

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.



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**THE LABOUR COURT OF SOUTH AFRICA
(HELD AT JOHANNESBURG)
JUDGMENT**

Not Reportable
Case no JR 2434/17

In the matter between:

GIFT BHEKUMUZI BUTHELEZI

Applicant

and

**GENERAL PUBLIC SERVICES
BARGAINING COUNCIL**

First Respondent

NGAKO PM, M.O.

Second Respondent

**DEPARTMENT OF TELECOMMUNICATIONS
AND POSTAL SERVICES**

Third Respondent

Heard: 17 January 2020

Delivered: 3 November 2020

JUDGMENT

HAFFEGEE, AJIntroduction

- [1] This case involves applications by both the Applicant and the Third Respondent (the Department) to review and set aside an award of the Second Respondent (the Commissioner) issued on 30 September 2017.
- [2] The Department employed the Applicant from 1 April 2005. It charged him with misconduct on 24 November 2014. The disciplinary proceedings were protracted and ended with the Applicant's dismissal on 9 March 2015. At the time of his dismissal, the Applicant held the post of Deputy Director-General: International Affairs and Trade (DDG International).
- [3] The Applicant referred a dispute to the General Public Services Bargaining Council (the Bargaining Council). The arbitration proceedings, also protracted, concluded with the Commissioner issuing an award on 30 September 2017. The Commissioner concluded that the Applicant's dismissal was substantively fair but procedurally unfair. He awarded the Applicant compensation equivalent to three months' remuneration.
- [4] The Applicant applied to review and set aside the award and served its application on the Department on 17 November 2017. In sum, the Applicant wants this Court to find that the Applicant's dismissal was procedurally unfair on several more grounds claimed and substantively unfair because he was not guilty of any of the charges of misconduct against him.
- [5] The Department then also applied to review (cross review) and set aside the Commissioner's award regarding both substantive and procedural fairness. The Department's application was filed about nineteen days' late. The Department seeks condonation for late filing of its application. Its application mirrors that of the Applicant in that it seeks the Court to find that the dismissal was procedurally and substantively fair on all accounts.

- [6] In seeking condonation, the Department states that it had intended to abide the award and not to review it despite being dissatisfied with the Commissioner's decisions.
- [7] Its attempts to establish whether the Applicant intended reviewing the award drew no response from the Applicant's previous attorneys. The Department only launched its application after it received the Applicant's application to review the award. In other words, the Department would not have launched its cross-review had the Applicant not applied to review the award or would have done so sooner if the Applicant's attorneys informed the Department's attorneys that the Applicant intended reviewing the award. This led to the Department's belated decision also to review the award.
- [8] The Department's condonation application is premised on simple grounds: it had also decided to review the award only after the Applicant had done so; drafting the application took longer because of the extensive record in this matter; the delay is not excessive, its prospects of success are reasonable, and the Applicant would not suffer any prejudice if condonation were granted.
- [9] Mr Mhambi, counsel for the Applicant, submitted that condonation should be refused. The Department should have launched its application within six weeks, and it should not have waited, opportunistically, to see whether the Applicant applied to review the award. The issues it raises could have been addressed in its answering affidavit and therefore, only the Applicant's review application ought to be considered.
- [10] I agree that it would be in the interests of justice that condonation be granted for the reasons the Department has presented. While the Department's wait-and-see approached would not justify condonation on its own, the other reasons are compelling. Amongst other things, the delay was not excessive and caused little, if any, prejudice to the Applicant.
- [11] As I have indicated above, the respective parties' applications mirror each other in stark contrast. The Applicant and the Department each ask the Court to

uphold those aspects of the award respectively in their favour and set aside those aspects against them. Consequently, in significant respects, these proceedings resemble appeal rather than review proceedings.

The disciplinary hearing

[12] The disciplinary hearing was initially scheduled for 3 December 2014 but postponed on several occasions and eventually commenced on 27 February 2015.

[13] The Department levelled the following charges of misconduct against the Applicant:

"CHARGE 1

FAILURE TO CARRY OUT LAWFUL AND REASONABLE INSTRUCTIONS WITHOUT JUST OR REASONABLE CAUSE AND/OR GROSS INSUBORDINATION

ALTERNATIVELY:

PREJUDICE THE ADMINISTRATION, DISCIPLINE OR EFFICIENCY OF A DEPARTMENT, OFFICE OR INSTITUTION OF THE STATE

ALTERNATIVELY:

FAILURE TO COMPLY WITH OR CONTRAVENED ACT, REGULATION OR LEGAL OBLIGATION

You are guilty of failure to obey lawful and reasonable instructions or orders by the Director General. By your gross insubordination, the Department has incurred an irregular expenditure and its administration, discipline or efficiency is adversely affected.

Facts:

1. In that on or about July 2013, after the Director General had approved the hosting of the ITU-R Joint Task Group 4-5-6-7 as per the ITU requirement estimated costs of R1 440 400.00, you failed to obey the D.G. direct instruction or order to confine the organisation of the ITU-R event within the approved budget.

2. You refused to obey the D.G.'s instruction, on 12 July 2013, to remove the gala dinner, cocktail party and related costs thereto. Consequently, the Department exceeded the approved budget and therefore incurring irregular expenditure in the amount of R4 317 869.19.
3. Your conduct severely prejudiced the administration, discipline or efficiency of a department and irretrievably broken down the trust relationship.

CHARGE 2

WILFULLY OR NEGLIGENTLY MISMANAGES THE FINANCES OF THE STATE

ALTERNATIVELY:

PREJUDICE THE ADMINISTRATION, DISCIPLINE OR EFFICIENCY OF A DEPARTMENT, OFFICE OR INSTITUTION OF THE STATE

You are guilty of procuring outside of the travel and accommodation contract and exceeding the approved budget.

Facts:

1. In that you procured and arrange transport facilities, accommodation, printed bags, gala dinner, cocktail party and performance by artist outside the department Supply Chain Management without prior authority and consequently exceeded the approved budget. It was not ITU-R's requirement that the hosting country should provide the transport to and from various locations and/or accommodation for the ITU member delegates.
2. Conversely and known to you, the approved budget of R1 440 400 was based on ITU-R requirements and the above mentioned activities were not part of the ITU-R mandatory requirements. Regardless of that knowledge, you proceeded to procure same without following the SCM policy and procedure and thereby exceeding the approved budget.
3. Your conduct resulted in gross irregular expenditure, severely prejudiced the administration, discipline or efficiency of a department and irretrievably broken down the trust relationship.

CHARGE 3

FAILURE TO CARRY OUT A LAWFUL ORDER OR INSTRUCTIONS WITHOUT JUST OR REASONABLE CAUSE

ALTERNATIVELY:

BRINGING THE DEPARTMENT INTO DISREPUTE

ALTERNATIVELY:FAILURE TO COMPLY WITH OR CONTRAVENED ACT, REGULATION OR
LEGAL OBLIGATION

You are guilty of above acts, collectively or respectively, for failure to appear at the Parliamentary hearing of the former Minister, Dina Pule, on 3 May 2013 and/or submit requested additional documents and/or provide reasons for your failure to appear before the hearing when you were the Acting Director General.

Facts:

1. On 10 April 2013 the Registrar of Parliament Members' Interests served you with the notice, and additional correspondence, to appear and provide the required documentations to Parliament Joint Committee on Ethics and Members' Interests for hearing of former Minister Pule which was scheduled for 3 May 2013.
2. Following your non-response to the notice and additional correspondence sent to you by the registrar, the notice was served on you by courier on 24 April 2013, to which your office confirmed receipt on 25 April 2013.
3. You undertook to provide the registrar with the requested additional documentations relating to records of whom Minister Pule registered as her travel companion during her tenure as deputy minister in the Department of communications and records of Mexico trip in 2009 which was paid for by the Department including flight costs, hotel bills and other expenditure in the PDF format on 29 April 2013;
4. You have failed to appear as per notice and failed to provide the requested documentations without any just or reasonable explanation. Your conduct brought the Department into disrepute; ALTERNATIVELY fails to comply with an act statute or legal obligations.

CHARGE 4FAILURE TO COMPLY WITH OR CONTRAVENED ACT, REGULATION OR
LEGAL OBLIGATIONALTERNATIVELY:PREJUDICE THE ADMINISTRATION, DISCIPLINE OR EFFICIENCY OF A
DEPARTMENT, OFFICE OR INSTITUTION OF THE STATE

You are guilty of failure to comply with section 38 of the Public Finance Management Act (PFMA), 1999.

Facts:

1. Section 38 of the PFMA stipulates that the D.G. is responsible for the maintenance of an effective, efficient and transparent system of an internal control. You failed to implement section 38 as an acting D.G. in that the file in respect of 2009 Mexico trip and the records of Nigeria trip went missing at the time when those records were requested by the Parliament Joint Committee on Ethics and members' interests in relation to the hearing of former minister Pule.
2. Your conducts prejudice the administration, discipline or efficiency of a department, office or institution of the state; ALTERNATIVELY fails to comply with an act, statute or legal obligations.

CHARGE 5

FAILURE TO CARRY OUT A LAWFUL ORDER OR ROUTINE INSTRUCTIONS WITHOUT JUST OR REASONABLE CAUSE / GROSS INSUBORDINATION

ALTERNATIVELY:

PREJUDICE THE ADMINISTRATION, DISCIPLINE OR EFFICIENCY OF A DEPARTMENT, OFFICE OR INSTITUTION OF THE STATE

ALTERNATIVELY:

FAILURE TO COMPLY WITH OR CONTRAVENED ACT, REGULATION OR LEGAL OBLIGATION

You are guilty of above acts, collectively or respectively, in that you have wilfully and repeatedly disobeyed the D.G.'s direct instructions to integrate Ms. Ingrid Poni into the ICT International Affairs and Trade branch.

Facts:

1. On 20 January 2014 Ms. Ingrid Poni was matched and placed in the post of Chief Director: ICT Multilateral following the completion of the migration process reporting directly to you.
2. You have refused to obey the DG'S verbal instructions to integrate Ms. Poni in that you refused to acknowledge her placement, give her instructions, sign her leave application forms to authorise her leave,

conduct her performance management and concluding of the performance agreement for the 2014/15 financial year.

3. On 9 November 2014 you were again given direct written instruction by the D.G. to properly integrate Ms. Poni into your branch and to conduct and enter into Performance agreement with Ms. Poni for the 2014/15 financial year for the second semester being from October 2014 to March 2015. You deliberately refused to obey and/or carry out the instructions without valid reason and/or just cause.
4. Your conducts amount to gross insubordination which prejudices the administration, discipline or efficiency of a department, office or institution of the state; ALTERNATIVELY fails to comply with an act statute or legal obligations.

CHARGE 6

GIVING FALSE STATEMENT OR EVIDENCE IN THE EXECUTION OF YOUR DUTIES

ALTERNATIVELY:

PREJUDICE THE ADMINISTRATION, DISCIPLINE OR EFFICIENCY OF A DEPARTMENT, OFFICE OR INSTITUTION OF THE STATE

ALTERNATIVELY:

FAILURE TO COMPLY WITH OR CONTRAVENED ACT, REGULATION OR LEGAL OBLIGATION

You are guilty of above acts of misconduct, collectively or respectively, in relation to the recruitment of Mr. Rebolang Macgregor Soldaat to the position of Director Accounting and Budgeting on the following grounds:

Facts:

1. On 5 May 2010, whilst you acted as the chairperson of the selection committee that recommended the appointment of Mr. Soldaat to the position of Director Accounting and Budgeting, you misled the Director General and/or misrepresented facts by recommending Mr Soldaat be appointed to the position of Director Accounting and Budgeting when he never applied for that position. On the contrary, he had applied for Director Risk Management position for which he was shortlisted and interviewed accordingly.

2. You further misled the Director General and/or misrepresented facts by stating that Mr Soldaat was head-hunted when in fact he had applied and was interviewed for Director Risk Management position.
3. Your conduct undermined the purpose of the Department's recruitment and selection policy. Alternatively your misrepresentations prejudice the administration, discipline or efficiency of the Department. Alternatively fails to comply with an act, regulations or legal obligations.

CHARGE 7

GIVING FALSE STATEMENT OR EVIDENCE IN THE EXECUTION OF YOUR DUTIES

ALTERNATIVELY:

PREJUDICE THE ADMINISTRATION, DISCIPLINE OR EFFICIENCY OF A DEPARTMENT, OFFICE OR INSTITUTION OF THE STATE

ALTERNATIVELY:

FAILURE TO COMPLY WITH OR CONTRAVENED ACT, REGULATION OR LEGAL OBLIGATION

You are guilty of above acts of misconduct, collectively or respectively, in relation to the recruitment of Mr. Sydney Mongala to the position of Director Risk Management on the following grounds:

Facts:

1. On 18 May 2010, whilst you acted as the chairperson of the selection committee that recommended the appointment of Mr. Sydney Mongala to the position of Director Risk Management, you misled the Director General and/or misrepresented facts by recommending that Mr Mongala be appointment to the position of Director Risk Management when he never applied for that position. On the contrary, he had applied for Director Accounting and Budgeting position for which he was shortlisted and interviewed accordingly on 25 April 2010.
2. You further misled the Director General and/or misrepresented facts by stating that Mr Mongala was head-hunted when in fact he had applied and was interviewed for Director Accounting and Budgeting position.
3. Your conduct undermined the purpose of the Department's recruitment and selection policy. Alternatively your misrepresentations prejudice

the administration, discipline or efficiency of the Department.
Alternatively fails to comply with an act, regulation or legal obligation.

CHARGE 8

GIVING FALSE STATEMENT OR EVIDENCE IN THE EXECUTION OF YOUR DUTIES

ALTERNATIVELY:

PREJUDICE THE ADMINISTRATION, DISCIPLINE OR EFFICIENCY OF A DEPARTMENT, OFFICE OR INSTITUTION OF THE STATE

ALTERNATIVELY:

FAILURE TO COMPLY WITH OR CONTRAVENED ACT, REGULATION OR LEGAL OBLIGATION

You are guilty of above acts of misconduct, collectively or respectively, in relation to the recruitment of Mr. Joseph Mlindi Kgamedl to the position of Chief Director in the Office of the Director General on the following grounds:

Facts:

1. On 18 March 2010, whilst you acted as the chairperson of the selection committee that recommended permanent appointment of Mr. Kgamedl to the position of Chief Director in the Office of the Director General, you misled the Director General by stating that the total package for the advertised position is R746 181, and Mr. Kgamedl was on R843 905 per annum with the previous employer. Conversely and known to you, Mr. Kgamedl was, at that time, employed by the Department on six months contract on an annual package of R746 181 as from 6 November 2009.
2. You further misled the Director General by recommending for the approval of Mr. Kgamedl's salary review to increase to R877 842 per annum without just or valid reasons.
3. Your conduct undermined the purpose of the Department's recruitment and selection policy. Alternatively prejudice the administration, discipline or efficiency of a department.

CHARGE 9

GIVING FALSE STATEMENT OR EVIDENCE IN THE EXECUTION OF YOUR DUTIES

ALTERNATIVELY:

PREJUDICE THE ADMINISTRATION, DISCIPLINE OR EFFICIENCY OF A DEPARTMENT, OFFICE OR INSTITUTION OF THE STATE

ALTERNATIVELY:

FAILURE TO COMPLY WITH OR CONTRAVENED ACT, REGULATION OR LEGAL OBLIGATION

You are guilty of above acts of misconduct, collectively or respectively, in relation to the recruitment of Ms. Khulie Mdluli to the position of Director Secretariat Support in the Director General on the following grounds:

Facts:

1. On 11 December 2009 whilst you acted as chairperson of the selection committee that recommended the appointment of Ms. Khulie Mdluli to the position of Director Secretariat Support in the Office of the Director General, you flouted the Recruitment & Selection policy and procedure read in conjunction with Public Service Regulations in your submission by recommending for the appointment of Ms Mdluli as she did not meet the academic requirements for the position and had failed the competency assessment.
2. You further misled the Director General by recommending the irregular appointment of Ms. Mdluli to the position of Deputy Director; a position which she did not apply for and as such not advertised.
3. Your conduct undermined the purpose of the Department's recruitment & selection policy & procedure. Alternatively your misrepresentations prejudice the administration, discipline or efficiency of the Department. Alternatively fails to comply with an act, regulation or legal obligation.

CHARGE 10

GIVING FALSE STATEMENT OR EVIDENCE IN THE EXECUTION OF YOUR DUTIES

ALTERNATIVELY:

PREJUDICE THE ADMINISTRATION, DISCIPLINE OR EFFICIENCY OF A DEPARTMENT, OFFICE OR INSTITUTION OF THE STATE;

ALTERNATIVELY:

FAILURE TO COMPLY WITH OR CONTRAVENED ACT, REGULATION OR LEGAL OBLIGATION, IN PARTICULAR THE DEPARTMENT'S RECRUITMENT AND SELECTION POLICY.

You are guilty of above acts of misconduct, collectively or respectively, in relation to the recruitment of Mr. Lerato Kojoana for the position of Director Internal Communications on the following grounds:

Facts:

1. On 22 June 2010 whilst you served as panel member for the selection committee which recommended the appointment of Mr. Kojoana to the position of Director Internal Communications, you recommended to the Director General for the promotion and appointment of Mr. Kojoana to the position of Director Internal Communications whereas Mr. Kojoana did not meet the academic requirements of the positions and was the lowest scoring candidates during the interview, which was contrary to the recruitment policy.
2. Your conduct undermined the purpose of the Department's recruitment & selection policy. Alternatively prejudice the administration, discipline or efficiency of the Department. Alternatively fails to comply with an act, regulation or legal obligation."

[14] The employee objected to the hearing on several grounds, including whether the Director-General had the necessary authority to discipline him and whether legal representation should be allowed. The hearing was rescheduled and eventually sat again on 2 February 2015 when the presiding officer determined some procedural issues such as legal representation. The presiding officer allowed the parties to be legally represented but dismissed the employee's request that the Department pay his legal fees. The hearing was postponed to 27 February 2015.

[15] The Department served an amended charge sheet on the employee on 11 February 2015. On 19 February 2015, the employee requested further documents. The employee attended a work-related matter in Cape Town from 23 to 26 February 2015. The Department attempted to provide the documents that he had requested on 24 February 2015 by sending the documents to his office. The employee instructed his assistant not to accept the documents on his behalf as he was only to return to Johannesburg on the evening of 26

February 2015. However, on 25 February 2015, the employee wrote to the chairperson requesting a postponement so that he may prepare for the hearing.

- [16] The employee did not attend the hearing. Consequently, the hearing went ahead in his absence. The chairperson found the Applicant guilty of all the charges and dismissed him. He referred an unfair dismissal dispute to the Bargaining Council challenging the procedural and substantive fairness of his dismissal.

Arbitration award

- [17] The arbitration took place from 22 June 2015 to 25 November 2015. The award was delivered on 30 September 2017 after parties had delivered written arguments during August 2017.
- [18] The Commissioner found against the Applicant's claims that his dismissal was procedurally unfair on several grounds: namely, because the hearing was not postponed even though he had prior work commitments; the Department was allowed to amend the charges; and that the Department was allowed to be legally represented. However, the Commissioner concluded that the Applicant's dismissal was procedurally unfair because he had not been allowed to make submissions in mitigation before being dismissed. The Commissioner awarded the Applicant three months' salary as just and equitable compensation because his dismissal was procedurally unfair.
- [19] As for substantive fairness relating to the ten charges of misconduct, the Commissioner found that the presiding officer of the disciplinary hearing had not made any findings regarding charges 2, 5 and 10 and that the Bargaining Council, therefore, lacked jurisdiction to consider whether or not the Applicant was guilty of these charges. He felt charge 6 to have been withdrawn and concluded that the Applicant was not guilty of charges 1, 3 and 4.
- [20] Of the remaining charges, namely, charges 7, 8 and 9, he first considered the Applicant's submissions whether these charges had prescribed and whether

the Department had acted inconsistently by charging only the Applicant and not anyone else involved in the acts of misconduct. The Commissioner accepted the Department's reasons for the delay in taking disciplinary action against the Applicant. These were that the Director-General had been suspended for a considerable period; she was deprived of some of her delegated powers when reinstated; an investigation had to be conducted; and that the Department took disciplinary action against the Applicant within a reasonable period after the investigations were completed.

[21] The Commissioner also dismissed the Applicant's submissions regarding consistency because the Director-General testified that everyone involved was charged with misconduct. Those found guilty were dismissed while others resigned while the Department was in the process of taking disciplinary action against them.

[22] After dismissing these points, the Commissioner concluded the Applicant was guilty only of charges 7, 8 and 9. He then considered these charges sufficiently serious to justify dismissal and recorded that the former Director-General had

"... testified that Applicant does not have respect of authority and the charges levelled against the Applicant are serious and continued employment relationship was intolerable hence dismissal was the only option available when disciplining the Applicant."

[23] The Commissioner further agreed with and relied on the sentiment expressed in *Hulett Aluminium (Pty) Ltd vs Bargaining Council for the Metal Industry and others*:¹

"It would, in my view, be unfair for this Court to expect the Applicant to take back the employee when she persisted with her denials and has not shown any remorse. An acknowledgement of wrongdoing on the part of the employee would have gone a long way in indicating the potential and possibility of

¹ (2008) 29 ILJ 1180 (LC) at para 45.

rehabilitation including an assurance that similar misconduct would not be repeated in the future"

- [24] Thus, the Commissioner concluded, the Department dismissed the Applicant for substantively fair reasons but had done so procedurally unfairly. The chairperson had not allowed him to make submissions or present evidence in mitigation before pronouncing on a sanction.

Applicant's review

- [25] The approach adopted by the Applicant's representatives in this application cannot go uncriticised. The Applicant's entire application stands out for being tediously and unnecessarily lengthy. The approach has confounded rather than clarified issues. For instance, the Applicant's initial founding affidavit of about 40 pages included a Public Service Commission (PSC) report of 8 December 2015 of an Investigation into the Alleged Destabilisation of the Department. The report is 114 pages long, and it is not entirely clear whether or not the report formed part of the record that served before the Commissioner. The Applicant's supplementary affidavit of 63 pages, once again, not only included the Commissioner's award as an annexure, but also another 135-page report of an investigation against the Chief Director of Human Resources of the Department of Communications dated October 2009. Further, the 114-page PSC report referred to above was again attached as an annexure. The Department has correctly pointed out that several documents constitute new evidence that did not serve before the Commissioner. Together, the founding and supplementary affidavit and their annexures alone comprise a few hundred pages — neither properly paginated nor indexed as they appear in the Court file.

- [26] The purpose of heads of argument is to identify the dispute and to set out the argument to be delivered to assist the Court. The Applicant initially filed heads of argument on 6 December 2018. These set out the employee's views concisely. Inexplicably, the employee's representatives filed supplementary heads on 19 December 2019. These are overly detailed at just more than 70 pages and again contain several annexures.

- [27] Despite a Court directive that the parties file a concise record of only the documents they rely upon, the Applicant seldom, if at all, referenced these documents. Several documents comprise reports and legal opinions that have little, if any, bearing on the matter. Besides their evidentiary value, it appears that many documents may not even be admissible. The Applicant does not state clearly whether each of the documents served before the Commissioner and, if so, their relevance for the arbitration or this application. Reports by the PSC, the Public Protector (on the appointment of Hlaudi Motsoeneng, for instance), and legal opinions about former Ministers, amongst many others, indiscriminately form part of the record. Opinion-related documents of this nature, while sometimes relevant in arbitrations, are not to be relied upon in such wholesale fashion.
- [28] Worse still, the Applicant presented more than a thousand pages of documents including extracts of yet another PSC report—both in draft and final form. This report alone seems to be over 1400 pages long, and the employee filed several hundred of its pages even though neither the pleadings nor the Heads meaningfully refer to this material. The hard copy version of what was meant to be a concise report runs into several arch lever files, and the total record in this matter totals almost twenty arch lever files.
- [29] Section 138 of the Labour Relations Act² (LRA) provides for Commissioners to conduct arbitrations fairly and quickly but must deal with the substantial merits of disputes with the minimum of legal formalities. The Commissioner could not reasonably have been expected to accept or interpret each of these reports and opinions to determine the substantial merits of the dispute, namely the employee's dismissal, before him.
- [30] Besides, the Applicant's representatives have unnecessarily burdened these proceedings. Their approach is an exemplary illustration of how not to conduct a matter. The disservice to the Applicant is at least two-fold: not only does his

² No. 66 of 1995, as amended.

case appear confusing and desperate, but censure in the form of costs is also appropriate.

[31] I now turn to the employee's grounds of review.

Grounds of review

Procedural fairness

[32] The Commissioner concluded that the Applicant's dismissal was procedurally unfair because the Department had not allowed him to make submissions in mitigation regarding an appropriate sanction. The Applicant complains that the Commissioner ought also to have found other grounds of procedural unfairness. These include whether the disciplinary hearing should have been postponed and not taken place in his absence (and therefore also the timely provision of documents) and the parties being legally represented at the disciplinary hearing.

[33] According to the employee, the Commissioner erred in finding that the presiding officer of the hearing was correct to go ahead with the hearing in the employee's absence because his absence was due to him being away on a work-related trip and he had not received the documents to be used at the hearing.

[34] The hearing was rescheduled several times before the dates on which it finally sat. In response to the very first notice to attend the hearing, the employee stated:

"I note the letter, and do not acknowledge its contents and flawed approach in terms of the procedure. All the area raised on the letter written you on the matter have not be responded to, I therefore do not recognise any hearing notice; and procedure until; issues I raised have been addressed for the process to be fair; just and reasonable. The so called presiding officer will not really answer my concerns."

- [35] The employee clearly adopted an intransigent stance from the outset. He continued with the approach and continued with the work-related trip with full knowledge of the dates on which the hearing was to sit. When the Department attempted to deliver documents to his office, he instructed his assistant not to accept the documents. The employee took it upon himself not to attend the hearing and expected that the matter must be postponed because he had requested the presiding officer to do so. Postponements are an indulgence to be sought and granted sparingly and for sound reasons. They are not merely there for the asking.
- [36] The Commissioner observed that it was up to the Director-General of the Department to determine whether the employee was to attend the work-related trip or the disciplinary hearing. Thus, the Commissioner found nothing wrong with the presiding officer's decision to continue in the employee's absence. I agree. The Department required the employee at the hearing. It had made all the arrangements and had neither postponed the hearing nor agreed to do so. The work-related trip could not have taken precedence over the hearing and did not constitute a valid reason for not attending the hearing.
- [37] The employee also raised another related issue, namely, whether the chairperson should have allowed the Department to amend the charges and, once he did so, whether he should not have postponed the hearing. The Commissioner did not consider this unfair even though, according to the Applicant, he insinuated that the presiding officer should have delayed the hearing. It is not necessary to address in detail an employer's right to amend charges as long as an employee is given sufficient opportunity to respond to the amended allegations.
- [38] Thus, any prejudice that amendments could cause an employee is related to whether or not these led to the employee not being given a fair opportunity to respond to the (amended allegations). Amendments to allegations do not always warrant postponement unless the effect of the amendments would be such that the entire basis of an employee's response to the case against him would be affected. In other words, it would not be unfair to proceed to present

evidence on allegations that are not affected by the amendments. Amendments that add further charges without amending the existing charges fall within this category. The employee does not state how the amendments to the allegations against him prejudiced him. As has already been noted above, the employee indicated early on his reluctance to participate in the proceedings. Therefore, the Applicant's further complaint that he was not informed about the decision not to postpone the hearing is also baseless.

- [39] The Applicant complains that the Department should not have been allowed legal representation at the hearing even though that right was also extended to him. He considers it incredibly unfair because the presiding officer did not oblige the Department to pay for his legal costs. The Commissioner disagreed with the Applicant that this was unfair — mainly because the Applicant was afforded the same right. The Applicant had asked during the disciplinary hearing that if he was also to be allowed legal representation, the chairperson of the hearing should have oblige the Department to pay his legal costs. The chairperson refused to do so and the Commissioner, it appears, considered this to be fair.
- [40] Our courts have confirmed that while Applicants are not necessarily entitled to be legally represented in all cases, circumstances may justify legal representation in some cases and an absolute rule against legal representation would be unconstitutional.³ Even if a disciplinary code does not permit legal representation, presiding officers must still consider applications for parties to be legally represented. The essential test is whether fairness requires employees to be represented by legal practitioners.⁴
- [41] While presiding officers must consider applications for parties to be legally presented at disciplinary hearings, I am not convinced that they may order an employer to pay the legal costs for an employee to be legally represented. In *SAPSAWU obo Jika v Department of Justice*⁵ the aggrieved employee referred

³ See: *Hamata and another v Chairperson, Peninsula Technikon Internal Disciplinary Committee and others* 2002 (7) BCLR 756 (A).

⁴ *Volschenk and Another v Morero NO and other* [2011] 3 BLLR 313 (LC).

⁵ [2000] 3 BALR 309 (CCMA).

a dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) and claimed that a presiding officer's refusal to order to allow him to appoint a legal representative at state (his employer) expense amounted to an unfair labour practice. The Commissioner, in that case, ruled that this did not amount to a benefit and therefore did not amount to an unfair labour practice.

- [42] The Commissioner's decision that because the Applicant was afforded the same rights as the Department, allowing the Department to be legally represented was not unfair, cannot be faulted. And, the presiding officer's failure or refusal to order the Department to pay the Applicant's legal fees does not make the disciplinary process unfair. In any case, even though presiding officers must consider applications for parties to be legally represented at disciplinary hearings, they may not have powers to order employers to pay legal fees for employees. The application fails on these grounds.

Substantive fairness

- [43] The Applicant's Heads starts and end with asking this Court to declare the Applicant's dismissal to be a "nullity and *void ab initio*" but does not set out a basis for a finding in this regard other than claiming that the Director-General did not have the necessary delegated authority to dismiss him as a Deputy Director-General. The Applicant's contention is misplaced on several counts.
- [44] The Commissioner (concerning one of the charges for which he concluded that the Applicant was not guilty) noted that the Director-General did not have the necessary delegated authority to pursue the allegation against the Applicant because he was charged in his then capacity as the Acting Director-General. The allegations for which the Applicant was found guilty and in respect of which the Commissioner concluded his dismissal justified, are not allegations against him in his capacity as Acting Director-General.
- [45] During oral argument, the Applicant's representatives changed tact. While initially claiming that the lack of delegated authority applied to all the allegations and therefore that the Applicant's dismissal should be *void*, the argument was

limited by conceding that the Director-General may have had the necessary authority to institute disciplinary proceedings against the Applicant but not to dismiss him. In part, the Applicant argued, that the delegated authority upon which the Director-General relied, was issued by a previous Minister.

- [46] The Applicant's arguments are not convincing and rely on form over substance. The Director-General had the necessary authority to discipline and dismiss the Applicant as Deputy Director-General. He conceded as much during the arbitration, and the Director-General did not need to rely on any delegation of authority in this regard. The relevant Minister as the Executive Authority only attends to dismissals relating to heads of Department such as the Director-General and not to those of other senior employees such as the Applicant.
- [47] There is yet another reason why the claim for this Court to declare the Applicant's dismissal invalid. This is an application to review and set aside the award of the Commissioner. The Commissioner was required to determine the fairness of the Applicant's dismissal, and this Court must assess if his conclusions are those that a reasonable decision-maker could not make. The Applicant's claim is against his alleged unfair dismissal and brought squarely within rights afforded to him in terms of the LRA.
- [48] In *Steenkamp and others (National Union of Metalworkers of South Africa intervening) v Edcon Ltd*⁶ the Constitutional Court made clear (albeit in the context of dismissals for operational requirements in terms of section 189A of the LRA) that employees whose cause of action arises from the LRA are confined to remedies provided for by the LRA. Claims that dismissal is unlawful and null and void are not provided for by the LRA, and the CCMA and this Court lack the power to declare dismissals null and void as opposed to unfair.
- [49] The Applicant claims that the charges the Department levelled against him had prescribed because the Department had not instituted disciplinary proceedings against him within a reasonable time. The Director-General, the Applicant

⁶ [2016] 4 BLLR 335 (CC)

contended, knew about the alleged acts of misconduct since June 2011 but only charged the Applicant during November 2014. The Applicant relies on the former date because, according to him, the Department used a report of the Auditor-General of 2011 to draft the charges against him.

- [50] Charges of misconduct in the workplace do not prescribe as such. Instead, fairness requires employers to bring charges of misconduct against employees within a reasonable time from when the employer became aware of the alleged misconduct. An inordinate delay could render a dismissal for misconduct procedurally unfair unless it can be shown that the employer had, by its failure to take disciplinary action within a reasonable time, either expressly or tacitly, condoned the misconduct and therefore waived its right to discipline the employee for the misconduct. In *Union of Pretoria Municipal Workers and Another v Stadsraad van Pretoria*,⁷ the Court stated that:

“delay is not, by itself, waiver” and even where waiver is not claimed or does not apply, “fairness, however, dictates that disciplinary steps must be taken promptly.”

- [51] The Labour Appeal Court (LAC), in *Maluti Transport Corporation Ltd v Manufacturing Retail Transport and Allied Workers Union*,⁸ addressed the issue of estoppel by election in the labour law context (albeit in the context of a strike ultimatum) and said that two basic requirements are to be met to retract an earlier election: a good reason and timeous notice.

- [52] The Department explained that the delay was caused by several factors. These are that the Director-General had been suspended for a considerable period; she was deprived of some of her powers when her suspension was lifted, and the Department still had to investigate the allegations. The Commissioner considered these issues not to be in dispute and that the Department had instituted disciplinary action against the Applicant within a reasonable time after investigating the allegations. Thus, the Department had not waived its right to

⁷ (1992) 13 ILJ 1563 (IC) at 1568A and 1569A.

⁸ (1999) 20 ILJ 2531 (LAC) at para 36.

charge the Applicant. While the delay in taking disciplinary action against the Applicant appears to be considerable, I cannot fault the Commissioner's reasoning and the evidence upon which he accepted the Department's explanation for the delay as reasonable. His conclusion is undoubtedly one that a reasonable decision-maker could make.

- [53] The Applicant attacks the Commissioner's conclusion of substantive fairness in relation to the actual allegations against him on amorphous grounds in his attempts to challenge every aspect of the award that disfavors him. The Applicant seems to take the approach that he is not guilty of charges 7, 8 and 9 and if he were guilty, then the Department acted inconsistently, and the sanction was inappropriate.
- [54] The Applicant's allegations regarding inconsistency are sparse. The Commissioner accepted the Director-General's evidence that everyone who had not left the employ of the Department were charged and dismissed and those not charged had resigned. The Applicant does not appear to dispute this. Instead, the essence of his submissions amounts to saying that others could have or should have detected any irregularities he committed and therefore they, and not he, should be found guilty.
- [55] The Applicant is alleged to have committed misconduct in relation to all three charges (7, 8 and 9) in his capacity as chairperson of a selection committee recommending the appointment of employees. In terms of charge 7, the Applicant is alleged to have misrepresented, as chair of a relation committee, that one Mr Mongala is appointed as Director: Risk Management when had not applied for that position and claiming that he had been headhunted for the position. According to charge 8, the Applicant is alleged to have misrepresented for a Mr Kgamedi to be appointed as Chief Director in the Office of the Director-General at a higher salary than that advertised because Mr Kgamedi was earning more at his previous employer even though the Department already employed Mr Kgamedi at a lower salary. Charge 9 alleges that the Applicant had misrepresented that a Ms Mduli met the academic requirements for the position of Director: Secretariat Support when she did not and failed to disclose

that she had failed the competent assessment, and yet he had recommended her appointment to the position of Deputy Director even though she had not applied for that position and it had not been advertised.

- [56] These are all serious charges, and each comprises elements of gross dishonesty. The consequences of irregular appointments are severe and prejudice the public service immensely. In essence, the allegations amount to a form of corruption.
- [57] The Applicant frankly does not focus his application on any proper review grounds. Instead, the Applicant reiterates in painful detail purported facts and submissions (mostly without any or adequate cross-referencing to the record) that amount to no more than arguments made to persuade a decision-maker to find in his favour. The tedious submissions do not state why the Commissioner's findings are those that a reasonable decision-maker could not have made.
- [58] Our courts have recognised that a review for reasonableness gets close to an appeal because the reviewing court must assess the merits of the Commissioner's decision. However, it remains prudent to draw a line between a review and an appeal. The Court must not simply prefer its view over that of the Commissioner as correct. The LAC held as follows in *Fidelity Cash Management Service v CCMA and Others*⁹:

"It will often happen that, in assessing the reasonableness or otherwise of an arbitration award or other decision of a CCMA commissioner, the Court feels that it would have arrived at a different decision or finding to that reached by the Commissioner. When that happens, the Court will need to remind itself that the task of determining the fairness or otherwise of such a dismissal is in terms of the Act primarily given to the Commissioner and that the system would never work if the Court would interfere with every decision or arbitration award of the CCMA simply because it, that is the Court, would have dealt with the matter differently."

⁹ [2008] 3 BLLR 197 (LAC) paras 98–99.

The Court will need to remind itself that it is dealing with the matter on review and the test on review is not whether or not the dismissal is fair or unfair but whether or not the Commissioner's decision, one way or another, is one that a reasonable decision-maker could not reach in all of the circumstances."

(Emphasis added)

[59] In respect of each of charges 7, 8 and 9, the Applicant deflects responsibility onto others and says that they should have satisfied themselves that he had acted regularly or had failed to "*take proper care and skill*" in effect to detect wrongdoing. The only reference made to the Commissioner's failing in relation to charge 7 is that if he "*had any intention of finding out the truth and making an honest decision, he would have familiarised himself with the A.G. report and the Policy Documents against the report of [one of the witnesses].*"

[60] There is no substantial contention or proof that these reports were properly placed before the Commissioner; that his attention was drawn to the discrepancies complained about, and that he had either unreasonably disregarded this evidence or, despite this evidence, had reached conclusions that a reasonable decision-maker could not have made.

[61] In relation to charge 8, the Applicant does not address at all why he is not guilty of the charge. Instead, criticism is levelled at whether or not the allegations find their origin in other reports, namely, those of the Auditor General and the DPSA. The challenge on the Commissioner is limited to the following:

"Had the Arbitrator been diligent in his duty, he would have seen this mischief, gross irregularity and desperation on the side of the [Department] to charge and dismiss [the Applicant] for the charges that fabricated with no supporting documents or investigation."

and

"The Arbitrator's decision on the matter is disturbing as [the Applicant] explained the process to him at the time during this testimony and he failed to be objective as he was intent of satisfying the interest of [the Director-General]."

- [62] The Applicant fails to put forward proper grounds of review, and when making bald claims of bias (and therefore gross misconduct by the Commissioner), he fails to substantiate the claims correctly or at all.
- [63] The Applicant's challenge relating to charge 9 also resorts to blaming others rather than putting forward reasons why the Commissioner had unreasonably concluded that the Applicant was guilty. The Applicant characterises the Commissioner's reasoning as "*disappointing and all over the place*" and claims that he failed to "*use all the material evidence that was before him including the oral one to enable him to come to a better decision ... because he was blinded by biases, he failed to pay careful attention to the most common facts.*"
- [64] Again, the submission of bias is without grounds. I cannot fault the Commissioner's reasoning in respect of all three charges as those of a reasonable decision-maker based on the evidence that served before him.
- [65] The Applicant's attack on the appropriateness of the sanction repeats, *ad nauseam*, essentially contentions that the Applicant is not guilty of misconduct; others are to blame; and that the Director-General was herself suspended by three Ministers, the subject of a parliamentary complaint, and lied under oath. Umpteen 'facts' are bandied around without referring to the record, or that the conclusions the Commissioner reached should be reviewed and set aside on proper grounds of review. Bald criticism and attacks of the decisions of the Commissioner are insufficient to sustain an application to review and set aside his award.
- [66] The allegation of bias against the Commissioner and his alleged failure to apply his mind to the matters at hand is unwarranted. Without deciding the merits of his decision regarding the applicability of the other charges, it is apparent that the Commissioner had carefully applied his mind to each of the charges levelled

against the Applicant. As stated above, he considered that the presiding officer of the disciplinary hearing had not made any findings regarding charges 2, 5 and 10 and therefore he lacked the necessary jurisdiction to consider whether or not the Applicant was guilty of these charges. In regard to charge 6 he felt the Department had withdrawn the charge. He found the Applicant not guilty of charges 1, 3 and 4. This could hardly be described as someone who blindly set out to find the Applicant guilty of the allegations against him and that his dismissal was fair.

- [67] In finding the Applicant guilty of charges 7, 8 and 9, the Commissioner found that he failed to comply with the recruitment processes set out in the Public Service Act¹⁰, Public Service Regulations and the Recruitment and Selection Policy of the Department. He agreed that the employment relationship had broken down irretrievably and that it would be unreasonable to expect the Department to take the Applicant back into its employment when he has shown no remorse. The charges were serious. Thus, he reasoned that dismissal was appropriate. His reasoning and conclusion is not one a reasonable decision-maker could not make.

Cross-review

- [68] I now turn to the Department's application to review and set aside the award of the Commissioner. The Department takes issue with the Commissioner's decision that the Applicant's dismissal was procedurally unfair and for awarding him compensation equivalent to three months' remuneration. The Commissioner concluded the dismissal to be procedurally unfair because the Applicant was not given an opportunity to make representations regarding an appropriate sanction.

- [69] The Department contends the Commissioner's decision in this regard should be set aside as irrational and not that of a reasonable decision-maker because, *among other things*, even though the Commissioner did not consider it unfair

¹⁰ No. 103 of 1994.

for the presiding officer of the disciplinary hearing not to postpone the hearing and to proceed in the Applicant's absence, he still considered it unfair that the Applicant was not given an opportunity to make representations regarding an appropriate sanction.

- [70] I agree with the Department. In respect to the Applicant failing to attend the hearing on the scheduled date, the Commissioner considered that

"... there was nothing wrong with the decision of the chairperson to proceed with the disciplinary hearing in the absence of the Applicant because the respondent required him to appear before a disciplinary hearing."

- [71] Yet, he also concluded as follows:

"I cannot agree with the respondent that the Applicant had abandoned his right to attend the disciplinary hearing; ... according to evidence before me Applicant was challenging the status of the D.G. to institute disciplinary proceedings against him as he claimed that in terms of the PSA and the delegation of the respondent such delegation resides with the Executive Authority not the Director General. As a result failure by the chairperson to invite the Applicant to submit mitigating factors after he had found him guilty in his absence amounts to procedural unfairness which infringed on the rights of the Applicant to fair labour practice; as a result an amount equivalent to Applicant's three months salary will be just and equitable to compensate for the infringement."

- [72] The Commissioner's reasoning about the latter is scant and irrational — more so in light of having found nothing wrong with the chairperson of the hearing proceeding with the hearing in the absence of the Applicant. His reasoning appears to be that it was unfair because the Applicant had challenged whether the Director-General was entitled to institute disciplinary proceedings against him. This reasoning is unreasonable and not that of a reasonable decision-maker for at least two reasons.

- [73] First, if the Applicant's challenge of the Director-General's authority to institute disciplinary proceedings against him rendered the dismissal procedurally unfair

because the chairperson failed to invite him to submit mitigating factors, then the same reasoning would apply to the Applicant not appearing at the hearing initially. He had all along challenged the authority of the Director-General to institute disciplinary proceedings against him and that, rather than the spurious reason of having to attend to other work-related matters, is the real reason for his dismissive attitude towards the disciplinary proceedings.

- [74] Second, and probably more importantly, once the Applicant adopted a stance not to participate in the disciplinary proceedings, the onus could not have then been on the chairperson or Department to assume that he intended abandoning that approach and invite him to make submissions in mitigation.
- [75] On the contrary, it could be argued that the Applicant ought to have indicated that even though he challenged the Director-General's authority to initiate disciplinary proceedings against him, he wished to make submissions in mitigation if he were to be found guilty. He did not convey any intention — expressly or by implication — that he still wished to participate in the disciplinary proceedings or that he reserved any right to do so.
- [76] Moreover, there was no evidence before the Commissioner (or at least none referred to by him or the parties) that indicate that had the Applicant been allowed to make submissions in mitigation, he would have grasped at such an opportunity. On the contrary, the Applicant's overwhelming attitude to the disciplinary proceedings was that the proceedings were illegitimate, and he probably would not have participated at such a late stage and by so doing infer that he considered the proceedings permissible.
- [77] It is not insignificant that both the chairperson of the disciplinary hearing and the Commissioner considered dismissal to be an appropriate sanction. The Commissioner had done so even on the basis that the Applicant was guilty of fewer charges than had been the case at the disciplinary hearing. Any procedural defect that could have existed from the Applicant being denied an opportunity to present mitigating factors must be weighed up against the substantive issues.

[78] In *CAWU and Others v Sabrix (Pty) Ltd*¹¹, the Court referred with approval to a litany of Labour Appeal Court cases¹², which support the view that the defects in the disciplinary enquiry do not necessarily render the dismissal procedurally unfair or entitle the Applicant to any relief. The nature and seriousness of the allegations for which the Applicant was found guilty and the obvious irretrievable breakdown in the trust relationship, coupled with the Applicant's attitude to the disciplinary proceedings, do not justify as reasonable a conclusion of procedural unfairness because the Applicant was not invited to make submissions in mitigation. The Commissioner found that:

"... the allegations ... are of serious nature that each attracts a sanction of dismissal. As a result it is my finding that dismissal is imposed on all three charges. There is no compelling reason that could justify me interfering with the sanction of dismissal imposed by the respondent on these allegations.
(Emphasis added)

[79] Thus, any defect which might have existed in the disciplinary proceedings does not render the disciplinary hearing procedurally unfair, and the Applicant certainly should not be entitled to relief. The Department's application to review and set aside the Commissioner's conclusion that the Applicant's dismissal was procedurally unfair must therefore succeed.

[80] Mr Phukubje, on behalf of the Department, indicated that it was not necessary to consider the Department's other grounds of review if the Commissioner's finding that the Applicant's dismissal was procedurally unfair is reviewed and set aside. There is, therefore, no need to consider the Department's other grounds of review.

Conclusion

¹¹ [1996] 1 BLLR 51 (IC).

¹² See in this regard: *Farmec (Edms) Bpk t/a Northern Transvaal Toyota v Els* (1993) 14 ILJ 137 (LAC), *Reckitt & Colman(SA) (Pty) Ltd v CWIU and Others* (1992) 12 ILJ 806 (LAC) and *Durban Confectionery Works (Pty) Ltd t/a Beacon Sweets v Majangaza* (1993) 14 ILJ 663 (LAC).

- [81] This Court is entitled to set aside an arbitration award if the Commissioner's decision falls outside a band of decisions to which a reasonable person could come on the available evidence.¹³ It is not the correctness of the Commissioner's decision that is relevant, but whether the result of the arbitration proceedings is reasonable.
- [82] The Commissioner's decision that the dismissal of the Applicant was fair is reasonable and does not fall to be reviewed and set aside. However, the Commissioner's decision that the Applicant's dismissal was procedurally unfair was not a reasonable conclusion based on the evidence that served before the Commissioner and especially so in light of his otherwise rational and reasonable decisions regarding substantive and procedural fairness in other respects.
- [83] Section 145(4) of the LRA entitles the Court to determine the dispute in the manner it considers appropriate. Justice and fairness would not be served if this dispute were to be remitted to the First Respondent to be heard before a Commissioner other than the Commissioner. The disciplinary hearing, the arbitration and this case have been conducted in a manner contrary to one of the principal purposes of the LRA — the speedy resolution of disputes. This Court is in as good a position as any Commissioner and therefore in a position to substitute the award.

Costs

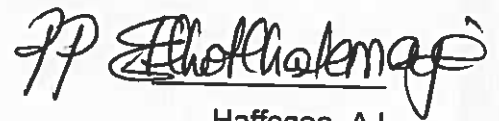
- [84] The Court has a broad discretion, in terms of section 162 of the LRA, to make an order for costs according to the requirements of the law and fairness. I have addressed in detail the unwieldy approach the Applicant adopted. Not only are there no reasons before me to suggest why costs should not follow the result, but there are also strong reasons that costs be awarded against the Applicant for the manner in which this application has been prosecuted.

¹³ See: *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] 12 BLLR 1097 (CC).

[85] Accordingly, the following order is made:

Order

1. The Applicant's application to review and set aside the Second Respondent's award is dismissed.
2. The Third Respondent's cross-review is hereby granted. The decision of the Second Respondent only in so far as the Applicant's dismissal was procedurally unfair is reviewed and set aside and is replaced with the following:
 - 2.1 "The dismissal of the Applicant was both substantively and procedurally fair."
3. The Applicant is ordered to pay the costs of the Third Respondent.



Haffegée, AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: Advocates M Mhambi and F Thema
Instructed by: Makhafola & Verster Inc

For the Third Respondent: Mr C N Phukubje of C N Phukubje Attorneys

LABOUR COURT