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

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Case No: C502/2022

In the matter between:

KGOMOTSO SEKHABISA **Applicant**

and

SOUTH AFRICAN HERITAGE RESOURCES

AGENCY (SAHRA) **First Respondent**

COMMISSION FOR CONCILIATION AND

ARBITRATION (CCMA) **Second Respondent**

ELDRIDGE EDWARDS N.O. **Third Respondent**

Heard: 18 February 2026

Delivered: 4 August 2026

JUDGMENT

MacROBERT, AJ

Introduction

[1] This is an opposed application for review in terms of section 145 of the Labour Relations Act[1] (the LRA) in which the Applicant seeks an order that the arbitration award handed down by Third Respondent on 17 August 2022 under the auspices of the Commission for Conciliation, Mediation and Arbitration (CCMA) under case No WECT11009-2, in which he found the Applicant's dismissal to be procedurally and substantively fair, be reviewed and set aside, together with an order as to costs.

[2] The Applicant seeks compensation, being the balance of the term of his fixed term contract.

[3] In his Practice note, the Applicant contends that the Third Respondent arrived at a conclusion in his award which was illogical and disconnected from the facts placed before him, and that in so doing he misconstrued the facts before him, resulting in an unreasonable conclusion that prevented the Applicant from receiving a fair hearing.

[4] It will be observed that this does not correctly set out the now well-established grounds for review, although the case made out by Applicant on the papers and in his heads correctly captures the grounds.

[5] The First Respondent, the South African Heritage Resources Agency (SAHRA), is a creature of statute and subject to the Public Finance Management Act[2] (PFMA), falling within the structure of the Department of Sport, Arts and Culture (the Department).

<u>Factual background and the evidence</u>

[6] Most of the facts are either common cause or not materially disputed.

[7] The Applicant was appointed as First Respondent's Chief Financial Officer (CFO) from 1 August 2017 at Level E1 on a five-year fixed term contract, terminating on 31 July 2022, and reporting to First Respondent's CEO, Advocate Lungisa Malgas.

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[1] Act 66 of 1995, as amended.
[2] Act 1 of 1999.

[8] Amongst his duties as CFO, the Applicant was required to acquaint himself with the relevant provisions of the PFMA and all legislation applicable to SAHRA, and policies, including procurement and procedures.

[9] Applicant's job description (JD) provides that the primary purpose of the job is:

> "To ensure that SAHRA finances are conducted in terms of the PFMA and to provide the CEO and (its) Council with strategic advisory services on all matters pertaining to financial management."

[10] Applicant's JD and Performance Plan contain a number of key requirements, not least in financial management; ensuring sound internal controls and producing quarterly reports for submission the Department and Treasury.

[11] The Applicant was appointed to act in the position of Executive: Corporate Services from 3 June 2019, whilst simultaneously occupying the position of CFO.

[12] The letter of Acting Appointment, signed by the CEO, stated that:

> "You are reminded to familiarise yourself with the all the relevant Policies and Delegations applicable to this position."

[13] As at 3 June 2019, the CFO position was graded at E1 level. At the same date, the position of Executive Officer: Corporate Services was graded at the same level, viz: E1.

[14] As from 1 August 2019, the position of CFO was re-graded to E2- i.e. one level higher than that of the Executive Officer: Corporate Services.

[15] The First Respondent's Remuneration Policy in section 4 provides as follows:

> "Temporary appointment of an existing employee to a higher level position vacated by an incumbent who is expected to return to the position at which time the acting appointee will return to his…former position or position vacated through the resignation of an employee."

[16] Further:

> "An acting allowance is payable when an employee is required to undertake the full duties and responsibilities of a higher level post for a minimum of four (4) weeks <u>and a maximum of six consecutive months</u>. The same will apply in instances where an employee is required to simultaneously fulfil the role of a colleague <u>in a position lateral to the one that the acting employee currently occupies."</u>
>
> (Own emphasis)

[17] As will be seen below the above rider was the subject of much debate and argument, which the Court deals with below.

<u>The Disciplinary Inquiry</u>

[18] The Applicant was charged with three allegations:

[19] Charge 1:

> " 2.1 In terms of clause 6.4.2.1(c) of the Remuneration Policy, an employee will be entitled to an Acting Allowance only if the employee is required to undertake the full duties and responsibilities of a <u>higher-level</u> post for a minimum of four (4) weeks and a maximum of six (6) consecutive months. The same will apply in instances where an employee is required to simultaneously fulfil the role of a colleague in a position <u>lateral</u> to the one that the acting appointee currently occupies.
>
> 2.2 Your position as Chief Financial Officer is at level E2 with a total cost of employment of R1,502,560 per annum. The position of an Executive Officer: Corporate Services is graded at E1 with a total cost of employment of R1,125,871 per annum.
>
> 2.3 Despite this, after being appointed to act in the position of Executive Officer, Corporate Services from June 2019, you caused yourself to be paid an acting allowance of R19,198.07 per month from June 2019 to July 2019, and an amount of R23 423,11 per month from August 2019 until October 2020, when you were removed from your acting position.

2.4 As a result of the above you caused yourself to be paid an authorised Acting Allowance totalling R389,742.79.

2.5 Your conduct in this regard amounts to you being paid an irregular and/or unauthorised expenditure and is a breach of the policies of SAHRA, including the Remuneration Policy. Such amounts to serious misconduct."

[20] Charge 2: The Applicant was acquitted on this charge and thus bears no further mention.

[21] Charge 3:

> "…During the period of 15 August 2020 to 3 September 2020 you, in your position as the Chief Financial Officer, you failed on several occasions to timeously submit the requisite Procurement Plans to the DSAC *(ie the Department of Sport, Arts and Culture)*, and despite various reminders to submit within the time-lines. This was to the detriment of SAHRA in its obligations owed to the DSAC. Your conduct in this regard was in dereliction of your duties alternatively due to your gross negligence in carrying out your duties as the Chief Financial Officer and amounts to serious misconduct."

[22] The disciplinary inquiry was independently chaired by attorney Clive Hendricks who found the Applicant guilty on Charges 1 and 3. After hearing representations in mitigation and aggravation of sanction, he dismissed the Applicant on 26 July 2021.

[23] The Applicant referred an unfair dismissal dispute to Second Respondent which was arbitrated by Third Respondent, who issued his award on 17 August 2022, in which he confirmed that the dismissal of Applicant was both procedurally and substantively fair.

[24] It is this award that the Applicant seeks to have reviewed and set aside by this Court.

The CCMA Arbitration

[25] Only two witnesses testified – First Respondent's CEO, Advocate Lungisa Malgas (Malgas), Applicant's line manager, who reports to First Respondent's Council, and the Applicant himself.

Charge 1

[26] The Third Respondent spent considerable time in his award in dealing with the meaning of "*lateral*" in First Respondent's policy[3] and concluded that the First Respondent did not discharge the onus of establishing that the positions of CFO and that of Executive Officer: Corporate Services (EOCS) were not lateral despite the differences in salary and grading, and thus in essence found the Applicant not guilty on this aspect of Charge 1. Although I am of the view that this finding was questionable on the evidence in relation to the Policy, I need not dwell on it any further.

[27] However, the Third Respondent found the Applicant guilty of breaching the Policy in receiving an acting allowance for a period longer than six months. The Policy is clear and unambiguous in this regard.

[28] The Applicant contended that Clause 6.4.2 of the Policy does not provide for a cap on acting allowances when an employee acts in a lateral position, and that the Rule is unclear.

[29] This is patently incorrect. The use of the words in the clause: "*The same applies…..*" is a direct reference to the provisions and the six month cap that apply when an employee acts in a higher position. It would in any event make no sense for there to be a cap of 6 months in one case and no cap in the other.

[30] The CEO testified as to a document that the HR Manager submitted dated 19 September 2019 for approval of corrections to acting allowances that had been calculated incorrectly. The Applicant's name does not appear on the document although he was receiving an acting allowance at the time. He

[3] See in this regard paras 24, 25, 35 and 47 to 52 of the arbitration award.

however signed approval of the recommendations in the document in his capacity as CFO and acting EOCS. This omission on the part of the Applicant is more than questionable.

[31] The Applicant did not apply for a deviation from the Policy with regard to the six month rule as provided in the Policy. The evidence reveals that the Applicant was aware of the submissions made to Council for deviation approval for the CEO and Mome to continue in their roles and receive acting allowances beyond the six month period

[32] Clause 7.5 of the Policy provides that "*(a)ny deviations from the policy are subject to the approval of the CEO*". No such approval was sought by the Applicant from the CEO, and no such approval was granted by the CEO. This constituted a serious breach of the policy and entailed unauthorised and irregular expenditure.

[33] The Applicant contended in his evidence that there had been precedent in the First Respondent for payment of acting allowances of other employees beyond six6 months, and hence there was inconsistency at play, for example, in relation to one Mr Hine and other employees. However, he led no firm or convincing evidence in this regard.

[34] The Applicant's version was that he had had discussions with the CEO and Boullion at a strategic planning meeting in relation to the extension of his acting period yet did not put this to the CEO in cross-examination, which one would have expected.

[35] The Applicant also contended that it was others who signed off on his receipt of an acting allowance. However, it was he who instigated the process.

[36] The CEO also testified that she had been unaware that the Applicant continued to receive an acting allowance beyond the six month period, which Applicant could not challenge. The Applicant's evidence that the CEO, Boullion and Mome ought to have known that he was in receipt of an acting allowance beyond the six months because they sat on committees when the 2021 Annual Financial Statements were considered, was also not put to the

CEO by him in cross-examination, which one would also have expected and thus carries little evidential weight.

[37] The Applicant attached much importance to the fact that the CEO authorised payment of an acting allowance in October 2020. The Third Respondent dealt with this adequately in his award, and not much store can be placed on this.

[38] The Applicant was aware of the Rule. He conceded that a finding of guilty on the first charge would constitute serious misconduct.

The law[4]

[39] Errors of fact or law by the arbitrator may not be enough to vitiate an award unless the arbitrator arrived at an unreasonable result.[5] To meet the test for review, the result of the award has to be so egregious that no reasonable person could reach such a result[6]. If the *arbitrator's* reasons rationally support the outcome, interference with the award on the basis of unreasonableness would not be justified[7].

[40] Even if an arbitrator commits a reviewable irregularity, the award cannot *be* assailed if the outcome falls within a band of decisions which a decision-maker could reach on the available evidence.[8]

[41] Adjudging the severity of misconduct is a power conferred upon the arbitrator. The arbitrator's sanction must stand unless no reasonable arbitrator could have reached that conclusion.[9]

[42] The review test as enunciated in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[10] has been given a strict interpretation. As *Bestel v*

[4] In this regard the Court is indebted to Professor Alan Rycroft and Bruce Robertson, co-editors of Workplace Law, for the source and analysis of certain of the decisions referred to in this Judgment.
[5] *See: Gauteng Department of Education v General Public Service Sectoral Bargaining Council and Others* [2025] 5 BLLR 435 (LAC) at para 18.
[6] See: *AJ Charnaud and Company v SACTWU obo Members and Others* [2024] 10 BLLR 1016 (LAC) at para 24 and *Herholdt v Nedbank Ltd* 2013 (6) SA 224 (SCA) at para 25.
[7] See: *Duncanmec (Pty) Limited v Gaylard NO and Others* (2018) 39 ILJ 2633 (CC) paras 42 and 43.
[8] *National Union of Metalworkers of South Africa obo Motloung and Others v Polyoak Packaging (Pty) Ltd Others* (2025) 46 ILJ 552 (LAC) at paras 34 to 36.
[9] *TMT Services and Supplies (Pty) Ltd v Commission for Conciliation Mediation and Arbitration and Others* (2019) 40 ILJ 150 (LAC) at para 21.

Astral Operations Ltd and Others[11] put it, an arbitrator's finding will be one that "a reasonable decision-maker could not reach" – i.e. reviewable – if it is unsupported by evidence, based on speculation, or made in ignorance of evidence that was not contradicted. Only if *evidence* which may have a bearing on the sanction is ignored will a Commissioner be guilty of gross irregularity[12].

[43] In summary, as long as the Commissioner's result is reasonable, reviewing and appeal Courts have been prepared to overlook errors of fact, errors of law, and other irregularities.

Conclusion on Charge 1

[44] The Third Respondent's award in this regard contains a detailed analysis and exposition of the evidence and is well reasoned and the Court can find no fault with it, save perhaps only with regard to the "*lateral*" issue discussed above, however, this does not work in Applicant's favour. His award and outcome accords with the legal principles and expositions the Courts as set out above.

[45] Given the seniority of the positions the Applicant held and the level of trust placed in him, what was expected of him under the First Respondent's Policies, his job description and his contract of employment as detailed in Third Respondent's award and the documents in the Bundles, also the failure by the Applicant to apologise and show any remorse, the Third Respondent's finding of guilty on Charge 1 and the sanction of dismissal he imposed must stand.

Charge 3

[46] The relationship between the First Respondent and DCAS is critical, as is adherence to policies and practice, in this instance a failure on the part of

[10] [2007] 12 BLLR 1097 (CC).
[11] [2011] 2 BLLR 129 (LAC) at para 30.
[12] See: *Transnet Rail Engineering v Mienies and Others* (2015) 36 ILJ 2605 (LAC) at para 11.

Applicant to adhere to same amounting to gross negligence and gross dereliction of duty.

[47] The evidence revealed that the Applicant failed in multiple respects in this regard, his conduct at times bordering on refusal to obey pre-determined prescripts and policy, and not least, instructions; if not insolence, and a total disregard both towards policy and his senior management and First Respondent's Council itself.

[48] The applicant either dissembled about the due date for submission of the Procurement Plans for DSAC, which the evidence reveals was clearly 31 July 2022, and not 31 August 2022 as the Applicant claimed, or he was severely remiss in his error, which was material.

[49] As an example the National Treasury instruction 2/2026/2017, and Ms Apies of DCAS's email of 2 July 2020, affording an extension, due to Covid-19, of certain of the deadlines, however the deadline of end July 2020 for submission of the Procurement Plan Report was not extended beyond that date - only the submission of the quarterly report. The Applicant conveniently "confuses" the extensions afforded.

[50] The Applicant simply failed to respond to urgent email communications from Ms Apies of DCAS reminding him of the deadline for submission, and also from his own Line Manager, the CEO in this regard, displaying great disdain, ultimately resulting in the CEO herself having to submit the requisite Procurement plans to DCAS on 2 September 2022.

[51] These amounted to some five unanswered emails from Ms Apies to the applicant from 15 August to 27 August 2020, the final being a final reminder, threatening escalation. All were unanswered by the Applicant. Also a further four emails from the CEO to him from 30 August 2020 to 2 September 2020, remained unanswered by the Applicant.

[52] [55] The Applicant's explanations in his evidence in this regard were woefully inadequate and unacceptable and amounted to gross dereliction of

duty and gross negligence, as also financial misconduct under the provisions of the PFMA,

[53] The Applicant was charged and found guilty of gross negligence in this regard.

<u>The law on gross negligence</u>

[54] To qualify as gross negligence the Applicant's conduct must depart from the standard of a reasonable person to an extent that it may be categorised as extreme.[13]

[55] The carelessness or mere failure which constitutes ordinary negligence, changes to gross negligence when there is an indifference to, and a blatant violation of, a workplace duty. Gross negligence can be described as a conscious and voluntary disregard of the need to use reasonable care, which has or is likely to cause foreseeable grave injury or harm to persons or property or both. It is conduct that is extreme when compared with ordinary negligence. Gross negligence also focusses on the magnitude of the risks involved such that, if more than ordinary care is not taken, a serious mishap can occur.

[56] Courts are less tolerant of employees who possess or claim to possess special skills and who, because of their position and experience can be expected to be aware of the performance standards set by their employer.

[57] In *Somyo v Ross Poultry Breeders (Pty) Ltd*[14] the Labour Appeal Court (LAC) held a manager or senior employee whose knowledge or experience qualifies him/her to judge for him/herself whether s/he is meeting the standards set by the employer, does not need a reasonable opportunity to improve his/her performance. The judgment states:

> "An employer who is concerned about the poor performance of an employee is normally required to appraise the employee's work performance; to warn

[13] *Department of Co-Operative Governance, Human Settlements and Traditional Affairs, Limpopo province and another v Seopela N.O. and others* [2015] ZALCJHB 22 (4 February 2015) (LC) at paras 40 to 42.
[14] [1997] 7 BLLR 862 (LAC) at p 866.

> the employee that if his work performance does not improve, he might be dismissed; and to allow the employee a reasonable opportunity to improve his performance: Craig v Rubdec (Pty) Ltd t/a Guys and Girls (1992) 1 LCD 29 (IC); James v Waltham Holy Cross UDC [1973] IRLR 202. Those requirements may not apply in two cases which are relevant to this matter. The first is the manager or senior employee whose knowledge and experience qualify him to judge for himself whether he is meeting the standards set by the employer: Stevenson v Sterns Jewellers (Pty) Ltd (1986) 7 ILJ 318 (IC) at 324F-G; Blue Circle Materials Ltd v Haskins (1992) 1 LCD 6 (LAC). The second is where "…the degree of professional skill which must be required is so high, and the potential consequences of the smallest departure from that high standard are so serious, that one failure to perform in accordance with those standards is enough to justify dismissal:Taylor v Alidair Ltd [1978] IRLR 82. Examples given in Taylor's case are the passenger carrying airline pilot, the scientist operating the nuclear reactor, the driver of an articulated lorry full of sulphuric acid and the chemist in charge of research of the possible effects of, for example, thalidomide."

[58] On the law as cited above, the applicant has clearly, at the very least, committed gross negligence as to Charge 3.

Conclusion as to Charge 3

[59] There is no doubt for all the reasons given above, that the applicant was correctly found guilty by third respondent on this charge and that dismissal is the appropriate sanction under first respondent's disciplinary code.

[60] In this regard, the remarks the court has made above apply equally here.

Applicant's attack on alleged procedural unfairness

[61] The third respondent has dealt with this in his award.[15]

[62] The crux of his attack on procedural fairness is the failure by first respondent to provide him and his representative at his disciplinary inquiry with the report of the forensic investigators, Diale Mogashoa Attorneys, and the lack of time adequately to prepare.

[15] See para 60 of the arbitration award.

[63] Neither ground was raised by his legal representative at the commencement of the disciplinary inquiry, which would have been the appropriate time to raise these procedural issues, which one would have expected.

[64] In any event first respondent did not rely on this report at the arbitration hearing, it was rather applicant who relied on it, by which time he had it.

[65] The Court thus finds no merit on this attack and does not believe that applicant was procedurally prejudiced.

Final Conclusions

[66] In all the premises, and for the reasons given above, the Court is satisfied that the third respondent's findings of guilty on the first and third charges, as also the sanction of dismissal that he imposed were fully merited, well-reasoned in relation to all the facts and the evidence before him, including both the oral and documentary evidence, and that he committed no reviewable irregularity under section 145 of the LRA, and his award should stand.

Costs

[67] In the interests of justice and fairness and on the basis of well established case law in this regard, the Court is of the view that an adverse award of costs is not merited.

[68] In the premise the following order is made:

Order

1. The applicant's application for review is dismissed.

2. There is no order as to costs.

J.M.J. MacRobert

Acting Judge of the Labour Court of South Africa

Appearances:

For the applicant	:	Mr Z. Parker of Parker Attorneys
For the First Respondent	:	Mr Luway Mongie of Bowman Gilfillan Inc