



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JR604/24

In the matter between:

GOVAN MBEKI LOCAL MUNICIPALITY

Applicant

and

MATUSA OBO PRISCILLA GELLY NKOSI

First Respondent

COMMISSIONER NOKO NKGOENG NO

Second Respondent

MANGALISO MASHIANE NO

Third Respondent

**SOUTH AFRICAN LOCAL GOVERNMENT
BARGAINING COUNCIL**

Fourth Respondent

Heard: 20 May 2025

Delivered: 15 July 2025

JUDGMENT

SCHENSEMA, AJ

Introduction

[1] This is an opposed review application brought by the applicant in terms of sections 158(1)(h) and 145 of the Labour Relations Act¹ (LRA).

[2] In terms of its section 158(1)(h) review, the applicant seeks to set aside the disciplinary sanction of the third respondent, Mr Mashiane (the Chairperson) dated 2 May 2023 in respect of which the first respondent was found guilty of numerous charges and was issued with a final written warning together with a sanction of the repayment of half of the monies that had not been banked.

[3] The applicant further seeks an order reviewing and setting aside the arbitration award (the award) of the second respondent (the Commissioner) in terms of section 145 of the LRA, in respect of which the Commissioner found that the first respondent's dismissal was both substantively and procedurally unfair.

[4] In terms of the award, the applicant was further ordered to retrospectively reinstate the first respondent together with backpay in the amount of R159 006.00. The reinstatement was effective from the date of the dismissal of 16 May 2023.

Condonation

[5] The applicant further seeks condonation for the late filing of its section 158(1)(h) and 145 review applications.

Section 158(1)(h) review application

[6] In respect of the section 158(1)(h) of the LRA, it is now trite law² that there is no statutory time frame prescribed to institute a review application by an organ of

¹ Act 66 of 1995, as amended

² *MEC for Economic Development, Environment and Tourism, Limpopo Province v Mogahlane* (2019) 40 ILJ 315 at para 16; *Khumalo and Another v MEC for Education, KwaZulu-Natal* 2014 (5) SA 579

state, but it must be done within a reasonable time. What constitutes a 'reasonable time' is determined on a case-by-case basis.

[7] Upon due consideration of the explanations provided for the delay in filing the section 158(1)(h) review, I am persuaded that the review application was instituted within a reasonable period, having regard to the circumstances that unfolded subsequent to the dismissal of the first respondent and the ensuing referral to the Bargaining Council.

Condonation for the late filing of the section 145 review application

Degree of lateness

[8] The applicant received the award on 7 November 2023. According to the service affidavit, the review application was served on the second to fourth respondents on 18 January 2024, and on the first respondent on 29 January 2024. Accordingly, the relevant period for condonation is calculated from 19 December 2023 to 29 January 2024.

[9] The review application was filed 24 days late, contrary to the first respondent's assertion that it was 73 days late. Whilst the delay is not excessive, it is not insignificant.

The explanation for the delay

[10] The applicant has submitted that it had received the award on 7 November 2023, upon receipt of which the applicant took steps to instruct attorneys to launch the review application. The attorneys were appointed on 15 November 2023 and, in light of the complexity of the matter, took some time to consider the relevant documentation and advise on what legal remedies were available to the applicant. This advice was received on 24 November 2023.

(CC) at para 42 wherein the Constitutional Court held that: 'There is no prescribed time limit for launching a review under s 158(1)(h) of the LRA. The Labour Court Rules further prescribe no time limits for bringing review applications... It is generally understood that proceedings under s 158(1)(h) must be launched within a reasonable time...'.

[11] A consultation was held with the applicant's attorneys on 29 November 2023, which ultimately resulted in the review application only being finalised on 11 December 2023. Due to the upcoming festive season and the closure of the applicant's offices, the applicant was only able to attend to the deposing of the founding affidavit upon its return in January 2024.

[12] In opposition, the first respondent, in her answering affidavit, primarily focuses her criticism on the applicant's failure to timeously launch the section 158(1)(h) review and ultimately concludes that the applicant cannot hide behind the negligence of its attorneys for the late filing of the review application. No reason, however, is proffered as to why the first respondent holds the view that the late filing of the review application is as a result of the applicant's attorneys' negligence.

Analysis of the condonation application for the late filing of the review application

[13] The relevant legal principles to be applied in an application for condonation are well established. This Court is required to exercise a discretion, having regard to the extent of the delay, the explanation for that delay, the prospects of success and the relative prejudice to the parties that would be occasioned by the application being granted or refused. The interest of justice will ordinarily reflect regard to all these factors.

[14] In *A Hardrodt (SA) (Pty) Ltd v Behardien and others*³ (*Hardrodt*) the Labour Appeal Court (LAC) restated the guidelines laid down in *Queenstown Fuel Distributors CC v Labuschagne NO and others*⁴ and held *inter alia* that there must be good cause shown for condonation in the sense that the reasons tendered for the delay have to be convincing. In other words, the excuse for non-compliance with the time periods must be compelling. The onus is on the applicant to satisfy the Court that condonation should be granted.

[15] The general principles applicable to deciding applications for condonation apply even more stringently when it comes to review applications. In *National Union*

³ (2002) 23 ILJ 1229 (LAC).

⁴ (2000) 21 ILJ 166 (LAC).

*of Metalworkers of SA on behalf of Thilivali v Fry's Metals (A Division of Zimco Group) and others*⁵ (*Thilivali*), the Court said:

‘What is clear from the judgment in *Hardrod* is that general principles applicable to condonation applications are even more stringently applied where it comes to a condonation application for the late filing of a review application. In review condonation applications, the explanation that needs to be submitted must be compelling and the prospects of success need to be strong. Where it comes to the issue of prejudice, the applicant in fact has to show that a miscarriage of justice will occur if the applicant’s case is not heard. The reason for these more stringent requirements is that review applications occur after the parties have already been heard, presented their respective cases and a finding has been made. Under such circumstances, considerations of justice, fairness and expedition require that challenges of such findings must not be delayed and must be completed as soon as possible.’

[16] The courts have held and emphasised that an applicant must necessarily act with the degree of diligence required, thus giving effect to the statutory imperative of expeditious dispute resolution.

[17] The onus is on the applicant seeking condonation to satisfy the Court that condonation should be granted. In employment disputes, there is an additional consideration which applies in determining whether the onus has been discharged, as was held in *Thilivali*:⁶

‘There is, however, an additional consideration which applies in employment disputes in determining whether an applicant for condonation has discharged this onus. This is the fundamental requirement of expedition. The Constitutional Court has, as a matter of fundamental principle, confirmed that all employment law disputes must be expeditiously dealt with and any determination of the issue of good cause must always be conducted against the back drop of this fundamental principle in employment law.’

⁵ (2015) 36 ILJ 232 (LC) at para 22.

⁶ *Ibid* at para 25.

[18] In summary, the Courts have endorsed the principle that where there is a delay with no reasonable, satisfactory and acceptable explanation for the delay, condonation may be refused without considering prospects of success, and to grant condonation where the delay is not explained may not serve the interests of justice. The expeditious resolution of labour disputes is a fundamental consideration.

[19] Notwithstanding the aforementioned principle, a measure of flexibility has been applied where required in the interests of justice. In *NEHAWU obo Mofokeng and Others v Charlotte Theron Children's Home*⁷, it was determined that, in the interest of justice, the case should proceed, as the policy in question appeared to be deeply influenced by a racist perspective and was perpetuating ongoing racial discrimination. In this case, the circumstances were described as 'exceptional', thereby justifying less focus on the unexplained periods of delay.

[20] In the matter of *Government Printing Works v Public Service Association and another*⁸, the LAC held that:

'[26] Judicial discretion involves a value judgment based on the facts of the case. The Labour Court must be fair to both sides. It must also consider the broader objects of the LRA, including the importance of expeditious resolution of employment disputes. The factors that must be considered in determining whether or not it is in the interests of justice to grant condonation, and the appropriate approach, have now been resolved as follows:

"[22] ... [T]he concept "interests of justice"... includes: the nature of the relief sought; the extent and cause of the delay; the effect of the delay on the administration of justice and other litigants; the reasonableness of the explanation for the delay; the importance of the issue...' and the prospects of success. It is crucial to reiterate that... the ultimate determination of what is in the interests of justice must reflect due regard to all the relevant factors but it is not necessarily limited to those mentioned above. The particular circumstances of each case will determine which of these factors are relevant.

(own emphasis)

⁷ [2004] 10 BLLR 979 (LAC).

⁸ [2025] 2 BLLR 112 (LAC) at paras 26 and 27.

[23] it is now trite that condonation cannot be had for the mere asking. A party seeking condonation must make out a case entitling it to the court's indulgence. It must show sufficient cause. This requires a party to give a full explanation for the non-compliance with the rules or court's directions. Of great significance, the explanation must be reasonable enough to excuse the default...

...

[51] The interests of justice must be determined with reference to all relevant factors. However, some of the factors may justifiably be left out of consideration in certain circumstances. For example, where the delay is unacceptably excessive and there is no explanation for the delay, there may be no need to consider the prospects of success. If the period of delay is short and there is an unsatisfactory explanation but there are reasonable prospects of success, condonation should be granted. However, despite the presence of reasonable prospects of success, condonation may be refused where the delay is excessive, the explanation is non-existent and granting condonation would prejudice the other party. As a general proposition the various factors are not individually decisive but should all be taken into account to arrive at a conclusion as to what is in the interests of justice."

[27] This description evokes a balancing approach, characterised by proportionality and flexibility. The general principle remains that the various factors are to be considered collectively, and not mechanically, in determining the interests of justice. ...'

[21] It is in this context that the application for condonation stands to be determined.

Explanation for the delay

[22] It is trite that a failure to comply with the timeframes must be explained, and the reasonableness of the delay should be considered by having regard to the explanation for the delay.

[23] The explanation for the delay has to be compelling, convincing and comprehensive and should cover every period of the delay.⁹ Furthermore that the explanation provided is reasonable and acceptable. In this regard, an applicant in a condonation application is required to provide an explanation for the entire period of the delay and the aspects related thereto.

[24] In considering the timeframe explained by the applicant, 19 December 2023 to 29 January 2024, I am satisfied that the applicant has provided an explanation for the late filing of the review application.

Prospects of success

[25] For purposes of properly determining the condonation application and for the aforementioned reasons, I have not limited my assessment of the review application on the basis of the reasons for the delay only.

[26] In order to ensure that this process is complete, I have further considered the prospects of success in order to determine whether there are compelling reasons for this Court to grant condonation.

[27] For the purpose of evaluating the prospects of success, and having regard to the applicant's review application brought in terms of sections 158(1)(h) and 145 of the LRA in relation to the sanction and the award, respectively, I have considered not only the grounds of review pertaining to the award under section 145, but also those relating to the sanction under section 158(1)(h) of the LRA.

[28] It is obvious that were the section 158(1)(h) review application to succeed, it would not be possible to give effect to the award in respect of which the Commissioner reinstated the first respondent.

[29] It is uncontroversial that the review test is whether an arbitrator has misconceived the nature of the enquiry or arrived at an unreasonable result.¹⁰ A

⁹ *Van Wyk v Unitas Hospital and Others* 2008 (4) BCLR 442 (CC).

¹⁰ *SA Rugby Union v Watson and Others* (2019) 40 ILJ 1052 (LAC) (*Watson*) at para 25.

result will be considered to be unreasonable if it is one that a reasonable arbitrator could not reach on all the material presented to him or her.¹¹

[30] The evidence, when considered alongside the inconsistent sanction outcome, clearly highlights the Chairperson's failure to properly evaluate the evidence before him, as well as his failure to consider the operational risks posed by the first respondent to the applicant's operations and the impact of her conduct on the trust relationship.

[31] For these reasons, I am of the view that a basis has been established by the applicant to justify its shortcomings in its late filing of its section 145 review application, which shortcomings are to be overlooked in the interests of justice.

Background

[32] Upon conclusion of an internal investigation into missing monies, the first respondent was charged with five charges relating to a failure to perform tasks and job responsibilities diligently, carefully and to the best of her ability; gross negligence; dereliction of duties, insubordination and dishonesty in respect of an amount of R93 481.00 that had not been banked with Standard Bank, who had confirmed that it had only received three instead of four bags of cash.

[33] The first respondent was found guilty of 4 of the 5 charges by the Chairperson. In respect of the allegations of dishonesty, the Chairperson in his 'verdict' *inter alia* made the following remarks:

'It is common cause that the accused employee is charged with five counts of misconduct. It was clear that an element of negligence, irresponsible and carelessness occurred during the incident. The testimony from some of the witnesses points to negligence and carelessness throughout. The accused employee should take responsibility of the money. The fact that the auto safe machine was not working makes it her sole responsibility to be more careful and vigilant on the money bags stored in the safe.

¹¹ Ibid.

The instruction of the accused employee to instruct subordinates verbally not to cash up the money is a serious matter. The reasons given to me are not good enough. There was no reason whatsoever for the accused employee to issue such instruction unless there was a serious and sound reason to do so. I'm not however taking away the fact that the person receiving such instruction has a duty to argue about it until she is satisfied, she can carry it out. In most instances people get into serious trouble because of such instructions.

I find it very strange that the accused employee will go to a cashiers house to get the keys outside office hours, to collect her son's CV. It is a serious matter, that what was the motive behind that? There is a grey area in so far as telling when did she go to collect her son's CV. The exchange of keys after hours leaves much to be desired. I have established that there is a lot of negligence and dishonesty from the side of the accused employee. Something that she should have avoided at all cost, knowing what will be the implications of losing such an amount of money.' (sic) (own emphasis)

[34] The Chairperson, upon consideration of the mitigating and aggravating factors, and notwithstanding his findings, determined that a sanction of a final written warning coupled with the repayment of half of the monies that had gone missing was appropriate. The Chairperson recorded the following in his sanction:

'I found that the accused employee failed to perform tasks and to discharged her duties responsible and to the best of her abilities as required of her. Furthermore, what she did was pure negligent in executing her duties trustworthy. She should have applied her mind when dealing with such an important asset of the employer which is money. It is her duty to ensure that as a head cashier and at that time as an acting assistant account money are collected and banked accordingly.

The accused Employee purposefully or accidentally failed to perform her obligations without a valid excuse. Moreover, this this was an obligation attached to her job. The accused employee dishonesty saw the employer losing a huge amount of money. The accused employee also went to subordinate to collect keys to the safe to fetch her son's Curriculum Vitae.

Though this matter was not deliberated upon at length in that it is not clear when she went to office for her son's CV. This is a matter of grave concern.

.....

It is common knowledge that municipalities are often at the centre of criticism with regard to misappropriation of funds. This issue has to be looked at seriously as we cannot turn a blind eye on it.' (*sic*)

[35] Subsequent to receiving the sanction from the Chairperson, an internal meeting was arranged with the Acting Director of Corporate Services Mr Ramolela by the Municipal Manager, Mr Maseko, during which meeting, he raised his concerns in relation to the sanction and issued an instruction that the first respondent was not to report for duty pending further consideration of the matter.

[36] Despite Mr Maseko's instruction (according to the applicant), the first respondent reported for duty, in response to which the first respondent was dismissed. It is common cause, that no procedure was followed prior to the first respondent's dismissal and that the first respondent was simply dismissed by way of a letter which reads as follows:

'Dear Ms Nkosi

Dismissal Letter

The above-mentioned matter bear reference.

You are hereby DISMISSED with immediate effect upon receipt of the letter.

Further to that you are required to return all the Employer's belongings in your possession.

The reasons for your dismissal is that the relationship is irretrievably broken down derived from the disciplinary hearing whereby you were found guilty.

(own emphasis)

It is trust that you will find the above in good order.' (*sic*)

[37] Subsequent to the dismissal, the first respondent referred an unfair dismissal dispute to the Bargaining Council.

The award

[38] The Commissioner determined that, on a balance of probabilities, the reasons advanced by the applicant throughout the arbitration were not supported by any evidence, be it from the applicant's witnesses or that of the first respondent.

[39] In summary, the Commissioner determined that the true reason for the first respondent's dismissal did not relate to the first respondent's failure to obey Mr Maseko's instruction. In making this finding, the Commissioner *inter alia* made reference to and relied on the applicant's dismissal letter, which specifically records:

'The reason for your dismissal is that the relationship is irretrievably broken down derived from the disciplinary hearing whereby you were found guilty.'

[40] The Commissioner concluded that:

40.1 Mr Maseko's decision to dismiss the first respondent amounted to the altering of the Chairperson's sanction, in contravention of clause 8.5 of the Procedure Collective Agreement;

40.2 The decision to dismiss the first respondent was unfair and without a valid reason;

40.3 All the issues raised in defence by the applicant were well canvassed during the internal disciplinary enquiry;

40.4 The applicant failed, on a balance of probabilities, to discharge its onus to prove the first respondent's dismissal was both procedurally and substantively fair, in that she was not notified of any allegations and was further not afforded an opportunity to state her case in response to the allegations; and

40.5 No evidence was led by the applicant to explain its failures for not convening an enquiry in respect of the allegations pertaining to insubordination.

Analysis of the award

[41] In effect, the Commissioner found that the first respondent's dismissal was both procedurally and substantively unfair in that the applicant had failed to lead any evidence in support of its contention that the first respondent's dismissal related to

her subsequent alleged insubordination and not the variation of the Chairperson's sanction.

Grounds of review

[42] In terms of the section 158(1)(h) review, the applicant challenges the Chairperson's outcome on the basis that it is unreasonable and/or irrational and specifically makes reference to portions of the 'verdict' in which the Chairperson held as follows:

'Having said that let me address the issue of charges, it is common cause that the accused was charged with 5 charges. She also pleaded not guilty on charges levelled against her. In the verdict she was found guilty on charges one (1), two (2), three (3) and five (5). On charges four (4), I couldn't find anything substantive from the evidence led and as well from the charges which suggest insubordination. Therefore, I have no reason whatsoever to find the accused guilty on that charge.

....

The accused employee purposefully or accidentally failed to perform her obligations without valid excuse. Moreover, this was an obligation attached to her job. The accused employee dishonestly saw the employer losing a huge amount of money. It is her duty to ensure that as a head cashier and at the time as an acting assist account money are collected and banked accordingly.

....

I have also considered the circumstances around this case, in particular the employee's personal circumstances. She cited amongst others that she was a first time offender, clean disciplinary record and is a breadwinner at home with lot of family responsibilities.

.....

This however cannot outweigh the fact that a guilty verdict was issues on four charges of the five. Which to me is crucial.' (*sic*)

[43] Further reference is made to the Disciplinary Procedure Collective Agreement of 2018 to 2023, in respect of which an employee may be dismissed for a first offence if the act relates to dishonesty or gross negligence. In light of the gravity of

the charges, the decision by the Chairperson is not one that a reasonable presiding officer could reach. Alternatively, the Chairperson's decision is irrational.

[44] In respect of the section 145 review application, the applicant has submitted that the Commissioner had ignored the applicant's evidence in respect of the first respondent's dismissal. The applicant further holds the view that its witnesses gave consistent testimony of the events that transpired prior to the first respondent's dismissal and the reasons for the dismissal.

[45] The applicant submits in the alternative that the Commissioner failed to consider the seriousness of the charges in respect of the internal disciplinary enquiry, which charges warranted her dismissal.

[46] In its supplementary affidavit, the applicant refers this Court to portions of the record in support of its contention that the evidence clearly related to the first respondent's defiance to still report for duty whilst the applicant was considering its legal remedies. Furthermore, that the applicant had not changed or amended the Chairperson's sanction.

[47] The applicant further seeks to convince this Court that, despite the wording of the dismissal letter, the evidence led during the arbitration clearly demonstrated that the reason for the first respondent's dismissal related to her insubordination and not the applicant's changing of the Chairperson's sanction.

[48] In opposition, the first respondent firstly takes issue with the fact that the second respondent, Commissioner Noko Nkgoeng, was not the presiding officer at the disciplinary hearing. Secondly, that the applicant has failed to make out a case that it be exempted from filing security in terms of section 145(7) and 145(8) of the LRA. The incorrect citation of the parties, in my view, requires no finding by this Court.

[49] Upon review of the Court file, a security bond was filed with the Labour Court on 19 July 2024. I am therefore satisfied that there has been partial compliance with the provisions of section 145(7) and 145(8) of the LRA. Furthermore, it is trite that

the furnishing of security relates to whether the award is suspended; it does not relate to whether the review application is defective.¹² The first respondent had alternative remedies available to her to enforce the award, which the first respondent elected not to utilise.

[50] With reference to the review grounds, the first respondent, in summary, opposes the applicant's review applications as follows:

50.1 the action by Mr Maseko resulted in the decision of the Chairperson being altered contrary to clause 8.5 of the Procedure Collective Agreement concluded between the parties for the period 2018 - 2023;

50.2 the applicant could therefore not unilaterally have changed the sanction and ought to have launched a review application to review and set aside the decision of the Chairperson;

50.3 Mr Maseko, despite his position as Municipal Manager, does not have the authority to dismiss or alter decisions of a chairperson;

50.4 During the arbitration proceedings, the applicant failed to present any evidence of insubordination;

50.5 The first respondent was neither notified of any allegation nor afforded any opportunity to state her case in response to the allegation of insubordination;

50.6 The test for review is not whether the arbitrator came to an incorrect decision, as this constitutes the test for an appeal. The test requires that an arbitrator's decision must be a decision that no reasonable decision maker could reach on all the material that was before him;

50.7 No evidence was submitted by the applicant as to why no procedural fairness was complied with prior to the first respondent's dismissal;

50.8 The evidence presented by the applicant during the arbitration proceedings, related to the evidence that was presented during the internal disciplinary enquiry; and

50.9 The first respondent's dismissal did not relate to her failure to obey a lawful and reasonable instruction, as there were no charges of this nature instituted against the first respondent.

¹² *Okhahlamba Local Municipality v Mabuya and others* [2021] 11 BLLR 1115 (LC).

First respondent's challenge to the applicant's condonation application

[51] The first respondent further challenges the applicant's condonation application in respect of the late filing of the review application, and she holds the view that the review application in respect of the award is 73 days late.

[52] In respect of the outcome of the disciplinary enquiry, the first respondent holds the view that the review application is 261 days late.

[53] For the aforementioned reasons, condonation has been granted for the late filing of the section 145 review application, and no condonation is required for the section 158(1)(h) review application.

Test for review

[54] In a range of cases, starting with *Sidumo and another v Rustenburg Platinum Mines Ltd and others*¹³ and the jurisprudence that followed,¹⁴ the test on review and as set out in the matter of *Herholdt v Nedbank Limited*¹⁵, the Supreme Court of Appeal has defined with greater clarity the standard of review:

54.1 It must be established either that the arbitrator has misconceived the nature of the enquiry or that they arrived at an unreasonable result.

54.2 For an award to be unreasonable, the arbitrator's conclusion must be one that a reasonable decision-maker could not reach on the material that was before the arbitrator.

54.3 Material errors of fact, including errors concerning the weight and relevance to be attached to certain facts, are only of consequence if their effect is to render the outcome unreasonable.

¹³ (2007) 28 ILJ 2405 (CC).

¹⁴ *Cusa v Tao Ying Metal Industries and others* 2009 (2) SA 204 (CC); *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and others* (2008) 29 ILJ 964 (LAC); *Herholdt v Nedbank Ltd (COSATU as amicus curiae)* 2013 (6) SA 224 (SCA) (*Herholdt*); *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and others* [2014] 1 BLLR 20 (LAC).

¹⁵ *Herholdt* supra.

54.4 If the arbitrator's reasons provide a reasonable 'route' leading towards the conclusions, it must follow that the decision is one that could have been reached (and in fact was) made by a reasonable decision-maker. A review application would, in such circumstances, not succeed.

54.5 Even if there are flaws in the arbitrator's reasons, a review must still consider whether, apart from the arbitrator's reasons, *'the result is one a reasonable decision maker could reach in light of the issues and the evidence'*.

54.6 A review court is required to examine the merits *'in the round'* only.

[55] It is thus obvious that reasonableness can only be assessed with regard to the evidence before the decision-maker.

[56] It is uncontroversial that the review test is whether an arbitrator has misconceived the nature of the enquiry, or arrived at an unreasonable result.¹⁶ A result will be considered to be unreasonable if it is one that a reasonable arbitrator could not reach on all the material presented to him or her.¹⁷

Application to the facts

Section 158(1)(h) review application

[57] It is trite that, in light of the fact that a state employer is not able to rescind or review the decision of the chairperson, that a review application must be brought to this Court.¹⁸

[58] Of further guidance when considering the review grounds, is the following *dictum* in *Ntshangase v MEC for Finance: KwaZulu-Natal & another*¹⁹, where it was held:

'... All actions and/or decisions taken pursuant to the employment relationship between the second respondent and its employees must be fair and must

¹⁶ *Watson* ibid at para 25.

¹⁷ ibid.

¹⁸ *SA Revenue Service v Commission for Conciliation, Mediation and Arbitration and Others* (2016) 37 ILJ 655 (LAC) (SARS). See also *Ntshangase v MEC: Finance KwaZulu-Natal and Another* [2010] 2 All SA 150 (SCA) (*Ntshangase*).

¹⁹ *Ntshangase* at para 18.

account for all the relevant facts put before the presiding officer. Where such an act or decision fails to take account of all the relevant facts put before the presiding officer. Where such an act or decision fails to take account of all relevant facts and is manifestly unfair to the employer, he/she is entitled to take such decision on review. Moreover, the second respondent has a duty to ensure an accountable public administration in accordance with sections 195 and 197 of the Constitution. ...'

[59] Having considered the evidence presented during the internal enquiry, coupled with the Chairperson's 'verdict' and sanction, it is clear that the Chairperson failed to appreciate (notwithstanding making reference thereto) that the nature of the first respondent's position requires honesty and integrity. In *G4S Secure Solutions (SA) (Pty) Ltd v Ruggiero N.O. & others*²⁰, it was held that an:

'employment relationship by its nature obliges an employee to act honestly, in good faith and to protect the interests of the employer. The high premium placed on honesty in the workplace has led our courts repeatedly to find that the presence of dishonesty makes the restoration of trust, which is at the core of the employment relationship, unlikely. Dismissal for dishonest conduct has been found to be fair where continued employment is intolerable and dismissal is "a sensible operational response to risk management".'

[60] The Chairperson's decision is therefore irrational and unreasonable in light of his own findings that the first respondent was found guilty of extremely serious charges relating *inter alia* to dishonesty, gross negligence and dereliction of duty. Furthermore, it is clear from the Chairperson's 'verdict' and sanction that he questions the first respondent's conduct, which conduct required an extensive explanation, which the first respondent failed to provide. Despite this, however, the Chairperson does not determine that the first respondent's conduct justifies a summary dismissal.

[61] The Chairperson's decision in respect of the sanction is therefore irrational and unreasonable in light of his own findings. In recognition of the seriousness of

²⁰ (2017) 38 ILJ 881 (LAC) at para 26.

such misconduct on the employment relationship, there is a plethora of judgments that have repeatedly ruled that serious misconduct self-evidently leads to the breakdown of the trust relationship.²¹

[62] In *Humphries & Jewell (Pty) Ltd v Federal Council of Retail and Allied Workers Union and Others*²², the LAC held that the employment relationship is one of trust, mutual confidence and respect and that this is the very essence of a master-servant relationship. In the absence of facts that this relationship was not detrimentally affected by the first respondent, it would be irrational to compel the applicant to continue with the employment relationship.

[63] The Chairperson found the first respondent guilty of four of the five charges. These charges, coupled with the first respondent's senior position, warranted no lesser sanction than a dismissal. The LAC in the matter of *De Beers Consolidated Mines v CCMA*²³ held in respect of a dismissal:

'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 a particular enterprise. That is why supermarket shelf packers who steal small items are routinely dismissed. Their dismissal has little to do with society's moral opprobrium of a minor theft; it has everything to do with the operational requirements of the employer's enterprise.'

[64] Given the seriousness of the first respondent's misconduct, it can only be implied, given the gravity thereof, that the trust relationship had broken down and that dismissal was therefore the only appropriate sanction. The Chairperson's sanction is therefore irrational and not one that a reasonable decision maker could have made. Accordingly, the applicant's section 158(1)(h) review application succeeds.

Section 145 review application

²¹ *Impala Platinum Ltd v Jansen & others* [2017] 4 BLLR 325 (LAC).

²² (1991) 12 ILJ 1032 (LAC).

²³ [2000] 9 BLLR 995 (LAC) at para 22.

[65] As stated above, were the section 158(1)(h) review application to succeed, it would not be possible to give effect to the Commissioner's award.

[66] The applicant has *inter alia* submitted in respect of its grounds of review that the Commissioner ought to have considered the seriousness of the charges during the internal disciplinary enquiry.

[67] Upon consideration of the evidence presented to the Commissioner, the severity of the charges was clearly highlighted. The Commissioner, when considering the remedies available, ought to have considered section 193(1) of the LRA, which provides an arbitrator with remedies that may be granted to an unfairly dismissed employee.

[68] Section 193(2) further dictates when an arbitrator must grant reinstatement or re-employment, or when it cannot. Accordingly, the correct approach to be adopted by an arbitrator under these circumstances is for the arbitrator to consider the provisions of section 193(1) and section 193(2) of the LRA in order to determine the appropriate remedy.²⁴

[69] Given the seriousness of these charges, the question that the Commissioner ought to have considered was whether reinstatement under the circumstances was appropriate. This, the Commissioner failed to do, and simply determined that the applicant had failed to discharge its onus in proving the procedural and substantive fairness of the dismissal and awarded the first respondent reinstatement with backpay.²⁵

[70] By ordering reinstatement, the Commissioner acted unreasonably and clearly ignored the extensive evidence led by the applicant in respect of the internal enquiry. This notwithstanding the fact that the Commissioner criticises the applicant for its reliance solely on the evidence presented in respect of the internal disciplinary enquiry and its failure to lead any evidence in respect of the subsequent dismissal

²⁴ See: *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration* 2009 (1) SA 390 CC (*Equity Aviation*) at para 42; and *Toyota SA Motors (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration* (2016) 37 ILJ 313 (CC) (*Toyota*) at para 133.

²⁵ SARS *supra*.

relating to insubordination. The reinstatement of the first respondent is therefore unreasonable and must be reviewed and set aside.

Compensation

[71] In considering compensation, Zondo JP (as he then was) in the matter of *Kemp t/a Centralmed v Rawlins*²⁶ outlined the applicable factors to be considered:

‘There are many factors that are relevant to the question whether the court should or should not order the employer to pay compensation. It would be both impractical as well as undesirable to attempt an exhaustive list of such factors. However, some of the relevant factors may be given. They are:

...

(b) Whether the unfairness of the dismissal is on substantive or procedural grounds or both substantive and procedural grounds; obviously it counts more in favour of awarding compensation as against not awarding compensation at all that the dismissal is both substantively and procedurally unfair than is the case if it is only substantively unfair, or, even less, if it is only procedurally unfair.

(c) Insofar as the dismissal is procedurally unfair, the nature and extent of the deviation from the procedural requirements; the less the employer’s deviation from what was procedurally required, the greater the chances are that the court or arbitrator may justifiably refuse to award compensation; obviously, the more serious the employer’s deviation from what was procedurally required, the stronger the case is for the awarding of compensation.

(d) Insofar as the reason for dismissal is misconduct, whether or not the employee was guilty or innocent of the misconduct; if he was guilty, whether such misconduct was in the circumstances of the case not sufficient to constitute a fair reason for the dismissal.

(e) The consequences to the parties if compensation is awarded and the consequences to the parties if compensation is not awarded.

²⁶ (2009) 30 ILJ 2677 (LAC) (*Kemp*) at para 20.

(f) The need for the courts, generally speaking, to provide a remedy where a wrong has been committed against a party to litigation but also the need to acknowledge that there are cases where no remedy should be provided despite a wrong having been committed even though these should not be frequent.

(g) Insofar as the employee may have done something wrong which gave rise to his dismissal but which has been found not to have been sufficient to warrant dismissal, the impact of such conduct of the employee upon the employer or its operations or business.

(h) Any conduct by either party that promotes or undermines any of the objects of the Act, for example, effective resolution of disputes.'

[72] Generally speaking, an unfair dismissal ought to earn an employee compensation where reinstatement is not feasible by reason of the intolerability of the continued working relationship.²⁷

[73] In considering the applicant's total disregard for the first respondent's rights prior to her dismissal, compensation under the circumstances would be justifiable. In calculating the amount to be awarded, this Court must also consider the nature of the first respondent's gross misconduct; the remedy for an unfair dismissal must therefore be just and equitable.

[74] In considering the seriousness of the charges, coupled with the financial loss suffered by the applicant, compensation in the amount of three months would be just and equitable.

Costs

²⁷ See for example *Lakomski v TTS Tool Technic Systems (Pty) Ltd* (2007) 28 ILJ 2775 (LC) at para 44 where that Court granted compensation where dismissal was procedurally and substantively unfair despite the fact that the employee found employment with a higher salary shortly afterwards. However, see *Kemp* id where compensation was refused even though the dismissal was substantively and procedurally unfair.

[75] This Court has a wide discretion in awarding costs. I am of the view that this is a matter where the interests of justice will be best served by making no order as to costs.

[76] In the premises, I make the following order:

Order

1. The section 158(1)(h) review application is upheld;
2. The Chairperson's sanction is reviewed and set aside, and is substituted by the following order:
 - 2.1 the first respondent is hereby dismissed with immediate effect.
3. The arbitration award issued by the second respondent under case number MPD052313 in respect of the first respondent's reinstatement and backpay in the amount of R159 006.00 is set aside in its entirety, and is replaced with an award in the following terms:
 - 3.1 The first respondent's dismissal is procedurally and substantively unfair.
 - 3.2 The first respondent is awarded three months in the amount of R79 503.00.
4. There is no order as to costs.

H Schensema

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant:	Advocate S Dlali
Instructed by:	Leepile Attorneys Inc
For the First Respondent:	Advocate P Serogole
Instructed by:	Mashifane Moswane Attorneys