



**THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

Not Reportable  
Case No. JR694/22

In the matter between:

**DEPARTMENT OF SCIENCE AND INNOVATION**

**Applicant**

and

**GENERAL PUBLIC SERVICE SECTORAL  
BARGAINING COUNCIL**

**First Respondent**

**MOLEKO, E N.O.**

**Second Respondent**

**NOMBUYISELO MOKOENA**

**Third Respondent**

**Heard: 15 August 2025**

**Delivered: 3 September 2025**

**This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date of hand-down is 3 September 2025.**

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**JUDGMENT**

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**MAKHURA, J**

## Introduction

- [1] When the Department of Science and Innovation's (Department's) pursuit to rid itself of an alleged grossly negligent, incompatible, and "*sneaky, dishonest and deceptive*" third respondent employee failed before the second respondent, an arbitrator presiding over the inquiry in terms of section 188A of the Labour Relations Act<sup>1</sup> (LRA), it approached this Court in terms of section 145 of the LRA to review and set aside the arbitration award issued by the arbitrator.
- [2] The Department contends that the arbitrator's decision is unreasonable and falls to be set aside. The employee opposes the application on the basis that the award meets the reasonableness threshold.
- [3] The Department also applied for condonation of the late delivery of the review application. This application is not opposed, and I have, in the interest of justice, decided to grant it.

## Material facts

- [4] The employee is the Deputy Director-General: Corporate Services in the Department. She was employed from 1 August 2011. In or about August 2019, the employee was charged with (gross) dereliction of duty or (gross) negligence and incompatibility and called to attend a section 188A inquiry by an arbitrator. At the time of the charge sheet and the inquiry, the employee reported to the Director-General, Dr Philemon Mjwara (Dr Mjwara).

## *The charges*

- [5] The first charge against the employee was gross dereliction of duty and gross negligence, alternatively, dereliction of duty or negligence. This charge is related to the appointment of Open Water Advanced Risk Solutions (Pty) Ltd (Open Water) as a service provider to perform a forensic audit. The charge contained five (5) specific and discrete allegations of misconduct. These allegations are:

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<sup>1</sup> Act 66 of 1995, as amended.

- 5.1. The employee failed to ensure and maintain compliance with the Preferential Procurement Policy Framework Act<sup>2</sup> (PPPFA) and the Department's Supply Chain Management (SCM) Guidelines during the evaluation of the bid. The Department specifically alleged that the employee failed to apply and comply with the mandatory requirement *"prior to the evaluation stage"*.
- 5.2. The second allegation are that the employee was grossly negligent alternatively negligent in the evaluation of the bid concerning her scoring on *trade references* which resulted in Nexus Forensic Services (Pty) Ltd (Nexus) and Integrated Forensic Accounting Services (Pty) Ltd (Integrated Forensics) respectively being disqualified from further evaluation for price and Broad-Based Black Economic Empowerment (BBBEE) even though these two bidders met the requirements. The third allegation is that she allocated maximum scores for *"proven experience of selected Chief Investigator"* to Open Water and Integrated Forensics, respectively, even though the two service providers failed to identify the names of their Chief Investigators.
- 5.3. The fourth allegation is that the employee failed to carefully consider the recommendation letter to the Director-General, Dr Mjwara, for the appointment of Open Water, and that had she done so, she would have identified the material or gross errors and/or omissions in the consolidated or averaged score sheet, the evaluation of the mandatory requirements, and the scoring on functionality.
- 5.4. Finally, it was alleged that the employee *"endorsed the fatally flawed procurement process"*, which she should not have done.

[6] The second charge is incompatibility. The Department alleged that the employee was *"incompatible with [her] line manager"* and that this rendered her continued employment impossible. In support of this charge, the Department listed the

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<sup>2</sup> Act 5 of 2000.

grievance lodged by the employee against Dr Mjwara, which the Department stated was baseless, unfounded, sneaky, deceptive, and dishonest. The Department alleged that after the Public Service Commission (PSC) investigated her grievance and made its findings and recommendations which included that she should attend coaching, the employee *rejected* the findings and recommendations, *failed to attend the coaching as recommended by the PSC report*, made unfounded accusations of victimisation and interference in corporate services, and that this was an abuse of the grievance procedure. Finally, the Department claimed that over the period 2015 to 2019, the employee refused to recognise and submit to the authority of Dr Mjwara, citing examples of incidents that occurred in December 2015 and May 2018 where the employee failed to report or submit her responses to Dr Mjwara on the specified deadlines.

*The documentary and oral evidence*

- [7] The genesis of charge 1 is the award of a bid for Fraud Forensic Audit on Stationery, Maintenance and Building Repairs, as well as Petrol Cards to Open Water in December 2014. It was a common cause fact between the parties that the bid was below R500 000.00 and therefore did not require the Department to go through a public tender. The Department, though referred to what is normally referred to as a request for quotation, as the terms of reference ordinarily associated with bids over R500 000.00, where it would have been required to go through a public tender, sourced and received quotations from three companies, namely, Open Water, Nexus and Integrated Forensics.
- [8] The evaluation process comprised the following stages: first, mandatory requirements, which required certain compulsory documents to be part of the proposal; second, functionality, which required relevant documents and information on the technical requirements of the bid. On functionality, the potential service providers were informed that the Bid Evaluation Committee (BEC) would evaluate and score their proposals and that these members of the

BEC would “*individually evaluate*” the responses against the specified criteria. The third evaluation process involved the price and BBEE.

- [9] The undisputed evidence was that the employee’s only involvement in this bid or quotation was during the functionality stage. She, together with another employee, Mr Matile Malimabe (Malimabe), was a member of the BEC. The employee evaluated and scored the three service providers, and Malimabe had also done the same. It was further undisputed that after the individual scores submitted by the employee and Malimabe were received by Joseph Sindane (Sindane), in his capacity as the Acting Director: SCM and the custodian of the process, Sindane averaged the scores. Based on Sindane’s averaged scores, Open Water qualified for the third and final stage of the evaluation process, whilst Nexus and Integrated Forensics were disqualified for failure to meet the 60% threshold. It is common cause that Sindane’s average calculations were incorrect, and that had he correctly calculated the averages, both Nexus and Integrated Forensics would have qualified for the third and final stage of the evaluation process.
- [10] Sindane, in his capacity as the Acting Director of SCM, prepared a memorandum for Dr Jwara’s signature. The memorandum explained the process undertaken by SCM, attached the relevant documents and requested Dr Jwara to approve the appointment of Open Water.
- [11] Sindane and the employee drove to Kloofzicht Lodge on 20 November 2014, where Sindane met Dr Jwara to present a memorandum to him. The undisputed evidence was that Sindane explained the content of the memorandum to Dr Jwara, who approved it by attaching his signature. Subsequently, the employee addressed a letter of appointment to Open Water. In the letter, the employee wrote that:

‘After careful review and evaluations of all submissions, we are pleased to accept your proposal.’

- [12] It was this transaction that was subsequently investigated by Adams & Adams, and an investigation report was compiled. At the inquiry, the Department relied on the evidence of Professor Johannes Daniel Van Romburgh (Prof Van Romburgh). Prof Van Romburgh was the lead investigator into the allegation of the irregular appointment of Open Water and had interviewed various officials, including Dr Jwara. He testified that Dr Jwara gave “*inconclusive responses*” or that there were “*no facts coming from him*” to the questions relating to the events that led him to sign the 20 November 2014 approval of the memorandum to appoint Open Water.
- [13] The cross-examination of Prof Von Romburgh exposed the poor manner in which the investigation was conducted. Prof Von Romburgh’s responses were characterised by phrases such as that he should have included in his report that Dr Jwara could not recall certain events, that he could have phrased certain parts of the report differently, that he could have asked certain relevant questions and that he asked certain questions vaguely. Prof Von Romburgh also conceded that he made conclusions based on assumptions, speculations, and impressions.
- [14] In response to the recommendation made in the report that the employee be subjected to an internal disciplinary hearing, Prof Von Romburgh said that he did not make the recommendation. He said that his role was to investigate and present factual findings, after which the legal department would include the recommendations in the report based on his findings.
- [15] Prof Von Romburgh testified that he did not recommend that the employee be disciplined. He testified that he ended his report at this point:
- ‘Based on the evidence at hand, we cannot conclusively state that either Ms Mokoena or Mr Malimabe orchestrated the appointment of Open Water.’
- [16] Further, Prof Von Romburgh distanced himself from the following conclusion contained in the report:

'In her capacity as DDG: Corporate Services and Acting CFO, she was required to ensure and maintain compliance with inter *alia* the PPPFA and SCM Guidelines. Given her capacity and intimate involvement in the process (including her participation in the functionality evaluation during which she scored all three bidders above 60% threshold and appeared to have insight into Mr Malimabe's scoring), she ought to have considered the recommendation letter to the DG (as prepared by Mr Sindane) carefully, she should have recognised the gross errors in the consolidated score sheet and the mandatory requirement results; and she should not have endorsed the fatally flawed procurement process. In the circumstances we believe that Ms Mokoena failed to perform her duties with the necessary skill and reasonable care.'

- [17] In response to the proposition that the above finding was unfair to the employee, Prof Von Romburgh said that it was "*a bit harsh*" and that he could not disagree with the proposition that the conclusion is unfair.
- [18] Dr Jwara's evidence on charge 1 was of no assistance. The arbitrator found him to be an evasive witness who could not remember anything related to the appointment of Open Water. Dr Jwara's evidence was dominated by the *would-haves*, a lack of immediate recollection of the facts, expression of his opinions, vague remembrance of the issue, and memory failure as the case related to a matter that happened a long time ago, citing his old age as a contributing factor to his amnesia.
- [19] Dr Jwara led evidence in support of charge 2. The incompatibility alleged in this case is confined to the relationship between the employee and Dr Jwara. This incompatibility was allegedly brought about by the employee's alleged *failure to obey lawful and reasonable instructions*, her decision to lodge a grievance, and doing so without informing Dr Jwara, as he expected her to approach him and state that she was going to lodge a grievance with the Minister. Further, Dr Jwara claimed that the grievance was lodged in a sneaky, dishonest, and deceptive manner, and that after the PSC had investigated the grievance and made its recommendations, the employee rejected these recommendations.

- [20] In response to the question why the Department only charged the employee after June 2019 for incidents that occurred more than a year prior in May 2018, Dr Jwara said that he was giving the employee a grace period, hoping that she would eventually respond to his letter. Further, Dr Jwara testified that after he received the report from Adams & Adams, it occurred to him that although the report was unrelated to these allegations, he decided to charge the employee based on her consistent behaviour.
- [21] Having considered the evidence, the arbitrator found the employee not guilty of the charges.

#### The review grounds

- [22] The Department complained that the arbitrator ought to have found the employee guilty of charge 1. It contends that for the arbitrator to accept that the employee played a limited role of evaluating and scoring when she was the Head of SCM and Finance at the time is a *“travesty because of the simple improbability of the explanation”* she provided. The employee, so the Department continues to contend, was unable to provide any support for her claim that, as a BEC member, her involvement in the procurement process ended with the scoring.
- [23] Whilst the Department accepts that Prof Von Romburgh was not a satisfactory witness, it, however, criticised the arbitrator for her finding that Prof Von Romburgh disowned the report. It contends that the arbitrator misconstrued the evidence. The Department argues that whether or not a person who added those findings which were not those of Prof Von Romburgh is irrelevant because their evidence would have, in any event, constituted opinion evidence. For these reasons, it is contended that the arbitrator committed a material error of law and irregularity.
- [24] The Department contends that it was *“problematic”* for the arbitrator to accept the argument about the segregation of powers, that is, that the employee only took part in the evaluation and could not be involved in the bid in any other role. It



criticises the employee for driving Sindane to Kloofzicht Lodge and for her alleged lack of curiosity about what was contained in the envelope or folder that Sindane was delivering to Dr Jwara. The department contends that the employee and Sindane gave inconsistent evidence about their trip to Kloofzicht Lodge. These inconsistencies are, however, not articulated, other than stating that the arbitrator brushed them aside and did not address the alleged improbable version of the employee that she would drive Sindane to Kloofzicht Lodge without knowing the purpose of the trip.

[25] For rejecting Prof Von Romburgh's evidence that he interviewed Dr Jwara due to his failure to refer to the interview in the report, the Department contends that the arbitrator ignored material and relevant evidence, failed to properly assess the evidence before her, and demonstrated bias in favour of the employee. The Department argues that the commissioner's decision is unjustified and unsustainable.

[26] On the charge of incompatibility, Dr Jwara, who deposed to the founding affidavit, contends that:

'the evidence established that the employee is incompatible with me, that she is the cause of the incompatibility, that she was given the opportunity to remedy the incompatibility and that she simply failed to do so.'

[27] The Department criticises the arbitrator's finding that it failed to call other employees to testify as irrational because its case of incompatibility was confined to the relationship between the employee and Dr Jwara. Therefore, the Department argues that the arbitrator failed to appreciate the nature of the issues and evidence presented before her.

[28] The Department contends that the finding that it was punishing the employee is unreasonable and unsubstantiated. It argues that the PSC made the finding that the relationship between the employee and Dr Jwara was "*harmed*" and that the employee was the cause of the alleged disharmony. Further, after the PSC

recommendations, the employee *did nothing for months before she could attend the recommended coaching*, and even after attending the coaching, the relationship remained the same.

## Analysis

### *The review test*

[29] The review test is trite. This Court must determine whether the decision reached by the commissioner is one that a reasonable decision-maker could not reach<sup>3</sup>. It is a test that is outcome-focused and seeks to ensure that awards are not interfered with based on minor irregularities and/or errors. In *Duncanmec (Pty) Ltd v Gaylard NO & others*<sup>4</sup>, the Constitutional Court reminded us that:

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

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

[30] For the review application to succeed, the applicant must demonstrate that on a fair reading of the award and considering the evidence adduced during the

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

<sup>4</sup> (2018) 39 ILJ 2633 (CC); [2018] 12 BLLR 1137 (CC) at paras 42 - 43.

proceedings, the decision reached by the arbitrator is untenable and so egregious that no reasonable decision-maker could reach such a conclusion.<sup>5</sup>

*Charge 1: Dereliction of duties and negligence in the award of tender to Open Water*

- [31] The arbitrator had to determine whether there was a dereliction of duty and/or negligence. If so, the next enquiry would be to determine whether this misconduct was gross. The arbitrator found no dereliction of duty nor negligence.
- [32] The Department has dedicated its 35-page founding affidavit to rehashing the evidence and leading new evidence, and conflating these review proceedings with appeal proceedings. The Department now questions some of the undisputed evidence, which was not disputed or questioned during the inquiry. In its founding and replying affidavits and heads of argument, the Department deviates from the issues and evidence that were before the arbitrator. The Department, through its replying affidavit filed by the State Attorney on record, Ms Jeanne Louise De Lange, sought to argue that the employee's alleged misconduct must be considered in terms of her role and responsibilities as a member of the BEC.
- [33] Therefore, the Department's theme in its replying affidavit and supplementary heads was the employee's role as a member of the BEC and the duties of BEC members. This, despite the Department failing to present the SCM Policy before the arbitrator and no evidence being led before the inquiry into the roles and responsibilities of the employee as a member of the *BEC*. The parties accepted that the BEC was not necessary. In any event, it was agreed that the SCM division, in this regard, Sindane, in his capacity as the Head of SCM, was the custodian of the process. The Department cannot now stray from the case it presented before the arbitrator and introduce new evidence in review

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<sup>5</sup> See: *Makuleni v Standard Bank of South Africa Ltd and Others* [2023] ZALAC 4; (2023) 44 ILJ 1005 (LAC) at paras 4 and 13.

proceedings by way of a founding affidavit and a new case in its replying affidavit. The Department sought to dismiss the employee based on the allegations contained in the charge sheet. It presented evidence or failed to present evidence to substantiate the allegations. It is too late to change or adapt its case.

[34] This Court refuses the temptation to determine this review application as an appeal. It also refuses to be drawn into dealing with this matter, as now adapted and modified by the Department. The application must be determined based on the charges against the employee and the evidence led at the inquiry.

[35] The employee allegedly failed to ensure and maintain compliance with the PPPFA and the SCM Guidelines during the evaluation of the bid. It was specifically alleged that she failed to apply and comply with the mandatory requirement “*prior to the evaluation stage*”. The arbitrator found that the Department did not lead evidence to show which provision of the PPPFA was contravened or not complied with. Regardless, she found that the PPPFA does not prescribe how an evaluation for a mandatory requirement must be conducted. The arbitrator found that no evidence was presented to show which provision of the SCM Guidelines was not complied with. Significantly, the arbitrator found that the employee was not involved in this evaluation process. The undisputed fact is that Sindane evaluated the service providers for mandatory requirements. The allegation was therefore dismissed.

[36] The second and third allegations concerned the employee’s scoring on *trade references* which resulted in Nexus and Integrated Forensics being disqualified from further evaluation for price and BBEE even though they met the requirements, and that she allocated maximum scores for “*proven experience of selected Chief Investigator*” to Open Water and Integrated Forensics when these two service providers failed to identify the names of their Chief Investigator.

[37] It was common cause that the role of the employee was limited to the evaluation and/or scoring of functionality. Together with Malimabe, they formed the *BEC*.

The constitution of the BEC was not necessary, but these two employees were referred to as the BEC. Their role, as the terms of reference also suggest, was to individually evaluate the responses from the service providers. It is common cause that the employee and Malimabe performed their duties and submitted their scores to Sindane. All the service providers, based on the employees' and Malimabe's scores, scored more than 60% and therefore qualified for the next stage of evaluation – price and BBEE.

[38] However, Sindane averaged the scores incorrectly, which resulted in the disqualification of Nexus and Integrated Forensics. This was also a common cause fact. The arbitrator found that had it not been Sindane's error, all the service providers would have qualified for the next stage. The arbitrator rejected the Department's allegation that the Open Water and Integrated Forensics did not identify their Chief Investigators as unsubstantiated. The record shows that both service providers had identified the Chief Investigators in their bid documents.

[39] The fourth allegation is that the employee failed to carefully consider the recommendation letter to Dr Jwara for the appointment of Open Water. The Department alleged that had she done so, she would have identified the material or gross errors and/or omissions in the consolidated or averaged score sheet, the evaluation of the mandatory requirements, and the scoring on functionality.

[40] The evidence on this allegation during cross-examination went like this:

ADV MATEBESE: You say Ms Mokoena and Mr Sindane supported the recommendation and jointly presented it to the DG. How did you arrive at that if you never asked her? How did you arrive at that?

PROF VON ROMBURGH: No, that is an assumption.

ADV MATEBESE: It is an assumption?

PROF VON ROMBURGH: Yes.

ADV MATEBESE: And you would agree with me that as an investigation you don't assume, you collect facts?

PROF VON ROMBURGH: Correct.

ADV MATEBESE: So you were wrong in acting as you did there?

PROF VON ROMBURGH: Yes.'

- [41] The undisputed evidence was that after he had averaged the scores and ultimately decided to recommend Open Water for appointment, Sindane prepared a memorandum for Dr Jwara's signature. The employee played no other role. The employee accompanied Sindane to Kloofzicht Lodge on 20 November 2014, where Sindane handed the memorandum as well as the relevant annexures to Dr Jwara. Dr Jwara signed the memorandum.
- [42] The arbitrator observed that the Department did not allege that the employee was negligent because she did not demand access to the memorandum that recommended Open Water for appointment. The arbitrator found that no evidence was presented to show that the memorandum or letter was shared with the employee or that the employee had access to it. Accordingly, she dismissed the allegation.
- [43] The final allegation is that the employee "*endorsed the fatally flawed procurement process*", which she should not have done. The evidence presented before the arbitrator shows that after Dr Jwara signed the memorandum approving the appointment of Open Water, the employee's role was to write a letter to inform Open Water of the decision. The arbitrator found that the evidence presented contradicted the allegation. She rejected the allegation that the employee endorsed the fatally flawed process.
- [44] The Department has failed to make out a case on review insofar as charge 1 is concerned. The review grounds are rejected.

*Charge 2: Incompatibility*

[45] In *Jabari v Telkom SA (Pty) Ltd*<sup>6</sup> (*Jabari*), Mokgoathleng AJ, as he was then, summarised incompatibility as a species of incapacity which relates to the subjective relationship of an employee and other co-workers, within the employment environment, regarding the employee's inability or failure to maintain cordial and harmonious relationships with his peers. Noting the employer's prerogative to set reasonable standards for harmonious interpersonal relationships, the Court pointed out that where the employer is of the view that the conduct of the employee creates disharmony, it must advise the employee of the alleged disharmony, enquire whether the fault for the disharmony is attributable to the employee, if so, to implement remedial action to address the incompatibility. The onus is on the employer to prove that the employee is responsible for the disharmony. It must present independent corroborative evidence to substantiate the allegation that the employee was primarily the cause of the disharmony and that the incompatibility constitutes a fair reason for the employee's dismissal, or that dismissal is the last resort.

[46] Following *Jabari*, Molahlehi J (as he then was) in *Mgijima v Member of the Executive Council Gauteng Department of Education and Others*<sup>7</sup> (*Mgijima*) said that some of the factors that may cause incompatibility may relate to "*personality conflicts, management style, inability to integrate into culture and the environment of the workplace and simple lack of confidence in the ability or willingness of the manager to do the job in the way the owner or senior colleagues desire*".<sup>8</sup>

[47] In *Zeda Car Leasing (Pty) Ltd t/a Avis Fleet v Van Dyk*<sup>9</sup> (*Van Dyk*), the LAC commented as follows regarding incompatibility and how employers should address the issue:

'Incompatibility involves the inability on the part of an employee to work in harmony either within the corporate culture of the business or with fellow

<sup>6</sup> (2006) 27 ILJ 1854 (LC); [2006] 10 BLLR 924 (LC) at 1868.

<sup>7</sup> [2014] ZALCJHB 414.

<sup>8</sup> Ibid at para 70.

<sup>9</sup> (2020) 41 ILJ 1360 (LAC); [2020] 6 BLLR 549 (LAC) at para 39.

employees. There has been some difference of opinion in the past about whether incompatibility is an operational requirements or an incapacity issue. The prevailing view is that incompatibility is a species of incapacity because it impacts on work performance. If an employee is unable to maintain an appropriate standard of relationship with his or her peers, subordinates and superiors, as reasonably required by the employer, such failure or inability may constitute a substantively fair reason for dismissal.'

[48] On procedure, the LAC in *Van Dyk* held that:

'Procedural fairness in incompatibility cases requires the employer to inform the employee of the conduct allegedly causing the disharmony, to identify the relationship affected by it and to propose remedial action to remove the incompatibility. The employee should be given a reasonable opportunity to consider the allegations and proposed action, to reply thereto and if appropriate to remove the cause for disharmony. The employer must then establish whether the employee is responsible for or has contributed substantially to irresolvable disharmony to the extent that the relationship of trust and confidence can no longer be maintained.'<sup>10</sup>

[49] To sustain a claim of incompatibility, the employer must establish that the employee was primarily the cause of the disharmony, that the disharmony is serious and has a significant impact on the operations of the employer, that the assistance, which in my view must be reasonable in the circumstances considering the nature of the conduct that caused the disharmony, was provided to the employee but did not yield the desired result, that alternatives other than dismissal were explored and that dismissal was the last resort.<sup>11</sup>

[50] The allegation of incompatibility was based on what Dr Jwara initially believed were two grievances lodged by the employee against him in a "*sneaky, dishonest and deceptive manner*", when in fact, there was only one grievance. Second, Dr

<sup>10</sup> Ibid.

<sup>11</sup> See *Jabari, Mgijima & Van Dyk*; see also *Edcon Limited v Padayachee and Others* [2018] ZALCJHB 307 where Moshoana J said that the employer "*must make some sensible, practical and genuine efforts to effect an improvement in interpersonal relations*".



Jwara listed the allegations made by the employee in her grievance that she was subjected to victimisation and interference in corporate services as unfounded and an abuse of the grievance procedure, thereby causing incompatibility. Third, Dr Jwara sought to substantiate the alleged incompatibility on the basis that the employee “*rejected*” the PSC recommendations, when in fact she took the initiative to ensure the implementation of the recommendations and attended the coaching per the recommendation. Fourth, the Department alleged that the employee refused to comply with lawful and reasonable instructions and further that over the period 2015 to 2019, she refused to recognise and submit to the authority of Dr Mjwara, citing examples in December 2015 and May 2018 where the employee failed to report or submit her responses to Dr Mjwara on the specified deadlines.

[51] The arbitrator rejected the claim of incompatibility. She found that procedurally, the Department did not investigate the cause of the alleged incompatibility, nor did it take steps to improve the relationship between the parties. Referring to the case law, the arbitrator found that the Department failed to comply with the prerequisites for incompatibility and dismissed the allegation.

[52] In their supplementary heads of argument, Mr Halgryn SC and Ms Vermaak, on behalf of the Department, submit that:

‘The commissioner misconstrued the nature of this charge, which had a large element of insolence underlying it, which the commissioner completely ignored.

No-one was in a better position to comment on the nature of the working relationship than the Employer’s immediate supervisor, the DG, who told the commissioner that the relationship was shodden and unless the commissioner was able to make a finding that the DG actually lied in this respect and that he had fabricated the entire charge, the DG’s say-so, which was largely not disputed, had to be accepted.’ (Emphasis added)

[53] In addition, they submit that:

'The Employee's conduct, as summarised in Charge 2, which includes pettiness, sneakiness and deceptiveness, furthermore, amounts to insolence.

The Employee's conduct was rude and disrespectful towards not only the DG, but also towards the Minister.'

[54] The submission is a fundamental misconception of the principles of incompatibility and misconduct. As a species of incapacity, incompatibility must not be conflated with misconduct, which involves discrete allegations that could lead to a breakdown of a continued working relationship. It would be absurd for employers to raise discrete acts of misconduct without charging the employee for misconduct under the guise of incompatibility. Where the employee committed what the employer and the line manager consider to be misconduct, in this case, insolence or insubordination, it is the duty of the employer to charge the employee and prove the allegations. Breakdown of a trust relationship as a result of misconduct should never be conflated with incompatibility, which is the inability to maintain an appropriate standard of relationship with not only his or her immediate supervisor, but also peers, subordinates, and other superiors, as reasonably required by the employer.

[55] Whilst it is not inconceivable that the relationship may be incompatible on the evidence and strength of the employee's immediate supervisor alone, evidence of a strained relationship limited to the two individuals in a company or an organisation would ordinarily point to misconduct, not incompatibility. The Department, through its counsel, submitted that the employee "*embarked upon deliberate conduct, which was rude, insolent and disrespectful*". These are alleged acts of misconduct that should have been processed in terms of the disciplinary code.

[56] Mr Halgryn and Ms Vermaak further submit:

'Adjudicators in the sphere of labour disputes are required to defer to managerial prerogative, because it is accepted that the employer knows what's best and, in

this context, it was not for the commissioner to tell the DG how he should have perceived the relationship.

The commissioner inexplicably found that because there was no evidence that the Employee did not get along with other employees, it could therefore not be found that she was incompatible to work with her supervisor. The Employee reported directly to the DG, and the fact that the DG never testified that there is a strained relationship between the Employee and other employees of the Department, is irrelevant.'

- [57] This submission is flawed and conflates unfair dismissal disputes in terms of section 186(1) of the LRA and a section 188A inquiry before the arbitrator. It is flawed firstly because it suggests that commissioners must defer to the employer's decisions, which is an incorrect legal principle. Secondly, in *casu*, the commissioner was not arbitrating an unfair dismissal dispute. He was sitting as the chairperson of the disciplinary hearing on behalf of the Department. Therefore, even if they were correct that adjudicators must defer to the employer's prerogative, the commissioner was not adjudicating a dispute or case where the employer had exercised its prerogative, which he had to defer to. To the extent that they suggest that the arbitrator must not question the employer's evidence, there is no space in our law or humanity for mechanical thinking. There is no merit in the Department's challenge against the arbitrator's finding.

#### Conclusion and costs

- [58] Having considered the award and the grounds upon which the Department seeks to assail it, I am not persuaded that the Department made out a case that the award or any part thereof is unreasonable and liable to be reviewed and set aside. The review application stands to be dismissed.
- [59] The investigation by Adams & Adams was poorly conducted. This much is clear from the evidence in the cross-examination of Prof Van Romburgh, whom even the Department in these proceedings accepted was a poor witness. His evidence could not and did not sustain charge 1. Equally, Dr Jwara was a poor witness

who had no independent recollection of the material part of the case. As a result, his evidence could not sustain charge 2 and was useless insofar as charge 1 is concerned. The award is sound and well-reasoned, with proper analysis of the facts and reasonably substantiated conclusions.

[60] The Department's application was doomed. The employee was forced to oppose this application, funding the opposition from her own pocket, whilst the Department and the officials who authorised these proceedings used the taxpayers' money. The employee should not be impoverished by this misdirected application and is entitled to her costs.

[61] The matter was postponed on two occasions in April and May 2025 to allow the parties to finalise the settlement discussions. In June 2025, Maserumule Attorneys, who represented the Department up to that stage, withdrew as attorneys of record. The Department appointed the State Attorney to act on its behalf. The Department, armed with senior counsel, appeared on 24 June 2025 and requested a postponement because the State Attorney and counsel did not have access to all the records, and they wanted to consider filing a replying affidavit and supplementary heads of argument. The matter was postponed to 15 August 2025.

[62] The Department subsequently filed a 46-page replying affidavit excluding annexures. It also filed supplementary heads of argument containing 30 pages, prompting the employee to file 14 pages of her supplementary heads. The Department's replying affidavit and the supplementary heads raised new issues or sought to adapt the Department's original case.

[63] Although the employee did not object to these belated filing of the reply and supplementary heads, this approach of filing these documents, which was obviously brought about by the appointment of new set of attorneys and/or new counsel who consider the already closed pleadings and filed heads of argument to be inadequate, is unacceptable, inconveniences the Court and the other litigant/s and should be frowned upon and rebuked by the Court. The

Department's conduct has elevated the scale of the costs. For the above reasons, the Department must be ordered to pay the costs of the application on a punitive scale, including the costs of two counsels.

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

Order

1. The late delivery of the review application is condoned.
2. The review application is dismissed with costs on an attorney and own client scale, including the costs of two counsel.

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M. Makhura

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr LP Halgryn SC with Ms. HM Vermaak

Instructed by: The State Attorney, Pretoria - Mrs JL de Lange

For the Third Respondent: Mr ZZ Matebese SC with Ms. NN January

Instructed by: Ngeno & Mteto Inc – Mr T Ngeno