



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

Signature

Date

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case No. JR1211/24

In the matter between:

MADIBANE BOKANG MAHLOBOGWANE

Applicant

and

CAPRICORN DISTRICT MUNICIPALITY

First Respondent

**SOUTH AFRICAN LOCAL GOVERNMENT
BARGAINING COUNCIL (SALGBC)**

Second Respondent

NONHLANHLA SITHOLE N.O.

Third Respondent

Case No. JR1357/24

In the matter between:

CAPRICORN DISTRICT MUNICIPALITY

Applicant

and

**SOUTH AFRICAN LOCAL GOVERNMENT
BARGAINING COUNCIL (SALGBC)**

First Respondent

NONHLANHLA SITHOLE N.O.

Second Respondent

MADIBANE BOKANG MAHLOBOGWANE**Third Respondent****Heard: 23 April 2026****Delivered: 5 May 2026**

Review Application – Disciplinary proceedings – Collective Agreement – Plea and sanction agreement approved by chairperson – Chairperson’s approval constitutes determination and brings finality to disciplinary process

Second disciplinary proceedings – Employer seeking to subject employee to a second disciplinary hearing – Enquiry – Fairness – Employer to establish exceptional circumstances – Employer failed to discharge onus – Dismissal unfair – Award reasonable – Review application dismissed

Review Application – Remedy – Commissioner awarding compensation – Reliance on allegations of misconduct withdrawn in terms of plea agreement to deny reinstatement – Error of law – Award of compensation unreasonable and substituted with reinstatement

JUDGMENT

MAKHURA, J

Introduction

[1] Before this Court are two review applications arising from an arbitration award issued by the commissioner on 23 June 2024. The first application is brought by the employee and is confined to the issue of remedy; she challenges the award of compensation and seeks reinstatement. The second application is brought by the Municipality, styled as a cross-review, in which it challenges the commissioner’s finding that the dismissal was substantively unfair. Each party opposes the other’s application.

Late delivery of the employee’s answering affidavit

- [2] After the Municipality delivered its review application on 4 August 2024, it filed the record together with a notice in terms of rule 37(20)(b) of the Rules of this Court¹ on 1 November 2024. In terms of rule 37(22), the employee's answering affidavit was due within 10-days of receipt of the notice. That period expired on 15 November 2024. The answering affidavit was, however, only delivered on 24 January 2025, and is 27 days outside the prescribed period. The Municipality, exercising its rights in terms of rule 36(2) and (3), objected to the late delivery of the answering affidavit, triggering a condonation application.
- [3] In her condonation application, the employee contended that the delay, which she quantified as 24 days, was not excessive. She explained that she did not consider it necessary to file an answering affidavit because, in her view, the Municipality's review application had itself been filed outside the prescribed six-week period without a condonation application and was, in any event, deemed to have been withdrawn. She further contended that the Municipality had acquiesced in the late delivery of her answering affidavit. None of these contentions can be sustained.
- [4] First, the assertion that the Municipality's review application was filed out of time is not supported by the facts. The arbitration award was issued on 23 June 2024 and served on the parties on 24 June 2024. The review application was served and filed electronically on 5 August 2024, which was the final day of the six-week period. A hard copy was filed the following day, on 6 August 2024. The contention that the review application was late is therefore misplaced.
- [5] Second, the employee's proposition that the review application was deemed withdrawn cannot be sustained. The Municipality complied with its obligations under rule 37(20) by filing the record together with the requisite notice. Once that step was taken, the review was properly before the Court, triggering those who sought to oppose it to do so by delivering an answering affidavit within 10 days. The employee's subjective belief that the review had lapsed did not relieve her of

¹ Rules Regulating the Conduct of Proceedings of the Labour Court, GN4775a in GG 50608, 3 May 2024.

the duty to comply with the Rules or entitle her to ignore the procedural requirements governing the filing of answering affidavits.

- [6] Lastly, the employee's contention that the Municipality acquiesced in the late filing of her answering affidavit is similarly without merit. The Municipality objected to the late filing of the answering affidavit and did so in terms of the rules of this Court. The letters from the Municipality's attorneys called upon the employee to file her answering affidavit, failing which the Municipality would proceed with the application on unopposed basis. At no stage did the Municipality indicate that it consented to or would not object to the non-compliance with the Rules. In the circumstance, there is no basis to infer acquiescence.
- [7] The employee's explanation rests primarily on an incorrect understanding of the procedural position and on assumptions that find no support in law or on the facts. Such an explanation does not constitute good cause for the indulgence sought. However, this is not the end of the enquiry. The 27-day delay and the explanation for the delay must be weight against other factors such as the prospects of success and prejudice.
- [8] The employee contends that she has excellent prospects of success in the Municipality's review application. She refers to the reasons above, which I have now rejected, to support her case. She also argued that the award is unassailable and that her condonation application should be granted. The employee also submits that the Municipality would suffer no prejudice if condonation were granted.
- [9] Although the reasons for the delay are poor, weighing this against the not so significant length of delay, the absence of prejudice and the employee's reasonable prospects of success as shall be demonstrated below, I find that it is in the interest of justice to grant the application.

Material facts

- [10] At the time of her dismissal, the employee was the Municipality's Human Resource Manager. She was charged with six allegations of misconduct. Charges 1 to 4 were framed as allegations of gross dishonesty, while charges 5 and 6 were described as gross misconduct.
- [11] On 25 January 2022, the employee and the Municipality, represented by its acting Municipal Manager, concluded a plea and sanction agreement in terms of clause 10 of the Disciplinary Procedure Collective Agreement, 2018 to 2023 (Collective Agreement). Clause 10 provides:
- '10.1 If the Employee wishes to plead guilty to the charge or charges, the Employee or his representative and the Employer representative may enter into a plea agreement on a sanction to be imposed.
- 10.2 The plea agreement shall be in writing, signed by the Employer representative and the Employee or his representative, and is subject to approval by the Presiding Officer.
- 10.3 The Presiding Officer shall consider and approve a plea agreement having considered all the relevant circumstances. If the plea agreement is approved by the Presiding Officer, a sanction shall be imposed on the Employee in accordance with the plea agreement. In the absence of such approval, the Disciplinary Hearing shall proceed as if the Employee has pleaded not guilty.'
- [12] Clause 8.3.8 empowers the chairperson *"to ratify and approve"* any settlement agreement concluded between the parties in the disposal of the whole or part of the dispute. In accordance with clauses 8.3.8 and 10.2, the chairperson approved the plea and sanction agreement.
- [13] The material terms of the plea and sanction agreement were that the employee pleaded guilty to charge 6; that she would receive a written warning and be suspended without pay for ten days over a period of three months from February to April 2022; that charges 1 to 5 would be withdrawn; and that the employee would resume duty on 1 February 2022.

- [14] On 28 January 2022, the acting Municipal Manager addressed a letter to the employee in which the Municipality purported to withdraw from the plea and sanction agreement concluded on 25 January 2022. The letter recorded that:

‘The municipality has re-considered its position in relation to the settlement agreement reached between the parties and resolved to abandon and or withdraw from the said agreement. This decision was arrived at, after having thoroughly considered the seriousness of the allegations levelled against you, the impact on the employer and the public interest.’ (Emphasis added)

- [15] Subsequently, and notwithstanding the chairperson’s approval of the plea and sanction agreement, the Municipality reconstituted the disciplinary proceedings in May 2022 on the same charges and before the same chairperson. The reconstituted disciplinary hearing resulted in the employee’s dismissal on 18 May 2023.
- [16] The employee referred an unfair dismissal dispute to the South African Local Government Bargaining Council (SALGBC). She challenged the Municipality’s unilateral withdrawal from the plea and sanction agreement and contended that the second disciplinary hearing was impermissible. In essence, her case was that the disciplinary process had been finalised by the approved plea and sanction agreement; that the Municipality was not entitled to resile from that agreement unilaterally; and that subjecting her to a further disciplinary hearing on the same charges amounted to double jeopardy and rendered her dismissal procedurally and substantively unfair.

The award

- [17] In her analysis of the evidence, the commissioner dealt first with the legal effect of the plea and sanction agreement and its subsequent purported unilateral withdrawal by the Municipality. She correctly stated that the second stage of the enquiry on the merits of the charges would depend on the finding on the first stage.

[18] The commissioner noted that the plea and sanction agreement was preceded by protracted discussions and found that the reasons for its purported withdrawal *“should have formed part of the considerations before the conclusion of the plea agreement”*. The commissioner rejected the chairperson’s evidence that there was new evidence or information that necessitated the second disciplinary hearing as unsubstantiated. She further rejected, as a reason recognised in law to resile from a validly concluded agreement, poor judgment. Dealing with the role of the chairperson in the plea and sanction agreement, the commissioner observed that:

‘The [Municipality’s] version that the agreement in question is the decision of the chairperson which enables interference is misleading; I am alive to the fact that ... the employer may sanction a second DC if it is not happy with the outcome of the first DC provided the (sic) is a fair reason to do so; this applies when the chairperson has made a substantive finding based on the merits of the case; In casu, what is referred to as the decision of the chairperson is in fact a meeting of mind ... between the [employee] and the [Municipality].

Mr Talane attempted to justify the [Municipality’s] decision by alluding to the fact that the agreement was the decision of the chairperson and was open for interference; however, during re-examination he correctly averred that he was not a party to the agreement per se, instead, the agreement was between the employee ... and the employer ... and that he was a party to the process by virtue of approving the agreement.’ (Emphasis added)

[19] The commissioner found that it was common cause that the plea and sanction agreement concluded on 25 January 2022 had been approved by the disciplinary chairperson in accordance with the Collective Agreement. She held that, once approved, the agreement had the effect of finalising the disciplinary proceedings and was binding on both parties. In those circumstances, the Municipality was not entitled unilaterally to withdraw from the agreement or to re-institute disciplinary proceedings on the same charges. The Collective Agreement, so she reasoned, did not confer a discretion on the employer to withdraw from an

approved plea and sanction agreement, and that any dissatisfaction should have been addressed before the agreement was concluded and ratified. She concluded that:

‘... the decision to abandon the full and final settlement and to re-charge the [employee] with the same charges that formed part of the agreement was unfair ...[and]... the subsequent dismissal emanating from unfairly reinstated charges was unfair because at that stage the dispute pertaining to the alleged misconduct was resolved.’

- [20] Having found that the plea and sanction agreement was a valid and binding agreement which the Municipality could not unilaterally withdraw from, and that a second disciplinary hearing was unfair, the commissioner then proceeded to deal with remedy. She referred to section 193(2) of the LRA and noted that the employee sought reinstatement. She, however, declined to award reinstatement and awarded compensation equivalent to 10 months’ remuneration. She reasoned that:

‘...However, I am seized with the merits of the matter; as HR Manager the [employee] was placed in the position of trust which placed high premium on ethics. She failed to act ethically and to appreciate conflict of interest, it is not necessary that I labour on all the instances in this regard, I will only refer to one of other instances.

It emerged from the evidence that what she referred to as an appointment letter template given to Ms Ramahlo was in fact populated with her personal information; consequently, the alleged template was probably her own appointment letter, more so, because she was subsequently appointed to the same position. It must be noted that this happened before the actual promotion.

The [employee’s] conduct was unethical, contrary to good morals and clearly shows failure to appreciate conflict of interest.

In light of the aforementioned, I am of the view that reinstatement is not an appropriate remedy under the circumstances instead compensation should suffice.'

- [21] Both parties challenge the award. The Municipality seeks the review of the whole award, and the employee seeks to review the remedy.

Review test

- [22] The applicable review standard is settled. As articulated in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others (Sidumo)*, an arbitration award is reviewable only if it is one that a reasonable decision-maker could not reach.² The inquiry is ultimately concerned with the reasonableness of the outcome, not whether the reviewing court would itself have reached a different conclusion.

- [23] The Constitutional Court in *Duncanmec (Pty) Ltd v Gaylard NO and others*³, emphasised that a reviewing court is not entitled to scrutinise the arbitrator's reasons with a view to determining whether it agrees with them. Disagreement with the reasoning is immaterial. The focus is whether the award is supported by reasons and is rationally connected to the evidence and issues before the arbitrator. An award that is so disconnected from the evidence that it yields an unreasonable result falls to be reviewed and set aside.⁴

- [24] Reviews based on errors of law stand on a particular footing. The LAC in *Herbert v Head of Education: Western Cape Education Department & others*⁵ summarised the position as follows:

'In *MacDonald's Transport* it was found that the LRA did not contemplate that a CCMA or bargaining council arbitrator, both statutory roles, would have the last word on the proper interpretation of an instrument as this would mean that a patently wrong interpretation would be left intact, which 'would be absurd'. The

² [2007] ZACC 22; (2007) 28 ILJ 2405 (CC) at para 110.

³ (2018) 39 ILJ 2633 (CC); [2018] 12 BLLR 1137 (CC) at paras 42 – 43; see also *Duncanmec (Pty) Ltd v Itumeleng NO & others* [2020] 7 BLLR 668 (LAC); (2020) 41 ILJ 1331 (LAC) at para 23.

⁴ *Ibid* at paras 42 – 43.

⁵ [2022] 8 BLLR 712 (LAC); (2022) 43 ILJ 1618 (LAC).

wrong interpretation of an instrument by an arbitrator could therefore constitute a reviewable irregularity as envisaged by s 145 of the LRA, in the sense that a reasonable arbitrator does not get a legal point wrong. The court concluded that either ‘the reasonableness test is appropriate to both value judgments and legal interpretations. If not, “correctness” as a distinct test is necessary to address such matters’. This view was echoed in *NUMSA*, in which it was stated that an incorrect interpretation of the law by a commissioner constitutes a material error of law which ‘will result in both an incorrect and unreasonable award’, which ‘can either be attacked on the basis of its correctness or for being unreasonable’.⁶ (Emphasis added)

JR1357/24: The Municipality’s application

Review grounds

[25] The Municipality, in setting out the background of the dispute, records that:

‘On or about 19th May 2022 the [employee] was served with the notice to appear in the disciplinary hearing together with the charge sheet also dated 19th May 2022. The charges levelled against the [employee] did not materially change from the original charges but there were some changes such as the fact that charge 1 and 3 under the previous charge sheet were combined or conciliated (sic) into one charge and the reliance on Business Ethics on some of the charges was replaced with the Code of Conduct for Municipal Staff Members in terms of Schedule 2 to the Local Government: Municipal Systems Act 32 of 2000 (“the Code of Conduct”).’

[26] The above was also common cause at the arbitration proceedings. This was also recorded by the commissioner, where she said that the *“particulars of the charges remained the same save for minor amendments wherein the ethics policy was removed and replaced with the provisions of the Municipal Systems Act”*.

⁶ Ibid at para 24.

- [27] The Municipality contends that the commissioner failed to determine the merits of the unfair dismissal dispute and instead impermissibly confined the enquiry to the legality of the Municipality's withdrawal from the plea and sanction agreement. In doing so, the commissioner is said to have acted *ultra vires* and committed a gross irregularity by deciding an issue of lawfulness that properly falls within the exclusive jurisdiction of this Court, rather than assessing whether the employee's dismissal was fair.
- [28] The Municipality further submits that the commissioner materially misdirected herself and failed to apply her mind to the evidence and relevant legal principles when she found that the Municipality was not entitled to withdraw from, or abandon, the plea and sanction agreement. This misdirection, it argues, vitiated the commissioner's reasoning and led to an incorrect outcome. In particular, the Municipality contends that the commissioner erred in concluding that withdrawal from a plea and sanction agreement was permissible only on limited common-law grounds such as fraud, duress, or common mistake. It submits that this interpretation ignored the proper construction of clauses 8.5⁷ and 8.6⁸ of the Collective Agreement, which envisage circumstances "*permitted in law*" in which a disciplinary determination may be revisited and an employee re-charged. The submission is that the commissioner's failure to engage with these provisions constitutes an error of law.
- [29] The Municipality also argues that the commissioner incorrectly characterised the plea and sanction agreement as a binding determination merely because it was approved by the chairperson. According to the Municipality, the agreement remained a product of negotiations between the employer and the employee, with the chairperson exercising a limited approval function rather than making a substantive determination on the merits. On this basis, the Municipality submits that the chairperson of the first hearing was not conflicted and was entitled to

⁷ Clause 8.5 provides that "*The determination of the Presiding Officer cannot be altered by the Municipal Manager or any other governing structure of a municipality and shall be final and binding on the employer and employee, subject to remedies permitted in law and this procedure.*"

⁸ In terms of clause 8.6, "*An employee may not be re-charged at a subsequent Disciplinary Hearing for the same alleged misconduct, unless for circumstances permitted in law*".

preside over the subsequent disciplinary proceedings. This was however contradicted to a certain extent in the Municipality's heads of argument, where counsel argued that the plea and sanction agreement constituted a determination by the disciplinary hearing chairperson. This latter submission formed the crux of the Municipality's case.

- [30] It is further contended that the commissioner misapplied or failed to apply her mind to the principle enunciated in *Ephraim Mogale Local Municipality v Hlongwane and another*⁹. In particular, the Municipality argues that the commissioner ought to have considered that the withdrawal from the plea and sanction agreement did not itself amount to a dismissal, but merely restored the Municipality's right to discipline the employee in a reconstituted disciplinary hearing in which she was afforded full procedural protections such as cross examining its witnesses and presenting her evidence.
- [31] Finally, the Municipality submits that abandoning disciplinary proceedings and subsequently re-charging an employee with the same or similar allegations is not, in itself, unfair. The commissioner's failure to provide adequate reasons for concluding that the withdrawal from the plea and sanction agreement was unfair, in circumstances where such withdrawal was allegedly permitted in law, renders the award unreasonable. For these reasons, the Municipality contends that the arbitration award falls outside the band of reasonableness and stands to be reviewed and set aside.

Analysis

- [32] At the heart of the Municipality's case is the contention that the commissioner misconstrued the legal nature of the plea and sanction agreement. In its heads of argument, the Municipality submits that the commissioner erred in treating the plea and sanction agreement as a mere settlement between the parties because the chairperson's approval elevated it to a formal disciplinary determination with binding consequences under the Collective Agreement. This contention is to be

⁹ (2023) 44 ILJ 1944 (LC).

contrasted with the Municipality's case in its founding affidavit, which is that the chairperson exercised only a limited approval function and did not make a substantive determination on the merits. Notwithstanding this internal inconsistency, the gravamen of the Municipality's case is that the commissioner erred in finding that the plea and sanction agreement was binding and that the Municipality was not entitled unilaterally to withdraw from it and re-institute disciplinary proceedings.

- [33] The legal principles governing the institution of second disciplinary proceedings are well established. In *BMW (SA) (Pty) Ltd v Van der Walt*¹⁰ (*Van der Walt*), the Labour Appeal Court (LAC) held that:

'Whether or not a second disciplinary enquiry may be opened against an employee would, I consider, depend upon whether it is in all the circumstances fair to do so. I agree with the dicta in *Amalgamated Engineering Union of SA & others v Carlton Paper of SA (Pty) Ltd* (1988) 9 ILJ 588 (IC) at 596A-D that it is unnecessary to ask oneself whether the principles of *autrefois acquit* or *res judicata* ought to be imported into labour law. They are public policy rules. The advantage of finality in criminal and civil proceedings is thought to outweigh the harm which may in individual cases be caused by the application of the rule. In labour law fairness and fairness alone is the yardstick. See also *Botha v Gengold* [1996] BLLR 441 (IC); *Maliwa v Free State Consolidated Gold Mines (Operations) Ltd* (1989) 10 ILJ 934 (IC). I should make two cautionary remarks. It may be that the second disciplinary enquiry is ultra vires the employer's disciplinary code (*Strydom v Usko Ltd* [1997] 3 BLLR 343 (CCMA) at 350F-G). That might be a stumbling block. Secondly, it would probably not be considered to be fair to hold more than one disciplinary enquiry save in rather exceptional circumstances.'¹¹

- [34] The decisive consideration in the enquiry is therefore fairness, and that a second disciplinary enquiry into the same misconduct will ordinarily be impermissible absent exceptional circumstances. Similar caution was reiterated in subsequent

¹⁰ [1999] ZALAC 28; (2000) 21 ILJ 113 (LAC).

¹¹ Ibid at para 12.

authorities, which emphasise that labour law does not adopt a rigid doctrine of double jeopardy, but instead requires a fairness-based enquiry, informed by all the circumstances relied upon by the employer to justify reopening disciplinary proceedings.¹²

- [35] More recently, the LAC in *SA Municipal Workers Union on behalf of Malatsi v SA Local Government Bargaining Council & others*¹³ (*Malatsi*) reaffirmed these principles and clarified that where a disciplinary process has culminated in a binding outcome, whether by way of an arbitration award or a sanction imposed pursuant to an agreed process, the employer cannot simply ignore that outcome and recharge the employee unless fairness, demonstrated by exceptional circumstances, warrants it.
- [36] In *Malatsi*, the employee's dismissal was found to be substantively unfair, but the commissioner denied him retrospective backpay on the basis that he was guilty of an alternative and lesser charge of password-related negligence for acting irresponsibly and breaching the employer's Information Technology Policy. The employer's review application against the commissioner's decision was unsuccessful, leading to the employer reinstating the employee. However, shortly after his reinstatement, the employer charged the employee with gross dishonesty for allegedly acting with the intention to deceiving the employer by sharing his password with other employees and failure to comply with the IT procedures. The employee was dismissed and his dismissal was found to be fair by the bargaining council commissioner. His review application, in which he argued that the commissioner unreasonably disregarded the fact that he had been sanctioned for the same misconduct that formed part of the second disciplinary hearing which resulted in his dismissal, was dismissed. On appeal, the LAC, having reaffirmed the legal position, held that:

¹² *Branford v Metrorail Services (Durban) & others* (2003) 24 ILJ 2269 (LAC); [2004] 3 BLLR 199 (LAC); *Member of the Executive Council for Finance, KwaZulu-Natal & another v Dorkin NO & another* [2008] 6 BLLR 540 (LAC); (2008) 29 ILJ 1707 (LAC); *Mahlakoane v SA Revenue Service* [2018] 4 BLLR 337 (LAC); (2018) 39 ILJ 1034 (LAC); *Anglo American Platinum (Rustenburg Platinum Mines) v Beyers & others* [2021] 10 BLLR 965 (LAC); (2021) 42 ILJ 2149 (LAC).

¹³ [2026] 1 BLLR 95 (LAC); (2026) 47 ILJ 321 (LAC).

‘...what the court ignored was the existence and effect of an unchallenged arbitration award that specifically imposed a sanction of unpaid suspension for the appellant’s password-related misconduct. The present case is thus distinguishable from *Van der Walt*, *Branford* and *SARS*. In those matters, the availability of further information was held fairly to warrant fresh charges of misconduct to be brought (*BMW* and *SARS*), or where the first disciplinary action taken was ill-informed, incorrect or misconceived (*Branford*). While it is correct that the municipality learned of the appellant’s password-related misconduct only at the first arbitration hearing and that, in the ordinary course, the convening of a second disciplinary enquiry in relation to that misconduct would not offend the applicable principles, what distinguishes the present case is the existence of an arbitration award issued consequent on the first arbitration...

In summary: by ignoring the binding effect of the first arbitration award, the arbitrator in the second arbitration committed a material irregularity, with the result that the decision to which he came when he upheld the appellant’s dismissal was a decision to which no reasonable decision maker could come to on the available evidence. The order granted by the Labour Court thus stands to be set aside and replaced with an order in terms of which the review sought by the appellant is upheld.¹⁴

- [37] In the present matter, the plea and sanction agreement was not some informal or provisional arrangement. It was concluded in accordance with a collective agreement that expressly regulates plea agreements and confers upon the disciplinary chairperson the power to approve or reject them. The chairperson approved the agreement in its entirety. Once approved, the agreement brought finality to the disciplinary proceedings, subject only to remedies permitted in law. This case is thus materially distinguishable from situations in which a chairperson rejects a proposed sanction¹⁵ or where new information emerges that could not reasonably have been within the employer’s contemplation at the time of the initial proceedings.

¹⁴ *Malatsi* at paras 23 – 24.

¹⁵ *South Africa Police Services v Mkonto and others* [2026] ZALAC 2 (8 January 2026).

- [38] The Municipality's submission in its heads of argument that the chairperson's approval transformed the plea and sanction agreement into a disciplinary determination is correct. I accept that in her reasoning, the commissioner has considered the plea and sanction agreement as an agreement between the employee and the Municipality, and not the chairperson's determination. The ultimate decision, however, was that the Municipality was bound by the agreement and that it was unfair for the Municipality to unilaterally withdraw from the agreement and to subject the employee to a second disciplinary hearing. The Municipality's criticism therefore does not advance its case because even on its correct version, the consequence of the chairperson's approval is that the Municipality became bound by the outcome of its own disciplinary process. The Collective Agreement does not permit the employer, having secured the chairperson's approval, to disregard or unilaterally overturn that determination because it allegedly later reconsidered the seriousness of the misconduct or the public impact thereof.
- [39] The legal principle is clear that an employer seeking to subject an employee to a second disciplinary process in respect of the same misconduct bears the onus of demonstrating that it is fair to do so. Fairness in this context requires evidence of exceptional circumstances, such as newly discovered information, common mistake, or a prior determination induced by fraud or corruption. No such evidence was presented in this case. The Municipality's reliance on the seriousness of the charges and generalised assertions of public interest (per the 28 January 2022 letter), unsupported by evidence, falls well short of the fairness threshold required to justify reopening concluded disciplinary proceedings.
- [40] Therefore, permitting the Municipality to abandon the plea and sanction agreement and overturn the chairperson's sanction would, in my view, undermine legal certainty and the integrity of collectively agreed disciplinary processes, and the commissioner would have committed a material irregularity had she ignored or overlooked the first determination by the chairperson.

[41] Accordingly, the commissioner's finding that it was unfair for the Municipality to abandon the approved plea and sanction agreement and to reinstitute disciplinary proceedings on the same charges accords with established legal principles. She did not commit an error of law as alleged. The conclusion that the subsequent dismissal, flowing from the unfairly reconstituted disciplinary hearing, was substantively unfair is one that a reasonable decision-maker could reach on the evidence. The Municipality therefore failed to discharge the onus of establishing fairness before the commissioner, and its review application cannot succeed. In the circumstances, the Municipality's review application stands to be dismissed.

JR1211/24: The employee's application

Review grounds

[42] The employee challenged the award of compensation on the basis that the commissioner committed a material error of law which vitiates the conclusion reached on remedy. She contended that, by relying on alleged unethical conduct, the commissioner misdirected herself in the application of section 193(2) of the LRA. In particular, the employee submitted that none of the statutory exceptions contemplated in that provision were applicable. Having found the dismissal to be substantively unfair, so she submits, the commissioner was therefore obliged to order reinstatement. The employee further submitted that there was no evidence to support a conclusion that her continued employment would be intolerable or reasonably impracticable.

Analysis

[43] Section 193 of the LRA regulates the relief that may be granted once a dismissal has been found to be substantively and/or procedurally unfair. It establishes reinstatement as the primary remedy, subject only to the limited exceptions set out in section 193(2). Where an employee seeks reinstatement and the dismissal is substantively unfair, a commissioner is obliged to order that remedy unless the

employer discharges the onus of proving that reinstatement is precluded by intolerability and/or reasonable impracticability.

- [44] The approach to remedy requires a sequential enquiry. A commissioner must first consider the remedies available under section 193(1) and thereafter determine whether any of the statutory exceptions in section 193(2) apply so as to justify a departure from reinstatement. Reinstatement does not follow automatically from a finding of unfair dismissal, but neither may it be refused without proper regard to the stringent requirements of section 193(2) of the LRA.¹⁶
- [45] The LAC in *Xstrata South Africa (Pty) Ltd (Lydenburg Alloy Works) v National Union of Mineworkers obo Masha*¹⁷ observed that the object of section 193(2)(c) of the LRA is to “exceptionally” permit the employer relief when it is not practically feasible to reinstate. Similarly, section 193(2)(b) exceptionally permits the employer relief when reinstating an employee would be intolerable.
- [46] In *Booi v Amathole District Municipality and Others*¹⁸, the Constitutional Court held that:

‘The primacy of the remedy of reinstatement is no coincidence. It is the product of a deliberate policy choice adopted by the legislature...

It is accordingly no surprise that the language, context and purpose of s 193(2)(b) dictate that the bar of intolerability is a high one. The term ‘intolerable’ implies a level of unbearability, and must surely require more than the suggestion that the relationship is difficult, fraught or even sour. This high threshold gives effect to the purpose of the reinstatement injunction in s 193(2), which is to protect substantively unfairly dismissed employees by restoring the employment contract and putting them in the position they would have been in but for the unfair dismissal. And my approach to s 193(2)(b) is fortified by the jurisprudence

¹⁶ *SA Revenue Service v Commission for Conciliation, Mediation & Arbitration & others* [2016] ZACC 38; (2017) 38 ILJ 97 (CC) at para 38.

¹⁷ [[2017] 4 BLLR 384 (LAC); (2016) 37 ILJ 2313 (LAC) at para 11.

¹⁸ (2022) 43 ILJ 91 (CC); [2022] 1 BLLR 1 (CC).

of the Labour Appeal Court and the Labour Court, both of which have taken the view that the conclusion of intolerability should not easily be reached, and that the employer must provide weighty reasons, accompanied by tangible evidence, to show intolerability.¹⁹

- [47] The employee's dismissal was found to be both substantively and procedural unfair. The employee sought reinstatement. The question is whether the exceptions in section 193(2)(b) and (c) are present in this case. The onus was on the Municipality to establish facts demonstrating either intolerability or reasonable impracticability. No such evidence was led. On the contrary, the facts indicate that, prior to its unilateral withdrawal from the plea and sanction agreement, the Municipality had accepted that the trust relationship remained intact. Charges 1 to 5 of the original charge sheet before consolidation of 3 and 5 during the second disciplinary hearing were withdrawn, a sanction short of dismissal was agreed to and approved, and the employee was permitted to resume her duties from 1 February 2022. These objective facts materially undermine any suggestion of an irretrievable breakdown in the employment relationship.
- [48] Despite this, the commissioner declined reinstatement based on alleged unethical conduct by the employee. In doing so, she misdirected herself in a material respect. Having found that the approved plea and sanction agreement finally resolved the disciplinary process and bound the Municipality, the commissioner was not entitled to revisit the very conduct that had been compromised and disposed of by the approved plea and sanction agreement in order to justify a refusal of reinstatement.
- [49] More fundamentally, the commissioner relied on conduct underpinning charges that had been expressly withdrawn in terms of the very same plea and sanction agreement that she found to be binding and without any evidence linking that conduct to the statutory requirements of intolerability or impracticability. The enquiry into remedy must be grounded in the reason for the dismissal and the

¹⁹ Ibid at paras 39 - 40; see also *Notisi v South African Police Service and Others* [2023] ZALAC 33; [2024] 4 BLLR 380 (LAC).

evidence properly before the commissioner. The commissioner's decision to deprive the employee of reinstatement constituted a material error of law and a gross irregularity which had the distorting effect. The refusal of reinstatement was therefore unreasonable and that decision is liable to be reviewed and set aside.

[50] The Municipality bore the onus of establishing that reinstatement should not operate retrospectively.²⁰ There was no evidence before the commissioner, nor before this Court, that militates against full retrospective reinstatement. In the circumstances, there is no basis to deny the employee retrospective reinstatement with full backpay. Accordingly, the employee's review application succeeds, and she entitled to full retrospective reinstatement.

Costs

[51] In respect of costs, section 162 of the LRA confers a discretion on this Court to make an order according to the requirements of law and fairness. The general principle in labour matters is that costs do not follow the result. In this matter, although the employee has been successful, she did not persist with the issue of costs. Having considered the matter, I do not think that there are facts that justify a departure from the usual approach. Therefore, there shall be no costs order made.

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

Order

1. The review application under case number JR1357/24 instituted by the Municipality is dismissed.
2. The review application under case number JR1211/24 instituted by the employee succeeds, and the arbitration award issued by the commissioner under case number LPD062305 dated 13 June 2024 is

²⁰ *Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile and others* (2010) 31 ILJ 273 (CC); [2010] 5 BLLR 465 (CC).

reviewed and set aside only to the extent that it awards the employee compensation per paragraphs 93 and 94.

3. Paragraphs 93 and 94 of the arbitration award are substituted with the following order:

- '1. The Municipality is ordered to reinstate the employee retrospectively from the date of her dismissal on the same terms and conditions of employment that existed prior to her dismissal and without any loss of benefits.
2. The Municipality is ordered to pay the employee backpay from the date of her dismissal until the April 2026 salary.
3. Payment of backpay above must be made within 21 calendar days of this judgment.
4. The employee is ordered to report for duty on Monday, 11 May 2026 in terms of her reinstated contract of employment.'

4. There is no order as to costs.

M. Makhura

Judge of the Labour Court of South Africa

Appearances:

For the Municipality: Mr A.N. Nkabinde

Instructed by: Lebea & Associates Attorneys

For the Employee: Mr M. Makgaa (with Mr M.P. Mannya)

Instructed by: MP Mannya Attorneys

LABOUR COURT