(1) Reportable: NO	
(2) Of interest to other Judges: NO	
Signature	Date
[redacted]	08/05/2026

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

CASE NO: JR1124/23

In the matter between:

NONKULULEKO MQAKA Applicant

and

MICHAEL HOWITZ *NO* First Respondent

COMMISSION FOR CONCILATION, MEDIATION AND ARBITRATION Second Respondent

MOTOR INDUSTRY BARGAINING COUNCIL Third Respondent

Heard: 5 March 2026

Delivered: 8 May 2026

Headnote: Review of arbitration award ~ commissioner committing several material errors including irregularly admitting hearsay evidence ~ award unreasonable ~ award reviewed, set aside, and substituted with finding that the dismissal was substantively unfair ~ applicant reinstated.

JUDGMENT

DANIELS J

Introduction

[1] Until her dismissal on 23 March 2022, the applicant was employed by the third respondent, the Motor Industry Bargaining Council (hereafter "the MIBCO" or "the employer") as its General Manager: Finance. The applicant challenged the fairness of her dismissal on both procedure and substance. The first respondent (hereafter "the commissioner") issued an arbitration award (hereafter "the award") finding that her dismissal was fair in all respects. The applicant seeks to review and set aside the award.

Material facts

[2] The applicant was a very senior manager within the finance department of MIBCO.[1] The MIBCO notified her of disciplinary charges against her on or about 28 June 2021. The notice identified five separate charges, which contained sub-charges.

[3] At her disciplinary hearing, MIBCO withdrew the first charge and abandoned part of charge 3(d). The chairperson dismissed charges 2(a), 2(b), 3(c) and 4(c).[2] The following charges were relevant to her dismissal: 2(c), 3(a), 3(b), part of 3(d), 4(a) and 4(b). The chairperson found that charge 5 (destruction of the trust relationship) could not be considered a charge, given that it did not relate

[1] At arbitration, the respondent assumed that the applicant was the most senior employee within the finance department, however the applicant testified that she reported to another manager.

[2] Pleadings bundle p33, disciplinary chairperson's findings at para 21

to misconduct but was the consequence of misconduct.[3] The chairperson found the applicant guilty of the following charges:

- Charge 2(c): She interfered with the Covid19 regulatory process when one of your employees, Maggie, was confirmed positive for Covid19. Instead of conducting proper investigations in her department she intimidated a member of the task team (Ithabeleng) and demanded to know why she mentioned the confirmed laboratory case in her departmental communication.

- Charge 3(a): She failed to require Tshepo to declare his business as per policies.

- Charge 3(b): She failed to discipline Tshepo and his team leader for non-adherence to the workplace plan and the health and safety laws for entering an isolation room and sitting with a clinical case which exposed other employees to risk. It further contravened the Disaster Management Act and the workplace plan.

- Charge 3(d): She left journals for 2018 – 2019 and 2019 – 2020 open. This poses a huge risk in the MIBCO financials and audit as they are open to fraud and/or dishonest conduct taking place.

- Charge 4(a): She disrespected colleagues by interfering in their work during the Avis tender investigation, intimidated them, and barred them from retrieving files necessary to conclude the investigation, abusing her powers.

- Charge 4(b): She mistreated employees which stirred up hostility between employees and management.

[3] Pleadings bundle p85, disciplinary chairperson's findings at para 47

The arbitration

[4] The following evidence was presented to the commissioner:

4.1 Mr Jaco Lessing[4] (hereafter "Jaco") an official of the employer organisation which represented the third respondent in the disciplinary hearing. Jaco testified that the disciplinary hearing took seventeen days over eighteen months, during which time the applicant was suspended on full pay. Jaco denied that any of the charges were vague and asserted that the applicant never requested clarification of the charges, despite being legally represented at the disciplinary hearing.

4.2 Ms Lilian Ntoagae ("Lillian") the MIBCO human resources manager testified as follows.

4.2.1 She had a difficult relationship with the applicant and at one point a senior executive was called in to mediate between the two of them.

4.2.2 According to Lillian, the applicant was obliged to investigate whether her subordinate, Mr Tshepo Molefe ("Tshepo"), had declared his private business to the MIBCO. If Tshepo had not declared his business in terms of the policy, the 'Code of Business Ethics,' the applicant was obliged to discipline him. During cross examination ("cross") it was put to Lillian that the applicant was not aware that Tshepo had not declared his business interests, to which Lillian replied that she should have checked. It was put to Lillian that the policy required that Tshepo make the declaration.[5]

[4] The witnesses are referred to by their first names, solely for the sake of convenience, to ensure consistency with the arbitration record.

[5] Code of Business Ethics, clause 6.1, Record V3 p260. Clause 13 states that all employees are required to complete the declaration of interests prior to commencing employment and are required to ensure that the declaration stays up to date for the duration of their employment.

Lillian testified that the applicant, as a manager, was required to support human resources and provide it with information. Notably Lillian did not suggest that human resources was unaware that Tshepo had not made a declaration of interests. It was put to Lillian that other managers were also aware that Tshepo was running his own business, which she could not deny.

4.2.3 Lillian testified that the applicant hindered the investigation of the Avis tender by delaying the disclosure of tender documentation to external auditors.

4.2.4 Lillian testified that the applicant was controlling and demanding and, in short, the applicant was a bully.

4.2.5 Lillian testified that Ms Ithabaleng Mphole ("Ithabaleng") complained to her that she was unjustly accused, by the applicant, of revealing to staff that Ms Maggie Pooe ("Maggie") had tested positive for the coronavirus. The applicant asked Lillian to investigate if Ithabaleng committed misconduct by revealing Maggie's identity. It was put to Lillian that Maggie complained to the applicant[6] and this prompted her to request that Lillian investigate.

4.2.6 Lillian conceded that, during the pandemic, management decided to ask employees for their written consent to reveal their names. Notably, Lillian did not suggest that Maggie had signed a consent form.[7]

[6] Record V12 lines 1 – 19

[7] The document is titled 'letter of consent' (Record V4 p383). The applicant testified that Maggie had not consented.

4.2.7 Lillian testified that, after applicant's request for an investigation, she spoke sternly to Ithabaleng and asked for a report. Ithabaleng reported that she had not informed staff that Maggie tested positive. They were already aware of this.

4.2.8 It was put to Lillian that the applicant had not met with Ithabaleng and could not have intimidated her. Lillian testified that the email,[8] from the applicant to her, asking her to investigate Ithabaleng's conduct, constituted the intimidation.[9] Lillian testified that she forwarded the applicant's email to Ithabaleng.[10]

4.2.9 Lillian testified that another employee (referred to only as "Kgomotso")[11] reported that Tshepo had entered the isolation room when Ms Mary Malete ("Mary") was in the room with Ms Maggie Pooe ("Maggie"), who was feeling sick.

4.2.10 Lillian testified that Tshepo was not permitted to enter the isolation room when Mary was already there with Maggie. Lillian conceded that there was no written rule[12] indicating the maximum number of

[8] See Record V4 p377 and Record V11 p1077 (lines 9 – 21). The email alleged to constitute intimidation, addressed by the applicant to Lillian, states:

> "*Dear Lillian,*
>
> *It has been reported to me that there were meetings held by Ithabaleng during the week where Maggie's name was made public to everyone as a person who tested positive for covid-19 and as a reason MIBCO was closed this week. I am really aggrieved by how Maggie's case has been treated by HR and I have urged the committee to investigate. I am now not urging but asking you to investigate Maggie's case even the way the email was written by Ithabaleng addressed to all MIBCO staff was really not acceptable. I have asked for another investigation to be done by HR on an unrelated matter it has been 3 weeks I have heard nothing from HR about the investigation, I hope this one will be given priority and the seriousness it deserves or else I will be left with no choice but to report this to AAC and ask them for an investigation.*"

[9] Initially, Lillian testified that the applicant had intimidated Ithabaleng during a meeting (Record V11 p1099).

[10] Record V12, p1139 lines 7 – 13; this was contradicted by Ithabaleng who testified that she did not see the email before the arbitration.

[11] This individual, referred to only as Kgomotso, did not testify.

[12] Record V11, p1065 lines 9 – 18

people who could enter the isolation room at the same time, but it was obvious from the term "isolation." It was put to Lillian that Tshepo was masked when he entered the room, which she could not deny.[13] It was put to Lillian that the room was big enough to permit social distancing for all three of the individuals.

4.2.11 Most senior managers, including the applicant and Lillian, were not present when the isolation room incident occurred.

4.2.12 Lilian testified that she received a call from the applicant, asking for guidance as to what should happen because Maggie arrived at the office, appeared sick, and was taken to the isolation room.

4.2.13 Lillian conceded that the applicant had a discretion as to whether to discipline staff in her department.[14] However, in her view, the applicant should have taken action against Tshepo, even if this was only a reprimand.[15] Notably, even though Lillian was also aware there were three individuals in the isolation room at the same time, she did not say that she suggested to the applicant that she ought to take action. Nor did Lillian explain why she did not take any action herself. The commissioner commented that, as head of human resources, Lillian could have acted.[16] Lillian did not respond to the comment.

4.2.14 Lillian conceded that charge 4 related to an alleged failure to disclose dishonest conduct (even though the substance of the

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[13] Record V11 p1041 lines 12 – 21

[14] Record V11 p1070 lines 24 – 25

[15] Record V10, p970 lines 7 – 20

[16] Record V11, p1056 lines 13 - 17

charge was unrelated). Lillian conceded that, to her knowledge, the applicant was honest.[17]

4.2.15 Under cross, Lillian conceded that the applicant had a clean record at the time of her dismissal.[18] She also conceded that the applicant had not lodged any grievances against her subordinates.

4.3 Mr Marwaan Davids ("Marwaan") the industry compliance and training manager, testified next. Marwaan was also manager for health and safety. Marwaan testified that initially he worked well with the applicant, but then things soured and eventually he laid a grievance against her. Marwaan testified that the applicant had laid a grievance against one of her own subordinates and this was her method intimidating them. Under cross, it was put to Marwaan that Tshepo and Mary were sanitised and wearing PPE when they entered the isolation room, which he could not deny. Although Tshepo contracted the coronavirus after her entered the isolation room, this was more than two weeks after the incident and probably unrelated to his entering the isolation room with Maggie.[19] Marwaan testified that the isolation room could accommodate three people at most, but it would be difficult for them to maintain a distance of 1.5 metres.[20] It was put to him that the isolation room was 5.5m x 5.5m which he could not deny.[21] It was put to him that the manager on duty, Tshepo, went into the room to see if Maggie could be assisted with transport to take her home. Marwaan conceded that the manager on duty should assist with getting the sick employee home.[22]

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[17] Record V10, p992

[18] Record V10, p988 lines 9 – 12

[19] In an email addressed to the applicant, dated 6 July 2020, Marwaan states that it is unlikely that Tshepo was infected by Maggie in the isolation room. See Record V4 p374

[20] Record V15, p1484 lines 4 – 6

[21] Record V16 p1575 lines 14 – 19; Note that the applicant requested an in loco inspection of the isolation room which the employer rejected as irrelevant. See Record Vol. 11 p1087, V11 p1091

[22] Record V16 p1579 lines 12 – 16

4.4 Ms Tlalane Kocha ("Tlalane"), the internal audit manager, testified as follows:

4.4.1 She assisted with an external audit into the MIBCO's contract to procure vehicles from Avis. Though the applicant sat on the Audit and Risk Committee with her, the applicant played no role in appointing the external auditors.

4.4.2 Tlalane explained that the audit was intended to start and complete within one month. She did not explain the need to complete the audit within a month. Under cross, it was put to Tlalane that the applicant was unaware of the period allocated for the audit, which she could not dispute. It was put to Tlalane that the audit commenced about one year after the Board decided to conduct an audit, something she could not dispute.

4.4.3 Tlalane requested certain documentation from the applicant, who promised to assist her.[23] The applicant, believing the documents were with the Board, referred Tlalane to the secretary to the Board, Ms Khensani Mohapi ("Khensani") who in turn referred her to Ms Lucia Buda ("Buda"). Buda, who worked in the finance department, told Tlalane that the documents were in a box underneath her desk. Tlalane walked to the finance department and removed the box. Despite the presence of other employees in the department, Tlalane did not speak to any of them before removing the box. She received an email from Mary, who requested that she identify the documents in the box. The applicant telephoned her, demanding to know who gave her the authority to remove the box. In chief, Tlalane testified that the applicant instructed her to return the files.

[23] Record V17 p1606 lines 20 – 25

Under cross, her evidence on this aspect was unclear.[24] The applicant called for an investigation as to why the documents were taken from the finance department without her authority.

4.4.4 Although the documents were supplied to the auditor, the applicant had delayed the audit by about two weeks. Tlalane did not testify when the audit was finalised, nor did she testify that the employer was prejudiced.

4.4.5 Tlalane testified that, besides the applicant, Khensani also shouted at her and behaved unprofessionally.[25] Tlalane recorded this in two emails.[26]

4.4.6 In another email, addressed to Khensani, Tlalane noted that when documents are removed from the finance department someone must see what has been removed.[27]

4.4.7 Under cross, it was put to Tlalane that the applicant did not know what documents had been removed from the department and missing documents could result in qualified audits, which she could not dispute.

4.5 Ms Ithabaleng Mphole ("Ithabaleng"), a senior practitioner in the human resources department, testified next. Ithabaleng testified that:

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[24] The applicant disputed that she directed Tlalane to return the documents. When the witness was challenged on this evidence under cross, she explained that it was a confusing time for her. See Record V18 p1720 lines 5 – 20

[25] Record V17 lines 4 – 9

[26] Record V3 pp284 – 286

[27] Record V3, p288

4.5.1 After being informed Maggie tested positive for the coronavirus, she met with various departments, including 'client services' and 'returns.' In returns, staff asked her about Maggie, they were already aware that she tested positive. She did not reveal Maggie's identity.

4.5.2 Lillian contacted Ithabaleng and told her that the applicant requested an investigation of her conduct. She was intimidated because of the applicant's seniority. She did not see the applicant's email at the time and only saw it during the arbitration.[28] Ithabaleng did not testify that the applicant made any threat to harm her person or her property.

4.5.3 The applicant accused Ithabaleng of informing staff that, if they had been in contact with Maggie, they should be tested. The applicant was upset that Maggie's identity had been disclosed. However, it was necessary to disclose her identity because the coronavirus was spread through social interaction.

4.5.4 It was put to Ithabaleng, during cross, Marwaan sent an email[29] to management stating that the identity of infected employees should not be disclosed in open communications. Ithabaleng said that she had not seen that email.

4.5.5 The applicant should have disciplined Tshepo for entering the isolation room. Mary, a team leader, and the health and safety representative, was permitted in the room, but she should not have

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[28] Record V19 p1838 lines 1 – 10, V20 lines 1 – 25; Note that Lillian's evidence that she forwarded the applicant's email to Ithabaleng was inconsistent with this version.

[29] Record V4 p375

allowed Tshepo to enter. She too did not explain why human resources did not take any action against Tshepo.

4.5.6 Ithabaleng testified that the applicant threatened to lay grievances against her subordinates, which was a means to intimidate them.

4.5.7 Ithabaleng testified that employees had resigned because of the applicant. She testified that the applicant would sometimes walk past them without greeting them.

4.5.8 Under cross, Ithabaleng conceded that the applicant was a good performer, and that her duties were substantial.[30]

4.6 Prior to calling its next witness, Jaco advised the commissioner that "*... we say that posting a journal, is you finalise a journal. It has been finalised, but it has not been protected yet.*"[31] The parties, together with the commissioner, debated the need to produce the journals to the commission. The matter was debated although a subpoena had been issued, by the applicant, to produce the journals. The employer's representative refused to produce the journals and, initially, argued that it was impractical to do so. Later, Jaco indicated that the journals (to be more accurate this should refer to journal periods) had all been closed and there was no point in producing the journals.[32]

4.7 Mr Werner Taute ("Taute") was not introduced by the third respondent as an expert witness, in terms of the Rules of the CCMA, though he was

[30] Record V21 p2079 lines 17 – 22

[31] Record V21 p2081 lines 19 – 21

[32] Record V22 p2197 lines 1 – 10

referred to as an expert during the arbitration.[33] Taute had knowledge and experience of IT systems, particularly the Sage X3 accounting system. He did not testify that he possessed financial expertise but stated that he was aware of the "financial accounting rules."[34] Despite his absence of accounting expertise, Taute testified that journals entries may be amended after posting, and this could lead to fraudulent activities. Journal periods should be closed at least thirty days[35] after the end of accounting periods (monthly) so that journal entries cannot be changed. Taute, a consultant, testified that, during 2021, he was brought in by MIBCO to close off various journal entries. He found that there were hundreds of journal periods that had not been closed. Taute testified that, on Sage X3, there was a finalised button that the applicant, or her team, were supposed to push to ensure that the journal period was finalised or closed. If the button was not pushed the account was in an active or temporary status. Taute testified that the responsible person to close off journal periods is the financial manager or the chief financial officer.[36] Under cross, it was put to him that at the MIBCO closing off the journal periods was the responsibility of the IT department.[37] Taute had no knowledge of the MIBCO procedures before 2021 (the applicant was suspended in 2020) when he was brought in. Taute testified that there is a report known as the Cloper report[38] that should be used at the end of every month to determine whether there are any transactions that remain open and need to be closed. He testified that the applicant did not use the Cloper report. In chief,[39] Taute testified that the auditors were unhappy because the journal periods were not closed off.[40] However, under cross, Taute refused to disclose why the auditors were unhappy.

[33] Record V20 p1983 (lines 10 – 21), p1985 (lines 1 – 3)

[34] Record V22 pp2169 - 2170

[35] Record V22 p2182 lines 3 – 7

[36] Record V22 pp2185 lines 11 – 21

[37] Record V23 p2233 lines 1 – 19

[38] This is derived from the words "Close Period."

[39] Record V22 p2192

[40] This was clearly hearsay evidence, as defined by the Law of Evidence Amendment Act No. 45 of 1988.

4.8 The applicant, Ms Nonkululeko Mqaqa ("Mqaqa") testified as follows:

4.8.1 She was not personally responsible for closing off the journal periods.[41] Two employees worked directly under her namely a clerk, and a team leader. She testified that she was not qualified accountant, but she held technical qualifications that were the equivalent of Bachelor of Commerce degree.

4.8.2 She treated journal periods as being closed after posting because the act of posting alters the trial balance (whereas the closing the journal periods does not). Furthermore, changes cannot be made to posted journal entries in the absence of a further journal entry.[42] In the MIBCO the practice was that journal periods were kept open until the AGM had adopted the financial statements. She had done this for many years and there had never been any complaints from the auditors.[43] She therefore did not need to push the button marked "finalized" to prevent changes being made.

4.8.3 She did not use the Cloper reports but used other methods to validate and safeguard the journal entries.

4.8.4 Under her guidance, MIBCO received clean audits whereas there were many problems before her.[44] There were no complaints of fraudulent or dishonest conduct while she was financial manager.

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[41] Record V23 p2284 line 18

[42] Record V23 p2287 lines 10 – 22

[43] Record V24 p2303 lines 9 – 20

[44] Record V24 p2312

4.8.5 She never directly confronted Ithabaleng (about revealing Maggie's identity) and her email (which was alleged to be intimidating) was sent to Lillian, not Ithabaleng. She denied intimidating Ithabaleng.

4.8.6 Marwaan sent an email to management that personal information should not be shared to avoid stigma and protect privacy. Maggie did not consent to her identity being disclosed and complained to her about Ithabaleng's conduct. She was obliged to assist Maggie after the complaint.

4.8.7 She exercised her discretion against taking disciplinary action against Tshepo because, as a manager, he entered the isolation room to find out if Maggie required transport home.[45] Tshepo was simply trying to help. She telephoned Lillian for guidance, but Lillian had offered nothing concrete. In addition, there was no rule against Tshepo entering the isolation room when others were there already. Furthermore, Tshepo and Mary were both masked and the isolation room was large enough to accommodate them all safely. Their conduct was not risky.

4.8.8 The MIBCO policies required that staff declare their own business interests to human resources. She did not know that Tshepo had not done so when he was employed. The applicant testified that she was under no duty to investigate whether Tshepo had disclosed his business interests. Several other managers were also aware that Tshepo had private business interests.

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[45] Record V24 p2397 (line 20) to p2398 (line 5)

4.8.9 Tshepo asked her for permission to start at 10h00 because he had to travel from Tembisa and experienced difficulties with traffic. She agreed that he could work flexitime.[46]

4.8.10 She did not obstruct the Avis audit. She needed to remain detached, and neutral, because she may have to chair hearings arising from the audit. She believed the documents required for the audit were with Khensani and offered to assist Tlalane to get them. She objected to the unilateral removal of (unidentified) financial documents from her department because this could have led to qualified audits. She was entitled to reprimand Tlalane, who was her subordinate at the time.

Legal principles

[5] The arbitration and the arbitration award both constitute administrative action. Section 33(1) of the Constitution requires that the arbitral process, and the outcome, must be lawful, reasonable, and procedurally fair. It is in this context that the review test applicable to awards of the CCMA and Bargaining Councils, was formulated by the Constitutional Court as follows: *is the arbitration award one which no reasonable commissioner could reach on the material before him or her?*[47] This is known as the "reasonableness test."

[6] As to what is reasonable, this must be determined by the circumstances of each case. The court must consider factors such as the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing

46 Record V24 p2381

47 *Sidumo and another v Rustenburg Platinum Mines Ltd & others* (2007) 28 ILJ 2405 (CC) at para [110]

interests involved and the impact of the decision on the lives and well-being of those affected.[48]

[7] It is important to remember that reasonableness embraces a wide range of outcomes several of which may be reasonable.[49] The reasonableness of the outcome must be evaluated not solely on the reasons given by the commissioner, but on all the evidence.[50]

[8] Where a commissioner fails to apply his mind to the material issues, this will usually indicate that the outcome is unreasonable or that the nature of the enquiry was misconceived. However, when a mistake of fact or law does occur, what matters is its materiality – and whether it had a distorting effect on the outcome.[51]

[9] More recently, the Constitutional Court, in *Vodacom (Pty) Ltd v Makate and another*[52] ("*Vodacom*") held:

> "The duty of proper consideration is an integral component of the fair hearing right. The founding constitutional value of the rule of law and section 34 of the Bill of Rights require, in my view, that a court should have regard to all material evidence and all material submissions bearing on the issues it must decide. And the court must bring its reasoning to bear on those material issues and reach a conclusion on them. The evaluation of the evidence and reasoning may – as I say – be erroneous, but there cannot be a fair hearing in compliance with the rule of law and section 34 if proper consideration of the matter before the court has not occurred."
> (own emphasis)

[48] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and others* 2004 (4) SA 490 (CC) at para [45]

[49] *Goldfields Mining SA (Pty) Ltd v CCMA and others* (2014) 35 ILJ 943 (LAC) at para [14]

[50] *Fidelity Cash Management Service v CCMA & others* (2008) 29 ILJ 964 (LAC) at para [102]

[51] See *Head of the Department of Education v Mofokeng* [2015] 1 BLLR 50 (LAC) at para [33]

[52] (CCT 51/24) [2025] ZACC 13 (31 July 2025) at para [45]

[10] Given that the reasons provided for the award acts as the first indication of whether the evidence and the submissions received proper consideration by the commissioner, *Vodacom* held that:

> "the reasons should deal with the substantial points which have been raised; include findings on material questions of fact; refer to the evidence or other material upon which those findings are based; and provide an intelligible explanation of the process of reasoning that has led the judge from the evidence to the findings and from the findings to the ultimate conclusion."

Grounds of review and analysis

[11] The applicant alleges that the commissioner committed numerous material errors, which led to an unreasonable outcome.

[12] The applicant submits that the commissioner erred by finding that the applicant intimidated Ithabaleng. First, she argues, her request for an investigation can never be intimidation because the alleged intimidation is based solely on a subjective emotional state. Second, she argues, the conduct fell outside of the definition of intimidation in the disciplinary code.[53] Third, she argues, the commissioner failed to take into consideration that her email (demanding an investigation) was not seen by Ithabaleng before the arbitration.

[13] In my view, the submission has merit. The commissioner failed to engage with the definition of intimidation. In general, intimidation requires an unlawful threat of harm to either person or property, with the intention of causing fear.[54] In

[53] See Record V11 p1100 (lines 19 – 25). The disciplinary code defines intimidation as "*Any threat to kill, assault or cause damage to any employee, client/customer or visitor of the Council with the intention to compel or induce such employee, client/ customer or visitor to ....*"

[54] See *Solidarity on behalf of Kruger v Transnet SOC Ltd t/a Transnet National Ports Authority & Others* (2021) 42 ILJ 852 (LAC); See also *Moyo and another v Minister of Police and others* 2020 (1) SACR 373 (CC) where the Constitutional Court grappled with the definition of intimidation in the Intimidation Act No. 72 of 1982.

addition, the test of whether the conduct was intimidating is objective. On the employer's own version, the applicant made no threat to cause harm to the person or property of Ithabaleng. Instead, the commissioner relied solely on whether the applicant's email instilled fear in Ithabaleng. The commissioner did not consider the evidence that the alleged victim only had sight of the email (which allegedly constituted intimidation) at arbitration. The commissioner did not grapple with the definition of intimidation in the employer's disciplinary code. In the result, the commissioner's analysis of the issue was superficial and, in my view, unreasonable. The evidence did not establish any threat, coercion, abuse of authority or conduct capable of inducing fear.

[14] The applicant submits that the commissioner erred by failing to consider whether the applicant was obliged to investigate whether Tshepo had disclosed his business interests to human resources. The commissioner should have considered that Tshepo was employed when the Code of Business Ethics was in effect - which required him to submit a declaration of interests to human resources when he was employed. Secondly, line managers have no such duty because it is the duty of human resources to request a declaration of interests.

[15] This submission also has merit. The commissioner avoided proper engagement with the issue by stating: "*A manager has the duty to continuously check-up on subordinates, to ensure that they are not breaking the rules of the institution.*" The policy, the Code of Business Ethics, places the duty to declare business interests squarely on the employees themselves. The evidence revealed that Tshepo was obliged to submit a declaration of interests to the human resources department upon his employment. A reasonable decisionmaker would have applied his mind to the Code and concluded that the primary responsibility of ensuring compliance lies with human resources. However, the commissioner ignored the evidence and, in consequence, his findings regarding the issue were unreasonable.

[16] The applicant submits that the commissioner erred by not engaging with whether a rule existed which prevented more than two individuals from entering the isolation room, and whether the applicant was aware of such a rule. The applicant submits that the commissioner erred by neglecting her testimony that Mary and Tshepo were wearing masks when they entered the isolation room. In addition, submits the applicant, the commissioner erred by ignoring evidence that Maggie had not tested positive for the coronavirus at that time. In my view, these submissions also have merit.

[17] Once again, it is apparent that the commissioner did not engage with the material evidence and submissions. The commissioner states that the rule (prohibiting entry into the isolation room by more than two people) was apparent from the term "isolation." This overlooked the testimony of the health and safety manager that three people could enter the isolation room though it might be difficult to maintain a safe distance. The commissioner did not consider whether Tshepo was sitting in the isolation room, which was denied. Importantly, given the undisputed evidence that the isolation room was 5.5m x 5.5m, the commissioner ought to have considered whether it was possible for the three individuals to maintain a safe distance from each other.

[18] The applicant submits the commissioner erred in admitting hearsay evidence that she caused two individuals to resign. Furthermore, such evidence related to charge 2(a) which was withdrawn. In that charge, the employer alleged that the applicant went to great lengths to get rid of employees "*which created an unharmonious working relationship which led to some of these employees resigning*." Neither of the employees, who allegedly resigned because of the applicant, testified. Given that the evidence was hearsay, it should not have been admitted absent an application in terms of section 3(1)(c) of the Law of Evidence Amendment Act No. 45 of 1988 ("LEAA"). Despite this, this evidence was taken into consideration, as is apparent from paragraph 119 of the award.

[19] In *Exxaro Coal (Pty) Ltd v Chipana and others*[55] and *Goldplat Recovery (Pty) Ltd v AMCU obo Maluleke and others*[56] the Labour Appeal Court warned that hearsay evidence is not admissible unless admitted in the interest of justice following an application of LEAA. The appeal court warned that the CCMA is not at liberty to ignore the rules of evidence simply because it is a tribunal with a mandate to expeditiously dispose of disputes. The appeal court held that commissioners must be alert to the introduction of hearsay evidence and may not remain passive. In the circumstances, the admission of the hearsay evidence by the commissioner constituted an irregularity.

[20] The applicant submits the commissioner, without any proper consideration, accepted the evidence of Taute (over that of the applicant) that posting of journal entries, and closing of journal periods, are significantly different. The commissioner faced two irreconcilable versions as to whether the act of posting was effectively final. The applicant testified that a new journal entry was necessary to amend an earlier entry that had been posted. It was common cause that Taute was not an accountant, or a financial expert, though he had significant knowledge of the Sage X3 accounting software. By contrast, the evidence was that the applicant held qualifications which could be equated with a Bachelor of Commerce degree, and more than twenty years of experience in finance. Despite this stark contrast in the knowledge of accounting processes, the commissioner resolved the factual dispute by simply stating that Taute's version just "made sense".[57] The commissioner conducted no analysis of the probabilities[58] as illustrated by his failure to consider the applicant's undisputed testimony that she had used the same method for many years, that the MIBCO had clean audits under her watch, and her method was accepted by the

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[55] (2019) 40 ILJ 2485 (LAC) at para [24]

[56] *(JA02/25; JA09/25) [2026] ZALAC 18 (29 April 2026)* at para [35]

[57] Arbitration award at paras [131] and [134]

[58] When faced with disputes of fact, the court, or in this case, the commissioner, must have regard to the probabilities. However, where the probabilities fail to indicate where the truth lies, recourse must be to an estimate of relative credibility apart from the probabilities. See *Workforce Staffing (Pty) Ltd v Mjoli & another* (2024) 45 ILJ 1627 (LAC) at para [24]

auditors. This failure to consider the material evidence had a significant distorting effect on the outcome.

[21] The applicant submits that the commissioner ignored her undisputed testimony that the practice in the MIBCO was that the accounting periods would only be closed after the annual financial statements were approved at the Annual General Meeting. All Taute could say in response was that this was not 'best practice.' However, Taute could not testify about the practice before he became involved in the MIBCO - after the suspension of the applicant. Furthermore, Taute's evidence about 'best practice' related to accounting practices, an area in which he held no expertise.

[22] The applicant gave testimony, which was not disputed, that she was not directly involved with the processing of journals and that her subordinates, who were personally responsible for such tasks, were not disciplined. The commissioner failed to consider this testimony when assessing whether the employer applied discipline consistently. The Labour Relations Act No. 66 of 1995[59] ("LRA") requires commissioners to consider whether the rule, which the dismissed employee allegedly broke, was consistently applied. Section 203(3) requires any person interpreting or applying the LRA to consider any relevant code of good practice. In the circumstances, it is apparent that the commissioner failed in his duty to consider whether the employer had applied discipline consistently.

[23] The applicant submits that the commissioner erred by failing to grapple with the evidence that Tlalane had removed unidentified files from the finance department, in the applicant's absence, and without her authorisation. The commissioner ignored the evidence that no files were missing, all the files were handed over, the audit was completed, and the employer suffered no prejudice. In addition, the commissioner did not consider the potentially serious

[59] See Item 7(b)(iii) of Schedule 8 Code of Good Practice: Dismissal. The Code of Good Practice was in effect at the time of the arbitration. It has since been replaced by Code of Practice: Dismissal published on 4 September 2025 in *GG*53294 *GN*3470.

consequences of unidentified files being removed from the finance department without a handover, he failed to consider that the applicant had undertaken to get the files to Tlalane, he failed to consider that the audit was delayed for no more than two weeks, and he failed to consider that the applicant was unaware of the time period allocated to the audit. I accept the submission. These failures indicate, collectively, that the commissioner failed in his duty to consider all the material evidence and submissions with bearing on the issue. Had the commissioner applied his mind to the material evidence, he could not have concluded that the applicant had "interfered" with the audit and barred the disclosure of documents to the auditor. In the result, the commissioner's conduct and findings were unreasonable.

[24] The applicant submits that the commissioner erred by finding that the applicant stirred up hostility between management and employees, and mistreated or bullied employees, when there was inadequate evidence to justify such finding.

[25] Bullying is a species of harassment, and in certain circumstances may intersect with discriminatory conduct. It relates to conduct that has the effect of undermining an employee's right to dignity and equality. The Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace[60] underscores the need for employers to create a safe, healthy, and respectful work environment. Bullying can negatively impact the victim's mental wellbeing, as well as his or her performance at work. That said, it is important to bear in mind that branding an employee a bully could jeopardize his or her livelihood. It is in this context that we ought to consider the evidence that the employer relied on, for its submission that the applicant mistreated employees and engaged in bullying:

25.1 In relation to the audit, Tlalane testified that she was shouted at, in an unprofessional manner, by both the applicant and Khensani. Despite this, Tlalane laid no grievance against the applicant. Tlalane testified that she

[60] Published under the Employment Equity Act, *GG*46056 R1890 dated 18 March 2022

hardly ever interacts with the applicant. Her manager, Lillian, testified that she had no knowledge of Ithabaleng being intimidated by the applicant.[61]

25.2 Ithabaleng testified that she was often intimidated by the applicant but did not testify about any incidents of intimidation apart from the applicant's request that her conduct be investigated. Ithabaleng has never laid a grievance against the applicant. She had not seen the email (which allegedly constituted intimidation) until the arbitration.

25.3 Marwaan, as previously mentioned, is a senior manager. Indeed the evidence suggested that he was the applicant's senior. Marwaan testified that he had a good relationship with the applicant until he felt that he was not receiving adequate support from her. Marwaan laid a grievance against the applicant, but he did not elaborate on the precise nature of the grievance. Marwaan did not allege that the applicant bullied him.

25.4 Lillian is also a senior manager. She did not suggest that she was junior to the applicant. Lillian testified that she had difficulties with the applicant, and they requested an executive of the MIBCO to mediate.[62] Lillian did not testify that the applicant had bullied her.

25.5 The evidence of employees resigning from the MIBCO constituted hearsay evidence and was not admissible absent an application under LEAA.

25.6 The applicant testified that she is stern and does not seek to make friends at work. The applicant testified that, as a senior manager, who must enforce rules and policies, it was natural that she was not popular.

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[61] Record V11 p1100 lines 3 – 10

[62] The applicant testified that they resolved their differences through this process.

[26] In my view, the totality of the evidence was insufficient to justify a finding that she mistreated employees, bullied employees, or stirred up hostility between employees and management. Before making his finding, the commissioner did not engage with the evidence. Accordingly, the commissioner's finding that the applicant was guilty of charge 4(b) was unreasonable.

Conclusion

[27] For the reasons set out above, the review application must succeed, and the award must be set aside. The award is not reasonable in relation to the totality of the evidence presented to the commissioner. There being a complete record before me, there is no reason to refer the dispute back to the second respondent for rehearing. In the interest of the efficient resolution of employment disputes, it is appropriate to substitute the award with the court's own finding based on the evidence.

[28] Without unnecessarily repeating the evidence canvassed above, I find as follows:

28.1 The third respondent failed to prove that the applicant was guilty of the misconduct alleged in charge 2(c). As a manager, the applicant was entitled to, and required to, take up the privacy complaint from Maggie. This did not constitute "interference" in the Covid19 regulatory processes. As earlier explained, the evidence did not establish that the applicant intimidated Ithabaleng. The conduct fell well short of the established meaning of intimidation.

28.2 The third respondent did not prove that the applicant was guilty of the misconduct alleged in charge 3(a). The applicant was under no duty to investigate whether Tshepo had declared his business interests. She was unaware that he had not done so when he was employed. The declaration of interests was a human resources function, and the duty fell on it to ensure compliance. Human resources must have been aware that Tshepo was not compliant.

28.3 The third respondent failed to prove that the applicant was guilty of the misconduct alleged in charge 3(b). The evidence did not establish any rule, written or otherwise, which prohibited three employees from entering the isolation room at the same time. The evidence did not establish that Tshepo was sitting in the isolation room, nor did it establish the period he was present. The evidence did not establish that Tshepo or the team leader failed to use masks. The evidence did not establish that the individuals in the isolation room failed to maintain a safe distance from each other.

28.4 The third respondent failed to prove that the applicant was guilty of the misconduct alleged in charge 3(d). The evidence failed to show that there was a rule governing the time that journal periods must be closed off. The evidence failed to show that the practice of posting journal entries, and treating them as closed, was unsafe or risky. Even if the third respondent was entitled to insist on a more conservative accounting methodology, the evidence failed to establish that the applicant breached a known rule. The evidence failed to show that the finance department, and not the IT department, was responsible for closing off the journal periods. In addition, the third respondent failed to prove that it applied discipline fairly and consistently as between the applicant and those directly responsible for processing the journal periods, taking into consideration their respective levels of authority.

28.5 The third respondent did not prove that the applicant was guilty of the misconduct alleged in charge 4(a). The evidence failed to establish that the applicant disrespected colleagues, intimidated them, or barred them from retrieving files necessary to conclude an audit. The applicant was entitled to, and indeed required to, safeguard and protect the files in the finance department. The applicant's insistence on proper handover procedures did not amount to barring colleagues from accessing information necessary for the audit.

28.6 The third respondent did not prove that the applicant was guilty of the misconduct in charge 4(b). This is canvassed in full in paragraphs 25 and 26 above.

[29] As explained above, on the totality of the evidence before the commissioner, the third respondent failed to establish any misconduct on the part of the applicant. In the circumstances, the dismissal of the applicant was substantively unfair.

[30] The applicant's challenge to the procedural fairness of her dismissal related primarily to the lack of particularity in the charge sheet. Despite this, the applicant adequately defended herself, over approximately eighteen months, using an attorney. She could easily have requested further clarity both before, and during, the disciplinary process. In my view, the procedure adopted was fair.[63]

[31] Although reinstatement is the primary remedy for a substantively unfair dismissal, before awarding reinstatement the commissioner or court must first consider the suitability of the remedies in section 193(2) of the LRA.[64] In *Booi v Amathole District Municipality & others*[65] the Constitutional Court held that the intolerability of a working relationship must be considered before making any order of reinstatement. This applies even when the misconduct could not be

[63] In *Avril Elizabeth Home for the Mentally Handicapped v CCMA & others* (2006) 27 ILJ 1644 (LC) the court signalled that, absent a collective agreement indicating otherwise, a fair procedure generally requires the conducting of an investigation, notification to the employee of any misconduct allegations flowing from that investigation, and an opportunity, within a reasonable time, to respond to the allegations with the assistance of a trade union representative or fellow employee.

[64] Section 193(2)(c) does not arise because the employer presented no evidence that it was not reasonably practicable to reinstate or re-employ. Section 193(2)(a) does not arise because the applicant seeks reinstatement. Section 193(2)(d) does not arise because the dismissal of the applicant was substantively unfair, not procedurally unfair.

[65] (2022) 43 ILJ 91 (CC)

proven. The apex court held that the threshold of intolerability is high and requires more than the mere suggestion that the relationship is difficult, fraught, or sour. Intolerability must not be confused with 'incompatibility' which triggers a different enquiry with different remedies. The evidentiary burden to establish intolerability is weightier where the dismissed employee has been absolved of any misconduct, as is the case here.

[32] The third respondent's witnesses testified that the employment relationship had broken down irretrievably. The applicant disputed this. This amounted to no more than broad contradictory statements. To establish intolerability, the employer must present weighty reasons, with tangible evidence. The third respondent presented no such reasons or evidence. Accordingly, it is fair and appropriate to award the primary remedy of reinstatement.

[33] When determining the retrospectivity of reinstatement, the Constitutional Court in *Equity Aviation Services (Pty) Ltd v CCMA & others*[66] held that the arbitrator or court may consider the period between the dismissal and the judgment, whether the dismissed employee was without income, and whether an employer will be unjustly financially burdened if retrospective reinstatement is ordered.

[34] In the exercise of my discretion, I must consider all the relevant facts and circumstances. The third respondent dismissed the applicant on 23 March 2022, at which time she earned R112 591, 00 per month. The arbitration award was issued on 23 May 2023 and all the necessary papers in the review were filed by 30 October 2023. However, the review was only enrolled for argument more than two years later, on 5 March 2026. Given the lengthy systemic delays, the substantial financial burden involved, and the absence of full evidence regarding mitigation, partial retrospectivity is just and equitable. In the circumstances, it is appropriate and fair to order reinstatement with effect from 30 October 2023, when the review was ripe for hearing.

[66] (2008) 29 *ILJ* 2507 (CC) at para [43]

[35] In this court, costs do not follow the result. I see no reason in law and fairness to award costs. In the circumstances, each party must bear their own costs.

Order

[36] In the result, I make an order as follows:

36.1 The arbitration award issued by the first respondent under CCMA reference GAJB5618-22 is reviewed and set aside,

36.2 The finding of the first respondent is substituted with a ruling that: (i) the dismissal of the applicant by the third respondent is substantively unfair but procedurally fair, and (ii) the applicant is reinstated into the employ of the third respondent with effect from 30 October 2023 from which date she is entitled to remuneration and benefits.

36.3 The applicant is directed to tender her services to the third respondent within ten (10) days.

[redacted]

RN Daniels

Judge of the Labour Court of South Africa

For the Applicant:

Adv Zito, Makhanya Attorneys

For the Third Respondent

M Chavoos, ENS Attorneys