IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT CAPE TOWN)

Not Reportable

Case no: C159/2020

In the matter between:

THE DEPARTMENT OF HEALTH, WESTERN CAPE **Applicant**

and

THEOPHILIS TWALO **First Respondent**

S MODACK-ROBERTSON N.NO **Second Respondent**

Date heard: 2 July 2021

Delivered: 8 April 2022

Date of Judgment: This judgment was handed down electronically by circulation to the parties 'legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing down judgment is deemed to be 12:00pm on the 8 April 2022.

Summary: Review – Application to review and set aside decision of disciplinary hearing presiding officer in the public service.

JUDGMENT

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Introduction

1. This is an application in terms of s 158(1)(h) of the Labour Relations Act 66 of 1995 (the LRA). The applicant (the Department) seeks to review and set aside decisions of the second respondent (the presiding officer) who presided over a disciplinary hearing at which the first respondent (Mr Twalo) faced five allegations of misconduct involving sexual harassment.

2. The presiding officer found the Mr Twalo guilty of only one of the five charges and considered an appropriate sanction to be a final written warning plus suspension without pay for two weeks.

3. The presiding officer delivered her decision on the merits of the charges on 21 October 2020 and on the sanction on 10 November 2020. The Department launched this application about five months later during early April 2021. Unlike s 145 of the LRA, which requires review applications to be brought within six weeks of a party receiving an award, s 158(1)(h) is silent on the period within which review applications should be launched.

4. The Department submits that reviews in terms of s 158 may be brought within six months of a party becoming aware of the decision or act it wishes to review. Presumably, it says so because the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") requires reviews to be instituted without delay but not later than 180 days of a person being informed or becoming aware of an administrative action. Mr Bosch, on behalf of Mr Twala, maintains that that is not so and that reviews in terms of s 158 must still be brought within a reasonable time. The Department has

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neither cited authority nor presented cogent reasons for its assertion. It has, however, applied for condonation in case that was necessary.

5. Accordingly, there are three broad issues to be determined. First, if necessary, should condonation be granted for the delay in bringing this application? Second, whether the decisions of the presiding officer should be reviewed and set aside. And third, if the decisions are to be set aside, whether this court should substitute the presiding officer's decisions with its own or remit the matter back to the Department for it to be considered by a different presiding officer.

Condonation

6. The Department's explanation for the delay revolves around it having to discuss the presiding officer's decision with its senior management and the Legal Services Department ("Legal Services") in the Premier's[1] office before instructing the state attorney who, in turn, could brief counsel to attend to this application. It is unnecessary to delve into all the details of each step the Department's employees took because some involve little more than internal discussions or informing a superior or colleague about the matter.

7. The Department, and in particular, the Director: Labour Relations, Mr RJ Roman, became aware of the presiding officer's decision on 20 November 2020. After consulting those involved in the disciplinary hearing, the Department sought an opinion of the matter from Legal Services on 7 December 2020. It received an opinion on 18 December 2020 recommending that it brief counsel. Mr Roman did

[1] The Premier of the Western Cape

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nothing about the matter from 18 December 2020 to 20 January 2021 because, according to the Department, he went on leave from 22 December 2020 to 18 January 2021 and he and the Department were involved in the planning of the Covid-19 vaccine rollout. He handed the Legal Services opinion to an Assistant Director: Labour Relations, Mr M Ngame, only on 20 January 2021. Mr Ngame again consulted with various people involved in the hearing (even though, according to the Department, this was already done during November and December 2020) – only to do no more than, on 15 February 2021, to recommend that the advice of Legal Services be followed to brief counsel for a further opinion. A further submission was made on 19 February "in terms of the [Department's] protocol" to the Chief-Director: People Management who met with Labour Relations on 25 February 2021. It was only then that "permission was given" (it is unclear by who and to whom) to instruct the State Attorney to brief counsel. The State Attorney briefed counsel on 3 March 2021 but only then were the digital recordings obtained for transcription. Counsel provided an opinion on 18 March 2021 and the initial papers in this matter were served on the other parties on 1 April 2021.

8. The explanation is poor and appears contrived in several respects. For instance, even though it had, during December 2020, discussed the matter with those involved in the disciplinary proceedings, the Department claims that Mr Ngame had to do so again after Mr Roman brought the matter to his attention on 20 January 2021. Similarly, while Legal Services had provided the Department with an opinion to seek counsel's opinion on 18 December 2020, Mr Ngame made the same recommendation on 15 February 2020. The Covid-19 pandemic has genuinely posed unforeseen challenges but has also become a useful scapegoat in many

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spheres of life. Mr Roman's involvement in the vaccine rollout is not an adequate explanation. After all, having done very little, if anything, relating to this matter from 18 December 2020 to 20 January 2021 (albeit also because he was on leave), when he eventually attended to the matter, on 20 January 2021, he did no more than hand the matter to Mr Ngame.

9. Mr van der Schyff, on behalf of the Department, submits that it might not be necessary to apply for condonation because, as mentioned above, the review was brought with six months of the Department becoming aware of the presiding officer's decision. I disagree.

10. Mr Bosch's submissions are more on point and his quotation from the judgment of the Labour Appeal Court ("LA") in *G4S Secure Solutions (SA) (Pty) Ltd v Gunqubele NO and others*[2] is worth repeating in full:

> "It is not permissible for a court to fix a certain time which it regards as a reasonable time; nor is it permissible to insist that an application for condonation should be made after a specific time. An application for condonation must be made when the delay is unreasonable and must be made at the earliest opportunity. The correct approach is that outlined by Brand JA in *Associated Institutions Pension Fund and others v Van Zyl and others*, followed by this Court in *Collet v Commission for Conciliation, Mediation and Arbitration* and others namely:
>
> "[46] . . . It is a longstanding rule that courts have the power, as part of their inherent jurisdiction to regulate their own proceedings, to refuse a review application if the aggrieved party had been guilty of unreasonable delay in initiating the proceeding . . .

[2] [2017] 12 BLLR 1181 (LAC) at paragraph 11

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[47] The scope and content of the rule has been the subject of investigation in two decisions of this Court. They are the *Wolgroeiers* case and *Setsokosane*

Busdiens (Edms) Bpk v Voorsitter, Nasionale Vervoerkommissie, en 'n ander 1986 (2) SA 57 (A). As appears from these two cases and the numerous decisions in which they have been followed, application of the rule requires consideration of two questions:

(a) Was there an unreasonable delay?

(b) If so, should the delay in all the circumstances be condoned?

(See *Wolgroeiers* at 39C–D.)

[48] The reasonableness or unreasonableness of a delay is entirely dependent on the facts and circumstances of any particular case (see eg *Setsokosane* at 86G). The investigation into the reasonableness of the delay has nothing to do with the Court's discretion. It is an investigation into the facts of the matter in order to determine whether, in all the circumstances of that case, the delay was reasonable. Though this question does imply a value judgment it is not to be equated with the judicial discretion involved in the next question, if it arises, namely, whether a delay which has been found to be unreasonable, should be condoned (see *Setsokosane* at 86E–F)."

11. I believe that there was an unreasonable delay and, even though I am not convinced that the explanation for the delay is sound and acceptable, the application has good prospects of success and, therefore, the Court should condone the delay in launching this review application.

Review in terms of s 158(h) of the Labour Relations Act

12. The parties agree that in its capacity as an employer, the state may review its decisions and acts in terms of s 158(1) of the Labour Relations Act (LRA) on "such grounds as are permissible in law". The LAC has confirmed this in, amongst others,

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MEC for Finance, KwaZulu-Natal & another v Dorkin NO & another[3] and, more recently, in *Hendricks v Overstrand Municipality and Another*[4].

13. However, Mr Bosch argued that while *Hendricks* held that the state may rely on PAJA, the principle of legality, and the common law to review its decisions, the Constitutional Court in *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited*[5] ruled that PAJA was not available to organs of state seeking to review its own decisions. The right to just administrative action created by s 33 of the Constitution, the Court ruled, were to be enjoyed by private citizens whereas the state had obligations under the section. Accordingly, Mr Bosch submitted that the Department is limited to the principle of legality and the common law, and not PAJA, for this review. Limited to the principle of legality and review in terms of the common law means that the test for review is not one of reasonableness but confined to whether the decision sought to be reviewed was lawful and rational. While the concepts of rationality and reasonableness overlap and rationality is an element of reasonableness, Mr Bosch submitted, the latter is of a higher standard and requires more intense scrutiny of administrative decisions.[6] Thus, applying the principle of legality and the common law, rationality and not reasonableness should be the basis of this review.

14. I am not entirely convinced that *Gijima* necessarily applies to decisions where the state, as an employer, seeks to review its decisions. The question facing the Constitutional Court in *Gijima* was whether an organ of state may invoke PAJA to

[3] [2008] 6 BLLR 540 (LAC)
[4] [2016] JOL 38251 (LAC)
[5] 2018 (2) SA 23 (CC)
[6] *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)* 2006 (2) SA 311 (CC) para 108

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review and set aside its own decision or whether the legality review is the appropriate route. While the Court in *Gijima* did not specifically mention situations of an organ to state seeking to review its own decision as an employer, its caution, as expressed hence, applies:

> "We must emphasise that the issue has nothing to do with a scenario where an organ of State that is in a position akin to that of a private person (natural or juristic) may be seeking to review the decision of another organ of State. Nor are we concerned with a situation where in seeking a review of its own decision an organ of State is purporting to act in the public interest in terms of section 38 of the Constitution. Those questions are not before us. Thus in this judgment any statement about the power that an organ of State has or does not have to seek the review of its own decision under PAJA does not go beyond what we are concerned with here." [7] (Emphasis added)

15. Mr Bosch further submitted that if the Court were not to accept that the test for review in this matter is confined to the principle of legality and common law and thus the test for rationality rather than reasonableness, the test for reasonableness still requires a wholistic survey of the evidence to establish whether the decision-maker made a decision that a reasonable decision-maker could not make rather than, as the Department seeks, scrutinising and criticising the presiding officer's decision in piecemeal manner. I agree. In doing so, he further argues, the Department seeks to appeal rather than review the presiding officer's decision.

16. Still, even if *Gijima* does apply and reviews in terms of s 158(1)(h) are confined to the principles of legality and common law grounds of review, if an administrative decision-maker fails to apply their mind to relevant material before them so that it

[7] *Supra, at paragraph [2]*

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affects the rationality of the decision, the decision stands to be reviewed as irrational. In *Reviews in the Labour Courts,* the authors state that attacks on the rationality of a decision, "reviews based on the principle of legality take us back to the *Carephone* test."[8] Mr Bosch referred to the very useful test formulated in *Carephone (Pty) Ltd v Marcus NO & others*[9]:

> "is there a rational objective basis justifying the connection made by the administrative decision-maker between the material properly available to him [or her] and the conclusion he or she eventually arrived at?"

The disciplinary findings

17. The allegations (without reference to the relevant codes and regulations) against Mr Twalo were as follows:

> "Charge 1
>
> On or about 25th October 2019, you sexually harassed Ms Maseti by kissing her / attempting to kiss her in your office without her consent.
>
> Charge 2
>
> On or about 25th October 2019, you sexually harassed Ms Maseti in your office by making the following unwelcome verbal remarks of a sexual nature, 'It seems it's not only your upper back, it's your lower back too. This means you are unable to perform in the bedroom and it is only kissing you can do.'
>
> Charge 3
>
> During the period February – March 2019, you sexually harassed Ms Maseti in that you touched and rubbed her thighs in your vehicle without her consent when she accepted a lift from you.
>
> Charge 4

[8] Page 138
[9] [1998] 11 BLLR 1093 (LAC) paragraph 37

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During 2017, you sexually harassed Ms Maseti when you called her ‘babygirl’ and ‘love’ in WhatApp messages to her cell phone without her consent.

Charge 5

During the period 2017 – 2018, you sexually harassed Ms Maseti when you repeatedly offered her lifts and invitations to lunch and to meet with you after she refused your offers.”

18. As mentioned above, save for the second allegation, the presiding officer acquitted Mr Twalo of all the charges. The second allegation was that Mr Twalo had made verbal remarks of a sexual nature to Ms Maseti. It is best to reproduce, in full, the presiding officer’s findings in order better and wholistically to consider whether her decision should be reviewed and set aside.

“My findings are based on the following:

- **My Not Guilty finding on Charge 1** is based on the fact that the complainant's testimony in the hearing versus her written complaint and interview with the sexual harassment officer differs. When asked in the hearing of what happened in your office, Ms Maseti had to be probed on a full description. According to her testimony she says she "felt tongue" but this is not mentioned to the SHO neither is it in her signed report. I also find it hard to believe that you would have left the door open, in full sight for colleagues as the offices are quite nearby, if you were going to kiss her full on.
- **The Guilty finding on Charge 2** - You, Mr Twalo in your position as a senior admin clerk HR, had full access to Ms Maseti's medical reports and the comment made about her abilities to perform with reference to her lower back problem, is a clear indication that you were fully aware of her condition and that you did make the comment to Ms Maseti. It is also very clear in the Departmental Sexual Harassment Policy in section 7.2.1 in determining whether conduct constitutes sexual harassment the following must be taken into account: 7.1.2.2 "whether the sexual conduct was unwelcome" which in this case it was.

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The policy also defines the types of sexual harassment in section 7.3.1 and states that sexual harassment may include unwelcome physical, verbal or non-verbal conduct. In the section 7.3.5 of the policy: Verbal conduct of a sexual nature includes: 7.3.5.2 Unwelcome and inappropriate enquiries about a person's sex life, this is not condoned in the workplace and is extremely unprofessional, especially for someone working within the Human Resources department.

- **I found you Not Guilty on Charges: 3, 4, 5** - Again, the version of the written complaint, the SHO's report and Ms Maseti's actual testimony differs. In terms of charge 4 there was no evidence presented to prove that you had sent those messages to Ms Maseti an on questioning Ms Maseti was asked if that was true, why did she not show her husband, to which there was no response. For Charge 5, I do not believe that offerings of lifts to someone can be classified as sexual harassment neither do I believe that repeated offers for lunch was made to Ms Maseti if both Mr Twalo and Ms Maseti confirmed that they only saw each other when she was there for HR matters and no other evidence was led to confirm these offers."

19. The presiding officer's reasons for the sanction she considered appropriate are more detailed and some remarks are worth considering. For instance,

"No evidence was given at the hearing and this was a matter of the complainants word against yous, as per the findings the complaint was found not to be a credible witness on the other charges as she omitted other stuff when she was interviewed by the SHO [sexual harassment officer]. You have maintained throughout the you never made such derogatory remarks to the complainant."

20. Presiding officers of disciplinary hearings are often laypeople and, when compared to CCMA commissioners, seldom legally trained and with less experience of adjudicating disputes. Those presenting evidence are also often lay people. Thus, the decisions of presiding officers in disciplinary hearings must be assessed in that light. Still, bearing in mind these differences, the factors that apply to the

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requirement that commissioners must "issue an award with brief reasons"[10], are useful in relation to presiding officers too even though the case law focusses mainly on commissioners and not presiding officers at disciplinary hearings.

21. The Disciplinary Code and Procedure for the Public Service ("the Disciplinary Code") provides that "if the chair decides the employee has committed misconduct, the chair must inform the employee of the finding *and the reasons for it.*"[11] The Constitution provides the right to anyone whose rights have been adversely affected by administrative action to be give written reasons[12] and PAJA creates a rebuttable presumption that administrative action was taken without good reason when an administrator failed to furnish adequate reasons when called upon to do so.[13]

22. Even though only brief reasons are necessary, it is still necessary for commissioners and, in my view, for presiding officers to give reasons for accepting or rejecting a party's version or for preferring one party's version. In *Vodacom Service Provider Company (Pty) Ltd v Phala & others*[14] the Labour Court said

> "It is trite that a commissioner is required to give brief reasons for the award that he or she has made. In giving those reasons a commissioner must deal with the issues that arose and where there are conflicting versions, the commissioner must deal with it and indicate in the award which version is acceptable and which version is rejected. The commissioner must also give reasons for arriving at a specific conclusion."

[10] LRA, s 138(7)(a)
[11] Clause 7.3.m
[12] Section 33(2)
[13] Section 5(3)
[14] [2007] JOL 19509 (LC) at paragraph 20

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23. Of course, presiding officers, perhaps more so than commissioners, do not have to analyse and give detailed reasons for each and every issue arising in a case. The remarks of Marcus AJ, in *Dairybelle (Pty) Ltd v CCMA & others,* canvasses the requirement for commissioners to give reasons for their decision but also why doing go is an essential element of administrative justice at common law:

> "While mindful of the fact that commissioners are required only to furnish "brief reasons" (see section 138(7)(a) of the Act) this does not relieve the commissioner of the obligation to justify his or her decision. Brevity is a question of degree. Much will depend on the nature and complexity of the case.The furnishing of reasons for arbitration awards underpins the accountability of commissioners and serves to discipline the process of reasoning. Dealing with this issue, Wade and Forsyth Administrative Law 7ed state at 542:
>
> > "There is a strong case to be made for the giving of reasons as an essential element of administrative justice. The need for it has been sharply exposed by the expanding law of judicial review now that so many decisions are liable to be quashed or appealed against on grounds of improper purpose, irrelevant consideration and errors of law of various kinds. Unless the citizen can discover the reasoning behind the decision, he may be unable to tell whether it is reviewable or not and so he may be deprived of the protection of the law. A right to reasons is therefore an indispensable part of a sound system of judicial review. Natural justice may provide the best rubric for it since the giving of reasons is required by the ordinary man's sense of justice. It is also a healthy discipline for all who exercise power over others."
>
> The learned authors were, of course, dealing with the position at common law.
>
> Both under the Act and under the Constitution the furnishing of reasons is obligatory. The Constitution permits scrutiny of these reasons to assess the justifiability of the decision. Commissioners need to be aware of the fact that however brief the reasons may be, they must demonstrate "a rational objective

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basis justifying the connection made by the administrative decision maker between the material properly available to him and the conclusion he or she eventually arrived at" (Carephone)." (Emphasis added)

24. It is not necessarily reviewable if a commissioner or presiding officer fails to give reasons and especially if the decision follows findings already made in the award or ruling or are self-explanatory. On the other hand, decisions lacking reasons so that the rationale cannot be determined from other findings or is not self-explanatory, stand to be reviewed. Although brief reasons will suffice, the failure to deal with each component of the dispute, important facets of the dispute, and factors of great significance or critical to the dispute, may give rise to the inference that a decision-maker failed to apply his or her mind to these factors and, if the failure caused the unsuccessful party to lose, the decision could be *prima facie* unreasonable.[15]

25. Mr Bosch correctly pointed out that the distinction between review and appeal must be maintained and as mentioned above, that challenging the presiding officer's decision in a piecemeal manner blurs that distinction. Its brevity aside, the presiding officer's findings are lacking in several respects. In respect of all the charges for which she acquitted the employee of guilt, she reasoned that, amongst other things, Ms Maseti's testimony differed from her written complaint and her interview with the Sexual Harassment Officer (SH) (in relation to the first allegation) or the SHO's report (regarding the third, fourth and fifth allegations). Yet, Ms Maseti's written complaint was not before the presiding officer as part of the evidence. I disagree with the submission on behalf of Mr Twalo that the presiding officer's reference to the "written complaint" was erroneous. Not only does the

[15] *Reviews in the Labour Courts,* Anton Myburgh and Craig Bosch, pages 239 - 240

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presiding officer refer to “written complaint” twice, but Mr Twalo also seems to rely on it being distinct by, in relation to the first allegation, saying that Ms Maseti had given three versions regarding the alleged kiss. It is not only the reference to the written statement, but the presiding officer does at least imply that three versions[16] of events served as evidence before her. Relying substantially on different versions as part of her reasoning for finding in favour of Mr Twalo, the presiding officer does not mention the nature of these differences. Moreover, by failing to canvass the different versions[17], she does not give any insight into the nature and extent of these differences and how and why these differences resulted in her concluding in favour of Mr Twalo. This, to my mind, are serious irregularities and shows the presiding officer’s failure to apply her mind to the evidence before her or to have misconstrued the enquiry she was meant to have engaged.

26. Sexual harassment hearings present various difficulties. Amongst these is the difficulty of weighing mutually exclusive versions – often presented only by the person who allegedly experienced sexual harassment and the alleged perpetrator. But sexual harassment cases also present factors such as the severe distress, anxiety, embarrassment, shame, and stigma to persons who experience sexual harassment and to alleged perpetrators. Some acts of sexual harassment are fleeting, quick and often unexpected. The presiding officer’s findings appear not to reflect any appreciation for these factors. It is in this context that her one reference to apparent different versions (in relation to the alleged kiss or attempted kiss) is

[16] The employee refers to three versions as that appearing in the SHO’s report and two references in the transcript to Ms Maseti’s testimony. I do not see any material differences or contradictions in these instances. The SOH report says that the employee “then proceeded to kiss her”. Ms Maseti’s testified the employee “tried to kiss me” and later, in response to the presiding officer asking her, “Did her full-on kiss you, was it an almost kiss, was it a cheek kiss, what was it?”, she answer, “I felt his tongue on my lips”.
[17] Other than mentioning that Ms Maseti’s testimony that she “felt tongue” was neither mentioned to the SHO nor in her signed report

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that while Ms Maseti testified that she felt the employee's tongue (on her lips), she had neither shared this information with the SHO nor does this information appear in the SHO's report. The presiding officer appears not to consider whether this is a material omission or whether Ms Maseti's description of what happened may explain this omission. Ms Maseti testified,

> "Hm, it happened so quickly. So, I can't explain exactly, and I didn't even expect it. So, you will understand that's why I can't explain it to, you know …"[18]

27. The presiding officer's decision is lacking in detail and rationale in other respects too. Even in respect of charge 2, for which she concluded Mr Twalo was guilty of misconduct, her reasoning is less than convincing as rationally connected to the evidence that served before her or being a decision of a reasonable decision-maker. Charge 2 alleges that Mr Twalo had made unwelcome verbal remarks of a sexual nature to Ms Maseti by saying,

> "It seems it's not only your upper back, it's your lower back too. This means that you are unable to perform in the bedroom and it's only kissing that you can do".

28. Most of the presiding officer's reasoning in respect of this charge deals with clauses from the Departments Sexual Harassment Policy. The only reasoning upon which she based her guilty finding is that Mr Twalo, as a senior HR Admin Clerk, had full access to Ms Maseti's medical reports and that he was therefore fully aware of her condition. This cannot be sufficient grounds to conclude that Mr Twalo had made the unwelcome remarks. Amongst other things, her reasoning is so flawed and irrational to mean that anyone who knew of Ms Maseti's condition, such

[18] Transcript of disciplinary hearing, pages 180 at lines 23 to 25 and page 181 at line 1

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as Dr Makan who treated her and provided a report of her medical condition, and who is subsequently accused of making the unwelcome remarks, could or would be guilty of sexual harassment. And as regards charge 2, it is noteworthy that the events seem happened on the same day and seemingly at the same time as the alleged kiss or attempted kiss. The presiding officer does not mention this or discusses whether the two events are related and whether, if so, how that might have influenced her decision making. She appears not to have applied her mind at all to these material factors.

29. Charge 3 alleges that the employee had touched and rubbed Ms Maseti's thighs without her consent when she accepted a lift from the employee. This is a serious charge and, like charge 1 alleging a kiss or attempted kiss, involves alleged physical conduct. Yet, the presiding officer deals with charges 3, 4 and 5 together and, in so doing, other than saying that the version of the written complaint, the SHO's report and Ms Maseti's testimony differs, she provides no reasoning whatsoever in relation to charge 3. Paying undue reliance on the SHO report may itself lack rationality. For instance, the report refers to interviews conducted with the employee and Ms Maseti as annexures to the report. The presiding officer does not mention whether she had sight of these annexures and, if so, whether the annexures too differed from Ms Maseti's testimony, omitted details and, if so, whether these were such that her version could not be believed. Amongst its recommendations, the SHO report states that, [d]ue to the serious nature of the incident, it is recommended that the matter be dealt with formally and a disciplinary investigation be launched into the alleged conduct of [the employee]". Clearly, the SHO report, in referring to annexures and a further investigation, was neither the

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entire account of Ms Maseti's complaint nor intended as the last word on investigating the allegations.

30. The presiding officer had misconstrued the enquiry she was meant to make, and her reasoning is not rationally connected to the evidence before her as regards the last two charges – allegedly calling Ms Maseti "babygirl" and "love" in WhatsApp messages and repeatedly offering Ms Maseti lifts and invitations to lunch. While it is correct that the Department had not presented the actual WhatsApp messages as evidence, the presiding officer's statement that there was no evidence to prove the messages were sent is patently irrational. Ms Maseti testified in this regard. She said that she had ignored the messages because they made her uncomfortable and that she could not produce the messages because she had lost them when she replaced her phone. Similarly, the presiding officer is incorrect that Ms Maseti did not respond when asked why she had not shown the messages to her husband. Ms Maseti testified,

> "I made an excuse to my husband, but I did not tell him what was going on because I did not want to make him insecure about nothing".[19]

31. While the employee may have offered Ms Maseti lifts, the presiding officer states that she does "not believe that offerings of lifts to someone can be classified as sexual harassment". Her reasoning at least insinuates that Mr Twalo had offered Ms Maseti lifts but that she did not believe such offers could constitute sexual harassment. Surely this required applying her mind to the circumstances under which and context of the lift offers. Without such considerations, a blanket statement that offers of lifts cannot constitute sexual harassment is irrational and

[19] Transcript, page 123 at lines 7 to 9

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not a decision that a reasonable decision-maker could reach. The presiding officer had not applied her mind to the circumstances and context of the lift offers in concluding that offers of lifts cannot constitute sexual harassment.

32. The presiding officer concluded that Mr Twalo had not made repeated offers to take Ms Maseti out for lunch because they had both confirmed that they only saw each other for HR matters and there was no evidence to confirm these offers. The transcript shows that Ms Maseti had testified that Mr Twalo had also telephoned her to ask her out for lunch.[20] Ignoring this evidence, coupled with the conclusion that the employee could not have repeatedly asked Ms Maseti out to lunch because they only saw each other for HR matters, constitutes an irregularity and results in an irrational decision not reasonably connected to the evidence that served before the presiding officer.

33. It is not necessary to address the presiding officer's decision regarding an appropriate sanction in detail as that was based on finding the employee guilty only of one charge. It is worth pointing out, though, that amongst other things, she observes as a mitigating factor, that

> "as per the findings [Ms Maseti] was found not to be a credible witness on the other charges as she omitted other stuff when she was interviewed by the SHO. [Mr Twalo] also maintained throughout that [he] never made such derogatory remarks to [Ms Maseti]".

34. It could be argued that her failure specifically to mention whether Ms Maseti was credible in her decision regarding the merits of the matter should not be interpreted to mean that she had not made credibility findings. I disagree. The irrational

[20] Transcript, page 123 at lines 11 to 13

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grounds for concluding that Ms Maseti was not a credible witness is borne out by the overall paucity in her reasoning and her failure to apply her mind properly to the evidence. Oddly, and irrationally and unreasonably, even though she states that Mr Twalo had maintained throughout that he had never made "such derogatory remarks", the charge for which she found him guilty included remarks that she concluded were unwelcome, inappropriate and constituted sexual harassment.

35. The above are but examples of instances where the presiding officer either ignored evidence before her, misconstrued the nature of the enquiry she was required to make and, ultimately, made decisions not rationally connected to the evidence before her and, indeed, drew conclusions that a reasonable decision-maker could not have made. Moreover, the presiding officer's failure to give proper reasons, albeit brief, dealing with important facets of the main issues and the factors "of great significance or relevance or critical to one or more issues in dispute"[21] has resulted in her findings being unreasonable.

36. Considering the above, the presiding officer's decisions are neither rational nor reasonable and stand to be reviewed and set aside.

37. However, I disagree with the primary relief the Department seeks, namely, that the presiding officer's decision be set aside and replaced with an order that Mr Twalo is guilty of all the allegations against him. In *Consol Ltd t/a Consol Glass v Ker NO & others*[22] Wagley J (as he then was) in considering whether an award should be corrected by the revising court or remitted back for a rehearing, referred to the

[21] *Reviews in the Labour Courts,* Anton Myburgh and Craig Bosch, page 239 and reference therein to *Maepe v CCMA & Another* [2008] 8 BLLR 723 (LAC) at paragraph 8
[22] [2002] JOL 9449 (LC)

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unreported mater of *Emcape Thermopack (Pty) Ltd v CEPPWAWU.*[23] The Court identified four circumstances when it would be appropriate for a court would to correct a decision:

"1. where the end result is a foregone conclusion;
2. where a further delay would unjustifiably prejudice the applicant;
3. where the decision-making body has exhibited bias or incompetence;
4. where the court is in a good position to make the decision itself."

38. Even though *Emcape* concerned a review in terms of s 158 (1)(g) of the LRA, the Court found that there is no material difference between the provisions of s 145 and s 158(1)(g) regarding the power of the Labour Court to correct an arbitration award set aside on review. That must also apply to s 158(1)(h). However, some of the above factors do not apply to the present case. In particular, the result is not a foregone conclusion, and the court is not in a good position to make the decision itself. In these circumstances, the matter must be remitted to the Department for another presiding officer to determine whether Mr Twalo is guilty of all the allegations – including those in charge 2 – against him. It would better serve the interests of justice that another presiding officer determine the allegations wholistically.

39. Accordingly, the Court makes the following order:

a. The decisions of the second respondent made on 21 October and 10 November 2020 are reviewed and set aside.

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b. The first respondent is to conduct a new disciplinary hearing presided over by a presiding officer other than the second respondent.

c. No order as to costs.

I Haffegee
Acting Judge of the Labour Court

Appearances:

Applicant: Adv J van der Schyff instructed by the State Attorney

Respondent: Advocate CS Bosch instructed by KG Kruger & Associates Inc

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