



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

Signature

Date

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case no: JR 1230/23

In the matter between:

**BANKING SECTOR EDUCATION AND
TRAINING AUTHORITY**

Applicant

and

DIMAKATSO BRENDA SEETE

First Respondent

LERATO SIKWANE N.O

Second Respondent

COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION (CCMA)

Third Respondent

Heard: 12 March 2026

Delivered: 14 April 2026

This judgment was handed down electronically by consent of the parties' representatives by circulation to them via email. The date for hand-down is deemed to be 14 April 2026.

JUDGMENT

PRINSLOO, J

Introduction

- [1] The Applicant seeks to review and set aside an arbitration award dated 5 June 2023, wherein the Second Respondent (the arbitrator) found the dismissal of the First Respondent (the Respondent) substantively unfair and ordered that she be reinstated retrospectively, with limited back pay.
- [2] The Respondent held the position of general manager: corporate services at the time of her dismissal in February 2022. She was dismissed for misconduct, and the charges levelled against her, which resulted in dismissal, were as follows:

‘CHARGE 1 – GROSS NEGLIGENCE

FAILURE TO MANAGE EXPENDITURE INVOLVING A CONTRACT BETWEEN BANKSETA AND TRAVEL WITH FLAIR

You are alleged to have committed a misconduct (sic) of gross negligence, in that you have failed and/or neglected as General manager: Corporate Service, to reasonably and diligently manage a travel contract concluded between BankSeta and Travel With Flair (“TWF”), in one or more of the following respect (sic):

1.1. Count one

1.1.1 BankSeta concluded a travel contract with Travel With Flair (“TWF”) on or about 04 December 2017, in terms whereof Travel With Flair would render travelling services to BankSeta, up to and until 31 March 2020, in the amount of R5 189 280,00. Due to your failure and/or negligence to manage the said contract, BankSeta incurred an amount of R 5 970 432,33, in excess of the contract amount by an amount of R 781 152.33.

1.1.2 The management of the said contract, was by virtue of your position as General Manager: Corporate Services, your duty and responsibility, which you failed to discharge.

1.2. Count Two

Your failure and/or negligence to manage the abovementioned contract, led to an over expenditure in the amount of R781 152.33 as abovementioned, which amount became as irregular expenditure, as defined in the Public Finance Management Act, 2000 (Act No. 1 of 2000).

1.3. **Count Three**

The incurring of irregular expenditure as abovementioned, has an effect and/or potential effect of depicting the BankSeta as an entity which is unable to manage its funds properly which act places the name of the BankSeta into disrepute and thereby prejudice the administration and efficiency of the BankSeta.

CHARGE 2 – GROSS NEGLIGENCE

FAILURE TO MANAGE THE VODACOM COMMUNICATION CONTRACT BETWEEN BANKSETA AND VODACOM

You are alleged to have committed a misconduct (sic) of gross negligence in that you have failed and/or neglected as General Manager: Corporate Services, to manage a communication contract between BankSeta and Vodacom, in one or more of the following respect (sic):

2.1 **Count One**

2.1.1 You have failed and/or neglected to ensure that a communication contract between BankSeta and Vodacom which was extended by the National Treasury for only one year from 01 April 2016 to 31 March 2017, would subsist for a one-year period for which it was extended.

2.1.2 Due to your failure to manage the Vodacom communication, as extended by the National Treasury, the said contract continued beyond the extended period, causing Banketa the amount of R1 417 459,09.

2.2. **Count Two**

Your failure and/or negligence to manage the said contract as abovementioned, led to the amount of R1 417 459,09 being incurred, which amount became an irregular expenditure as defined in the Public Finance Management Act, 2000 (Act No.1 of 2000).

2.3 **Count Three**

The incurring of irregular expenditure as abovementioned, has an effect and/or potential effect of placing the name of the BankSeta into disrepute and depicting the BankSeta as an entry which is unable to

manage its funds properly and thereby prejudicing the administration and efficiency of the BankSeta.

2.4 **Count Four**

You have failed and/or neglected to advise the BankSeta management and/or Board about the one-year extension period of the Vodacom communication contract by the National Treasury, thereby leaving the BankSeta management and/or Board to an act and/or Board to an act and/or omission, which was to its prejudice.

ALTERNATIVE CHARGE TO CHARGE 2

FAILURE TO FOLLOW CHAIN MANAGEMENT PROCESS TO APPOINT A TELECOMMUNICATION SERVICE PROVIDER

You are alleged to have committed a misconduct for failure to follow supply chain management processes of appointing a communication service provider, in one or more of the following respect (sic):

2.2.1 **Count One**

2.2.1.1 You have failed to ensure that upon the expiry of the one-year extension period of the Vodacom contract by the National Treasury, procurement processes are followed in terms of the BankSeta's Supply Chain Management Policy ("SCM Policy"), to appoint a telecommunication service provider to supply telecommunication services to the BankSeta.

2.2.1.2 Due to your failure as abovementioned, Vodacom continued to supply voice and data telecommunication services to the BankSeta, after the expiry of the one-year extended period, without Vodacom being properly appointed through the procurement processes in terms of the BankSeta's SCM Policy.

2.2.2 **Count Two**

Your failure to follow the procurement processes in terms of the BankSeta's SCM Policy, has as effect and/or potential effect of depicting the BankSeta as an entity which does not follow procurement processes in terms of its own SCM Policy, which places the name of the BankSeta into disrepute and thereby prejudice the administration and efficiency of the BankSeta.'

The evidence adduced:

- [3] The issue to be decided by the arbitrator was whether the Respondent's dismissal was substantively fair. In order to assess the arbitrator's findings and the grounds for review raised by the Applicant, it is necessary to consider the charges the Respondent was found guilty of and dismissed for and the evidence adduced at the arbitration proceedings.
- [4] During the arbitration proceedings, the Applicant called four witnesses and the Respondent testified.

The Applicant's case

- [5] The transcribed record in this matter is lengthy. It is unfortunate that in presenting their respective cases, the parties' representatives lost sight of the issues to be decided by the arbitrator and they persisted in presenting lengthy and irrelevant evidence. The legal representatives posed questions and explored versions that were of no assistance, they pursued immaterial issues and as a result, they burdened this Court with an excessive record, which was at times difficult to follow. The cross-examination of the Respondent was repetitive to an extent that was completely unnecessary.
- [6] The Applicant's first witness, Mr Motsoeneng, the human resources manager, testified that the Respondent's position was a senior executive position and one of her key functions was to be the custodian of supply chain management (SCM) compliance. He explained that the Respondent had to "*drive and oversee the SCM compliance internally by staying abreast of development around SCM and to provide ongoing updates and development within the SCM environment across the business*". As a state entity, the Applicant is governed by the rules and regulations emanating from the Public Finance Management Act (PFMA) and SCM must comply with the relevant prescripts. The Respondent was also responsible for overseeing and managing the operational budget for the division to ensure compliance with the PFMA and other relevant regulations. The position of general manager required the Respondent to advise on procurement related matters.
- [7] The Respondent was also responsible to manage and oversee outsourced service providers by managing the service level agreements to ensure that the delivery demonstrates that services are effectively provided.

- [8] Mr Motsoeneng referred to the contract entered into between the Applicant and a service provider, Travel With Flair CC (TWF), to provide travel management services and he explained that this was the type of outsourced services the Respondent had to manage and oversee. The said agreement was concluded on 4 December 2017 for the period ending on 31 March 2020.
- [9] A material part of Mr Motsoeneng's evidence and cross-examination was spent on the Respondent's performance appraisal. The evidence did not relate to the issues the arbitrator had to consider and was of no assistance in determining the fairness of the Respondent's dismissal for reasons related to misconduct. It contributed to a lengthy record which made its way to this Court and was unnecessary so. The manner in which Mr Motsoeneng responded to questions in cross-examination was not helpful and further contributed to a lengthy record.
- [10] The Respondent's version in the cross-examination of Mr Motsoeneng was that during her term as general manager: corporate services, the SCM function was outsourced. Mr Motsoeneng was unsure about the dates and he could not give a definitive answer to the proposition.
- [11] Mr Mphosi Sathekge, the Applicant's travel coordinator, testified that he processed travel forms and invoicing. His position reported to the general manager: corporate services.
- [12] He explained that he would receive approved travel forms, which are allocated in terms of two different budgets, to wit, one for operational and another for project related travel. The approval is done by the line manager, which is the general manager: corporate services, if the budget falls under operational, otherwise it is approved by the general manager: operations, if the travel is project related. As soon as the approved travel forms are received, Mr Sathekge would liaise with the appointed travel agency, TWF, to obtain quotations in accordance with the travel request.
- [13] Mr Sathekge would obtain three quotations on the required travel services (which could be flights, accommodation, car rental or shuttle services) and once received, he will check if the quotations fall within the threshold as provided in the regulations from the National Treasury. If everything falls within

the threshold, he would request TWF to issue the travel services according to the travel request. After it is issued by TWF, it is returned to the travel coordinator and sent to the traveller.

- [14] The Applicant would receive invoices from TWF, which are checked against the supporting documents and if everything was in order, he would complete an Excel spreadsheet, detailing all the information. The said spreadsheet is thereafter approved by the relevant general manager, whereafter it is submitted to the finance department for payment and payment will be made either from the operations or project related budget, depending on where the travel request was made and approved from.
- [15] Mr Sathekge referred to the minutes of a meeting he had attended with the Respondent and representatives from TWF on 29 May 2019. In the minutes it was recorded that a spreadsheet was forwarded to show the total of all amounts paid by the Applicant to TWF. It was recorded that the *“tender stated that they should not go over R 5 189 million. The spreadsheet shows that Bankseta has paid TWF over R5,7 million”*. Mr Sathekge referred to a credit note in terms of which TWF paid (or credited) the Applicant R 758 589.86.
- [16] In cross-examination, Mr Sathekge explained that his duty was to process invoices and to coordinate the process relating to travel arrangements, he did not manage the travel agent's contract, nor did he check whether there was a budget available to fund the invoices he had captured on the spreadsheet. He emphasised that he was only coordinating the process and that the general manager: corporate services, managed the travel contract, as travel management fell under corporate services.
- [17] Mr Sathekge agreed that the travel budget for projects falls under the control and approval of the general manager: operations and that corporate services and projects have separate travel budgets.
- [18] Mr Rapula Sathekge, the Applicant's SCM manager, referred to the SCM policy which was applicable during the 2017/2018 financial year. The purpose of the policy was to provide a set of comprehensive policy guidelines to regulate the SCM systems of the Applicant and the broad objective was to ensure compliance with acceptable practices, applicable laws and regulations.

The main legislation affecting SCM is, *inter alia*, the PFMA and national treasury regulations.

- [19] The SCM policy provided that all employees were required to take note of the content of the policy and if *“employees are in doubt about the application of certain policies, they should discuss the matter with the person to whom they report, their divisional general manager or the CFO responsible for implementing these policies. It is the responsibility of staff to ensure that they have the latest copy of this policy”*. If the Respondent was in doubt about the SCM policy, she should have discussed it with the CFO.
- [20] The SCM policy defined ‘irregular expenditure’ as expenditure incurred in contravention of or that is not in accordance with a requirement of any applicable legislation, including the PFMA, the State Tender Board Act, any regulations or any provincial legislation providing for procurement in that provincial government. The policy further provided that each official must carry out his/her task with due care and diligence and must take appropriate steps to prevent any unauthorised, irregular, fruitless and wasteful expenditure in his/her area of responsibility. Goods and services must only be procured in accordance with authorised procurement processes.
- [21] Mr Sathekge explained that when there was a request for goods to be procured, he would check the procurement plan and check if there was a budget available to procure the requested goods.
- [22] Ms Dziruni, the Applicant’s CFO, testified that the finance and SCM divisions fall under her control and management. She testified about the TWF contract and explained that it was for travel management services, which services would cover travel, accommodation, conferencing and car hire – in short, *“anything under the general description of travel and accommodation”*. The contract value for the effective period of the contract was R 5 182 280, including VAT. TWF had their own service fee, which was added to the travel services provided.
- [23] Clause 3 of the contract provided for ‘duration and termination’ and stated that the agreement would end on 31 March 2020 or in the event that (*inter alia*) *“all obligations have been met by the service provider in accordance with the*

provisions of the agreement and the full contract price specified in the agreement has been paid by the purchaser to the service provider in terms of the provisions of the agreement and correctly invoiced". Ms Dziruni explained that the aforesaid clause meant that if the full amount of the contract value was paid prior to 31 March 2020, the contract would come to an end.

- [24] Ms Dziruni testified that in terms of the contract, TWF should provide daily invoices as well as quarterly reviews where the total quarterly spend and savings should be presented to the Applicant's travel coordinator, who falls under the general manager: corporate services.
- [25] In terms of the minutes of the meeting of 29 May 2019 between the Respondent, Mr Mphosi Sathekge and representatives of TWF, the spreadsheet which was forwarded to the Respondent showed that the Applicant has paid more than R 5,7 million to TWF, whereas the agreement provided only for R 5 189 280. Ms Dziruni explained that any amount paid above the contract amount is regarded as irregular expenditure. She further explained that once the full contract price was paid, the contract should be terminated, as was provided for in the terms of the agreement.
- [26] Ms Dziruni explained that in April 2018 VAT increased from 14% to 15% and there was an adjustment of R 51 892.80 to the contract with TWF to make provision for the 1% VAT increase. There was a further adjustment of 4,5% (R 235 857,78), which was an escalation in accordance with the consumer price index (CPI) and after the said two adjustments were made, the total contract value with TWF was R 5 477 025.58. Ms Dziruni referred to the adjustments and expenditures from 2017 and said that by May 2019, the over expenditure was R 781 152.33. The over expenditure of this amount constituted the basis for charge 1.
- [27] Ms Dziruni testified that the amount of R 781 152 was credited to the Applicant.
- [28] Ms Dziruni testified about a request made by the Respondent to the Applicant's CEO in July 2019 to adjust the TWF contract to provide for the 1% VAT increase and the 5.2% CPI adjustment, as at December 2018. She further requested to vary the contract by a further 8% *"which will have to be*

tabled at BAC for consideration and only then if approved by members, that it be brought to you for approval. The variation would come to a total amount of R 440 560,77 bringing the new total contract value for travel to R 5 947 570,37". Ms Dzurini explained that the process to be followed for any contract variation is that a submission should be made through SCM, to be recommended by the bid adjudicating committee (BAC) and to the CEO for approval. She emphasized that the aforesaid process should be followed before any contract value is exceeded.

- [29] Ms Dzurini explained that divisions could have their own budgets for travel, such as budgeting for travel within a project, but the management of the travel contract is located centrally within the travel division, which falls under the general manager: corporate services.
- [30] The cross-examination of Ms Dzurini was extremely lengthy and dealt with issues, at length, which had no relevance or bearing on the issues to be decided by the arbitrator. Legal representatives should guard against the temptation to pose questions just for interest's sake or just for the sake of posing questions. Evidence should be relevant and questions posed to witnesses should be focused on the issues to be decided.
- [31] In cross-examination Ms Dzurini testified that by the time the contract with TWF was entered into (December 2017), she had been the CFO for a period of three years. The details of the contract were entered by the SCM manager and it was given to the end user, being the travel division, which falls under the general manager: corporate services.
- [32] She explained that the travel agent would make the travel bookings, bill the Applicant and include the fee that was agreed to with the Applicant. In respect of the TWF contract, Ms Dzurini explained that the contract value was R 5 189 280 and this was a 'usage-based contract', meaning that it was the value the Applicant required from the contract. The value of the contract was made up of various components such as flights, accommodation and car hire, which could not have been predetermined or predicted upfront. She explained that the R 5 189 280 which was to be spent on travel, was an estimate as they did not know for sure how many travel bookings there would be, but once the tender

was awarded for the said amount, it was fixed. The amount could have been varied only by following the prescribed SCM variation process.

- [33] The contract value was meant to pay for the travel activities of the Applicant, including for example domestic and international travel, air fares, accommodation, car hire, shuttle services and the agent's service fees. The service fee was the fee TWF charged for the services they rendered when making travel bookings.
- [34] Every travel request would go to the travel division and they would get three quotations from the travel agency. Ms Dzurini explained that the travel division should check *inter alia* that there is sufficient contract value before they proceed with the travel request and they must check whether the request was properly completed and authorised. The general manager: corporate services was responsible to ensure that the travel division follows the procedure to check, as alluded to, prior to processing a travel request to finality. She emphasized that all travel bookings that are made at the Applicant are ultimately approved in the travel division and that the approval had to be done by the general manager: corporate services, who managed the said division.
- [35] Ms Dzurini testified that the travel service provider gets paid upon submission of the invoice of travel expenses, including their service fee, which was their profit. She testified that the TWF contract was exceeded due to poor record keeping. She explained that the Applicant's accounting system is open to all employees to view transactions. The travel division should have been keeping records and tracking the bookings as they made them against the contract so that they could see the expenditure. If this had been done, the Respondent would have known that the contract was reaching its limit and a request for variation could have been made in time or a new contract could have been entered into.
- [36] Ms Dzurini testified that as the CFO she is not responsible to check the travel expenditure against the value of the contract, her responsibility is to put overall processes in place and she is in charge of the establishment of sound internal control systems. Every division has its own responsibility and each manager is responsible for the financial management and commitments they have within their own area of responsibility. The travel division was aware of the need to

track the travel bookings as they were responsible for the travel service within the Applicant. If they made a booking against the contract, they must keep track of that. Every travel booking cannot be signed off by the CFO, that is why there are delegations of authority and different roles within the Applicant. Every employee has financial management responsibilities within their own area of responsibility. The management of contracts is the responsibility of the divisional managers within whose portfolio the contract falls. In terms of the travel contract, they had to look at the booking value versus what they had already expended and the general manager: corporate services is responsible for travel and had to ensure that due process was followed.

- [37] If the travel contract was managed properly, it would *inter alia* mean that they would keep track of the amount spent on the contract and determining how much was left before authorising TWF to move any travel booking at all. There is an Excel spreadsheet in the travel department where they keep track of all bookings versus the contract value and the amount available to make further bookings. It was put to Ms Dzurini during cross-examination that the said Excel spreadsheet did not exist. She responded that she was very surprised about the Respondent's version.
- [38] Ms Dzurini explained that the budgets for contract and admin travel are managed at two different places – there is a yearly budget for admin related and project related travel. The admin related travel is managed by the general manager: corporate services and the project related travel budget is managed by the general manager: operations. The general manager: operations signs off on the travel budget that is related to a project. The travel request is then submitted to the travel division, who would get quotations and send the best quotation back to the project manager and general manager: operations to confirm. The travel division needs to ensure compliance by checking that there is sufficient contract value for them to proceed with the booking. The project managers etcetera do not know the value of the travel contract – it is the travel division that should monitor the expenses and keep track of what the remaining contract value is. The general manager: corporate services is responsible to make sure that there is compliance, after the travel division received an approved travel request from the general manager: operations, as she oversees the travel division. In short, the compliance checking happens in

the travel division, for which the general manager: corporate services was responsible. The travel contract value is overseen by the general manager: corporate services for all travel within the Applicant. If there was no value left on the travel contract, the general manager: corporate services could have vetoed the travel request as she had a duty to avoid irregular expenditure.

- [39] Ms Dzurini explained that the travel division had a responsibility to monitor the TWF contract and if there was no value left on the travel contract, they were supposed to seek a variation of the contract or start a process for a new tender for a new contract. The travel division must check the contract value before they issue any travel booking. The travel contract was varied to accommodate CPI variations and an increase in VAT.
- [40] It is evident from the transcribed record that notwithstanding the lengthy cross-examination of Ms Dzurini it was never put to her that there was no overspending on the TWF contract or that the Respondent was not responsible for the management of the travel division. The responsibilities of the travel division or the Respondent as general manager: corporate services, as testified to, were not disputed.
- [41] In respect of charge 2 Ms Dzurini testified that cell phone contracts also resorted under the general manager: corporate services. In cross-examination she however testified that the cellular phone account fell under SCM and that the Respondent was not responsible for SCM. The SCM function fell under the SCM manager, who fell under the CFO and the CEO.
- [42] Ms Dzurini explained that the issue was that the Vodacom contract was not contracted through SCM. Corporate services would monitor the contract and as the end user, corporate services should have approached SCM to get new mobile contracts when the contracts ended or when there was a need to extend or vary the Vodacom contract. SCM had to put the request through the supply chain process.
- [43] She referred to Circular 2 of 2016/2017, issued by National Treasury and addressed to all accounting officers of departments and constitutional institutions. The circular provided information on the implementation of the national mobile communications project and guidance on the steps to be taken

during the transitional period to 30 April 2016 and after the implementation period from 1 May 2016. The circular advised that the National Treasury had developed a national sourcing strategy for the procurement of mobile communication to avoid duplication and high expenditure. Interim measures were put in place for the transitional period up to 30 April 2016. Accounting officers were required not to renew any mobile contracts during the transitional period and where current contracts expired before 30 April 2016, the contracts must be extended on a month-to-month basis until 30 April 2016. Where tenders were already issued, Departments had to consult with National Treasury before the conclusion of the tender process and awarding of the contracts. Contracts expiring after 30 April 2016 should be honoured until completion and after the expiry of the contracts, and after expiry, departments and entities were required to implement the national mobile communication strategy.

- [44] The national mobile communication strategy entailed a transversal contract with Vodacom, the RT15, as service provider. A transversal contract is defined as a centrally facilitated contract arranged by the National Treasury for goods and services that are required by one or more than one institution. Departments and public entities were required to use the RT15, but there was a provision in terms of which they could get an exemption from the National Treasury and once an exemption was granted, they could follow a normal procurement process.
- [45] The Applicant requested an extension of the existing Vodacom contract for a period of two years from 1 April 2016 to 31 March 2018, which request was denied by the National Treasury. The request was only approved for a period of one year on condition that a new bid be advertised and awarded after the extension. Ms Dziruni explained that shortly after the approval, the National Treasury issued *“new legislation about the RT15 transversal contract”* whereby public entities had to go onto the Vodacom RT15 or apply for exemption from participating in the transversal contract.
- [46] In February 2018, the National Treasury granted the Applicant partial exemption from participating in the RT15 in respect of the voice part of mobile communication. The Applicant had to participate in the RT15 contract in

respect of data and WiFi services. Mr Dziruni explained that after being granted partial exemption, the Applicant had to do a normal procurement exercise or if they wanted to have a single source or extend the current contract, they needed prior approval from National Treasury.

- [47] On 28 November 2017 the acting CEO signed a letter to Vodacom requesting that the upgrading of 52 existing data contracts, 4 new WiFi routers, 11 new voice contracts and an upgrade on 35 existing voice contracts be processed. Ms Dziruni testified that at the time the aforesaid request was made, the Applicant had not obtained exemption from the National Treasury, as was required. She explained that the request was not properly done in terms of the procurement process. First, the Applicant had to obtain an exemption from the National Treasury and once the exemption was obtained, they had to do a normal procurement exercise through SCM. If the value was above R 500 000, it had to be advertised on open tender. If there was to be a deviation by using a single source or extending a contract, it still had to go through SCM and be recommended by the BAC, whereafter it would be approved by the CEO. This too required prior approval from the National Treasury.
- [48] This was referred to the Applicant's Board as an irregular expenditure. In cross-examination, Ms Dzurini emphasised that the letter of 28 November 2017 should not have been signed off by the CEO as the Vodacom contract did not go through the prescribed process. It was wrong of the acting CEO to sign the letter and it was wrong for everyone else to have drafted the letter and forwarded it to the acting CEO, as the goods and services had to go through the SCM process.
- [49] On 15 December 2017, the Respondent expressed concern regarding 'smses' that staff members had received confirming upgrades on their Vodacom contracts. She stated that the processing of the upgrades was dependent on approval from the National Treasury and that same had not yet been received. She was concerned that the handsets were delivered without the arrangement regarding the upgrading of the contracts being approved by the National Treasury.
- [50] On 12 February 2018 Ms Dzurini addressed an email to the Respondent and the acting CEO expressing her concerns about the fact that the Respondent

had contracted with Vodacom to get new contracts in December 2017 as that did not comply with legislation because the contract was concluded without getting exemption from the RT15, it did not go out on tender, was not approved by the CEO, the Board or National Treasury as single source deviation, was not compliant with National Treasury instructions and did not comply with SCM processes. Ms Dzurini stated that the transaction was irregular. She recorded that she had communicated with the National Treasury in January 2018, and it was confirmed that the Applicant was not granted any exemption and that the Respondent had not formally applied for any exemption.

- [51] In 2018, there was an attempt to minimise the amount of irregular expenditure and one of the identified avenues was to request a premature cancellation quotation from Vodacom. The Applicant wanted to ascertain if it would be cheaper to terminate the contracts with Vodacom early as opposed to going through the full duration of the contracts. In January 2019, it was communicated that the early termination would cost R 544 038, which was not much of a saving.
- [52] Ms Dzurini referred to the National Treasury Instruction 2 of 2016/2017, dated 30 September 2016, wherein it was provided that accounting officers and authorities must participate in the transversal term contract (RT15) for the acquisition of mobile communication services. If accounting officers or authorities decided not to participate in the RT15, they must report to National Treasury the discounts that would be achieved by the institution prior to the conclusion of mobile communication contracts.
- [53] On 1 November 2016 the acting CEO wrote to National Treasury to request to be exempted from compliance, as referred to in the aforesaid circular, in regard to mobile communications and data, with effect from 1 November 2016, for a period of 92 days. It was indicated that the Applicant would be in a position to fully comply by 1 February 2017. The irregular Vodacom contract was entered into in December 2017 and resulted in irregular expenditure of R 1 417 459.

- [54] In April 2022 the Applicant made in application to National Treasury to condone the irregular expenditure of R 1 417 459 when Vodacom was appointed without following a competitive bidding process.
- [55] In cross-examination Ms Dzurini explained that she was appointed as the CFO in 2014 and at the time she was appointed, the SCM function was outsourced to CCS and the finance function was outsourced to Deloitte. CCS however reported to the general manager: corporate services. Late in 2015 the SCM function was moved to the office of the CFO and a SCM manager was appointed, who reported to the CFO.
- [56] In cross-examination Ms Dzurini explained that when the Vodacom contract was nearing its end, she was the CFO and she was approached on how to deal with the contract. At the time National Treasury published legislation on the RT15 transversal contract for government entities, with specific guidelines to be followed to either participate or not in the RT15. They started the process and the first step was to get exemption from National Treasury from participating in the RT15 transversal contract with Vodacom.
- [57] Ms Dzurini referred to an email from the company secretary (who was acting CEO in 2017) on 18 March 2016 regarding a decision by the Board to approve the SCM applications for the extension of certain contracts. She confirmed that the Board is the highest decision making body at the Applicant, there is a process for submitting matters for decision to the Board and that the CEO and CFO were standing invitees to the Board. Ms Dzurini attended the Board meetings and she participated in the discussion as to what to do with the Vodacom contract and the decision was to extend the old Vodacom contract. The old contract ended on 31 March 2016 and they wanted to extend it for two years. The National Treasury reduced the period to only one year, but before the period would have expired, the National Treasury introduced the RT15. On 22 September 2016, approximately six months after the extension was sought, National Treasury approved the extension for one year, thus until 31 March 2017. On 30 September 2016 the legislation changed with the introduction of the RT15 instruction from National Treasury, which became pertinent and relevant for going forward with the Vodacom contract. The National Treasury

instruction took effect from 1 November 2016 and it override all previous arrangements.

- [58] From 1 November 2016 accounting officers and authorities must participate in the transversal contract for the acquisition of mobile telecommunication services or apply for exemption.
- [59] In cross-examination Ms Dzurini conceded that charge 2.1.1 of the charge sheet was not answerable by the Respondent as *‘the alternative charge, 2.2, is the correct description of what happened’*. She explained that *“count 2.1 that the old contract subsists for a year period is not correct, because the legislation changed. And count 2.1... That one I cannot say for sure but what I can say is on the alternative charge whereby I indicated that this contract, 27 November 2017, did not go through supply chain and therefore missed crucial things”*.
- [60] Ms Dzurini testified that it was wrong of the CEO to have signed the letter of 28 November 2017 and the drafting of the letter for signature by the CEO was also wrong as it happened outside of the SCM process and there was no compliance with the prescribed processes.

The Respondent's case

Charge 1

- [61] The Respondent testified that after the CFO was appointed in 2014, the finance division and the function of SCM moved from corporate services and fell under the office of the CFO. The travel management division, with only one employee, reported to the Respondent.
- [62] In respect of charge 1, the Respondent testified that she did not perform any travel management duties, as those were done by the travel coordinator. Until 2017, travel management was the responsibility of the CEO, after which it was moved to corporate services. The travel coordinator was very junior, and the Respondent would sit in on meetings with TWF.
- [63] The Respondent described the process to make travel arrangements as follows: an employee would request travel by completing a form, and the

employee's manager would sign the form, meaning that the travel is authorised. It would then go to the travel coordinator, who would engage with TWF. TWF would send three quotations and make a recommendation about the lowest price. The travel coordinator would thereafter check if the quotation was in accordance with the prescripts from the National Treasury and after checking, he would give the go-ahead to TWF, who would process the booking. The travel coordinator would subsequently communicate the travel arrangements with the traveller.

[64] She testified that she would use a spreadsheet to tally the service fee that is payable to the travel management company, as that was what the contract was about. At the end of every month, there would be a meeting between TWF and the travel coordinator, which the Respondent join from time to time. TWF had to provide the Applicant with invoices on a monthly basis, which were sorted by the travel coordinator into two different files. The one batch, which were the invoices authorised by the Respondent as general manager: corporate services, was sent to her and the other batch, which was for travel authorised by the general manager: operations, was sent to that manager. The said managers would sign off on their respective division's travel invoices and give a directive to the finance department to pay TWF. The travel coordinator tracked the service fees against the R 5 million of the contract value.

[65] The Respondent testified that she understood the management fees, as set out in the contract with TWF, to be the fees paid to TWF *"which is theirs for the work that they do. Because that is how it has always been done even in the previous contracts. The very understanding is shared by the supply chain manager"*.

[66] The Respondent referred to the contract entered into between the Applicant and TWF, wherein 'contract price' was defined as the price payable to TWF under the agreement for the full and proper performance of its contractual obligations, as set out in the pricing schedule. The pricing schedule was not part of the evidence before the arbitrator. 'Services' were defined as the services to be provided by TWF to the Applicant pursuant to the agreement, as set out in clause 4. Clause 4 of the agreement with TWF recorded that services were to be rendered by TWF.

- [67] Ms Dzurini testified that the contract value of R 5 million included expenses relating to travel, including the cost of flights, accommodation, car rental etcetera. All the cost related to travel arrangements had to be paid from the said contract value for a period of three years. The Respondent testified that her understanding was different from that of Ms Dzurini and she understood the R 5 million contract to cover only the service management fee. The amount *“is the money that would be paid to TWF for the work that they were going to do for BankSeta. What it means is that when TWF makes bookings they will be charging a fee for flight for this and for all that. That is how they will tally what they are charging us and we are managing that against the contract value”*. The monies to be paid for car rental, flights etcetera did not go to TWF and therefore it did not form part of the contract value.
- [68] The contract with TWF recorded that the Applicant accepted TWF’s proposal for the rendering of services and that the Applicant undertook to make payment for the services rendered in accordance with the terms and conditions of the contract. The ‘contract price’ was defined as the price payable to TWF for the full and proper performance of its contractual obligations. In cross-examination, it was put to the Respondent that the contract with TWF did not state that the contract amount was only for service fees, and she conceded that the conclusion that the contract price covered only service fees was indeed her own interpretation. She claimed that nobody ever corrected her interpretation of the contract, nor was there any other discussion with her regarding the TWF contract. This material version was not put to the Applicant’s witnesses.
- [69] In cross-examination, the Respondent explained that her defence in respect of charge 1 was that she *“did not cause irregular expenditure for travel services or travel management services at the organisation. I was handed a contract between the organisation, which is BankSeta and TWF that I needed to manage. The contract that I was responsible to make sure that I manage and having gone through the contract, the contract is the travel management service fee contract”*. Her version was that the travel management service fees had not reached the value as captured in the contract and there was no irregular expenditure. Mr Ndou, for the Applicant, has put it to the witness that

the version that there was no irregular expenditure in respect of the travel management service contract was not put to any of the Applicant's witnesses.

- [70] On 10 May 2019, the Respondent had sent an email to employees of TWF, indicating to them that the Applicant *"has reached the maximum amount as contracted with TWF and therefore, we cannot make further payments as any amount paid over and above the contract value is regarded as irregular"*. The Respondent explained that this did not reflect her personal view, but it was the view of the Applicant and the CEO that the contract value included everything and not only a service management fee. Her view was that the contract with TWF was only for service fees and did not include the cost of flights, accommodation etcetera. On this understanding, the Respondent testified that the contract amount had not been exceeded. This version too was not put to the Applicant's witnesses when they testified.
- [71] The Respondent interpreted the contract to include only a service management fee, payable to TWF. This version was not put to the Applicant's witnesses.
- [72] The Respondent was referred to the minutes of a meeting with TWF on 29 May 2019, which she attended. The minutes recorded that the tender stated that they should not exceed R 5.1 million, and the spreadsheet of the total amount paid by the Applicant to TWF indicated that the total being paid up to date was over R 5,7 million.
- [73] The Respondent explained that the different divisions (administration and operations) would do their own budgets, which included an allocation for travel expenses. She was responsible for the corporate services (administration) budget and travel expenses within that division. When the different divisions made travel bookings, they looked at their own travel budgets, and she was not responsible for the travel budgets or expenses of other departments. Those travel expenses were covered by the relevant department's own budget.
- [74] The Respondent emphasised that she did not control the budget of the general manager: operations. She testified that *"I am controlling my budget and my responsibility is to make sure that I am authorising within what is*

allocated to me and not only that, also to manage the service fees against the contract value when I oversee that as a function that is actually assigned to my travel coordinator.” The tracking of the travel services was done manually by the travel coordinator because they had no automated system. The Respondent's version was that *“what I was managing there, it is the service fees..”*

Charge 2

- [75] Regarding the Vodacom contract, the Respondent explained that in July 2009 the Applicant had concluded a contract with Vodacom for handsets, routers, data etcetera and the contract was for a period of nine years, ending around June 2018.
- [76] She explained that every two years they would get new handsets and contracts, on the existing Vodacom contract, which was approved by the Board on 17 March 2016 for a period of two years. It took more than one year to implement the said approval, which was only implemented around November 2017. The upgraded contracts ran for the entire 2018 and were to expire at the end of 2019.
- [77] In March 2016 the acting CEO got approval from the Board for the acquisition of new handsets etcetera, and the said approval was communicated to management. The CEO indicated that the approval was obtained and that they should go ahead to acquire the handsets and do the upgrades *“because that has been the process we have been following all these other years. Even when we were following this very process the other years, after we have gotten approval from the Board and the go ahead from the CEO as the end user, we are the ones that were engaging directly with Vodacom, we were not engaging with supply chain and the reason for this is because there is already a contract in place that supply chain has prepared. Now you only go to them when there is something that they need to do, now there is nothing that they have to do. So, CEO given the instruction, we start engaging with Vodacom. Vodacom says to us, ja we see you sent us an email., just put it on the BankSeta letterhead and get it signed off”*. The CEO subsequently signed the letter which was sent to Vodacom and which gave them the go ahead.

- [78] After the Board approval, but before implementation, they learned from the CFO's office about the RT15 contract. The question was whether it would make sense to procure mobile services through the RT15 when the Applicant already had a contract with Vodacom in place. They did an analysis through Vodacom and found that there would be no savings for the Applicant by going the RT 15 route instead of *"the normal way that we have been doing things"*. The Respondent testified that Ms Dzurini's understanding and interpretation of the RT15 differed from hers and she engaged National Treasury. She called for a meeting with National Treasury, inviting the CEO, the CFO and Ms Baloyi, whose responsibility was to manage the Vodacom contract. Ms Dzurini refused to attend the meeting with National Treasury, and she attended it with the acting CEO and Ms Baloyi.
- [79] The Respondent explained that they followed a process with National Treasury and Vodacom around the question whether or not to use the RT15 and in the end Kwanele Mthembu, a director at National Treasury, advised them that *"you have done that which is required and you are not going to realise any saving from this contract, you are telling me further that you have an approval from your Board to extend the contract, you had just not implemented it because you wanted to first explore compliance with RT. Now that we have done this part you can actually go ahead and upgrade your phones with Vodacom. This is Kwanele, director assigned to guide public entities on the RT mobile. The Board says to us, try and find this Kwanele, bring her here, let us hear it from Kwanele because there is this view that keeps on coming that is different. A meeting is arranged at BankSeta, Kwanele Mthembu is attending the meeting at BankSeta, the CEO is attending the meeting, the CFO is attending the meeting, I am attending the meeting.....so the discussion goes on and on in that meeting and ultimately the feedback we are getting from Kwanele is that there is nothing illegal about what we have done"*.
- [80] The Respondent testified that even before implementing the upgrades with Vodacom, they contacted the Applicant's lawyers, who went with them to National Treasury and she kept on engaging on the issue. Ms Dzurini did not attend any of the meetings, notwithstanding the fact that she was invited to attend. After a meeting with National Treasury, the lawyers sent an email

“telling us that there is nothing irregular about what is happening. We must go and then report that to the Board”.

- [81] The Respondent explained that *“I have applied everything that I thought I could, I have engaged everybody that I though needed to be engaged. I went to my superior, we sought advice from our lawyers, we engaged National Treasury and all the parties relevant. I did not know where else to go and it was my conclusion that what we have done is sufficient. So, when we were talking with the CEO and CEO says no I am comfortable, upgrade, I was comfortable in upgrading because I felt it is the right thing to do. So, we pressed the button and we get the phones and everything else. We continue making use of that (sic) phones, it was say from January 2018 it goes the whole year... 2019 in September I am charged with having caused irregular expenditure...”*.
- [82] In short the Respondent's defence on charge 2 was that she was merely extending an existing contract. She prepared the letter, which was signed by the acting CEO in November 2017, requesting an upgrade of existing contracts and applying for new contracts. It was put to her during cross-examination that the letter of November 2017 did not only upgrade existing contracts, but it also applied for new contracts and services and the problem was the to procure new services, the Applicant had *“to go through RT 15 to procure these new services and if you do not go through RT 15 you have to go out on tender”*. The Respondent explained that the RT 15 was not mandatory but provided an option. In this instance they did not procure because there was already an existing contract. The Respondent conceded that the National Treasury Circular on the implementation of the national mobile communications strategy provided *inter alia* that where contracts with mobile service providers expired after 30 April 2016, those contracts must be honoured until completion, but after completion departments and entities would be required to implement the RT15. She conceded that she was aware of the said circular, which was issued in March 2016 and that the letter of November 2017 was prepared after the circular became effective.
- [83] It was put to the Respondent that the mere fact that she requested an upgrade as well as new services, suggested that the existing contract was expiring.

The Respondent disputed this and explained that the Applicant had entered into a contract with Vodacom in 2009, which was for a period of 9 years and thus it only expired in July 2018. It was for this reason that they proceeded on the basis that there was an existing contract.

- [84] The issue remained that new mobile telecommunication services were procured without following a tender procedure. The Respondent insisted that *“the prescript or the circular says if there is a contract in place honour that contract until completion. Was there a contract in place? And my answer is yes”*.
- [85] In my view this understanding was incorrect. The said circular directed departments and entities not to renew cellular contracts which were to expire by April 2016, but if the expiry was after April 2016, the contract must be honoured until completion, but thereafter RT15 must be implemented. The mobile contract had to be honoured until its expiry and could not be used for extension and the procurement of new services for a further two year period just because it was existing after April 2016. It had to be honoured only until its expiry.
- [86] Be that as it may, the Respondent testified that the irregularity around the Vodacom contract was investigated and she had an interview with the head of internal audit around July 2018. She explained the steps that were taken and was told that the irregularity was that she had implemented a two-year contract with Vodacom when National Treasury only gave approval for one year. The Respondent testified that she had never seen the letter from National Treasury, dated 22 September 2016, which gave approval for extension of the Vodacom contract for only one year. The Respondent explained that she was very puzzled because of the long journey they took to upgrade the Vodacom contract, during which she would not have ignored a letter from National Treasury indicating that the contract could only be extended for one year. She confronted the CEO, who said that she had never seen the letter from National Treasury before. She asked the CFO if she knew about the letter from National Treasury, and she said she that she knew about it, but did not explain why she did not inform the Respondent about the letter. The Respondent's version is that she only learnt of the existence of the said

letter long after the contracts were extended and when the matter was investigated by internal audit. She explained that the letter from National Treasury was dated 22 September 2016 and the phones on the Vodacom contract was only upgraded in December 2017, which would have given SCM ample time to share the existence of the letter with her.

- [87] In February 2018 the acting CEO requested partial exemption from the RT15 from National Treasury and the request included “*condonation for sourcing voice services directly from Vodacom*”. The Respondent conceded that the request for condonation was made in respect of the services requested and obtained in terms of the letter dated 28 November 2017.

Analysis of the arbitrator’s findings and the grounds for review

The test on review

- [88] I have to deal with the grounds for review within the context of the test this Court must apply in deciding whether the arbitrator's decision is reviewable. The test has been set out in *Sidumo and another v Rustenburg Platinum Mines Ltd and others*¹ (*Sidumo*) as whether the decision reached by the commissioner is one that a reasonable decision maker could not reach. The Constitutional Court held that the arbitrator's conclusion must fall within a range of decisions that a reasonable decision maker could make.

- [89] The Labour Appeal Court (LAC) in *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA*² affirmed the test to be applied in review proceedings and held that:

‘In short: A reviewing court must ascertain whether the arbitrator considered the principal issue before him/her; evaluated the facts presented at the hearing and came to a conclusion that is reasonable.’

- [90] The reviewing Court must consider the totality of the evidence and then decide whether the decision made by the arbitrator is one that a reasonable decision maker could make³.

¹ 2007 28 ILJ 2405 (CC) at para 110.

² (2014) 35 ILJ 943 (LAC).

³ (2014) 35 ILJ 943 (LAC) at paras 18 and 19.

[91] In *Quest Flexible Staffing Solutions v Lebogate*⁴ the LAC confirmed the test to be applied on review:

'The test that the Labour Court is required to apply in a review of an arbitrator's award is this: "Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?" Our courts have repeatedly stated that in order to maintain the distinction between review and appeal, an award of an arbitrator will only be set aside if both the reasons and the result are unreasonable. In determining whether the result of an arbitrator's award is unreasonable, the Labour Court must broadly evaluate the merits of the dispute and consider whether, if the arbitrator's reasoning is found to be unreasonable, the result is, nevertheless, capable of justification for reasons other than those given by the arbitrator. The result will, however, be unreasonable if it is entirely disconnected with the evidence, unsupported by any evidence and involves speculation by the arbitrator.

An award will no doubt be considered to be reasonable when there is a material connection between the evidence and the result or, put differently, when the result is reasonably supported by some evidence. Unreasonableness is, thus, the threshold for interference with an arbitrator's award on review.'

[92] In *Bestel v Astral Operations Ltd and others*⁵ the LAC considered the limited scope possessed by this Court to review an arbitration award and accepted that an arbitrator's finding will be unreasonable if the finding is unsupported by any evidence, if it is based on speculation by the arbitrator, if it is disconnected from the evidence, if it is supported by evidence that is insufficiently reasonable to justify the decision or if it was made in ignorance of evidence that was not contradicted.

[93] This aspect was more recently reflected upon by the LAC in *National Bargaining Council for the Road Freight and Logistics Industry v Deyssel NO and Others*⁶ where the question of material errors of law committed by an arbitrator was considered. The LAC referred to the reasonableness standard

⁴ (2015) 36 ILJ 968 (LAC), [2015] 2 BLLR 105 (LAC) at para 12 and 13.

⁵ [2011] 2 BLLR 129 (LAC) at par 18.

⁶ [2025] 8 BLLR 790 (LAC), (2025) 46 ILJ 1679 (LAC) (*Deyssel*).

established in *Sidumo*⁷ and found that the ‘threshold of reasonableness’ established by the judgment recognises that in relation to the penalty of dismissal, value choices may differ in relation to the same factual matrix but nonetheless fall within a range of decisions to which a reasonable decision-maker could come. The metaphor of an elastic band has been usefully employed to illustrate the applicable threshold – the function of the review court is to determine the point to which the elastic of reasonableness can stretch without snapping.⁸

[94] It is within the context of this test that I have to decide this application for review.

The arbitrator’s findings and grounds for review

[95] The main issue to be decided by the arbitrator was whether the Respondent’s dismissal was substantively fair.

[96] The arbitrator considered the two charges that resulted in the Respondent’s dismissal as well as the evidence adduced in respect of the charges.

Charge 1:

[97] In analysing the misconduct relating to the TWF contract, the arbitrator recorded that the Applicant had concluded a contract with TWF in December 2017, to render travel services to the Applicant until 31 March 2020 in the amount of R 5 189 280.

[98] The Respondent’s version was that the said contract was for travel management service, excluding airfares, accommodation, car hire, traffic fines etcetera. TWF would facilitate the travel and will bill the Applicant the travel management fee for having facilitated the travel in question. The payment for flight tickets, accommodation, car hire etcetera would be in addition to the service management fee and would come from the budget of the responsible general manager, depending on where the travel request was initiated from (operations or administration).

⁷ *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] ZACC 22; [2007] 12 BLLR 1097 (CC).

⁸ *Deyse* ibid at para 31.

- [99] The Applicant's version on the other hand was that the contract with TWF was not a contract for travel management service fees, but it was a travel contract which encompassed the booking of flights, paying of accommodation, car hire etcetera including all travel related activities.
- [100] The arbitrator referred to paragraph 1.2.17 of the TWF contract which provided that the services to be provided were as set out in clause 4. Clause 4.1 provided that TWF would render travel management services to the Applicant. The Respondent, the SCM and the CEO of TWF had a similar understanding of what the contract fee was, namely that it only included service fees and did not cover all services rendered.
- [101] The arbitrator accepted that the Respondent *"at the time of the incident has a bona fide belief that the contract in question was for travel management fees only. The applicant's understanding of what the contract is for was shared or similar to that of the Group CEO of TWF. What cemented the aforesaid understanding into the applicant's mind is the budget for travelling allocated to different divisions. The applicant testified that her division was allocated an annual budget of R2 million for travelling. If the R 5 189 280,00 was to cater for the entire travelling exercise, then what was the annual travelling budget for?"*
- [102] The arbitrator held the view that there was a common understanding between the acting CEO at the time, who was at the helm of the Applicant, the Board and TWF that the contract was for travel management service fees only. There was no evidence that the CFO advised the Respondent between 2018 and 2019 that she was overspending on the budget for travelling.
- [103] The arbitrator concluded that there was no evidence to show that someone interpreted the TWF contract for the Respondent in order for her to have a clear understanding of what it is all about. She found that at the time she effected the payments, the Respondent was not aware that she was overspending and *"as such, it cannot be said she committed misconduct"*.
- [104] The Applicant took issue with the arbitrator's findings in respect of the first charge and raised several issues as grounds for review. The gist of the review relates to the way the arbitrator dealt with the evidence - more specifically,

how she considered and accepted evidence that was not tested with the Applicant's witnesses or which was unsubstantiated and further that the arbitrator ignored relevant evidence.

[105] In my view, there is merit in this ground for review, as there are obvious difficulties with the arbitrator's assessment of the evidence and her findings based on the evidence and her assessment thereof.

[106] The first difficulty raised by the Applicant is that the arbitrator's findings are contradictory and mutually exclusive, which render them irrational and unreasonable. On the one hand the arbitrator found that the Respondent was of the belief that the TWF contract was for travel management service fees only and this understanding was cemented by the fact that the Respondent's division was allocated an annual budget of R 2 million for travelling. The arbitrator concluded that *"if the R 5 189280,00 was to cater for the entire travelling exercise, then what was the annual travelling budget for?"*. The finding is effectively that there was no overspending as the TWF contract was for service management fees only.

[107] On the other hand the arbitrator found that the Respondent was not advised by the CFO that she was overspending on the budget for travelling, nobody interpreted the contract for the Respondent in order for her to have a clear understanding of *'what it is all about'* and at the time she effected the payments, she was not aware that she was overspending. Thus, effectively the arbitrator accepted that there was indeed overspending, but that the Respondent was not aware of it.

[108] The second difficulty with the arbitrator's findings is that they were based on an acceptance of evidence that was either unsubstantiated or untested.

[109] It is trite that after a witness has given his or her evidence in chief, the other party is given the opportunity to cross-examine the witness. The intended purpose of cross-examination is *inter alia* to reveal weaknesses in the evidence adduced, to challenge the truth or accuracy of the witness's version, to bring to light facts reinforcing the cross-examiner's case, to elicit favourable facts, to place a defence on record and to put the version of the cross-examining party.

[110] A party has a duty to cross-examine on aspects which he or she disputes. The rationale of the duty to cross-examine is that the witness should be cross-examined to afford him or her an opportunity of answering points supposedly unfavourable to him.

[111] The failure to cross-examine a witness about an aspect of his or her evidence may have the result that the evidence may not be called into question later. The cross-examiner who disputes what the witness says has a duty to give the witness an opportunity to explain his or her evidence, to qualify it or to reveal its basis. Failure to do so has been dubbed extremely unfair and improper⁹. Apart from the injustice to the witness, failure to cross-examine may indicate acceptance, comparable with an admission by silence¹⁰. From this point of view, such evidence will carry more weight than evidence disputed by means of cross-examination and the failure to cross-examine will be a factor increasing evidential value¹¹.

[112] A failure to cross-examine a witness on any aspect is generally considered to be an indication that the party who had the opportunity to cross-examine did not wish to dispute the version or aspects of the version of the particular witness who was available for cross-examination¹². A cross-examiner is duty-bound to put his or her defence or version on each and every aspect he or she wishes to place in issue, to the witness.

[113] In *Masilela v Leonard Dingler (Pty) Ltd*¹³ the Court was faced with a scenario where a version was not put to a witness in cross-examination and held that:

‘The problem that I have with the applicant's version where it differs from that of Masina is that none of it was put to Masina while he was testifying. This court has been denied the benefit of Masina's response. It is trite that if a party wishes to lead evidence to contradict an opposing witness, he should first cross-examine him upon the facts that he intends to prove in contradiction, to give the witness an opportunity for explanation. Similarly if the court is to be asked to disbelieve a witness, he should be cross-examined

⁹ *Small v Smith* 1954 3 SA 434 (SWA), *Barry v Mxaisa* 1977 4 SA 786 (O).

¹⁰ *S v Boesak* 2000 3 SA 381 (SCA).

¹¹ *Law of Evidence*, CWH Schmidt and H Rademeyer, Lexis Nexis, 9-54 – 9-72.

¹² See *President of the RSA v SARFU* 2000 1 SA 1 (CC).

¹³ (2004) 25 ILJ 544 (LC) at para 28.

upon the matters that it will be alleged make his evidence unworthy of credit. In *Small v Smith* 1954 (3) SA 434 (SWA) Claassen J said at 438:

"It is, in my opinion, elementary and standard practice for a party to put to each opposing witness so much of his own case or defence as concerns that witness, and if need be, to inform him, if he has not been given notice thereof, that other witnesses will contradict him, so as to give him fair warning and an opportunity of explaining the contradiction and defending his own character. It is grossly unfair and improper to let a witness's evidence go unchallenged in cross-examination and afterwards argue that he must be disbelieved".'

- [114] To emphasise: a cross-examiner is duty bound to put to an opposing witness all of his or her own case or defence as concerns that witness, so as to give the witness and the opposing party a fair warning and an opportunity to respond to the case or the defence that has been put forward.
- [115] *In casu* the Applicant took issue with *inter alia* the fact that the arbitrator accepted that the Respondent had a *bona fide* belief that the TWF contract was for travel management service fees only and that such finding was supported by the fact that the said understanding was shared by the CEO of TWF and SCM. The difficulties with the arbitrator's findings are obvious.
- [116] The Respondent never disclosed her understanding of what the contract amount was for, her version that it only covered service management fees was not put to the Applicant's witnesses and neither was the CEO of TWF, nor the employee from SCM called as witnesses to support the Respondent's version that they shared her understanding. The Respondent's understanding was not aligned with the terms of the TWF contract and it became evident during her testimony that her understanding and interpretation of the contract, was nothing but her own, personal understanding and interpretation and that it did not align with the Applicant and her superior's understanding thereof.
- [117] At no stage prior to her own testimony during the arbitration proceedings, did the Respondent raise the defence that the contract amount was for service management fees only and that there was no overspending on the contract. This defence is indeed material, and it should have been raised and put to the Applicant's witnesses. The arbitrator failed to consider that it was strange that

such a material defence was not raised at any point prior to the last leg of the arbitration.

- [118] The arbitrator, in finding that because the Respondent was unaware that she was overspending and as such did not commit misconduct, did not consider the evidence of the Applicant's witnesses, especially its CFO, or the clear terms of the TWF contract. The arbitrator ignored material and relevant evidence and in the same breath she considered and accepted a version which was not supported by evidence, alternatively was not put to the Applicant's witnesses.

Charge 2

- [119] The arbitrator recorded that the Vodacom contract came to an end at the end of June 2018. Every time there was a need to acquire a handset or services, the Applicant would tap into the existing contract. The practice was for the Respondent to prepare a motivation to the CEO to upgrade handsets, which was done every two years and this exercise would extend the contract for the instrument.

- [120] The Respondent was aware of National Treasury Circular 2 of 2016/2017 at the time she applied for the upgrading of the handsets and she knew that the contract would expire at the end of July 2018. Paragraph 10 of Circular 2 provided that where contracts were expiring after 30 April 2016, those contracts must be honoured until completion. After the expiry of the contracts, departments and entities were required to implement the national mobile communication strategy.

- [121] On 17 March 2016 the Applicant's Board approved the SCM application for the extension of contracts. The arbitrator accepted the Respondent's version that the CFO told them about the RT15 after she had received approval from the Board and that the Respondent's interpretation of the RT 15 differed from that of the CFO.

- [122] The arbitrator considered that the Respondent sought clarity from National Treasury before she extended the Vodacom contract by 2 years and a director at National Treasury told her that there was nothing irregular, the Applicant's

attorneys also confirmed that the mobile service provider contract was not irregular expenditure.

[123] The arbitrator accepted that at the time the Respondent extended the Vodacom contract, she had assurance from National Treasury and the Applicant's attorneys that there was nothing wrong with her conduct, the application for extension was approved by the Board and she only learned of the letter from National Treasury, approving the extension for one year only, after the transaction was finalised and the handsets being delivered. The arbitrator found that the Respondent did not commit any misconduct and that the evidence suggested that the Respondent was dismissed for conduct which was approved by the previous Board and the acting CEO. According to the arbitrator the *"Conduct became a misconduct after the Acting CEO has left and after the new Board has been put in place"*.

[124] The Applicant submitted that the arbitrator ignored Ms Dzurini's evidence that the Applicant was expected to procure mobile services either through the RT15, or by going out on tender. The Respondent extended the Vodacom contract by upgrading the existing services and procured new services without resorting to RT15, without exemption from RT15 and without going through a tender process. The Applicant further submitted that the arbitrator ignored the evidence that after the Respondent procured goods and services without resorting to tender, she tried to obtain an exemption from the National Treasury to condone the non-compliance with SCM processes. The Respondent's attempts to obtain exemption from National Treasury and to cancel the Vodacom contract, was not the conduct of someone who was mandated by the Board or National Treasury to extend the Vodacom contract. This aspect was ignored by the arbitrator.

[125] In my view there is merit in this ground for review.

[126] Considering the arbitrator's analysis of the evidence on charge 2, it is evident that the arbitrator did not consider the Applicant's version or evidence adduced by Ms Dzurini at all. A perusal of the transcribed record shows that the arbitrator was faced with conflicting versions and as such she had to evaluate the plausibility of the versions and of their relative probabilities.

[127] It is trite that an arbitration is a hearing *de novo* and that it calls for a fresh determination as to the fairness or otherwise of the employee's dismissal, based on all the evidential material that is placed before the arbitrator¹⁴.

[128] The approach to be adopted by arbitrators when faced with two disputing versions was set out in *Sasol Mining (Pty) Ltd v Ngeleni NO and Others*¹⁵ (*Sasol*), where it was held that the arbitrator must conduct an

‘...assessment of the credibility of the witnesses, a consideration of the inherent probability or improbability of the version that is proffered by the witnesses, and an assessment of the probabilities of the irreconcilable versions before the commissioner.’

[129] In *Sasol* the Court also held that it was one of the prime functions of a commissioner to ascertain the truth as to the conflicting versions before him. The Court held that:

‘What he manifestly lacked was any sense of how to accomplish this task, or which tools were at his disposal to do so. The commissioner was obliged at least to make some attempt to assess the credibility of each of the witnesses and to make some observation on their demeanour. He ought also to have considered the prospects of any partiality, prejudice or self-interest on their part, and determined the credit to be given to the testimony of each witness by reason of its inherent probability or improbability. He ought then to have considered the probability or improbability of each party's version. The commissioner manifestly failed to resolve the factual dispute before him on that basis. Instead, he summarily rejected the evidence of each of the applicant's witnesses on grounds that defy comprehension.’

[130] The arbitrator had to follow the approach as set out by this Court and she had to assess the credibility of the factual witnesses, their reliability and overall assessment of the inherent probabilities of the different versions before her.

[131] *In casu* it is apparent from the transcript that the Applicant's witnesses were not challenged in any material way during cross-examination and the Respondent's version was not put to the Applicant's witnesses.

¹⁴ *Country Fair Foods (Pty) Ltd v CCMA and others* (1999) 20 ILJ 1701 (LAC), *IMATU obo Strydom v Witzenburg Municipality and others* (LAC) Unreported judgment handed down under case number CA 08/08.

¹⁵ (2011) 32 ILJ 723 (LC) at 727C-F.

[132] Glaringly absent from the arbitration award is an assessment of the credibility of the witnesses or the inherent probabilities of the versions presented. The essential ingredients of an assessment of the credibility of the witnesses and the inherent probability or improbability of the versions before her, is missing in the arbitration award. The arbitrator failed to perform one of her primary functions, she did not undertake a full analysis of the evidence and the probabilities as they presented themselves during the arbitration proceedings.

[133] In *Sidumo and another v Rustenburg Platinum Mines Ltd and others*¹⁶ Ngcobo J stated at 268:

'[W]here a commissioner fails to have regard to the material facts, the arbitration proceedings cannot, in principle, be said to be fair because the commissioner fails to perform his or her mandate. In so doing, in the words of Ellis the commissioner's action prevents the aggrieved party from having its case fully and fairly determined. This constitutes a gross irregularity in the conduct of the arbitration proceedings, as contemplated by s 145(2)(a) (ii) of the LRA. And the ensuing award falls to be set aside not because the result is wrong but because the commissioner has committed a gross irregularity in the conduct of the arbitration proceedings.'

[134] *In casu* the arbitrator failed to have any regard to the credibility and reliability of any of the witnesses, nor did she have regard to the inherent probabilities of the versions before her. Instead, the arbitrator failed to consider relevant evidence, she based her findings on unsubstantiated evidence, rather than the evidence presented and she took into consideration almost only the Respondent's version. All the aforesaid culminated in findings that were unreasonable.

Conclusion

[135] The arbitrator made findings a reasonable decision maker could not have reached, and she arrived at conclusions which were not rational, given the facts of the matter and the evidence adduced. She failed to assess the versions presented and failed to decide the matter on a balance of probabilities.

¹⁶ (2007) 28 ILJ 2405 (CC); [2007] 12 BLLR 1097 (CC).

- [136] The question that this Court must ask on review is whether the way the arbitrator dealt with the evidence, constituted an irregularity or error which was material, and if it was material, whether it impacted on the determination of the question whether the Respondent's dismissal was substantively fair and whether it ultimately distorted the arbitrator's decision and the outcome of the proceedings.
- [137] The arbitrator failed to take cognisance of the material evidence placed before her and she had failed to assess the totality of the evidence presented. It was incumbent upon her to make credibility findings and to state why she accepted one version and rejected another, which she dismally failed to do. The arbitrator had no sense of how to accomplish this task and she failed in her duties as arbitrator. There is no proper assessment or analysis of the evidence nor any coherent reasoning, and evidently the arbitrator was wholly incapable of analysing the evidence and making findings based on what was presented.
- [138] I must consider the grounds for review within the context of the test this Court must apply in deciding whether the arbitrator's decision is reviewable. The ultimate question is whether holistically viewed, the decision taken by the arbitrator was reasonable based on the evidence placed before her.
- [139] On a holistic consideration of the facts before the arbitrator, her finding that the Respondent's dismissal was substantively unfair, for the reasons recorded in the arbitration award, is not reasonable.
- [140] The relevant authorities indicate that misdirections of this sort invariably have the consequence that an award will be unreasonable in its result. Whether the award stands to be set aside is a second-stage enquiry which requires an assessment of the reasonableness of the outcome. A review court may intervene if and only if the outcome or result of the proceedings under review represents a decision to which no reasonable decision-maker could come on the available evidence. What this requires is the review court to determine whether on the evidence, and regardless of any reviewable irregularity committed by the arbitrator, the result should nevertheless be sustained because it represents a reasonable outcome.¹⁷

¹⁷ *Head of the Department of Education v Mofokeng and others* [2015] 1 BLLR 50 (LC).

[141] For the reasons already alluded to *supra*, I am not persuaded that the outcome of the proceedings under review can be sustained. It is unreasonable and does not pass the test as set out in *Sidumo*.

[142] It follows that the arbitration award is to be interfered with on review.

Relief

[143] This leaves the issue of relief.

[144] The Applicant seeks for the arbitration award to be reviewed and set aside and to be substituted with an order that the Respondent's dismissal was substantively fair.

[145] In the event the award is set aside on review, this Court has a discretion whether or not to finally determine the matter.

[146] *In casu* the arbitrator failed to determine the real dispute, failed to consider and decide the conflicting versions and to a large extent, she failed to consider the Applicant's version. The arbitrator failed to apply the applicable principles of the law of evidence when she accepted a version that was not tested as the basis for her ultimate findings.

[147] It is not the duty of the review Court to assess the inherent probabilities of the versions presented or to make credibility findings. I am not inclined to substitute the award where principal and material issues were not properly determined, where conflicting versions were not considered or assessed and no coherent reasons were provided for accepting the Respondent's version, which was not put to the Applicant's witnesses and where the arbitrator over all failed to carry out one of her principal functions.

[148] I am of the view that it would be in the interest of justice to remit the matter for a hearing *de novo*.

[149] This Court has a wide discretion in respect of costs and in this is a matter where the interest of justice will be best served by making no order as to cost.

[150] In the premises I make the following order:

Order

1. The arbitration award dated 5 June 2023 and issued under case number GATW2051-22 is reviewed and set aside;
2. The dispute is remitted to the Third Respondent for a hearing *de novo* on the issue of substantive fairness before a commissioner other than the Second Respondent;
3. There is no order as to costs.

Connie Prinsloo

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr B Ndou from Ndou Attorneys

For the First Respondent: Advocate K T Kgole

Instructed by: Baepi Attorneys

LABOUR COURT