THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR 331/22

In the matter between

DEPARTMENT OF INFRUSTRUCTURE DEVELOPMENT **Applicant**

and

KAWU obo M DELIHLAZO **First Respondent**

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

ADV. ITUMELENG KGATLA *N.O* **Third Respondent**

Heard: **10 December 2024**

Delivered: **30 June 2025**

Summary: Review Application – The applicant contends that inconsistency was never raised as an issue in dispute, yet the commissioner relied on it as a basis for reinstating the employee, despite having made a finding of dishonesty. Such reliance, in the absence of this being a live issue, renders the award unreasonable.

Condonation – Although the explanation for the delay in filing was not detailed, it was found to be adequate when assessed against the strength of

the applicant's case and the broader interests of justice. Condonation granted

JUDGMENT

SWARTZ, AJ

Introduction

[1] This is an application brought in terms of section 145 of the Labour Relations Act[1] (LRA) to review and set aside the arbitration award dated 25 November 2021, issued under the auspices of the second respondent, the General Public Service Sectoral Bargaining Council (GPSSBC), under case number GPBC436/2021. The award was issued by the third respondent (the commissioner).

[2] The commissioner found the dismissal of the first respondent (Muzwethu Delihlazo – the employee) both substantively and procedurally unfair and ordered reinstatement without retrospective effect. The employee was initially represented by KAWU but is now represented by NEHAWU.

[3] There has been an unfortunate and material delay in the finalisation of this matter. The conduct that led to the employee's dismissal dates back to 2017.

[4] The applicant seeks for this Court to substitute the commissioner's findings with an order that the first respondent's dismissal was substantively and procedurally fair.

[5] The applicant's principal grounds of review are, *inter alia*, that the commissioner exceeded his powers by determining the appropriateness of the sanction without affording the parties an opportunity to be heard on the issue, and

[1] Act 66 of 1995, as amended.

that, despite finding the employee guilty of dishonesty, he nonetheless reinstated him. The applicant contends that the award is therefore unreasonable and that the commissioner committed a gross irregularity.

[6] In addition to the review application, there is also a condonation application for the late referral of the review and an application for the revival of the review.

[7] The merits of the review will be addressed first, as they have a direct bearing on the applicant's aforementioned condonation and revival applications.

Factual background

[8] The employee commenced employment with the applicant on 1 December 2012 as a boiler operator. He was dismissed on 30 October 2019, and at the time of his dismissal, he was based at Bertha Gxowa Facility Maintenance Hub (the hospital).

[9] On Saturday, 4 November 2017, it was common cause that the employee and Mr Robert Nkosi (Mr Nkosi) were found cutting boiler pipes in the hospital's old boiler room. They were discovered by Mr Malefo Johannes Doepeleng (Mr Malefo), a chief artisan, manager at the hospital, and the employee's superior.

[10] On 13 February 2019, the employee was formally charged with three counts of misconduct, principally relating to the damage to property and the theft of boiler pipes. A disciplinary hearing was conducted between 12 July and 11 September 2019. The employee was found guilty on all charges and was dismissed on 30 October 2019.

[11] The employee referred an unfair dismissal dispute to the GPSSBC. The arbitration commenced on 17 August 2021 and concluded on 21 October 2021.

The applicant's submissions – on the merits

[12] The employee and Mr Nkosi had not been granted permission to work overtime on 4 November 2017. Overtime instructions are never issued verbally; a formal work order (like a job card) must be issued before any overtime work is authorised. This is essential in order to process the overtime payment.

[13] On the morning of 4 November 2017, Mr Malefo attended the hospital to meet a generator contractor. As the contractor was running approximately 30 minutes late, he proceeded to the office in the old boiler room to make himself some tea. Upon entering the old boiler room, he heard a grinder in use and discovered Mr Nkosi and the employee inside. Mr Nkosi was standing beneath the boiler, while the employee was positioned on top of it. Both were wearing personal protective equipment, and the employee was using a grinder to cut the boiler's steel pipes.

[14] Mr Malefo observed numerous cut pipes on the old boiler room floor, as well as additional cut pipes in the employee's bakkie, which was parked outside the premises. He proceeded to switch off the power to the grinder. Upon seeing Mr Malefo, both Mr Nkosi and the employee began apologising, explaining that they had no money for food or electricity. Mr Malefo reprimanded them and instructed them to cease what they were doing immediately.

[15] Mr Malefo then returned to the hospital to meet with the generator contractor. The meeting lasted approximately 1.5 hours, after which he went back to the old boiler room, only to find Mr Nkosi and the employee still cutting pipes. It was at that point that he contacted the police and his supervisor, Mr Ernest Moraka (Mr Moraka).

[16] Mr Nkosi and the employee spent the weekend in police custody. During this time, the employee signed a police statement admitting to the theft. Their families pleaded with Mr Malefo to withdraw the charges and handle the matter internally. As a result, the police investigation was not pursued further.

[17] Mr Nkosi was the employee's assistant and subordinate. On 4 November 2017, he was instructed by the employee to assist in cutting pipes. The employee had falsely informed Mr Nkosi that Mr Malefo had authorised the overtime work they were about to perform.

[18] Mr Nkosi was also charged with misconduct. Following a disciplinary hearing, held separately from that of the employee, he cooperated with the applicant and was suspended from the applicant's service for two months without pay.

[19] The applicant contends that the issue of the consistency of sanction was not in dispute and, accordingly, was never properly ventilated during the arbitration proceedings. Despite this, the commissioner, of his own accord, found that the sanction imposed on the employee was too harsh in comparison to that imposed on Mr Nkosi. The applicant submits that this demonstrates the commissioner exceeded his powers by determining and basing his award on an issue that was never placed in dispute.

[20] The commissioner's finding is also irrational. Despite concluding that the employee's version was less probable, that he was not authorised to perform overtime work, that he acted with intent to steal, and that tampering with essential infrastructure constitutes a serious offence, the commissioner nevertheless ordered the employee's reinstatement. The applicant contends that, in doing so, the commissioner not only exceeded his powers but also made a finding that is irrational, which constitutes a gross irregularity.

[21] The applicant further submits that remitting the matter to the GPSSBC would result in unnecessary delay and incur additional, unwarranted costs.

<u>The employee's submissions – on the merits</u>

[22] The employee contends that Mr Malefo gave him and Mr Nkosi verbal instructions to work overtime on 4 November 2017 and that work orders are only required when working in the hospital, not outside the hospital.

[23] According to the employee, they were instructed to clean the boiler room by cutting pipes to create space for the interns' lockers. He further alleges that Mr Malefo deliberately set a trap for him and Mr Nkosi due to discord in their working

relationship. The employee denied having apologised to either Mr Malefo or Mr Moraka and further denied that there were any cut pipes in his bakkie.

[24] In the answering affidavit, the employee fails to engage with any specificity in relation to the review ground concerning the commissioner's determination of the issue of inconsistency. The only reference appears in paragraph 12, where he states that '…*in determining the fairness of my dismissal the arbitrator had to look into the inconsistence sanction that was meted towards me and my colleague, and, there is nothing unreasonable in that regard'*.

[25] In the employee's heads of argument, it is further submitted that it would be 'impossible' for this court to substitute the GPSSBC's sanction with one of dismissal.

Analysis of the review application

[26] The employee's submissions in his heads of argument focus primarily on the condonation and revival applications, rather than on the merits of the review itself.

[27] In essence, the applicant relies on two principal grounds of review. First, that the commissioner found the employee's dismissal to be unfair on the basis of inconsistency in sanction when compared to that imposed on Mr Nkosi, an issue that was never in dispute. Second, that despite the commissioner finding the employee to be an unreliable witness and his version improbable, he nevertheless concluded that the dismissal was unfair.

Ground of review: The commissioner determined the issue of inconsistency

[28] An analysis of the transcript and the pre-arbitration minute confirms that inconsistency was not a matter placed in dispute between the parties. The employee testified that Mr Nkosi remains employed by the applicant, and under cross-examination, Mr Nkosi confirmed that he was suspended without pay for two months following his disciplinary hearing. It was further established that the disciplinary hearings of Mr Nkosi and the employee were conducted separately and presided over by different chairpersons.

[29] During the arbitration, the commissioner made only passing references to the issue of inconsistency. At page 61 of the transcript, he briefly asked Mr Moraka, '*Then how was the case closed by labour relations?*', to which Mr Moraka responded that Mr Nkosi had been suspended without pay but added that the question should rather be directed to Mr Malefo. Later, at pages 188 to 189 of the transcript, the commissioner sought clarification in relation to a question posed by the employee's representative to Mr Malefo regarding the outcome for Mr Nkosi following the incident. Mr Malefo confirmed that Mr Nkosi had been charged and remained employed by the applicant. Aside from these brief and incidental exchanges, the issue of inconsistency was neither raised nor meaningfully explored by either party during the arbitration.

[30] Not only was the issue of inconsistency not identified in the pre-arbitration minute, but it was never raised by the employee's representative in his opening address. This ground is based on the premise that the commissioner should be bound by the limitation of issues concluded in the course of the opening addresses of the parties and identified in the pre-arbitration minute. This is because there are no pleadings to speak of in CCMA arbitration proceedings, and, therefore, the opening addresses and the limitation of issues articulated by the parties at the outset of the arbitration would serve the very same purpose as limiting issues in a pre-trial minute.[2] In *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others*[3]*,* the Court dealt with the limitation of issues for determination in an arbitration by way of the opening addresses made by the parties. The Court referred to what each party in the arbitration had said in their opening addresses,[4] and then concluded:[5]

> '… in an arbitration such as the one that happened in this matter, the parties do not exchange, and, in this case, did not exchange, pleadings that would enable each party to know what the other party's case is. In cases in which

[2] See: *Tiger Brands Field Services (Pty) Ltd v Commission for Conciliation Mediation and Arbitration and Others* (JR 2650/2010) [2013] ZALCJHB 216 (13 August 2013) at para 71.
[3] (2008) 29 ILJ 964 (LAC) (*Fidelity Cash*).
[4] Ibid at paras 20 – 22.
[5] Id at para 23.

opening statements are made, they serve to inform both the arbitrator and the other side what one's case is. …'

[31] It is a well-established principle that an issue expressly excluded by way of a pre-arbitration agreement (minute) cannot be introduced during arbitration proceedings, as the parties are bound by the limitations they have agreed to.[6] As stated in *Filta-Matix (Pty) Ltd v Freudenberg and Others*:[7] '…*If a party elects to limit the ambit of his case, the election is usually binding*…'. Similarly, the applicants are bound by the case as outlined in their opening address at the arbitration. In *ZA One (Pty) Ltd t/a Naartjie Clothing v Goldman NO and Others*,[8] the Court held:

'The effect of the events at the commencement of the arbitration, as specifically set out above, is similar to a pretrial agreement and has the same consequences. As there are no pleadings in CCMA arbitrations, the court has specifically dealt with the significance of opening addresses. …'

[32] The employee did not challenge the issue of inconsistency, nor did he dispute the procedural fairness of his dismissal. Significantly, the employee's representative made no mention of inconsistency in the opening statement. Nevertheless, in paragraph 7 of the award, the commissioner unexpectedly identified as an issue for determination, '*Thirdly I must determine whether or not the Respondent was justified to impose different sanctions between the Applicant and his co-accused for a misconduct arising from the same facts'*.

[33] This issue was introduced *mero motu* by the commissioner and was never raised during the arbitration proceedings. This identification of inconsistency as a matter for determination appears for the first time in the award itself.

[34] Inconsistency was not placed in dispute by the parties; however, the commissioner nevertheless concludes that '*I find that the employers conduct in meting out the different sanctions between the Applicant and Mr. Robert Nkosi*

[6] See: *GE Security (Africa) v Airey and Others* (2011) 32 ILJ 2078 (LAC) at para 20 – 21.
[7] 1998 (1) SA 606 (SCA) at 614B-D.
[8] (2013) 34 ILJ 2347 (LC) at para 62. See also para 61 of the judgment.

amounts to self-misdirection, improper exercise of discretion, which further amounts to unexplainable act of inconsistency'.

[35] In paragraph 47 of its heads of argument, the applicant sets out the reasons why Mr Nkosi received a lesser sanction than the employee. However, this issue was not expressly ventilated during the arbitration because it was never placed in dispute. The difficulty and resulting prejudice to the applicant is that had the employee identified inconsistency as an issue in dispute, the applicant would have been afforded an opportunity to present evidence explaining the differential treatment. For instance, the outcome of Mr Nkosi's disciplinary hearing was not included in the arbitration bundle, nor was the matter meaningfully canvassed with any of the applicant's witnesses.

[36] The commissioner exceeded his powers within his jurisdiction by deciding an issue which the parties had not placed in dispute.[9] In *Reunert Industries (Pty) Limited t/a Reutech Defence Industries v Naicker & others*[10], the Labour Court held that where the parties have expressly limited the issues in dispute, thereby confining the arbitrator's jurisdiction, it constitutes a gross irregularity for the arbitrator to determine an issue that was not placed before him. By deciding a matter outside the scope of the agreed dispute, the arbitrator exceeded his mandate, which rendered the award reviewable. The court held:

> 'The commissioner exceeded her powers by entering into the question of the adequacy of the sanction and, in so doing, committed a gross irregularity by failing to hear the parties on the issue.'[11]

[37] By raising inconsistency *mero motu* in the award, the commissioner denied the applicant a fair opportunity to address the point, thereby failing to comply with the tenets of the *audi alteram partem* rule. This constitutes a gross irregularity in terms of section 145(2)(a)(ii) of the LRA, as well as the commissioner exceeding his powers in terms of section 145(2)(a)(iii) of the LRA.

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[9] A Myburgh, C Bosch, 'Review in the Labour Courts', LexisNexis, at p 117 para 6.5.
[10] [1997] 12 BLLR 1632 (LC) at 1637.
[11] At p 1638 A-B.

Ground of review: Despite finding the employee was not credible and his version was improbable the commissioner still found that his dismissal was unfair

[38] The commissioner makes the following adverse findings against the employee:

38.1 '*I find this contradiction is very material and taps negatively into the Applicant's credibility and reliability as a witness in these proceedings*';

38.2 '*I find that this version is less probable and should not be accepted. I am inclined to believe that the Applicant was indeed not authorised to conduct overtime work on the day in question*';

38.3 '*In my view that tampering with essential infrastructure is a serious crime and should be treated as such*'; and

38.4 '*I take cognizance of the fact that the Applicant's dismissal was for cutting of steel pipes with the intention to* [steal]*…*'.

[39] In paragraph 73 of the award, the commissioner outlines instances in which an employee may be dismissed for a first offence where the misconduct is particularly serious. Strikingly, in the same paragraph, the commissioner expressly includes examples of such serious misconduct as '... *gross dishonesty or wilful damage to the property of the employer*'.

[40] The commissioner made an adverse credibility finding against the employee and concluded that he was not authorised to cut the steel pipes, which constituted State property. However, despite setting out in the award when dismissal is appropriate even for a first offence involving serious misconduct, the commissioner nevertheless found that the sanction of dismissal was too harsh, relying on the employee's length of service and clean disciplinary record. In so doing, the commissioner relied on *Shoprite Checkers (Pty) Ltd v CCMA & others.*[12] The reliance of this judgment is misplaced because the form of misconduct was substantively different.

[12] [2008] 12 BLLR 1211 (LAC).

[41] This Court should only interfere with credibility findings made by commissioners if the evidence contained in the record before the Court shows that the credibility findings of the commissioner are entirely at odds with or completely out of kilter with the probabilities and all the evidence actually on the record when considered as a whole.[13]

[42] In particular, and having considered the record, I am of the view that the employee's testimony leaves much to be desired, and that the commissioner was correct to make an adverse finding about the employee's credibility.

[43] Despite these findings, namely, that the employee did not have permission from Mr Malefo to cut the steel pipes and that the probabilities favoured the employer, the commissioner, inexplicably, found the dismissal to be unfair and ordered the employee's reinstatement without retrospective effect.

[44] As submitted by the applicant, the commissioner failed to appreciate that the employee caused damage with the intention of stealing State property. The commissioner's finding is entirely disconnected from both his reasoning and the evidence before him and accordingly, amounts to a gross irregularity.

[45] The test for review is well established. In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*,[14] the Constitutional Court held that '*the reasonableness standard should now suffuse s 145 of the LRA*'[15], and articulated the threshold test for the reasonableness of an award as follows: '… *Is the decision reached by the commissioner one that a reasonable decision maker could not reach?*'[16]

[13] See: *National Union of Mineworkers and Another v Commission for Conciliation, Mediation and Arbitration and Others* (2013) 34 ILJ 945 (LC) at para 31; *Truworths Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2009) 30 ILJ 677 (LC) at para 25; *Moodley v Illovo Gledhow and Others* (2004) 25 ILJ 1462 (LC) at para 22; *Kgoadi v Commission for Conciliation, Mediation and Arbitration and Others* [2014] JOL 31908 (LC) at paras 51 – 52.
[14] (2007) 28 ILJ 2405 (CC).
[15] Ibid at para 106.
[16] Id at para 110. See also *Commercial Workers Union of SA v Tao Ying Metal Industries and Others* (2008) 29 ILJ 2461 (CC) at para 134; *Fidelity Cash supra* at para 96.

[46] In *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)*[17] the Court stated:

> '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.'

[47] The commissioner was not entitled to consider the issue of inconsistency, and his decision to reinstate the employee bears no rational connection to his own findings regarding the employee's guilt. The outcome is accordingly unreasonable.

[48] For all the reasons set out above, I conclude that the commissioner's award is reviewable. I am of the view that it clearly falls outside the bounds of what may be regarded as reasonable. The applicant's review application is therefore granted.

<u>Condonation for the late filing of the review and the revival application</u>

Condonation

[49] At the hearing of this matter the applicant submitted it was not perusing its objection to the late filing of the employee's answering affidavit.

[50] In respect of the condonation application: the award was received by the applicant on 30 November 2021, and accordingly, the review application should, according to the applicant, have been launched by 5 January 2022. However, by this court's calculation, the six-week period expired on 12 January 2022.

[51] The review application was served on 4 March 2022 making the application just over seven weeks late.

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[17] (2013) 34 ILJ 2795 (SCA) at para 25. See also *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others* (2014) 35 ILJ 943 (LAC) at para 14; *Monare v SA Tourism and Others* (2016) 37 ILJ 394 (LAC) at para 59; *Quest Flexible Staffing Solutions (Pty) Ltd (A Division of Adcorp Fulfilment Services (Pty) Ltd) v Legobate* (2015) 36 ILJ 968 (LAC) at paras 15 – 17; *National Union of Mineworkers and Another v Commission for Conciliation, Mediation and Arbitration and Others* (2015) 36 ILJ 2038 (LAC) at para 16.

[52] The applicant attributes the late filing of its review application primarily to internal administrative delays. In its founding affidavit, the applicant explains that upon receipt of the award, the standard procedure is to forward it to the Labour Relations Unit, which then considers the award and prepares a memorandum to the Head Office advising whether to comply with the award or to institute review proceedings.

[53] The memorandum was submitted on 22 December 2021. However, as this fell during the festive season, it was only considered on 4 January 2022. Thereafter, it was referred to the Legal Services Department for further consideration of the identified issues. As this department had not yet returned from the holiday break, its opinion was only submitted on 31 January 2022.

[54] Ms Maponya from the Office of the State Attorney only received the file on 14 February 2022. The applicant attributes the continued delay to the recruitment process for the appointment of counsel. Given the urgency of the matter, Ms Maponya elected to draft the founding affidavit herself. However, due to capacity constraints, including other urgent applications and a trial, she was only able to consult on 28 February 2022.

[55] The employee contends that the allegations contained in the applicant's condonation application amount to hearsay, as none of the supporting documents, such as the memorandum, have been attached. Furthermore, no explanation is provided as to why the State Attorney was only briefed on 4 February 2022, or why Ms Maponya was only instructed on 11 February 2022. In addition, while Ms Maponya attributes the delay to her workload at the time, no supporting documentation, such as a notice of set down for her trial, has been provided to substantiate this claim.

[56] The employee further contends that the delay is unreasonable and that the explanations provided by the applicant are wholly inadequate.

[57] The legal principles applicable to an application for condonation are well established. This court exercises a discretion in such matters, which must be applied judicially and with due regard to the facts of each case. Ultimately, the enquiry is one of fairness to both parties.

[58] In *NUM v Council for Mineral Technology*[18], the Labour Appeal Court was very clear that in the absence of a reasonable explanation, considerations such as the prospects of success become irrelevant. It was said that:

> 'The approach is that the court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefore, the prospects of success and the importance of the case. These facts are interrelated; they are not individually decisive. What is needed is an objective conspectus of all the facts. A slight delay and a good explanation may help to compensate for prospects of success which are not strong. The importance of the issue and strong prospects of success may tend to compensate for a long delay. There is a further principle which is applied and that is that without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused…'.

[59] Condonation for delays is not simply there for the taking. An applicant in an application for condonation seeks an indulgence and bears the onus to show good cause.

[60] The applicant's explanation for the delay is lacking in that it has failed to attach any documents to support Ms Maponya's allegations that she was overwhelmed with work. However, Ms Maponya did depose to a confirmatory affidavit in this regard.

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[18] [1999] 3 BLLR 209 (LAC) (*NUM*) at para 10.

[61] Moreover, there is no explanation as to why Ms Maponya only received the file on 11 February 2022 when the mandate was granted to refer the matter to the office of the State Attorney already on 4 February 2022.

[62] The review application was filed just over seven weeks out of time. While this constitutes a delay, it cannot be regarded as unduly excessive.

[63] As already stated above, the award falls to be reviewed and set aside. Accordingly, the applicant's prospects on the merits are strong.

[64] This court enjoys a wide judicial discretion to grant condonation where it would be in the interests of justice to do so, primarily based on the interrelated factors already outlined above.[19] In addition, the Labour Courts have, at various times, taken into account a number of ancillary considerations, including: the relative prejudice to each party should condonation be granted or refused; the importance of the case; the respondent's interest in the finality of the dispute; the convenience of the Court and the need to avoid unnecessary delays in the administration of justice.[20]

[65] In circumstances where the explanation for the delay and the prospects of success stand at opposite ends of the spectrum, I must take into account the ancillary considerations set out above and, ultimately, determine whether it is in the interests of justice to grant condonation.

[66] It is not in the interests of justice to overlook the seriousness of conduct involving the damaging and attempted theft of property, particularly where, as in this case, the property in question belongs to the State. To refuse condonation solely on

[19] *Steenkamp & Others v Edcon Ltd* (2019) 40 ILJ 1731 (CC) (*Steenkamp II CC*) at paras 29 and 36. See also *NEHAWU obo Mafokeng and Others v Charlotte Theron Children's Home* [2004] 10 BLLR 979 (LAC); *Mndebele & Others v Xstrata SA (Pty) Ltd t/a Xstrata Alloys (Rustenburg Plant)* (2016) 37 ILJ 2610 (LAC) at [4]; See also *Chetty v Baker McKenzie* (2022) 43 ILJ 1599 (LAC); *Mashishi v Mdladla NO & Others* (2018) 39 ILJ 1607 (LC) at para 7; *Matsha & Others v Public Health & Social Development Sectoral Bargaining Council & Others* (2019) 40 ILJ 2565 (LC).

[20] *National Education Health & Allied Workers Union on behalf of Leduka v National Research Foundation* (2017) 38 ILJ 430 (LC) at para 38 citing *Academic & Professional Staff Association v Pretorius NO & others* (2008) 29 ILJ 318 (LC) at paras 17-18.

the basis of a weak, albeit existent, explanation for the delay would unjustly undermine the applicant's strong prospects on the merits and risk diminishing the public respect for and protection of State-owned property.

[67] As stated in the Labour Appeal Court's judgment of *Government Printing Works v Public Service Association and Another*[21] held that: '*The failure to provide a proper explanation for a delay has not been an absolute bar to condonation. A measure of flexibility has been applied where required in the interests of justice*…'.

[68] Although the explanation for the delay lacks specific detail and some periods remain unexplained, an explanation has nonetheless been provided and in my view, meets the minimum threshold. The delay is not excessive, and when considered alongside the strength of the applicant's case and the overarching interests of justice, I am satisfied that condonation for the late filing of the review application is warranted.

Revival application

[69] The applicant filed the record one day out of time. In its heads of argument dated 19 November 2024, approximately three weeks before the matter was argued, the employee alerts the applicant that the matter has been archived. The applicant brought a revival application on 6 December 2024.

[70] The employee has not filed opposing papers.

[71] The reason for the applicant's late filing of the record, by one day, is attributed to one of the four messengers employed by the State Attorney failing to file the record on the same day it was served on the employee. Given that the record was ultimately filed on 14 July 2022, approximately a year and a half after the revival application was launched, the specific individual responsible can no longer be identified.

[21] (2025) 46 ILJ 915 (LAC) at para 25.

[72] The employee further contends that the applicant failed to notify the Registrar in writing to request the allocation of a hearing date, a step which the employee was ultimately compelled to take on 10 October 2023. The employee also asserts that the applicant did not comply with the obligation to furnish security in terms of section 145(7) of the LRA.

[73] The applicant attaches a notice of enrolment dated 21 December 2022, advising the Registrar that the court file had been indexed and paginated, and applying for a date on the opposed roll. As for the issue of security, the failure to file security does not render the application defective; rather, it affects only the enforceability of the award. An award may still be enforced if security is not furnished, and as such, the point raised by the employee in this regard is misplaced.

[74] For all the reasons stated for the granting of the condonation application, the revival application is granted

<u>The substitution of the award</u>

[75] In relation to misconduct, the commissioner found that '… *a misconduct involving dishonesty does not automatically warrant a sanction of dismissal*…'.

[76] Dishonesty is the kind of misconduct that justifies the sanction of dismissal as an appropriate and fair sanction.[22] There can thus be little doubt that the employee's misconduct was very serious, especially as it involved the State's property. Further, all of the applicant's witnesses, Mr Nkosi, Mr Moraka, and Mr Malefo, confirmed that the employee had apologised for his actions. Notably, Mr Malefo testified that the employee had signed an admission of guilt at the police station. In light of the commissioner's finding that the probabilities favoured the employer, it is striking that he failed to consider the employee's reversal of his version of events during the arbitration.

[22] *Toyota SA Motors (Pty) Ltd v Radebe and Others* (2000) 21 ILJ 340 (LAC) at para 15; *Mutual Construction Co Tvl (Pty) Ltd v Ntombela NO and Others* (2010) 31 ILJ 901 (LAC) at paras 35 and 37.

[77] Even if the commissioner failed to consider this aspect, he still found the employee to have been dishonest.

[78] From the transcript and the findings of the award (in finding that the employee was dishonest), the employee sought to evade responsibility by advancing contrived and false defences and explanations. As aptly described in *Malaka v General Public Service Sectoral Bargaining Council and Others*,[23] this conduct signifies the following:

> 'The evidence reveals that the appellant's dishonest conduct rendered continued employment intolerable and incapable of restitution. Conduct, such as we have here, is incompatible with the trust and confidence necessary for the continuation of the employment relationship. The Department of Justice was entitled, in the circumstances, to end the employment relationship.'

[79] In *De Beers Consolidated Mines Ltd v Commission for Conciliation, Mediation and Arbitration and Others*[24]*,* it was stated that: '… *Dismissal is not an expression of moral outrage; much less is it an act of vengeance. It is, or should be, a sensible operational response to risk management in the particular enterprise. …*'.

[80] In light of the facts of this case and, in particular, the commissioner's adverse credibility findings against the employee and his conclusion that the employee had indeed committed misconduct, it is surprising that the commissioner nevertheless ordered reinstatement, albeit without retrospectivity. His justification for doing so rests on the issue of inconsistency, which, as detailed above, ought not to have been considered by him in the first place.

[81] The employee contends that this Court may not substitute the award.

[82] In terms of section 145 (4) (a) of the LRA, this Court has the broadest powers to determine a dispute in whatever manner it considers appropriate.[25] In exercising

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[23] (2020) 41 ILJ 2783 (LAC) at para 34.
[24] (2000) 21 ILJ 1051 (LAC) at para 22.
[25] *National Union of Metalworkers of South Africa v Commission for Conciliation, Mediation and Arbitration and Others* (2022) 43 ILJ 530 (CC) (*NUMSA*).

this power, this 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.

[83] The Labour Appeal Court in *Phakoago v SANCA Witbank Alcohol and Drug Help Centre and Others*[26] (*Phakoago*) referred to *National Union of Metalworkers of South Africa v Commission for Conciliation, Mediation and Arbitration and Others*[27] where the Constitutional Court held that the Labour Court should '*exercise a measure of judicial deference and only substitute decisions in exceptional circumstances*'. However, the Constitutional Court 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*'.[28]

[84] *Phakoago* also referred to *Southern Sun Hotel Interests (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*[29] (*Southern Sun*), and stated:[30]

> '…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."'

[85] As stated above, the employee's misconduct occurred in 2017. There has been an unfortunate material delay in the conclusion of the matter, which erodes one

[26] [2024] 12 BLLR 1271 (LAC) at para 41.
[27] Ibid.
[28] *NUMSA supra* at para 67.
[29] (2010) 31 ILJ 452 (LC) at para 33.
[30] *Phakoago* supra at para 43.

of the cornerstones of employment law, being the expeditious resolution of employment disputes.[31]

[86] Having regard to the factors listed in *Southern Sun,* this court finds that (i) 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; and (iii) this court is in as good a position as the CCMA to make the decision itself.

[87] Furthermore, having carefully considered the transcript and the arbitration bundle in detail, I am satisfied that a rehearing would serve little to no practical purpose.[32]

[88] For all the reasons set out above, and given that the commissioner's decision is one that no reasonable decision-maker could have reached, this court is in a position to substitute the award with a finding that the employee was fairly dismissed.

<u>Costs</u>

[89] In terms of the provisions of section 162(1) of the LRA, I have a wide discretion when it comes to the issue of costs. I am aware of what the Constitutional Court said with regard to costs in employment disputes as expressed in *Zungu v Premier of the Province of KwaZulu-Natal and Others*[33] (*Zungu*). In exercising this judicial discretion, the same court recently reaffirmed the principle set in *Zungu* and stated that '*when making an adverse costs order in a labour matter, a presiding officer is required to consider the principle of fairness and have due regard to the conduct of the parties'*.[34]

[31] *Food and Allied Workers Union on behalf of Gaoshubelwe v Pieman's Pantry (Pty) Ltd* (2018) 39 ILJ 1213 (CC) at para 187.
[32] Stated *Auto Industrial Group (Pty) Ltd and Others v Commission for Conciliation, Mediation and Arbitration and Others* (2019) 40 ILJ 550 (LC) at para 60.
[33] (2018) 39 ILJ 523 (CC) at para 25.
[34] *Long v SA Breweries (Pty) Ltd and Others* (2019) 40 ILJ 965 (CC) at para 29.

[90] The employee was fully entitled to oppose this application, particularly given the lack of detail in the condonation application. Taking these factors into account, together with a broader consideration of fairness to both parties, I am satisfied that it is just and appropriate to make no order as to costs.

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

Order

1. The application to condone the late filing of the review application is granted.
2. The revival and reinstatement application is granted.
3. The review is granted and the award issued by the third respondent under case GPBC436/2021 is set aside and substituted with the following order:

'1. The employee, Muzwethu Delihlazo's dismissal was substantively and procedurally fair.'

4. There is no order as to costs.

S. Swartz

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant:	Adv M Mhambi
Instructed by:	The State Attorney
For the First Respondent:	M Maraka
Instructed by:	NEHAWU