



- (1) Reportable
- (2) Of interest to other Judges: Yes
- (3) Revised

Signature

Date

THE LABOUR APPEAL COURT OF SOUTH AFRICA, DURBAN

Case No: DA 22/2023

In the matter between:

NONTOBEKO LLIONA MACHI

Appellant

and

CHEP SA (PTY) LTD

First Respondent

**THE COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

Second Respondent

BESS PILLEMER N.O.

Third Respondent

Heard: 9 September 2025

Delivered: 19 January 2026

Coram: Mahalelo ADJP, Nkutha-Nkontwana JA et Djaje AJA

Summary: Labour Law - Dismissal of an employee - Arbitration Proceedings - whether the Arbitrator committed an irregularity when he found the employee guilty of an unexpressed charge – Labour Court finding no reviewable irregularity - Dismissal confirmed on appeal

JUDGMENT

MAHALELO, ADJP

- [1] This is an appeal against the judgment and order of the Labour Court delivered on 23 May 2023, in which it dismissed the appellant's application to review and set aside a portion of the arbitration award of the third respondent (the Commissioner). The appeal is with leave of the Labour Court.
- [2] The Commissioner had found that while the appellant's dismissal was procedurally unfair, it was substantively fair.
- [3] The following aspects were not in issue in the review proceedings:
- 3.1. The suspension of the appellant was correctly found to be an unfair labour practice,
 - 3.2. The dismissal of the appellant was correctly found to be procedurally unfair, and the commissioner correctly found the appellant not guilty of all three misconduct charges appearing in the notice to attend the disciplinary proceedings.
- [4] The appellant is a former employee of the first respondent. The arbitration proceedings related to a dispute between the appellant and the first respondent about the fairness of the employee's dismissal from the first respondent's employ.
- [5] Before I deal with the merits of the appeal, it is necessary to set out the facts relating to this matter.

Background Facts

- [6] The appellant, Ms Nontobeko Machi, is a former employee of the first respondent. She was employed by the first respondent (CHEP), a subsidiary of Brambles, as a Senior Human Resources Business Partner (HR Manager) from 3 May 2016.

- [7] The events leading to her dismissal originated in July 2017. In July 2017, the first respondent dismissed Mr Kagiso Malepe for defrauding it to the tune of R1.7 million. Mr Malepe had been appointed as the Learning and Development Manager of the first respondent.
- [8] The appellant was scheduled to attend the company's 'Achievers Awards' event in Cape Town on the afternoon of 6 July 2017. On the morning of 6 July, she contacted her manager, Ms Monika Ferdin, and requested permission to miss the event and return early to Durban. She explained that she was feeling unwell and emotionally shocked due to the recent suspension of her colleague, Mr Kagiso Malepe, for the alleged fraud.
- [9] Ms Ferdin granted this permission. The appellant flew back to Durban on the morning of 6 July. It is common cause that upon landing in Durban during normal business hours, the appellant did not go home or to CHEP's offices. Instead, she went to the premises of a company called Zala Corporates, where she chaired a disciplinary hearing. Subsequently, she issued a finding in that matter in which she described herself as the 'HR Director' of Zala Corporates. It is also common cause that the appellant was neither a director nor an employee of Zala Corporates.
- [10] Following an investigation, CHEP served the appellant with a notice to attend a disciplinary enquiry containing three charges:
- Charge 1: Gross Negligence relating to the recruitment process of Mr Malepe (this charge is not directly relevant to this appeal).
- Charge 2: Dishonesty, in that she told her manager that she was unwell to avoid the Achievers Awards, while having pre-booked her return flight, demonstrating that she never intended to attend.
- Charge 3: Gross Misconduct for failing to inform CHEP that she was 'acting as a Director' of Zala Corporates, in breach of the Brambles Code of Conduct, which prohibits conflicts of interest, including outside employment.

- [11] The chairperson of the internal disciplinary enquiry found the appellant guilty of all three charges. In the reasoning for the finding on charge 2, the chairperson noted that the appellant had *“abused the trust relationship”* and that *“it was not disputed that she then engaged in other work for another company during Company time”*. For charge 3, the chairperson found that she had *“acted as a Director of Zala Corporates during working hours”*. The chairperson concluded that the trust relationship was irreparably broken and recommended summary dismissal, which CHEP implemented.

The Arbitration and the ‘Unexpressed Fourth Allegation’

- [12] Dissatisfied with the outcome of the disciplinary hearing, the appellant referred an unfair dismissal dispute to the CCMA. The issue for determination in the arbitration was whether the dismissal of the employee was substantively and procedurally fair or not. The Commissioner, in her award, found that the appellant was not guilty of all three formal charges. Specifically, on charge 2, she found no proof of dishonesty in the flight booking. On charge 3, the Commissioner found no evidence that the appellant was a director or employee of Zala, thus no breach of the specific Code clause. However, the Commissioner identified what she termed an ‘unexpressed fourth allegation’ that emerged from the evidence. She formulated this as the appellant being guilty of misconduct that destroyed the employment relationship when, during normal business hours and after being given permission to miss the event in Cape Town due to her not feeling well, she chaired a disciplinary hearing for another business concern and in the finding described herself as a director of that concern. The Commissioner found the appellant guilty of this misconduct and held that her dismissal was substantively fair, albeit procedurally unfair, awarding her two months’ salary compensation.

The Review Proceedings

- [13] Aggrieved by the Commissioner’s award, the appellant launched an application in the Labour Court for the review and setting aside of the award, essentially on the grounds that the Commissioner had committed a gross irregularity by, *mero motu*, creating a new charge, finding her guilty of it, and

imposing a sanction of dismissal where the disciplinary code prescribed only a final warning for such an offence.

- [14] In dismissing the review application, the Labour Court agreed with the Commissioner that the allegation of chairing a disciplinary hearing for Zala Corporates during office hours was part of the charges levelled against the appellant and it formed part of the reasons for her dismissal. The court *a quo* found that the Commissioner had not *mero motu* formulated the unexpressed fourth charge; instead the unexpressed fourth charge was a derivative of charges 1 and 2. On the question of sanction, the Labour Court found that the sanction of dismissal was fair because the conduct of the appellant involved serious dishonesty as she claimed to be unwell and left Cape Town early without attending the Achievers Awards, but she was fit enough to chair a disciplinary inquiry of an outside company when she arrived in Durban.

The Appeal and Submissions of the parties

- [15] The appellant's case is built on a foundational principle of labour law that the fairness of a dismissal must be determined with reference to the reason for which the employer actually dismissed the employee. It was argued on behalf of the appellant that the dismissal letter which she received from the employer unequivocally stated that she was dismissed for being found guilty of the three specific charges. The act of chairing the Zala disciplinary hearing was not one of these charges, and this was, at best, used as evidence or an aggravating factor for charges 2 and 3. The appellant contended that the Commissioner, after correctly acquitting her of the formal charges, could not then formulate a new, different charge to justify the dismissal. This, it was contended on her behalf, is a gross irregularity that vitiates the award. The appellant's argument relied on a line of authority, including *ABSA Brokers (Pty) Ltd v Moshwana NO & others*¹, *Palluci Home Depot (Pty) Ltd v Herskowitz and Others*² (*Palluci Home Depot*), and *SAMWU obo A N Malatsi v South African Local Government Bargaining Council and Others*³ (*SAMWU obo Malatsi*), which

¹ (2005) 26 ILJ 1652 (LAC), [2005] 10 BLLR 939 (LAC).

² [2014] ZALAC 81; [2015] 5 BLLR 484 (LAC).

³ [2023] ZALCJHB 63; [2023] 6 BLLR 581 (LC).

emphasises that an arbitrator cannot craft a new charge to salvage a dismissal.

- [16] The appellant distinguishes the case of *EOH Abantu (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*⁴ (*EOH Abantu*), relied upon by the first respondent and the court *a quo*, arguing that it applied only to ‘competent verdicts’ or mischaracterisation of a known act, not the introduction of a completely new factual allegation.
- [17] The first respondent’s case is that the Commissioner did not invent a new charge but rather correctly identified the true, core misconduct that was always embedded in the evidence and the narrative of the case against the appellant.
- [18] It was argued before us on behalf of the first respondent that from the disciplinary hearing through to the arbitration, the central issue was the appellant’s abuse of trust, claiming to be unwell to be released from a work function, and then immediately performing work for a third party during company time.
- [19] The first respondent pointed to the disciplinary chairperson’s report, the opening address at arbitration, and the extensive cross-examination of the appellant on this precise point, to demonstrate that she was fully aware of the case she had to meet.
- [20] The first respondent relied heavily on *EOH Abantu*⁵, which held that a formalistic approach to charges should be avoided. The first respondent contended that the key question is whether the appellant had adequate notice of the misconduct alleged and was not prejudiced in mounting a defence.
- [21] The first respondent submitted that the appellant’s own closing arguments at arbitration, where she specifically addressed the allegation of “*performing private work during office hours*”, shows that she was alive to the issue and was not prejudiced.

⁴ [2019] ZALAC 57, (2019) 40 ILJ 2477 (LAC).

⁵ *Supra*.

- [22] On the issue of sanction, the first respondent argued that, given the appellant's senior HR role, where trust and integrity are paramount, her conduct made the continuation of the employment relationship with the respondent intolerable, justifying dismissal despite any guideline in a disciplinary code.
- [23] The core issue in this appeal is whether the Commissioner committed a reviewable irregularity by finding the appellant guilty of, and dismissing her for, what was termed an 'unexpressed fourth allegation' of misconduct, which was not explicitly listed in her charge sheet. Put differently, the central legal question is whether the Commissioner's approach in dealing with the 'unexpressed fourth allegation' falls within the bounds of what is permissible in an arbitration, or whether it constitutes a gross irregularity as contemplated in section 145 of the LRA.
- [24] I am persuaded by the reasoning of the court *a quo* and the arguments of the first respondent. The Commissioner's award, in this regard, is not one that a reasonable decision-maker could not reach. First, it is necessary to contextualise the 'unexpressed fourth allegation'. A careful reading of the record reveals that this was not a new or alien concept introduced by the Commissioner. Rather, it was a succinct and accurate label for the conduct that formed the *gravamen* of the employer's case from the outset. The charges, while perhaps inelegantly drafted, were part of a single narrative, the events of 6 July 2017. Charge 2 (dishonesty about her illness) and Charge 3 (conflict of interest through a directorship) were two facets of the same core conduct. The evidence led at the disciplinary hearing and the arbitration, that she chaired a hearing for Zala after being released on grounds of illness, was the factual bridge between these two charges. The disciplinary hearing chairperson explicitly relied on this conduct in his findings. The Appellant's own representative at arbitration felt the need to warn the Commissioner about the prevalence of this evidence, indicating he was acutely aware of its centrality to the case.
- [25] Second, the legal principles in *EOH Abantu* are directly applicable and dispositive. This Court in *EOH Abantu* held:

[15] ... courts and arbitrators must not adopt too formalistic or technical an approach. It normally will be sufficient if the employee has adequate notice and information to ascertain what act of misconduct he is alleged to have committed. The categorisation by the employer of the alleged misconduct is of less importance.

...

[17] ... there is no requirement that competent verdicts on disciplinary charges should be mentioned in the charge sheet... Prejudice is absent if the record shows that had the employee been alerted to the possibility of a competent verdict on a disciplinary charge he would not have conducted his defence any differently or would not have had any other defence.'

[26] The appellant's attempt to distinguish *EOH Abantu* is unconvincing. While the charge in that case mentioned the act but mischaracterised it, the principle is broader: the focus is on the employee's knowledge of the *substance* of the allegation, not its legal label. Here, the Appellant knew from the charge sheet, the disciplinary report, and the employer's opening address that her conduct on 6 July 2017, specifically chairing the Zala hearing after being released due to illness, was the fundamental issue. She led evidence and made arguments specifically to rebut the implication of dishonesty and breach of trust arising from this conduct. She cannot credibly claim that she was ambushed or prejudiced.

[27] The authorities cited by the Appellant, such as *Palluci Home Depot* and *SAMWU obo Malatsi*, are distinguishable. In those cases, the arbitrators relied on completely distinct and unrelated acts of misconduct that were never part of the employer's case. That is not the situation here. The 'unexpressed allegation' was the very heart of the narrative presented by the employer; it was the factual matrix from which the expressed charges sprang.

[28] On the question of sanction, the Commissioner and the court *a quo* were correct. The appellant held a senior and sensitive position in the HR

department, a function where the incumbent is a custodian of company policy, ethics, and trust. Her conduct of using company time under the guise of illness to perform work for a third party, while holding herself out as a director of that entity, demonstrated a profound lack of judgment and integrity. This is precisely the kind of conduct that irreparably damages the trust relationship. As held in *Autozone v Dispute Resolution Centre of Motor Industry and Others*⁶ that:

‘where the offence in question reveals a stratagem of dishonesty or deceit, it can be accepted that the employer probably will lose trust in the employee.’

- [29] While the first respondent’s disciplinary code may list ‘private work during office hours’ as an offence typically warranting a final warning, such codes are guidelines, not straitjackets. The seriousness of the misconduct must be assessed in context. In this context, the act was not a mere technical breach but a fundamental betrayal of trust, aggravated by the seniority of the appellant’s role. The sanction of dismissal was therefore within the band of reasonableness.

Conclusion

- [30] In summary, the Commissioner did not commit a gross irregularity. She identified the true reason for the dismissal of the appellant that was evident from the evidence, and which the appellant had a full opportunity to defend. Her finding that this misconduct destroyed the trust relationship and justified dismissal is one that a reasonable decision-maker could reach. The Labour Court was correct in refusing to interfere with the award.

Costs

- [31] As to costs, both parties asked for costs in the event of being successful on appeal. It is my view that fairness and equity will be best served by not making any cost order.

- [32] I therefore make the following order:

⁶ [2019] ZALAC 46; [2019] 6 BLLR 551 (LAC).

Order

1. The appeal is dismissed.
2. There is no order as to costs.

MB Mahalelo

Acting Judge of the Labour Appeal Court

Nkutha- Nkontwana JA et Djaje AJA concur.

APPEARANCES:

For the Appellant: B Mgaga (Attorney)

Instructed by: Garlicke & Bousfield Inc.

For the First Respondent: L Frahm-Arp (Attorney)

Instructed by: Fasken (Incorporated in South Africa as Bell Dewar Inc)