



- (1) Reportable Yes/No
(2) Of interest to other Judges: Yes/No
(3) Revised

Signature

Date

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case no: JR 798/2024

In the matter between

WOOLWORTHS (PTY) LTD

Applicant

and

THE COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

Second Respondent

COMMISSIONER SIBUSISO MKANDAWIRE

Third Respondent

SACCAWU

Fourth Respondent

JANE MAKHUBELA

Fourth Respondent

Heard: 27 August 2025

Delivered: 23 February 2026

JUDGMENT

SIDZUMO, AJ

Introduction

- [1] This is an opposed application to review an arbitration award under case number GATW17400-23 dated 24 April 2024. In terms of the award, the second respondent found that the dismissal of the fourth respondent was substantively unfair and ordered for reinstatement and back pay of the fourth respondent.

Condonation

- [2] The applicant at the hearing of this review application, sought condonation for the late filing of its supplementary affidavit, which was delayed by five days. The applicant submitted that in terms of the Rules for the Conduct of Proceedings in the Labour Court (the Rules), it had ten days within which to file its supplementary affidavit after the filing of the record. The supplementary affidavit was, however, filed on 30 July 2024 instead of 23 July 2024, resulting in a delay of five days.
- [3] The applicant explained that the delay was occasioned by an administrative error on the part of its attorneys. It was submitted that although the affidavit had already been prepared by 22 July 2024, the attorney laboured under the mistaken belief that it had been forwarded to the applicant for signature. Upon realisation by the attorney's personal assistant that the affidavit had not yet been provided to the applicant, immediate steps were taken to rectify the omission and the affidavit was duly filed.
- [4] The applicant contended that the delay was minimal, that it enjoyed strong prospects of success in the review application, and that no prejudice has been suffered by the respondent.
- [5] The application was not opposed, and it was submitted on behalf of the fourth respondent that she suffered no prejudice as a result of the delay. However, the mere fact that the respondent did not oppose condonation did not absolve this Court from its duty to scrutinise the application. It remains incumbent upon the applicant to demonstrate good cause for the delay, and the Court must be satisfied that the requirements for condonation have been met.

- [6] Condonation is not granted for the mere asking; it is an indulgence that must be justified. In considering whether to grant condonation, the Court must assess the degree of the delay, the explanation tendered, the prospects of success on the merits, and the absence or presence of prejudice to the respondent¹ and in the interest of justice.²
- [7] Turning to the present application, the delay in filing the supplementary affidavit was limited to five days. The explanation tendered is reasonable, and the respondent has expressly indicated that she suffers no prejudice, in the absence of prejudice, this Court is satisfied that sufficient cause has been shown.

Background facts

- [8] The background to the dispute is not only set out in the arbitration award and may also be briefly summarized from the transcript. The fourth respondent was employed by the applicant in the capacity of departmental coordinator with effect from 1 October 2007 until the date of her dismissal on 25 October 2023. At the time of her dismissal, she was earning a monthly salary of R9 077.47.
- [9] The fourth respondent had thus rendered approximately sixteen years of service to the applicant. Her dismissal followed disciplinary proceedings in which allegations of misconduct were levelled against her. The nature of those allegations, the findings made, and the subsequent challenge brought before the second respondent form the subject matter of the present review.
- [10] The fourth respondent was charged and dismissed for gross misconduct. The charge is captured as follows:

‘gross misconduct in that on the 13th April 2023 you breached company policies and procedures designed to protect the company from shrinkage, risk and loss when you were observed behaving in a suspicious manner in a high-risk area, which actions impacted negatively on workplace relations.’

¹ *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at 532 C-E

² *Madinda v Minister of Safety and Security* 2008 (4) SA 312 (SCA) at paras 10; 12; 14 and 28.

- [11] A disciplinary hearing was convened on 4 August 2023, at which the charges referred to above were preferred against the fourth respondent. Following the inquiry, the fourth respondent was found guilty as charged and was dismissed from her employment on 25 October 2023.
- [12] Dissatisfied with her dismissal, the fourth respondent referred the dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) for arbitration. The arbitration was conducted on 19 March 2024. At that stage, both the dismissal and the procedure followed in effecting the dismissal were common cause. The fourth respondent, however, challenged the substantive fairness of her dismissal and sought reinstatement as the appropriate relief.
- [13] The arbitrator found that the dismissal was substantively unfair. Consequently, the applicant was ordered to reinstate the fourth respondent to the same position she held prior to her dismissal, on the same terms and conditions of employment. The order of reinstatement was made retrospective to the date of dismissal, namely 25 October 2023.
- [14] It was further ordered that the applicant pay the fourth respondent back pay in the amount of R9 077.47 per month for six months, totalling R54 464.00. The payment was directed to be made no later than 10 May 2024 into the fourth respondent's bank account, the same account previously utilised by the applicant for the payment of her salary.
- [15] It is against this order that the applicant has approached this Court, seeking to review and set aside the arbitration award. The applicant contends that the arbitrator erred in finding the dismissal substantively unfair and in ordering reinstatement together with retrospective back pay.

Grounds for review

- [16] The applicant alleges that the:

‘award was not an award of a reasonable and objective decision maker, failed to apply his mind, misconducted himself, committed a gross irregularity, exceeded his power by acting unreasonably or unjustifiably in; -

- i. Finding that the fourth respondent was a reliable witness in the circumstances where on her own version she had presented three mutually exclusive versions which meant that she was an unreliable and dishonest witness.
- ii. When questioned at the CCMA on these versions she indicated that she could not remember anything and that her mind was blocked and that she was very frustrated which is not acceptable or logical reason for her dishonest testimony.
- iii. The arbitrator clearly should not have found that her evidence was probable and trustworthy in the light of the three different versions and in fact at the arbitration she could not explain these;
- iv. In the light of these the fourth respondent has been dishonest in seeking the reinstatement which in terms of the case of *Mahepe v CCMA* dismissal could not have been found unfair and neither could she have been reinstated'

[17] Upon receipt of the record, the applicant supplemented its papers to include further submissions upon which it sought to rely. Central to these submissions was video footage which, according to the applicant, depicted the fourth respondent engaging in conduct that appeared to be concealing an item.

[18] The Court was furnished with a USB device containing the said footage, which was presented as evidence of the fourth respondent's alleged "*suspicious actions*." This footage was duly viewed during the proceedings before this Court.

[19] The applicant contends that the footage corroborates its position that the fourth respondent's conduct was dishonest and acted suspiciously. The respondent, however, disputes this interpretation, maintaining that the footage does not establish misconduct on a balance of probabilities and that suspicion alone cannot justify dismissal.

The charge

- [20] In this matter, the fourth respondent was charged with gross misconduct in that on 13 April 2023 she allegedly breached company policies and procedures designed to protect the company from shrinkage, risk and loss when she was observed behaving in a suspicious manner in a high-risk area, which actions are said to have impacted negatively on workplace relations.

At the arbitration proceedings

- [21] At the arbitration proceedings, the issues for determination were whether the dismissal of the fourth respondent was substantively fair and, if not, whether reinstatement constituted an appropriate remedy.
- [22] In order to resolve the dispute, the second respondent had before him various items of material evidence. This included the CCTV footage³ relied upon by the applicant, the testimony of two witnesses called by the applicant, namely Mr Steenkamp,⁴ who chaired the disciplinary hearing, and Mr Ramlagan,⁵ the departmental manager and direct supervisor of the fourth respondent. In addition, the second respondent considered the documentary record of the disciplinary proceedings, together with the testimony of the fourth respondent herself.
- [23] Briefly, the testimony of Mr Ramlagan shows the following, the stockroom where all the backup stock was kept, with an average of about R15 million to R20 million of stock. The stockroom was high risk area as it stores all the high value items and everything that's backed up.
- [24] Further, testified that the investigation included the viewing of the CCTV footage, which depicted the fourth respondent entering the stockroom and coming into the view of the camera. In that footage, the fourth respondent was observed engaging in conduct which the applicant characterised as suspicious.

³ Record at p. 6.

⁴ Record at pp. 59 to 127.

⁵ Record at pp. 7 to 58.

[25] When called upon to elaborate on what he meant by “suspicious,” Mr Ramlagan, the departmental manager and supervisor of the fourth respondent, testified as follows:

“So, when you look at the footage, you’ll see it looks like an act of concealment. The behaviour in which the applicant is under the camera, *you’ll see where the hand of the applicant is and also the looking back to see that they were not being watched.*”⁶

[26] It was Mr Ramalagan further testimony that the fourth respondent led different versions which are captured and summarised as follows⁷ from the applicant’s heads of argument:

26.1 When first questioned by the applicant regarding the conduct the fourth respondent insisted that she has undergone a medical operation which makes her uncomfortable when wearing a dress.

26.2 Thereafter, the fourth respondent said her tights were rolling up and she was just adjusting them down.

26.3 Finally and for the first time before the second respondent, the fourth respondent testified under cross examination that she was attending to a personal issue relating to her menstrual cycle.

26.4 That the reason the fourth respondent was adjusting her menstrual cup in the stock room was that she did not have time to go to the bathroom.

[27] However, it is noted from his testimony that Mr Ramlagan conceded that the incident in question had occurred “long ago.” Notwithstanding this concession, he maintained that the fourth respondent ought not to have altered her version on several occasions, but should rather have stated that she did not recall the events.

⁶ Record at p. 10.

⁷ Applicant’s heads of arguments at p. 5.

[28] Turning to the evidence of Mr Steenkamp, he testified that, all evidence was taken into consideration. Regarding the different versions, Mr Steenkamp said the following:

‘if that was the only version, that would have been transpired across. If there was a consistent version across the enquiry, it could have been plausible. But basically, all the different versions that was given, all versions had to be considered, or had to be factored in. If there was one version from front to back, but there were so many versions’.

[29] On cross examination, Mr Steenkamp conceded that there's no footage where the fourth respondent appears to have picked something somewhere, came into the stockroom and put it on her person.

[30] Upon Mr Steenkamp being asked, why the fourth respondent was dismissed for concealment whilst there was no item seen being concealed by the fourth respondent, his response seems not to be clear. The response is captured as follows:

“Once again, as I stated previously, it's not just for concealment, it's for a combined (inaudible) of all, but the act that can be seen, taking into consideration all the different versions from the place. employee leads to probability that she is, or that there is concealment taking place”.

[31] Dissatisfied with Mr Steenkamp's response, Mr Mathaba, the employee representative at the hearing asked further as follows:

“MR MATHABA : Maybe let me ask this question because you're not answering. My question is, why have you dismissed the Applicant on suspicion of, on suspicion of concealment? Why have you confirmed here that there's not any item you have seen the Applicant concealing?”

MR STEENKAMP: But it's on the footage, and the act that the employee is actually doing leads to suspicion that the employee, or it leads me to believe that the employee is actually concealing something. The different version that was

provided for that by the employee cannot explain, because it shows a probability that concealment is taking place.'

- [32] The fourth respondent did not call any witnesses in support of her case and relied solely on her own testimony. She explained that she had recently returned from a suspension in relation to another matter when she was summoned to view the video footage in question.
- [33] When asked to account for her conduct as depicted in the footage, the fourth respondent stated that she could not recall the specific incident. She requested that additional footage be made available and asked for an opportunity to refresh her memory. Her explanation was that the stress she had endured during the period in question had affected her ability to recollect events with clarity.⁸
- [34] The fourth respondent was confronted on different versions she gave when asked to explain her actions. The explanation given by the fourth respondent was that when she was called for the first time she indicated that she was fixing her tights. She further testified that she was called for the second time and was requested another statement, she made it clear that she was not comfortable, her words were *'I'm not even comfortable to have this conversation with you, but here it's me fixing my tights, he said, it's fine you can go, we'll see you again'*.⁹
- [35] It was further the fourth respondent testimony that the cameras in the store are not showing what she took and held in her hands. Her argument seemed to be that if she had something in her hands surely the cameras could have shown this.
- [36] The fourth respondent further gave an explanation that in her' culture she does not speak with a male person about her menstrual cycle. The fourth respondent proceed to state that:

⁸ Record at p 111.

⁹ page 112 of the transcribed record

'I cannot speak to my uncle, even the Commissioner or whoever that is a male person about the menstrual cycle. And for me to tell them about my back pain is that, every woman who goes to, of the clothes on her time of menstruation, they experience a pain, depending on the kind of (inaudible).'

And for them to kept on saying, "Why were you fixing your tight on camera? Why were you fixing your pad on camera?" I felt humiliated. And I also disclosed, about the back pain I also disclosed on my line manager about the operation that I had, that I gave birth with caesarean. I have a big operation. So I don't like even wearing trousers because of this operation'.¹⁰

Findings and Award

[37] The second respondent's analysis of the evidence concerning whether the third respondent was, on a balance of probabilities, guilty of the alleged misconduct is confined to six paragraphs in the award. The second respondent's reasoning is captured as follows:

'[15] Based on her suspicious behaviour and the change of version the Respondent dismissed her. I find the evidence of the Respondent not justifiable to dismiss the person based on suspicions. In *Mbanjwa v Shoprite Checkers (Pty) Ltd and Others* the court held that the test at all times remains one of balance of probabilities. Reasonable or strong suspicion is not adequate to terminate the employment relationship.

[16] The video footage played dated 13/4/2023, shows the Applicant putting her hands between her thighs and was covered by an apron. No evidence was adduced of an attempt to remove the stock from storeroom. There was no record provided before me that there was stock missing for the day in question or the Respondent suffered financial losses.

[17] The Respondent cannot rely on suspicion of concealment in dismissing the Applicant. Nothing in the charge mentions concealment even if there was concealment the Respondent bears the onus of proof and the video footage played shows nothing was concealed by the Applicant.

¹⁰ page 114 of the transcribed record.

- [18] The Applicant's defence was that she was on suspension for 4 months when she came back month end of July 2023, she was called to the boardroom by Kiran Ramlogan showing her the video of the 13/4/2023. She told him that was aware of the video footage, and she told him that she felt uncomfortable to be interviewed by a male person. In her culture she cannot talk about menstruation with a male person. She fixed herself in the storeroom because she had limited time, and the pad could have fallen at any time.
- [19] The reasons she gave different versions was that she was from suspension, and she could not remember everything. Her mind was blocked, and she was very frustrated.
- [20] I find the evidence of the Applicant probable and trustworthy. The Respondent couldn't rebut her evidence with anything beside the suspicions he has.
- [21] Having considered all the facts placed before me and the charge of the Applicant, I find, on the balance of probabilities, that the Applicant's version of events is the more credible, the Applicant's dismissal was substantively unfair.
- [22] I find reinstatement as an appropriate remedy. Respondent could not justify how the Applicant conduct destroyed the trust relationship and rendered a continued employment relationship intolerable. No evidence was brought before me why it would not be reasonably practicable for the employer to reinstate the Applicant.
- [23] The Respondent is ordered to reinstate the Applicant retrospectively therefore back pay of 6 months is justifiable. My calculations are as follows: R9 077.47 (monthly salary) X 6 Months = R54 464.82
- [24] The dismissal of the Applicant is held to have been substantively unfair.
- [25] The Respondent is ordered to reinstate the Applicant in the same position she occupied before dismissal, on the same terms and conditions. The reinstatement of the Applicant takes effect from date of dismissal (25/10/2023).

- [26] The Applicant should report to work on 6/5/2024. The Respondent is ordered to back pay the Applicant a total amount of R9 077.47 X 6 = R54 464.82 by no later than 10 May 2024. The amount should be paid into the Applicant's bank account, known, and used by the Respondent in paying her salary.'

Analysis

- [38] Where an applicant brings an application in terms of section 145 of the Labour Relations Act¹¹ (LRA), the Court may only review and set aside an arbitration award or ruling if it is shown to contain a defect as contemplated by section 145 of the LRA that renders the arbitration award so unreasonable that no reasonable decision-maker could have reached the same conclusion.
- [39] The Constitutional Court in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*¹² clearly set out how an arbitrator is required to determine the fairness of the sanction of dismissal applied by the employer and thus places a high threshold on applicants seeking to challenge an arbitration outcome or a ruling.
- [40] The Constitutional Court in *Sidumo*¹³ stated that:

'In approaching the dismissal dispute impartially a commissioner will take into account the totality of circumstances. He or she will necessarily take into account the importance of the rule that had been breached. The commissioner must of course consider the reason the employer imposed the sanction of dismissal, as he or she must take into account the basis of the employee's challenge to the dismissal. There are other factors that will require consideration. For example, the harm caused by the employee's conduct, whether additional training and instruction may result in the employee not repeating the misconduct, the effect of dismissal on the employee and his or her long-service record. This is not an exhaustive list'.

¹¹ Act 66 of 1995, as amended.

¹² (2007) 28 ILJ 2405 (CC).

¹³ Ibid at para 78.

- [41] A dismissal of an employee has serious consequences, thus dismissal is affected for a fair reason and in accordance with a fair procedure. In this instance related to an employee's conduct in accordance with section 188 of the LRA.
- [42] The issue for determination is whether the award of the second respondent, finding the dismissal to be unfair, was one that a reasonable and objective decision-maker could reach. In this regard, the Court must consider whether the second respondent failed to apply his mind to the material before him, misconducted himself in the conduct of the proceedings, committed a gross irregularity, or exceeded his powers by acting unreasonably or unjustifiably.
- [43] The test is not whether this Court would have reached a different conclusion, but whether the decision falls within the band of reasonableness required of an impartial adjudicator.
- [44] The employer bears the onus to prove, on a balance of probabilities, that the misconduct alleged was indeed committed by the employee concerned. The question that arises on the facts before this Court is whether misconduct has in fact been established. More particularly, whether conduct described merely as 'suspicious' can properly constitute misconduct of such gravity as to justify dismissal.
- [45] It is common course that the misconduct charges brought against the fourth respondent were predicated upon images depicting her, as recorded in footage obtained from a closed-circuit television (CCTV) surveillance system. It is clear that the camera was installed in the stockroom as to enable the capturing of movements inside the stockroom which is said to be a high-risk area storing all high value items. In essence, where misconduct is in fact committed, it will ordinarily be more apparent to the employer and thus more readily capable of proof.

- [46] It is also a matter of common course that an investigation was initiated by the applicant upon suspicion that the third respondent had attempted to remove items from the stock room by concealing them upon her person.¹⁴
- [47] However, as a point of departure, we have in the bundle of documents before this Court, the fourth respondent's job profile dated November 2017. According to the job profile, gross negligence or gross non-adherence to, or gross failure to comply with company policies and procedures, designed to protect the company from risk, shrinkage and loss is a dismissible offence even if it is an employee's first offence. The Disciplinary Procedure and Code of 1 November 2015 under category C also mentions gross negligence as a dismissible offence.
- [48] The charge was framed in terms that encapsulate both the requirements contained in the employee's job profile and the provisions of the Disciplinary Code. It is, however, recorded in the charge that the fourth respondent was '*observed behaving in a suspicious manner in a high-risk area*'. The term '*suspicious*', and its meaning, does not appear in both the Disciplinary Procedure Code of 1 November 2015 and the fourth respondent's job profile dated November 2017.
- [49] In the absence of such definition or guidance, reliance upon the term '*suspicious*' is vague and incapable of sustaining disciplinary action without further substantiation in any of the applicant's policies or the Disciplinary Code or job profile.
- [50] The applicant's case rested upon what it described as the "suspicious act" of the fourth respondent. It is therefore necessary to enquire whether such conduct, as depicted in the CCTV footage and interpreted by the applicant's witnesses, can properly be characterised as misconduct of such gravity as to justify dismissal.
- [51] In determining this issue, one takes into consideration that suspicion, however strong, cannot substitute proof of misconduct. The employer bears the onus to

¹⁴ See: para 10.3 of the affidavit in support of the review application.

establish, on a balance of probabilities, that the employee committed a misconduct. Mere suspicion or inference, unsupported by cogent evidence, does not meet the threshold required to sustain a charge of gross misconduct.

[52] The enquiry therefore had to consider whether the evidence presented, that is the CCTV footage, the testimony of Mr Steenkamp and Mr Ramlagan, and the fourth respondent's own explanation demonstrated misconduct or whether it merely raises suspicion insufficient to justify dismissal.

[53] In addressing this issue, the second respondent correctly relied on the authority of *Mbanjwa v Shoprite Checkers (Pty) Ltd and others*¹⁵ wherein the Labour Appeal Court held that:

[26] It is trite that an employer bears the onus to prove, on a balance of probabilities, that the misconduct was indeed committed by an employee concerned. Where the employer is suspicious that the employee, through the latter's movements or conduct, may have some dishonest intentions, the employer cannot justifiably rely on that suspicion as a ground to dismiss the employee for misconduct because suspicion, however, strong or reasonable it may appear to be, remains a suspicion and does not constitute misconduct. There needs to be tangible and admissible evidence to sustain a conviction for the misconduct in question.'

[54] In the circumstances, I agree with the second respondent's findings that, on the balance of probabilities, the dismissal of the fourth respondent based solely on suspicion does not constitute misconduct. Suspicion, however strong, cannot be elevated to proof, and in the absence of cogent evidence of dishonesty, the dismissal was substantively unfair.

Concealed an item

[55] The fourth respondent was alleged to have concealed an item in the stockroom. However, the applicant has not indicated with any degree of certainty what the item was said to be, nor does the video footage reveal any object being concealed.

¹⁵ (DA 4/11) [2013] ZALAC 29 (7 November 2013) at para 26.

[56] The Labour Appeal Court in *Woolworths (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*,¹⁶ in deciding the appeal before it, the meaning of concealment was looked into. It was held that:

‘according to the dictionary, the meaning of to “conceal” is “to prevent someone or something from being seen; keep something secret”; (or) “refrain from disclosing or divulging. Put, remove, or keep out of sight or notice.”

[57] Although it is submitted on behalf of the applicant, that the applicant maintains strict rules regarding the unauthorised removal of stock, including attempted acts of removing property, the video footage upon which reliance is placed does not establish what, if anything, was being concealed. In contrast, in the *Woolworths* matter, *supra*, the employee was found to have concealed a belt and a blouse. No such evidentiary basis exists in the present case.

[58] The testimony of the fourth respondent was to the following effect, and it shows that nothing was concealed:

‘on the day of hearing the investigator told me that the act is like an act of concealment. I asked him, if I’m concealing something, what do I have in my hands? What do you see me having in my hands when I’m coming? When we enter the stockroom, they search us. Even when we go out they search us’¹⁷

....’ja, yes, there’s something that you took’

...And another concern is that if I really took something then I put it inside the tight, that day I worked the whole day and there was no way I would feel comfortable or be able to work the whole day with something on me. When we come in, they search you, when you go out they search you.

Mr MATHABA: So Jane, have you concealed any item?

Ms MAKHUBELA: No’

¹⁶ (JA 30/10) [2011] ZALAC 12 (26 July 2011) at para 31.

¹⁷ Record at p 113.

[59] I am persuaded to accept the second respondent's analysis of the evidence. The video footage played on 13 April 2023 depicts the applicant placing her hands between her thighs, which were covered by an apron. No evidence was adduced before the second respondent to demonstrate any attempt to remove stock from the stockroom. Moreover, no record was placed before the second respondent indicating that stock was missing on the day in question or that the applicant suffered any financial loss. In these circumstances, there is no basis upon which to conclude that the fourth respondent breached company policies or procedures designed to safeguard against shrinkage, risk, and loss.

[60] I find no basis to conclude that the second respondent's findings are unreasonable. The second respondent correctly observed that nothing in the charge makes reference to concealment. Even if concealment were alleged, the respondent would bear the onus of proof. The video footage presented demonstrates that no item was concealed by the applicant. In the circumstances, nothing was put away, removed, or kept out of sight.

Mutually exclusive versions

[61] The applicant's submissions appear to centre on the contention that the versions advanced by the fourth respondent are mutually exclusive and cannot occur simultaneously. According to the applicant, if the fourth respondent was adjusting her tights, that explanation is exhaustive and cannot coexist with the suggestion that she was either attending to a sanitary pad or recovering from a medical procedure. On this basis, the applicant contends that the fourth respondent was an unreliable witness, having placed before the second respondent a dishonest and irreconcilable set of events.

[62] On the other hand, the second respondent's reasoning for accepting the differing versions advanced by the fourth respondent was premised on her suspension, her inability to recall certain events, and her frustration at the time. He concluded, on the totality of the facts before him, that her version was probable on a balance of probabilities.

- [63] In assessing the reasonableness of the second respondent's findings, this Court must weigh the fourth respondent's version against the inherent probabilities and the totality of the evidence. Where conflicting versions arise, the enquiry entails an evaluation of credibility, reliability, and probabilities, including whether a witness's testimony is internally consistent and accords with the broader evidentiary picture.
- [64] In applying this test, the Court is guided by whether the version advanced is plausible in light of common experience and the objective circumstances of the case. Accordingly, the determination of reasonableness in the second respondent's findings cannot be divorced from a holistic evaluation of the evidence and the inherent probabilities.
- [65] It is therefore necessary for this Court to examine the versions advanced by the fourth respondent, which are said to be inconsistent and mutually exclusive. It is evident that there were two interviews conducted by Mr Ramlagan which occurred at different stages prior to the commencement of either the disciplinary hearing or the arbitration proceedings. In the first interview, the fourth respondent indicated that she was unable to recall the events and required time to do so.
- [66] Upon viewing the video footage, she acknowledged that she appeared to be adjusting her tights. She nevertheless remained steadfast in her second interview that she was uncomfortable discussing such matters with men.
- [67] The applicant further submitted that the fourth respondent offered another explanation, namely that she had disclosed to her line manager that a medical operation made her uncomfortable when wearing dresses. The applicant regarded this as inconsistent with her earlier accounts and a change of versions. However, the applicant did not elaborate on the circumstances of this disclosure, which might have clarified whether the respondent's explanation was consistent with her claim that she adjusted her tights in the stockroom rather than in the toilet.

- [68] The disclosure to her line manager is a factor that lends some measure of being in line with her explanation, as it is consistent with her stated discomfort of wearing trousers and not dresses as submitted by the applicant.
- [69] In considering the disclosure made by the fourth respondent to her line manager concerning her medical operation and the discomfort she experienced when wearing trousers against the broader evidentiary picture, is that she testified that she was from suspension and could not remember the particular incident and her mind was blocked thus she needed time to recollect. The fourth respondent's disclosure in this regard is probable. Therefore, this Court accepts that such disclosure provides some context to her explanation and probability to her explanation.
- [70] The fourth respondent at the arbitration during cross examination gave a further explanation on why she fixed herself at the stockroom rather than at the toilet. which is as follows:

'MS MAKHUBELA: The time to go to the bathroom is very limited, given the situation that I was in. And if you can watch the video footage, it doesn't even take two minutes or twenty minutes. It's just a matter of just fixing fast, fast. And for me to turn back before I was, I was (inaudible) and I was, when I was coming, I was coming, I was speaking to my line manager, for me to turn and look I was checking if my line manager is looking at me or what. That's why I just turned and looked straight.

MR MOKOENA: Now, you've just mentioned that the situation that you were in warranted you immediately to attend to yourself immediately. Now, I just want you to go to a question that you were asked....

No, no, I will go there now.

COMMISSIONER: So, why could you not go to the toilet and go and fix yourself at the time? What was the main reason you couldn't go to the toilet and go and fix yourself,

considering you're explaining you were under those circumstances?

MS MAKHUBELA: My time was limited. My pad could have fell at any time, and the toilets are upstairs. You must go to the security to search you and go up. So, my time was limited and the situation didn't allow.

MR MOKOENA: Okay. That's all from me.'

[71] The evidence further shows that she chose the stockroom as it was closer and more convenient for her purpose. Her act of glancing to see who might be observing her while she was fixing herself was, in the circumstances, an act of being cautious rather than one of dishonesty.

[72] It has been submitted on behalf of the applicant as a further ground for review that the fourth respondent was on suspension and she had recently returned from suspension, was frustrated, and that this affected her ability to recall events with precision had no bearing on her memory.

[73] The applicant failed to place before the second respondent any evidence contradicting the fourth respondent's account or demonstrating that her conduct upon return from suspension was inconsistent with frustration or a blocked memory (memory decay).

[74] What was placed before the second respondent was the fourth respondent's version that she had been frustrated and that her mind had been blocked, which account remained uncontradicted and undisputed by the applicant. Indeed, the minute of the enquiry records that the fourth respondent requested additional time to recollect, as she did not remember the incident in question. Her testimony before the second respondent was to the effect:

'If you can give me a chance, maybe I can go back and recall. The reason why maybe I don't remember is that I have been through a lot of stress at that time.'

[75] Should the applicant have taken issue with this explanation, he could have disputed it and placed before the second respondent evidence of the fourth

respondent's conduct upon her return from suspension, demonstrating that she was not in fact frustrated or suffering from a blocked mind. In the absence of such rebuttal evidence, the second respondent was entitled to accept the fourth respondent's explanation as probable.

- [76] The alleged different versions of the fourth respondent's account do not detract from the undisputed fact that nothing was found concealed on her person. In light of this, the only explanation that accords with the probabilities is that she was adjusting her tights and her sanitary pad. The evidence further shows that she chose the stockroom as it was closer and more convenient for her purpose. Her act of glancing to see who might be observing her while she was fixing herself was, in the circumstances, an act of caution rather than one of dishonesty.
- [77] The mere existence of differing versions does not, in itself, render a witness unreliable; what matters is whether, when tested against credibility, reliability, and inherent probabilities, the version accepted is more probable than not.
- [78] Holistically considering the different versions and explanations given in different interviews held with her, her undisputed testimony that when she came from suspension she was unable to recollect the particular incident I find that they are not far-fetched when viewed against the totality of the evidence. I am persuaded that the fourth respondent's testimony accords with the inherent probabilities and the objective facts. There is no basis for this Court to conclude that the second respondent misdirected himself on the facts before him. The versions advanced by the fourth respondent are not mutually exclusive, nor are they impossible to reconcile. When examined logically, each explanation relates to the other in a manner that is coherent and plausible.
- [79] The applicant submits that the delivery of multiple versions of fact by the fourth respondent demonstrates dishonesty. In support of this contention, reliance was placed on *Maepe v Commission for Conciliation, Mediation and Arbitration and Another*,¹⁸ where Zondo JP (as he then was) held that the

¹⁸ (2008) 29 ILJ 2189 (LAC).

giving of false evidence under oath rendered reinstatement incompetent, as the employee would not be able to perform his duties effectively.

- [80] This Court is mindful of the distinction between the *Maepe* matter and the present case. In *Maepe*, the commissioner was confronted with deliberate falsehoods under oath, which went to the heart of the employee's integrity and competence. In the present matter, however, it is not clear what exactly the applicant considers as false on the versions provided by the fourth respondent. The applicant cannot rely on falsehood in the absence of a contradictory version by the applicant.
- [81] It is further significant to note that dishonesty was never expressly included as part of the charge preferred against the fourth respondent. The allegation was framed in terms of a "suspicious act" of concealment, without any specification of the item allegedly concealed or any reference to dishonesty as a distinct ground of misconduct.
- [82] In disciplinary proceedings, charges must be clearly formulated so as to inform the employee of the case to be met. The absence of dishonesty from the charge is material, as the applicant's submissions and reliance on the alleged breakdown of trust were premised upon an inference of dishonesty which was not part of the charge sheet.
- [83] The second respondent was therefore correct to confine his enquiry to the charge as formulated. In the absence of proof of concealment, and with dishonesty not forming part of the charge, the dismissal of the fourth respondent was not justified. The finding of substantive unfairness was accordingly reasonable and supported by the evidentiary record.

Reinstatement

- [84] On the supplemented heads of argument, the applicant, in addressing the issue of honesty, relies upon the findings of the disciplinary inquiry, wherein it was concluded that the fourth respondent's conduct was suspicious and that the trust relationship had consequently been broken. The applicant further submits that the alleged dishonesty of the fourth respondent created a

scenario in which no reasonable decision-maker could have ordered her reinstatement.

[85] Accordingly, while the applicant asserts that dishonesty rendered reinstatement incompetent, such submission is not borne out by the evidence. The versions advanced by the fourth respondent, were not shown to be false or deliberately misleading. In the absence of proof of dishonesty, the conclusion reached by the second respondent cannot be said to fall outside the bounds of reasonableness.

[86] On behalf of the fourth respondent, it was submitted that the applicant failed to raise the issue of the trust relationship either before the second respondent or in his papers before this Court. It was further contended that no prejudice was suffered, nor was any financial loss or shrinkage proven that could have affected the trust relationship. Lastly, it was argued that the respondent's conduct does not, of itself, demonstrate that the trust relationship has been irreparably broken.

[87] The submission that the applicant failed to raise the issue of the trust relationship before the second respondent is misplaced. It is evident from the record that the matter was canvassed during the arbitration proceedings. In particular, reliance was placed on the testimony of Mr K Ramlagan, who expressly addressed the issue of trust as follows:

'MR MOKOENA: Now, looking at the behaviour, and you've already alluded to the fact that it's a suspicious behaviour in a high risk area. In the absence of a reason believable provided by the Applicant as to what is happening on the footage, will the company be able to trust the Applicant going forward based on what as been viewed on this footage, and the versions that the Applicant has provided? Will the company be able to trust the Applicant going forward?

MR RAMLAGAN: No. So, in every organisation, trust plays a major part of the organisation. So, we are, me as her line manager, must trust that what I'm being told is truthful

and I take it to the bank to say that this is honest information given to me. After going through these proceedings and different versions of stories that were told, this is not a trustworthy person. The business cannot trust this person because they cannot trust what they're saying is honest and truthful.

MR MOKOENA: And looking at the behaviour itself that you've viewed on the footage, will the company trust that the Applicant is not behaving in a suspicious manner and continue working in employment with the Applicant under the circumstances that appeared on the footage?

MR RAMLAGAN: No. So, we are custodians of the store and we are there to protect the business assets, especially in high-shrinkage areas. So, behaviour in that high-shrinkage area, and suspicious behaviour in the high-shrinkage area raises a lot of concern for the business owner. The business will not be able to trust this individual.'

[88] In this Court submissions were made on behalf of the applicant with reliance in the case of *Maepe*,¹⁹ where it was held that:

'In my view the Flex-o-Thene case is distinguishable from the present case. In that case the alleged misconduct with which Froneman DJP was dealing, if established, would not have meant that it was incompetent to order reinstatement whereas in the present case the fact that the appellant gave false evidence under oath meant that, if he were reinstated, he would not have been able to do his job effectively and that an order for his reinstatement was not competent. I have said earlier that that renders it reasonably impracticable for the first respondent to reinstate him and the order of reinstatement that the commissioner made in those circumstances was not competent.'

[89] It was further submitted on behalf of the applicant that the fourth respondent's alleged dishonesty under oath during the arbitration proceedings rendered

¹⁹ Ibid at para 24.

reinstatement inappropriate and therefore very little or no compensation should be awarded. The applicant emphasised that the respondent occupies a position of authority within the retail sector, a high-risk environment in which employees are entrusted with stock valued in millions of Rands, and that such conduct undermines the trust essential to the employment relationship.

[90] On the other hand, it is submitted on behalf of the fourth respondent that reinstatement remains practical, as her conduct does not, in itself, signify that the trust relationship has been irreparably broken or incapable of repair.

[91] Section 193 of the LRA sets out remedies for unfair dismissals. Section 193(1) provides:

“If the Labour Court or an arbitrator appointed in terms of this *Act* finds that a *dismissal* is unfair, the Court or the arbitrator may—

- (a) order the employer to reinstate the employee from any date not earlier than the date of dismissal;
- (b) order the employer to re-employ the employee, either in the work in which the employee was employed before the dismissal or in other reasonably suitable work on any terms and conditions from any date not earlier than the date of dismissal; or
- (c) order the employer to pay compensation to the employee.”

[92] Although section 193 of the LRA provides reinstatement as the primary remedy for unfair dismissal, unless one of the statutory exceptions as provided for in section 193(2) applies. According to this section, the:

‘Labour Court or the arbitrator must require the employer to re-instate or re-employ the employee unless-

- ‘(a) the employee does not wish to be reinstated or re-employed;
- (b) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable;

- (c) it is not reasonably practicable for the employer to reinstate or re-employ the employee; or
- (d) the dismissal is unfair only because the employer did not follow a fair procedure.'

[93] The Constitutional Court in *Toyota SA Motors (Pty) Ltd v CCMA and Others*²⁰ held that:

'In seeking to determine what remedy the Labour Court or an arbitrator should grant in a particular case, it seems to me that the Court or an arbitrator should first appreciate the meaning of the word "reinstate". In *Equity Aviation* this Court said: "The ordinary meaning of the word 'reinstate' is to put the employee back into the same job or position he or she occupied before the dismissal, on the same terms and conditions. Reinstatement is the primary statutory remedy in unfair dismissal disputes. *It is aimed at placing an employee in the position he or she would have been [in] but for the unfair dismissal. It safeguards workers' employment by restoring the employment contract. Differently put, if employees are reinstated they resume employment on the same terms and conditions that prevailed at the time of their dismissal.*"

[94] The Constitutional Court in *Toyota*²¹ (*supra*) further said:

'once the Labour Court or an arbitrator has decided that dismissal is unfair, it or he should, before deciding on which remedy to grant, ask itself or himself certain questions. These would include questions such as: in what way, if any, did the dismissal cause the employee prejudice? Had the dismissal not occurred, where would the employee be?

[95] Having regard to *Toyota*, it is clear that reinstatement may be inappropriate where the evidence demonstrates that the continued employment relationship would be intolerable. In the present matter, however, no evidence was led by the fourth respondent to suggest that the employment relationship had become intolerable.

²⁰ (2016) 37 ILJ 313 (CC) at para 137.

²¹ *Ibid* at para 136.

- [96] On the contrary, the submissions advanced on her behalf do not establish that her conduct signified a breakdown of trust, nor has the applicant shown that any prejudice, financial loss, or shrinkage was suffered.
- [97] In these circumstances, the conclusion reached by the second respondent that reinstatement remained a competent remedy cannot be faulted.
- [98] Conversely, the applicant has not shown that the dismissal renders continued employment intolerable or impracticable, as contemplated in *Toyota*. While trust is integral to any employment relationship, reliance on statements not proven to be dishonest cannot justify a finding of irreparable breakdown. The versions advanced by the applicant were not established as dishonest, particularly since dishonesty was never part of the charge. Mere suspicion, unsupported by evidence, cannot sustain a charge of misconduct nor demonstrate that the employment relationship has collapsed.
- [99] Therefore, the second respondent's finding that reinstatement was an appropriate remedy cannot be said to be unreasonable. The applicant failed to demonstrate that the fourth respondent's conduct destroyed the trust relationship or rendered continued employment intolerable. No evidence was led to show that reinstatement was not reasonably practicable for the employer.

Conclusion

- [100] Having read and considered the submissions made, pleadings and the record filed herein and in the absence of evidence that the first respondent's discretion was arbitrary or unreasonable, I see no reason why this Court should interfere with the award. I am therefore satisfied that the first respondent's award was reasonable in light of the evidence that was placed before her by the parties in the arbitration proceeding.
- [101] In the circumstances, the following order is made:

Order

1. The late filing of the supplementary affidavit is hereby condoned
2. Accordingly, the review application is dismissed.
3. There is no order as to costs.

W. N. Sidzumo

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

Mr MacGregor Erasmus

For the Fourth Respondent:

Ms Leatha Marakalala SACCAWU