IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JR124/18

In the matter between:

CITY OF JOHANNESBURG	**Applicant**
And	
L. JACOBS N.O	**First Respondent**
T. MOLEFE	**Second Respondent**
N. SIMELANE	**Third Respondent**

Heard: **13 January 2021**

Delivered: **08 February 2021**

Summary: **review application in terms of 158(1)(h) – late filing of review application and late delivery of record - condonation applications granted – seriousness of misconduct – dismissal is the appropriate sanction - findings not rational and not connected to evidence – review application upheld.**

JUDGMENT

DEANE AJ

Introduction

[1] This is an application launched in terms of section 158(1)*(h)* of the Labour Relations Act 66 of 1995 (LRA) to (i) review and set aside a ruling dated 24 October 2017 for the reinstatement of the Second and Third Respondents; said ruling made by the First Respondent in their official capacity as the Chairperson of the appeal tribunal and at the instance of the employer; and (ii) substituting this ruling with an order that this appeal be dismissed; and (iii) confirming the dismissal of the Second and Third Respondents. The review of the Applicant is primarily directed against the finding of the First Respondent in respect of the sanction.

[2] The Applicant has filed a condonation application for the late filing of the review application; and for the late delivery of the record.

Relevant Background

[3] The Applicant is a municipality and an organ of State for the purposes of section 239 of the Constitution of the Republic of South Africa.[1] It is also an employer and carries out the ordinary duties and obligations of an employer.

[4] The First Respondent is Luvoyo Jacobs, an employee of the Applicant, and who was the Presiding Officer in the appeal hearing of the Second and Third Respondents. The First Respondent was appointed as such by the Applicant's labour relations department on or about August 2017.

[5] The Second Respondent is Mrs Nwabisa Simelane (Simelane) who is employed as a drivers' licence examiner in the licence licensing section in the Public Safety Department.

[6] The Third Respondent is Ms Thandeka Molefe (Molefe) is also employed as a drivers' licence examiner in the licensing section in the Public Safety Department.

[1] Constitution of the Republic of South Africa, 1996.

[7] Simelane and Molefe were dismissed on 12 June 2017 pursuant to having been charged with a failure to comply with schedule 8 of the LRA read with schedule 2 of the Municipal Systems Act 32 of 2000 (MSA), in that on 9 November 2015, 10 November 2015 and 29 February 2016, (i) they dishonestly assisted candidates in the learner's licence class at the Sandton Licencing Department by indicating the answers to them in the test; (ii) that by doing so they brought the council into disrepute.

[8] Mrs E Esau, who was appointed as head of the Sandton Testing Station, testified in a disciplinary hearing that in February 2016 she noticed that there were irregularities at the station and reviewed Learners Class footage from the CCTV cameras. She noted the irregularities and submitted them for investigation. An investigation was duly completed and the Investigation Report[2] forms part of the Bundle before the court. In addition, the video footage[3] forms part of the evidence before this court. It is common cause that the employees are the ones on the video footage.

[9] The Gauteng Department of Transport Circular no. 1 of September 2013 (Circular 1) titled Procedure and Guidelines in Conducting a Computerised Learner Licence Test (CLLT) was submitted into evidence and explains the procedure expected of an examiner in the Learner Licence Class. It provides that:

> 'Its purpose is to assist in fighting fraud and corruption in our Provincial Driver Learner Testing Centres (PDLTC's) and to protect officials from being corrupted.
>
> Examiners shall not at any time offer assistance to an Applicant, in the form of verbal or physical gestures on behalf of the Applicant.'

[10] The Second and Third Respondents (cumulatively, the employees), not being happy with the outcome of the disciplinary hearing, proceeded to appeal the outcome of said disciplinary hearing.

[2] See Pg 59 of Vol 1 of the Bundle of Documents.
[3] See Vol 1 of the Bundle of Documents.

[11] The appeal was heard before the First Respondent and pursuant to the appeal hearing, the First Respondent, in the appeal outcome dated 24 October 2017, found that despite the employees being guilty of the charges against them, dismissal was considered to be too harsh of a sanction.[4]

[12] The First Respondent thus reinstated the employees with a final written warning to be noted in the employees file.[5]

The Issue

[13] The issue in this matter is one relating to the sanction imposed and whether the First Respondent in overturning the sanction of dismissal acted rationally and/or reasonably.

Grounds for Review

[14] The Applicant argues that the First Respondent committed misconduct as contemplated by section 145(2) of the LRA; alternatively, the First Respondent arrived at a decision which is irrational and which could not have been reached by a reasonable decision-maker.[6]

[15] The Applicant makes reference to the various reviewable irregularities made by the First Respondent; in that "*the first reviewable irregularity committed by the First Respondent*" is related to an irrational determination by the First Respondent when he found that there was an *"error as to there being nowhere where the sentence or corrective measure is determined and the failure of the First Respondent to recognise that this misconduct self-evidently warrants dismissal."*[7] This review ground is based on the submission that the First Respondent commits both a material error of fact and arrives at a finding that is not rationally connected to evidentiary material before her.

[16] The second reviewable irregularity committed by the First Respondent relates the "*unsubstantiated and unjustified alternatively irrelevant findings as to flaws*

[4] Pgs 1-2 of the Award or 36-37 of the Pleadings Bundle.
[5] Pg 2 of the Award or pg 37 of the Pleadings Bundle.
[6] Founding Affidavit dated 22 January 2018.
[7] Applicants Heads of Argument court stamped 25/11/2019 and the Supplementary Affidavit dated 21 June 2018.

in the disciplinary hearing process",[8] in that she adopted an incorrect legal approach to the inquiry and committed a material error of law and/or considered irrelevant considerations that have no bearing on the procedural fairness of the employees' dismissal.

Review Principles

[17] Firstly; it is by now settled that section 158(1)*(h)* of the LRA is available to review the decisions of the state in its capacity as an employer.

[18] Furthermore, the Applicant squarely places its reliance on the principle of legality. It is also settled that the principle applicable in section 158(1)*(h)* is that of legality.[9] As stated by the SCA in *NDPP v Freedom under Law*,[10] the legality principle has become well established in our law as an alternative pathway to judicial review of exercises of public power where Promotion of Administrative Justice Act[11] (PAJA) finds no application. The principle permits review on grounds of both legality and rationality.[12]

[19] Dealing with 'legality' the Court in *Hendricks*[13] found that:

> '…. Legality includes a requirement of rationality. It is a requirement of the rule of law that the exercise of public power by the executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with the rule of law.'

[8] Applicants Heads of Argument court stamped 25/11/2019 and the Supplementary Affidavit dated 21 June 2018.
[9] *MEC for the Department of Health, Western Cape v Weder; MEC for the Department of Health, Western Cape v Democratic Nursing Association of SA on behalf of Mangena* (2014) 35 ILJ 2131 (LAC) at para 33 …Irrespective of the classification of the decisions of the appellant as administrative action, appellant's actions are open to review in terms of s 158…on the ground of legality, a principle that has been developed significantly by the courts over the past decade.
[10] (2014) 4 SA 298 (SCA) 309B-D; see also *MEC for the Department of Health, Western Cape v Weder* (2014) 35 ILJ 2131 (LAC) at para 33.
[11] Promotion of Administrative Justice Act 3 of 2000.
[12] *Democratic Alliance v President of the Republic of South Africa & others* (2013) 1 SA 248 (CC) 15, *Turner v Jockey Club of South Africa* (1974) 3 SA 633 (A); and *Theron v Ring van Wellington van die NG Sendingkerk in Suid-Afrika* (1976) 2 SA 1 (A).
[13] *Hendricks v Overstrand Municipality & another* (2014) 12 BLLR 1170 (LAC); (2015) 36 ILJ 163 (LAC) at para 28.

[20] The Court in *Khumalo & another v MEC for Education: KwaZulu-Natal*[14] also specifically dealt with the meaning of 'legality', in the context of a review application under section 158(1)(*h*), and held:

> '… The principle of legality is applicable to all exercises of public power and not only to 'administrative action' as defined in PAJA. It requires that all exercises of public power are, at a minimum, lawful and rational. …'

[21] In *MEC for the Department of Health, Western Cape v Weder; MEC for the Department of Health, Western Cape v Democratic Nursing Association of SA on behalf of Mangena,*[15] the Court held that the principle of legality has developed over the past decade, to the extent that a parallel system of review for action which falls outside of the strict definition of administrative action, has developed. Having so held, the Court then proceeded to set out this development as follows:[16]

> '… Public functionaries are required to act within the powers granted to them by law.'[17]

[22] Furthermore, in the seminal judgment in *Pharmaceutical Manufacturers Association of SA & another*: *In re Ex parte President of the Republic of SA & others*, the court laid down the core element of legality as follows:[18]

> 'It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the Executive and other functionaries must, at least, comply with this requirement.'

[23] The Court in *Weder*[19] then proceeded to consider this component of rationality as part of the legality enquiry, and held:

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[14] (2014) 35 ILJ 613 (CC).
[15] (2014) 35 ILJ 2131 (LAC) at para 33.
[16] Id at para 34.
[17] See *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council & others* (1999) 1 SA 374 (CC) at para 58,
[18] (2000) 2 SA 674 (CC) at para 85.
[19] At para 35.

> ‘In later judgments the court has developed this concept of rationality requiring the executive or public functionaries to exercise their power for the specific purposes for which they were granted so that they cannot act arbitrarily, for no other purpose or an ulterior motive.’

[24] Furthermore, in *Democratic Alliance v President of the Republic of SA & others*,[20] the court held:

> 'If in the circumstances of a case, there is a failure to take into account relevant material that failure would constitute part of the *means* to achieve the purpose for which the power was conferred. And if the failure had an impact on the rationality of the entire process, then the final decision may be rendered irrational and invalid by the irrationality of the *process as a whole*.''

[25] Of further guidance when considering legality review grounds, is the following *dictum* in *Ntshangase v MEC for Finance: KwaZulu-Natal & another*[21], where it was held:

> ‘… All actions and/or decisions taken pursuant to the employment relationship between the second respondent and its employees must be fair and must account for all the relevant facts put before the presiding officer. Where such an act or decision fails to take account of all the relevant facts and is manifestly unfair to the employer, he/she is entitled to take such decision on review. Moreover, the second respondent has a duty to ensure an accountable public administration in accordance with ss 195 and 197 of the Constitution. …’

[26] The Applicant in the Founding and Supplementary Affidavits as well as the Heads of Argument does not rely upon PAJA. I shall therefore proceed to consider this matter under the provisions of the LRA as opposed to PAJA.

[27] In sum, the Applicant’s review application in this case is indeed competent under section 158(1)*(h)*, and should be considered by this Court. As this application is founded on the principle of legality, it must be evaluated based on the principles as summarised above.

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[20] (2013) 1 SA 248 (CC) at para 39.
[21] (2009) 30 ILJ 2653 (SCA) at para 18.

[28] Secondly, the appropriate test for review is settled. In *Sidumo & another v Rustenburg Platinum Mines Ltd & others,*[22] Navsa AJ held that the standards as contemplated by Section 33 of the Constitution are in essence to be blended into the review grounds in Section 145(2) of the LRA, and remarked that 'the reasonableness standard should now suffuse s 145 of the LRA'. The learned Judge held that the threshold test for the reasonableness of an award was:

> '…Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?...'[23]

[29] Pursuant to the judgment in *Sidumo*, and in every instance where the constitutionally suffused, section 145(2)*(a)*(ii)[24] is sought to be applied to substantiate a review application, any failure or error of the arbitrator relied on, must lead to an unreasonable outcome arrived at by the arbitrator, for it to be reviewable.

[30] In *PSA OBO Rae v General Public Services Sectoral Bargaining Council & others,*[25] the court stated:

> 'In my view therefore, what the applicant must show to exist in order to succeed with a review in this instance, is firstly that there is a failure or error on the part of the arbitrator. If this cannot be shown to exist, that is the end of the matter. But even if this failure or error is shown to exist, the applicant must then further show that the outcome arrived at by the arbitrator was unreasonable. If the outcome arrived at is nonetheless reasonable, despite the existence of the error or failure, that would equally be the end of the review application. In short, in order for the review to succeed, the error of failure must affect the reasonableness of the outcome to the extent of rendering it unreasonable.'

[31] In *Herholdt v Nedbank Ltd and another*[26] the Court said:

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[22] (2007) 28 ILJ 2405 (CC).
[23] At para 110. See also *CUSA v Tao Ying Metal Industries & others* (2008) 29 ILJ 2461 (CC) at para 134; *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration & others* (2008) 29 ILJ 964 (LAC) at para 96.
[24] The Section reads: 'A defect referred to in subsection (1), means- (a) that the commissioner ... committed a gross irregularity in the conduct of the arbitration proceedings.'
[25] (JR755/14) (2017) ZALCJHB 410.
[26] (2013) 34 ILJ 2795 (SCA) at para 25.

> '…. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to the particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of consequence if their effect is to render the outcome unreasonable.'

[32] As to the application of the reasonableness consideration as articulated in *Herholdt*, the LAC in *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration & others*[27] said:

> '…. in a case such as the present, where a gross irregularity in the proceedings is alleged, the enquiry is not confined to whether the arbitrator misconceived the nature of the proceedings, but extends to whether the result was unreasonable, or put another way, whether the decision that the arbitrator arrived at is one that falls in a band of decisions a reasonable decision maker could come to on the available material.'

[33] Accordingly, the reasonableness consideration envisages a determination, based on all the evidence and issues before the arbitrator, as to whether the outcome the arbitrator arrived at can nonetheless be sustained as a reasonable outcome, even if it may be for different reasons or on different grounds.[28] This necessitates a consideration by the review court of the entire record of the proceedings before the arbitrator, as well as the issues raised by the parties before the arbitrator, with the view to establish whether this material can, or cannot, sustain the outcome arrived at by the arbitrator. In the end, it would only be if the outcome arrived at by the arbitrator cannot be sustained on any grounds, based on that material, and the irregularity, failure or error concerned is the only basis to sustain the outcome the arbitrator arrived at, then the review application would succeed.[29] In *Anglo Platinum (Pty) Ltd (Bafokeng Rasemone Mine) v De Beer & others*[30] it was held:

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[27] (2014) 35 ILJ 943 (LAC) at para 14. The *Gold Fields* judgment was also followed by the LAC itself in *Monare v SA Tourism & others* (2016) 37 ILJ 394 (LAC) at para 59; *Quest Flexible Staffing Solutions (Pty) Ltd (A Division of Adcorp Fulfilment Services (Pty) Ltd) v Legobate* (2015) 36 ILJ 968 (LAC) at paras 15 – 17; *National Union of Mineworkers & another v Commission for Conciliation, Mediation and Arbitration & others* (2015) 36 ILJ 2038 (LAC) at para 16.
[28] See *Fidelity Cash Management* at para 102.
[29] See *Campbell Scientific Africa (Pty) Ltd v Simmers & others* (2016) 37 ILJ 116 (LAC) at para 32.
[30] (2015) 36 ILJ 1453 (LAC) at para 12.

> '…. the reviewing court must consider the totality of evidence with a view to determining whether the result is capable of justification. Unless the evidence viewed as a whole causes the result to be unreasonable, errors of fact and the like are of no consequence and do not serve as a basis for a review.'

[34] Of importance in this matter, considering the grounds of review raised by the Applicant, is the concept of an error of law, and how this kind of case is contemplated to be dealt with under the review test. In line with the review test summarised above, the mere existence of an error of law would be insufficient to substantiate a successful review application, unless that error of law has the result of an unreasonable outcome. In *Head of Department of Education v Mofokeng & others*[31] the Court held:

> '… Mere errors of fact or law may not be enough to vitiate the award. Something more is required. To repeat: flaws in the reasoning of the arbitrator, evidenced in the failure to apply the mind, reliance on irrelevant considerations or the ignoring of material factors etc must be assessed with the purpose of establishing whether the arbitrator has undertaken the wrong enquiry, undertaken the enquiry in the wrong manner or arrived at an unreasonable result. Lapses in lawfulness, latent or patent irregularities and instances of dialectical unreasonableness should be of such an order (singularly or cumulatively) as to result in a misconceived enquiry or a decision which no reasonable decision maker could reach on all the material that was before him or her.'

[35] In *Democratic Nursing Organisation of SA on behalf of Du Toit & another v Western Cape Department of Health & others*[32] it was said:

> 'Since the advent of the Constitution of the Republic of South Africa 1996 (the Constitution), the concept of review is sourced in the justifications provided for in the Constitution and, in particular, that courts are given the power to review every error of law provided that it is material; that is that the error affects the outcome. …'

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[31] (2015) 36 ILJ 2802 (LAC) at para 32.

[32] (2016) 37 ILJ 1819 (LAC) at para 21. See also *Xstrata SA (Pty) Ltd (Lydenburg Alloy Works) v National Union of Mineworkers on behalf of Masha & others* (2016) 37 ILJ 2313 (LAC) at para 12; *MacDonald's Transport Upington (Pty) Ltd v Association of Mineworkers and Construction Union & others* (2016) 37 ILJ 2593 (LAC) at para 30.

[36] In *Opperman v Commission for Conciliation, Mediation and Arbitration & others*[33] the Court specifically dealt with a situation where the applicant sought to review and set aside an award of substantive fairness on the basis of an error of law, and in particular contending that the arbitrator grossly misapplied the law pertaining to inconsistency. The Court said:[34]

> 'In the case before me, the arbitrator committed an error of law by referring to and then not following the dictum of Basson J in *Rennies.* But even if that in itself does not make the award reviewable, it led to an unreasonable result. It must be reviewed and set aside on that basis.'

[37] Therefore, the Applicant, in relying on an error of law on the part of the First Respondent, would have to show that this error materially affected the outcome arrived at, rendering it unreasonable.

[38] Against the above principles and test, I will now proceed to consider the Applicant's review application.

[39] However, before I proceed, I must first deal with the delay that has been occasioned in this matter, as well as the implications of such delay to the Applicant's review application.

Condonation

Late filing of the Application

[40] The application for review was brought in terms of section 158(1)*(h)* of the LRA. That section does not prescribe a time limit for the filing of the application, in contradistinction to s 145(1)*(a)* that prescribes a time limit of six weeks from the date that the award was served on the applicant.

[33] (2017) 38 ILJ 242 (LC) at para 5.
[34] At para 25. See also *SBV Services (Pty) Ltd v National Bargaining Council for the Road Freight and Logistics Industry and thers* (2016) 37 ILJ 708 (LC) at para 36.

[41] The application therefore had to be brought within a 'reasonable time'. In *Gqwetha v Transkei Development Corporation Ltd & others,*[35] the court stated that:

> "it is important for the efficient functioning of public bodies ... that a challenge to the validity of their decisions by proceedings for judicial review should be initiated without undue delay. The rationale for that longstanding rule ... is twofold: First, the failure to bring a review within a reasonable time may cause prejudice to the respondent. Secondly, and in my view more importantly, there is a public interest element in the finality of administrative decisions and the exercise of administrative functions."

[42] The question is what, then, is a 'reasonable time' in the context of s 158 of the LRA. The extent of the delay must be considered together with the other factors outlined in *Melane v Santam Insurance Co Ltd*[36] and subsequent authorities.

[43] In this case, the reason for the delay is that, the Appeal Ruling was dated 24 October 2017 and argued to have been first published on 2 November 2017 when it was sent to the Acting Deputy Director Licencing. The application was launched on 23 January 2018. The Applicant's attorneys were on leave from 20 December 2017 until 15 January 2018.

[44] Additionally, for a number of weeks after the receiving the ruling, the Applicant argues that they did not know what to do and despite being unhappy with the outcome was under the impression that it was legally obliged to live with it, until they were advised sometime in January 2018 that the Applicant could review its own irregular decision and thereafter immediate steps were taken to launch the present application.[37]

[45] Furthermore, the Applicant argues that since the offence for which the Second and Third Respondents were dismissed namely, for fraudulent and corrupt assistance to learner driver applicants; this matter is of huge public interest as the acts of the employees could potentially contribute to high accident rates.

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[35] (2006) 2 SA 603 (SCA) at 612 E-F para 22, citing *Associated Institutions Pension Fund & others v Van Zyl & others* 2005 (2) SA 302 (SCA) at 321.
[36] (1962) 4 SA 531 (A).
[37] Pgs 19-20 of the Pleadings Bundle.

[46] The employees argue that the matter was brought more than two months late, which cannot be said to be a reasonable period; that the explanation given by the Applicant is not a plausible explanation and that the Applicant had sufficient time to bring this application; if there was a legitimate reason to do so.[38]

[47] I disagree. I do not consider the extent of the delay, coupled with the reasons therefore, to be so unacceptable or unreasonable as to deprive the Applicant of a hearing. The application for condonation is granted.

Late Delivery of the Record

[48] An application for the condonation of the late delivery of the record was made. The applicant delivered the Record 1 day late and I am inclined to grant this condonation for this late delivery based on the explanations provided for in the Applicant's Heads of Argument court stamped 25/11/2019; and in any event the application is not opposed.

[49] I deem it to be in the interests of justice to grant condonation in both these applications.

Analysis

[50] I have looked at the stills, the pleadings, the transcript and the video footage. All the evidence clearly point to the fact that the employees engaged in some form of misconduct.

[51] In both the disciplinary and appeal hearings, the employees were found to have assisted learner applicants in the Learner's Licence Class at the Sandton Licensing Department on various occasions.

[52] In the Opposition Affidavit dated 9 July 2018 and oral presentations before me, it is argued that the employees are "*merely assisting previously disadvantaged individuals, indigent and illiterate people or old people of our land*"[39] and that they assisted these persons "in the name of *ubuntu*" as some of these learners do not know how to use computers. It was indicated that the Third Respondent

[38] See 2nd and 3rd Respondent's Replying Affidavit dated 6 February 2018.
[39] Pg 10 of the Opposition Affidavit dated 9 July 2018.

only assisted the learner applicants when they did not know or understand how the computer system worked and the Second Respondent argues that she was not helping the learner applicants but merely playing with her fingers.

[53] From the Investigations Report; it states that there is a test administration and a demo test which is given at the beginning of each test.[40] In addition, learner license applicants are also given demo questions in order to assist them navigate the system. This procedure clearly makes provision for assistance of learner applicants at the beginning of every test.

[54] Circular 1 provides clear guidlelines on the acceptable and unacceptable conduct of examiners in a learner's class that is using a computer system for the test. Its purpose, as stipulated is meant to "assist in fighting fraud and corruption".[41] Specifically, it states that once a test has started "examiners shall not at any time offer assistance to an applicant in the form of verbal or physical gestures or answer on behalf of the applicant.".[42] The Circular goes on to state "Challenges with examiners conducting CLLT…….Hand signals given to applicants indicating the correct answer".[43]

[55] The employees have denied any knowledge of the mentioned Circular 1.

[56] Looking at the job descriptions of Examiners,[44] one of their listed duties/tasks is to test applicants for learners license according to the Road Traffic Act and K53. Being employed as examiners tasked with testing of applicants; indicates that by virtue of their job description it includes not assisting applicants in the answering of tests. Furthermore, it is not unreasonable to expect that the employees would have received some kind of training and instructions on how to conduct a learner licence test online. Same was even put forth in the Employers Opposing Affidavit Appeal Application.[45] Even if this is denied, it is improbable to assume that the employees would not know what is the expected behaviour of an examiner in a test situation.

[40] Pg 68 of the Investigation Report Vol 1 of the Record.
[41] Pg 372 of Vol 1 of the Record.
[42] Pg 375 of Vol 1 of the Record.
[43] Pg 373 of Vol 1 of the Record.
[44] Pg 86 of Vol 1 of the Record.
[45] Dated 14 September 2017 to be found in Vol 1 of the Record.

[57] From a reading of the Transcript,[46] the bare denials by the employees of knowledge of the rules or guidelines that examiners must abide by cannot in all reasonableness be sustained by this Court. Circular 1 clearly explains that the examiner shall not at any time offer assistance to a candidate, whether in the form of verbal or physical gestures,[47] and the stated ignorance of the Circular 1 and its rules cannot serve to absolve the employees.

[58] Evidence[48] led indicate that tests are in the form of a multiple-choice format and where a learner driver applicant is answering the test they have one of three choices. The examiners are clearly seen in the video footage, at specific times either pointing one finger, two fingers or three fingers, to indicate one of these three choices; 1 finger indicating that option 1 or A is correct; two fingers indicate option 2 of B is correct and three fingers indicate option 3 or C is correct. In some parts of the footage one can clearly see that the learner driver applicant waits for the examiners signal, and only then proceeds to answer the question.

[59] The fact that there is no sound does not detract from what one can clearly see is happening in the video footage. It happens on a consistent basis and only for a few students. Once again it is not probable to think that the indication of 1,2 or 3 of the fingers is a random or a co-incidental tap. The video footage clearly shows the examiners assisting the learner driver applicants. One can clearly see that the learner applicant waits for an indication for an answer, which indication is then given in the form of either 1,2 or 3 fingers being pointed and then the learner applicant proceeds to type on his computer. The answering of the learner applicants test is synchronised with the tapping of the examiners' fingers, indicating either 1,2, or 3.

[60] In this situation, it is clear that the employees were engaged in dishonest conduct and that they were in fact assisting applicant learners in the answering of the learners test.

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[46] Pgs 234-235 and pgs 360-361 of the Transcript.
[47] Pleadings Bundle, pg 9; See also 3rd Respondent's Replying Affidavit pg 42, paras 8 – 10; Opposition Affidavit pg 102, par 6.4.2.
[48] The Investigation Report in the Pleadings Bundle.

[61] Looking at the appeal ruling, the First Respondent finds that "*it is clear in the footage that the two ladies who are invigilators of the examination are seen making some signs that are believed to be assisting learner driving applicants with some answers and that is only happening to the few*"; [49] and the First Respondent seems to accept that the employees are assisting the learner driver applicants when he writes that the employees were "*unable to discredit the managers testimony*" but that they proceeded to "*give a scathy explanation about their actions during the examination*".[50]

[62] The First Respondent therefore correctly agress that the employees were engaged in dishonest conduct. They are therefore guilty of the charges.

[63] Appreciating the effect of this dishonest conduct the First Respondent writes: "*The impact of this conduct is that a number of drivers who never went through the entire process are likely to commit fatal accidents that caused the country and families a huge pain and burden to the state. The normal norm of this conduct (sic) is that examiners are willing to assist applicants in exchange for money and that is deemed a corrupt relationship of which the City has a clear determination in that regard*."[51] In fact, the seriousness of the impact of the kind of dishonest conduct that the employees were engaged in is further enunciated in the Investigators Report.[52]

[64] The First Respondent is therefore aware of the nature of the misconduct and the impact of the misconduct on society for which the employees were disciplined and dismissed. He is aware that in this regards they had been dismissed for unlawfully and corruptly assisting learner drivers to pass their learner driver test and he knew the effects of their actions.

[65] The First Respondent then turns to the issue of the sanction and in finding that dismissal was not the appropriate sanction and ordering reinstatement, he writes in his award that "*the appeal was conducted within the confinement of Procedural and or Substantive fairness*". It goes on to state that "*it became*

[49] Pg 1 of the Award or pg 36 of the Pleadings Bundle.
[50] Pg 1 of the Award or pg 36 of the Pleadings Bundle.
[51] Pg 1 of the Award or pg 36 of the Pleadings Bundle.
[52] Pgs 72-73 of the Investigation Report in the Pleadings Bundle.

evident that prior to the initial disciplinary hearing there were a number of administrative errors that could have led this disciplinary hearing otherwise".[53] He goes on further to write that "*there are three things to consider in dealing with this matter: the nature of the misconduct, the impact of the misconduct and the sufficient corrective measures utilized and in that, the question is, was the dismissal a correct outcome? If yes what informs the dismissal? If no, when do you dismiss an employee*".[54]

[66] Furthermore, the First Respondent despite writing that … "*the substance equals the Guilty verdict…*", proceeds to find "*it is clear that procedural, there were some flaws from start to end of the process and that doesn't necessarily mean that there is no substance of a misconduct, … in my view there was a selective adherence in this process*".[55] The First Respondent ruled that *"failure to adhere to the entire disciplinary procedure … will result in the review of the corrective measure imposed. It is necessary therefore to present a final written warning as the necessary outcome of the appeal and that is substantiated by the evidence brought forward. The employer must reinstate retrospectively employees with immediate effect.*"[56]

[67] The issue here is the absence of a reasoned justification to substantiate the conclusion that there were procedural flaws from start to end of the process. The First Respondents's ruling gives no indication as to how or in what respects the Applicant or its officials failed to adhere to the disciplinary process. If one has recourse to the evidence in the Pleadings and the Transcript, the procedural aspects included but is not limited to the following: an investigation being conducted; in accordance with the Code of Good Practice in schedule 8 of the LRA; in order to ascertain if there was a *prima facie* case against the employees; the Applicant relied on the provisions of said Code of Good Practice in effecting discipline in the workplace; the employees were informed of their rights, given sufficient time to prepare, exercised their rights in terms of the *audi alteram partem* rules, they were given an opportunity to make

[53] Pg 1 of the Award or pg 36 of the Bundle of Documents.
[54] Pg 1 of the Award or pg 36 of the Bundle of Documents.
[55] Pg 2 of the Award or pg 37 of the Bundle of Documents.
[56] Pg 2 of the Award or pg 37 of the Bundle of Documents.

submissions in terms of mitigating and aggravating factors and the decision taken was communicated to them. It is therefore not clear from the First Respondent's averment, what and where were the procedural flaws. There is simply no evidence and corroboration provided.

[67] I have to therefore agree with the Applicant's arguments that there is no supporting reasons for the assertions made by the First Respondent above; or even a proper analysis of the situation in order for the First Respondent to reach such a conclusion.

[68] The First Respondent further writes that "*… the Outcome of the disciplinary hearing finds these two employees Guilty but there is nowhere, where the sentence or corrective measure is determined and the big question is Who dismissed these employees and when?*" I have looked at the initial disciplinary record and the transcript and it is clear that the Presiding Officer of the initial disciplinary hearing after considering the evidence and arguments presented by both parties found the Second and Third Respondents guilty of dishonest behaviour and of bringing the council into disrepute.

[69] Furthermore, in a signed document headed Sanction and Reason,[57] the Presiding Officer of the disciplinary hearing noted that the employees were found guilty of dishonesty in their core employment function. Therefore to find that the dismissal of the employees was not determined and that no-one dismissed them, is a material error of fact.

[70] With regard to the finding that "*there is nowhere, where the sentence or corrective measure is determined"* and the applicant's argument that "*the failure of first respondent to recognise that this misconduct self-evidently warrants dismissal*", the Founding Affidavit states that "*the common cause misconduct of which the Second and Third Respondents were found guilty, namely dishonestly assisting candidates in the learner's licence test by indicating the answers to them, is self-evidently serious misconduct of a kind*

[57] Pg 31 of the Pleadings Bundle.

such as to destroy the relationship of trust between the parties and such as to justify their dismissal."[58]

[80] The Applicant contends that it was not a reasonable sanction and that the First Respondent arrived at a decision which is irrational and which could not have been reached by a reasonable decision-maker. The Applicant further argues that "*the decision of first respondent falls to be considered in the context of the decision as a whole and against the background of the evidence which served before first respondent which includes video footage that clearly shows that the respondents did assist the learner drivers in answering the test*".[59]

[81] Having looked at the totality of the evidence in front of me, it is clear that the employees were guilty of the charges of dishonesty and of bringing the Council into disrepute.

[82] The First Respondent is clearly aware of this. However, he fails to take into account the gravity of the misconduct and fails to appreciate the extent to which such serious misconduct destroys the trust relationship between the parties.

[83] In addition, the First Respondent failed to appreciate that the nature of the employees' position requires honesty and integrity. In *G4S Secure Solutions (SA) (Pty) Ltd v Ruggiero N.O. & others*[60] it was held that an:

> 'employment relationship by its nature obliges an employee to act honestly, in good faith and to protect the interests of the employer. The high premium placed on honesty in the workplace has led our courts repeatedly to find that the presence of dishonesty makes the restoration of trust, which is at the core of the employment relationship, unlikely. Dismissal for dishonest conduct has been found to be fair where continued employment is intolerable and dismissal is "a sensible operational response to risk management'.

[84] The First Respondent's decision is therefore irrational and unreasonable in light of his own findings that, the employees were indeed guilty of misconduct, that there was existence of corruption, that drivers that went through the entire

[58] Pg 15 of the Pleadings Bundle.
[59] See index to review application at pg 61, para 16.5; pg 63, para 18; 19; 20, see also pgs 84 - 93
[60] (2017) 38 ILJ 881 (LAC) at para 26.

process who were in fact not competent road users, were likely to commit fatal accidents on the road and cause huge pain to families and that results in a burden to the state, and that the Applicant employed a zero tolerance to fraud and corruption.

[85] Furthermore, it was identified that one of the main challenges experienced with examiners conducting CLLT, and as highlighted in Circular 1, is examiners using hand signals, or tapping their foot or hand, to indicate the correct answer. The Applicant as a municipality has an obligation to provide accountable government for local authorities, to ensure the provision of services to those communities and to promote a safe and healthy environment free from corruption.[61] In fact the main purpose of the Circular 1 is to assist in fighting fraud and corruption and to assist in producing safer drivers on the roads. The employees dishonest conduct achieves none of these objectives and in fact perpetuates a culture of corruption that has been identified as a serious concern within the Municipality.

[86] In recognition of the seriousness of such misconduct on the employment relationship there is a plethora of judgments that has repeatedly ruled that serious misconduct self-evidently leads to the breakdown of the trust relationship.[62]

[87] In *Anglo Platinum (Pty) Ltd (Bafokeng Rasemone Mine) v De Beer*[63] the Labour Court set aside a commissioner's award on review because the employer had not led any evidence to establish the breakdown in the employment relationship. The LAC reversed the decision on appeal and found the award reasonable despite the absence of the evidence in question. It upheld the commissioner because it found that:

> '. . . it is implicit in the commissioner's findings that in view of the nature of the offence, which involved deception and dishonesty and, in particular, the failure of the first respondent to demonstrate any acceptance of wrongdoing or

[61] Applicants Heads of Argument pg 17 dated 25 November 2019.
[62] *Impala Platinum Ltd v Jansen & others* (2017) 4 BLLR 325 (LAC).
[63] At para 19.

remorse, he considered the employment relationship to be destroyed and dismissal an appropriate sanction.'

[88] Also, in *Absa Bank Limited v Naidu & others*,[64] it was stated that:

> 'there are varying degrees of dishonesty and, therefore, each case is to be determined on the basis of its own facts on whether a decision to dismiss an offending employee is a reasonable one. Generally, however, a sanction of dismissal is justifiable and, indeed, warranted where dishonesty involved is of a gross nature."

[89] This implies that the nature of the misconduct may well determine the fairness of the sanction. It must therefore be implied from the gravity of the misconduct that the trust relationship had broken down and that dismissal is the appropriate sanction.

[90] The First and Second Respondents' actions go to the root of an employment relationship deserving of the severest sanction. It would be unfair to expect the Applicant to retain them in its employ where they had not only displayed serious misconduct in failing to comply with regulations but also contravened the duty to act in good faith by assisting learner driver applicants to pass their tests; thereby compromising integrity, fairness and honesty within the Applicant's business relationships. In the circumstances, I am therefore unable, to find that the First Respondent's ruling was rational and one that a reasonable decision-maker could have made.

[91] This then only leaves the issue of costs to be decided on. The Applicant requests an order as to costs. I find in this case that an order of costs would be neither just nor fair.

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

Order

1. The condonation applications are granted.

[64] (2015) 36 ILJ 602 (LAC) at para 42.

2. The ruling of the First Respondent is set aside and is replaced with the following order:

(a) The appeal ruling issued by the First Respondent is reviewed and set aside and replaced with the order that the dismissal of the Second and Third Respondents is confirmed.

(b) There is no order as to costs.

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T Deane

Acting Judge of the Labour Court

Appearances:

For the Applicant:	Adv Peter Burski Instructed by Salijee Govender Van Der Merwe Inc
For the Second and Third Respondents:	Floyd Makhanya Attorney's