



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

Signature

Date

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case no: JR681/20

In the matter between:

RAMOJOE, JACOB LEHLOMA

Applicant

and

THEE, JOSEPH WILSON N.O

First Respondent

**COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION**

Second Respondent

SERVICES SECTOR EDUCATION AND TRAINING

AUTHORITY

Third Respondent

Heard: 20 March 2026

Delivered: 28 August 2026

JUDGMENT

SCHENSEMA, AJ

Introduction

- [1] This is an opposed application in which the applicant seeks to review and set aside the outcome of inquiry conducted by the first respondent (the Commissioner) in terms of section 188A of the Labour Relations Act¹ (the LRA) (the outcome). The inquiry was conducted under the auspices of the second respondent, the Commission for Conciliation, Mediation and Arbitration (the CCMA), pursuant to an agreement between the parties in terms of section 188A (11) of the LRA.
- [2] In the outcome, the Commissioner found that the third respondent had proved, on a balance of probabilities, that the applicant had committed the misconduct set out in the charge sheet. Furthermore, that the third respondent had followed a fair procedure and accordingly recommended that the applicant's services be terminated.
- [3] The applicant also seeks condonation for the late filing of the record.

Condonation

Background

- [4] This matter has a protracted procedural history. The outcome was issued on 31 March 2020, following which the applicant launched these review proceedings. During December 2020, the applicant served and filed a notice in terms of rule 7A (6) of the then Rules for the Conduct of Proceedings in the Labour Court², relating to the record of the section 188A inquiry conducted between 27 March 2019 and 25 February 2020. On 13 January 2021, the applicant delivered a supplementary affidavit. The third respondent thereafter filed its answering affidavit to both the founding and supplementary affidavits on 26 February 2021.
- [5] On 26 April 2021, the applicant filed two further notices in terms of rule 7A(6). The first incorporated the transcript of the EOHCB proceedings, whilst the second related to the transcription of the evidence of Ms Lerato Mbonani. On the same date, the applicant also filed his replying affidavit.

¹ Act 66 of 1995, as amended.

² Now Repealed and replaced with the Rules Regulating the Conduct of the Proceedings of the Labour Court. Published 3 May 2024 (GN 50608). Effective 17 July 2024.

- [6] On 19 May 2021, the third respondent filed an application in terms of rule 11 objecting to the applicant's replying affidavit and the further notices delivered in terms of rule 7A(6) on the basis that they had been filed out of time without the requisite consent or leave of the Court.
- [7] The matter was enrolled for hearing on 18 May 2023. Prior to the hearing, the third respondent delivered a further notice in terms of rule 11(3), objecting to the applicant's filing of an additional record. At the hearing before Mahosi J, the applicant abandoned his replying affidavit. The Court further directed the applicant to provide the third respondent with a copy of the arbitration bundle and to file an application for condonation for the late filing of the record and the accompanying transcript. The costs in relation to the hearing on 18 May 2023 were reserved.
- [8] Pursuant to that order, the applicant filed an application for condonation on 21 June 2023. The applicant explained that the record was extensive and that, after receiving the record from the CCMA, he identified those portions which he considered relevant to the review. During that process, he discovered that portions of the January 2020 recordings were missing. According to the applicant, the missing recordings were only made available approximately five months after the CCMA had delivered the record in terms of rule 7A(3), and, upon arranging for the recordings to be transcribed, it became apparent that they remained incomplete.
- [9] The applicant further explained that the transcribed record, comprising approximately 1 519 pages, was filed on 11 December 2020. Thereafter, on 26 April 2021, he filed additional transcriptions which, according to him, were relevant to the review. He attributes the delay in filing the complete record to the late receipt of the recordings and the fact that the recordings initially provided were incomplete.
- [10] As regards prospects of success, the applicant contends that he enjoys good prospects in the review. In broad terms, he submits that the charges on which he was ultimately dismissed did not correspond with the Accounting Authority's decision to investigate him and that the disciplinary process was

unfair, *inter alia* because some of the allegations related to events dating back to 2016.

- [11] In relation to prejudice, the applicant submits that the delay in filing the complete record was occasioned by the CCMA's failure to provide a complete record in terms of rule 7A. He contends that, despite those difficulties, he ultimately succeeded in placing a complete record before the Court and that he would suffer substantial prejudice were condonation to be refused.
- [12] At the hearing before this Court, the third respondent confirmed that it no longer persisted in its opposition to the condonation application, although it drew the Court's attention to the circumstances surrounding the late filing of the record. In those circumstances, it is unnecessary to traverse the submissions originally advanced in opposition.

Analysis of the condonation application for the late filing of the record

- [13] The applicable principles are well established. An application for condonation involves the exercise of a judicial discretion upon a consideration of all the relevant facts. The factors identified in *Melane v Santam Insurance Co Ltd*³ remain applicable, namely the extent of the delay, the explanation therefor, the prospects of success, the importance of the matter, prejudice and the interests of justice. These factors are not individually decisive but are interrelated and must be weighed together.
- [14] As the Constitutional Court explained in *Grootboom v National Prosecuting Authority*⁴, the overarching enquiry is whether it is in the interests of justice to grant condonation. In labour matters, this enquiry must be undertaken mindful of the statutory imperative that disputes be resolved expeditiously, as emphasised in the matter of *Toyota SA Motors (Pty) Ltd v CCMA and Others*⁵. Nevertheless, expedition is not an end unto itself. The Court retains a discretion to grant condonation where good cause has been shown.

³ 1962 (4) SA 531 (A).

⁴ (2014) 35 ILJ 121 (CC).

⁵ (2016) 37 ILJ 313 (CC).

- [15] In relation to the late filing of the rule 7A record, the Labour Appeal Court in *Samuels v Old Mutual Bank*⁶ confirmed that a review which has become archived or deemed withdrawn may be revived upon a proper showing of good cause. Whether such relief should be granted depends upon the facts of each case.
- [16] Having considered the degree of the delay, the explanation advanced, the absence (or limited nature) of prejudice to the respondent, the importance of determining the review on its merits, and the interests of justice, I am satisfied that the applicant has established good cause for the late filing of the record. Condonation should therefore be granted.

The Review Application

Background

- [17] During the inquiry, the third respondent's case was that the applicant, whilst employed as Senior Manager: Chamber Operations, engaged in a sustained pattern of misconduct consisting of neglect of duty, failure to perform managerial responsibilities, bullying and intimidation of subordinate employees, unprofessional conduct towards external stakeholders, and breach of the conditions of his precautionary suspension.
- [18] In support of these allegations, the third respondent led evidence from seven witnesses.
- [19] Ms Emma Mbele testified that the applicant repeatedly subjected her to intimidation, humiliation and unfair criticism, threatened disciplinary action without justification, ignored her communications, excluded her from meetings and created a hostile working environment. Although she acknowledged that she had not lodged a formal grievance at the time, she explained that she feared victimisation and described a marked improvement in the workplace following the applicant's suspension.

⁶ (2017) 38 ILJ 1790 (LAC).

- [20] Ms Lerato Mbonani testified that the applicant consistently undermined and humiliated her, particularly in the presence of junior staff, dismissed her concerns, shouted at her, accused her of dishonesty and failed to provide the managerial support required of him. She also dealt extensively with the applicant's alleged failure to address the long-standing issue concerning the registration of assessors and moderators within the Institute for Work at Height, contending that despite repeated reports and stakeholder concerns, he failed to intervene appropriately.
- [21] Dr Alti Kriel, Chief Executive Officer of the Institute for Work at Height, together with Mr Rob Urquhart, described the significant delays experienced in resolving the registration of assessors and moderators. Their evidence was that the applicant failed to engage constructively with stakeholders, ignored requests for meetings and updates, and adopted an indifferent or dismissive attitude, thereby contributing to prolonged delays in resolving an issue which had important safety implications for the industry.
- [22] Ms Nomfezeko Vendle similarly testified that the applicant regularly belittled, criticised and intimidated her, both privately and in the presence of colleagues and subordinates. She stated that he threatened employees with dismissal, discouraged participation during meetings, and created an atmosphere of fear within the department. She further testified regarding the applicant's conduct during stakeholder engagements, including an incident in which his behaviour towards stakeholders resulted in complaints being lodged against him.
- [23] Mr Thando Zonke, the Employee Relations Specialist, testified regarding the investigation, the applicant's precautionary suspension and the subsequent disciplinary process. His evidence was that the applicant breached the terms of his suspension by communicating directly with the Chairperson of the Board, bypassing established reporting lines, attending the workplace and undertaking official travel during the suspension period.
- [24] Mr Victor Msomi, a Board member representing the Employers Organisation for Hair Cosmetology and Beauty, testified that the applicant conducted himself unprofessionally during a stakeholder workshop, interrupted

participants, restricted stakeholder participation, made inappropriate remarks and alienated stakeholders to the extent that formal complaints were submitted to the Board.

- [25] Ms Jacqui Ford testified that, despite repeated requests, the applicant failed to meet with her in her capacity as Chairperson of the Labour Relations Chamber, resulting in her being unable to perform her functions effectively. She also described his conduct towards stakeholders as dismissive, discourteous and damaging to the respondent's relationship with industry representatives.
- [26] The applicant denied all allegations of misconduct. He maintained that he was a firm but fair manager and that the complaints arose because he introduced greater accountability within the department. He disputed that the registration of assessors and moderators fell within his area of responsibility, contending that this function belonged to another division of the third respondent. He asserted that stakeholder dissatisfaction resulted largely from confusion created by subordinate employees and that he had been excluded from relevant correspondence concerning the registration process. He further denied bullying or intimidating employees, describing the witnesses' evidence as exaggerated, fabricated and motivated by a concerted campaign against him. Regarding the suspension-related allegations, he disputed that he had acted improperly and maintained that his conduct was authorised or misunderstood.
- [27] The applicant seeks to review and set aside the outcome issued in terms of section 188A of the LRA, on the basis that the Commissioner committed reviewable irregularities as contemplated in section 145 of the LRA, rendering the outcome one that a reasonable decision-maker could not have reached.
- [28] The applicant submits that the Commissioner erred both in finding him guilty of four misconduct charges and in recommending dismissal. It is further contended that, even if the findings on guilt were sustainable, the Commissioner committed a material irregularity by recommending dismissal without affording the applicant an opportunity to present evidence or

submissions in mitigation. According to the applicant, the Commissioner considered only aggravating factors and failed to consider relevant mitigating circumstances, including his length of service, disciplinary record and overall contribution to the third respondent.

- [29] The applicant further submits that the proceedings were procedurally unfair because the Commissioner incorrectly permitted legal representation. He argues that proceedings conducted under section 188A are governed by rule 25 of the Rules for the Conduct of Proceedings before the Commission for Conciliation, Mediation and Arbitration, and that the statutory requirements permitting legal representation were not satisfied. It is contended that the Commissioner misconstrued the applicable legal framework, predetermined the issue and demonstrated bias in favour of the third respondent.
- [30] The applicant also argues that the disciplinary charges were procedurally defective because they differed materially from the allegations initially investigated and those upon which he was suspended. He submits that the charges lacked the necessary specificity, particularly those alleging bullying and intimidation "on various occasions", thereby depriving him of a fair opportunity to prepare his defence. He further contends that several allegations related to events dating back to 2016 and 2017, were excessively stale, and had either already been addressed internally or constituted impermissible double jeopardy.
- [31] On the merits, the applicant submits that the Commissioner failed to properly assess the evidence and credibility of the witnesses. He contends that the Outcome contains numerous factual inaccuracies, incorrect dates, mischaracterisations of witness testimony and omissions of material evidence. These errors, it is argued, demonstrate that the Commissioner failed to apply his mind to the evidence and reached findings unsupported by the record.
- [32] The applicant further contends that the Commissioner failed to apply the principles governing the assessment of mutually destructive versions as articulated in *Stellenbosch Farmers' Winery Group Ltd and Another v Martell*

*and Cie SA and Others*⁷. In particular, he submits that the Commissioner ignored significant internal and external contradictions in the evidence of the third respondent's witnesses, failed properly to assess credibility and probabilities, and accepted their evidence notwithstanding material inconsistencies.

- [33] The applicant disputes the findings on the bullying and intimidation charges, contending that the conduct relied upon by the third respondent amounted to legitimate managerial supervision, performance management and the exercise of disciplinary authority rather than workplace bullying. He argues that isolated incidents of criticism, correction or disciplinary intervention do not satisfy the accepted definition of bullying, which requires repeated and deliberate misuse of power.
- [34] The applicant also challenges the findings relating to the remaining misconduct charges, contending that the evidence did not establish misconduct on a balance of probabilities and that the Commissioner ignored contextual evidence explaining his conduct. He submits that the Commissioner accepted the third respondent's version without properly considering his explanations or the documentary evidence.
- [35] Finally, the applicant submits that the cumulative effect of the Commissioner's errors, including permitting legal representation, failing to consider relevant evidence, relying on incorrect facts, misapplying legal principles, overlooking contradictions in the third respondent's evidence and failing to permit mitigation constitutes misconduct and gross irregularities in the conduct of the proceedings. Accordingly, the applicant contends that the outcome falls to be reviewed and set aside.
- [36] In response the third respondent submits that the review application should be dismissed. Its principal submissions may be summarised as follows:

36.1 the applicant has misconceived the nature of review proceedings by seeking to re-argue the merits of the disciplinary enquiry;

⁷ 2003 (1) SA 11 (SCA).

- 36.2 it contends that the supplementary affidavit amounts to a factual appeal, inviting the Court to reconsider the evidence rather than determine whether the Commissioner's decision falls within the band of reasonable decisions contemplated in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*⁸ and subsequent authorities;
- 36.3 Relying on authorities including *Cox v CCMA and Others*⁹, *Gold Fields Mining (SA) (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*¹⁰, *Duncanmec (Pty) Ltd v Gaylard NO and Others*¹¹ and *Marthinussen v Metal and Engineering Industries Bargaining Council and Others*¹², the third respondent argues that the Court should not interfere merely because another decision could have been reached;
- 36.4 the third respondent further rejects the applicant's complaints regarding the drafting of the disciplinary charges. Relying on Labour Appeal Court authority, it submits that disciplinary charges should not be approached with undue technicality and that the applicant was fully aware of the case he had to meet;
- 36.5 it emphasises that the section 188A inquiry extended over approximately one year, during which the applicant had ample opportunity to hear the evidence, consult his legal representative and cross-examine witnesses;
- 36.6 in respect of the procedural complaints, the third respondent submits that the applicant's allegations concerning mitigation, legal representation and other procedural irregularities lack merit;
- 36.7 it contends that these allegations are unsupported by the complete transcript, portions of which the applicant elected not to place before

⁸ (2007) 28 ILJ 2405 (CC).

⁹ [2001] 2 BLLR 141 (LC).

¹⁰ (2014) 35 ILJ 943 (LAC).

¹¹ (2018) 39 ILJ 2633 (CC).

¹² (JR2862/2011) [2015] ZALCJHB 27 (27 January 2015).

the Court, and that none of the alleged irregularities render the award reviewable;

- 36.8 the third respondent submits in respect of the trust relationship and the credibility findings, that the Commissioner properly considered the deterioration of the employment relationship;
- 36.9 it points to evidence that the applicant accused the third respondent of conspiracies, challenged the appointment of the CEO, referred disputes and made allegations against senior management, all of which the Commissioner was entitled to consider in assessing whether the trust relationship had broken down;
- 36.10 the third respondent further argues that credibility findings attract judicial deference and should not readily be interfered with on review;
- 36.11 in respect of the bullying allegations, the third respondent contends that the Commissioner thoroughly considered the applicant's allegations of bullying. It submits that the applicant omitted those portions of the transcript dealing with his cross-examination on this issue and that the concept of bullying cannot be determined simply by reference to a dictionary or internet definition;
- 36.12 in respect of the errors in the outcome, the third respondent argued that the applicant's reliance on approximately twenty alleged grammatical or factual errors in the outcome is misplaced. It submits that even if such errors exist, they amount at most to mistakes which do not establish a reviewable irregularity;
- 36.13 relying on *Telcordia Technologies Inc v Telkom SA Ltd*¹³ and *Ellerine Holdings Ltd v Commission for Conciliation, Mediation and Arbitration and Others*¹⁴, the third respondent submits that an arbitrator is entitled to make errors without rendering the award reviewable, provided the enquiry was properly undertaken and the outcome remains reasonable;

¹³ [2007] 2 All SA 243 (SCA).

¹⁴ (2008) 29 ILJ 2899 (LAC).

36.14 the third respondent further submits in respect of the evidence before the Commissioner, that he was entitled to accept the evidence of witnesses such as Ms Vendle and Mr Msomi, whose material evidence remained largely uncontested. It further submits that the Commissioner correctly observed inconsistencies in the applicant's own version during cross-examination and was entitled to draw adverse credibility findings;

36.15 the third respondent also notes that the Commissioner acquitted the applicant on several charges, demonstrating that the evidence was carefully and objectively evaluated rather than accepted uncritically; and

36.16 in conclusion the third respondent submits that on the available record, the Commissioner's findings fall within the range of decisions that a reasonable decision-maker could reach, and the review application should therefore be dismissed, with costs.

Interlocutory Application

[37] Before considering the grounds of review, it is necessary to deal with the interlocutory application brought by the applicant after the matter had been argued and while judgment was pending.

[38] The application seeks an order reopening the review proceedings and admitting as further evidence public statements allegedly made by the Administrator of the third respondent on 20 March 2026. The applicant contends that those statements constitute admissions that he suffered an occupational detriment as a consequence of having made protected disclosures and that his dismissal was automatically unfair in terms of section 187(1)(h) of the LRA. He accordingly seeks, *inter alia*, that the Court admit the alleged new evidence and substitute the section 188A outcome with an order declaring his dismissal automatically unfair and reinstating him retrospectively with full backpay and benefits.

[39] The interlocutory application must be considered within the confines of the proceedings presently before this Court. The main application is a review in terms of section 145 of the LRA of the outcome of an inquiry conducted in

terms of section 188A. It is not an appeal against the merits of the Commissioner's decision, nor is it a hearing *de novo* of the applicant's dismissal dispute.

- [40] The distinction is fundamental. In a review application, this Court is required to determine whether the Commissioner committed a reviewable irregularity contemplated by section 145 of the LRA and, applying the constitutional standard of reasonableness, whether the decision reached falls within the range of decisions that a reasonable decision-maker could reach on the material that served before him. The Court is not called upon to determine whether the Commissioner reached the correct decision or whether this Court would, on a reconsideration of the evidence, have reached a different conclusion.
- [41] The enquiry is therefore directed at the decision under review and the evidential and procedural material relevant to that decision. The function of the reviewing Court is supervisory rather than appellate. It is not open to a review court to assume the powers of the primary decision-maker and determine the underlying dispute afresh merely because additional evidence has subsequently become available.
- [42] The evidence upon which the applicant now relies did not form part of the proceedings before the Commissioner. Indeed, on the applicant's own version, the statements relied upon were made on 20 March 2026, contemporaneously with or after the hearing of the review application before this Court. The applicant expressly relies upon their subsequent emergence as the reason why the evidence could not have been placed before the Court at the hearing.
- [43] The difficulty is that the proposed evidence does not demonstrate that the Commissioner committed a reviewable irregularity, misconceived the nature of the enquiry, failed to consider material evidence that was before him, or reached a decision that a reasonable decision-maker could not have reached on the evidence before him. Rather, the applicant seeks to rely upon a subsequent change in the third respondent's position to establish the

substantive merits of his contention that his dismissal was automatically unfair.

- [44] That is not the enquiry which this Court is required to undertake. The applicant's reliance on the Administrator's subsequent statements effectively invites this Court to determine the underlying dispute afresh and, on the basis of evidence that was not before the Commissioner, to substitute its own determination for that of the decision-maker. Such an approach would impermissibly convert the review into an appeal or a rehearing on the merits.
- [45] The applicant's contention that the statements are "dispositive of the whole dispute" does not alter the position. Even assuming, without deciding, that the statements constitute admissions by a person authorised to make them, they do not retrospectively become part of the evidential record before the Commissioner, nor do they establish that the Commissioner's decision was unreasonable when it was made.
- [46] Nor does the fact that the statements were made before judgment was delivered alter the nature of the review enquiry. The fact that judgment had been reserved does not entitle the applicant to introduce subsequent evidence which fundamentally changes the evidential basis upon which the review is to be determined and thereby transform the proceedings into a determination of the underlying dismissal dispute.
- [47] The applicant's further contention that the third respondent has effectively abandoned its opposition to his case does not lead to a different conclusion. The applicant himself records that, notwithstanding the Administrator's statements, the third respondent declined to enter into a settlement agreement and instead required the applicant to obtain an order from this Court. The alleged concession therefore does not dispose of the review before the Court.
- [48] It follows that the Court cannot, in these review proceedings, determine the applicant's entitlement to reinstatement and backpay on the basis of subsequent evidence which was not before the Commissioner. The Court must determine the review on the grounds of review properly before it and

with reference to the record of the proceedings under review. The interlocutory application accordingly falls to be dismissed.

[49] I turn now to the grounds advanced in support of the review application.

Analysis

[50] The applicant advances numerous grounds upon which he contends that the outcome is reviewable. These include complaints concerning the Commissioner's assessment of the evidence, the credibility findings made, the formulation of the disciplinary charges, alleged procedural irregularities during the proceedings, the Commissioner's findings on sanction and the breakdown of the trust relationship, as well as various alleged factual and grammatical errors contained in the outcome.

[51] The starting point is the well-established distinction between an appeal and a review. A review court is not concerned with whether the Commissioner reached the correct conclusion or whether this Court would have reached a different conclusion on the evidence. The enquiry is whether the Commissioner misconceived the nature of the enquiry, committed a reviewable irregularity, ignored material evidence, or reached an outcome that falls outside the band of decisions to which a reasonable decision-maker could come on the material before him or her.

[52] The authorities, including *Sidumo, Herholdt v Nedbank Ltd*¹⁵, *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA and Others* and *Head of the Department of Education v Mofokeng and Others*¹⁶, make it clear that a review court must consider the totality of the evidence and determine whether the outcome is one that a reasonable arbitrator could reach. It is equally well established that a review is not an appeal disguised as an attack on the commissioner's reasoning.

[53] Having considered the outcome, the record placed before the Court and the extensive submissions advanced by the applicant, I am not persuaded that the applicant has established any reviewable irregularity. Much of the

¹⁵ [2013] 11 BLLR 1074 (SCA).

¹⁶ [2015] 1 BLLR 50 (LAC).

applicant's challenge constitutes a detailed attack on the Commissioner's factual findings and credibility assessments. The applicant identifies numerous instances where, in his view, the Commissioner ought to have preferred his version, drawn different factual inferences or attached greater weight to particular evidence. These submissions effectively invite this Court to reconsider the merits of the dispute and substitute its own assessment of the evidence for that of the Commissioner. That is not the function of a review court.

- [54] The Commissioner analysed the evidence presented by the respective witnesses, dealt with the probabilities, assessed credibility where necessary and furnished reasons for accepting certain evidence while rejecting other evidence. Importantly, the Commissioner did not simply accept the third respondent's version in its entirety. The outcome demonstrates that the Commissioner acquitted the applicant on a number of allegations whilst finding other charges proved. This is indicative of a careful and independent assessment of the evidence rather than an uncritical acceptance of the third respondent's case.
- [55] The applicant also places considerable reliance on what are described as factual inaccuracies, grammatical errors and inconsistencies contained in the outcome. Even if some of those criticisms are accepted, they do not, without more, render the outcome reviewable. An outcome is not required to be flawless. The enquiry remains whether any alleged error materially affected the outcome or demonstrates that the commissioner misconceived the enquiry. The applicant has failed to establish such a causal connection. The alleged errors do not detract from the reasonableness of the ultimate conclusions reached by the Commissioner.
- [56] Similarly, the applicant's complaints concerning the formulation of the disciplinary charges cannot be sustained. Labour law does not require disciplinary charges to be drafted with the precision expected of criminal indictments. The relevant enquiry is whether the employee understood the allegations he was required to meet and whether he was afforded a fair opportunity to answer them. The record demonstrates that the disciplinary

enquiry extended over a lengthy period, the applicant was legally represented, extensive evidence was led, and he enjoyed a full opportunity to cross-examine witnesses, testify and present his defence. No prejudice arising from the wording of the charges has been established.

- [57] Nor am I persuaded that the procedural complaints relied upon by the applicant establish reviewable irregularities. Whether considered individually or cumulatively, they do not demonstrate that the Commissioner deprived the applicant of a fair hearing or failed to determine the real dispute between the parties. At best for the applicant, some of the complaints amount to disagreements with procedural rulings or with the manner in which the Commissioner exercised his or her discretion. Such disagreements do not, without more, establish reviewable misconduct.
- [58] The applicant further challenges the Commissioner's findings concerning the breakdown of the trust relationship. However, the outcome reflects that the Commissioner considered the evidence bearing upon that issue, including the nature of the misconduct found to have been committed, the applicant's conduct towards colleagues and management, and the impact of that conduct on the ongoing employment relationship. The conclusion that the trust relationship had irretrievably broken down is one that was reasonably open to the Commissioner on the evidence before him.
- [59] The Court is also mindful that credibility findings are generally entitled to considerable deference on review. The Commissioner had the benefit of observing the witnesses testify, assessing their demeanour and evaluating their evidence within the context of the proceedings as a whole. Nothing placed before this Court demonstrates that those credibility findings were irrational, arbitrary or unsupported by the evidence.
- [60] Having regard to the evidence in its totality, the reasoning contained in the outcome and the applicable review principles, I am satisfied that the Commissioner identified the true dispute, considered the material evidence, applied the correct legal principles and reached conclusions that fall within the band of decisions to which a reasonable decision-maker could come. The

applicant has failed to establish that the Commissioner misconceived the nature of the enquiry, ignored material evidence or committed any gross irregularity that rendered the outcome unreasonable.

[61] The review application accordingly falls to be dismissed.

Costs

[62] In relation to costs, this Court exercises a broad discretion in terms of section 162 of the LRA to make orders according to the requirements of the law and fairness. As the Constitutional Court explained in *Zungu v Premier of KwaZulu-Natal and others*¹⁷, the ordinary rule that costs follow the result does not apply in labour matters. The Court is required to strike a fair balance between ensuring that litigants are not unduly discouraged from approaching the Labour Court and discouraging parties from pursuing litigation that ought not reasonably to have been brought or persisted with.

[63] It is equally well established that the purpose of an award of costs is to indemnify the successful litigant for the expense to which it has been put in defending or pursuing litigation. As was observed in *Public Servants Association of South Africa obo Khan v Tsabadi NO and Others*¹⁸, unless there are sound reasons to depart from that approach, fairness generally dictates that a successful litigant should not be left out of pocket where it has been compelled to incur legal costs in defending proceedings.

[64] In the present matter, I am satisfied that considerations of both law and fairness warrant a costs order against the applicant.

[65] First, for the reasons set out above, the review application was devoid of merit. The applicant failed to establish any reviewable irregularity on the part of the Commissioner or that the outcome was one that no reasonable decision-maker could have reached. The third respondent was accordingly compelled to incur the costs of opposing a review application for which there was no proper legal or factual basis.

¹⁷ (2018) 39 ILJ 523 (CC).

¹⁸ (2012) 33 IL 2117 (LC).

[66] Secondly, the applicant elected to prosecute the review on the basis of a record that was, as correctly submitted by the third respondent, “dysfunctional”. As the *dominus litis*, the applicant bore the responsibility of ensuring that a proper, coherent and usable record was placed before the Court. The applicant failed to discharge that obligation. The deficiencies in the record unnecessarily complicated the determination of the review, required the third respondent to expend additional time, effort and costs in attempting to identify, reconstruct and respond to the relevant material, and placed an unwarranted burden on this Court. Instead of being presented with a coherent record that facilitated the adjudication of the review, this Court was required to expend considerable time and effort in attempting to navigate, decipher and reconcile a record that was poorly compiled and difficult to follow. The administration of justice is not served where review proceedings are prosecuted on the basis of a record that frustrates the proper and efficient determination of the issues before the Court.

[67] Having regard to the absence of any merit in the review application, together with the applicant's failure to place a proper record before this Court, I am satisfied that this is one of those matters where the requirements of law and fairness justify a departure from the general approach in labour matters. The third respondent ought not to bear the costs of successfully opposing a meritless review that was prosecuted on the basis of a dysfunctional record. In the exercise of my discretion under section 162 of the LRA, I am accordingly satisfied that it is fair and equitable that the applicant be ordered to pay the third respondent's costs, including the costs that were reserved on 18 May 2023.

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

Order

1. Condonation for the late filing of the record is condoned.
2. The review application is dismissed.

3. The applicant is to pay the third respondent's costs on a party and party scale.

H. Schensema

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant : KMG & Associates Incorporated

For the Third Respondent : Advocate F Venter

Instructed by : Cheadle Thompson & Haysom Incorporated
Attorneys

LABOUR COURT