



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

Signature

Date

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR 1121/2022

In the matter between:

QUALITY COUNCIL FOR TRADES AND OCCUPATION

Applicant

and

COMMISSION FOR CONCILIATION MEDIATION

AND ARBITRATION

First Respondent

COMMISSIONER PAUL BOTHA N.O.

Second Respondent

NEHAWU O.B.O LYNETTE NKOMO

Third Respondent

Heard: 13 January 2026

Delivered: 04 March 2026

JUDGMENT

H A VAN DER MERWE AJ

- [1] This is an application for the review of an arbitration award rendered by the second respondent (the commissioner) in an unfair dismissal dispute.
- [2] The third respondent (the employee) was employed by the applicant (the employer) in a position called deputy director: assessments and assurance. She was dismissed on 5 November 2021 and thereafter referred an unfair dismissal dispute to the first respondent (the CCMA). In his award, the commissioner found that the employee's dismissal was procedurally and substantively unfair.
- [3] The employer challenges the award on broadly two grounds. First, it is contended that the commissioner's refusal to permit the employer the benefit of legal representation is reviewable. Second, the employer contends that the award falls to be reviewed when measured against the *Sidumo* test, that is that the award is one that a reasonable decision-maker could not reach.¹
- [4] The essential facts were largely common cause in the proceedings before the commissioner.
- [5] The employee was employed on a probationary basis at the end of which she was made a permanent employee with effect from 1 July 2019, although she was only advised of her permanent employment on 28 July 2020.
- [6] The employer is a public entity, which is responsible for accreditation of skills development providers, amongst other functions. This function requires the vetting of such providers, to ensure that they possess, for instance, the right equipment to be used in the training of individuals. This vetting is a requirement for the accreditation of skills development providers. One of the tasks assigned to the employee was to visit and inspect the facilities of Gijima Holdings (Pty) Ltd (Gijima). The inspection was required for Gijima's accreditation. The employee was meant to perform the inspection on 27 May 2019 and thereafter submit a verification report. She did not attend at the premises but submitted a verification report nonetheless that indicated that she did.

¹ *Sidumo and another v Rustenburg Platinum Mines Ltd & others* [2007] 12 BLLR 1097 (CC) para 110; *Head of Department of Education v Mofokeng & Others* (2015) 36 ILJ 2802 (LAC) para 33

- [7] Matters unravelled for the employee when on 4 or 5 June 2019 representatives of Gijima attended at the employer's office and insisted on an audience with a manager to discuss the fact that Gijima has not been issued with an accreditation letter. Ms Diane Kemp obliged. (Ms Kemp was employed as the director of the employer's assessment unit, a position senior to the employee's position.) The representatives of Gijima informed Ms Kemp that no visit to its premises took place. This came as a surprise to Ms Kemp, as a verification report had been submitted by the employee. Ms Kemp then sent an email to the employee, asking for the pictures she was supposed to take of Gijima's facilities during her visit. That is when the employee admitted that she did in fact not attend at Gijma's premises, citing getting lost as her excuse.
- [8] On 20 June 2019 a meeting was held between the employee, Ms Kemp and someone else employed in the employer's human resources department. In this meeting the employee was told that she should submit a report on the matter. The person employed in the human resources department advised the employee that one of the consequences of her misconduct might be a final written warning, but nothing was confirmed. It was made clear to the employee that the consequences of her misconduct fell to be determined in disciplinary proceedings to come. The importance of this is that the employee must have realised that her fate lay not in any decision that Ms Kemp may make, but in the outcome of disciplinary proceedings.
- [9] Three weeks later the employee submitted a report dated 3 July 2019. In her report of 3 July 2019 the employee explained that she did not perform the inspection, because she could not find Gijima's premises. She gave up the effort to find its premises, with the intention of returning later on, but could not when she experienced back pain. Importantly, in her report she says nothing about the verification report that she submitted that indicated that she did attend at Gijima's premises. The verification report, misleading as it is regarding the employee's inspection of Gijima's facilities, lies at the heart of this matter.
- [10] On 24 June 2019 the employee was appointed to act in the position of another superior of hers, Mr Shannon Davids.

- [11] The employee was served with the allegations of misconduct proffered against her on 20 March 2020. The well-known lockdown that followed the outbreak of the COVID-19 pandemic delayed the commencement of the disciplinary enquiry, so that it did not commence until 6 May 2021, when it was postponed due to the employee's illness.
- [12] On 26 May 2021 the employee was appointed to act in Ms Kemp's position during the latter's absence.
- [13] The hearing reconvened on 7 June 2021.
- [14] On 2 July 2021 the employee was again appointed to act in Ms Kemp's position.
- [15] The disciplinary hearing was concluded on 26 October 2021 and as recorded above, the employee was dismissed on 5 November 2021.
- [16] At the hearing of this application, Mr Finck who appeared for the employee conceded that, all other things being equal, the false verification report submitted by the employee is a sufficient cause for a substantially fair dismissal. Mr Finck's concession is consistent with a long line of judgements by this court and higher courts, to the effect that, generally, dishonesty by an employee justifies summary dismissal.²
- [17] All other things are not necessarily equal however. The delay on the part of the employer to initiate disciplinary proceedings is relevant. Potentially so too the fact that the employee was placed in acting positions, after her misconduct was discovered by Ms Kemp on 4 or 5 June 2019 (that is on 24 June 2019, 26 May 2021 and 2 July 2021). The fact that the employee was advised that she was made a permanent employee on 28 July 2020 also should be considered. All of these matters may potentially indicate that the employer forgave the employee's misconduct and therefore tends to compromise the employer's right to dismiss the employee. The real question

² *Sappi Novaboard v Bolleurs* (1998) 19 ILJ 784 (LAC); *Central News Agency v CCAWUSA* (1991) 12 ILJ 340 (LAC); *Boschendal Restaurant v Komjwayo* (1992) 13 ILJ 573 (LAC); *Lahee Park Club v Garratt* [1997] 9 BLLR 1137 (LAC); *Woolworths (Pty) Ltd v Mabija* (2016) 37 ILJ 1380 (LAC); *Standard Bank of SA v CCMA* (1998) 19 ILJ 903 (LC) at 630–1; *Kalik v Truworhs (Gateway)* (2007) 28 ILJ 2769 (LC); *Hulett Aluminium v Bargaining Council for the Metal Industry* (2008) 29 ILJ 1180 (LC)

is therefore whether the delay, the permanent employment and the appointment of the employee in acting positions is such as to justify the conclusion that the employer forgave her misconduct.

[18] When considered in the context of the pertinent facts, it cannot fairly be said that the employer forgave the employee's misconduct. A delay in initiating disciplinary proceedings is a matter of the circumstances of each individual case. Here the delay was significant (a period of nine months or so between 3 or 5 June 2019 and when the employee was served with the notice that signalled the commencement of the disciplinary proceedings on 20 March 2020). What is important however for the question as to the substantive fairness of the employee's dismissal is whether the delay could be interpreted as an indicator of the pardoning her conduct. It could not be, inasmuch as the employee was told that the consequences of her misconduct fell within the province of the human resources department and the disciplinary proceedings to come. This is in any event exactly what one would expect in an organisation such as the employer. That there was a delay by the human resources department to get the disciplinary process going, from the employee's point of view, is better explained by bureaucratic inefficiency rather than a decision by that department that the employees' misconduct was forgiven. This is so as it was made known to the employee that her misconduct was viewed in a serious light and that it would be the subject matter of disciplinary proceedings.

[19] The same goes for the appointment of the employee in acting positions. It was Ms Kemp's decision to place the employee in an acting position to temporarily fill her own position. While she did so with knowledge of the employee's misconduct, in her view, the employee was innocent until proven guilty and the pending disciplinary proceedings against her were to be kept confidential. Ms Kemp held a favourable view of the abilities of the employee, so long as it did not involve vetting service providers. On this basis Ms Kemp's decision to appoint the employee in an acting position made sense. It also seems that it was Mr Davids' decision to place the employee in an acting position when his own position had to be filled. However, it must have been obvious to the employee that it was not for either Ms Kemp or Mr Davids to decide whether

the employee's misconduct should be forgiven or not. That decision was always going to be taken by the chairperson of a disciplinary enquiry.

- [20] It could have been a different matter if the human resources department conducted itself in a way that fairly suggested to the employee that her misconduct would not be acted upon. But, as the relevant conduct is that of two people who the employee must have known did not have the power to forgive her misconduct, their conduct is irrelevant.
- [21] The same goes for the permanent appointment of the employee. So long as the disciplinary proceedings remained pending, the employee could not fairly have assumed that her employer as such, resolved to turn a blind eye to her misconduct.
- [22] Relevant to all these potential indicators of forgiveness is the fact that the employee's misconduct involved her dishonesty, so that she must have realised that her employer would treat it as a serious matter that would not merely be swept under the rug.
- [23] It should therefore follow that the employee's dismissal was substantively fair.
- [24] As for procedural fairness, as Ms Naidoo submitted on behalf of the employer, there is no suggestion that the delay in the commencement of the employee's disciplinary proceedings created any prejudice for the employee in the conduct of her defence in the disciplinary enquiry. The employee herself did not regard the extraordinary long duration of the disciplinary enquiry itself, once it commenced, as prejudicial, in that she recognised the disruptive effect of the lock-down following the outbreak of the pandemic. The delay is returned to below in the context of the commissioner's assessment of this topic.
- [25] The employee's dismissal was therefore also procedurally fair.
- [26] In his award, the commissioner came to the opposite conclusion. The commissioner referred to the principle that a delay between an employee's misconduct and the institution of a disciplinary hearing, could give rise to an impression with the employee that the employer condoned their conduct, such

as would engage the principles of estoppel or waiver. However, the commissioner failed to consider whether in fact the employee formed that impression and if she did, whether her impression was reasonable.

- [27] A long delay may indicate that the trust relationship between employer and employee has not broken down, but it depends on the facts of each case.³
- [28] A long delay may have consequences for the procedural fairness of a dismissal. However a long delay does not per se lead to procedural unfairness. Among the factors to consider is the reasonableness or otherwise of the delay, the explanation for the delay, whether the employee took steps to assert the right to prompt disciplinary proceedings, whether material prejudice was caused to the employee, the seriousness of the misconduct and whether it justifies an investigation that takes time to complete. The factors are to be considered holistically.⁴ The commissioner found that the employer offered no acceptable explanation for the delay. Ms Seema's evidence was the effect that the employer has elaborate bureaucratic processes to follow to get a disciplinary enquiry together. The employer's is certainly not a paragon of an efficient organisation, but that factor alone does not go far enough to label the proceedings as procedurally unfair, especially as it appears that the commissioner did not consider that the employee took no steps to speed up the process and did not raise prejudice as a result of the delay. The effect of the lock-down should also be considered.
- [29] The fact that the employee was advised that she was made a permanent employee (on 28 July 2020) in the midst of the pertinent events as set out above. In her evidence, the employee testified that when she was advised that her employment was made permanent, she thought that her misconduct was forgiven. This belief of hers could not have been reasonable however, as the disciplinary proceedings against her was still pending at the time, it having been instituted on 20 March 2020. The hearing itself only commenced on 6 May 2021, but that was due to the lock-down.

³ *Stokwe v Member of the Executive Council, Department of Education, Eastern Cape & others* (2019) 40 ILJ 773 (CC) para 167

⁴ *Stokwe v Member of the Executive Council, Department of Education, Eastern Cape & others* (2019) 40 ILJ 773 (CC) para 72

- [30] The commissioner also placed significance on the fact that the employee was not suspended pending the disciplinary proceedings against her. That however misses the proper purpose of a suspension. An employee is suspended at a time when the misconduct of the employee has not yet been established. Its proper function is to ensure the integrity of an investigation or where the employee's presence may 'endanger the well-being or safety of any person or property'.⁵ None of these considerations were present.
- [31] The commissioner found that the employer's disciplinary code prescribes a final written warning for the type of misconduct committed by the employee. The disciplinary code is not a model of clarity. For '[d]eliberately giving false statements or evidence in the execution of duties' the indicated sanction is indeed, oddly, a final written warning. However, for 'dishonesty or attempted dishonesty... or giving false or misleading statements to any stakeholders, internal or external' the indicated sanction is, as one would expect, dismissal.
- [32] The commissioner found that the employee performed her duties in an acceptable fashion. To this extent the award is consistent with the evidence. Ms Kemp, for instance, described the employee as a 'star' employee. However, dishonesty and competence are two very different attributes of an employee and one has very little, if anything, to do with the other.
- [33] The commissioner's finding that the employee apologised for her misconduct is not consistent with the evidence. She did concede in her report of 3 July 2019 that she did not attend at Gijima's premises and acknowledged her 'mistake', but offered no apology for it. Moreover, the stand-out feature of her misconduct is the false verification report she submitted. The false report is not even mentioned in her report of 3 July 2019.
- [34] Finally, the commissioner awarded the employee reinstatement, despite her unequivocal evidence that she did not seek reinstatement.
- [35] The pertinent question then is whether the award is so wrong as to be one that a reasonable decision-maker could not reach. On every pertinent issue the commissioner came to the wrong conclusion: he awarded reinstatement

⁵ *Edumbe Municipality v Putini* (2020) 41 ILJ 891 (LAC) paras 38 and 45

when it was impermissible to do so in terms of section 193(2) of the Labour Relations Act⁶; he placed great emphasis on the employee's acting appointments without considering that those appointments were not made by persons who were responsible for judging the employee's conduct or the sanction it should attract; he found that she apologised for her misconduct when she did not and then overlooked the more pertinent element of her misconduct; he failed to consider all the factors relevant to the implications of the employer's delay; while he recognised that the employer's disciplinary code may be deviated from, he focussed on only one part of it; he failed to consider that the employee was given a permanent position while the disciplinary proceedings were still pending against her. When an award is wrong on all its essential findings like the one in this case, the award is indeed reviewable on the *Sidumo*-test.

[36] The award should therefore be set aside and replaced with a finding that the dismissal of the employee was substantively and procedurally fair.

[37] It is therefore not necessary to consider the ground of review related to the commissioner's refusal to allow the employer legal representation in the arbitration proceedings.

[38] This application was brought late, however, the parties agreed to forego reliance on preliminary points so that the matter can be decided on its merits. Condonation should be granted on that basis.

[39] In the result the following order is made:

Order

1. Condonation is granted for the late filing of the review application;
2. The arbitration award issued by the first respondent under case number GATW 13991-21 dated 24 July 2022 is reviewed and set aside and substituted with the following: "The employee party's referral is dismissed";

⁶ 66 of 1995

3. There is no order as to costs.

H A van der Merwe

Acting Judge of the Labour Court of South Africa

LABOUR COURT

Appearances:

For the Applicant: Ms P Naidoo, Cheadle Thompson & Haysom Inc

LABOUR COURT