



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

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Date

**THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

Case No: JR 958/22

In the matter between:

**NATIONAL NUCLEAR REGULATOR**

**Applicant**

and

**MARGARET MSOMI MKHOSI**

**First Respondent**

**COMMISSION FOR CONCILIATION,**

**MEDIATION AND ARBITRATION**

**Second Respondent**

**JAMES NGOAKO MATSHEKGA NO**

**Third Respondent**

Heard: 28 October 2025

Delivered: 28 may 2026

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**JUDGMENT**

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**MAGANO, AJ**

Introduction

- [1] This is an application for review of the arbitration award of the Third Respondent at the auspices of the Commission for Conciliation, Mediation and Arbitration (CCMA) under case number GTW11362-21. In terms of the award the dismissal of the first respondent was found to be both substantively and procedurally unfair. Based on that finding, the Commissioner awarded six months' compensation in the amount of R 825 000 (Eight hundred and twenty five thousand rand). The applicant seeks an order setting aside the arbitration award.

#### Background facts

- [2] Prior to the termination of the employment of the first respondent, he was employed by the applicant in the position of Director Centre for Nuclear Safety and Security on a fixed term contract for the period 1 February 2017 to 31 January 2020, subject to a six months' probation period, the probation period being from 1 February 2017 to 31 July 2017 (the first term of employment). Towards the end of the fixed term of employment contract the applicant offered the first respondent another fixed term contract, subject to another six months' probation period.
- [3] The dispute between the parties that culminated in the dismissal of the first respondent emanates from and/or relates to the probation of the second term of employment.

#### Respondent's case before the CCMA

- [4] At the end of the probation period, and in particular on 12 August 2020 the first respondent met with her line manager, Mrs Louisa Mpete (Louisa), the executive director, virtually, during the Covid-19 pandemic lockdown period. The purpose of the meeting was to discuss the first respondent's performance during the probation period. This meeting and its purpose is not in dispute.
- [5] Email correspondence between the first respondent and Louisa on the day confirm a request from Louisa to the first respondent requesting that she sign the probation form ASAP as she wanted to finalise it that day. The first respondent delivered the signed probation form by email to Louisa.

- [6] According to the first respondent Louisa was happy with the first respondent's performance on the KPI's, they agreed and the signature she appended on the document was the basis of that agreement. However, the applicant made a U-turn and convened a second performance meeting on 16 August 2020 and upon enquiry for the reason for the second assessment Louisa failed to provide a response. She did not see the reason for the reassessment. The applicant sought to extend the first respondent's probation period. During the second assessment, the first respondent's performance rating decreased, her probation period was extended for six months which she disagreed with.
- [7] Importantly the first respondent's version in this regards is confirmed in material respect in an email sent by Louisa to the first respondent, dated 09 November 2020 explaining to the first respondent that she provided the first respondent with feedback of the basis for the probation extension, attached in the probation form which was furnished to the first respondent, but will escalate the matter to HR before she signs the second probation form effectively extending her probation period, according to the first respondent's request.
- [8] According to the first respondent the issue of extension of probation was not concluded, pending a meeting with HR, which meeting did not materialize, until November 2020 when the first respondent was suspended and charged for misconduct that was not related to the probation period, the disciplinary process was concluded on 25 May 2021 with a finding of not guilty. The first respondent contends that on return from suspension, she was asked by Louisa to sign the probation for which she reminded Louisa that they agreed to meet with HR first. On 01 September Louisa gave her an ultimatum to submit the signed probation form by Friday, 3 September 2021. The first respondent advised Louisa that a meeting was scheduled with HR for Thursday, 02 September 2021 on teams for 10h00. On Thursday before the meeting, HR cancelled the meeting, due to an urgent session and another shortlisting schedule. Louisa was advised accordingly. She responded advising the first respondent to sign the form as Louisa is concerned that the first respondent currently doesn't have any legal contract with the applicant.

- [9] On 08 September 2021 the first respondent received a letter from another executive, Ms A Simons with the subject matter '*Discharge from employment due to refusal to sign probation confirmation*', effectively terminating the first respondent's employment contract.

#### Applicant's case before the CCMA

- [10] The applicant does not deal with the event that culminated in the first respondent's signature,<sup>1</sup> neither does the applicant deny the content of the email but proffers a version that begins with the moderation committee that took place on 01 July 2020 where the first respondent's score was reduced. The applicant contends that the first respondent was advised to follow an appeal process which she elected not to exercise but instead signed the form on 13 August 2020 on the part that relates to confirmation of probation rather than signing on extension of probation. The suspension period is common cause. According to the applicant on 13 August 2021 on resumption of duty by the first respondent, Louisa offered to confirm the first respondent's employment on a permanent basis. The first respondent again refused to sign the probation confirmation form. The first respondent instead sought the intervention of HR which meeting did not materialize. On 08 September 2021 after it became clear that the first respondent was disinclined to accept their confirmation and to sign the probation form, and long after the probation period had ended, the applicant terminated the first respondent's employment.

#### Grounds of review

- [11] The applicant states that the Commissioner is correct that the dismissal was in dispute. The onus rested on the first respondent to discharge, on a balance of probabilities that there was a dismissal, once dismissal is established, the onus shifts to the applicant, the employer to establish that the dismissal was procedurally and substantively fair. The applicant contends that the Commissioner has erred on the first leg, which is whether the dismissal was established by the first respondent. The Commissioner ought to have found

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<sup>1</sup> See para 4 *supra*.

that there was no obligation on the employer to confirm an employee on probation.

- [12] The applicant further contends that on common cause facts, the first respondent did not complete the probation period, instead some of the activities required in the first respondent's probation contract were executed by someone else. While the applicant was prepared to confirm the first respondent's employment, the applicant wanted the first respondent's employment, the applicant wanted the first respondent to agree to the extension of the probation period and thereafter confirmation of the first respondent's permanent employment.
- [13] The finding of the Commissioner that a dismissal had occurred, is unreasonable and irrational as it is not supported by the common cause facts and on that basis alone, the award falls to be reviewed and set aside.
- [14] The applicant further contends that the Commissioner also found that there was no fair or substantive reason for dismissal. This according to the applicant is not supported by objective facts. The Commissioner committed a material error of law and fact and rendered an award that is unreasonable and irrational. The applicant further attacks the finding that the procedure was unfair as unreasonable and irrational and not supported by facts.
- [15] The applicant also contends that the Commissioner's award of six months compensation, when on the undisputed facts the first respondent had obtained another job from 01 November 2021, is unreasonable. The first respondent was only out of employment for one month and 22 days. Paragraphs 88 and 89 of the Award ignored this fact, while compensation is a *solatium*, the Commissioner is obliged to take all relevant facts into account, therefore, two months compensation in the circumstances would have been fair, reasonable, just and equitable if a proper discretion was exercised. Contending that the Commissioner did not correctly apply the principle

enunciated in *South African Revenue Services vs CCMA and Others*<sup>2</sup>, and in particular paragraph 50 thereof, thus committing gross irregularity

#### First Respondent's version on grounds of review

[16] The first respondent denies the dispute centered on whether the first respondent's permanent employment status required to be confirmed, contending that the first respondent's employment was permanent and could only be terminated in accordance with the contract of employment. They aver that the Commissioner correctly identified what was in dispute. The terminology used in the letter of dismissal is lucid and amounts to a termination of employment. Clearly an internal disciplinary hearing is envisaged at termination. The compensation award is just and equitable relying on *Alpha Plant and Services (Pty) Ltd v Simmonds*<sup>3</sup>, the discretion should have to factor such issues such as the employer's conduct, and the employee's length of service.

#### Analysis

[17] In the applicant's own version, they were pleased with the first respondent's performance, and they intended to confirm her permanent employment. It is not disputed that an assessment was held on 12 August 2020 between the applicant's Louisa and the first respondent for the purpose of assessing her performance. It is also not disputed that the first respondent thereafter furnished the applicant with a signed probation confirmation form. It is common cause that the first respondent was not satisfied with the reduction of her performance scores, and it was agreed that she would be granted an opportunity to meet with HR for clarity, which never materialized. It is further common cause that the process was delayed due to the first respondent's suspension, on an unrelated matter, and resumed when she returned about a year later, and that on her return the procedure agreed upon was no longer respected. Instead, the first respondent was compelled to sign a probation

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<sup>2</sup> [2017] 1 BLLR 8 (CC) at para 50.

<sup>3</sup> [2001] 2 BLLR 261 (LAC)

form and was advised, despite HR's unavailability to meet her despite her endeavours (on her own without assistance from line manager) to arrange same. She was advised that she didn't have a legal contract with the applicant.

*Commissioner's findings*

- [18] Based on testimony before the Commissioner, he found that the first respondent could not have been dismissed for poor work performance because her overall performance was satisfactory as at 12 August 2020 following the moderation committee meeting of 1 July 2020 and Louisa herself wanted the first respondent's probation to be confirmed. The first respondent had further not committed misconduct, neither were there any operational requirements, which inevitably compelled the Commissioner to conclude that the dismissal of the first respondent was substantively unfair.
- [19] The Commissioner further found that there was nothing in the exchanges between the parties, having differing views about the probation matter. The first respondent was justified in having been shocked by the dismissal when the meeting that was meant to resolve the issue was aborted, not by the first respondent but by HR, which supports a contention of HR's intervention having been sought, he could therefore not find that the dismissal was procedurally fair.
- [20] Item 8 of the Code of Good Conduct: Dismissal which entitles employers to require an employee to serve a probationary period before the appointment of the employee is confirmed. Item 8(1)(e) provides that the probationary period must be used to assess the employee's performance and that the employer should give the employee reasonable evaluation, instruction, training, guidance or counselling in order to allow the employee to render satisfactory service. Items 8 (1)(f) – (h) provide that an employer is entitled to extend the probationary period in order to complete any performance appraisal. This creates an obligation on the applicant that, while safeguarding its own interests, to also treat the first respondent with fairness. The applicant had a

duty to finalise the agreed process and not act arbitrarily without affording the first respondent an opportunity for clarity, as agreed.

[21] This court agrees with the commissioner that there was a dismissal and further agrees that the dismissal was both substantively and procedurally unfair.

[22] The next issue in contention is the compensation amount awarded. It is trite, once the first respondent did not wish to be reinstated, the Commissioner must award compensation. The applicant contends however that while the Commissioner has discretion, he erred in not considering the fact that the first respondent had only been without employment for a period of over one month, that the Commissioner failed to consider facts which were before him for consideration in arriving at a just and equitable compensation. They further contend that while they acknowledge that compensation is a *solatium*, a number of factors must be considered<sup>4</sup>. Further that the function of sections 197 and 194 of the Labour Relations Act<sup>5</sup> (LRA) is not to yield a quantum based on the concept of positive interest but rather is premised on the broader consideration of fairness, having weighed the circumstances holistically<sup>6</sup>. The applicant further contends that there was no evidence of the Respondent suffering financially except for the period she was unemployed. The factors the Commissioner says he considered are not judiciously based considering that the first respondent was only out of salary for a mere one month.

[17] This court, agrees discretion must be exercised judiciously.

[18] Section 193 of the LRA states:

(1) If the Labour Court or an arbitrator appointed in terms of this Act finds that a dismissal is unfair, the Court or the arbitrator may-

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<sup>4</sup> See: *Ekurhuleni Metropolitan Municipality v Matonsela and Others* [2021] 10 BLLR 994 (LAC) at para 28.

<sup>5</sup> Act 66 of 1995, as amended.

<sup>6</sup> See: *Bester (Scott) in re: Small Enterprises Finance Agency SOC Ltd vs Commission for Conciliation, Mediation and Arbitration and Others* (2020) 3 BLLR 244 (LAC) at para 13.

- (a) order the employer to reinstate the employee from any date not earlier than the date of dismissal;
  - (b) order the employer to re-employ the employee, either in the work in which the employee was employed before the dismissal or in other reasonably suitable work on any terms and from any date not earlier than the date of dismissal; or
  - (c) order the employer to pay compensation to the employee.
- (2) The Labour Court or the arbitrator must require the employer to reinstate or re-employ the employee unless-
- (a) the employee does not wish to be reinstated or re-employed;
  - (b) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable;
  - (c) it is not reasonably practicable for the employer to reinstate or re-employ the employee; or
  - (d) the dismissal is unfair only because the employer did not follow a fair procedure.
- (3) If a dismissal is automatically unfair or, if a dismissal based on the employer's operational requirements is found to be unfair, the Labour Court in addition may make any other order that it considers appropriate in the circumstances.
- (4) An arbitrator appointed in terms of this Act may determine any unfair labour practice dispute referred to the arbitrator, on terms that the arbitrator deems reasonable, which may include ordering reinstatement, re-employment or compensation.'

[19] Section 194(1) of the LRA reads:

'The compensation awarded to an employee whose dismissal is found to be unfair either because the employer did not prove that the reason for dismissal was a fair reason relating to the employee's conduct or capacity or the employer's operational requirements or the employer did not follow a fair

procedure, or both, must be just and equitable in all circumstances, but may not be more than the equivalent of 12 months' remuneration calculated at the employee's rate of remuneration on the date of dismissal.'

- [20] The Commissioner considered a number of facts in arriving at a just and equitable compensation, all of which revolve around the first respondent. While the court agrees that the manner in which the applicant handled the matter deserves frowning upon, the Commissioner ought to have also considered the applicant's position and not merely award compensation as a punishment for an offender. Section 193 assists in balancing out the respective interests once dismissal is found to be unfair on both or either substance and/or procedure. In this matter there can be no re-instatement or re-employment not because the employment relationship was rendered intolerable, but because the first respondent is gainfully employed and does not wish to be re-instated. Ordinarily because there is no evidence of a breakdown in the relationship the first respondent would have been re-instated under the circumstances, and the first respondent would have derived value as well from the services of the first respondent.
- [21] Furthermore, the first respondent sought eight months, while the applicant contended for the financial damage only. The Commissioner did not explain why he rejected the submission of the applicant which were based on facts which the Commissioner ought to have considered. The Commissioner further had a duty to provide reasons for rejecting that submission.
- [22] It is common cause, the first respondent was unemployed for one month, she rejected re-instatement as she has secured alternative employment. This ought to have been considered in arriving at a just and fair compensation.

#### The test for review

- [23] The test for review is set out in *Sidumo and Another v Rustenburg Platinum Mines Ltd and others*<sup>7</sup>. The enquiry is the reasonable decision-maker test which is to determine whether the decision reached by the commissioner is

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<sup>7</sup> (2007) 28 ILJ 2405 (CC).

one which a reasonable decision maker could not reach. In assessing the reasonableness of the award, the Court takes into account the material evidence which was before him or her during the arbitration proceedings. In *Fidelity Cash Management Services v Commission for Conciliation, Mediation and Arbitration and others*,<sup>8</sup> the Court emphasized that the reasonable decision maker's test:

"... is a stringent test that will ensure that such awards are not lightly interfered with. It will ensure that, more than before, and in line with the objective of the Act and particular the primary objective of the effective resolution of disputes, awards of the CCMA will be final and binding as long as it cannot be said that such a decision or award is one that a reasonable decision-maker could not have made in the circumstances of the case. It will not be often that the decision of the arbitration award of the CCMA is found to be one that a reasonable decision-maker could not, in all circumstances, have reached."

[24] This court is persuaded that the decision of the Commissioner of six months' salary under the circumstances and facts of this case, is one which a reasonable decision maker could not have made. This court therefore deems, that in the interests of justice, there is room for interference with the compensation for the following reasons:

24.1 the first respondent was unemployed for a period of about one month;

24.2 the first respondent elected not to be re-instatement because she secured alternative employment;

[25] This Court frowns upon the conduct of the applicants in handling this situation, particularly because the applicant is well capacitated to handle issues of employment with prudence and further has a legal duty to safeguard the welfare of its employees, and by extension the first respondent.

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<sup>8</sup> (2008) 29 ILJ 964 (LAC) at para 100.

[26] Therefore, in light of these facts this Court finds that a compensation of four months is just and equitable under the circumstances of this case.

### Costs

[27] While the applicant has been successful on the part of compensation, the applicant took issue with the substantive and procedural issues which came at a cost to the first respondent, the applicant has capacity and was adequately represented, it ought to have been apparent that there were no reasonable prospects as far as their case was concerned. The resource allocation to the aspect of compensation was only a fraction of the bigger plight on the dismissal itself. To this end this court finds that it was unnecessary for the applicant to have challenged the Commissioner's decision on dismissal, they ought to have only challenged compensation in this matter. As a result, this court finds that the first respondent is entitled to her costs.

[28] In the premises, the following order is made:

### Order

1. It is confirmed that the dismissal of the first respondent was both substantively and procedurally unfair, to this extent the review application is dismissed;
2. The order of six (6) months compensation is reviewed, set aside and substituted with an order of four (4) months compensation, calculated at a rate of R137 500 X 4 = R 550 000;
3. The applicant is ordered to pay the first respondents taxed party and party costs of this application.

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F. Magano

Acting Judge of the Labour Court of South Africa

LABOUR COURT

Appearances:

For the applicant: W R MOKHARI SC

Instructed by: MOJA SIBIYA ATTORNEYS

For the respondent: J M THOMPSON

Instructed by: THOMPSON ATTORNEYS

LABOUR COURT