



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

Signature

Date

THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Case no: JA14/25

In the matter between:

DEPARTMENT OF SPORTS, ARTS,

CULTURE AND RECREATION, GAUTENG

Appellant

and

GENERAL PUBLIC SERVICE SECTOR

BARGAINING COUNCIL

First Respondent

LUYANDA OLOTA N.O.

Second Respondent

ANDILE KOLANISI

Third Respondent

Heard: 19 May 2026

Delivered: 1 September 2026

Coram: Mahalelo ADJP, Nkutha- Nkontwana JA & Moshwana AJA

Summary: Review of arbitration award – Dismissal of senior public service employee (Chief Director: Human Capacity Management) – Employee found guilty of failure to attend meetings but not guilty of breach of fiduciary duties in supporting irregular appointment – Labour Court dismissed review application –

Appeal to Labour Appeal Court – Whether Commissioner's findings reasonable – Whether employee breached fiduciary duties – Whether dismissal proportionate sanction for failure to attend meetings

Held: Commissioner's findings were reasonable and supported by evidence – Employee not responsible for initial flawed advertisement – Employee not member of selection panel and had no power to "recommend" appointment – Employee unaware of NEHAWU report – Department failed to prove bad faith – Failure to attend meetings over a few days did not justify dismissal. Appeal dismissed.

JUDGMENT

MAHALELO, ADJP

Introduction

- [1] This is an appeal against the judgment and order of the Labour Court delivered on 30 September 2024, in which the Court dismissed the appellant's application to review and set aside an arbitration award issued by the General Public Service Sector Bargaining Council (GPSSBC) on 27 April 2021. The Labour Court granted leave to appeal on 21 January 2025.
- [2] In the arbitration award, the commissioner found that the appellant's dismissal of the third respondent (Mr Kolanisi) was substantively unfair and ordered his reinstatement with payment of nine months' back pay. Mr Kolanisi opposed the appeal. He did not pursue a cross-appeal regarding the limitation of back pay.

Background Facts

- [3] Mr Kolanisi was employed by the appellant as Chief Director: Human Capacity Management from 1 September 2016 until his dismissal on 1 March 2019. The circumstances leading to his dismissal were as follows: The Department of Public Service and Administration issued a directive to all Heads of Department advising them of the need to comply with minimum entry requirements for senior public service employee positions with effect from 1 April 2015.
- [4] The directive required that, for an applicant to be considered for a director position, the applicant must hold an undergraduate qualification (NQF7) recognized by SAQA and have five years' experience at the middle or senior management level. The directive emphasised that these were minimum entry requirements. It also noted that certain departments were not complying with the minimum qualification requirements for senior management service positions and reiterated that the directive takes precedence and that the minimum requirements stipulated in the directive must be applied.
- [5] During 2016 and 2017, the department embarked upon a recruitment process for the position of Director: Risk Management and Monitoring, a Senior Management Service (SMS) position.
- [6] The first recruitment process concluded that no suitable candidate was available. The position was thereafter re-advertised. Following the second recruitment process, a selection panel recommended the appointment of Ms Matsapola. The recommendation was ultimately presented to various officials, including Mr Kolanisi.
- [7] Mr. Kolanisi subsequently signed documentation supporting the recommendation, which was transmitted to the Head of Department and ultimately to the MEC for approval. Before the appointment was finalised, NEHAWU objected, contending that Ms. Matsapola did not meet all the stipulated requirements. Mr. Kolanisi was charged for his role in the irregular appointment of Ms. Matsapola. Following investigations and a later report by the Public

Service Commission, disciplinary proceedings were instituted against Mr. Kolanisi. He faced four charges of misconduct.

- [8] Charge 1 and the Alternative (Breach of Fiduciary Duties): The Department alleged that Mr. Kolanisi breached his fiduciary duties as Chief Director: Human Capacity Management by:
- 8.1 Recommending the appointment of Ms. Nombulelo Matsapola to the post of Director: Audit and Risk Management.
 - 8.2 The appointment was irregular because the advertisement did not comply with the DPSA Directive, which required an NQF Level 7 qualification and five years of managerial experience, requirements which Ms. Matsapola did not meet.
- [9] Charge 2 (Failure to Attend Meetings): The Department alleged that Mr. Kolanisi committed misconduct by failing to attend pre-scheduled meetings with the Head of Department on 23, 29, 30, and 31 May 2018.
- [10] Charge 3 and Charge 4: The Department alleged that Mr Kolanisi compiled and recommended a submission to the MEC and HOD for the moderation and implementation of 2016/2017 bonuses and pay progression for directors and chief directors who did not qualify under the incentive framework prescribed by the Minister of Public Service and Administration. After he was rated 3 by the Head of Department for the 2016/2017 performance cycle, he wrote a memorandum to the MEC requesting a review of the scoring of his annual appraisal for his personal gain, and in this regard, he failed to apprise the MEC that she did not have the power to moderate and alter the scoring.
- [11] At a properly constituted disciplinary hearing, Mr Kolanisi was found guilty on all four charges, culminating in his dismissal. He considered his dismissal unfair and referred a dispute to arbitration before the Commissioner.

The Arbitration Proceedings

- [12] The arbitration was heard over several days between July 2019 and March 2021. The Commissioner heard evidence from both sides and made extensive factual findings. Regarding Charge 1, the Commissioner found the following: the recruitment process was flawed from the outset. The advertisement, approved on 2 August 2016, predated Mr Kolanisi's assumption of duty on 1 September 2016. It did not comply with the DPSA Directive, which required an NQF Level 7 qualification and five years' managerial experience. Mr Kolanisi was not a member of the selection panel and had no power to "*recommend*" an appointment. His role was to support the panel's recommendation. Mr Kolanisi was unaware of the contents of the NEHAWU Observation Report, which was addressed to the Acting HOD, Mr Boy Ngobeni. Mr Kolanisi testified that he contacted Mr Gawe, who compiled the memorandum, and was informed that Mr Gawe did not have the report. The Acting HOD, who was the custodian of the report, did not testify to refute Mr Kolanisi's version. The Appellant called no evidence to rebut Mr Kolanisi's testimony that he informed the Acting HOD about the observation. The Appellant's own witness, Ms Monica Newton, the HOD, had previously assisted the MEC in drafting a response to the Public Service Commission, in which she stated that the Acting HOD "*was convinced that recruitment and selection processes were followed and the recommended candidate met all the requirements as specified by the advert*".
- [13] Having made the above findings the Commissioner was not satisfied that the appellant had proved that Mr Kolanisi acted in bad faith or breached his fiduciary duties.
- [14] Regarding Charge 2, the Commissioner found that Mr. Kolanisi had indeed failed to attend the meetings, but that this misconduct was not sufficiently serious to justify dismissal. The Commissioner considered that: Mr. Kolanisi provided reasons for his non-attendance, including being in another meeting, a power failure, and a request that the consultation process be conducted formally with the right to representation. He did not challenge the HOD's authority but sought to follow proper procedures. The employment relationship continued for many

months after the incident, and the HOD ultimately redeployed Mr. Kolanisi to other positions. The misconduct did not destroy the trust relationship, particularly because the HOD who had charged him was no longer in the employ of the Department.

- [15] The Commissioner found Mr Kolanisi not guilty on Charge 1 and the alternative charge, not guilty on Charge 3, and 4, but guilty on Charge 2. She concluded that the dismissal of Mr Kolanisi was a disproportionate sanction. He ordered his reinstatement with nine months' back-pay.

In the Labour Court

- [16] The appellant applied to the Labour Court to review and set aside the arbitration award. The grounds of review, as set out in the founding affidavit, included that the Commissioner committed a gross irregularity and misconducted herself in performing her duties. The Commissioner asked herself the wrong questions and ignored relevant evidence. The Commissioner misconstrued the evidence, particularly regarding the presence of other Chief Directors on the panel. That the Commissioner failed to appreciate that Mr Kolanisi provided four contradictory versions for his conduct and that the Commissioner erred in finding that Mr Kolanisi's failure to attend meetings did not destroy the employment relationship.
- [17] Mr Kolanisi opposed the review and filed an answering affidavit and a cross-review in respect of the limitation of back-pay.
- [18] The Labour Court dismissed the review application. It found that the Commissioner's findings were reasonable.

In this Court

- [19] The Appellant submitted that the Labour Court erred in finding that Mr Kolanisi did not breach his fiduciary duties. The Appellant argued that Mr Kolanisi, as Chief Director: Human Capacity Management, was responsible for ensuring legislative compliance, including compliance with the DPSA Directive. He

supported Ms Matsapola's appointment despite knowing she did not meet the minimum requirements. He had previously directed that a process be re-done when no suitable candidates were found, and he could have done the same here. He provided no less than four contradictory versions for his conduct, and Labour Court failed to follow binding precedent on fiduciary duties,

- [20] Mr Kolanisi submitted that the charge he faced was that he "recommended" the appointment, which he lacked the authority to do. He only "supported" the recommendation of a properly constituted selection panel. The NEHAWU Observation Report was not before him; it was addressed to the Acting HOD. He contacted Mr Gawe to inquire about it and was told that Mr Gawe did not have the report. The Acting HOD, who was the custodian of the report, did not testify to refute his version. He reviewed the submission and was satisfied that the candidate met the requirements as set out in the advert. Even the HOD, Ms Newton, had expressed the same view in a letter to the Public Service Commission. The Appellant failed to prove that he acted in bad faith or breached his fiduciary duties.

The Legal Principles

- [21] The test for reviewing an arbitration award under section 145 of the Labour Relations Act¹ (LRA), as interpreted by the Constitutional Court in *Sidumo and another v Rustenburg Platinum Mines Ltd and others*² is one of reasonableness. A reviewing court must determine whether the decision reached by the commissioner is one that a reasonable decision-maker could not have reached. The court must consider the totality of the evidence and the reasons given by the commissioner.
- [22] In *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others*³ this Court held that a process-related irregularity will only justify interference if the final outcome is

¹ Act 66 of 1995, as amended.

² (2007) 28 ILJ 2405 (CC) at para 110.

³ (2014) 35 ILJ 943 (LAC)

unreasonable. The inquiry does not end with the establishment of a gross irregularity; the reviewing court must also be satisfied that the outcome is unreasonable.

- [23] In *Herholdt v Nedbank Ltd*⁴ the Supreme Court of Appeal held that where a commissioner fails to have regard to material facts, this constitutes a gross irregularity, and the award will fall to be set aside if the outcome is unreasonable.

Discussion

- [24] The central issue on the first charge is whether the Commissioner's finding that Mr Kolanisi did not breach his fiduciary duties is so unreasonable that no reasonable decision-maker could have reached it. I am not persuaded that it is. The Commissioner's findings are supported by the evidence and are rationally justifiable.
- [25] First, the advertisement for the post was approved on 2 August 2016, a month before Mr Kolanisi assumed duty on 1 September 2016. He had nothing to do with the drafting or approval of the advertisement. The Commissioner correctly found that the person who approved the advertisement acted negligently.
- [26] Second, Mr Kolanisi was not a member of the selection panel. The Department's Recruitment and Selection Policy (Version 2.00 SACR-PCY-001) states in paragraph 10.3.1.6 that "*the selection criteria cannot be changed once the interviewing of applicants has begun and all applicants must be measured against the same criteria.*" The panel had used the criteria in the advertisement for the first round of interviews. Mr Kolanisi could not have changed the criteria for the head-hunting process without violating the policy. The Commissioner's finding in this regard is supported by the evidence.
- [27] Third, the NEHAWU Observation Report, dated 2 and 7 March 2017, was addressed to the Acting HOD, Mr Boy Ngobeni. Mr Kolanisi testified that he did

⁴ (2013) 34 ILJ 2795 (SCA),

not have the report. He contacted Mr Gawe, who compiled the memorandum, and was informed that Mr Gawe did not have the report. The Acting HOD did not testify. The Appellant called no evidence to refute Mr Kolanisi's version. The Commissioner was entitled to accept Mr Kolanisi's evidence.

- [28] Fourth, the Appellant's own witness, Ms Newton, had previously assisted the MEC in drafting a response to the Public Service Commission. In that response, she stated that "*the Acting HOD was convinced that recruitment and selection processes were followed and the recommended candidate met all the requirements as specified by the advert.*" This is a significant admission. The HOD herself had expressed the same view as Mr Kolanisi. It was reasonable for the Commissioner to conclude that Mr Kolanisi was not acting in bad faith when he shared that view.
- [29] Fifth, the Appellant's reliance on *RSF Administrators (Pty) Ltd v Samons and Others*⁵ is misplaced. The case seems to confirm that senior employees owe fiduciary duties, however, it does not establish a principle that if a poor decision is made, a breach is proved. The Appellant bore the onus of proving that Mr Kolanisi acted in bad faith or in a manner incompatible with his duties. The Commissioner found that the Appellant failed to discharge that onus, and that finding, based on the evidence on record, is reasonable.
- [30] Sixth, the Appellant's submission that Mr. Kolanisi gave four different versions is not supported by the record. The Appellant was given the opportunity to supplement its grounds of review after receiving the record of the arbitration proceedings, but it failed to do so. It was not entitled to make out its case in its heads of argument. The Labour Court correctly found that the Appellant had not directed the court to the specific portions of the record where the alleged contradictory versions were given. The Appellant cannot now complain about the Labour Court's failure to consider evidence that it failed to identify.

⁵ (JS 641/17) [2022] ZALCJHB 110 (30 August 2022).

- [31] Seventh, the issue of whether Mr Kolanisi had previously directed that a process be re-done is not decisive. Mr Kolanisi explained that the previous instance involved a situation where there was no change to the selection criteria. In this case, the criteria could not be changed once the interviewing process had begun. The Commissioner was entitled to accept Mr Kolanisi's explanation.
- [32] In the circumstances, I am satisfied that the Labour Court was correct in finding that the Commissioner's award on the first charge falls within the bounds of reasonableness. The Commissioner correctly identified the issue as whether the Appellant had proved that Mr Kolanisi had recommended the appointment and acted in bad faith. She considered the totality of the evidence and concluded that the Appellant had failed to discharge its onus. That conclusion is not unreasonable.
- [33] The Appellant submitted that the Labour Court erred in finding that Mr Kolanisi's failure to attend meetings was not serious enough to justify dismissal. The Appellant relied on *TMT Services and Supplies (Pty) Ltd v CCMA and Others*⁶, where this Court held that persistent refusal to attend meetings can undermine the working relationship. The Commissioner found Mr Kolanisi guilty of failing to attend the meetings. She noted that the meetings were scheduled and that Mr Kolanisi did not present any evidence to support his claim that he had another meeting. The Commissioner, however, found that the misconduct did not destroy the employment relationship. She considered that Mr Kolanisi provided reasons for his non-attendance, including being in another meeting, a power failure, and a request for a formal consultation process with representation. Mr Kolanisi did not question the HOD's authority but merely sought to follow proper procedures. The employment relationship continued for many months after the incident, and the HOD ultimately re-deployed Mr Kolanisi to other positions. The Labour Court agreed with the Commissioner and found that the sanction that the dismissal was substantively unfair was within the bounds of reasonableness.

⁶ (2019) 40 ILJ 150 (LAC)

[34] I am not persuaded that the Labour Court erred. The test for sanction is not whether this Court would have imposed a different sanction, but whether the sanction imposed by the Commissioner was one a reasonable decision-maker could have imposed. The Commissioner applied the factors set out in *Sidumo*, including the importance of the rule, the harm caused, and the effect of dismissal on the employee. She concluded that dismissal was disproportionate to the misconduct Mr Kolanisi was found guilty of. That conclusion is reasonable.

[35] The Appellant's reliance on *TMT Services* is misplaced, as this case is distinguishable. In that case, the employee persistently refused to attend meetings over an extended period. In this case, Mr Kolanisi's non-attendance was over a few days, and he provided reasons for his absence. The Commissioner was entitled to distinguish the case. I am therefore satisfied that the Labour Court was correct in finding that the Commissioner's award on the second charge is reasonable.

Costs

[36] Mr Kolanisi had asked for costs. It is trite that in labour matters costs do not always follow the result. In the interests of fairness and the law, there should be no order as to costs.

[37] For the reasons set out above, the following order is made:

Order

1. The appeal is dismissed.
2. There is no order as to costs.

M. B. Mahalelo
Acting Deputy Judge President of the Labour and Labour Appeal Court

APPEARANCES:

For the appellant: X. D. Matyolo, instructed State Attorney,
Johannesburg.

Instructed by :

For the Respondent: M. Vilakazi of Menzi Vilakazi Attorneys.

LABOUR APPEAL COURT