application for condonation.

[21] After hearing these submissions as aforesaid, I held the view that Baloyi AJ was satisfied that the review application was filed timely and therefore condonation was unnecessary. In these circumstances, the order issued by Baloyi AJ as set out above did not deal with condonation. If I am wrong, which I do not think I am, I am satisfied given the aforesaid submissions and having had sight of the heads of argument by the applicant, the review application was emailed timeously to this Court and the original review application was filed within five days of the service by e-mail. In the circumstances, this Court is clothed with jurisdiction to adjudicate this review application. It follows that condonation is not necessary. Before this Court was a comprehensive set of pleadings. The review application was ripe for hearing. Therefore it was in the interests of justice that this application be disposed of without further unnecessary delays.

Second preliminary point: condonation for late filing of the replying affidavit

[22] The second preliminary point was, as with the first, unnecessary, as the first respondent did not, within 10 days of receipt of the replying affidavit, which was filed out of time, serve and file a notice of objection to its late filing in terms of the provisions of item 11.4.2 of the former Practice Manual[12] of this Court, which read:

> 'Where the respondent or the applicant has filed its opposing or replying affidavit outside the time period set out in the rules, there is no need to apply for condonation for the late filing of such affidavits unless the party upon

[12] Practice Manual of 2013 (repealed on 17 July 2024).

whom the affidavits are served files and serves a Notice of Objection to the late filing of the affidavits. The Notice of Objection must be served and filed within 10 days of the receipt of the affidavits, after which time the right to object shall lapse'.
(Own emphasis).

Third preliminary point: the doctrine of peremption

[23] The first respondent contends that the applicant acquiesced to the arbitration award, in that on 8 March 2021, the applicant allowed Mr Speek to resume duties. At no point, when he presented himself to resume duties armed with the arbitration award which was in his favour, was he turned away by the applicant for the reason that the applicant intended to institute proceedings to review and set aside the arbitration award. Mr Speek only learned about the review proceedings when he was served with the application on 19 April 2021.

[24] The applicant contends that at no stage did it acquiesce to the arbitration award. When it became aware of the arbitration award on 8 March 2021, given the seriousness of the offence for which Mr Speek was charged, it sought a legal opinion on the reviewability of the award on 10 March 2021. Ms Mbilini, who was the applicant's Human Resources Manager at the time, and during the arbitration proceedings, was the first respondent's local branch chairperson and Mr Speek's initial representative, permitted Mr. Speek to resume duties. She had no authority to do so, as only the Municipal Manager is empowered in terms of section 55 of the MSA to appoint and dismiss employees. At no stage did the Municipal Manager, Ms Peu, who is now deceased, authorise Mr. Speek's return to work. In fact, she expressly instructed Mr Cannon, the applicant's representative in the disciplinary proceedings and its acting Manager: Corporate Secretariat and Legal Services to proceed with the review application. Mr. Cannon followed through with this instruction. Mr. Cannon informed Ms Mbilini that Mr Speek must not be reinstated. He also informed the salary section not to pay Mr. Speek the back pay as ordered in the arbitration award. Due to Ms Mbilini's efforts, Mr Speek was paid a salary for March to May 2021 and was informed on 25 May 2021 to refrain from reporting for duty as review proceedings had been instituted.

[25] The applicant, therefore submits that the doctrine of peremption is inapplicable.

[26] The common law doctrine of peremption is explained in *Dabner v South African Railways and Harbours*[13] as follows:

> 'If the conduct of an unsuccessful litigant is such as to point indubitably and necessary to the conclusion that he does not intend to attack the judgment, then he is held to have acquiesced in it. But the conduct relied upon must be unequivocal and must be inconsistent with an intention to appeal. And the onus of establishing that position is upon the party alleging it…'
> (Own emphasis).

[27] In labour law matters, peremption usually occurs once an employee has accepted a settlement agreement or compensation, or where the employer took actions to comply with an arbitration award or Labour Court order to reinstate or re-employ the employee.[14]

[28] In determining whether the defence of peremption should succeed, a fact-based enquiry should be undertaken as peremption is fact-specific.[15]

[29] In *National Union of Metalworkers of South Africa v Fry's Metals (A division of Zimco Group) and Others*[16] *(Fry's Metals)* this Court, quoting from the Labour Appeal Court judgment in *National Union of Metalworkers of South Africa and Others v Fast Freeze*[17] held as follows regarding the doctrine of peremption:

> 'In the context of employment law, the former LAC also specifically dealt with preemption (sic) in the judgment of *National Union of Metalworkers of SA and*

[13] 1920 AD 583.
[14] See: *Jusayo v Mudau NO and Others* [2008] 7 BLLR 668 (LC).
[15] *Doorgesh v Commission for Conciliation, Mediation and Arbitration and Others* (CA4/2014; C965/2011) [2015] ZALAC 44 (6 November 2015) at para 29.
[16] (2015) 36 ILJ 232 (LC) at para 41.
[17] (1992) 13 ILJ 963 (LAC).

Others v Fast Freeze. As to the concept of peremption, Mullins J said the following:

"If a party to a judgement acquiesces therein, either expressly, or by some unequivocal act wholly inconsistent with an intention to contest it, his right of appeal is said to be perempted, ie he cannot thereafter change his mind and note an appeal. Peremption is an example of the well-known principle that one may not approbate and reprobate, or, to use colloquial expressions, blow hot or cold, or have one's cake and eat it. Peremption also includes elements of the principles of waiver and estoppel."

The Court then analysed all the authorities relating to this issue and held as follows as to the applicable principles that must be considered in order to determine if peremption exists:

"From the above authorities it seems to me that the relevant principles can be summarised as follows:

(a) Where a right of appeal exists, the party desiring to appeal loses the right to appeal where he has acquiesced in the judgement.

(b) Such a acquiesence may be express, or implied from the conduct of such party.

(c) Acquiescence by conduct requires an overt act by such party, i.e. conduct which conveys outwardly to the other party his attitude towards the judgment.

(d) The overt act must be consistent with an intention to abide by the judgment, and inconsistent with an intention to appeal against such judgment.

(e) The test is objective. It is the outward manifestation of such party's attitude in relation to the judgment that must be looked at, not his subjective state of mind or intention.

(f) Where there is such overt conduct, a mental reservation or resolve not to acquiesce in the judgement will not avail the party who by his conduct in evinces an intention to abide by the judgment.

(g) The state of mind of the party mentally reserving his right to appeal must yield to his conduct which plainly contradicts such intention.

(h) The court must be satisfied that the conduct in question, when fairly construed, necessarily leads to the conclusion that the party intends abiding by the judgment.

(i) If more than one inference may fairly be drawn from the conduct in question, this will not be sufficient to prove renunciation. The conduct must be unequivocal.

(j) The onus of proving that a party has renounced his right to appeal rests on the party alleging such renunciation.

(k) Voluntary payment, or acceptance of payment, as the case may be, in terms of a judgment, will usually be sufficient to satisfy a court that the party has acquiesced to the judgment."

[30] The doctrine of peremption applies not only to appeals but also to reviews.[18]

[31] In *Balasana v Motor Bargaining Council and Others*,[19] (*Balasana*) this Court specifically dealt with the doctrine of peremption in a review application referencing *Fry's Metals*. The Court in *Balasana* accepted that the principle applied to review applications and said thus:

'As a general rule a party that perempts the arbitration award would not be entitled subsequently to challenge that arbitration award. The basic requirement, however, to sustain a claim of peremption entails having to show that the acceptance of the outcome of the arbitration award expressly or by conduct was unequivocal'.

(Own emphasis).

[32] In *Venture Otto SA (Pty) Ltd v Metal and Engineering Industries Bargaining Council and Others*[20] this Court in considering the specific facts of the case, upheld

[18] See: *Venmpo 275 (Pty) Ltd and Another v Cleverland Projects (Pty) Ltd and Another* 2016 (1) SA 78 (GJ) where Peter AJ at para 26 stated thus:
'Although the doctrine of peremption has its genesis in relation to appeals, it has been extended to applications for rescission of default judgement… and to the common law right of judicial review in respect of the exercise of statutory authority… Although there appears to be no precedent for peremption in the context of an application to set aside an arbitration award, there appears to be no reason, either in policy or principle, not to apply the doctrine of peremption to such a right.'
[19] (2011) 32 ILJ 297 (LC) at para 11.
[20] (2005) 26 ILJ 349 (LC).

the defence of peremption as the employer undertook to comply with the arbitration award and the employee positively responded to the undertaking, such that a written agreement was concluded between the parties. The Court thus found that the acquiesence with the arbitration award was unequivocal. What subsequently occurred was a repudiation of the agreement pursuant to the employer's managing director having some qualms after having sought legal advice. By then, the Court remarked, it was too late.

[33] In the present case, the specific facts, objectively assessed, demonstrate that the applicant did not unequivocally acquiesce to the arbitration award. Ms Mbilini utilised her powers to Mr Speek's advantage, although expressly informed by Mr Cannon, that Mr Speek must not be reinstated. Mr. Speek's conduct and that of the Municipal Manager at the time, the latter who had the statutory power to reinstate Mr Speek, by their conduct in seeking a legal opinion on the reviewability of the award and proceeding with the review application, the applicant's refusal to pay Mr Speek his back pay and informing him to refrain from rendering services, are acts which unequivocally demonstrate no intention by the applicant to acquiesce to the arbitration award.

[34] It is now well-established that an arbitration award does not reinstate an employee – the employee is to render his services and his reinstatement takes effect only once the former employer accepts the tender of his services.[21] The delegated official, being the Municipal Manager, refused to reinstate Mr Speek. Ms Mbilini had no power to reinstate Mr Speek, therefore the doctrine of estoppel does not arise and was not contended to have had arisen.

[35] In view of the aforegoing fact specific ingredients, it simply cannot be, that the applicant attempted *to have its cake and eat it* - the ingredients do not come together for the cake to rise. In short, on the facts, the doctrine of peremption does not arise.

Argument in the review application

[21] *National Union of Metalworkers of SA on behalf of Fohlisa and others v Hendor Mining Supplies (A Division of Marschalk Beleggings (Pty) Ltd)* (2017) 38 ILJ 1560 (CC) and *Mahlanga N.O v Rand Water* (2023) 44 ILJ 569 (LC).

[36] The applicant raises five grounds of review.

[37] The first and fifth ground of review in summary, is that the third respondent committed a gross irregularity, misconstrued the enquiry before her and failed to apply her mind to the evidence before her when she found that the evidence of the applicant was corroborative and proved that (a) the shortage of R1 220,00 in Mr. Speek's takings on 19 May 2017 did not contitute a shortfall as defined in the applicant's cashing up rules; (b) that he failed to return the money when instructed, and despite this finding, she reached an irrational decision that the applicant failed to discharge the onus on it to prove that the dismissal was substantively fair.

[38] Further, the third respondent misconstrued the nature of the enquiry before her when she took into consideration the dismissal letter by the Municipal Manager dated 23 April 2018 and found that as Mr Speek was not charged with the allegations in paragraph 2.2 of her letter, Mr. Speek's dismissal was unfair. In the circumstances, the applicant contends that the third respondent reached an unreasonable decision. The applicant contends that the third respondent ignored the submissions in the written closing argument submitted by the Mr Cannon for applicant, that Mr Speek was found guilty of a competent verdict, that is, he contravened the policies mentioned in charge 1. Mr van Graan submitted that the guilty finding in the disciplinary hearing on both charge 1 and 2 relate to the contravention of Municipal policies, charges that were understood by Mr Speek which he was to meet.

[39] The applicant further contends that the dismissal letter penned by the Municipal Manager does no more than summarise the unsatisfactory conduct of Mr Speek, and paragraph 2.1 of that letter records the allegations of misconduct in charge 1 for which he was found guilty.

[40] Mr Gwebu submitted that had the letter by the Municipal Manager ended at paragraph 2.1, then "*we would not be here*". I understand this submission to mean that there would be no opposition to the dismissal. That being the case, then in my

view, there is no basis for the first respondent to argue that Mr Speek's dismissal was substantively unfair, and the review application succeeds.

[41] The second ground of review is that the third respondent took into account irrelevant evidence relating to the delay in instituting disciplinary hearings against Mr Speek and this had no bearing on the determination of substantive fairness. Therefore, her decision is unreasonable.

[42] Mr Gwebu submits that it was necessary for the third respondent to consider this evidence in determining substantive fairness, as it shows that the misconduct was not serious, hence the third respondent's decision that Mr. Speek be reinstated.

[43] The third ground of review is that the third respondent reached a factually incorrect finding that the applicant paid Mr Speek a salary until 31 May 2018. Mr Speek was dismissed on 23 April 2018 and his last day of service was 30 April 2018. This incorrect finding, which is immaterial to the substantive fairness of the dismissal renders her outcome unreasonable.

[44] The fourth ground of review is that the third respondent failed to take into consideration, the factors listed in section 193(2) of the LRA in reaching a decision to reinstate Mr Speek following her finding that his dismissal was substantively unfair.

[45] In opposing the merits of the review application, the first respondent is fixated on the content of the letter of dismissal by the Municipal Manager of 23 April 2018 and in essence, contends that the *reason* for dismissal captured in the letter is not what Mr Speek was charged for. The first respondent contends that Mr Speek was found guilty of contravening section 9 of Schedule 2 of the MSA, that is, taking the applicant's money without authorisation.[22] In this regard, the first respondent refers to the finding of the disciplinary hearing.[23] What the first respondent loses sight of, is

[22] First respondent's heads of argument at para 48.

[23] Pleadings, annexure "MLM 2" at p 53. Although not eloquently drafted, paragraph 5.9 of the disciplinary hearing outcome reads:
'In this case I am convinced that Mr Speek did take the employer's money without authorisation, thereby violating section 9 of the Municipal Systems Act 32 of 2000 (schedule 2) which stipulates as follows: a member of a municipality may not use, take, acquire or benefit from any property or assets owned, controlled or managed by the municipality to which that staff member has no right. I therefore

firstly, the chairperson found Mr. Speek guilty of both charges 1 and 2 on the basis that he contravened the Municipal policies and prescripts mentioned in charge 1. This is what paragraph 5.9 of the finding of the disciplinary hearing states.

[46] Secondly, the first respondent loses sight of the fact that the arbitration hearing is a hearing *de novo*. The third respondent found that the applicant's version was more probable. This should then, have been the end of the enquiry insofar as proving the charges is concerned. The third respondent ought then, to have considered whether or not dismissal was the appropriate sanction.

Evaluation

[47] The test in review applications in terms of section 145 of the LRA is trite.[24] The third respondent was tasked to determine substantive fairness only.[25]

[48] On the totality of evidence before the third respondent, Mr Speek was extensively trained in his job. Mr Speek admitted that he had a shortage of R1220.00 as discovered by Ms Henning, but he denied having taken the money. In the same breath, he admits having paid back that exact shortage of money the following week and complains that the applicant failed to follow its own policy on cash shortages.

[49] It was not disputed that Mr Speek was instructed by Ms Henning, supported by Ms Chauke, the Manager: Revenue, to whom Ms Henning reported the incident, to return the money immediately but he refused to do so.

[50] Due to his failure to return the money, Ms Chauke instructed Ms Henning to institute disciplinary proceedings against Mr Speek.

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find Mr Speek guilty of contravening both section 2 (a)(b)(d) and section 9 of schedule 2 of Local Government Municipal Policies on Cashiers and Banking [sic]'.

[24] *Sidumo and Another v Rustenburg Platinum Mine Ltd and Others* [2007] BLLR 1097 (CC). *Goldfields Mining South Africa (Pty) Ltd (Kloof Goldmine) v Commission for Conciliation, Mediation and Arbitration and others* [2014] 1 BLLR 20 (LAC); *Herholdt v Nedbank Limited and Congress of South African Trade Unions* (Amicus Curiae) [2013] 11 BLLR 1074 (SCA).

[25] Transcribed record of 27 November 2020 at p 300, lines 5 to 11.

[51] The chairperson of the disciplinary hearing found him guilty on charge 1. He found that he applicant did not prove theft on charge 2 and thus found Mr Speek guilty of contravening clause 9 and clauses 2 (a), (b) and (d) of Schedule 2 of the MSA.[26]

[52] When Mr. Speek was furnished with his dismissal letter, the Municipal Manager summarised the reasons for his dismissal. The third respondent misconstrued the nature of the enquiry before her when she determined that the content of the Municipal Manager's letter contained different allegations of misconduct in paragraph 2.2 thereof that Mr Speek was not charged for, and therefore, she reached an unreasonable decision in determining that Mr Speek was unfairly dismissed.

[53] It was not the version of Mr. Speek before the third respondent that he was dismissed for charges that were not levelled against him as contained in the Municipal Manager's letter. His version was that he had a shortfall; the applicant failed to follow its own policies to deal with the shortfall. He paid it back and therefore, he was not guilty of theft. The first respondent did not refer to anywhere in the record, where Mr Speek's case before the third respondent was that the letter by the Municipal Manager referred to allegations for which he was not charged, which rendered his dismissal procedurally and substantively unfair. It is not for this Court to troll through the record to find portions that substantiate parties' contentions one way or the other. Be that as it may, I have considered the record and on the reading of the record, this was not the first respondent's defence.

[54] Therefore, the third respondent not only misconstrued the nature of the enquiry before her, she also committed a gross irregularity in considering a version that was not before her. Her conduct in so doing had distorted the outcome and renders the arbitration award unreasonable.

[55] The third respondent considered irrelevant evidence relating to the delay in suspending and charging Mr. Speek. Procedural unfairness was not an issue that

[26] Fn. 23 *supra.*

was before her to determine. Her considering this irrelevant evidence has distorted the outcome such that her decision is one that no reasonable decision maker could reach.

[56] The third respondent considered the evidence before her, made a credibility finding and determined on the probabilities, that the version of the applicant was more probable, yet she found that the applicant failed to discharge the onus on it. Her decision is out of kilter not only with her own finding on the probabilities, but it is also irrational in consideration of the totality of evidence before her.

[57] On the evidence, there was a rule which was known by Mr Speek. The rule is that cashiers are not to take the property of the employer without authorisation. The evidence before the third respondent is that the misconduct committed by Mr Speek was not a shortfall. Ms Henning stated that it could not be categorised as a shortfall, as the reason for the shortfall was known – Mr Speek took the money, which he was isntructed to return immediately, but did not. The evidence by Ms Chauke is that Mr Speek on his own version of having a shortfall, did not report the incident to the Chief Executive Officer. She stated that Mr Speek paying back the money was an admission of guilt.

[58] The third respondent was fixated on the letter by the Municipal Manager, when the charges were clear and were clarified to her during the evidence of Mr Mazibuko, the applicant's witness who investigated the misconduct.[27] It was also clarified to the third respondent that the issue she was to determine, was substantive fairness only. Therefore, she misconstrued the enquiry before her and failed to apply her mind to the evidence before her. The third respondent ignored the heads of argument by the applicant submitted by Mr Cannon which set out that according to the Labour Appeal Court decision in *Woolworths (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*[28], disciplinary hearing charges need only be crafted with sufficient particularity for an employee to know the case he or she is to meet. In the present case, Mr Speek knew the case he was to meet and conducted his defence with this knowledge.

[27] See: transcribed record of 13 January 2021 at p 365.
[28] [2011] 10 BLLR 963 (LAC).

[59] On the totality evidence before the third respondent, the applicant had a rule, Mr Speek was aware of the rule. The rule was not to take funds, the property of the applicant without authorization; the rule was that staff are to be loyal and are to execute their duties diligently, honestly, transparently and in good faith and are not to compromise the integrity and credibility of the applicant. The funds in issue are public funds, thus the integrity of the municipality is seriously compromised if staff use taxpayer's money as they will without there being transparency in dealing with taxpayer's money.

[60] The rule in question does not permit taking funds of the applicant at all. Only where there is a shortfall that cannot be accounted for, is an employee responsible to pay it over. In the present case, following a reconciliation, Mr. Speek's takings had a discrepancy. He did not deny this. When questioned, he became emotional, threw his wallet on the desk and left the employer's premises. He returned the following week and paid in the money without following the same procedure he complains the applicant did not follow. In this instance, he cannot approbate and reprobate. He failed to raise the issue of the discrepancy with his Chief Executive Officer – this was the unchallenged evidence of Ms Chauke. On the evidence the discrepancy was not a shortfall as envisaged in the Cashing up policy, as he took the money. Had he not taken the money, and it was a shortfall as envisaged by the policy, he would have complied with the policy.

[61] The real issue before the third respondent was a cashier who breached the applicant's rules. The applicant discharged its onus in proving the allegation.

[62] Taking funds of the Municipality for personal use and refusing to immediately pay back the money is serious misconduct. The nature of the charges and the rules contravened denote that the relationship of trust was broken down irretrievably. This is an employee who refused, together with his union, to co-operate with the investigation – this was the unchallenged evidence of Mr. Mlangeni the investigator. Mr Speek showed no remorse for his conduct. This is not an employee who can be trusted with public funds.

[63] In the circumstances, dismissal was an appropriate sanction.

[64] Therefore, in light of the afore-going, the third respondent's decision is one which no reasonable decision maker could reach on the totality of evidence before him or her.

[65] In view of the Court's finding and order, it was not necessary to determine the fourth ground of review relating to the third respondent failing to consider the factors in section 193 of the LRA in respect of the order of reinstatement.

[66] The application suceeds and the record is sufficient for this Court to substitute the award with its own order.

Conclusion

[67] It is for the above-mentioned reasons that the said order was made.

M. T. M. Phehane
Judge of the Labour Court of South Africa