THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable

Case no: C 82 /2023

In the matter between:

CITY OF CAPE TOWN **Applicant**

and

IMATU obo YOLANDE QUINTON **First Respondent**

SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING COUNCIL **Second Respondent**

URSULA BULBRING *N.O* **Third Respondent**

Heard: **22 August 2024**

Delivered: **06 November 2024**

This judgment was handed down electronically by consent of the parties' representatives by circulation to them via email. The date for hand-down is deemed to be 06 November 2024.

JUDGMENT

PRINSLOO, J

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Introduction

[1] The Applicant seeks to review and set aside an arbitration award dated 1 December 2022 and issued under case number WCM112104, wherein the Third Respondent (arbitrator) found that Ms Quinton's dismissal was substantively unfair and ordered that she be reinstated retrospectively and that she be paid five months' salary as backpay.

[2] The Applicant also filed an application for condonation for the late filing of the review application and the record and an application for the reinstatement of the review application.

[3] The First Respondent, IMATU (Respondent), acting on behalf of Ms Quinton, opposed all the aforesaid applications.

Reinstatement application and condonation

[4] The first issue to be decided is whether the review application is to be reinstated. The application for condonation for the late filing of the review application and the record can only be considered in the event that the review application is reinstated.

[5] In argument, Ms Geldenhuys for the Respondent, withdrew the opposition to the reinstatement application. The reinstatement application has merit and I can see no reason as to why the review application is not to be reinstated.

[6] I have considered the Applicant's condonation applications and in applying the applicable principles, I am satisfied that a case has been made out for condonation to be granted and I will deal with the merits of the review application.

[7] The unfair dismissal dispute was arbitrated over a period of 8 days and the transcribed record comprises 1351 pages. The Applicant called three witnesses, and Ms Quinton testified and the arbitrator issued an award of 56 pages, wherein she summarised the evidence adduced comprehensively and I do not intend to repeat the evidence that was adduced. The Applicant takes

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issue with the arbitrator's findings and I will deal with the evidence to the extent that is necessary to consider the grounds for review.

Background facts:

[8] Ms Quinton was employed by the Applicant in December 2012 and from 2016 she was employed in the safety and security directorate as Professional Officer: Events Planning (PO). It is common cause that Ms Quinton's role was to liaise with event organisers and that she was regarded as the 'face of the City'.

[9] On 26 February 2021, Ms Quinton was issued with a notice to attend a disciplinary hearing, scheduled for 15 March 2021. She was charged with five charges of misconduct and Ms Quinton was dismissed on 27 September 2021, after the disciplinary hearing was held and she was found guilty of misconduct on all the charges levelled against her. Ms Quinton's internal appeal was dismissed on 31 October 2021.

[10] The Respondent referred an unfair dismissal dispute to the Second Respondent (SALGBC) and procedural fairness was not in dispute.

[11] It is evident from the transcribed record that at the onset of the arbitration proceedings, the parties made opening statements and that the issues were narrowed. The Applicant's case was that Ms Quinton was guilty of the five charges of misconduct levelled against her, her conduct amounted to gross misconduct, it was serious, caused reputational harm to the City, the trust relationship was broken and a continued employment relationship was not possible. Her dismissal was an appropriate sanction.

[12] Ms Quinton admitted her conduct in respect of charges 1, 2 and 4 but her version was that her conduct did not constitute gross dereliction or gross negligence – at best, it was negligence and the sanction of dismissal was not reasonable or fair, as a lesser sanction should have been imposed. Ms Quinton disputed charges 3 and 5.

[13] In this review application, the Applicant took issue with the arbitrator's findings in respect of charges 1, 2, 3 and 4 and for purposes of this judgment, it is not

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necessary to consider the evidence adduced or the findings made in respect of charge 5 as it is not subject to review. I will deal with the charges and the grounds for review *infra.*

Analysis of the arbitrator's findings and the grounds for review

The test on review

[14] I have to deal with the grounds for review within the context of the test this Court must apply in deciding whether the arbitrator's decision is reviewable. The test has been set out in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[1] (*Sidumo)* as whether the decision reached by the commissioner is one that a reasonable decision maker could not reach. The Constitutional Court held that the arbitrator's conclusion must fall within a range of decisions that a reasonable decision maker could make.

[15] The Labour Appeal Court (LAC) in *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and others*[2] affirmed the test to be applied in review proceedings and held that:

> 'In short: A reviewing court must ascertain whether the arbitrator considered the principal issue before him/her; evaluated the facts presented at the hearing and came to a conclusion that is reasonable.'

[16] The review Court is not required to take into account every factor individually, consider how the arbitrator treated and dealt with each of those factors and determine whether a failure by the arbitrator to deal with it is sufficient to set the award aside. This piecemeal approach to dealing with the award is improper as the reviewing Court must consider the totality of the evidence and decide whether the decision made by the arbitrator is one that a reasonable decision maker could make, based on the evidence adduced.[3]

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[1] [2007] ZACC 22; (2007) 28 ILJ 2405 (CC) at para 110.
[2] [2013] ZALAC 28; (2014) 35 ILJ 943 (LAC) at para 16.
[3] *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation Mediation and Arbitration and Others* [2013] ZALAC 28; (2014) 35 ILJ 943 (LAC) at paras 18 - 19.

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[17] In *Herholdt v Nedbank Limited (Congress of South African Trade Unions as amicus curiae)*[4], the Supreme Court of Appeal held that:

> '… the test "is a stringent [one] that will ensure that… awards are being lightly interfered with". … The *Sidumo* will however, justify setting aside an award on review if the decision "is entirely disconnected with the evidence" or is "unsupported by any evidence" and involves speculation by the commissioner.'

[18] In *Quest Flexible Staffing Solutions v Legobate*[5] the LAC confirmed the test to be applied on review:

> '[12] The test that the Labour Court is required to apply in a review of an arbitrator's award is this: "Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?" Our courts have repeatedly stated that in order to maintain the distinction between review and appeal, an award of an arbitrator will only be set aside if both the reasons and the result are unreasonable. In determining whether the result of an arbitrator's award is unreasonable, the Labour Court must broadly evaluate the merits of the dispute and consider whether, if the arbitrator's reasoning is found to be unreasonable, the result is nevertheless, capable of justification for reasons other than those given by the arbitrator. The result will, however, be unreasonable if it is entirely disconnected with the evidence, unsupported by any evidence and involves speculation by the arbitrator.
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> [13] An award will no doubt be considered to be reasonable when there is a material connection between the evidence and the result or, put differently, when the result is reasonably supported by some evidence. Unreasonableness is, thus, the threshold for interference with an arbitrator's award on review.'

[19] The review test to be applied is a stringent and conservative test of reasonableness. The Applicant must show that the arbitrator ultimately arrived at an unreasonable result.

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[4] [2013] ZASCA 97; [2013] 11 BLLR 1074 (SCA) at para
[5] [2014] ZALAC 136; (2015) 36 ILJ 968 (LAC) at para 12 and 13.

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[20] It is within the context of this test that I have to decide this application for review.

The arbitrator's findings and the grounds for review

[21] The charges levelled against Ms Quinton and relevant for purposes of this review application are as follows:

> 'Charge 1:
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> It is alleged that on or about 11 September 2020 you committed an act of gross dereliction when you failed to act in the best interests of the City of Cape Town and thereby opening up the employer for scrutiny as well as compromising the protection of sensitive information of one company (Reed Exhibition) to another (Weil Entertainment). It is alleged that you forwarded a business plan and multiple year strategy bearing the details of Reeds Exhibition to Stephanie Weil, the owner of a different company, called Weil Entertainment.
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> Charge 2:
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> It is alleged that on or about 11 September 2020 you were in gross dereliction of your duties when you failed to perform functions allocated to you in terms of your job description, namely a co-ordination and project management role in the implementation of the event planning support function. You were sent information from the Manager: Events Department (Ms Leonara De Souza-Zilwa) to action a request for an endorsement letter for the event, Best of Cape Town. You failed to apply due diligence in the task at hand, in that you sent off an email to your supervisor at the time (Ms Rix) with the incorrect approval, namely SAACI: Proof of Concept in Person Conference advising that the event had been approved by the Special Events Committee however, no such approved existed.
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> Charge 3:
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> It is alleged that during September 2020 you were in gross dereliction of your duties when dealing with the SANLAM Cape Town Marathon application, whereby you unilaterally changed the amount depicted in the application form of R1 300 000 as received from the Event Organiser to R1 798 748.48 as depicted in the Powerpoint presentation to the Special Events Committee.
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> Charge 4:

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> It is alleged that during the period of October 2020 you were in gross dereliction of your duties in respect of the Africa Brand Summit Event. You drafted and forwarded a letter of support to the event owner, Solly Moeng, notifying him a three-year approval which was contrary to the Special Events Committee decision. This conduct could have resulted in financial and reputational damage to the City of Cape Town.'

[22] The charges relate to four separate incidents that occurred between September and October 2020.

[23] The arbitrator found Ms Quinton's dismissal substantively unfair and ordered her reinstatement.

The first and second ground for review

[24] The Applicant takes issue with the arbitrator's findings on charges 1 – 4 and the gist of this ground for review is that the arbitrator failed to apply her mind to relevant and material evidence placed before her and by failing to apply her mind, she reached a decision that no reasonable decision maker could have reached, based on the totality of evidence. The Applicant's first ground for review is focussed on the arbitrator's findings on charges 1, 2 and 4, and charge 3 is dealt with in a separate ground for review. In my view, the said grounds for review could be considered together as both deal with the arbitrator's failure to apply her mind to the evidence before her.

[25] Ms Quinton admitted her conduct in respect of charges 1, 2 and 4 but her version was that her conduct did not constitute gross dereliction or gross negligence – at best it was negligence.

[26] Ms Quinton's role was *inter alia* to liaise with event organisers and to coordinate the event support application process. It is evident that charges 1 – 4 all relate to her duties and functions as PO and related to acts of gross dereliction of her duties as PO.

[27] The arbitrator recorded that the Applicant's case was that Ms Quinton's conduct amounted to dereliction of duty and she considered the definition of dereliction. The arbitrator held that dereliction is an intentional or conscious failure of an

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employee to do his or her duty, it is a conscious or wilful neglect and it differs from making errors. The arbitrator accepted that 'dereliction of duty' has a very specific meaning in law and as it means an intentional or conscious failure of an employee to do his or her duty, it could not be true of Ms Quinton. Ms Quinton "*did not abandon her work or intend to not fulfil her duty*". Instead, the arbitrator accepted that Ms Quinton failed to exercise reasonable care and made four mistakes and that *"at worst, she was careless. That is negligence…"*

[28] The arbitrator considered whether Ms Quinton's negligence was gross and she found that Ms Quinton's negligence or carelessness was not indicative of a blatant disregard of the standard of care and that each charge was actually nothing more than "*a mistake that results from a single act of negligence*".

[29] Ms Quinton's conduct was however aggravated by the fact that there were four incidents, each carrying reputational and possible financial risk to the City, in a short space of time. The arbitrator accepted that the reputational and potential financial risk was real and that it permitted the Applicant to 'view the negligence in a serious light' and that the conduct was serious because Ms Quinton tried to rectify the errors by herself.

[30] On the other hand, the arbitrator found that Ms Quinton's 'state of mind' and her 'mental illness' were mitigating. The arbitrator observed that the Applicant should have reacted differently and considered incapacity rather than disciplinary action and she found Ms Quinton's 'mental health' to be compelling in mitigation.

[31] Ultimately, the arbitrator concluded that there was no dereliction of duty and dismissal for negligence would not be appropriate.

[32] The Applicant's case is that the arbitrator reached an unreasonable result because she failed to consider material evidence which showed that Ms Quinton's conduct was not merely a mistake.

[33] In my view, there is merit in this ground for review.

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[34] 'Dereliction' has been described or defined as *inter alia* wilful negligence, a failure to act when under an obligation to do so, carelessness, neglect, the failure to act with the prudence that a reasonable person would exercise under the same circumstances and the shameful failure to fulfil one's obligations. The dereliction of duty in the work environment and labour context can be described as a failure to do what you should do as part of your job.[6]

[35] In considering the question as to whether Ms Quinton's conduct as per charges 1 – 4 amounted to dereliction of duty, the arbitrator accepted, with approval, the opinion expressed by Ivan Israelstam[7] that: *"dereliction of duty is a charge that is tempting for employers to use especially when they are angry with the employee concerned. This is because the phrase 'dereliction of duty' has a serious and damaging ring to it….. He goes on to say that employers need to be extremely careful before charging an employee with dereliction of duty because this term has a very specific meaning in law".* The arbitrator's finding that Ms Quinton was not guilty of misconduct on charges 1 – 4 because she "*did not abandon her work or intend to not fulfil her duty*" but merely failed to exercise reasonable care and made four mistakes, which was at worst 'careless' and negligence, is indicative of the fact that the arbitrator misdirected the inquiry and that she was unduly influenced by an article written by Ivan Israelstam, which is no authority on the law.

[36] In *National Union of Metalworkers of South Africa and another v Commission for Conciliation, Mediation and Arbitration and others*[8] *(NUMSA),* this Court dealt with the issue of negligence and it was held that:

> '[32] Negligence, in short, is the failure to comply with the standard of care that would be exercised in the circumstances by a reasonable person and in the employment context, the employee's conduct is compared with the standard of skill and care that would have been expected of a reasonable employee in the same circumstances. The reasonable employee with whom the employee is compared must have experience and skill comparable with that of the employee charged. In labour law,

[6] Collins Dictionary.
[7] I Israelstam, "*Dereliction is a Serious Offence: Know what it is*" – Labour Guide website.
[8] (2023) 44 ILJ 1575 (LC) at paras 32 and 35.

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> negligence is not applied 'in vacuo' or against the general standard of a 'reasonable person', but it is applied in the context of the particular workplace or industry, considering the performance standards and procedures set by the employer. Negligence is usually established with reference to workplace rules or procedures applicable in the workplace.
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> …
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> [35] The test for negligence remains the same — whether negligence, once established, is gross, is a matter of degree, to be determined considering a number of relevant factors. Those factors are inter alia whether the employee is persistently negligent; the seriousness of the act or omission; whether the act or omission is inexcusable; the employee's awareness of the performance standard required or the procedure to be complied with; the seriousness of the consequences of the act or omission; damages caused and the skills and experience of the employee or the position held by the employee.'

[37] It is one of the prime functions of an arbitrator to consider all material evidence, to assess the credibility of the witnesses and the inherent probability or improbability of the version that is proffered by the witnesses and to make findings based on all the relevant evidence presented.

[38] *In casu,* the arbitrator manifestly failed to carry out one of her prime functions. The Applicant presented material and convincing evidence to show that Ms Quinton's misconduct was not merely a 'mistake' or being 'careless', which evidence was not considered by the arbitrator and of which she made no assessment and findings of fact.

[39] Glaringly absent from the arbitration award is an assessment of the Applicant's version, of findings on the credibility of the witnesses and the inherent probabilities of the versions presented. Evidently, the arbitrator failed to take cognisance of the material evidence placed before her and she failed to assess the totality of the evidence presented.

[40] The arbitrator's findings effectively exonerated Ms Quinton for serious misconduct, which she admitted, without any consideration of the totality of the

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evidence and the grave and serious consequences of Ms Quinton's conduct. The arbitrator's findings were disconnected from the evidence presented, she failed to consider the applicable legal principles but instead considered an article, which swayed her in the wrong direction and holistically viewed, her findings are not reasonable and cannot withstand the test of reasonableness on review.

The third ground for review

[41] The arbitrator found that Ms Quinton's dismissal was substantively unfair and she ordered her retrospective reinstatement. The Applicant takes issue with the arbitrator's finding *"that the trust relationship has broken down, it is not so much the relationship between the City and Quinton that is damaged but that between Quinton and Zilwa. Quinton said that when Williams returned to work she was able to work through Williams. To my mind this can continue".*

[42] The Applicant's case is that all three of the City's witnesses gave evidence relating to the trust relationship and to the effect that the relationship was broken down as well as the impact of Ms Quinton's misconduct on the relationship. The arbitrator only accepted Ms Quinton's version and ignored the evidence of the Applicant's witnesses, which resulted in an unreasonable outcome.

[43] In my view, there is merit in this ground for review.

[44] It is evident from the transcribed record that the Applicant's witnesses adduced evidence to the effect that trust is very important to the City, that the City's reputation and relationship with external events organisers are important and that in the position held by Ms Quinton, she was the face of the City.

[45] The arbitrator accepted that misconduct committed by Ms Quinton was serious and that it was aggravated by the fact that there were four incidents, each carrying reputational and possible financial risk to the City, in a short space of time. The arbitrator further accepted that the reputational and potential financial risk was real and that it permitted the Applicant to 'view the negligence in a

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serious light' and that the conduct was serious because Ms Quinton tried to rectify the errors by herself.

[46] Notwithstanding the evidence adduced and the findings made by the arbitrator, she however found that the trust relationship was not broken down to the extent that the employment relationship could not continue. In finding as such, the arbitrator failed to take cognisance of the material evidence placed before her and she failed to assess the totality of the evidence presented.

[47] In *NUMSA,* the employee was dismissed for gross negligence and this Court held that:

> '[54] Although Mr Lumka was not dismissed for dishonesty, the same principles apply — an employee is obliged to act to protect the interests of the employer and where an employee fails to do so and the failure constitutes serious misconduct, the sanction of dismissal will be fair, as an employer is entitled, as an operational imperative, to rely on its employees to act in good faith and to protect the interests (which include property) of the employer. In such a case, dismissal becomes an operational imperative and way of managing risk.
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> [55] In *De Beers Consolidated Mines Ltd v Commission for Conciliation, Mediation & Arbitration & others*, the LAC found that the risk factor is paramount:
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> "Dismissal is not an expression of moral outrage; much less is it an act of vengeance. It is, or should be, a sensible operational response to risk management in the particular enterprise. That is why supermarket shelf packers who steal small items are routinely dismissed. Their dismissal has little to do with society's moral opprobrium of a minor theft; it has everything to do with the operational requirements of the employer's enterprise."
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> [56] Since *Edcon*, the LAC has repeatedly stated that where an employee is found guilty of gross misconduct it is not necessary to lead evidence pertaining to a breakdown in the trust relationship as it cannot be expected of an employer to retain a delinquent employee in its employ. Serious misconduct destroys the employment relationship and when that happens, dismissal is appropriate.'

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[48] *In casu,* the reputational and potential financial risk caused by Ms Quinton's conduct was serious and real. The Applicant cannot be expected to continue with an employment relationship with Ms Quinton and the fact that she is of the view that Ms Quinton 'was able to work through Williams' is of no moment. The dismissal of Ms Quintin was an operational response to risk, a factor the arbitrator completely ignored.

[49] Section 193(1) of the Labour Relations Act[9] (LRA) provides for the remedies of reinstatement, re-employment or compensation in the event that a dismissal is found to be unfair. Section 193(2) provides that the Labour Court or the arbitrator "*must require the employer to reinstate or re-employ the employee*" unless one or more of the situations set out in paragraphs *(a)-(d)* of section 193(2) exists.

[50] Section 193 makes provision for a number of remedies and allows the decision maker to exercise a discretion in respect of which would be the appropriate remedy, taking into consideration all the facts. Reinstatement or re-employment is the primary statutory remedy in unfair dismissal disputes. It is cast in peremptory terms unless one or more of the circumstances specified in paragraphs *(a)-(d)* of section 193(2) exists. If none of the exceptions to reinstatement or re-employment exists, the arbitrator has no discretion regarding reinstatement or re-employment, it must be ordered.[10]

[51] The converse is however also true. If a case falls under one or other of the situations listed in paragraphs *(a)-(d)* of section 193(2) it is not competent for the Labour Court or an arbitrator to order reinstatement or re-employment.

[52] In *Toyota SA Motors (Pty) Ltd v CCMA*[11] the Constitutional Court confirmed that:

> '[135] Once the Labour Court or an arbitrator has found a dismissal unfair, it or he is obliged to consider which one of the remedies listed in section 193(1) is appropriate, having regard to the meaning of section 193(2).

[9] Act 66 of 1995, as amended.
[10] A Myburgh and C Bosch, '*Reviews in the Labour Court*', LexisNexis, pp 337 – 350.
[11] [2015] ZACC 40; (2016) 37 ILJ 313 (CC) at paras 134 – 136.

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> Considering both the provisions of section 193(1) and section 193(2) is important because one cannot adopt the attitude that dismissal is unfair, therefore, reinstatement must be ordered. The Labour Court or an arbitrator should carefully consider the options of remedies in section 193(1) as well as the effect of the provisions of section 193(2) before deciding on an appropriate remedy. A failure to have regard to the provisions of section 193(1) and (2) may lead to the Court or arbitrator granting an award of reinstatement in a case in which that remedy is precluded by section 193(2).
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> [136] I wish to highlight paragraph (c) of section 193(2). Paragraph (c) is to the effect that reinstatement may not be granted in a case where it would not be "reasonably practicable for the employer to re-instate or re-employ the employee".'

[53] Considering the facts and the evidence placed before the arbitrator, she could not have ordered Ms Quinton's reinstatement and the relief granted was unfair, unreasonable and not justified.

The fourth ground for review

[54] The arbitrator found that dismissal was not appropriate because Ms Quinton's state of mind was mitigating and her mental health was compelling. She held that at the time of the disciplinary hearing, Ms Quinton was treated for anxiety and depression and with that knowledge, the Applicant and the chairperson should have reacted differently and considered incapacity rather than discipline as an appropriate route to pursue.

[55] The Applicant takes issue with the arbitrator's finding that: "*the City could have shown compassion and understanding for the mental illness or inquired more closely what was impacting Quinton's performance. The City did not dispute the mental health issues other than to unsympathetically point out each time Quinton made a mistake she would be off sick the next day. That should have alerted the City to consider what else might be at play here. The City failed to investigate Quinton's incapacity and consider alternatives when such steps might have made a difference and instead left the situation and rather charged her with misconduct".* Consequently, the arbitrator held that *"the City misses*

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the key point in that had they explored it at the time, then they could have come to a conclusion as to its significance. Dismissal in relation to the negligence in charges 1 to 4 would not be appropriate. The mitigation, Quinton's mental health is compelling. There was no dereliction of duty. There were extenuating circumstances that explain the errors in the period concerned…"

[56] The arbitrator issued an award wherein she directed the Applicant *"to monitor any errors on Quinton's behalf going forward and assess any incapacity/mental health issues, if still applicable".*

[57] The Applicant took issue with the arbitrator's aforesaid findings on two main grounds, which I will deal with in turn.

[58] First, the Applicant's case is that the arbitrator's conclusions on Ms Quinton's state of mind and mental health were premised on medical evidence that was untested and not supported by medical expert evidence, but introduced by Ms Quinton's own evidence on her personal view of her state of mind. Ms Quinton presented copies of two medical certificates, issued by a general practitioner, which booked her off from work for certain days during the period September to October 2020 and the recorded reason for her absence was 'stress/anxiety/depression'. Ms Quinton testified that she experienced anxiety to the effect that she "was all over the place" and 'confused' and 'not herself'. The arbitrator concluded that Ms Quinton's 'mental illness started as a result of the difficulties she experienced reporting to Zilwa'.

[59] There are obvious difficulties with the arbitrator's findings in this regard. The first is that the arbitrator made findings on mental illness which she was not qualified to make without hearing expert evidence to support such a finding.

[60] In *Mgobhozi v Naidoo N O and others*[12], the LAC considered the status of medical certificates where no evidential material was provided by the medical practitioners and held that:

> '[25] In fields as esoteric as the workings of the mind and the effects on daily life - more especially the ability to instruct attorneys or bring

[12] (2006) 27 ILJ 786 (LAC) at paras 25 – 29.

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proceedings on one's own - the courts are reliant upon the views of the medical profession. In this context psychologists and psychiatrists usually provide the evidential material necessary for the court to decide the issue. For the appellant to convince the Labour Court that he was mentally and/or physically incapable to bringing proceedings in that forum he had to have the evidence of such professionals.

[26] The Evidence Act requires the court to consider the reason why the medical evidence was not provided in the form of affidavits. No reasons are given why no affidavits have been provided. It is not suggested that the doctors have passed away, have emigrated or are unavailable for some other cogent reason.

[27] The absence of any such explanation is viewed in a most serious light. The cynic might observe that medical certificates are available for anyone paying the appropriate fee. If perceptions of the abuse of medical certificates are widespread - as I believe they are-it strengthens the need for courts to be especially vigilant against their misuse. One inference to be drawn in this application is that the medical practitioners were not prepared to go on oath to defend their certificates. Another is that they were not prepared to spare the time to explain their very truncated and laconic comments.

[28] The absence of affidavits from the doctors means that the court is deprived of any elaboration of the widely and vaguely stated symptoms attributed to the appellant. The nature of the medication and the efficacy thereof are also not explained.

[29] The Evidence Act speaks of prejudice to the third respondent. The latter has had no opportunity of having the appellant examined by its own practitioners and has had to rely on the vague allegations in the certificates. I cite but one example, namely that the appellant is alleged to have suffered from sane automatism for seven months. Even the most cursory research into the law reports on the topic of sane automatism and its use as a defence in criminal proceedings would reveal that it is a complex condition, requiring the assistance to the court of specialist psychiatrists, with a special interest in the field. For it to continue for seven months seems most incongruous. But that

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was for the appellant to explain to the Labour Court in acceptable fashion via affidavits from psychiatrists, not for the Labour Court or this court to speculate.'

[61] In *National Union of Metalworkers of SA and others v Kaefer Energy Projects (Pty) Ltd*[13]*,* the Court also considered the status of medical certificates and confirmed that in the absence of affidavits from the respective doctors who issued the medical certificates, the court is asked to speculate because the employees, as laymen, could not give evidence as to their medical condition. The employees' failure to provide an explanation for their ailments by their respective doctors under oath was fatal to their claim as such medical certificates constituted inadmissible hearsay evidence. It was held that:

'[49] The LAC made it clear in *Mgobhozi* that when considering the nature of the proceedings per s 3(1)*(c)* of the Evidence Act, which in this instance is an unfair dismissal action, this court should be alive to the fact that the medical certificates pertain to the expert evidence of the doctors who expressed a medical opinion on the applicant employees' illnesses. Since they constitute opinion evidence, it cannot be given by laymen, but by the respective doctors who issued the medical certificates.'

[62] The arbitrator's conclusions and findings on Ms Quinton's mental health were not supported by medical expert testimony and the evidence before her, was no more than inadmissible hearsay evidence. The arbitrator's acceptance thereof distorted the outcome and resulted in an unreasonable outcome.

[63] The second difficulty is that the arbitrator accepted and concluded that Ms Quinton's 'mental illness started as a result of the difficulties she experienced reporting to Zilwa'. This version was not put to Zilwa during her evidence, a fact the arbitrator was acutely aware of because she recorded that *"I note that this was not put to Zilwa that she was the cause of Quinton's distress but the mental illness was real……and whether it was caused by Zilwa and not put to her misses the point".*

[13] [2021] ZALCJHB 280; (2022) 43 ILJ 181 (LC) at para 49.

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[64] In my view, the arbitrator misconceived the enquiry and she failed to apply the law of evidence when she accepted Ms Quinton's version and made findings on her 'mental illness.'

[65] It is trite that after a witness has given his or her evidence in chief, the other party is given the opportunity to cross-examine the witness. The intended purpose of cross-examination is *inter alia* to reveal weaknesses in the evidence adduced, to challenge the truth or accuracy of the witness's version, to bring to light facts reinforcing the cross-examiner's case, to elicit favourable facts, to place a defence on record and to put the version of the cross-examining party.

[66] A party has a duty to cross-examine and the rationale of the duty to cross-examine is that the witness should be cross-examined to afford him or her an opportunity of answering points supposedly unfavourable to him.

[67] A failure to cross-examine a witness on any aspect is generally considered to be an indication that the party who had the opportunity to cross-examine, did not wish to dispute the version or aspects of the version of the particular witness who was available for cross-examination.[14] A cross-examiner is duty bound to put his or her defence or version on each and every aspect he or she wishes to place in issue, to the witness.

[68] In *Masilela v Leonard Dingler (Pty) Ltd*[15], the Court was faced with a scenario where a version was not put to a witness in cross-examination and held that:

> 'The problem that I have with the applicant's version where it differs from that of Masina is that none of it was put to Masina while he was testifying. This court has been denied the benefit of Masina's response. It is trite that if a party wishes to lead evidence to contradict an opposing witness, he should first cross-examine him upon the facts that he intends to prove in contradiction, to give the witness an opportunity for explanation. Similarly if the court is to be asked to disbelieve a witness, he should be cross-examined upon the matters

[14] See: *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 1 SA 1 (CC).
[15] (2004) 25 ILJ 544 (LC) at para 28.

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that it will be alleged make his evidence unworthy of credit. In *Small v Smith* 1954 (3) SA 434 (SWA) Claassen J said at 438:

> "It is, in my opinion, elementary and standard practice for a party to put to each opposing witness so much of his own case or defence as concerns that witness, and if need be, to inform him, if he has not been given notice thereof, that other witnesses will contradict him, so as to give him fair warning and an opportunity of explaining the contradiction and defending his own character. It is grossly unfair and improper to let a witness's evidence go unchallenged in cross-examination and afterwards argue that he must be disbelieved."'

[69] The arbitrator found that the City could have shown compassion and understanding for Ms Quinton's mental illness or inquired more closely what was impacting her performance, should have considered what else might be at play and failed to investigate her incapacity. She further directed the Applicant to monitor Ms Quinton's errors and to assess her incapacity and mental health issues. The second issue taken by the Applicant is that these findings were at odds with prevailing law.

[70] In my view, there is merit in this ground for review. In *Pahlanga v Petroleum Oil and Gas Corporation of South Africa (SOC) Ltd and others*[16], it was held that:

> '[36] The first point that needs to be made is that it is trite that an employer bears the onus of justifying the fairness of a dismissal on the basis of the reason given for the dismissal. The legitimate reasons for a fair dismissal encompass a spectrum ranging from a complete absence of fault on the part of the employee (as in the case of dismissal for operational reasons) through to dismissal on account of the wilful conduct of an employee (in the case of deliberate misconduct). Whilst these categories of legitimate reason can sometimes become blurred, as in a case where employees are retrenched because they refused to accept a reasonable alternative to retrenchment, the employer must defend the dismissal on the basis of the reason it provides for the dismissal. If the employee believes that an ulterior motive lies behind the ostensible reason, the employee can lead evidence to show that the

[16] [2021] ZALCCT 48; (2022) 43 ILJ 212 (LC) at paras 36 – 37.

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dismissal cannot be justified on the ostensible cause or can pursue a claim on the basis that the dismissal is for an impermissible reason under s 187 of the LRA. Likewise, if an employee charged with misconduct believes that their actions can be explained as something wholly or partially beyond their control because they are suffering from a physical or mental incapacity, the employee can lead evidence to show that they are not at fault, or that the degree of fault that they can be held accountable for is diminished by their condition and warrants the adoption of other measures before dismissal can be justified.

[37] However, the employer is not obliged to eliminate all possible explanations for what appears to be the deliberate and wilful misconduct of an employee, in circumstances where other possible explanations were not previously known to the employer, or were not obviously apparent. In this regard, the principle that an employer should exhaust all possible alternatives to dismissal must be contextualised. It is only in the case of anticipated unreasonably long-term absence from work in a case of incapacity, that schedule 8 requires an employer to 'investigate all alternatives to dismissal'. Further, in the context of such an investigation the employee must be given an opportunity to make representations. In the guidelines for dismissals for misconduct there is no similar obligation placed on an employer to conduct a full-scale investigation into what might underlie an employee's misconduct. The guidelines cannot be interpreted to mean that, merely because an employer considers the possibility that there might be an explanation for misconduct which could reduce an employee's accountability for their actions, the employer has an obligation to conclude an investigation to determine whether or not that is the case before it can finalise a disciplinary enquiry. In the circumstances, it cannot be said that the arbitrator misconstrued the issue he had to determine.'

Conclusion

[71] I have to consider the grounds for review within the context of the test this Court must apply in deciding whether the arbitrator's decision is reviewable. The ultimate question is whether holistically viewed, the decision taken by the arbitrator was reasonable based on the evidence placed before her.

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[72] In *Bestel v Astral Operations Ltd and others*[17], the LAC considered the limited scope possessed by this Court to review an arbitration award and accepted that an arbitrator's finding will be unreasonable if the finding is unsupported by any evidence, if it is based on speculation by the arbitrator, if it is disconnected from the evidence, if it is supported by evidence that is insufficiently reasonable to justify the decision or if it was made in ignorance of evidence that was not contradicted.

[73] I must ascertain whether the arbitrator considered the principal issue before her, evaluated the facts presented and came to a conclusion that is reasonable. I have considered this question after perusal of the transcribed record, the arbitration award and the grounds for review raised by the Applicant.

[74] I am convinced that the arbitrator ignored evidence or failed to apply her mind to the facts, the evidence, the probabilities and the issues that were material in determining the dispute she had to adjudicate. On a holistic consideration of the facts before the arbitrator, her finding that Ms Quinton's dismissal was substantively unfair, is disconnected from the evidence and is not reasonable.

[75] The arbitrator made findings that the misconduct was serious, a factor that was aggravated by Ms Quinton's admissions, but thereafter the arbitrator trivialised the misconduct and made findings that were not supported by the evidence. Ultimately, the outcome was unreasonable. It follows that the arbitration award is to be interfered with on review.

Relief

[76] This leaves the issue of relief.

[77] The Applicant seeks for the arbitration award to be reviewed and set aside and to be substituted with an order that Ms Quinton's dismissal was fair.

[78] In the event that the arbitration award is set aside on review, this Court has a discretion whether or not to finally determine the matter. The matter could be

[17] [2010] ZALAC 19; [2011] 2 BLLR 129 (LAC) at para 18.

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finally determined where there is a full record of the proceedings before Court and where it would be in the interest of justice to do so.

[79] The principles had been set out by the LAC in *Palluci Home Depot (Pty) Ltd v Herskowitz*[18] as follows:

> 'Where all the facts required to make a determination on the disputed issues are before a reviewing court in an unfair dismissal or unfair labour practice dispute such that the court "is in as good a position" as the administrative tribunal to make the determination, I see no reason why a reviewing court should not decide the matter itself. Such an approach is consistent with the powers of the Labour Court under s 158 of the LRA, which are primarily directed at remedying a wrong, and providing the effective and speedy resolution of disputes. The need for bringing a speedy finality to a labour dispute is thus an important consideration in the determination by a court of review of whether to remit the matter to the CCMA for reconsideration, or substitute its own decision for that of the commissioner.'

[80] *In casu,* the Court has the entire record before it and is well-placed to make a decision on the merits and to decide and finally determine the matter on the record as it is before me and the parties' cases were fully ventilated.

[81] On a consideration of all the facts before the arbitrator at the time, it is evident that the most reasonable finding would have been that Ms Quinton's dismissal was substantively fair.

[82] In the circumstances, it follows that the arbitration award ought to be set aside, and I am satisfied that upon the material that was placed before the arbitrator, this Court is in a position to substitute that award. No purpose would be served by remitting the matter back to the SALGBC for reconsideration. It is also in the interest of justice to determine the matter finally and not to order a rehearing of the matter as that would undermine one of the key objects of the LRA namely expeditious dispute resolution. This is so as the dismissal, which was the subject of the review application, took place as far back as 2021 and the parties are entitled to finality in 2024.

[18] [2014] ZALAC 81; (2015) 36 ILJ 1511 (LAC) at para 58.

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Costs

[83] This Court has a wide discretion in respect of costs.

[84] This is a matter where ultimately the arbitrator got it wrong and the Respondent was entitled to defend an award that was issued in the favour of Ms Quinton by opposing the application. The Respondent should not be punished for doing so. In my view, the interest of justice will be best served by making no order as to cost.

[85] In the premises, I make the following order:

Order

1. The review application is reinstated;

2. The late filing of the review application and the record of the arbitration proceedings are condoned;

3. The arbitration award dated 1 December 2022 and issued under case number WCM112104 is reviewed and set aside;

4. The arbitration award is substituted with the following:

   'i. Ms Quinton's dismissal is substantively fair;

   ii. The Applicant's case is dismissed.'

5. There is no order as to costs.

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Connie Prinsloo

Judge of the Labour Court of South Africa

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Appearances:

For the Applicant:	Advocate V September
Instructed by:	Riley Inc Attorneys
For the First Respondent:	Ms N Geldenhuys from IMATU

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