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

04/06/2026

Signature Date

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR2582/23

In the matter between:

VERNON NAIDOO **Applicant**

and

PM NGAKO *N.O* **First Respondent**

GENERAL PUBLIC SERVICE SECTOR

BARGAINING COUNCIL **Second Respondent**

GAUTENG DEPARTMENT OF ROADS AND TRANSPORT **Third Respondent**

Heard: 28 May 2026

Delivered: 04 June 2026

JUDGMENT

NORVAL AJ

Introduction

[1] This is a review application brought in terms of s 145 of the Labour Relations Act 66 of 1995 ('LRA'). The applicant, Mr Vernon Naidoo, seeks an order reviewing and setting aside the arbitration award issued by the first respondent, Commissioner P.M Ngako, on 13 November 2023.

[2] The arbitration award was delivered following a s 188A enquiry that was conducted virtually over approximately 20 days spanning from September 2021 to May 2023.

[3] The applicant further seeks an order substituting the recommendation of the first respondent and the decision of the third respondent to dismiss the applicant on 27 November 2023, and reinstating him on the same terms and conditions that applied prior to his dismissal, together with back pay and benefits from the date of dismissal, and costs.

Background

[4] The applicant was employed by the third respondent as the Director of Supply Chain Management from 1 September 2016. His duties included, amongst others, the procurement of goods and services for the third respondent. He reported to Mr Poobalan Govender, the Chief Director: Financial and Management Accounting, who was the Head of SCM.

[5] The applicant testified that when he joined the third respondent, the Department was burdened with in excess of 40 Supply Chain Management audit findings from the Auditor-General. Within approximately one year, under his stewardship, the SCM unit managed to clear all those control issues and thereafter received clean reports with regards to Supply Chain Management. Following his suspension, the Department received qualified audit opinions, and of the 190 pages of audit findings, 150 pages related to Supply Chain Management, his area of former responsibility.

[6] The applicant was charged with misconduct in terms of Chapter 7 of the Senior Management Services Handbook ('the SMS Handbook'). The first set of charges (two allegations) were presented on or about 2 November 2020, based on a Public Service Commission ('PSC') Report dated 20 May 2019. The applicant was charged together with another employee, Mr C Ramoshu, in those initial charges relating to alleged irregular procurement. Supplementary charges (12 charges) were issued on

or about 11 February 2021, and additional supplementary charges (three charges) on or about 8 March 2021, the latter being charges of insubordination proffered during the tenure of the Acting CFO, Ms Lesibana Japhatalina Fosu.

[7] The charges broadly fell into two categories: (i) those arising from the PSC Report relating to the procurement of the services of Bosman Giyose Incorporated ('BG Inc') as chairperson for an internal disciplinary hearing, comprising allegations of accepting a late quotation, using an incorrect comparative schedule, and incurring irregular expenditure in the sum of R425 239.75 in contravention of section 217 of the Constitution, section 45 of the Public Finance Management Act 1 of 1999 ('PFMA'), and paragraphs C.4.4, C.4.8 and C.4.9 of the Code of Conduct; and (ii) those arising from the tenure of Ms Fosu as Acting CFO relating to alleged failures in the performance of duties, insubordination, and a breakdown in the employment relationship.

[8] Both the third respondent and the applicant agreed to appoint an independent external chairperson from the bargaining council to preside over the matter. The first respondent was appointed as the arbitrator by the GPSSBC. In terms of section 2.7(5)(a) of Chapter 7 of the SMS Handbook, the decision of the arbitrator was to be final and binding and only subject to review by the Labour Court.

[9] The inquiry was held virtually via Microsoft Teams over a period of approximately 20 days spanning from September 2021 to May 2023. The employer was represented by Mr Anton Roskam (Attorney) and the employee was represented by Mr Joey Govender (Fellow Employee). The employer called two witnesses: Advocate Lawrence Cronje, who conducted the PSC investigation, and Ms Lesibana Japhatalina Fosu, the former Acting CFO, having been employed at the Department from approximately August 2020 to February 2021 on a six-month contract. The applicant testified on his own behalf and called Mr Pule Sekawana, who was the Acting Deputy Director-General for Corporate Services.

[10] On 31 July 2023, the first respondent delivered his findings. The applicant was found guilty on six charges/sub-charges, namely charges 4.1, 4.1.3, 5.1, 5.2, 6.9 and 6.11. He was found not guilty on 16 charges/sub-charges, namely charges 4.1.2, 4.1.4, 6.1, 6.2 (read with 6.2.1 and 6.2.2), 6.3, 6.7, 6.8, 6.10, 6.12, 2.1 (read

with 2.2, 2.2.1, 2.2.2), and 2.3. Three charges (6.4, 6.5 and 6.6) were withdrawn by the third respondent in its written closing arguments.

[11] On 13 November 2023, the first respondent issued an arbitration award in which he recommended a sanction of dismissal on charges 4.1.1, 4.1.3, 5.1 and 5.2 relating to procurement irregularities, a final written warning on 'charge 2.9', and dismissal on 'charge 2.1' for insubordination. The first respondent stated: 'I have recommended a sanction of dismissal on the Employee Mr. Naidoo on charges 4.1.1, 4.1.3, 5.1, and 5.2 relating to procurement irregularities, I have further recommended a sanction of a final written warning on charge 2.9 for the Employee, Mr Naidoo for failing to put measures in place to monitor the validity period of bids and recommended a sanction of dismissal on charge 2.1. for insubordination.'

[12] On 27 November 2023, the Head of Department, Dr Thulani A. Mdadane, issued a termination letter, dismissing the applicant with effect from 30 November 2023. The applicant was directed to return his laptop, accessories, office keys, and confidential information by 30 November 2023 at 12h00. The letter advised the applicant of his right to take the matter up for review in the Labour Court.

Condonation application

[13] Before turning to the grounds of review, the Court must address the third respondent's application for condonation for the late filing of its answering affidavit, which was filed on 5 August 2025 and is supported by the affidavit of Ms Sindiswa Jane Manitshana, an admitted legal practitioner employed at the State Attorney, Johannesburg.

[14] The chronology of the delay is as follows. The review application was launched on 20 December 2023. The third respondent filed a Notice of Intention to Oppose on 8 January 2024. Counsel was formally briefed on 30 January 2024. The applicant filed his Notice of Amendment and Supplementary Affidavit on 1 February 2024. The third respondent's answering affidavit was due by approximately 15 February 2024, in accordance with the applicable rules. Despite this, a protracted dispute about the completeness of the record ensued from 29 March 2024 to 6 May 2024 , with the State Attorney contending that the record was incomplete and the

applicant's attorneys maintaining that the relevant portions had been furnished. The State Attorney however agreed on 6 May 2024 that the record was complete.

[15] Ms Manitshana's explanation for the delay may be summarised as follows: counsel was out of town and only received the brief on 14 February 2024; the record was considered incomplete; Ms Manitshana fell ill from 20 May to 22 May 2024 and her leave was extended until 3 July 2024 with a recommendation to work from home; counsel faced ‘severe capacity constraints’ during July 2024 and only delivered the updated draft answering affidavit on 2 August 2024; and the answering affidavit was finally served on or about 16 September 2024, approximately seven months late. Five months if taken from when Ms Manitshana returned to work from her illness.

[16] On 27 September 2024, the applicant filed a Notice of Objection to the late filing. It was only on 5 August 2025, approximately eleven months after the Notice of Objection, that the condonation application was filed.

[17] In the answering affidavit to the condonation application, the applicant opposes condonation. He submits that: (i) he has been unemployed for a period nearing two years as a result of his unfair dismissal and has been severely prejudiced by the delay; (ii) the third respondent was, at all material times, in possession of the very records it claimed were incomplete; (iii) the third respondent has on multiple occasions promised that an answering affidavit was forthcoming (on 29 February 2024 and 16 May 2024) but failed to deliver; (iv) the third respondent has also failed to file its Heads of Argument despite a directive from the Registrar compelling it to do so by 26 March 2024; and (v) the condonation application itself was filed eleven months after the Notice of Objection, which is 'patently unreasonable'.

[18] The Court has also noted from the State Attorney's letter dated 30 April 2024 that the commissioner recorded in the award that the proceedings spanned approximately 20 hearing days, whereas the transcripts provided cover only ten days. The State Attorney identified the following dates for which transcripts were missing: 22 September 2021; 18, 19 and 20 May 2022; 15 August 2022; 22, 23 and 26 September 2022; and 24 and 26 October 2022. However, it appears that the transcript is complete in relation to the charges for which the applicant was found guilty, and this much was eventually accepted by the State Attorney.

[19] In determining whether to grant condonation, the Court must weigh the following factors: the degree of lateness; the reasonableness of the explanation; the prospects of success on the merits; the prejudice to the applicant; and the interests of justice. Under Rule 42(3), this Court may condone non-compliance with time frames if good cause is shown.

[20] The delay is substantial. The answering affidavit was at best approximately five months late and the condonation application itself was a further eleven months late. The explanation, whilst containing legitimate elements such as Ms Manitshana's illness and the dispute regarding the completeness of the record, is taken as a whole, as unsatisfactory. The dispute about the completeness of the record does not explain the entire delay. Counsel's 'severe capacity constraints' and the bureaucratic process for briefing counsel are not extraordinary circumstances but rather the ordinary challenges of litigation, and the State Attorney's office bears the responsibility of managing its workload. More troubling is the fact that even after the answering affidavit was belatedly served on 16 September 2024, the condonation application was not filed until 5 August 2025, with no explanation whatsoever for this further eleven-month delay.

[21] In all the circumstances, the third respondent's conduct in this matter has been lamentable, and the Court records its displeasure. This pattern of persistent non-compliance with the rules of this Court, weighs heavily against the grant of condonation.

[22] However, the Court is mindful that the interests of justice require that matters be determined on their merits wherever possible, and that refusing condonation has the drastic consequence of depriving a party of the opportunity to ventilate its case. Rule 42(3) affords this Court a broad discretion. The subject matter of this review, the dismissal of a senior public servant following a disciplinary inquiry that spanned approximately 20 hearing days, is not trivial. There are matters of public interest at stake, including the integrity of procurement processes in the public service.

[23] Accordingly, and with considerable reluctance, condonation is granted for the late filing of the third respondent's answering affidavit. The Court does so solely in the interests of justice.

[24] The granting of condonation nonetheless comes at a price. In *Passenger Rail Agency South Africa v CCMA and Others*[1] (‘*PRASA’*), Tlhotlhalemaje J granted condonation for the late filing of an answering affidavit in review proceedings in the interests of justice, but held that:

> *‘[24] The granting of condonation nonetheless comes at a price. The third and fourth respondents had clearly been remiss and negligent in not delivering the answering affidavit when required to do so, compelling PRASA to file an objection... PRASA as a consequence of the third and fourth respondents' dilatoriness was also compelled to oppose the condonation application in circumstances which the third and fourth respondents could have avoided. In the circumstances, considerations of law and fairness dictate that the fourth respondent be burdened with the costs of this application.’*

[25] The same considerations apply here. The third respondent's delay was five months at best if not seven months; its condonation application was a further eleven months late. It failed to comply with the Registrar's directive. Accordingly, the third respondent is ordered to pay the costs of the condonation application on Scale B, as a mark of the Court's displeasure at the third respondent's persistent failure to comply with the rules of this Court. Scale B is ordered as it provides enhanced tariff costs, which are appropriate for conveying the Court’s displeasure at the way the third respondent decided to litigate.

[26] Having granted condonation, the Court has had regard to the contents of the third respondent's answering affidavit, deposed to by Dr Thulani Mdadane (the HOD), in its consideration of the merits

<u>The grounds of review</u>

[27] The applicant raises several grounds of review, which are addressed in turn below. These fall broadly under the following headings:

27.1 The first respondent failed to make a binding award as required by the SMS Handbook, the agreement, and the LRA;

[1] (JR137/2015) [2018] ZALCJHB 160.

27.2 Inconsistency in charging officials for misconduct;

27.3 The sanctions imposed are inconsistent, unfair, and harsh;

27.4 The break in transmission signal affected the virtual arbitration (which was withdrawn in oral argument);

27.5 The arbitration award and findings are inconsistent, contradictory, and contain material errors;

27.6 The third respondent waived its right to discipline the applicant; and

27.7 Substantive defects on the six guilty verdicts.

The applicable review test

[28] Before turning to the substantive grounds of review, it is necessary to identify the correct legal framework. The arbitration in this matter was conducted under the auspices of the GPSSBC, a bargaining council established in terms of the LRA. Section 51(8) of the LRA stipulates that 'unless otherwise agreed to in a collective agreement, sections 142A and 143 to 146 apply to any arbitration conducted under the auspices of a bargaining council.' Accordingly, this review falls to be determined in terms of section 145 of the LRA, which provides that an arbitration award may be set aside if the commissioner committed misconduct in relation to his duties, committed a gross irregularity in the conduct of the proceedings, exceeded his powers, or the award was improperly obtained.

[29] The grounds of review in section 145(2) of the LRA were modelled on section 33(1) of the Arbitration Act 42 of 1965. However, because CCMA and bargaining council arbitrations constitute administrative action, the Constitutional Court in *Sidumo v Rustenburg Platinum Mines Ltd*[2] held that s 145 must be 'suffused' by the constitutional standard of reasonableness. The test for unreasonableness is: 'Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?'.

[30] Where a commissioner exceeds his or her powers by acting outside of jurisdiction or *ultra vires* within jurisdiction, the correctness standard of review applies. The LAC

[2] 2008 (2) SA 24 (CC)

confirmed this principle in *Fidelity Cash Management Service v CCMA*[3] and others where the Court held:

> 'If the CCMA had no jurisdiction in a matter, the question of the reasonableness of its decision would not arise. Also if the CCMA made a decision that exceeds its powers in the sense that it is ultra vires its powers, the reasonableness or otherwise of its decision cannot arise.'

[31] The correctness standard entails that a decision or conduct by a commissioner is reviewable if it was incorrect; nothing more needs to be established. Reasonableness does not enter the equation, and the reviewing court does not show any deference to the commissioner's decision.

[32] With this framework in mind, the Court turns to the grounds of review.

Analysis

Jurisdiction — binding award versus advisory recommendation (Ground 1)

[33] Section 2.7(5)(a) of Chapter 7 of the SMS Handbook provides that where the employer and employee agree that the disciplinary hearing will be chaired by an arbitrator from the relevant sectoral bargaining council, 'the decision of the arbitrator will be final and binding and only subject to review by the Labour Court'. This provision is clear and unambiguous.

[34] It is common cause that both the applicant and the third respondent agreed that the first respondent would chair the disciplinary hearing as an arbitrator from the GPSSBC. The consent form in the record, signed by the applicant on 6 September 2021, records the applicant's confirmation that he has been advised of the allegations against him and consents to the process. The request was for the appointment of a 'Chairperson to chair the disciplinary hearing' and the GPSSBC appointed Commissioner P.M Ngako as the arbitrator. Furthermore, the Code of Conduct for Conciliators and Arbitrators, as contained in the Dispute Procedures for the PSCBC, provides at section 5.2 that 'Arbitrators' awards should be definite, certain and as concise as possible'.

[3] (2008) 29 ILJ 964 (LAC).

[35] The third respondent contends in its answering affidavit that the award was intended to be final and binding, arguing that ‘the essence of an arbitration award's binding nature is not in the terminology but in its intent and effect.’ The third respondent submits that the parties engaged in arbitration with the understanding that the decision would be final and binding, and that the proceedings were conducted under PSCBC Resolution 1 of 2003. The Court has considered this submission carefully. However, the Court must have regard to the language of the award itself, not to the subjective intentions or understandings of the parties. It is manifest from the face of the arbitration award that the first respondent did not render a binding decision. Instead, he couched his conclusion in the language of a recommendation. He stated: ‘I have recommended a sanction of dismissal’ and ‘I therefore recommend a sanction of dismissal on the Employee, Mr. Naidoo’. Indeed, the word ‘recommended’ or ‘recommend’ appears no fewer than five times in the concluding paragraphs of the arbitration award. The use of the word ‘recommended’ rather than ‘imposed’ or ‘ordered’ throughout the sanction phase is telling. The first respondent failed to exercise the power conferred upon him. Rather than making a final and binding decision, he deferred the decision-making power to the third respondent.

[36] The distinction between advisory and binding awards is well recognized in labour law. Section 135(3) of the LRA envisages advisory arbitration as a form of conciliation, where the commissioner makes ‘a recommendation to the parties, which may be in the form of an advisory arbitration award.’ Such awards are appropriate in the conciliation context, for example, prior to a strike over a refusal to bargain dispute under section 64(2) of the LRA. They are inappropriate, and indeed are impermissible, where the parties have agreed to a binding arbitration under the SMS Handbook. The first respondent's rendering of an advisory award where a binding award was mandated represents a fundamental misconception of the nature of the inquiry and his duties in connection therewith.

[37] The Court must also address the third respondent's alternative submission, namely that if the award is advisory, it cannot be reviewed under s 145 of the LRA. The present proceedings were not conciliation proceedings. They were a disciplinary inquiry conducted under the auspices of the GPSSBC pursuant to an agreement under s 2.7(5)(a) of the SMS Handbook, which required a binding award. The fact

that the first respondent erroneously rendered an advisory recommendation rather than the binding award that was mandated does not transform the proceedings into conciliation proceedings. The award remains reviewable under s 145, indeed, the very defect is that the commissioner failed to comply with the terms of reference under which he was appointed, which constitutes a classic ground of review.

[38] In *Telcordia Technologies Inc v Telkom SA Ltd*[4], the SCA confirmed that the inquiry is whether the arbitrator purported to exercise a power which he did not have as opposed to erroneously exercising a power vested in him.[5]

[39] By rendering an advisory award rather than a binding one, the first respondent both exceeded his powers (section 145(2)(a)(iii)) and committed a gross irregularity in the conduct of the arbitration proceedings (section 145(2)(a)(ii)) as contemplated in section 145(2) of the LRA. The correctness standard of review applies to this ground. The first respondent was mandated to render a binding award; he rendered an advisory recommendation instead, for which he had no power. This was incorrect: nothing more need be established, and the reasonableness or otherwise of the outcome does not arise. The failure to render a binding award, the very purpose for which the arbitrator was appointed, is a mistake of such a fundamental character that it is also properly characterised as misconduct (section 145(2)(a)(i)). The third respondent, who was a party to the dispute and the employer, then assumed the role of decision-maker.

[40] This ground alone is sufficient to vitiate the proceedings and warrants the setting aside of the arbitration award. The Court notes that the third respondent, having received the 'recommendation', proceeded to implement it by issuing a dismissal letter on 27 November 2023 signed by the HOD, Dr Thulani A. Mdadane. This confirms that the third respondent itself understood the award to be advisory in nature. Had it been a binding decision, there would have been no need for the employer to separately 'implement' it by issuing a termination letter, let alone implement it at its discretion.

The remaining grounds of review

[4] 2007 (3) SA 266 (SCA).
[5] [52]

[41] Given the Court's finding on the first ground of review, that the first respondent exceeded his powers and committed a gross irregularity and misconduct by rendering an advisory recommendation rather than a binding award, it is unnecessary to determine the remaining grounds of review. The first ground is dispositive of the application: the arbitration award falls to be set aside on this basis alone.

The dismissal does not sit in the award

[42] The setting aside of the arbitration award does not, without more, set aside the applicant's dismissal. The dismissal was not effected by the first respondent. It was effected by the third respondent, the employer, acting independently upon receipt of the first respondent's recommendation.

[43] The timeline is instructive. The first respondent delivered his arbitration findings on 31 July 2023. Thereafter, the parties submitted mitigating and aggravating factors by 31 October 2023. The first respondent delivered the arbitration award, couched as a recommendation, on 13 November 2023. Fourteen days later, on 27 November 2023, the HOD, Dr Thulani A. Mdadane, issued a termination letter dismissing the applicant with effect from 30 November 2023. The termination letter stated: ‘Take note that having been found guilty and given the serious nature of the charges levelled against you, you are hereby dismissed from your position in the Gauteng Department of Roads and Transport as per the arbitrator’s ruling attached hereto.’

[44] The dismissal was thus the employer's own act of managerial prerogative. The employer received the recommendation, considered it over a period of fourteen days, and then chose to implement it by issuing a termination letter.

[45] The award recommended; the employer decided. These are two distinct acts.

[46] Were the analysis to end here, the applicant would be left in an untenable position: the recommendation upon which his dismissal was premised would have been set aside, yet the dismissal itself would remain extant. He would be required to refer an unfair dismissal dispute to the CCMA or the GPSSBC under s 191 of the LRA, a process that would further delay the resolution of a matter that has already been ongoing for more than five years.

The employer had no authority to dismiss

[47] The analysis does not, however, end there. The question that must be addressed is whether the employer retained the authority to dismiss the applicant in circumstances where it had agreed, under s 2.7(5)(a) of the SMS Handbook, that the disciplinary hearing would be chaired by an arbitrator from the bargaining council whose decision would be 'final and binding.'

[48] Section 2.7(5)(a) of Chapter 7 of the SMS Handbook provides:

> 'The employer and the employee charged with misconduct may agree that the disciplinary hearing will be chaired by an arbitrator from the relevant sectoral bargaining council appointed by the council. The decision of the arbitrator will be final and binding and only subject to review by the Labour Court.'

[49] The effect of this agreement is that the employer abdicated its decision-making power regarding the outcome of the disciplinary inquiry, including sanction, to the commissioner appointed by the GPSSBC.

[50] This principle was applied by Van Niekerk J (as he was then) in *SA Transport and Allied Workers Union and others v MSC Depots (Pty) Ltd and others*[6] ('MSC Depots'), a case concerning the consequences of a s 188A pre-dismissal arbitration. The Court held at paragraph 11 that in terms of the tripartite agreement between the employee, the employer and the CCMA, 'an arbitrator steps into the shoes of the employer and assumes the right normally considered a sacrosanct element of the managerial prerogative — the right to exercise discipline, including the right to dismiss.' The principle in *MSC Depots* applies with equal force here: the employer chose to place the disciplinary decision in the hands of the commissioner. Having done so, it cannot now unilaterally reassume that decision-making power.

[51] The third respondent and the applicant agreed, through the consent form signed on 6 September 2021, read with s 2.7(5)(a) of the SMS Handbook, that the first respondent would chair the disciplinary hearing and that his decision would be final and binding. Paragraph 7.4(a) of PSCBC Resolution 1 of 2003, under which the proceedings were conducted, expressly provides that if the chair finds an employee has committed misconduct, 'the chair must pronounce a sanction.' The sanctions

[6] (2013) 34 ILJ 706 (LC).

may include dismissal. The employer's role, post-award, was limited to implementing the decision of the commissioner, not to making an independent decision on sanction.

[52] Having delegated its disciplinary decision-making power to the commissioner, the employer could not unilaterally reassume that power upon receipt of a recommendation. The SMS Handbook did not contemplate a two-stage process in which the commissioner recommends and the employer then decides. It contemplated a single-stage process in which the commissioner decides and the employer enforces that decision. The employer's purported exercise of managerial prerogative in dismissing the applicant was accordingly without authority.

[53] Furthermore, the first respondent's award has been set aside as a nullity. It was made outside the powers conferred upon the first respondent. An act taken pursuant to a nullity is itself a nullity. The employer's decision to dismiss was premised entirely on the first respondent's recommendation, as the dismissal letter expressly states: ‘you are hereby dismissed ... as per the arbitrator’s ruling attached hereto.’ The foundation having been removed, the structure built upon it cannot stand.

[54] The Court accordingly finds that the third respondent's decision to dismiss the applicant on 27 November 2023 is null and void, being premised on a recommendation that has been set aside as a nullity and having been made without authority in circumstances where the employer had delegated its disciplinary decision-making power to the commissioner.

Substitution – the merits of each charge

[55] Having set aside the arbitration award and declared the dismissal null and void, the Court must consider whether it is appropriate to substitute the award or to remit the matter for a fresh hearing. In the interests of finality, having a record that is complete in material respects, and having regard to the unconscionable delays that have already characterised this matter, the Court considers it appropriate to examine the merits of each charge for purposes of determining whether substitution is warranted. The evidence on the six guilty verdicts is before the Court in the transcripts, evidence bundles, and the commissioner's own findings.

Charges 4.1 and 4.1.1- late quotation

[56] Charge 4.1.1 alleged that BG Inc's bid was accepted notwithstanding its lateness, which may have prejudiced other potential bidders. The PSC Report at paragraph 6.1.2(i) found that 'the allegation that the bid of Bosman Giyose was submitted late is correct, however it was 1 minute late and not seven days late as averred.' Mr Cronje testified in examination-in-chief on 27 January 2022 that the email on page 70 of the employer's bundle was sent from Annelise van Deventer at Bosman Giyose on 3 October 2016 at 11:01 AM, and that the closing time was 11:00 AM. He testified that 'it is acceptable practice in the public service that whatever procurement process you follow be it tenders that are advertised or sourcing of price quotations there would be a closing date that you must comply with.'

[57] Under cross-examination on 28 January 2022, Mr Cronje conceded that the email sent on 29 September 2016 by Mr Ramoshu was a 'request for quotation for a chairperson for an internal disciplinary hearing.' Mr Govender then established that a *second* email was sent on 6 October 2016 with a closing date of 10 October 2016. When asked whether the quotation received on 10 October 2016 would have been on time, Mr Cronje agreed: 'He would have been in time, yes.' Mr Cronje further conceded that 'he does not know whether there is a comparative list of bidders for the quotation that was closed on the 10th of October' and that 'he is not hundred percent sure what happened to Mr. Ramoshu.'

[58] The applicant testified that there were two separate procurement processes running simultaneously. He explained: 'So the request that was sent on 29 September, and where the quotations were required by 3 October, there were two requests, there was a request for quotations as an initiator and there was a quotation for request as a chairperson in both cases related to Mr Xolani. So on Mr Xolani's case Bosman Giyose was appointed as the initiator.' He then referred the commissioner to Bundle A, page 3, and identified the quotation dated 10 October 2016 with the title 'Quotation for chairing disciplinary hearing' at a rate of R1 300 per hour, which he testified related to Ms Natalie Govender. He further demonstrated, by reference to the PSC Report at page 21, that there were indeed two purchase orders issued to the service provider Bosman Giyose. The first on 7 October 2016 (for the initiator on Mr Xolani's case) and the second on 13 December 2016 (for the chairperson on Ms Govender's case, which was deleted on the same day).

[59] The applicant also adduced evidence, demonstrating that the sender and recipient have no control over network transmission times. He conducted a live test during the hearing on 22 November 2022, showing that an email sent at 8:54 AM from a Gmail address was only received by the Department's server at 8:55 AM, a one-minute delay attributable to system latency rather than the sender's conduct, showing it was submitted on time.

[60] The commissioner expressly found at paragraph 18.3 of his findings: 'I further agree with Mr. Naidoo that the price quotations that were received on 10 October 2016 for the chairperson in Ms. N Govender's matter were on time.' Despite this finding, the commissioner nonetheless found the applicant guilty on the main charge 4.1, and in the award recommended dismissal on sub-charge 4.1.1. This is irreconcilable. The commissioner's own analysis establishes that the quotation for the matter that is the subject of the charge, Ms Govender's disciplinary hearing, was received on time. On the commissioner's own analysis, this charge is not established, and is an outcome a reasonable decision-maker could not reach.

Charge 4.1.3 – incorrect quote used for comparison

[61] Charge 4.1.3 alleged that the incorrect quote was used for the comparison of prices of bidders. The PSC Report maintained that R&W Attorneys' quotation of R228 000 should have been used instead of BG Inc's quotation, and that using the wrong quotation constituted an irregularity.

[62] The applicant testified on 23 November 2022 and referred the commissioner to the R&W quotation at page 140 of the employer's bundle. He identified that the quotation was for a 'candidate attorney' - Ms F Asmall, whose hourly rate as a Director was R3 420, whose associate's rate was R2 280, and whose candidate attorney's rate was R1 140. The applicant testified: 'what is not considered is that is using a candidate attorney, an articled clerk a person that has not been admitted as an attorney yet. So, his comparison is wrong, he is not comparing apples with apples because in the other quotations, they looked at admitted attorneys and they took the pricing of admitted attorneys.'

[63] Under cross-examination on 10 May 2023, Mr Roskam put to the applicant that the comparative schedule showed the incorrect quotation was used. The applicant

maintained that the mandate from the Labour Relations Directorate was to source admitted attorneys and that the R&W candidate attorney quotation could not be compared with the quotations of admitted attorneys from BG Inc.

[64] The commissioner found at paragraph 18.4: 'it is clear from this paragraph that the mandate was to request price quotations from an admitted attorney that will exclude candidates' attorneys as they are trainees, and I agree with Mr. Naidoo that the mandate that was given to them was request price quotations from admitted labour attorneys who are registered on the CSD... As a result, I agree with Mr. Naidoo that the price of the quotation for R228 000 for a candidate attorney from Rooth & Wessels cannot be used in the comparative schedule as this did not meet the mandatory requirements from the client.'

[65] Furthermore, BG Inc was appointed at R1 200 per hour, lower than both the quoted rate of R1 300 and substantially lower than R&W's admitted attorney rate of R2 280 to R3 420 per hour. The applicant testified that if the service provider accepted R1 200 when it had quoted R1 300, 'it did not disadvantage the second and the third service provider because their prices were in excess of 260 000 in any case, the Preferential Procurement Regulation permits the HOD to negotiate with the first service provider.'

[66] On the commissioner's own analysis, the premise of the PSC Report is unsustainable, and a decision a reasonable decision-maker cannot reach. .

Charges 5.1 and 5.2 – payment irregularities

[67] Charges 5.1 and 5.2 alleged irregular expenditure of R425 239.75 in contravention of s 45 of the PFMA and paragraphs C4.4, C4.8 and C4.9 of the Code of Conduct, on the basis that the applicant failed to ensure that the system of financial management and internal controls was carried out within his area of responsibility.

[68] The applicant testified on 23 November 2022 about the payment process. He explained that BG Inc submitted invoices to the Labour Relations Directorate (the business unit), not to SCM. The business unit certified the work completed and the invoice amounts, and then forwarded a checklist to the Finance Directorate for payment. He testified if payment was made then that would be between the business unit and the finance directorate, and he must maintain that is not his area

of responsibility, as the area of responsibility of financial management lies with the financial directorate. He stated that he would not have known the overcharge because the invoice would go to the business unit, the business unit will certify the work completed and invoice amounts, and the case of the change from R1 200 to R1 500 supply chain management would not know anything about it.

[69] The transcript of 23 November 2022 records the applicant referring to the invoices at Bundle B, Part 6. He identified that BG Inc charged R1 500 per hour in all its invoices (totalling R425 239.75) when the appointment was at R1 200 per hour, an overcharge of R300 per hour. Mr Govender asked: 'Would you have known about the overcharge?' The applicant answered: 'No. The invoices ... the business unit will certify the works completed and the invoice amounts and then they would prepare a checklist, which they would then forward to the finance directorate. So in terms of the change in the rate from R1 200 to R1 500, supply chain management will not be, will not have any knowledge of this.'

[70] Mr Cronje, the PSC investigator, testified on 27 January 2022 that the payments were processed by the Labour Relations Directorate under Mr Mlambo and that page 134 of the employer's bundle showed the payment report. Under cross-examination, Mr Cronje conceded that he recommended disciplinary proceedings against 'everybody implicated in the report', including Mr Mlambo and his team, and that he was 'not hundred percent sure what happened to Mr. Ramoshu.'

[71] The commissioner expressly found at paragraph 18.6 that 'Mr. Naidoo was not responsible for processing invoices from Bosman Giyose, they were approved by Labour Relations Directorate.' Despite this finding, the commissioner sustained the guilty verdict on the basis that the applicant failed to put measures in place to ensure that a wrong comparative schedule is not used with a quotation to initiate from Bosman Giyose which was late for 1 minute.

[72] This reasoning is a *non sequitur*. The charge alleged irregular expenditure of R425 239.75: a payment irregularity. The finding was that the applicant had no involvement in the payments. The commissioner conflated the procurement process (charges 4.1.1 and 4.1.3) with the payment process (charges 5.1 and 5.2). The two are distinct: one concerns the *appointment* of BG Inc; the other concerns the *payment* to BG Inc. The applicant may have had a role in the former (which this

Court has addressed under charges 4.1.1 and 4.1.3) but, on the commissioner's own finding, had no role in the latter.

[73] Furthermore, the commissioner's finding that the applicant was the 'Head of SCM' and therefore bore ultimate oversight responsibility is factually incorrect. The SCM Policy of 2016, approved by the HOD on 21 September 2016, identified the Chief Director, Mr Poobalan Govender, as the Head of SCM, not the applicant. The applicant testified on 22 November 2022 that whenever he took decisions, he was not taking them in isolation, it was based on the engagement with their Chief Director, Mr. Poobalan Govender, who then indicated how he should deal with matters, and according to him at all times he acted within the policy of the department. Mr Govender, as Chief Director, recommended the procurement transaction to the HOD for approval. If anyone bore ultimate oversight responsibility for the system of financial management and internal controls within SCM, it was the Chief Director, not the applicant who reported to him. The commissioner's attribution of 'Head of SCM' responsibility to the applicant was a material misdirection, and one that a reasonable decision-maker could not reach.

Charge 6.9 – failure to monitor validity periods of bids

[74] Charge 6.9 alleged that the applicant failed to put in place measures to monitor the validity period of bids so that, if necessary, these periods could be extended before their expiry.

[75] Ms Fosu testified on 25 October 2022 and 31 January 2022 that the validity period is 'the responsibility of SCM. SCM is the function that oversees the Supply Chain Management, supply chain, and monitoring of the validity period of the bid, it is part of the Supply Chain Management and you are managing the entire supply chain.' She testified that 'if it was not for a good Samaritan that alerted the HoD' the validity period would have expired. The 'good Samaritan' was the Probity Auditor.

[76] The applicant testified on 24 November 2022 that responsibility for monitoring the validity period rested with the BEC under the SCM Policy, the Standard Operating Procedures, and the BEC Charter. He referred the commissioner to the extension letter signed by Ms Ruth Morena, the BEC chairperson, demonstrating that the BEC, not SCM, took accountability for the extension. He testified: 'This is one of the

tenders that was monitored weekly' and that the probity auditor served as a 'backup' who called him to advise that the bid was about to expire.

[77] The commissioner found at paragraph 19.6 of the findings: 'I do not agree with the contention of Mr. Naidoo is not the responsibility of the SCM to put measures in place to monitor the validity period it is the responsibility of the BEC, which is a committee that does not have full-time employees, so the administrative responsibility falls under SCM.' He found the applicant guilty because he 'failed to lead evidence before me on what measures are in place to ensure that the validity period does not expire.'

[78] This is a closer question than the preceding charges. The BEC is indeed a committee without full-time employees, and the administrative support for it falls under SCM. The commissioner's reasoning, that the applicant bears oversight responsibility and failed to demonstrate what measures existed, is reasonable. However, the mitigating circumstances are substantial: the bid did not expire; it was extended; the SCM vacancy rate was almost 60%; and the incident occurred during Covid-19 closure. The commissioner himself acknowledged these factors when imposing only a final written warning rather than dismissal on this charge.

[79] The Court is prepared to accept, on a balance of probabilities, that the applicant bore some responsibility as Director of SCM for ensuring measures were in place to monitor bid validity, and considers that for purposes of substitution.

Charge 6.11 – insubordination

[80] Charge 6.11 alleged that on or about 15 October 2020, the applicant refused the CFO's request to set up a meeting with the DDG in GPT responsible for Probity regarding ways to unblock the probity service function.

[81] Ms Fosu testified on about the background to this charge. She explained that following the decentralisation of probity audit functions from Provincial Treasury to the Department in April 2020, there were challenges with delays in probity reports. She testified that she asked the applicant to arrange a meeting with the DDG at GPT to discuss 'ways to unblock the probity service function.' She stated that Mr. Naidoo said to her that he was not her PA and that the reason she asked Mr.

Naidoo to arrange the meeting was that he could explain the importance of the meeting to ensure that it was set up soon.

[82] The applicant testified on 24 November 2022 that he did not refuse the instruction. He explained that Ms Pailman (his predecessor's personal assistant) had previously arranged such meetings with Treasury by communicating with the PA in Treasury and comparing diaries. He testified that he referred the matter to his supervisor, Mr Govender, who then indicated how he should deal with matters. He stated that 'Ms Fosu became upset and she indicated that she knows that he is not his PA.' He explained that Ms Kgage (the Director responsible for Probity Auditors) resolved the matter directly with Treasury and that the resolution was communicated to Ms Fosu. He further testified that the HOD had mandated that SCM not be involved in the probity audit function to maintain the integrity and independence of the tender process, and referred the commissioner to the relevant email in Bundle B at Part 7.

[83] The commissioner found at paragraph 19.7 of the findings that 'the Employee, Mr. Naidoo guilty of Charge 6.11 for refusing to set up a meeting with the Deputy Director General in the GPT responsible for probity.' He agreed 'with the Employer that failure by the Employee, Mr. Naidoo to comply with the instructions constitutes insubordination and was a blatant refusal to implement lawful instructions.' He stated: 'What makes the insubordination serious is the response from the Employee, Mr. Naidoo when he refused the instruction telling the Acting CFO that he was not his Secretary.'

[84] The evidence does not support a finding of outright insubordination.

[85] The Court is constrained in its ability to resolve this factual dispute. The evidence on charge 6.11 turns entirely on a private telephonic conversation between two people. There were no witnesses, no recording, and no contemporaneous written record. Ms Fosu says the applicant told her he was 'not her PA'; the applicant denies ever having said it, testifying under cross-examination he denied that he said to Ms Fosu that he is not her personal assistant, and said everyone who knows him, knows that is not his character. The commissioner resolved this credibility dispute in favour of Ms Fosu's version without articulating any reasoning as to why her version was preferred over his, and the Court struggles to find enough evidence in the record to resolve this factual dispute, and indeed so would a reasonable decision-maker.

[86] There is accordingly insufficient evidence to have found insubordination, and is taken into account for purposes of substitution.

Waiver

[87] The applicant contends that the third respondent waived its right to discipline him by reason of the inordinate delay of approximately 18 months between becoming aware of the alleged misconduct (PSC Report dated 20 May 2019) and preferring charges on 2 November 2020. The PSC Report recommended implementation within 90 days.

[88] Two independent decision-makers, Adv Bham SC and the first respondent, both concluded that the delay did not amount to waiver. The third respondent's explanation is the political transition following the May 2019 general elections, which required the new MEC to be apprised of developments. Waiver requires a clear, unequivocal, and intentional abandonment of a right. Mere delay, even significant delay, does not automatically constitute waiver.

[89] The Court is not persuaded that the delay amounts to waiver sufficient to dismiss the charges. Waiver requires a clear, unequivocal, and intentional abandonment of a right. The explanation proffered, a change in MEC leadership following the May 2019 elections and the subsequent disruptions occasioned by the COVID-19 pandemic, explains the administrative delay in preferring charges. It does not, however, constitute evidence of an intention not to prosecute. At no point during the 18-month delay did the employer communicate any intention to abandon the disciplinary process. It continued to employ the applicant throughout. The change in political leadership and the pandemic are explanations for tardiness, not evidence of intentional waiver. The Court accordingly agrees with the commissioner and with Adv Bham SC that the delay did not amount to waiver.

[90] The delay is, however, highly relevant to the question of sanction and to the overall fairness of the process.

[91] An employer that takes 18 months to charge an employee, and then a further three years to conclude the hearing, cannot credibly maintain that the employment relationship has irretrievably broken down, particularly when, during that same

period, it sought the employee's assistance with audit turnaround, appointed him to chair committees, and assessed him as 'fully effective.'

The appropriate sanction

[92] The Court has found that the applicant should have been found guilty on only one charge: charge 6.9 (failure to monitor validity periods of bids). The Court has found that the applicant should have been found not guilty on charges 4.1/4.1.1, 4.1.3, 5.1, 5.2 and 6.11.

[93] The Sanctioning Guidelines applicable to the public service classify charge 6.9 as a 'Less Serious Offence.' For a first offence, the prescribed sanction is 'corrective counselling or a verbal warning.'

[94] The applicant is a first-time offender. He has three dependent children and elderly parents who rely on his income. The infractions on the procurement charges occurred within 29 days of his appointment and during his probationary period, in a unit with a vacancy rate exceeding 60%. He did not benefit financially or otherwise. The employer itself proposed an alternative sanction of demotion and one month's suspension without pay, thereby conceding that dismissal was not the only reasonable sanction. The applicant's supervisor provided a glowing character reference, and the Department itself sought his assistance with the audit turnaround, appointed him to chair committees, and assessed him as 'fully effective.'

[95] The delay in prosecuting the matter is also a significant mitigating factor. The applicant was suspended on 8 March 2021. The hearing commenced in September 2021 and was only concluded in May 2023. The findings were delivered on 31 July 2023 and the award on 13 November 2023. From the date of the first charges (2 November 2020) to the date of dismissal (30 November 2023), more than three years elapsed. From the date of the alleged procurement infraction (October 2016/January 2017) to the date of dismissal, more than six years elapsed. Furthermore, the applicant was suspended from 8 March 2021 until September 2023, a period of approximately two and a half years, before his suspension was lifted and he was appointed to chair committees. An employer that suspends an employee for two and a half years, then lifts the suspension and appoints the

employee to senior committee positions, and then dismisses the employee three months later upon receipt of a recommendation, struggles to credibly maintain that the employment relationship is intolerable. The employer's own conduct during the protracted process negates any suggestion of an irretrievable breakdown.

[96] In the circumstances, the Court finds that dismissal is grossly disproportionate to the misconduct established. Having regard to the Sanctioning Guidelines, and the totality of the evidence, the appropriate sanction for the charge on which the applicant has been found guilty is a written warning, valid for six months.

Costs for the review

[97] In respect of the costs of the review application, the Court has had regard to the approach of the Constitutional Court in *Zungu v Premier of the Province of KwaZulu-Natal and Others*[7], where the Court held that costs in labour matters are a matter of discretion and that the general rule that costs follow the result does not apply with equal rigidity in the Labour Court.

[98] The review raised important questions of law concerning the binding nature of s188A reviews, not to mention the parties have a continued employment relationship stemming from the order. In the exercise of the Court's discretion, accordingly, no order as to costs is made in respect of the review application.

[99] Accordingly, the following order is made:

Order

1. The third respondent's application for condonation for the late filing of its answering affidavit is granted.

2. The third respondent is ordered to pay the costs of the condonation application alone on Scale B.

3. The arbitration award issued by the first respondent on 13 November 2023 under Case Number GPDH04/2021 under the auspices of the second respondent is reviewed and set aside.

[7] [2018] ZACC 1.

4. The third respondent's decision to dismiss the applicant on 27 November 2023 is declared null and void for the reasons set out in this judgment.

5. The arbitration award is substituted with the following order:

   a. The applicant is acquitted on all charges, except for charge 6.9, on which he is found guilty (failure to implement measures to monitor the validity periods of bids).

   b. A written warning, valid for six months from the date of this order, is imposed in respect of charge 6.9.

6. The applicant is reinstated retrospectively to his position as Director: Supply Chain Management in the Gauteng Department of Roads and Transport on the same terms and conditions that applied prior to his dismissal, with effect from 30 November 2023.

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JA Norval

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Adv E Nhutsve
Instructed by:	DMO Incorporated Attorneys
For the Third Respondent:	Adv PJ Daniell
Instructed by:	The State Attorney, Johannesburg