IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case No: JR 2882/19

In the matter between:

SOLIDARITY obo FREDERICK JOHANNES DU PLESSIS Applicant

and

COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION First Respondent

TREVOR DENNIS WILKES *N.O.* Second Respondent

ESKOM HOLDINGS SOC LTD Third Respondent

Heard: **6 June 2024**

Delivered: **26 November 2025**

JUDGMENT

KUMALO AJ

Introduction

[1] The applicant, Solidarity, acting on behalf of its member, Mr Johannes du Plessis (employee), approached this Court seeking an order reviewing and setting aside the arbitration award under case number GAJB 4860-19 dated 30 October 2019 issued by the second respondent (Commissioner) acting under the auspices of the first respondent, the Commission for Conciliation, Mediation and Arbitration (CCMA). The Commissioner found that the dismissal of the employee by the third respondent, Eskom Holdings SOC Ltd (Eskom), was substantively and procedurally fair.

[2] Eskom opposed the review on the basis that the award is reasonable and lawful. It asserted that the employee, though not formally appointed, acted as the *de facto* contract manager for Task Order 480 (TO480) and bore accountability by virtue of seniority. Eskom contended that the employee dishonestly influenced the technical evaluation, promoted services beyond the scope, procured additional resources, and negligently certified fraudulent payments, causing substantial financial loss.

[3] It was argued that these acts contravened Eskom policies and the Public Finance Management Act[1] (PFMA), resulting in an irretrievable breakdown of trust. Eskom further maintained that the disciplinary process was procedurally fair, with delays justified by a whistleblower investigation, and that dismissal was warranted given the gravity of the misconduct and lack of contrition.

[4] On 24 January 2022, the Court struck the review application from the roll for want of jurisdiction due to the applicant's failure to comply with Rule 7A(6) and Rule 7A(8) by filing the record and supplementary affidavit late without condonation. On 27 July 2022, the Court reinstated the review application, condoned the non-compliance, and directed the Registrar to re-enrol the matter on the opposed motion roll.

[1] Act 1 of 1999.

Background

[5] The employee was employed by Eskom from 1 January 2007 as the Operating Manager (M18) at Matla Power Station. In February 2015, he requested a demotion and was seconded to the Outage Commissioning Centre as the Outage Commissioning Manager (M16) to assist with outages at multiple power stations. During this secondment, he reported to Senior Manager Joe Koeberg and was tasked with drafting technical specifications for the TO480 contract, a professional services contract intended to address Eskom's shortage of commissioning resources.

[6] The allegations were that the employee prepared technical specifications and participated in evaluating technical proposals alongside two other Eskom employees. He only assessed technical aspects, not financial or commercial elements, and recommended ACBO Services CC as the preferred supplier. The procurement process and contract award were handled by Eskom's Commercial Department. The TO480 contract was valued at R60,041,120 (excluding VAT), scheduled for 15 September 2015 to 31 March 2018, but was terminated early on 31 December 2016 due to budget depletion. The employee signed the task order as the "Requesting Manager," while the official contract manager was listed as Nomvula Dikgale or her assistant, Mduduzi Nene.

[7] Furthermore, a conflict of interest was declared in November 2015 when it emerged that Mr Koeberg Senior (employee's line manager) was the father of the ACBO's director. Ms Carel Cronje replaced Mr Koeberg Senior as Cost Centre Owner in April 2016. After his secondment ended in May 2016, the employee returned to Matla but later secured a CCMA settlement, upgrading him to M16 and placing him permanently in Outage Management by September 2016.

[8] Budget issues arose when the TO480 contract funds were exhausted prematurely. The employee requested additional funds in October 2016 but was denied. On 11 July 2018, he was served with a notice to attend a disciplinary hearing, found guilty on all charges on 29 January 2019, and dismissed on

15 February 2019. He then referred the matter to the CCMA. The impugned arbitration award is a consequence of the arbitration proceedings on that dismissal dispute referred to the CCMA and served before the Commissioner.

The arbitration award

[9] The Commissioner noted that the dispute arose from the TO480 contract, a professional services contract valued at approximately R60 million, awarded to ACBO Services CC for outage-related consulting services between 15 September 2015 and 31 March 2018, but which was terminated prematurely on 31 December 2016 after the funds were depleted. The employee, who was seconded to Eskom's Outage Commissioning Centre in February 2015, was accused of acting as a *de facto* contract manager despite not being formally appointed.

[10] The Commissioner found that although Eskom failed to formally appoint the employee as contract manager, his seniority and active involvement in managing the TO480 contract rendered him accountable under Eskom's policies and his duty of good faith. The Commissioner concluded that the evidence had established that the employee dishonestly influenced the technical evaluation between August and September 2015 by favouring ACBO, permitted services outside the contract scope during 2016, played a role in sourcing additional resources, and negligently certified fraudulent payment assessments, causing significant financial loss.

[11] This was because, first, between August and September 2015, the employee dishonestly influenced the technical evaluation by favouring ACBO, awarding full marks despite their resources lacking the required qualifications, and permitting outsourcing to Dunamis Power, an unapproved supplier. Second, during the contract period, he allowed ACBO resources to be deployed for normal commissioning at Komati Power Station, outside the contract scope, contributing to early budget exhaustion.

[12] Third, he played a material role in sourcing additional resources, including administrative staff, contrary to the agreed scope. Fourth, he negligently certified payment assessments containing fraudulent claims, such as inflated accommodation costs and hours not worked, resulting in irregular expenditure exceeding R341,000. The fifth charge alleged a contravention of the PFMA by approving payments for Foreign Material Exclusion (FME) work outside the scope; however, the Commissioner found FME essential for outage recommissioning and ruled this charge unproven. This was because Foreign Material Exclusion was found to be essential for outage recommissioning and not wasteful expenditure.

[13] The Commissioner held that Eskom failed to follow its own appointment protocols but emphasised the applicant's seniority and duty of good faith. Furthermore, the Commissioner noted that although a delay occurred in initiating discipline, charges were only served on 11 July 2018 following a whistleblower-triggered forensic investigation; the delay was justified and did not render the process unfair.

[14] The hearing was procedurally sound, and the applicant's persistent denial indicated a lack of contrition. The Commissioner found that the delay did not prejudice the applicant's ability to defend himself. The disciplinary hearing was fair, and the applicant, in his defence, persisted in his denials, which Eskom considered. Given the seriousness of the misconduct, the financial impact, and the irretrievable breakdown of trust, dismissal was deemed an appropriate and reasonable sanction, and no relief was granted. Accordingly, the Commissioner concluded that the dismissal was both procedurally and substantively fair.

<u>Grounds of review</u>

[15] The applicant contends that the Commissioner committed misconduct and gross irregularities under section 145(2)(*a*) of the Labour Relations Act[2] (LRA) by failing to consider the uncontested evidence that the employee was never formally

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[2] Act 66 of 1995, as amended.

appointed as the contract manager and lacked authority and requisite training in terms of Eskom policy. The applicant submits that the award is reviewable on grounds of unreasonableness and material misdirection, alleging that the Commissioner misconstrued material evidence and failed to apply his mind to uncontested facts, including that the employee was neither formally appointed nor met Eskom's prescribed training requirements for the role.

[16] Further, Eskom's own witnesses conceded that no written appointment existed, and documents identified the employee only as the "Requesting Manager." Despite this, it was contended that the Commissioner found him to be the de facto contract manager and accountable. Despite Eskom's own witnesses conceding that no written appointment existed, the Commissioner erroneously inferred accountability solely from the applicant's seniority and participation as a requesting manager. This inference disregarded Eskom's policies and procedures, which require formal designation and training to assume contract management responsibilities.

[17] The applicant further highlights inconsistencies in the Commissioner's reasoning regarding training, accountability, and sanction, contending that dismissal was disproportionate compared to lighter sanctions imposed on other employees for similar misconduct. The Commissioner also contradicted himself by acknowledging that the employee was unaware of relevant policies and training requirements, yet holding him accountable for breaches of those same policies.

[18] The applicant further contends that the award contains internal inconsistencies regarding sanction, noting that dismissal was not a decision that a reasonable decision-maker would have reached, followed by a conclusion that dismissal was fair. It was contended that the Commissioner failed to weigh inherent probabilities between the applicant's version and Eskom's version and disregarded evidence that other accountable role players were neither disciplined nor called to testify, resulting in an inconsistent application of discipline.

[19] It was contended that these errors and irregularities materially distorted the enquiry and produced an outcome falling outside the band of decisions a reasonable arbitrator could reach based on the evidence presented. Lastly, the applicant persisted with the contention that the delay in charging the employee (from 2015 to 2018) constituted procedural unfairness, even though the Commissioner accepted Eskom's explanation that the delay was due to a whistleblower-triggered forensic investigation.

Discussion

[20] The applicant contends that the Commissioner's findings are vitiated by material irregularities and that these alleged errors permeate all charges and taint the outcome. It is argued that, had the Commissioner properly applied his mind, he would have concluded that the employee lacked both authority and requisite training for contract management and therefore could not reasonably be held liable for related breaches. It was argued that without these irregularities, a different result would have ensued, rendering the award unreasonable and susceptible to review.

[21] The Labour Appeal Court has held that irregularities in arbitration proceedings render an award unreasonable only if they are material and affect the outcome. A material error is one that, but for the mistake, would have produced a different result, indicating prima facie unreasonableness. In review proceedings, the court must assess the nature of the decision, relevant considerations, and competing interests to determine whether a fair balance was achieved under the LRA. While posing the correct question is essential, an incorrect answer alone does not render the award unreasonable. However, where an error distorts the inquiry or impedes a fair trial of issues, the award may be set aside.[3] The Labour Appeal Court in *Gold Fields Mining* held as follows:

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[3] *Head of the Department of Education v Mofokeng and Others* [2014] ZALAC 50; [2015] 1 BLLR 50 (LAC); (2015) 36 ILJ 2802 (LAC) at para 31- 33; see also *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation Mediation and Arbitration and Others* [2013] ZALAC 28; [2014] 1 BLLR 20 (LAC); (2014) 35 ILJ 943 (LAC) at 20.

> Where the arbitrator fails to have regard to the material facts, it is likely that he or she will fail to arrive at a reasonable decision. Where the arbitrator fails to follow proper process, he or she may produce an unreasonable outcome (see *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* 2006 (2) SA 311 (CC)). But again, this is considered on the totality of the evidence, not on a fragmented, piecemeal analysis. As soon as it is done in a piecemeal fashion, the evaluation of the decision arrived at by the arbitrator assumes the form of an appeal. A fragmented analysis rather than a broad-based evaluation of the totality of the evidence defeats review as a process. It follows that the argument that the failure to have regard to material facts *may potentially* result in a wrong decision has no place in review applications. Failure to have regard to material facts must actually defeat the constitutional imperative that the award must be rational and reasonable- there is no room for conjecture and guesswork.[4]

[22] The Court held that an error of fact or the weight accorded to a fact does not, in itself, justify interference. The decisive question is whether the error results in an unreasonable outcome. The review test remains whether the award falls within a range of decisions that a reasonable decision-maker could reach. Process-related irregularities, including factual mistakes, only warrant setting aside the award if they distort the inquiry or prevent a fair trial of issues.[5] As aptly stated in the *South African Rugby Union,*[6]

> …The test is not whether the arbitrator's award meets the precision that might be expected from a judgment of the Labour Court. It is one thing to argue that such a mistake justifies a different result on appeal, but a very different approach must be taken, when in a case such as the present, the decision of third respondent is the subject of a review.

[23] The applicant's criticism to the effect that the Commissioner's conclusion regarding the employee's knowledge of the applicable rule lacks foundation. It

[4] *Gold Fields Supra* at para 20.
[5] *Nyathikazi v Public Health and Social Development Sectoral Bargaining Council and Other [5]* [2021] ZALAC 11; [2021] 8 BLLR 778 (LAC) at para 21.
[6] *South African Rugby Union v Watson and Others* [2018] ZALAC 57; (2019) 40 ILJ 1052 (LAC); [2019] 7 BLLR 638 (LAC) at para 33.

must be accepted that, as the Commissioner found, the employee, as a senior official within a parastatal, must have been aware of procurement prescripts, *arguendo* including those derived from section 217 of the Constitution and given effect through the PFMA and related statutes. Even in the absence of formal training, it should have been apparent that fair, equitable, competitive, and cost-effective procurement processes do not permit favourable remarks towards one bidder over others on the technical evaluation template without a justified basis. The employee disregarded these policies, and no legitimate basis for the comments exists. The Commissioner cannot be faulted for inferring that the employee was aware of the obligations governing public procurement, particularly in light of his seniority, which rendered such an inference plausible.

[24] In the present matter, the contention advanced is that, although the Commissioner acknowledged that the employee did not formally occupy the position of contract manager, Eskom's non-compliance with its own internal policies did not preclude the attribution of accountability to him. The Commissioner, relying on the employee's seniority and experience, inferred that he assumed responsibility for the management of the contract. In the absence of evidence indicating instructions from an appointed contract manager, the Commissioner concluded that the employee acted as the *de facto* contract manager, notwithstanding the absence of a formal appointment.

[25] The applicant argues that the Commissioner's reasoning is unreasonable. This is because Eskom's policies require formal training for contract managers, which the employee never completed, making it impossible for him to assume that role. By inferring that the employee was the *de facto* contract manager solely based on seniority, the Commissioner disregarded clear evidence of Eskom's systemic non-compliance and unfairly shifted accountability. The contention was that this inference was speculative and ignored the fact that other designated role players, who bore direct responsibility, were not disciplined, resulting in inconsistency and a failure to apply fairness. It was argued that these errors render the award reviewable.

[26] It must be accepted that Eskom correctly contended that the applicant pursued this review in a piecemeal fashion, contrary to repeated cautions by the Labour Appeal Court, including in *Gold Fields*, which emphasises a holistic assessment of the award rather than isolating individual errors.[7] The fixation on whether the employee was a *de facto* contract manager is immaterial to these review proceedings. Eskom correctly asserted that the employee discharged all responsibilities associated with that role, including completing the technical evaluation template, authorising payment to ACBO Services CC by signing off on invoices and time sheets submitted by the contractor.

[27] Additionally, he served as the contact person for ACBO Services CC and was aware of the budget status, including its depletion, and applied for its modification. Eskom correctly argues that the employee's lack of formal training does not absolve him, as he performed duties inherent to a contract manager. Compliance with material policies and the PFMA was therefore required, and the absence of training can only operate as a mitigating factor. The Commissioner further noted that no evidence implicated the alleged official contract managers, Messrs Bhima, Sihole, or Dikgale, in any transaction related to the TO480 contract.

[28] It is reasonable to conclude that any individual engaging in the transactions attributed to the employee is bound by the provisions of the PFMA, as well as by a duty of good faith and adherence to ethical standards. An assertion of inadequate training cannot excuse the failure to exercise due diligence in matters affecting the employer. Accordingly, the Commissioner's finding that the employee acted as a *de facto* contract manager, or that he owed a duty of good faith to Eskom irrespective of his designation, is justified in light of his conduct throughout the duration of the TO480 contract.

[29] The applicant maintains that the lack of training for contract management responsibilities impacts accountability, citing common cause evidence that the

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[7] *Gold Fields supra* f(n) 3.

employee had no prior knowledge of technical evaluation before the TO480 contract and misunderstood the scoring methodology. Eskom correctly argued that this review conflates appeal and review, as the Commissioner expressly acknowledged the employee's lack of training. However, as Eskom rightly contends, that factor did not absolve the employee from complying with the prescripts; it can only serve as mitigation.

[30] The applicable prescripts were intended to prevent the very irregularities that occurred, including manipulation of technical evaluations to favour ACBO, authorising work beyond contractual scope, procuring additional resources contrary to the agreement, certifying fraudulent claims, incurring irregular expenditure, and approving payments for work not performed. Such conduct is wrongful and cannot be excused by an alleged lack of training. This is more so because, despite being ill-equipped, the employee assumed and executed functions consistent with those of a contract manager. It is untenable for an employee to unilaterally undertake responsibilities with statutory implications and subsequently plead immunity based on inadequate training.

[31] The Commissioner correctly acknowledged both the employee's inadequate training and Eskom's failure to comply with its PFMA obligations. However, as affirmed by the Labour Appeal Court in *Makuleni*,[8] the proper inquiry in review proceedings is not whether the reasoning was correct, but whether the outcome is one that a reasonable decision-maker could reach. This means that errors or imperfections in reasoning do not, in themselves, warrant interference unless they render the result unreasonable. The Labour Appeal Court held as follows:

> …demands reflection in order to digest the essence of the exercise that a commissioner embarks upon. The court asked to review a decision of commissioner must not yield to the seductive power of a lucid argument that the result could be different. The luxury of indulging in that temptation is reserved for the court of appeal. At the heart of the exercise is a fair

[8] *Makuleni v Standard Bank of South Africa Ltd and Others* [2023] ZALAC 4; (2023) 44 ILJ 1005 (LAC); [2023] 4 BLLR 283 (LAC) at para 4.

> reading of the award, in the context of the body of evidence adduced and an even-handed assessment of whether such conclusions are untenable. Only if the conclusion is untenable is a review and setting aside warranted.[9]

[32] In the present matter, the applicant accepts the Commissioner's findings that the employee lacked adequate training, performed the relevant duties, and that such duties carried statutory obligations. The applicant, however, disputes the Commissioner's evaluation of evidence concerning the employee's annotations on the Technical Evaluation Template, which were central to the awarding of the contract to ACBO. Although the employee asserted that assigning a score of 10 to all bidders was an honest misunderstanding, his written remarks indicated that ACBO's project manager possessed "precisely the expertise required," while observing that a competing bidder's equivalent resource "would require extensive training."

[33] As held by the Labour Appeal Court in *Mofokeng*, defects in an arbitrator's reasoning, such as failure to apply the mind, reliance on irrelevant considerations, or omission of material factors, do not automatically render an award reviewable. Such flaws must be assessed to determine whether they disclose a misconception of the true inquiry or culminate in an unreasonable outcome. The governing test remains whether the decision falls within a range of outcomes that a reasonable decision-maker could reach:

> ….If but for an error or irregularity a different outcome would have resulted, it will ex hypothesi be material to the determination of the dispute. A material error of this order would point to at least a prima facie unreasonable result. The reviewing judge must then have regard to the general nature of the decision in issue; the range of relevant factors informing the decision; the nature of the competing interests impacted upon by the decision; and then ask whether a reasonable equilibrium has been struck in accordance with the objects of the LRA. Provided

[9] *Makuleni ibid* at para 4.

> the right question was asked and answered by the arbitrator, a wrong answer will not necessarily be unreasonable…[10]

[34] Accordingly, since an error that materially affects the outcome may indicate prima facie unreasonableness, however, where the arbitrator posed and answered the correct question, an incorrect answer alone does not render the decision unreasonable. The applicant concedes the significance of the remarks on the Technical Evaluation Template yet seeks to challenge the Commissioner's findings. In this regard, Eskom correctly asserts that the Commissioner addressed the proper question, whether the comments constituted dishonesty, given that both bidders proposed the same individual, yet the employee's remarks unjustifiably favoured ACBO Services CC.

[35] It must be accepted that the allegations concern unethical and unlawful conduct. Conduct such as manipulating technical evaluations to favour ACBO, authorising work beyond contractual scope, procuring additional resources contrary to agreement, certifying fraudulent payment claims, incurring irregular expenditure, and approving payments for work not performed are patently irregular. As the Commissioner observed, the employee's seniority imposed a duty to appreciate the consequences of such conduct, which cannot, by any stretch, be justified, particularly during a period marked by systemic malfeasance within parastatals in the Republic. Accordingly, such conduct cannot be countenanced.

[36] The employee could not approve invoices while simultaneously disregarding the prescripts governing such conduct. He had the option to decline approval and escalate the matter to the managers he now asserts were the appropriate contract managers and could have deferred the request for budget modification to the rightful contract manager. Instead, as Eskom contended, he recommended ACBO Services CC as the preferred bidder, approved defective invoices, and sought budget expansion. The employee cannot thereafter claim

[10] *Mofokeng supra* f(n) 3at para 33.

immunity based on ignorance. It follows that the breaches were deliberate and were uncovered years later through the intervention of a whistleblower.

[37] Having considered all these factors, it is immaterial whether this Court would have reached a different conclusion on the facts. The proper inquiry is whether the Commissioner identified the dispute for arbitration, understood its nature, addressed the substantial merits, and rendered a decision that a reasonable decision-maker could reach on the evidence. Apart from the applicant's disagreement with the Commissioner's treatment of the remarks and ultimate conclusions, his conduct cannot be faulted. The Commissioner's findings were based on his assessment of the remarks, and as emphasised in *Mofokeng*, the correctness of that assessment is inconsequential in review proceedings. Accordingly, the applicant has effectively blurred the distinction between an appeal and a review, and its contentions are without foundation.

[38] Lastly, regarding the sanction, the applicant alleged an inconsistency in challenging the fairness of dismissal. The Commissioner addressed this contention, noting that the applicant referred to two employees, Wannenburg and Koekemoer, who were not dismissed but received short, unpaid suspensions despite charges involving dishonesty. The Commissioner found these cases distinguishable from the present matter and observed that no evidence was adduced regarding mitigating or aggravating factors in those instances. He concluded that there was no inconsistent application of discipline, although he remarked that Eskom does not generally apply the principle that dishonesty automatically destroys the trust relationship. Ultimately, he held that the differences in circumstances justified the divergent sanctions.

[39] In this regard, the Commissioner reiterated that the employee acted as a *de facto* contract manager and, by virtue of his seniority and experience, bore significant responsibility for the administration of the contract. The misconduct in question encompassed dishonesty, irregular expenditure, and negligence, conduct which the Commissioner correctly regarded as serious and fundamentally inconsistent

with Eskom's values and ethical standards. The Commissioner further accepted Eskom's evidence that the trust relationship had irretrievably broken down, rendering the continuation of the employment relationship untenable.

[40] The employee maintained his denial of wrongdoing throughout, which the Commissioner regarded as an aggravating factor precluding rehabilitation. The misconduct carried financial implications and reputational risks for a state-owned entity, reinforcing the need for severe sanctions. The Commissioner concluded that the combination of seniority, proven dishonesty, lack of contrition, and the breakdown of trust justified dismissal as appropriate and proportionate. These reasons are significant, as inconsistency is not a standalone ground for unfair dismissal; rather, it is one of several factors considered in assessing overall fairness.[11]

[41] In this case, the Commissioner considered both mitigating and aggravating circumstances, assessed the gravity of the misconduct and the employee's seniority, and concluded that dismissal was fair. This determination was based on the facts and the Commissioner's finding that similarities in misconduct among other employees did not outweigh the relevant distinguishing factors. Overall, the Commissioner evaluated all circumstances relating to the appropriateness of the sanction and determined that dismissal was justified.

[42] This issue is inextricably linked to the question of contrition. The applicant contends that the employee's persistent denial of culpability ought not to be regarded as an aggravating factor in assessing fairness. This argument is manifestly self-serving. The employee has demonstrably failed to appreciate the seriousness of the misconduct, thereby rendering the application of progressive discipline inappropriate. He has not acknowledged that his conduct, namely, making unsolicited annotations on the technical evaluation template, authorising payment for work not performed, and requesting an extension of the TO840 contract, constituted a breach of established public procurement standards.

[11] *South African Commercial Catering and Allied Workers Union and others v Irving & Johnson Limited* [1999] ZALAC 7; 2002 (3) SA 250 (LAC) at para 29.

Such conduct is particularly egregious given the seniority of his position. In these circumstances, the Commissioner's finding that the employee exhibited a lack of remorse is beyond reproach.

[43] Lastly, the applicant contends that the dismissal was procedurally unfair due to Eskom's delay in instituting disciplinary proceedings. He argues that fairness requires disciplinary steps to be taken without undue delay and that the prolonged lapse compromised his ability to prepare a proper defence, causing material prejudice, particularly regarding the first charge. The applicant submits that Eskom's explanation for the delay was inadequate and that the Commissioner erred in failing to accord proper weight to this factor. In his view, the delay compromised the integrity of the process and should have led to a finding of procedural unfairness.

[44] The Commissioner correctly found that the dismissal was procedurally fair, observing that any prejudice occasioned was confined to a single charge and was immaterial, as it related to information already within the applicant's knowledge. Moreover, it was noted that Eskom provided a cogent explanation for the delay, namely that the misconduct only came to light following a whistle-blower disclosure and that a comprehensive investigation was required thereafter.

[45] It is well established that, in assessing the fairness of a delay, the inquiry must be holistic and context sensitive, and such an assessment requires consideration of multiple factors, including the duration of the delay, the explanation proffered, the assertion of rights, the extent of any material prejudice, and the seriousness of the misconduct. It has been reiterated that the evaluation of the delay is not a mechanical exercise, but a value judgment informed by fairness. These factors must be weighed collectively, recognising that the gravity of the offence and the explanation for the delay may justify its length in appropriate circumstances.[12]

[12] See *Stokwe v Member of the Executive Council: Department of Education, Eastern Cape and Others* [2019] ZACC 3; (2019) 40 ILJ 773 (CC); 2019 (4) BCLR 506 (CC); [2019] 6 BLLR 524 (CC); see also

[46] Applying these principles to the present matter, the Commissioner accepted Eskom's explanation and correctly concluded that the delay did not vitiate the fairness of the process. There exists no basis upon which to interfere with the Commissioner's findings. On the objective facts, the bulk of the misconduct only emerged following a whistle-blower disclosure, rendering it impossible for Eskom to initiate an investigation at an earlier stage. It is common cause that the whistle-blower's evidence substantiated the majority of the charges, and the necessity to address such conduct arose only thereafter. In these circumstances, the review application is devoid of merit on all grounds and falls to be dismissed.

[47] In conclusion, having considered the totality of the evidence and the applicable legal principles, this Court is satisfied that the Commissioner correctly identified the dispute, applied the appropriate test, and arrived at a decision that falls within the range of outcomes that a reasonable decision-maker could reach. The applicant's grounds of review amount to an impermissible attempt to convert a review into an appeal. There is no material irregularity that has been established, nor has unreasonableness been demonstrated. The review application is accordingly without merit and falls to be dismissed.

<u>Costs</u>

[48] The determination of costs must be made considering both statutory provisions and the principles of fairness. This Court cannot allow its court roll to be encumbered by matters that, in substance, constitute appeals masquerading as reviews. In the present case, the applicant, a registered trade union represented by legal practitioners, seeks to impugn the commissioner's findings in a piecemeal fashion without demonstrating any procedural irregularity or unfairness. This is in circumstances where the Commissioner duly evaluated all evidence presented and, notwithstanding the length of the award, complied with

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Buffalo City Metropolitan Municipality v Asla Construction (Pty) Limited [2019] ZACC 15; 2019 (6) BCLR 661 (CC); 2019 (4) SA 331 (CC); *Altech Radio Holdings (Pty) Limited and Others v City of Tshwane Metropolitan Municipality* [2020] ZASCA 122; 2021 (3) SA 25 (SCA).

the requirements of section 138(1) and (2) of the LRA, thereby reflecting a comprehensive and reasoned approach.

[49] A review application instituted after a full and fair arbitration hearing, where the evidence was properly ventilated, and the Commissioner delivered a reasoned award, undermines the principle of finality envisaged in section 143 of the LRA. Manifestly, such conduct frustrates the statutory objectives of expeditious and cost-effective dispute resolution. An applicant who persists in litigation despite these safeguards warrants censure through an appropriate costs order to deter similar abuse of process.

[50] In the present matter, Eskom was compelled to defend an ill-founded application notwithstanding its full participation in the arbitration proceedings. Considerations of fairness, legal principle, and the integrity of the arbitration system therefore justify the imposition of costs against the applicant. Accordingly, the applicant, Solidarity, is ordered to pay the costs of opposing the review application.

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

<u>Order</u>:

1. The application to review and set aside the arbitration award under case number GAJB 4860-19 dated 30 October 2019 issued by the second respondent is dismissed with costs.

M. Kumalo

Acting Judge of the Labour Court of South Africa

APPEARANCE:

For the applicant: W.P. Bekker SC, instructed by Serfontein Viljoen & Swart Attorneys.

For the third respondent: Z. Ngwenya, instructed by Magagula George Mcetywa Incorporated.