THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not reportable

Case no: C656/2023

In the matter between:

PERFORMANCE ARTS CENTRE OF THE FREE STATE Applicant

and

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION First Respondent

VUYO BASHOLO N.O. Second Respondent

NTEBOHENG JULIA MOKGUTLE Third Respondent

Heard: **13 August 2025**

Delivered: **25 November 2025**

JUDGMENT

MacKENZIE, AJ

<u>Introduction</u>

[1] This is a review brought under section 145 of the Labour Relations Act, 1995 (LRA). The Applicant, the Performance Arts Centre of the Free

State, seeks to review and set aside the award of the Second Respondent ("**the Arbitrator**") reinstating the Third Respondent, Ms Mokgutle.

[2] The Third Respondent opposes the review.

[3] Mr Masihlelo appeared for the Applicant. Mr Aarninkhof of Aarninkhof Attorneys appeared for the Third Respondent. The Court is indebted to both for their comprehensive and helpful submissions.

[4] The Applicant failed to file the record timeously within the 60-day time limit imposed under paragraph 11.2.2 of this Court's former Practice Manual.[1] Accordingly, the review is deemed withdrawn. The Applicant seeks condonation and reinstatement, to which I turn first.

Condonation

[5] Paragraphs 11.2.2 and 11.2.3 of the Practice Manual read:

> '*11.2.2 For the purposes of Rule 7A(6), records must be filed within 60 days of the date on which the applicant is advised by the registrar that the record has been received.*
>
> *11.2.3 If the applicant fails to file a record within the prescribed period, the applicant will be deemed to have withdrawn the application, unless the applicant has during that period requested the respondent's consent for an extension of time and consent has been given. If consent is refused, the applicant may, on notice of motion supported by affidavit, apply to the Judge President in chambers for an extension of time. The application must be accompanied by proof of service on all other parties, and answering and replying affidavits may be filed within the time limits prescribed by Rule 7. The Judge President will then allocate the file to a judge for a ruling, to be made in*

[1] On 17 July 2024, this Court's new rules commenced, which, in effect, combine the old Practice Manual with the old rules. Rules 37(15) and (16) of the new rules effectively mirror paragraphs 11.2.2 and 11.2.3 of the Practice Manual.

> *chambers, on any extension of time that the respondent should be afforded to file the record*.' (emphasis added)

[6] Non-compliance requires condonation. It is well established that an applicant for condonation must show good cause by acting *bona fide*, explain the full period of default, demonstrate reasonable prospects of success, and show that granting the order serves the interests of justice. An applicant need not prove the merits in detail but only set out facts which, if established, would justify success. Ultimately, condonation is a discretionary remedy that the court must exercise judiciously.[2]

[7] The review application was launched on 14 December 2023. On 9 January 2024 the Registrar issued a notice in terms of Rule 7A(5). The Applicant was thus required to file the record on or before 5 April 2024. The Applicant neither did so nor did it seek an extension of time as contemplated in paragraph 11.2.3. Accordingly, the review was deemed withdrawn as from 6 April 2024.

[8] On 16 April 2024, the Third Respondent's attorneys reminded the Applicant that the review was deemed withdrawn. Ten days later, on 26 April 2024, the Applicant, in writing, requested an extension from the Third Respondent's attorneys for the late filing of the record. On 30 April 2024, the Applicant served a copy of the record upon them. Inexplicably, the record was only filed with the Registrar two weeks later, on 16 May 2024, some 29 court days after the deadline of 5 April 2024.

[9] There was yet another delay of two weeks before the Applicant served the application for condonation and reinstatement on 30 May 2024, upon the Third Respondent's attorneys. Again, inexplicably, the application was only filed with the Registrar on 14 June 2024.

[10] The Applicant's explanation for the delay is this.

10.1 The Applicant had requested transcription of the record on 12 January 2024. However, as a public entity, transcription services

[2] *Samuels v Old Mutual Bank* (2017) 38 *ILJ* 1790 (LAC) at para 17; *POPCRU obo Nkoko v GPSSBC and Others* [2022] ZALCCT 50 (10 August 2022) at para 15.

had to be procured through the Applicant's supply chain management (SCM) process, and only one quotation was initially received. Accordingly, the appointment of transcribers was delayed until 25 March 2024.

10.2 The recordings were received between 4 and 9 April 2024, and the full transcript was delivered on 12 April 2024. Its volume caused further delays, and pagination was only completed on 30 April 2024.

10.3 The Applicant's counsel then required additional time to read the extensive record, but fell ill between 21 and 26 May 2024.

10.4 An extension to file the Rule 7A(8) notice was accordingly sought and communicated, and the application was filed on that basis.

[11] The Applicant did not put up any evidence as to the scope or content of its SCM policy. The Court is thus left in the dark as to the process that was required to be followed, whether it was followed and, if not, to properly assess the resulting reasons and delay. Be that as it may, I am prepared to accept the Applicant's explanation for the delay between 12 January and 12 April 2024.

[12] However, the Applicant's explanation for the month-long delay between 12 April and 16 May 2024 is far from satisfactory.

12.1 According to the Applicant, the record was paginated between 12 April and 30 April 2024. In this regard, the full record, including transcripts and documents, runs to just over 1 500 pages. A period of two weeks to paginate the record by hand would already, in my view, have been excessive – but the record was paginated electronically. There is therefore no reason why pagination could not have been completed within a single day.

12.2 When it served the record on the Third Respondent's attorneys on 30 April 2024, the Applicant knew that it was already almost a month late. Indeed, the Third Respondent's attorneys had already reminded the Applicant on 16 April 2024 that the record was late. Yet, it did not deliver the record and simultaneously seek condonation and reinstatement of the review application. There is no reason why it could not do so, nor was one given; after all the record was at hand, the Applicant had counsel on brief and the facts giving rise to the delay were known.

12.3 In this regard, the necessity for counsel to have additional time to read the record does not justify any further delay in delivering the application for condonation and reinstatement.

12.4 The Applicant then inexplicably waited another two weeks before it filed the record with the Registrar on 16 May 2024. There is no explanation for that delay.

12.5 Worse still, the Applicant only filed the application for condonation and reinstatement with the Registrar on 16 June 2024 – just over two weeks after it had served a copy upon the Third Respondent's attorneys, on 30 May 2024. There is no explanation for that delay, either.

[13] The delays set out above were all within the Applicant's control. It could and should have acted with the alacrity demanded by review applications.

[14] However, as I turn to deal with, the Applicant's prospects of success are not negligible. Indeed, this is a rare case where an unsatisfactory explanation that would otherwise merit the refusal of condonation, is fortuitously rescued by the prospects of success. Accordingly, condonation is granted and the review application is reinstated.

<u>Undisputed factual background</u>

[15] The Third Respondent commenced her employment with the Applicant on 1 April 2008. She was later appointed as a human resources (HR) Administrative Secretary on 1 April 2011.

[16] On 1 September 2014, she was appointed to act as the personal assistant to the Applicant's chief executive officer (PA-to-CEO). The Third Respondent's acting stint as PA-to-CEO ended in early 2016. However, on

1 June 2016, she was again appointed to act in that role and continued to do so until 2020.

[17] On 25 March 2020, the Applicant's CEO, Mr Peter Pedlar, advised the Third Respondent in writing that her duties as PA-to-CEO were to be terminated, and that her last day in that role would be 30 April 2020. Around this time the PA-to-CEO role was renamed '*CEO Office Co-ordinator'*, and was filled by someone new, Ms Maarman.

[18] The CEO further advised the Third Respondent that, due to the revised organisational structure her original position '*does not exist anymore*' but she was to remain attached to HR and would report to the HR Manager.

[19] On 23 July 2020, the CEO's office furnished the Third Respondent with a hand-over letter requiring her to ensure a complete handover to the newly-appointed CEO coordinator.

[20] During October 2020, the Applicant's HR Manager, Ms Ramiah, wrote to the Third Respondent recording, *inter alia*, that the Third Respondent had allegedly sat at reception all day in full view of staff, and that the Applicant had viewed her conduct as a *de facto* strike, and the Third Respondent was accordingly instructed to report to HR. In her handwritten response, the Third Respondent denied that she had defied the Applicant, and asserted that the Applicant had not allocated her a workspace, tools or even duties. In concluding her written response, the Third Respondent informed the Applicant that she considered its letter as a form of intimidation.

[21] In early 2021, the Third Respondent referred a dispute to the CCMA with the primary issue described as '*unilateral changes to terms and conditions of employment*'.

[22] On 7 May 2021, the acting CEO, Ms Snell, issued a written ultimatum to the Third Respondent to stop her '*illegal strike action*', and report to and perform her duties as Administrative Secretary, and that Mr Sello Sanyane (the Applicant's chief financial officer) would point out her allocated

workspace. The Third Respondent was warned that failure would result in disciplinary action.

[23] On 13 May 2021, the Third Respondent was issued with a key for the HR office that she was to occupy.

[24] On 24 May 2021, Mr Sanyane sent the Third Respondent a revised Administrative Secretary job description for her input and acceptance. On 2 June 2021, the Third Respondent replied that she is unfamiliar with that job description, and that it differed from the one she had.

[25] Meanwhile, on 10 June 2021, the CCMA dismissed the Third Respondent's referral.

[26] On 21 June 2021, Mr Sanyane issued a further letter to the Third Respondent, apparently urging her to desist from non-compliant behaviour, to stop her work stoppage, obey instructions, and sign the job description and performance agreement that he had sent her, failing which disciplinary action would follow.

[27] On 4 August 2021, Mr Sanyane requested the Third Respondent to submit to him the job description that the Third Respondent believed she had. In response, the Third Respondent provided him with her job description as '*PA to CEO*'.

[28] On 18 October 2021, Mr Sanyane pleaded with the Third Respondent to stop insisting that she is the PA-to-CEO, and to perform her Administrative Secretary duties.

[29] On 7 December 2021, Mr Sanyane e-mailed the Third Respondent reminding her to report to him rather than to Mr Karabelo Morake, the Applicant's HR head. Mr Sanyane also queried the Third Respondent's reporting practices. The Third Respondent replied later that day, accusing Mr Sanyane of harassment, victimisation and threatening behaviour.

[30] More than eight months later, on 18 August 2022, the Third Respondent was suspended on full pay '*due to serious allegations of misconduct*' pending investigation and potential disciplinary proceedings.

[31] In a notice dated 14 September 2022, the Third Respondent was informed that she was required to attend a disciplinary hearing to answer the following three charges preferred against her:

31.1 Work stoppage and/or illegal strike and/or gross insubordination;

31.2 Gross insubordination;

31.3 Gross insolence and/or gross insubordination.

[32] The disciplinary hearing was held over several days in September 2022. The Third Respondent had applied for legal representation, which was denied.

[33] On 5 October 2022, the Third Respondent was found guilty on all three charges, and, on 7 October 2022, she was dismissed with immediate effect.

[34] Consequently, the Third Respondent referred a complaint to the CCMA, which culminated in the arbitration before the Arbitrator.

<u>The evidence</u>

[35] Considering the nature of the Applicant's grounds of review, it is necessary to briefly traverse the evidence led at the arbitration. It is also helpful to bear in mind that, given that the Third Respondent's dismissal was common cause, the Applicant bore the onus to prove its fairness.[3]

[36] The Applicant led two witnesses, namely Mr Sanyane and Mr Morake. There were likewise two witnesses for the Third Respondent, namely herself and Ms Mpho Motete, a former finance manager of the Applicant.

[3] Section 192(2) of the LRA.

Mr Sanyane

[37] Mr Sanyane testified that the Third Respondent's substantive post had always been that of Administrative Secretary, as reflected in her original 2011 appointment letter. Although that post had no longer appeared on the 2019 approved organisational structure, he testified that the Third Respondent had thereafter operated on a '*warm bodies structure*'. Under that arrangement, employees whose posts had been removed continued working in their previous roles, had kept their old titles, and had retained their old duties.

[38] He testified that after the Third Respondent's acting stint as PA-to-CEO had ended, she was instructed to return to HR and resume her Administrative Secretary duties. He testified that she had refused to do so and had instead sat at reception for months, even after being repeatedly directed to report to her workstation in HR. He referred to letters and instructions issued from 2020 onwards (including those from the CEO) requiring her to return to HR, but maintained that she had disobeyed them.

[39] He testified further that, because the Third Respondent had acted for years without a formal job description, he had drafted a job description for her position as Administrative Secretary in May 2021 and had presented it to her. He testified that the Third Respondent had refused to accept or sign it, insisting, instead, on duties aligned with her former role as PA-to-CEO – despite that role having been filled by someone else. He characterised her refusal – together with her failure to report to her HR office – as persistent insubordination and a form of work stoppage.

[40] He maintained that the Third Respondent had been given a designated office and tools of trade, and disputed her version that she had nowhere to work. He emphasised that the Third Respondent had refused lawful instructions, failed to report to her workstation, and failed to perform duties allocated to her. He testified that her conduct had persisted over many months and amounted to gross insubordination, thus fitting squarely within the charges brought against her.

Mr Morake

[41] Mr Morake testified that once her acting PA-to-CEO role had ended, the Third Respondent was required to return to her substantive post in HR, as communicated in the CEO's letter of March 2020. He maintained that her own correspondence had acknowledged that instruction and that her explanations about lacking tools or an office amounted to an admission that she was not working during the relevant period.

[42] He said the Applicant's concern – expressed in letters from multiple senior managers – had consistently been that the Third Respondent had not been reporting to HR and not performing her duties.

[43] Mr Morake testified that he had shared an office with the Third Respondent, that a fully equipped workstation had been made available to her, and that the photographs put up by the Applicant depicted her allocated workspace. Accordingly, he denied the Third Respondent's version that she had not been allocated office space. He maintained that she had chosen not to return to HR, and had lingered at reception in contravention of repeated instructions to resume her duties.

[44] He, like Mr Sanyane, characterised the Third Respondent's failure to comply with lawful instructions as deliberate work stoppage and gross insubordination.

Ms Motete

[45] Ms Motete testified that all of the Applicant's employees – including herself and Mr Sanyane – only returned to work on 5 October 2020. She therefore regarded the allegation that the Third Respondent had '*refused to return*' from 1 August 2020 as factually impossible.

[46] She testified that the Third Respondent's June 2021 e-mail querying her job description had been polite and legitimate – and not insubordinate.

[47] Ms Motete testified further, that, in her experience, job descriptions during restructuring had to be consulted on and agreed, and not imposed. She

testified that she had also been dismissed for refusing to sign a job description for which she had not been consulted.

[48] Ms Motete explained that the Applicant's restructuring policy had required engagement with unplaced employees and efforts to allocate alternative roles – and that those processes had not been followed in respect of the Third Respondent.

The Third Respondent

[49] The Third Respondent confirmed that her prior Administrative Secretary post had been abolished during the restructuring, but she testified that she had continued receiving her salary and performing her duties.

[50] She accepted that while other posts had also been abolished, her situation was different in that her colleagues' posts had either been renamed or reassigned: but she had been told to return to a position that no longer existed on the organogram.

[51] She maintained that she had never refused to work, but had, in fact, kept working – often from reception because she had lacked an office or tools, and had, furthermore, acted on the tasks assigned to her. She maintained that she had complied whenever given instructions and that any delays or confusion stemmed from the Applicant's failure to clarify her revised role after abolition of the post.

<u>The disputes of fact on the evidence</u>

[52] It is clear from the aforegoing that several material disputes of fact arose on the evidence. The following are the most significant.

52.1 The Applicant's allegation that the Third Respondent had refused to report to HR from 1 August 2020.

52.2 Whether the Third Respondent had in fact been allocated a workspace.

52.3 Whether the Third Respondent had in fact been working during the period in question.

52.4 Whether the Third Respondent had been allocated an office and tools; and, if so, whether she had in fact shared that office with Mr Morake.

52.5 The status of the Administrative Secretary post. The Third Respondent alleged that her post had been abolished and that no duties were clarified; but Mr Sanyane claimed the post had continued under a '*warm bodies'* structure.

52.6 Whether the Third Respondent had refused to sign her (new) Administrative Secretary job description – the Third Respondent arguing that she had only requested clarity – and whether that refusal could amount to '*work stoppage*'.

52.7 The proper interpretation of the Third Respondent's 29 October 2020 letter. Ms Mokgutle maintained that it showed that she had sought clarity on her role; but the Applicant argued that it constituted an admission that the Third Respondent had not been working.

<u>The award</u>

[53] The Arbitrator handed down his award on 7 November 2023.

[54] In sum, the Arbitrator held that the Applicant had failed to prove the misconduct charges. In this regard, he considered that, as her previous position no longer existed, the Third Respondent could not be compelled to sign something she did not understand, and which would later determine her performance assessment. He found that Mr Sanyane had never met with the Third Respondent to explain the new job description, its purpose, or what would be expected of her.

[55] The Arbitrator accepted that the Third Respondent had known only the PA-to-CEO job description (which she had used for years) and not the newly drafted Administrative Secretary one. However, the Arbitrator reasoned that, although her continued reliance on the PA-to-CEO role had

been misplaced, it had not justified the Third Respondent's dismissal. He reasoned, further, that since the parties had worked in the same building, there was no reason why the Third Respondent's line manager could not simply have called a meeting to resolve the misunderstanding.

[56] The Arbitrator found that, had the Third Respondent's '*line manager called a meeting to discuss the job description as per the policy and such explained in reference to the abolished position of the Applicant, the matter would probably been resolved'* and Ms Mokgutle '*would probably not have been dismissed'*.

[57] Similarly, he found that had the Third Respondent gone to Mr Sanyane's office and '*asked for clarity regarding the job description she had to sign, the matter would probably have been resolved and she probably would not have been dismissed'*.

[58] The Arbitrator concluded that the Applicant had not discharged its onus to prove guilt on the charges. Accordingly, he found that the Third Respondent's dismissal had been substantively unfair. He therefore ordered that the Third Respondent be reinstated, without back pay, with effect from 21 November 2023.

<u>The applicable legal principles</u>

[59] The central question posed in reviews of this kind is whether the decision reached by the Arbitrator is one that a reasonable decision-maker could not reach.[4] Put differently, was the Arbitrator's decision so unreasonable that it cannot be sustained on the evidence as a whole.[5] It is an outcomes-based assessment. It is not competent for a court to review and set aside an award merely because it disagrees with the outcome on the merits. For the court to interfere with it, the award must be '*so egregious … no*

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[4] *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others* (2007) 28 ILJ 2405 (CC) at para 110.

[5] *Ludick Financial Services v Commission for Conciliation, Mediation and Arbitration and Others* [2022] ZALCCT 58 (18 November 2022) at para 21.

reasonable person could reach such a result'.[6] The test is thus one of rationality: a rational decision is one that is logically supported by the evidence.[7]

[60] Section 145 of the LRA governs the review of arbitration awards. Section 145(2)(a)(ii), in particular, specifies that an award is reviewable where it is tainted by a gross irregularity. Gross irregularities may be divided into two categories, namely procedural irregularities and latent irregularities. While the former is fairly self-explanatory, the latter is slightly more vexing.

[61] To begin with, there are three flavours of latent irregularity, namely (i) errors of law, and (ii) errors of logic, and (iii) errors of fact.[8]

61.1 Firstly, an error of law arises where the mistake misdirects the enquiry, causes the arbitrator to ask the wrong question, or otherwise distorts the reasoning process. In that event, the error operates beneath the surface yet taints the outcome, rendering the result one that no reasonable decision-maker could reach.

61.2 Secondly, an error of logic arises when faulty reasoning misdirects the enquiry or breaks the rational connection between the material before the arbitrator and the outcome. It is reviewable only where the lapse in reasoning is so material that it taints the decision-making process and results in an outcome no reasonable arbitrator could reach.

61.3 Thirdly, an error of fact arises where an arbitrator fails to properly identify the material facts and apply the LRA to them. That failure may render the award unreasonable.

[62] However, an error of law, logic and/or fact is not *per se* sufficient to impugn an award on review. It is only where their cumulative effect is to render an award unreasonable.[9]

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[6] *Makuleni v Standard Bank of South Africa Ltd and Others* (2023) 44 ILJ 1005 (LAC) at para 13.

[7] *Carephone (Pty) Ltd v Marcus NO* 1999 (3) SA 304 (LAC) at para 37.

[8] *Head of Department, Department of Education v Mofokeng* (2015) 36 ILJ 2802 (LAC) at para 32.

[63] Reasonableness is assessed objectively on all the evidence. It is enough that the arbitrator failed to consider key facts in a way that could have altered the outcome. This is so since process and substance are intertwined and latent defects can render a result unreasonable. In that sense, irregularity under section 145(2) concerns the method, not the correctness, of the decision. Thus, if the arbitrator's conduct – however *bona fide* – prevents a fair trial of the issues, it is a gross irregularity under s 145(2). The court must therefore scrutinise the arbitrator's reasons, not to reassess the merits, but to detect any latent flaw in the decision-making process.[10]

<u>The parties' submissions</u>

The Applicant's submissions

[64] The Applicant contends that the Arbitrator's award is vitiated by material misdirection and gross irregularity.

[65] Although the issues before the Arbitrator concerned the substantive and procedural fairness of a dismissal for repeated gross insubordination and insolence, the Applicant argues that the Arbitrator failed to engage with the Applicant's version, despite (so it was argued) it having been largely uncontested.

[66] Mr Masihlelo argued that the Applicant's instructions to the Third Respondent to resume work as Administrative Secretary were indeed lawful instructions. the evidence – specifically, that the Third Respondent had received from Mr Sanyane the Administrative Secretary job description and in response had sent him the PA-to-CEO job description as well as the photographs depicting the Third Respondent's workspace – showed a persistent, deliberate refusal by the Third Respondent to perform her Administrative Secretary duties, despite the Applicant's repeated lawful instructions, and that this conduct was corroborated in all material respects by her supervisor and the HR officer.

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[9] *Gold Fields Mining SA (Pty) Ltd v CCMA* 2014 (1) BLLR 20 (LAC) at para 17.

[10] *Herholdt v Nedbank Ltd (Congress of South African Trade Unions as* amicus curiae*)* [2013] 11 BLLR 1074 (SCA) at para 25.

[67] He argued that the Third Respondent offered no rebuttal and had, in fact, confirmed key aspects of the misconduct, including refusing to sign the correct job description and returning the PA-to-CEO job description instead.

[68] Moreover, it was argued that the Arbitrator failed – as he was required to do[11] – to properly evaluate the evidence logically and cumulatively, consider the probabilities and then the credibility and reliability of the witnesses.

[69] As such, Mr Masihlelo submitted that the Arbitrator had ignored material evidence, created speculative findings not grounded in the record – such as suggesting that a meeting or further clarification would have resolved the impasse – and thereby substituted an invented version for the parties' actual evidence. That failure to consider material facts, and the introduction of suppositions contrary to the record, rendered the award unreasonable.

[70] Finally, Mr Masihlelo argued that the Arbitrator had failed altogether to determine the charge of insolence, leaving a material component of the dispute unresolved.

[71] In sum, he argued that the Third Respondent's cumulative misconduct – persistent defiance of instructions, sustained repudiation of authority, and an incident of insolence – constituted gross insubordination warranting dismissal. By finding otherwise, the Arbitrator reached an outcome that no reasonable decision-maker could reach.

The Third Respondent's submissions

[72] Mr Aarninkhof argued that the review was, in substance, one of an appeal disguised as a review. Relying on the decision in *Mofokeng*,[12] he argued that the Court must go beyond identifying flaws in the Arbitrator's reasoning. Even if the Arbitrator relied on irrelevant considerations, ignored material facts, or otherwise failed to apply their mind, the central

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[11] *Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others* 2003 (1) SA 11 (SCA) at para 5.

[12] *Head of Department of Education v Mofokeng & Others* (2015) 36 ILJ 2802 (LAC)

question remains whether – despite those defects – the outcome is one that a reasonable arbitrator could still have reached on the evidence. Irregularities in reasoning or process only justify interference where those irregularities show that the arbitrator undertook the wrong enquiry, conducted the enquiry in the wrong manner, or produced a result that is objectively unreasonable. Only irregularities – whether legal, factual, procedural, latent or patent – of such gravity (individually or cumulatively) as to render the enquiry misconceived or the outcome one no reasonable decision-maker could reach will justify setting the award aside.

<u>Analysis and evaluation</u>

[73] It is clear from his award that the Arbitrator approached the matter by treating the 12 May 2021 job description as the fulcrum of the dispute and proceeding on the premise that the post had been abolished and that a new job description for Administrative Secretary had been created, and he reasoned that the Applicant was therefore obliged to convene a meeting to explain it.

[74] Relying on the evidence of Ms Motete, the Arbitrator held that a job description required mutual discussion and agreement. From that, he inferred that a meeting between the parties '*would probably*' have resolved the issue. He therefore found the dismissal substantively unfair.

[75] However, even on the most indulgent reading of the award, the Arbitrator failed to deal with several of the disputes of fact set out above – all of which bore centrally upon the question whether the Third Respondent's conduct constituted work stoppage, insubordination or insolence. For example, there is no indication in the award that the Arbitrator dealt with any of the following:

75.1 the dispute surrounding the instruction to return to work on 1 August 2020;

75.2 whether the Third Respondent had, as a fact, been given a workspace;

75.3 whether the Third Respondent had, in fact, been working during the period in question;

75.4 whether instructions had actually been given to the Third Respondent and had actually been disregarded or ignored;

75.5 whether the Third Respondent's former Administrative Secretary position had been entirely abolished or whether it lived on in the '*warm bodies'* structure;

75.6 whether the Third Respondent had refused to sign the new job description or had merely sought clarity on it;

75.7 whether the photographs relied on by the Applicant genuinely depicted a workspace allocated to the Third Respondent; and

75.8 whether the Third Respondent's e-mails amounted to insolence or mere requests for clarity.

[76] In my view, the Arbitrator's failure to deal with the above disputes of fact constitutes a material and vitiating error of fact. He did not appraise the material facts, each of which is vital to the outcome of the matter. Those omissions meant that he failed to engage with determinative factual disputes central to the charges, resulting in a conclusion divorced from the evidential material that had to be weighed, and is therefore irrational. His failure likewise constitutes an error of law since it materially misdirected the enquiry towards one aspect and one aspect alone, namely the necessity for the Applicant to consult the Third Respondent regarding her new job description.

[77] What is more, the Arbitrator's finding that, had a meeting been called the matter '*would probably'* have been resolved is impermissibly speculative and unsupported by any evidence on record – and therefore also irrational.

[78] In sum, the Arbitrator failed to deal with material aspects of the evidence, all of which bore squarely upon the outcome, with the result that there was no fair and proper ventilation of the essence of the dispute. In other words, the Arbitrator misconceived the nature of the enquiry resulting in an irrational decision.

[79] Accordingly, in my view, the Arbitrator's finding that dismissal was substantively unfair falls, in the face of the aforegoing, outside the band of reasonableness required by *Sidumo*.

[80] It follows that the award falls to be reviewed and set aside.

Appropriate remedy

[81] Considering that the Arbitrator failed, in essence, to properly resolve the dispute between the parties, the appropriate remedy is to remit the matter for hearing *de novo* before a different arbitrator.

Costs

[82] Costs in this Court are discretionary and do not follow the result as a matter of course.[13] I consider it fair that each party pay its own costs.

Order

[83] In the result, the following order is made:

1. The Applicant's late filing of the review application is condoned, and the review application is reinstated;

2. The Second Respondent's award dated 7 November 2023 under case number FSBF5662-22 is reviewed and set aside;

3. The matter is remitted to the First Respondent for hearing *de novo* before a new arbitrator.

4. Each party shall pay its own costs.

[redacted]

PS MacKenzie

Acting Judge of the Labour Court of South Africa

[13] *Union for Police Security and Corrections Organisation v South African Custodial Management (Pty) Ltd and Others* [2021] 12 BLLR 1173 (CC).

Appearances:

For the Applicant: PT Masihlelo

Instructed by: RC Ishmail Attorneys (Mr R Ishmail)

For the Third Respondent: B Aarninkhof of Aarninkhof Attorneys