



- (1) Reportable Yes
(2) Of interest to other Judges: Yes
(3) Revised



Signature

05 March 2026

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case Numbers: JR 2129 / 23

JR 1544 / 23

JR 160 / 24

JR 1879 / 23

JR 1595 / 23

Case no: JR 2129 / 23

In the matter between:

**DEPARTMENT OF AGRICULTURE, LAND REFORM,
AND RURAL DEVELOPMENT**

Applicant

and

WILLIAM RICHARD PRETORIUS *N.O.*

First Respondent

**PSA obo XOLISWA MZILIKAZI AND MOJALEFA
SEETSE**

Second Respondent

**PUBLIC SERVICE COORDINATING BARGAINING
COUNCIL**

Third Respondent

Case no: JR 1544 / 23

In the matter between:

DEPARTMENT OF HOME AFFAIRS

Applicant

and

**PUBLIC SERVICE COORDINATING BARGAINING
COUNCIL**

First Respondent

MBULAHENI NETSHIFHEFHE N.O.

Second Respondent

JURGEN VON WIELLIGH

Third Respondent

THOBELA MANGE

Fourth Respondent

MAANDA MUANGWE

Fifth Respondent

ELMON MNDawe

Sixth Respondent

Case no: JR 160 / 24

In the matter between:

**DEPARTMENT OF AGRICULTURE, LAND REFORM,
AND RURAL DEVELOPMENT**

Applicant

and

MINETTE VAN DER MERWE N.O.

First Respondent

PSA obo SIVIWE SHWABABA

Second Respondent

**PUBLIC SERVICE COORDINATING BARGAINING
COUNCIL**

Third Respondent

Case no: JR 1879 / 23

In the matter between:

DEPARTMENT OF HOME AFFAIRS

Applicant

and

**PUBLIC SERVICE COORDINATING BARGAINING
COUNCIL**

First Respondent

MINETTE VAN DER MERWE N.O.

Second Respondent

LINDA BRIAN SIBISI

Third Respondent

NJABULO MTHEMBU

Fourth Respondent

Case no: JR 1595 / 23

In the matter between:

DEPARTMENT OF HOME AFFAIRS

Applicant

and

**PUBLIC SERVICE COORDINATING BARGAINING
COUNCIL**

First Respondent

MBULAHENI NETSHIFHEFHE N.O.

Second Respondent

WISEMAN BHEKUMUSA KUBHEKA

Third Respondent

This judgment was handed down electronically by circulation to the parties and legal representatives by email. The date and time for hand-down is deemed to be 5 March 2026.

Summary: Bargaining council arbitration proceedings – Review of awards of arbitrators on interpretation of collective agreement (Resolution 1 of 2003) – Test for review – Section 145 / 158 (1)(g) of LRA – issue concerns material error of law – application of review test set out

Collective agreement – bargaining council collective agreement relating to disciplinary code and procedure – interpretation thereof – principles relating to interpretation of collective agreement considered – in addition to ordinary principles of interpretation proper consideration of objectives / purpose of LRA essential

Collective agreement – provisions relating to external legal representation and appointment of external chairperson considered – text of agreement appears to prohibit such appointments – such interpretation however contrary to purpose / objectives of LRA – LRA requires overall fairness of process – to ensure such fairness interpretation may go beyond text of agreement – chairperson retains discretion to allow legal representation – employer retains discretion to appoint external chairperson – exceptional circumstances however required in both instances

Collective agreement – appointment of external chairperson – no express prohibition in agreement (Resolution) – overall consideration for such appointment is fairness and justice – employer remains entitled to make

appointment of external chairperson – however exceptional circumstances must justify it – employee may raise concerns regarding appointment before chairperson to decide

Collective agreement – Resolution 1 of 2003 considered – overall considered Resolution constitutes disciplinary code to be interpreted and applied in line with LRA – residual discretion always contemplated under LRA – any exclusion of discretion under Resolution would be unfair

Review application – arbitration awards set aside – awards substituted with determination that employer entitled to appoint external chairpersons – whether discretion properly exercised by employer to be decided by appointed chairperson – relief afforded accordingly

JUDGMENT

SNYMAN, AJ

Introduction

- [1] I must confess, at the outset, that this has been a difficult judgment to write, and both sides of the dispute have arguable points of law. Nonetheless, it is an important issue that concerns an essential component in the internal disciplinary processes in the Public Service. I am compelled to say that the conundrum has been caused by the fact that the instrument forming the very basis of this case, being PSCBC Resolution 1 of 2003 (*the 2003 Resolution*) was adopted as far back as 2003, and has not been changed since. There have been many operational developments and challenges since then which would make it necessary to be revisited. What forms the subject matter of this judgment should far more preferably have been dealt with by all the parties to the Public Service Coordinating Bargaining Council (PSCBC) in order to clarify the position. As pertinently expressed in *Department of Public Works and Another v Vukela and Others*¹:

¹ (2022) 43 ILJ 2319 (LC) at para 2.

'... What has developed over the years in the public sector is what this court has referred to as a 'yawning gap' between the respective rights of employees in the public and private sectors, and the injustice that is occasioned. Ironically, the multiplicity of laws and the consequent complexity, inconsistency, duplication of resources and jurisdictional confusion are all problems that the LRA sought to address. Perhaps the time has come for there to be a formal enquiry into why workplace discipline and dispute-resolution procedures (especially in the public sector) remain out of step with legislative intent, and for the legislature to consider how the agreed goal of efficient, expeditious and inexpensive procedures might be better achieved.'

- [2] In my view, and in agreement with what was expressed in *Vukela supra*, disciplinary proceedings in the Public Service have developed to be overly complicated and unduly formalistic. Whilst I appreciate that there is historical context to this, I believe the time has come to revisit all these provisions to bring the same in line with what the Labour Relations Act (LRA)² really envisages where it comes to internal dispute resolution proceedings in any employer, including the Public Service. What is in reality envisaged by the LRA in this respect was aptly articulated as far back as 2006 in *Avril Elizabeth Home for the Mentally Handicapped v Commission for Conciliation, Mediation and Arbitration and Others*³, where the Court said:

'... The balance struck by the LRA thus recognizes not only that managers are not experienced judicial officers, but also that workplace efficiencies should not be unduly impeded by onerous procedural requirements. It also recognizes that to require onerous workplace disciplinary procedures is inconsistent with a right to expeditious arbitration on merits. ...'

- [3] Returning to all the abovementioned cases at hand, each of the individual cases concern a challenge by each of the applicants concerned, of determinations made by various arbitrators appointed by the PSCBC, concerning the interpretation and application of clauses 7.3(b) and 7.3(f) of the 2003 Resolution, in individual matters, where employees of the applicants were sought to be disciplined for misconduct. In some of the cases, the appointment by the applicants of external legal representatives as initiators was in issue, but

² Act 66 of 1995 (as amended).

³ (2006) 27 ILJ 1644 (LC) at 1652A-B.

in all of the cases the appointment by the applicants of an external chairperson was in issue. The pertinent question placed before the arbitrators was whether such appointments were prohibited by the 2003 Resolution, and in each of these cases, the question was answered by the arbitrators against the applicants. The current challenges brought by the applicants to this Court have been brought in the form of five individual review applications, in terms of section 145 as read with section 158(1)(g) of the LRA. Each of the applications have been opposed by the employee party respondents, and contrary to what is normally the case, was also opposed by the PSCBC itself.

- [4] As the core legal issues in each of these applications are identical, and it became apparent that there were in reality no individual disputes of fact to be decided. As a result, application was brought to consolidate all five these individual applications so that they could be heard simultaneously. On 13 June 2025, Tlhotlhemaje J granted an order to this effect, thus consolidating all five review applications.
- [5] The consolidated review applications came before me for argument on 29 January 2026. On that date, after hearing argument from all parties and considering the pleadings and records, as well as submissions filed by the parties, I reserved judgment. I now hand down judgment by commencing with a brief exposition of the applicable factual matrix.

The relevant background

- [6] In setting out the factual background, I will refer to each of the individual employee respondents in each of the matters by name. But where I refer to all the respondents collectively, I will simply refer to them as '*the respondents*'. Where it comes to the Department of Agriculture, Land Reform and Rural Development and the Department of Home Affairs as applicants in each of the review applications, I will refer to them jointly as '*the Departments*' whilst I will refer to the Department of Agriculture, Land Reform and Rural Development individually as '*the Agriculture Department*', and to the Department of Home Affairs as the '*Home Affairs Department*'.
- [7] Xolisa Mzilikazi (Mzilikazi) and Mojalefa Seetse (Seetse) were charged by the Agriculture Department with misconduct charges, emanating from a forensic

investigation commissioned by the Minister at the time, into allegations of financial mismanagement. This investigation was carried out by an independent third-party forensic investigation service provider, being Morar Inc. This investigation culminated in a written report issued by Morar Inc, and according to the Agriculture Department, that report implicated Mzilikazi and Seetse in wrongdoing. The actual charges were presented to Mzilikazi and Seetse on 7 March 2023, with the disciplinary hearing set to take place on 14 to 17 March 2023. The Agriculture Department appointed an external legal representative to act as initiator in the disciplinary hearing, and also appointed an external legally qualified person as chairperson of the disciplinary hearing. The reasons provided for such appointments was, in short, that the matter was very complex, and involved several other employees in the Agriculture Department, thereby severely compromising such Department's ability to conduct the proceedings internally. In short, it was explained that the Department did not have ability or capacity to conduct the disciplinary proceedings internally.

- [8] When the disciplinary hearing convened on 14 March 2023, Mzilikazi and Seetse raised an objection *in limine* to the effect that the Agriculture Department was not permitted to appoint external legal persons as initiator and chairperson, as it was prohibited by the 2003 Resolution. The point was argued before the chairperson, who ruled in favour of the Agriculture Department, deciding that such representation / appointment was not prohibited by the 2003 Resolution. Dissatisfied with this ruling by the chairperson, a dispute concerning the interpretation / application of a collective agreement (the 2003 Resolution), was referred by the employees to the PSCBC, ultimately for arbitration. The arbitration proceedings were presided over by arbitrator Pretorius, and in an arbitration award dated 11 September 2023, such arbitrator decided that:

'Legal representation by the respondent, through the use of legal representatives, either as initiator or chairperson, in the pending disciplinary matter against the applicants, is contrary to Resolution 1 of 2003 in respect of clause 7.3(f)(i)(ii) as well as clause 7.3(b) read with 7.3(c) respectively.'

- [9] In the case of the disciplinary proceedings against Jurgen Von Wielligh (Von Wielligh), Thobela Mange (Mange), Maanda Mutangwa (Mutangwa) and Elmon Mndawe (Mndawe), were instituted by the Home Affairs Department. It was explained that such Department was experiencing an inordinate and

disproportionate number of disciplinary disputes and matters it had to attend to, and it simply did not have the capacity, resources or expertise to deal with the same internally. With the approval of the Portfolio Committee for Home Affairs, it was decided that legal services, which included legal representation where it came to initiating disciplinary proceedings, as well as external legally qualified chairpersons, would be put out to tender. Pursuant to this tender, a panel of legal professionals were appointed, and initiators and chairpersons could then be appointed from this panel in respect of internal disciplinary proceedings against employees. This would alleviate all the challenges the Home Affairs Department was experiencing. It is in this context that the employees referred to earlier were then charged for misconduct, and an external legal professional was appointed to preside over their disciplinary hearing, set to take place from 13 to 15 February 2023.

- [10] When the disciplinary hearing convened, Von Wielligh, Mange, Mutangwa and Mndawe raised an objection *in limine* to the appointment of the external legal professional as chairperson, which objection was to the effect that the Home Affairs Department was not permitted to appoint external legal persons as initiator and chairperson due to the provisions of the 2003 Resolution. On this occasion, the chairperson declined to determine this objection *in limine*. Instead, he decided that he will only proceed with presiding over the disciplinary hearing once a competent forum decided that it was lawful for him to do so. This resulted dispute concerning the interpretation / application of the 2003 Resolution being referred to the PSCBC, ultimately for arbitration. The arbitration proceedings were presided over by arbitrator Netshifhefhe, and in an arbitration award dated 25 July 2023, the arbitrator decided that:

‘Respondent incorrectly interpreted clause 7.3(b) of Resolution 1 of 2003, when it appointed a person from outside the employment of the respondent to preside over the applicant disciplinary hearing.’ (sic)

- [11] The next case is that of Siviwe Shwababa (Shwababa), also disciplined by the Agriculture Department in 2023. The disciplining of Shwababa resulted from the same Morar Inc investigation report, which according to the Agriculture Department implicated him in misconduct. Whilst it is true that the Agriculture Department appointed an external chairperson to preside over the disciplinary

hearing of Shwababa and an external legal representative to act as initiator, it turns out on the facts that Shwababa is a senior manager in the Department, and as such, the 2003 Resolution would not apply to him, and instead his disciplinary proceedings would resort under what is commonly known as the SMS Handbook. In short, the 2003 Resolution does not apply in his case, which will be further dealt with later in this judgment. But nonetheless, the issue of the appointment of the external chairperson was referred to the PSCBC and ultimately came before arbitrator Van Der Merwe as a dispute concerning the interpretation and application of the 2003 Resolution. In an arbitration award dated 28 November 2023, the arbitrator decided:

'The Respondent, the Department of Agriculture, Land Reform and Rural Development, has contravened of Resolution 1 of 2003 in the disciplinary hearing of the Applicant, Seviwe Shwababa, by unilaterally appointing legal practitioners as Chairperson and Initiator respectively in the disciplinary hearing of the Applicant.' (sic)

- [12] The next matter is that of Linda Brian Sibisi (Sibisi) and Njabulo Mthembu (Mthembu). These two employees were also disciplined by the Home Affairs Department for misconduct. The same considerations where it came to the appointment of the external initiator and external chairperson for their disciplinary hearings, as those applicable to such appointments in the cases of Von Wielligh, Mange, Mutangwa and Mndawe referred to above, equally applied. In this instance, the disciplinary hearing against Sibisi and Mthembu was convened for 3 to 5 April 2023, and an independent legal practitioner was appointed to preside over the hearing. Another legal practitioner was also appointed as initiator.
- [13] When the disciplinary hearing convened on 3 April 2023, Sibisi and Mthembu raised an objection *in limine* to the effect that the Home Affairs Department was not permitted to appoint external legal persons as initiator and chairperson, due to the provisions of the 2003 Resolution. The point was argued before the chairperson, who ruled in favour of the Home Affairs Department, and decided that such Department retained the discretion, even under the 2003 Resolution, to make such external appointments. As in the other cases, and being dissatisfied with this ruling by the chairperson, a dispute concerning the interpretation / application of the 2003 Resolution was referred by these two

employees to the PSCBC, ultimately for arbitration. The arbitration proceedings were presided over by arbitrator Van Der Merwe, and in an arbitration award dated 31 August 2023, such arbitrator held as follows:

‘The Respondent, the Department of Home Affairs, has contravened Resolution 1 of 2003 in the disciplinary hearings of the Applicants, Linda Brian Sibisi and Njabulo Mthembu.’

[14] The final case to refer to is that of Wiseman Kubeka (Kubeka). He was also disciplined by the Home Affairs Department for misconduct. The issue at hand concerned the appointment by the Home Affairs Department of an external legal professional to preside over the disciplinary hearing, again in terms of the disciplinary panel established following the Portfolio Committee approval and tender process referred to earlier. The disciplinary hearing convened on 26 January 2023.

[15] When the disciplinary hearing convened, Kubeka moved a point *in limine*. He objected to the appointment of the external legal representative to preside over the disciplinary hearing, again based on the 2023 Resolution. After hearing submissions from the parties, and on the same day, the chairperson refused the objection raised, and directed that the hearing proceeds. This led to a dispute relating to the interpretation and application of the 2003 Resolution being referred to the PSCBC, ultimately for arbitration. This dispute also came before arbitrator Netshifhefhe, who in an arbitration award dated 27 July 2023, decided that:

‘The respondent incorrectly interpreted clause 7.3(b) of PSCBC Resolution 1 of 2003, when it appointed a legal practitioner from outside the employment of the respondent to preside over the applicant disciplinary hearing.’ (sic).

[16] The above being a summary of all the individual disciplinary proceedings brought against each of the individual employee respondents, and their ultimate arbitration outcomes, I now turn to the real issue at hand. It must be emphasized that for the purposes of deciding this matter, it is not necessary to delve into the particulars of the alleged misconduct of, and the charges then brought against, the individual employee respondents. What is important to consider is that they were all charged in terms of clause 7.1 of the 2003 Resolution, and the

disciplinary proceedings were convened in terms of clause 7.3 of the 2003 Resolution.

- [17] Although strictly speaking not necessary to decide the current case, and simply for the purposes of being complete on the facts, according to both the Agriculture Department and the Home Affairs Department, they lacked the necessary resources and capacity, and in particular the skills and ability, to conduct the disciplinary proceeding against the various employees concerned. In some of the cases, it was contended that the issues were so complex that it required external handling. And where it came to the Home Affairs Department in particular, it was compelled, due an inordinate number of disputes and a complete lack of capacity, and with approval from the Portfolio Committee, to establish a panel of legal practitioners to assist it in conducting internal discipline. The explanations provided were not really in contention, but it is nonetheless not required at this juncture to decide the veracity or merits of the same.
- [18] It was never suggested by any of the respondents that the Departments somehow acted with malice or with the intent to prejudice the employees, in doing what they ultimately did in convening and then appointing external representation / chairpersons in the various disciplinary hearings. There is also no case made out, nor is it suggested, that the appointment of external initiators and chairpersons would compromise the employees' rights to a fair hearing. What the respondents complained about was that the 2003 Resolution simply did not permit external initiators or external chairpersons being appointed in their respective disciplinary proceedings, as a matter of principle and *per se*. Each of the employee respondents, in their respective disciplinary hearings, raised points *in limine* to this effect, but were not successful in raising those points, leading to the various disputes being referred to the PSCBC, and then culminating in the arbitration awards as set out above.
- [19] All the aforesaid arbitration awards having been made, the various review applications then followed. In essence, the review applications all concern whether the arbitration awards made by the various arbitrators concerning clauses 7.3(b) and 7.3(f) of the 2003 Resolution were materially in error, and an

unreasonable interpretation of the provisions of the 2003 Resolution.⁴ I will now turn to deciding these very questions, starting with identifying the proper test for review.

The test for review

[20] It is obvious that in this case, the main pleaded ground of review raised by the Departments is that the various PSCBC arbitrators erroneously interpreted and applied the provisions of the 2003 Resolution, and in particular, clauses 2.8 as well as 7.3(b) and 7.3(f) thereof. Or in other words, the Departments are saying that these arbitrators committed a material error of law in this regard. If an error of law is committed by an arbitrator, and that error of law is material, it has been said that this in itself would render the award arrived at to be unreasonable, and thus subject to being reviewed and set aside.⁵ But developing this basis for review even further, it can now with confidence be said that an award based on a material error of law can be legitimately challenged not only on the basis of it being unreasonable, but also on the basis that the award would be incorrect.⁶ The simple point is that a reasonable arbitrator will not commit a material error of law. The Court in *Herbert v Head of Education: Western Cape Education Department and Others*⁷ articulated the following apposite summary:

‘In *MacDonald’s Transport* it was found that the LRA did not contemplate that a CCMA or bargaining council arbitrator, both statutory roles, would have the last word on the proper interpretation of an instrument as this would mean that a patently wrong interpretation would be left intact, which ‘would be absurd’. The

⁴ There were also issues of condonation for the late filing of pleadings and alleged misconduct by one of the arbitrators raised in some of the review applications, but after ventilating these issues with the parties in the course of argument, all the parties were *ad idem* that it was important for everyone concerned that this matter rather be decided purely on the merits. It is accordingly not necessary to decide any of these ancillary issues. And insofar as any party sought condonation where it came to the filing any process, it must be considered to be granted.

⁵ See *Head of Department of Education v Mofokeng and Others* (2015) 36 ILJ 2802 (LAC) at paras 32 – 33; *Democratic Nursing Organisation of SA on behalf of Du Toit and Another v Western Cape Department of Health and Others* (2016) 37 ILJ 1819 (LAC) at paras 21 – 22; *Civil and Power Generation Projects (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2019) 40 ILJ 2055 (LC) at para 33.

⁶ In *National Union of Metalworkers of SA v Assign Services and Others* (2017) 38 ILJ 1978 (LAC) at para 32, it was held: ‘... An incorrect interpretation of the law by a commissioner is, logically, a material error of law which will result in both an incorrect and unreasonable award. Such an award can either be attacked on the basis of its correctness or for being unreasonable ...’. This judgment of the LAC was upheld by the Constitutional Court in *Assign Services (Pty) Ltd v National Union of Metalworkers of SA and Others (Casual Workers Advice Office as Amicus Curiae)* (2018) 39 ILJ 1911 (CC).

⁷ (2022) 43 ILJ 1618 (LAC) at para 24.

wrong interpretation of an instrument by an arbitrator could therefore constitute a reviewable irregularity as envisaged by s 145 of the LRA, in the sense that a reasonable arbitrator does not get a legal point wrong. The court concluded that either 'the reasonableness test is appropriate to both value judgments and legal interpretations. If not, "correctness" as a distinct test is necessary to address such matters'. This view was echoed in *NUMSA*, in which it was stated that an incorrect interpretation of the law by a commissioner constitutes a material error of law which 'will result in both an incorrect and unreasonable award', which 'can either be attacked on the basis of its correctness or for being unreasonable'.⁸

- [21] The Court in *National Bargaining Council for the Road Freight and Logistics Industry v Deysel NO and Others*⁹ specifically considered the aforesaid reasoning in *Herbert supra*, and then decided as follows:

'What this approach recognises is that the right to review established by s 145, where the applicant seeks to review an arbitration award on the basis of a material error of law committed by an arbitrator, is not limited to circumstances where the alleged error resulted in an unreasonable award. A material error of law is a discrete, substantive ground for review under s 145 of the LRA. It follows that a reviewing court, when faced with what is alleged to be an error in law in relation to the interpretation of an instrument, is empowered to interpret the relevant text itself, rather than assessing whether the arbitrator's decision was reasonable.

In short: although a material error of law may previously have been viewed as no more than a side car on the motorcycle of reasonableness, the constitutional right to administrative action that is lawful requires that the grounds for review established by s 145 of the LRA be understood as admitting a material error of law as a discrete, legitimate ground for review.'

- [22] A final apposite reference regarding the appropriate review test, in the specific instance of an error of law in the context of interpreting and applying a collective agreement, can be found in the recent judgment of *National Union of Metalworkers of SA v Motor Industry Staff Association and Others*¹⁰. The Court in such instance considered the argument that was advanced by the review

⁸ The Court was referring to *MacDonald's Transport Upington (Pty) Ltd v Association of Mineworkers and Construction Union and Others* (2016) 37 ILJ 2593 (LAC) at para 29, and *Assign Services (supra)*.

⁹ (2025) 46 ILJ 1679 (LAC) at paras 42 – 43.

¹⁰ (2025) 46 ILJ 109 (LAC).

applicant that the arbitration award was unreasonable because a material error of law was committed. The Court decided as follows:¹¹

'The review application was argued in the Labour Court on the basis of an application of the reasonableness threshold, in circumstances where the unreasonableness of the arbitrator's award was attacked on the basis that the arbitrator was alleged to have committed a material error of law. As will appear from the authorities referred to below, where alleged imputed tacit terms are in issue, these terms are based on a legal fiction. Their existence or otherwise is thus a question of law. The issue before us then is whether the conclusion to which the arbitrator came to was correct, given that 'a reasonable arbitrator does not get a legal point wrong'.'

[23] Against the above principles and test, I will now proceed to consider the review applications brought by the Departments to review and set aside the arbitration awards by the various arbitrators in each of the review applications referred to above.

Analysis

[24] In deciding this matter, the case of Shwababa under case number JR160 / 24 must first and separately be dealt with. Shwababa was employed as Chief Environmental Specialist. As such, he qualifies as a senior manager as contemplated by the Senior Management Service Handbook (Disciplinary Code and Procedures), commonly known as the '*SMS Handbook*'. In argument before me, the PSCBC in fact conceded that Shwababa was a senior manager and not subject to the 2003 Resolution, and then further conceded that the arbitration award where it comes to the external appointments made in his disciplinary hearing should be reviewed and set aside on this basis. The concession was properly and responsibly made. The SMS Handbook contains an entirely different dispensation where it comes to appointment of chairpersons in disciplinary proceedings of senior managers. In fact, and in clause 3(b) of the Introduction to the 2003 Resolution, it is recorded that: '*... the provisions of the amended disciplinary procedure remain applicable to members of the Senior Management Service of the public service until such time as the Minister for the Public Service and Administration issues a directive to cover the disciplinary*

¹¹ Id at para 28.

matters of this group of employees ..., this being a reference to the SMS Handbook. The disciplinary enquiry in the case of the SMS Handbook is regulated in clause 2.7 thereof. This clause to large extent is quite similar to clause 7 of the 2003 Resolution, however, where it comes to the issue of a chairperson, it materially differs. In particular, clause 2.7(3)(b) provides that: *'The employer must appoint a person, from within or from outside the public service, as chairperson of the disciplinary hearing'*. The provisions in the SMS Handbook relating to representation in the disciplinary hearing, as found in clause 2.7(3)(e), is more or less the same as the provisions of clause 7.3(f) of the 2003 Resolution, and can be considered and dealt with in the same way. But the simple point where it comes to the case in respect of Shwababa, is that the wrong legal provisions have been applied, and for that reason alone, the arbitration award of arbitrator Van Der Merwe must be reviewed and set aside.

- [25] I will now proceed to the pertinent question to be answered in this judgment. First and foremost, the nature of the 2003 Resolution must be considered. It is trite that the 2003 Resolution is collective agreement concluded between all the parties to the PSCBC. In this collective agreement, the parties seek to regulate the conducting of discipline of employees in all the Public Service employers that are subject to the scope and jurisdiction of the PSCBC¹². But all considered, it is nothing else but a disciplinary code and procedure¹³, which is commonplace in virtually all employers, and in this case is just sanctioned by agreement. This disciplinary code was first brought into being by way of Resolution 2 of 1999 (*the 1999 Resolution*) concluded in the PSCBC, and the current 2003 Resolution was adopted to enhance it. This is evident from clause 2 of the Introduction to the 2003 Resolution, which reads: *'... the Disciplinary Code and Procedures for the Public Service has been in existence since 1 July 1999 and that there is a necessity to streamline the Code, remove certain ambiguities and effect certain technical changes'*. Clause 2.4 of the 2003 Resolution records the following primary objective:

‘A disciplinary code is necessary for the efficient delivery of service and the fair treatment of public servants, and ensures that employees:

¹² Clause 3 of the 2023 Resolution reads: *'This Code and Procedure apply to the employer and all employees falling within the registered scope of the Public Service Co-ordinating Bargaining Council'*.

¹³ Clause 1 of the 2023 Resolution reads: *'Parties to the PSCBC adopt the attached Disciplinary Code and Procedures for the public service'*.

- (a) have a fair hearing in a formal or informal setting;
- (b) are timeously informed of allegations of misconduct made against them;
- (c) receive written reasons for a decision taken; and
- (d) have the right to appeal against any decision.'

In the above respect, the 2003 Resolution is identically worded to the 1999 Resolution.

- [26] Specific mention must be made to clause 4.1 of the 2003 Resolution which provides that: *'The Code of Good Practice contained in Schedule 8 of the Labour Relations Act, 1995, insofar as it relates to discipline, constitutes part of this Code and Procedure.* The 1999 Resolution contained an identical provision.
- [27] Another important provision at stake *in casu* is clause 2.8 of the 2003 Resolution. In this respect, there appears to be a material amendment made by the 2003 Resolution of the predecessor clause 2.8 of the 1999 Resolution. Clause 2.8 of the 1999 Resolution reads: *'The Code and Procedures are guidelines and may be departed from in appropriate circumstances'*. As opposed to this, clause 2.8 in the 2003 Resolution now reads: *'The Disciplinary Code and Procedures constitutes a framework within which departmental policies may be developed to address appropriate circumstances, provided such policies do not deviate from the provisions of the framework'*. The effect this amendment may have on disciplinary proceedings in the Departments will be specifically dealt with later in this judgment, and was the subject of some debate between the respective parties when the matter was argued.
- [28] The next clause of relevance for consideration is clause 6 of the 2003 Resolution. In this respect there has been no change in respect of this clause as found in the 1999 Resolution. Clause 6 reads: *If the alleged misconduct justifies a more serious form of disciplinary action than provided in paragraph 5, the employer may initiate a disciplinary enquiry. The employer must appoint a representative, who as far as possible should be the manager for the employee, to initiate the enquiry'*.
- [29] That brings me to clause 7, which then specifically deals with disciplinary hearings. Clause 7.1 of the 2003 Resolution sets out the requirements where it comes to giving notice of the disciplinary hearing. Again, it is identical to the

corresponding clause in the 1999 Resolution. The provision in this clause that may have relevance to deciding the matter *in casu* is clause 7.1(c)(iii), which provides that: *'The written notice of the disciplinary meeting must use the form of Annexure D, and provide: ... information on the rights of the employee to representation by a fellow employee or a representative or official of a recognised trade union, and to bring witnesses to the hearing'*.

[30] As intimated earlier, deciding this matter however centres on clause 7.3 of the 2003 Resolution. As such, I will specifically quote the relevant parts of this clause, which read as follows:¹⁴

(a) The disciplinary hearing must be held within ten working days after the notice referred to in paragraph 7.1(a) is delivered to the employee.

(b) The chair of the hearing must be appointed by the employer and be an employee on a higher grade than the representative of the employer.

(c) The employer and the employee charged with misconduct may agree that the disciplinary hearing will be chaired by an arbitrator from the relevant sectoral bargaining council appointed by the council. The decision of the arbitrator will be final and binding and only open to review in terms of the Labour Relations Act, 1995. All the provisions applicable to disciplinary hearings in terms of this Code will apply for purposes of these hearings. The employer will be responsible to pay the costs of the arbitrator.

(d) If the employee wishes, she or he may be represented in the hearing by a fellow employee or a representative of a recognised trade union.

(e) If necessary, an interpreter may attend the hearing.

(f) In a disciplinary hearing, neither the employer nor the employee may be represented by a legal practitioner, unless –

(i) the employee is a legal practitioner or the representative of the employer is a legal practitioner and the direct supervisor of the employee charged with misconduct; or

(ii) the disciplinary hearing is conducted in terms of paragraph 7.3.c.

For the purposes of this agreement, a legal practitioner is defined as a person who is admitted to practice as an advocate or an attorney in South Africa.'

¹⁴ Save for clause 7.3(e) which was added by the 2003 Resolution, the entire clause 7.3 is identically worded to the corresponding clause 7.3 in the 1999 Resolution.

- [31] Having due regard to all the aforesaid quoted provisions of the 2003 Resolution, what is then the respective cases advanced by the parties? First, according to the Departments, the amendments to clause 2.8 of the 2003 Resolution was never intended to completely remove the discretion the employer may have to appoint external representatives or chairpersons, but rather to narrow the discretion to prevent '*wholesale discretionary departures*' and limit the same to particular and specific circumstances within the various Public Service departments. The Departments further argued that the entire clause 7 of the 2003 Resolution must be interpreted having due regard to all the provisions of the Resolution, and the objectives of the LRA itself, meaning any interpretation could not just be limited to the text of clause 7. According to the Departments, the real test is whether there exists fairness in the disciplinary proceedings, and any provision in clause 7 should be applied to give effect to such fairness. And finally, it has been contended by the Departments that irrespective of how the 2003 Resolution may read, the notion of fairness in disciplinary proceedings requires at least some flexibility on the issues in contention, and an absolute prohibition would be irreconcilable with such notion of fairness. In short, the 2003 Resolution must be considered and applied so as to allow at least a residual discretion in this regard, as far as the Departments are concerned.
- [32] The respondent parties obviously disagree with all the notions propagated by the Departments. According to the respondents, the language of the 2003 Resolution is clear, and the text of it can only be consistent with an absolute prohibition on the kind of discretions contended for by the Departments. It is argued by the respondents that the 2003 Resolution is the product of collective bargaining under the LRA, and it is an imperative that effect must be given, in all respects, to such product, without effectively seeking to rewrite the agreement for the parties. Or in other words, it cannot be up the Court to make a different contract for the parties because the Court may believe different terms are more appropriate. It is further argued that there exists nothing where it comes to prohibiting the appointment of an external chairperson that could render the disciplinary process to be unfair, and it simply cannot be treated the same as the situation where it comes to possibly permitting external legal representation in the hearing. The respondents also contend that if the Departments may experience resource difficulties, they could avail themselves of clause 7.3(c). In particular, it is said by the respondents that when the 2003

Resolution is interpreted and applied as a whole, it can only lead to a conclusion that the external appointments are completely and unambiguously prohibited, and even clause 2.8, as it currently reads, emphasises that internal Department policies may not deviate from what is specifically regulated in the 2023 Resolution. In the end, it is said that 'framework' is different from a 'guideline' as was the case in the 1999 Resolution, with 'framework' emphasising the binding nature of the 2003 Resolution.

[33] When next deciding the respective cases of the parties, it is appropriate to first establish the principles applicable to the interpretation of written instruments, such as the 2003 Resolution *in casu*. These principles are by now fairly trite. In *Natal Joint Municipal Pension Fund v Endumeni Municipality*¹⁵ the Court held as follows:

'... The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.'

¹⁵ 2012 (4) SA 593 (SCA) at para 18.

[34] The approach established in *Endumeni supra* has been consistently applied since.¹⁶ Because it is in my view of importance to the decision to be made *in casu*, some specific references to the application of the *Endumeni* principles, for the want of a better description, is necessary. In *Capitec Bank Holdings Ltd and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others*¹⁷ the Court had the following to say:

'*Endumeni* simply gives expression to the view that the words and concepts used in a contract and their relationship to the external world are not self-defining. The case and its progeny emphasise that the meaning of a contested term of a contract (or provision in a statute) is properly understood not simply by selecting standard definitions of particular words, often taken from dictionaries, but also by understanding the words and sentences that comprise the contested term as they fit into the larger structure of the agreement, its context and purpose. Meaning is ultimately the most compelling and coherent account the interpreter can provide, making use of these sources of interpretation. It is not a partial selection of interpretational materials directed at a predetermined result.

Most contracts, and particularly commercial contracts, are constructed with a design in mind, and their architects choose words and concepts to give effect to that design. For this reason, interpretation begins with the text and its structure. They have a gravitational pull that is important. The proposition that context is everything is not a licence to contend for meanings unmoored in the text and its structure. Rather, context and purpose may be used to elucidate the text.'

And in *University of Johannesburg v Auckland Park Theological Seminary and Another*¹⁸ it was held:

'The approach in *Endumeni* 'updated' the previous position, which was that context could be resorted to if there was ambiguity or lack of clarity in the text. The Supreme Court of Appeal has explicitly pointed out in cases

¹⁶ See *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) at para 12; *Unica Iron and Steel (Pty) Ltd and Another v Mirchandani* 2016 (2) SA 307 (SCA) at para 21 and all the authorities cited there; *Nel v De Beer and Another* 2023 (2) SA 170 (SCA) at paras 22 – 23.

¹⁷ 2022 (1) SA 100 (SCA) at para 50-51. See also *Sugar Berry CC t/a Horison Staff Solutions v Motor Industry Bargaining Council and Others* (2026) 47 ILJ 188 (LAC) at para 13.

¹⁸ 2021 (6) SA 1 (CC) at para 66.

subsequent to *Endumeni* that context and purpose must be taken into account as a matter of course, whether or not the words used in the contract are ambiguous. A court interpreting a contract has to, from the onset, consider the contract's factual matrix, its purpose, the circumstances leading up to its conclusion, and the knowledge at the time of those who negotiated and produced the contract

- [35] A final reference is to *Association of Mineworkers and Construction Union and Others v Chamber of Mines of SA and Others*¹⁹, where the Court applied the aforesaid *dictum* in *Endumeni supra* specifically in the context of interpreting a collective agreement, and decided as follows:

'All interpretations of law are themselves in a sense 'factual': certain textual and other sources (for example, statutes, common and customary law) are excavated and marked out as factually 'law', in contradiction to non-law. But this process itself involves a contextual analysis of those sources. See in this regard *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) at para 18. Indeed, interpretation and application are simultaneous and intricately intertwined. The most imaginative exponent of this insight is Ronald Dworkin. See Dworkin *Law's Empire* (Harvard University Press Cambridge 1986) at vii: 'legal reasoning is an exercise in constructive interpretation', in which we advance 'the best justification of our legal practices as a whole'.'

- [36] The aforesaid general principles of interpretation duly considered, something more must however be said where it comes to the interpretation and application of collective agreements in particular. This is because of the very nature of collective agreements, how they come about, and the primacy afforded to these kinds of agreements by the LRA itself. It is therefore a very important consideration, when interpreting and applying collective agreements, that proper regard is had and proper effect is given to the objects and purpose of the LRA itself. In this context, the Court in *eThekweni Municipality (Health Department) v Independent Municipal and Allied Trade Union on behalf of Foster and Others*²⁰ said that that a collective agreement must be interpreted: '... in such a manner as to ensure effective and sound industrial relations ...'.

¹⁹ (2017) 38 ILJ 831 (CC) at fn 28.

²⁰ (2012) 33 ILJ 152 (LAC) at para 27.

This was followed by the judgment in *Western Cape Department of Health v Van Wyk and Others*²¹ where the Court added the following pertinent considerations:

'In interpreting the collective agreement the arbitrator is required to consider the aim, purpose and all the terms of the collective agreement. Furthermore, the arbitrator is enjoined to bear in mind that a collective agreement is not like an ordinary contract. Since the arbitrator derives his/her powers from the Act he/she must at all times take into account the primary objects of the Act. The primary objects of the Act are better served by an approach that is practical to the interpretation and application of such agreements, namely, to promote the effective, fair and speedy resolution of labour disputes. In addition, it is expected of the arbitrator to adopt an interpretation and application that is fair to the parties.'

[37] More recently, and in *Motor Industry Staff Association supra*²² the Court once again recognised the aforesaid imperative, and held as follows:

'What these decisions make clear is that when a collective agreement is interpreted, in contrast to a commercial contract, a more normative approach is required. In the case of commercial contracts, a degree of primacy is placed on contractual autonomy, in the form particularly of the intention of the parties. When a collective agreement is interpreted, values based on the social character of the agreement are relevant. To this end, the common-law canons of interpretation of contracts offer obvious guidance but must necessarily be tempered, where appropriate, with a consideration of the statutory context in which a collective agreement is concluded and specifically, the objects and purposes of the LRA.'

And in *Sugar Berry CC t/a Horison Staff Solutions v Motor Industry Bargaining Council and Others*²³, with reference to the same earlier decided authorities, the Court also decided:

²¹ (2014) 35 ILJ 3078 (LAC) at para 22. See also *Health and Other Services Personnel Trade Union of SA on behalf of Naidoo and Others v Member of the Executive Council, Department of Health, KwaZulu-Natal and Others* (2025) 46 ILJ 933 (LAC) at para 30; *SA Police Service v Solidarity on behalf of Gibbons and Others* (2025) 46 ILJ 985 (LC) at para 15; *Mvelatrans (Pty) Ltd t/a Bojanala Bus Services v Democratic Municipal and Allied Workers Union of SA and Others* (2025) 46 ILJ 2702 (LC) at para 9.

²² *Id* at para 32.

²³ (2026) 47 ILJ 188 (LAC) at para 38.

'It must be emphasised that, when interpreting a collective agreement, one must bear in mind that it is not like a commercial contract where a degree of primacy is placed on contractual autonomy, in the form particularly of the intention of the parties. When a collective agreement is interpreted, values based on the social character of the agreement are relevant. To this end, the emphasis is always on the objects and purposes of the LRA.'

[38] This brings me neatly back to the 2003 Resolution. As said, it is a disciplinary code and procedure. In interpreting this kind of code and procedure, all the LRA requires is disciplinary proceedings that are fair. What is fair, in general, can be found in the Code of Good Practice as set out in Schedule 8 to the LRA (the Code). In fact, the 2003 Resolution itself suggests that it incorporates the provisions of the Code by making reference thereto in that context. The aforesaid being the case, what the parties may have intended plays second fiddle to an interpretation that accords with the standards of fairness contemplated by the LRA. Considering that the matter *in casu* specifically concerns the provisions of the 2003 Resolution relating to representation of the parties and the appointment of chairpersons, item 11(4)(c) of the Code provides that: '*Usually, before a decision is taken to dismiss, the employee should be- ... allowed the assistance of a fellow employee or trade union representative ...*'. Nothing is said about the appointment of a chairperson, or about external legal representation. Further, and in terms of item 11(6) of the Code, it is provided that: '*In exceptional circumstances, if the employer cannot reasonably be expected to comply with these guidelines, the employer may dispense with some or all of them. ...*'.

[39] Against the above basic tenets of fairness, the applicable provisions of the 2003 Resolution must now be considered. Where a disciplinary hearing against an employee is contemplated, two appointments, for the want of a better description, must be made by the employer. First, an initiator must be appointed, which is referred to in clause 6 as the employer representative in the proceedings. This representative should as far as possible should be the manager of the employee, or at least an employee of a grade higher than the employee. Second, a chairperson must be appointed. In terms of clause 7.3(b), this appointment must be made by the employer and be an employee on a higher grade than the representative of the employer. But where it comes to external legal representation of either party in the disciplinary hearing, clause

7.3(f) prohibits it, recording that neither the employer nor the employee may be represented by a legal practitioner. The only exception to this principle is where, considering that in the broad spectrum of the Public Service, the employee or the initiator may turn out to be legal representatives themselves. In that case, legal representation of both parties will be allowed in the disciplinary proceedings, and any party who is not a legal representative may appoint one in terms of this clause.

[40] In sum, the structure of the 2003 Resolution as it reads, seems clear. The employer initiates disciplinary proceedings against an employee by serving the employee with notice to attend a disciplinary hearing, and further appoints an initiator and chairperson for the disciplinary hearing. This is all part of the same prescribed process. It also appears clear that the initiator and the chairperson must be appointed from amongst the employees of the employer, pursuant to the stipulated levels of authority. And lastly, as a matter of general principle external legal representation is not allowed in the proceedings.

[41] But is the aforesaid textual reading and interpretation the end of the enquiry? Or should these provisions nonetheless be measured against the yardstick of fairness and what is intended by the LRA where it comes to the notion of fair disciplinary proceedings? Based on all the principles and considerations elaborated on above, I believe a purely textual interpretation is not appropriate. In my view, the 2003 Resolution must be interpreted and applied having full and proper regard to the objectives and provisions of the LRA where it comes to the notion of procedural fairness required for internal disciplinary hearings. If such an interpretation necessitates some departure from the text of the 2003 as it reads, then so be it.²⁴ As said in *Potgieter v National Commissioner of the SA Police Service and Another*²⁵:

‘There is authority in our law that disciplinary codes, including those set out in collective agreements, are guidelines that should generally be followed unless there are valid reasons for failing to do so. In general the courts have adopted

²⁴ As an example, and in instance concerning the text of the LRA itself, being the use of the word ‘*despite*’ in section 158(1)(g), the Court *Carephone (Pty) Ltd v Marcus NO and Others* (1998) 19 ILJ 1425 (LAC) at para 28 dealt with this as follows: ‘*It is necessary to attempt to interpret s 145 in a manner which is consistent with the Constitution ... It is capable of such an interpretation. If the result means that the word ‘despite’ in s 158(1)(g) should be read as ‘subject to’, then so be it. It is a lesser evil than ignoring the whole of s 145, including its sensible provisions relating to time limits ...*’.

²⁵ (2009) 30 ILJ 1322 (LC) at para 60.

a holistic approach in dealing with this issue and have emphasized that the guiding principle should be whether the principles of justice are upheld.'

[42] Turning next to the specific provisions in clause 7.3, it is perhaps appropriate to start with the issue of representation in the disciplinary hearing. As said, the 2003 Resolution allows only representation by an employee or trade union representative. As discussed above, and in this respect, the provisions of the 1999 Resolution and the 2003 Resolution are identical. In *MEC: Department of Finance, Economic Affairs and Tourism, Northern Province v Mahuman*²⁶ the Court had specific regard to clause 7.3(e) of the 1999 Resolution, which as said is identical to the current clause 7.3(f) of the 2003 Resolution. The Court reasoned as follows as to how this clause should be applied, despite its clear text:²⁷

'... clause 7.3 (e) is a fundamentally important provision of the agreement and that it should not lightly be departed from. But, there may be circumstances in which it would be unfair not to allow legal representation

In terms of our common law a person does not have an absolute right to be legally represented before tribunals other than courts of law (*Dabner v SA Railways & Harbours* 1920 AD 583 at 598; and *Hamata* at para 5). However, it does require disciplinary proceedings to be fair and if 'in order to achieve such fairness in a particular case legal representation may be necessary, a disciplinary body must be taken to have been intended to have the power to allow it in the exercise of its discretion unless, of course, it has plainly and unambiguously been deprived of any such discretion' (per Marais JA in *Hamata* at para 23).

The parties, who agreed on the code, were intent on devising a fair procedure (see clause 2.4) and it is reasonable to assume that they also knew that there may be circumstances in which it would be unfair not to allow legal representation. In these circumstances it is likely that they would have intended the presiding officer to have a discretion to allow legal representation in circumstances in which it would be unfair not to do so. I can find no indication in the code to the contrary. There is, therefore, no justification for interpreting 'appropriate circumstances' in clause 2.8 so as not to include circumstances

²⁶ (2004) 25 ILJ 2311 (SCA).

²⁷ Id at paras 10 – 13.

which would render it unfair not to allow legal representation at a disciplinary enquiry.

It follows that, if, on a conspectus of all the circumstances, it would be unfair not to allow legal representation the provisions of clause 7.3 (e) may in terms of clause 2.8 be departed from. The presiding officer erred in holding that he had no discretion to allow such a departure.' (emphasis added)

- [43] It is important to appreciate that the Court in *Mahumani supra*, in interpreting clause 7.3(e) had due regard to all the other provisions in the 1999 Resolution which dealt with the tenets of what would be a fair hearing under such Resolution. I have quoted all those provisions earlier in this judgment, and none of these provisions have been changed as they stood in the 1999 Resolution, by way of the current 2003 Resolution. It must follow that generally speaking, it may be considered necessary to ensure a fair disciplinary hearing that it be inferred that the chairperson still has a discretion to allow legal representation, no matter what the 1999 Resolution provided.
- [44] But it cannot be ignored that clause 2.8 as it read in the 1999 Resolution played an important part in the reasoning of the Court in *Mahumani*. In the 1999 Resolution, it was specifically provided the provisions therein were only guidelines and could be departed from in appropriate circumstances. That provision, as it read, could thus be said to provide for the kind of discretion as envisaged by the Court in *Mahumani*. However, the 2003 Resolution expressly amended clause 2.8. It now provides that the provisions of the 2003 Resolution constitutes a framework within which internal policies in each and every employer may be developed to address appropriate circumstances, provided such policies do not deviate from the provisions of the framework. The question now is whether this amendment was intended to pertinently expel any possibility of a discretion where it comes to appointments of external legal representatives in the disciplinary hearing.
- [45] As touched on earlier in this judgment, it was certainly an important part of the case presented by the Departments that clause 2.8 of the 2003 Resolution still envisaged such a discretion, or at least certainly did not permanently and completely dispel it. And on the other hand, the respondent parties argued it was an express amendment to dispel any such notion, and even internal policies

adopted in individual Departments could not depart from it. So, and in short, has the discretion been retained? For the reasons to follow, I believe the answer to this must be in the affirmative.

[46] Clause 2.8 as it stood in the 1999 Resolution refers to it as a '*guideline*'. Clause 2.8 in the 2003 Resolution refers to it as a '*framework*'. Is there really a material difference between these two concepts? In general, a framework is a real or conceptual structure intended to serve as a support or guide for the establishment of something else or further, such as a procedure, policy or process, that then expands the structure into something useful or appropriate. In simple terms, the very concept of a framework contemplates something more being envisaged than just what is contained in the framework. As opposed to this, the concept of a '*guideline*' has a very similar consequential meaning, even if it is not as forceful as a framework. A guideline also contemplates the development of something further where required or appropriate, and serves as an indication how this should be developed. I may also mention that item 11 of the Code refers to the provisions relating to a fair procedure therein as '*guidelines*'. In the end, and even when considering 'framework' in this particular context, it cannot be said to be entirely rigid.

[47] In my view, what was intended by the amendment of clause 2.8 was something entirely different to what is contended for by the respondents. Even under the 1999 Resolution, an employer was compelled to adhere to such Resolution and the prescripts relating to legal representation therein, despite being called a '*guideline*', barring the existence of something exceptional to indicate otherwise, which was specifically recognised in *Mahumani*. So, the manner in which the Court applied '*guideline*' in *Mahumani* was quite comparable to how one would apply a framework. Importantly, clause 2.8 is always a general provision applicable across a large number of Public Service Departments where exceptional circumstances and occupational necessities may differ from Department to Department. A uniform standard in this regard may not be appropriate. It is in this context that the amendment to clause 2.8 makes sense, as it then allows individual Departments to develop policies in this regard for themselves, provided that these policies remain within the confines of the framework of the 2003 Resolution. It is not a clause intended to completely dispel any discretion. It is a clause intended to rather specifically regulate it.

[48] I therefore believe that the framework of the 2003 Resolution is not intended to place an absolute prohibition on any external legal representation. The basic provisions in this regard as found in the current clause 7.3(f) of the 2003 Resolution were considered in *Mahumani supra*, and Court made it clear that despite this wording, a discretion in this regard must always remain, in order to ensure that, in appropriate circumstances, effect is given to the requirements of a fair hearing under the LRA. An example of where the framework as envisaged by the 2003 Resolution would not be able to be departed from by way of Department policy is where the employee is called to a disciplinary hearing without being presented with charges, where the employee is deprived of a right to appeal²⁸, or where the employee is not allowed any representation at all. The point is that under the LRA and then also the 2003 Resolution, the employee is entitled to representation in the internal disciplinary hearing. That is the basic tenet of fairness. In general, representation that would be considered fair is internal (by a fellow employee) or trade union representation. But exceptional circumstances may require such representation to be external legal representation in order to be considered fair representation. The chairperson must be entitled to consider this issue, and make a determination accordingly. Anything else would not be fair. As succinctly held in *Highveld District Council v Commission for Conciliation, Mediation and Arbitration and Others*²⁹:

'Where the parties to a collective agreement or an employment contract agree to a procedure to be followed in disciplinary proceedings, the fact of their agreement will go a long way towards proving that the procedure is fair as contemplated in s 188(1)(b) of the Act. The mere fact that a procedure is an agreed one does not however make it fair. By the same token, the fact that an agreed procedure is not followed does not in itself mean that the procedure actually followed was unfair ...'

[49] But even if a more restrictive interpretation is placed on clause 2.8 in the 2003 Resolution, it must be remembered that the Resolution itself makes it an imperative that the Code must be applied when interpreting its provisions. And

²⁸ The right to appeal is prescribed in clause 8 of the 2003 Resolution.

²⁹ (2003) 24 ILJ 517 (LAC) at para 15. See also *Ekurhuleni Metropolitan Municipality v SA Municipal Workers Union and Others* (2018) 39 ILJ 546 (LAC) at 15, which Court called the 'marginality' of a collective agreement in determining unfair dismissal matters. See further *Lebaka and another v Road Traffic Management Corporation* [2017] JOL 36764 (LC) at para 17; *Greater Letaba Local Municipality v Mankgaba NO and Others* [2008] 3 BLLR 229 (LC) at para 26.

I believe this is where item 11(6) of the Code is decisive. It provides that in exceptional circumstances, if the employer cannot reasonably be expected to comply with the guidelines under item 11, it may be department from. This is quite similar to how clause 2.8 of the 1999 Resolution had read. It effectively duplicated item 11(6) of the Code. When the clause was amended by way of the 2003 Resolution, it was never provided that the employer may not in any circumstances depart from the framework, despite what item 11(6) of the Code allows for. If that is what was intended, especially considering the objectives of the LRA, it needed to be specially provided to that effect. Thus, clause 2.8 must always be considered in conjunction with item 11(6) of the Code. That allows for the concept of fairness even under the 2003 Resolution to also be informed by exceptional circumstances outside the ordinary. The 2003 Resolution must therefore always be interpreted and applied with that in mind. As pertinently said in *Dukada v MEC: Department of Provincial Planning and Treasury, Eastern Cape and Others*³⁰, albeit in the context of interpreting virtually identical provisions found in the SMS Handbook:

'The above decisions demonstrate the necessity for the parties at least to request legal representation. A literal interpretation of clause 2.7(3)(e) may find parties having to represent their own cases in circumstances where they lack the necessary ability, leading to a miscarriage of justice. The ruling reflects that the third respondent based his decision not only on a few clauses of the handbook but on the entire relevant chapter, a proper reading of which justifies the ruling. The third respondent's interpretation that a proper construction of clause 2.7(3)(e) does not obliterate his discretion to determine legal representation is consistent with the spirit of the handbook, the Constitution and decisions of our courts.'

- [50] In summary, and where it comes to the issue of legal representation of any of the parties before an internal disciplinary hearing convened under the 2003 Resolution, the default position is that external legal representation is not allowed, however the chairperson of the disciplinary hearing will always retain the discretion to allow legal representation where exceptional circumstances may justify the same. Importantly, a party does not have the right to such legal representation. The chairperson has a wide discretion to allow it.

³⁰ (2013) 34 *ILJ* 3220 (LC) at para 17.

- [51] So, what is then the position where it comes to appointment of an external chairperson? As touched on above, clause 6 relating to the appointment of an initiator in the disciplinary hearing and clause 7.3(b) relating to the appointment of the chairperson in the same proceedings are quite similarly worded, and part and parcel of the same process of appointment. It has been established, by virtue of the reasoning set out above, that despite what clause 6, as read with clause 7.3(f) may provide for, there is still a residual discretion that the chairperson can exercise to allow external legal representation. It must follow that surely the same considerations would apply to the appointment of an external chairperson. Simply put, the appointment of a chairperson is an integral part of the exact same process, and must thus be subject to the exact same discretion, where of course it is appropriate based on exceptionality.
- [52] But nonetheless, there is something different where it comes to exercising a discretion in respect of the appointment of an external chairperson. Obviously, and where the situation involves a chairperson exercising the discretion to allow external legal representation, both the parties would have the opportunity to ventilate and argue their respective cases in this regard before the chairperson, and the chairperson then is able to such discretion in a judicial manner based on what was placed before him or her by the parties in this respect. But that obviously cannot happen where it comes to the appointment of a chairperson in the first place. How would the parties make submissions in this regard, and to whom would it be made. The employee can hardly make submissions to the employer itself, as the employer is the very party that is seeking to appoint the external chairperson. In my view, it is an untenable proposition to have some kind of pre-process relating to the appointment of a chairperson in which parties participate. To describe it simply, it would be silly to appoint a pre-chairperson, so to speak, to decide on the appointment of an external chairperson. Rather, I believe, the answer lies in a subsequent challenge in the convened disciplinary proceedings based on what is fair or unfair, as I will discuss below.
- [53] As a matter of law and fairness, the only requirements for a chairperson of a disciplinary hearing is that such chairperson must be neutral, impartial, unbiased, and have no *ex parte* knowledge of the events giving rise to the disciplinary proceedings, which is in any event presumed to be case where it

comes to a legally qualified external chairperson.³¹ In particular, there is no right on the part of employees to insist on an external chairperson, and this remains a decision entirely up to the employer.³² In this respect, appointing an external chairperson would therefore be better than what the requirements of fairness under the LRA dictates. That being the case, I find it difficult to comprehend how the appointment of an external chairperson can even be said to be unfair or prejudicial toward the employee party. That is why I say the attack on such appointment can only be based on fairness, for example that the chairperson is not neutral, because that chairperson gave advice to the employer on the merits of the matter beforehand. But absent these kinds of anomalies, there can be no cause or prejudice to an employee to object to such an appointment. So, and at least, let's call what happens in these cases a *prima facie* appointment of the external chairperson by the employer, acting unilaterally, as being justified and permitted. But as I will discuss further below, there is a check and balance that can be applied to ensure the requirements of exceptionality is satisfied.

- [54] Therefore, and in my view, based on all the above considerations where it comes to the appointment of an external chairperson, the proper interpretation to be attached to clause 7.3(b) is that as a general principle, the employer must appoint a chairperson which is an employee of the employer, and where that chairperson is a fellow employee, that chairperson must be of a higher rank than the initiator. The purpose of this qualification is clear, namely to ensure neutrality and impartiality. It will ensure that the chairperson cannot be unduly influenced by an initiator that is his or her superior. But I do not believe clause 7.3(b) envisages that the chairperson appointed by the employer must only be a fellow employee and no one else. The general principle must be subject to a discretion informed by exceptionality. If a complete prohibition was envisaged, it needed to have been specifically determined in the clause, and in the absence of that being done, the objectives of the LRA, as discussed earlier, must prevail. If this is not done, unfairness may result. It must be remembered that fairness applies

³¹ In *Mbana v Shepstone & Wylie* (2015) 36 ILJ 1805 (CC) at para 41, it was said: 'There is a presumption in our law that judicial officers are impartial when adjudicating disputes and, as it was noted by this court in *Irvin & Johnson*, the threshold a litigant would have to meet to establish a reasonable apprehension of bias is high ...'

³² Compare *RCL Foods Consumer (Pty) Ltd v National Union of Food Beverage Wine Spirits and Allied Workers and Others* (2018) 39 ILJ 2318 (LC) at para 22; *Mkhize v Antrobus NO and Another* (2013) 34 ILJ 2893 (LC) at para 9.

to both employer and employee.³³ In particular circumstances, such as where a case might be extremely complex, any internal employee may not have the ability to decide the case. It would be unfair to expect the employer under such circumstances to push through with a chairperson that may not be competent, nonetheless. And in any event, the residual discretion to ensure fairness in the process, as discussed above, always remains. The following *dictum* in *Khula Enterprise Finance Ltd v Madinane and Others*³⁴ is apposite:

‘The arbitrator does not appear to have considered at all the reasons why an independent advocate was appointed to chair the enquiry. There were sound reasons for doing so, in particular that the most senior levels of management were personally involved in the complaints and allegations against Dr Madinane and it was simply unrealistic to appoint anybody within management. None was available or able to handle a disciplinary enquiry with any level of detachment and objectivity in the circumstances. The code serving merely as a guideline, the employer was entitled to look outside the organization for somebody with appropriate expertise and objectively to chair the enquiry. This served the interests of both sides receiving a fair hearing. There is no basis for Dr Madinane’s objection in this regard. His reliance on the provision of the code was misplaced. It did not provide that an employee had to approve the appointment of any person to chair the disciplinary enquiry. It merely provided that enquiries would ordinarily be chaired by a member of management, the level of which ‘would be acceptable to both parties’. In this case no level H of manager was acceptable to management, for sound reasons as discussed above. There could be no reasonable objection to appointing an outsider in these circumstances. ...’

[55] In summary, and as I see it, where it comes to the appointment of the chairperson, the employer has the discretion to decide whether or not to appoint

³³ In *Anglo American Platinum (Rustenburg Platinum Mines) v Beyers and Others* (2021) 42 ILJ 2149 (LAC) at para 25, it was pertinently said that: ‘The concept of fairness applies to both the employer and the employee. It involves the balancing of competing and sometimes conflicting interests of the employer on the one hand and the employee on the other hand. The weight to be attached to those respective interests depends largely on the overall circumstances of each case ...’. And in *National Union of Metalworkers of SA v Vetsak Co-operative Ltd and Others* (1996) 17 ILJ 455 (A) at 593G-H, albeit in the context of the LRA, 1956; it was held: ‘... The fairness required in the determination of an unfair labour practice must be fairness towards both employer and employee. Fairness to both means the absence of bias in favour of either. In the eyes of the LRA of 1956, contrary to what counsel for the appellant suggested, there are no underdogs ...’. See also *Steenkamp and Others v Edcon Ltd (National Union of Metalworkers of SA intervening)* (2016) 37 ILJ 564 (CC) at para 116.

³⁴ (2004) 25 ILJ 535 (LC) at para 11. Also compare *Public Servants Association of South Africa obo Dodo v Minister of Home Affairs and Others* [2024] JOL 64748 (LC) at paras 42 – 43.

an external chairperson, if exceptional circumstances dictate. The employer unilaterally makes such appointment if it believes there are such exceptional circumstances. If the employee believes such an appointment could lead to an unfair disciplinary hearing or that there actually exists no exceptional circumstances to justify such appointment, then that is an issue that can be raised with the appointed chairperson to decide. That is the check and balance I referred to earlier in this judgment. It is surely best for such an external independent chairperson to decide if he or she as external chairperson is competent to proceed with the disciplinary hearing, on the basis that exceptional circumstances exist. It is a wide discretion and can only be attacked if it is exercised in a manner that is not judicial. But it is not appropriate nor permitted to challenge the appointment of the external chairperson on the basis that the 2003 Resolution completely prohibits it. Such a challenge is not legally competent, as the 2003 Resolution allows for such an appointment, once interpreted and applied as a whole, and in line with the objectives of the LRA.

- [56] This question of the appointment of an external chairperson was pertinently dealt with in the judgment of *Public Servants Association of South Africa obo Dodo v Minister of Home Affairs and Others*³⁵. The Court relied on the aforesaid quoted reasoning in *Mahumani supra*, and held:³⁶

'Inasmuch as it is appreciated that clause 7.3 (b) of the Code was not an issue before the SCA, the principles emanating therein in the interpretation of clause 7.3 (e) are in my view, equally applicable to clause 7.3.(b) of the Code. This is so in that fundamental to that interpretation was a requirement for disciplinary proceedings to be fair. It is trite that fairness applies to both the employer and the employee. In *Anglo American Platinum Ltd v Beyers and Others*, it was held that the concept of fairness applied to both the employer and the employee, and that it involved the balancing of competing and sometimes conflicting interests of the employer on the one hand and the employee on the other hand. The weight to be attached to those respective interests depends largely on the overall circumstances of each case.

The Court accepts that there is a *lacuna* in both the Resolution and the Directive in regards to the process to be followed when a department seeks to appoint an external chairperson who is a legal practitioner. The Directive at its clause 7.1

³⁵ [2024] JOL 64748 (LC).

³⁶ *Id* at para 39 – 41.

merely refers to the parties having first to obtain the chairperson's ruling prior to appointing legal representatives. This obviously created an invidious position for departments where they seek to engage the services of legal practitioners as chairpersons, especially in circumstances such as in this case.

In my view however, the solution is to be found in the principles of fairness as already pointed out in *Mahumani and Anglo American Platinum Ltd v Beyers and Other*. Thus, if it means that the employer in order to ensure that it gets a fair hearing in pursuing allegations of serious misconduct against an employee, fairness dictates that it should be allowed deviation from the provisions of clause 7.3 (b) of the Code, provided that it demonstrates exceptional circumstances necessitating the deviation. ...'

- [57] In summary therefore, I find that where it comes to the appointment of a chairperson under clause 7.3(b) of the 2003 Resolution, the default position is that such chairperson to be appointed must be a fellow employee, of a rank higher than the initiator of the disciplinary hearing. However, this default position is always subject to the entitlement of the employer to appoint an external chairperson, provided that exceptional circumstances justify such appointment. It is the employer that makes such a decision to appoint such chairperson, pursuant to what it believes to be exceptional circumstances. This entitlement to appoint an external chairperson on such basis is then tempered by a corresponding entitlement on the part of the employee to challenge the appointment before the chairperson himself or herself, on the basis that exceptional circumstances do not justify the appointment. Where this challenge is made, the chairperson exercises a wide discretion, conducts a fairness evaluation based on the submissions by both parties, and decides whether he or she is competent to preside over the disciplinary hearing. All this considered, a complete prohibition on the appointment of an external chairperson is not what is envisaged nor contemplated by the 2003 Resolution, properly considered and applied in accordance with the objectives of the LRA. Any finding to the contrary, as is the case where it comes to the findings of the various arbitrators *in casu*, is therefore materially in error, and constitutes an error of law.
- [58] The respondent parties have suggested that instead of adopting an approach as I have summarized above, the answer for any predicament the Departments may have is to use clause 7.3(c) of the 2003 Resolution, which allows for the

parties to agree that the disciplinary hearing will be chaired by a bargaining council arbitrator, with the decision of the arbitrator then being final and binding. This clause is however no solution at all. First and foremost, it requires an agreement from the employee. Without such an agreement, the employer would still be stuck. And secondly, what this clause in reality does is just to incorporate section 188A of the LRA, which provides for pre-dismissal arbitration, thereby entirely skipping the internal disciplinary process and resorting immediately to final arbitration.³⁷ This cannot resolve any issue relating to what is permissible in an internal disciplinary hearing. And in any event, it is not appropriate to effectively deprive the Departments of their right to internal disciplining of employees, which is what this argument in fact contemplates. Therefore, any reliance on clause 7.3(c) of the 2023 Resolution is misplaced, and no answer *in casu*.

- [59] All considered, the arbitration awards issued by the various arbitrators in this consolidated matter, to the effect that the appointment by the Departments of the external chairpersons concerned is not permitted by the 2003 Resolution and contrary to clause 7.3(b) of such resolution, constitutes a material error of law, and falls to be reviewed and set aside. The same applies to any determination relating to external legal representation of any of the parties in terms of clause 7.3(f).

Conclusion

- [60] With the arbitration awards of the various arbitrators having been reviewed and set aside, where to now? The answer lies in section 145(4) of the LRA.³⁸ In *General Motors SA (Pty) Ltd v National Union of Metalworkers of SA and Others*³⁹ the Court held that:

³⁷ See *SA Transport and Allied Workers Union and Others v MSC Depots (Pty) Ltd and Others* (2013) 34 ILJ 706 (LC) at para 11, where the Court held: 'Section 188A (despite its unfortunate title which on the face of it, assumes the outcome of the arbitration hearing) has as its purpose a means of expediting dispute resolution by avoiding duplication between internal and external hearings. In effect, in terms of a tripartite agreement between the employee, the employer and the CCMA, an arbitrator steps into the shoes of the employer and assumes the right normally considered a sacrosanct element of the managerial prerogative — the right to exercise discipline, including the right to dismiss. The benefit for all is the elimination of the duplication that inevitably occurs when court-like in-house hearings are inevitably followed by an arbitration hearing conducted on a *de novo* basis ...'. See also *Msagala v Transnet SOC Ltd and Others* (2018) 39 ILJ 259 (LC) at para 7.

³⁸ Section 145(4)(a) reads: 'If the award is set aside, the Labour Court may – (a) determine the dispute in the manner it considers appropriate ...'.

³⁹ (2018) 39 ILJ 1316 (LC) at para 26

'In successful review applications, this court ordinarily exercises a discretion to either remit the matter to the CCMA for rehearing or substitute the commissioner's finding for one that is appropriate. The source of this discretion is s 145(4) of the LRA, which provides that this court may either 'determine the dispute in the manner it considers appropriate' or 'make any order it considers appropriate about the procedures to be followed to determine the dispute'. The court ordinarily takes into account whether the result is a foregone conclusion, whether any prejudice would be caused to the applicant by any further delay, whether the decision maker has exhibited bias, and whether the court is in as good a position to make the decision itself.'

[61] In this case, the determination of the review applications hinges on what is quintessentially a legal question. That is the kind of question that can competently be finally decided by this Court without the need to refer it back to the PSCBC to decide. Further, this judgment may then serve as precedent for all the further cases on this issue to come, as I am quite certain that there will be many more instances where employers in the Public Service will seek to appoint external chairpersons, and where the issue of legal representation in these internal disciplinary proceedings may come up. A final determination of these questions is thus in the interest of all parties to the PSCBC, and essential for certainty to be established. I shall thus substitute the findings made in each of the awards at stake in this consolidated matter, by way of a determination that the 2003 Resolution does not prohibit the appointment of an external chairperson by employers and that such appointment is not contrary to clause 7.3(b) thereof, provided proper exceptional circumstances exist for such appointment to be made. I shall similarly substitute findings relating to external legal representation with a determination that the 2003 Resolution does not abolish a residual discretion in this regard.

[62] However, and as I have dealt with earlier, the various arbitrators decided that the 2003 Resolution does not contemplate the appointment of external chairpersons / representatives, and effectively prohibits it, *per se*. There was never any consideration nor determination made by any of these arbitrators as to whether exceptional circumstances justifying such appointments exist. This was also not the cases these arbitrators were actually called on to decide. Even

though the submissions on the facts by the Departments why it was necessary to make such external appointments currently stand as undisputed, it remains the prerogative of each appointed chairperson, as I have discussed above, to determine whether his or her appointment is justified and substantiated by exceptional circumstances, and whether it would be competent for him or her to continue to preside over the disciplinary hearing on such basis. Similarly, the chairperson must decide if external legal representation is permitted, also on such basis. It appears from the points *in limine* raised in all of the individual disciplinary hearings that the only issue was whether the appointment of the chairpersons was competent under the 2003 Resolution, *per se*. Exceptional circumstances and the cause for such appointments was not properly ventilated, nor decided. It is not for this Court to make such decision at this stage. I would therefore consider it appropriate to refer this issue back to the various chairpersons for determination, when the individual disciplinary hearings of the employee respondents reconvene before each of them.

Costs

[63] This then leaves only the issue of costs. In terms of the provisions of section 162(1) of the LRA, I have a wide discretion where it comes to the issue of costs. I am aware of what the Constitutional Court said with regard to costs in employment disputes as expressed in *Zungu v Premier of the Province of Kwa-Zulu Natal and Others*⁴⁰. In exercising this judicial discretion, the same Court in *Long v South African Breweries (Pty) Ltd and Others*⁴¹ re-affirmed the principle set in *Zungu supra* and stated that '*when making an adverse costs order in a labour matter, a presiding officer is required to consider the principle of fairness and have due regard to the conduct of the parties*'. Even though the applicants were successful, I do not believe that this will ever be a case where a costs order in their favour would be justified and fair. The issue placed before this Court was an important legal question extending beyond the parameters of only this case, and it was in the interest of all the parties to the PSCBC that the issue be decided. And as I have already touched on, all parties certainly had an arguable case. The parties also have an ongoing relationship in the PSCBC,

⁴⁰ (2018) 39 ILJ 523 (CC) at para 25.

⁴¹ (2019) 40 ILJ 965 (CC) at para 30.

which mitigates against any costs award. I can therefore see no reason to depart from the general principle that costs do not follow the result in an employment dispute such as the one *in casu*. Coupled with an overall consideration of fairness to all parties, I am convinced that it would be appropriate and fair to make no order as to costs.

[64] For all the reasons as set out above, I hereby make the following order:

Order

Case Number JR 2129 / 23

1. The applicant's review application is granted.
2. The arbitration award of the first respondent, arbitrator William Richard Pretorius, dated 11 September 2023 and issued under case number PSCBC 95-23/24, is reviewed and set aside.
3. The arbitration award is substituted with an award and determination that clause 7.3(b) of Resolution 1 of 2003 does not contemplate nor prescribe that the applicant is prohibited from appointing any person as the chairperson of the disciplinary hearing in respect of the second respondents, other than a person specifically employed as an employee of the applicant, as the applicant under clause 7.3(b) retains the discretion to appoint an external chairperson in exceptional circumstances.
4. The arbitration award is further substituted with an award and determination that clause 7.3(f) of Resolution 1 of 2003 does not contemplate nor prescribe that the applicant is prohibited from appointing an external legal representative to act as initiator in the disciplinary hearing in respect of the second respondents, as the applicant under clause 7.3(f) retains the discretion to appoint an external legal representative as such an initiator in exceptional circumstances.

5. The determination of whether exceptional circumstances exist as contemplated by paragraphs 3 and 4 of this order is remitted back to the appointed chairperson for decision and determination.
6. There is no order as to costs.

Case Number JR 1544 / 23

1. The applicant's review application is granted.
2. The arbitration award of the second respondent, arbitrator Mbulaheni M Netshifhefhe, dated 25 July 2023 and issued under case number PSCBC 378-22/23, is reviewed and set aside.
3. The arbitration award is substituted with an award and determination that clause 7.3(b) of Resolution 1 of 2003 does not contemplate nor prescribe that the applicant is prohibited from appointing any person as the chairperson of the disciplinary hearing in respect of the third, fourth, fifth and sixth respondents, other than a person specifically employed as an employee of the applicant, as the applicant under clause 7.3(b) retains the discretion to appoint an external chairperson in exceptional circumstances.
4. The determination of whether exceptional circumstances exist as contemplated by paragraph 3 of this order is remitted back to the appointed chairperson for decision and determination.
5. There is no order as to costs.

Case Number JR 160 / 24

1. The applicant's review application is granted.
2. The arbitration award of the first respondent, arbitrator Minette Van der Merwe, dated 28 November 2023 and issued under case number PSCBC 568-23/24, is reviewed and set aside.

3. The arbitration award is substituted with an award and determination that Resolution 1 of 2003 does not find application in this instance as the second respondent is a senior manager as contemplated by the SMS Handbook, in terms of which the applicant is entitled to appoint an external chairperson in respect of the disciplinary hearing of the second respondent.
4. There is no order as to costs.

Case Number JR 1879 / 23

1. The applicant's review application is granted.
2. The arbitration award of the second respondent, arbitrator Minette Van der Merwe, dated 31 August 2023 and issued under case number PSCBC 62-23/24, is reviewed and set aside.
3. The arbitration award is substituted with an award and determination that clause 7.3(b) of Resolution 1 of 2003 does not contemplate nor prescribe that the applicant is prohibited from appointing any person as the chairperson of the disciplinary hearing in respect of the third and fourth respondents, other than a person specifically employed as an employee of the applicant, as the applicant under clause 7.3(b) retains the discretion to appoint an external chairperson in exceptional circumstances.
4. The arbitration award is further substituted with an award and determination that clause 7.3(f) of Resolution 1 of 2003 does not contemplate nor prescribe that the applicant is prohibited from appointing an external legal representative to act as initiator in the disciplinary hearing in respect of the third and fourth respondents, as the applicant under clause 7.3(f) retains the discretion to appoint an external legal representative as such an initiator in exceptional circumstances.
5. The determination of whether exceptional circumstances exist as contemplated by paragraphs 3 and 4 of this order is remitted back to the appointed chairperson for decision and determination.

6. There is no order as to costs.

Case Number JR 1595 / 23

1. The applicant's review application is granted.
2. The arbitration award of the second respondent, arbitrator Mbulaheni M Netshifhefhe, dated 27 July 2023 and issued under case number PSCBC 001-22/23, is reviewed and set aside.
3. The arbitration award is substituted with an award and determination that clause 7.3(b) of Resolution 1 of 2003 does not contemplate nor prescribe that the applicant is prohibited from appointing any person as the chairperson of the disciplinary hearing in respect of the third respondent, other than a person specifically employed as an employee of the applicant, as the applicant under clause 7.3(b) retains the discretion to appoint an external chairperson in exceptional circumstances.
4. The determination of whether exceptional circumstances exist as contemplated by paragraph 3 of this order is remitted back to the appointed chairperson for decision and determination.
5. There is no order as to costs



S Snyman

Acting Judge of the Labour Court of South Africa

Appearances:

Case numbers JR 1544 / 23, JR 1879 / 23 and JR 1595 / 23

For the Applicant: Mr S July of Werksmans Attorneys Inc

For the First and Second Respondents: Mr L Frahm-Arp of Fasken Inc Attorneys

For the Third and Fourth Respondents (JR 1879/23): Advocate W K Mphahlele of the Public Servants Association

For the Third to Sixth Respondents (JR 1544/23): Advocate C Sihlali

For the Third Respondent (JR 1595/23): Advocate C Sihlali

Case numbers JR 2129 / 23 and JR 160 / 24

For the Applicant: Advocate S Mahlangu together with Advocate B Maphosa

Instructed by: Vuma Attorneys

For the First and Third Respondents: Mr L Frahm-Arp of Fasken Inc Attorneys

For the Second Respondents (JR 2129/23): Advocate K Mahapa of the Public Servants Association