(1) Reportable: Yes
(2) Of interest to other Judges: Yes/No
(3) Revised

________ 11/08/2026
Signature Date

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case No. JR2102/22

In the matter between:

VALENTIA MAHLABA **Applicant**

and

COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION **First Respondent**

PHALA, MOTLATSI *N.O.* **Second Respondent**

SOUTH AFRICAN REVENUE SERVICES **Third Respondent**

Heard: **23 July 2026**

Delivered: **11 August 2026 (By uploading on *CaseLines* and/or circulation to the parties' legal representatives by email)**

Review application - Misconduct – (Gross) Negligence - VAT audit verification - Failure to record audit findings - Distinction between failure to perform audit and failure to document audit

Sanction and Remedy – Negligence not gross – Employee not suspended and allowed to perform same duties – Unblemished record of 26 years - Employer's evidence confirming no breakdown of trust relationship – Dismissal substantively unfair – Retrospective reinstatement with written warning.

JUDGMENT

MAKHURA, J

Introduction

[1] This is an application to review and set aside an arbitration award issued by the second respondent (commissioner) under the auspices of the first respondent, the Commission for Conciliation, Mediation and Arbitration (CCMA). The award upheld the applicant's dismissal by the third respondent, the South African Revenue Service (SARS), for gross negligence arising from her handling of a VAT refund verification audit relating to the Muslim Judicial Council Land Trust (MJC).

[2] The primary issue before this Court is whether the commissioner's decision that the applicant committed gross negligence and that dismissal was an appropriate sanction is one that a reasonable decision-maker could reach on the evidence presented. This issue necessarily requires this Court to consider whether the applicant is guilty of negligence for alleged non-compliance with the SARS's audit procedures and guidelines, if so, the degree of the negligence and its consequences on SARS, and whether the commissioner properly evaluated the evidence concerning both misconduct and sanction.

[3] As will become apparent, the dispute between the parties turns on the applicant's alleged failure to adequately record her audit findings and on whether that failure, viewed against the totality of the evidence, was sufficiently grave to warrant displacing the applicant from employment.

Material facts

[4] The applicant was employed from 1 July 1995. At the time of her dismissal, she held the position of a Compliance Auditor or VAT verifier. As part of their performance targets, auditors are expected to conclude nine audits per day. On 15 February 2021, she was charged with the following allegation of misconduct:

> 'Gross Negligence
>
> It is hereby alleged that on or around the 31st December 2019 you were grossly negligent by failing to follow the Standard Operating Procedure (Finalisation of VAT Operations Audit Cases) and Guidelines for Finalisation of VAT Operations Audit Cases in the execution of your duties relating to the verification of a case involving taxpayer The MJC Land Trust - Value Added Tax number 4470280597 - Tax Period 201904 - Service Manager case number 336105992 resulting in financial loss to SARS to the total amount of R-3,608,006.26.' (Emphasis added)

[5] The genesis of the charge is the audit of the MJC's claim for a VAT refund, which was allocated to the applicant on 24 December 2019 as one of the top 1000 manual evaluation cases. The MJC claimed a VAT refund for the period April 2019.

[6] It is common cause that this claim was initially assigned to another auditor, Dianne van der Westhuizen. On 19 November 2019, van der Westhuizen issued a letter to the MJC. The letter acknowledged the submission of MJC's VAT201 declaration for April 2019 and notified MJC that its declaration had been identified for verification *"as a result of variances detected"*. MJC was requested to review its VAT201 declaration against its calculations and relevant material and to submit any corrections, if any. The claim was deferred pending MJC's response.

[7] MJC responded by, inter alia, submitting three tax invoices from Sulnisa Property Holding (Pty) Ltd (Sulnisa) to MJC, claiming various payments for the Toyota Showroom project, with a total VAT of R3 608 006.27.

[8] On 4 December 2019, van der Westhuizen telephoned MJC and noted that an MJC official she spoke to asked her to send an email. On the same day, SARS issued another letter to MJC. The letter reads that:

> 'Unfortunately, we are unable to complete your request which we received on 2019/11/19 as we require additional information from you in order to proceed with this case.

You are kindly requested to submit the information listed below to SARS in order for us to complete your request.

Kindly supply the following documents for the 04/19 period;

- Nature of business;
- When will income be generated?
- Bank statements from 01/03/19 to 30/04/19;
- When will output be declared by Sulnisa Property Holdings on the three invoices issued to MJC Land Trust?'

[9] On 13 December 2019, van der Westhuizen recorded that a letter had been issued to MJC, but that no supporting documents had been uploaded. She further indicated that a request for such documents would be sent. Van der Westhuizen did not testify, and no evidence was presented regarding the events that occurred between 14 and 24 December 2019. The record nevertheless reflects that MJC responded to the request on 17 December 2019. In its response, MJC stated that its business consisted of a rental enterprise and that its estimated date of income generation was 1 February 2020. It further indicated that Sulnisa Property Holding would declare its output tax in its next VAT201 return for February 2020 and attached the relevant bank statements.

[10] Further, the record contains the affidavit of Zodidi Portia Makeke, an Audit Manager at SARS who leads and manages the audit team, signed on 30 September 2020, confirming that MJC responded on 17 December 2019. The affidavit states that:

'Prior to the case being allocated to Valentia, another Auditor Dianne van der Westhuizen had issued 2 letters requesting information on 04 December and 13 December 2019 respectively. <u>The vendor responded on 17 December 2019 providing the specific information requested in the first letter. Up until this point all the procedures listed in step 3 of the SOP (Evaluate VAT operations audit case) and the applicable procedures listed in step 2.2 par. (a) - (h) Guidelines</u>

(EXECUTION OF THE AUDIT - General Guidelines) were followed.' (Emphasis added)

[11] The matter was subsequently reassigned to the applicant by his line manager, who was the Operations Manager, on 24 December 2019. When the matter was reassigned to the applicant, six specific risks were identified which needed to be addressed. These risks were described as follows:

> '4001 - For the Period 201904. The VAT Refundable of R-3,608,006.26 is Anomalous Compared to the Previous History. A VAT Nil Return of Less Than R0.00 was Expected
>
> 4017 - For the Period 201904. The VAT Refundable of R- 3,608, 4026 - Verify the timing and value of input tax on Capital Goods
>
> 4026 – Verify the timing and value of input tax on Capital Goods
>
> 4038 - The Total Balance (including the current period) for the vendor is R-3608006.26.
>
> 4039 - The vendor has outstanding return(s). Please request the vendor to submit all outstanding returns.
>
> 4021- This vendor also has on his id number IT1332/2004, 1 other VAT Reference Numbers registered with 1 Bank Accounts. Please verify and refunds.'

[12] The finalisation of VAT Operations Audit cases is governed by two instruments, namely the *Standard Operating Procedure: Finalisation of VAT Operations Audit Cases* (SOP) and the *Internal Annexure: Guidelines for Finalisation of VAT Operations Audit Cases* (Guidelines).

[13] The Guidelines describe each specific risk code and where necessary, set out how the risk should be addressed. Risk code 4001 indicates a newly registered vendor with another refund return. This risk should be addressed by verifying that the claims made are justified. Risk code 4017 denotes that the refund is above the vendor's threshold.

[14] Risk code 4021 indicates that the vendor's party ID is associated with one or more additional VAT reference numbers registered to different bank account(s). In terms of the applicable audit requirements, the auditor must address this risk by verifying the validity of the registration(s) and any refunds claimed. Furthermore, clause 2.5.3(a)(ii) of the Guidelines requires the auditor to assess the possibility of fraud by contacting the supplier telephonically, using information obtained from SARS's systems or third parties, in order to verify the authenticity of the invoices.

[15] Risk code 4026 indicates that the vendor deducted a substantial portion of input tax in respect of capital goods purchased and signifies a risk that the value and timing of the input tax deduction is incorrect. The auditor should verify the timing and value of input on capital goods by following the guidelines in clause 4.1 of the Guidelines.

[16] The applicant conducted the audit[1] and prepared the following notes:

> 'Risk: 201904 4001 - For the period 201904, The VAT refundable of R-3 608 006.26 is Anomalous Compared to the Previous History. A VAT Nil Return of Less Than R0.00 was Expected
>
> Nature of business: Rental enterprise
>
> Reason for variance/no income operational expenses see letter attached
>
> Third party verification VAT output tax has been declared on the SARS core system & no discrepancy noted. (closed for festive season)
>
> Verified the accuracy of the VAT201 declaration with the VAT work papers/schedule/reports. Core systems were checked to determine whether there are any further risks. Review previous audits - Verified compliance of the tax invoices with the requirements of sec 20(4) and 20(5) of the VAT Act where applicable. Duplicate input tax from the previous periods verified.'

[17] She found that:

[1] SARS's case was not that the applicant failed to conduct the audit.

> 'Schedule reconciled to the VAT 201, tax invoices complies (sick) with the requirements of s 20(4) and 20(5) of the VAT Act. No duplicate claims were found from the previous periods.
>
> No further verification necessary – risk adequately addressed.
>
> Declaration finalised as in order.'

[18] On 31 December 2019, SARS notified MJC that it had finalised its verification and that no adjustment had been made in respect of its VAT201 declaration.

[19] On 14 January 2019, SARS placed stopper 41 to block payment to MJC. However, on 30 January 2020, Nosipho Mkhoma lifted the stopper and payment was processed on the same day. Although she did not testify, I note that Mkhoma wrote a statement on 17 June 2020 indicating that she received the case as part of the stopper 41 cases on 29 January 2020. She stated that at the time she was acting as a Senior Manager and tasked to *"review the VAT refund submission, verify the authenticity of the refund and uplift the stopper if all is in order"* or *"release the stoppers where no fraud is detected"*. Mkhoma claimed that she erroneously uplifted the stopper, which enabled the payment of the refund.

[20] On 31 January 2020, the stopper was placed back, and the payment was recalled. On the same day, Jack Ledwaba red-flagged the transaction and noted:

> 'Red flag, MJC Land Trust & claiming progress payments from a connect company Sulnisa Properties Holding (Pty) Ltd VAT registration number 4200229971 for the construction of Toyota Showroom at Jan Smuts Road, Athlone, Cape Town. No land/property was found in the name of MJC Land Trust. On whose land is Toyota Showroom built? Physical inspection of the address should be conducted and request proof of payment for the invoice claimed.'

[21] Ultimately, SARS's view was that MJC was not entitled to the refund, at least pending a further audit. MJC repaid the refund to SARS on 14 May 2020. The record shows that the stopper 41 was released on 10 June 2020. The basis for releasing the stopper is not apparent, given that MJC's refund claim remained

unpaid. It is common cause that at the beginning of 2020, SARS initiated an investigation into the audit conducted in respect of MJC, which culminated in the applicant being charged with gross negligence on 15 February 2021.

[22] The chairperson, in her disciplinary hearing outcome, recorded that SARS alleged that the applicant had knowingly and improperly failed to adhere to the VAT SOP, which sets out the procedures and steps to be followed when conducting an audit. According to the chairperson, SARS contended that the applicant failed to place the case on hold when she was unable to contact the taxpayer and did not perform the required third-party verification or verify the authenticity of the invoices submitted. The chairperson further noted SARS's allegation that the applicant had also failed to comply with the general requirements contained in paragraphs (i) and (j) of the SOP. Instead, the applicant captured notes in the SARS Core system stating that third-party verification had confirmed that the VAT output tax had been declared in the system and that no discrepancies had been detected, while also recording that the taxpayer's business was closed for the festive season.

[23] The chairperson found that the employee neither challenged nor disputed the allegations against her, nor did she offer any explanation for her failure to comply with the additional requirements set out in the SOP and the VAT guidelines. Although the applicant acknowledged that she had captured the notes on the system, the chairperson stated that the case should have been pended when she was unable to make contact with the taxpayer. The chairperson further found that the note stating, *"Third party verification VAT output tax has been declared on the SARS core system and no discrepancy noted"*, was misleading. In addition, there was no evidence to show whether the applicant had genuinely attempted to contact the taxpayer or had simply assumed that the taxpayer was unavailable because the business was closed during the festive season.

[24] The applicant was dismissed with immediate effect on 3 September 2021 and subsequently referred an unfair dismissal dispute to the CCMA. During the CCMA proceedings, the parties concluded a pre-arbitration minute wherein they identified

the issues in dispute. These included whether the applicant had committed the alleged misconduct; whether SARS's approval and payment of a VAT refund of over R3.6 million to the MJC was legitimate and in accordance with the applicable SOP and the Guidelines; the category into which MJC fell for purposes of VAT refunds; whether the MJC had submitted its VAT returns timeously and was therefore compliant; whether SARS had in fact suffered a financial loss in excess of R3.6 million; and whether SARS had applied its rules and policies consistently. As regards procedural fairness, the parties identified as an issue whether the applicant's appeal had been heard and determined in accordance with the applicable disciplinary code.

[25] During the period in which SARS had withheld the refund (after it was paid back by MJC) and was pursuing an investigation that culminated in the disciplinary hearing and dismissal, MJC threatened litigation against SARS concerning the withholding of the payment of this refund together with other payments.

[26] In one of MJC's attorneys' correspondence to SARS dated 12 March 2021 where they were claiming the refund and threatening litigation, the attorneys recorded that the refund was lawfully due to MJC and payable with interest and MJC had *"accommodated SARS in sending information that has not only been sent on previous occasions, but information that is regardless not necessary … to attend to the refund"*. SARS paid the refund amount on 18 May 2021.

[27] The record shows that, despite the payment in May 2021, SARS conducted another verification on 8 June 2021, in the middle of the disciplinary hearing. It is unclear why this verification was conducted after the claim was paid. The fact that the refund was paid to MJC was not brought to the attention of the disciplinary enquiry.

[28] On 15 October 2021, over a month after the applicant's dismissal, the audit report found, inter *alia*, as follows:

> 'CRU report dated 13 May 2021 identified the understatement of Output VAT, overstatement of invalid inputs and possible clawback of input tax on unpaid invoices exceeding 12 months.
>
> Auditor obtained copies of agreement of sale with City of Cape Town, Development agreement with third party to develop commercial property, written contract deferring obligation to pay outstanding invoices, valid tax invoices from third parties and various correspondences from lawyers regarding the pending dispute between the vendor and the City of Cape Town.
>
> Perusal of all relevant information and audit tests performed revealed the following: (1) All Output VAT on taxable supplies (rental) have been correctly and timeously declared to SARS. No adjustments is required. (2) All input tax claimed are valid and the clawback ito s 22(3) is not applicable as a signed written contract is in place postponing the obligation to pay as required in terms of s 22(3)(b)(i) of the Act. No disallowable/invalid'

[29] At the arbitration, SARS called Hester Susanna De Sousa as its first and key witness, who testified on the substance of the charge and the trust relationship. Maria Mjoki, the SARS Human Resource Business Partner, testified on the applicant's procedural challenge. The applicant testified and called no further witness/es.

[30] De Sousa served as an Audit Operations Manager. There is no dispute that the applicant addressed risk code 4001. During cross-examination, De Sousa was asked whether risk codes 4001 and 4038 concerned the same issue. She replied that they were *"more or less the same thing, ja"*. When a similar proposition was put to her regarding risk code 4017, she again agreed, stating that risk code 4017 was *"more or less the same"* and that the applicant should have recorded whether the case was *"in line with the previous history"*.

[31] Insofar as risk code 4021 is concerned, SARS noted that MJC had one other reference number registered with another bank account. The applicant was therefore required to verify the validity of the registration and the refund. De Sousa

testified that in terms of the Guidelines, the applicant had to determine if there was potential fraud and verify the validity of the invoice by contacting the third party or supplier. She testified that the applicant did not record any notes regarding this risk and that her statement that she reviewed the previous audit was incorrect, as this was the first audit on MJC. When it was put to her during cross-examination that the applicant had conducted the audit and that when she realised that the other reference number belonged to a deregistered entity, she considered it unnecessary to record this in her note, she maintained that the key concern was that the applicant did not record the findings and that without a note, there was no way to establish whether the verification had been performed.

[32] Risk code 4026 required the applicant to verify the timing and value of tax on the capital goods. De Sousa testified that although the applicant noted that the property would be used in a rental enterprise and that VAT-generating income was expected from February 2020, she did not verify and record whether the rental income would be commercial or residential in nature. She said that because residential rental income is not subject to VAT and that for residential rentals the related expenses and VAT claims might not be allowable, the applicant should have recorded the intended use of the property to determine whether the VAT claim was valid and whether the property would be used to generate taxable supplies. The criticism ultimately was that the applicant did not record whether the property would generate commercial or residential rental income.

[33] During cross-examination, the applicant sought to demonstrate that the invoices from Sulnisa, particularly the reference to the Toyota Cape Town Showroom, provided evidence that the property was commercial in nature or that the services (rather than capital goods) related to a commercial property intended to generate commercial rental income. De Sousa accepted that the invoices reflected professional services rendered but noted that such services could still relate to capital goods rather than ordinary operating expenses.

[34] The applicant testified that from her review of the invoices, she established that MJC was constructing a warehouse in Cape Town, indicating that the project was a commercial enterprise. In addition, the expenditure claimed aligned with the nature and requirements of that business activity. The commissioner, in line with De Sousa's evidence, questioned why this conclusion was not clearly recorded in the audit report. He pointed out that a determination kept only in the auditor's mind would not assist anyone reviewing the matter later and that such findings should be documented in the report. In reply, the applicant stated that had she concluded that the property was not commercial in nature, she would have raised an assessment. Her evidence was that the information available satisfied her that the property was commercial. The commissioner maintained that the applicant should have recorded this in her audit findings.

[35] Regarding risk code 4039, it was alleged that MJC had outstanding returns. De Sousa testified that the applicant did not record any note that MJC was requested to submit the outstanding returns. During cross-examination, De Sousa conceded that the VAT refund would not have been paid if there were outstanding returns. She testified that since the issue of outstanding returns had been identified at a particular stage of the audit process as a risk, the applicant was required to request the vendor to submit all outstanding returns. Her criticism, ultimately, was not that the returns ultimately remained outstanding, but that there was no audit note recording that the applicant had requested the outstanding returns or that the returns had subsequently been submitted.

<u>The arbitration award</u>

[36] SARS's case was that the audit report demonstrated compliance only with risk code 4001. According to SARS, the absence of contemporaneous audit notes relating to risk codes 4017, 4021, 4026, 4038 and 4039 led it to conclude that the applicant had not documented, and therefore could not demonstrate, that those risks had been addressed during the audit process.

[37] After the applicant performed the audit on 24 December 2019, the risk engine identified the risk and placed stopper 41 on 14 January 2019. This stopper was released by Mkhoma on 30 January 2020, resulting in the payment to MJC. The stopper was placed back on 31 January 2020.

[38] The commissioner found:

> 'Considering that there was no evidence that the applicant addressed the rest of the risks, a stop was placed on the payment of a refund. The respondent conducted an investigation, and the applicant was formally charged and subjected to a disciplinary hearing for Gross Negligence.
>
> It is difficult to understand the defense of the applicant. She initially stated that she complied with the Standard Operating Procedure and the Guidelines. When it became clear that her audit report was inadequate as it only referred to one risk, she stated that she in fact addressed the other risks but used her discretion as an auditor in respect of the other risks.
>
> There was nothing on the inchoate audit report suggesting that the applicant exercised her discretion by explaining how it was exercised, to what extent and whether this did not affect the outcome of the audit. There was no note to that effect.
>
> The applicant also stated that it was not necessary to request information from the vendor as the previous auditor had already done so. Again if indeed that is the situation, a note should have been made in the report as well.'

[39] The commissioner, in effect, found the applicant guilty of negligence for failing to document or record her notes, which was the crux of SARS's complaint. He then proceeded:

> 'The applicant was intransigent and did not own up to her errors. An auditor is in a position of trust moreover she worked for an institution which uses public funds, the failure to observe and comply with the SOP and guidelines may have led to the payment of a refund to an undeserving tax-payer.

The Labour court described Gross Negligence as conduct which is a departure from standard of the reasonable person to such an extent that it may be considered "extreme". To do so , the conduct should either demonstrate *"conscious risk-taking*, a complete *"obtuseness of mind"*.

…

The applicant stated that she was with SARS for 26 years and had a clean disciplinary record. Furthermore, no one led evidence on the trust relationship. In Impala Platinum Limited v Zirk Bernadus Jansen & Others (JA 100/14) the Labour Appeal Court ("LAC") finally and an equivocally (sic) dispelled the myth in Pillemer v Edcon that evidence ought to be led by the employer for the CCMA to conclude that the trust relationship had broken down. The LAC considered the applicability of Edcon to Jansen's conduct and concluded that Jansen's dismissal was fair, even though specific evidence was not led on the breakdown of the trust relationship.

The LAC also held that considerations such as long service, an unblemished disciplinary record and remorse, albeit mitigating factors, do not bar any employee from avoiding the sanction of dismissal. The same principles apply to the case of the applicant.

It is therefore my finding that the respondent led sufficient evidence to show that the dismissal of the applicant was procedurally and substantively fair.'

<u>Grounds of review</u>

[40] The applicant contends that the commissioner exceeded his powers by ignoring the evidence and committed misconduct and errors by improperly analysing the evidence and ignoring her undisputed evidence.

[41] She contends further that the commissioner disregarded the fact that SARS failed to lead evidence to sustain her dismissal and the breakdown of the trust relationship or to show that a continued employment relationship was not possible. She submitted that the commissioner's decision was not *"logically connected to the overall assessment of the law of employment, the evidence of legality, legal*

submissions made and documentation" and that he unreasonably favoured SARS's *"poor and uncorroborated evidence"* over her undisputed evidence.

[42] The applicant then concluded that the award is *"inappropriate"*, shocking and alarming and that it is *"distorted, irregular and has no legal basis"*.

[43] Although the applicant raised a ground relating to the commissioner's alleged bias, this ground was abandoned at the commencement of the hearing. Further, the applicant does not complain about the procedural fairness finding.

<u>Analysis</u>

Merits of the charge

[44] SARS contended that the applicant had not set out the grounds for review. This contention is difficult to comprehend, given the grounds of review plainly summarised above. The argument is therefore devoid of any merit. I expressed my view with Mr Mndebele for SARS, who, while not formally abandoning the point, prudently elected not to detain the Court further with a submission that was clearly unsustainable.

[45] At the hearing of this application, SARS correctly conceded, on the strength of De Sousa's evidence, that the applicant had conducted an audit in relation to risk codes 4001, 4017 and 4038. On this score, the commissioner's decision that the applicant conducted the audit in relation to risk code 4001 is not founded on evidence and cannot be sustained.

[46] Before considering each of the risk codes, it is necessary to address the commissioner's finding that the stopper was placed because the applicant had allegedly failed to address the relevant risks. That finding finds no support in the evidence. There was simply no evidence explaining why the stopper was initially placed on 14 January 2020. Mkhoma's statement went no further than stating that, upon reviewing the stopper on 30 January 2020, she released it. No witness testified as to the reason for its placement in the first instance. In these

circumstances, the commissioner's conclusion that the stopper was triggered by the applicant's alleged failure to address the risks was speculative and unsupported by the evidentiary record.

[47] Turning to the only contentious risk codes 4021, 4026 and 4039, the evidence in this regard has been summarised above. Concerning risk code 4021, De Sousa's evidence focused on whether the applicant recorded the notes or not. She maintained that an auditor is required to record a note confirming that a company search or verification was performed. She testified that if no note is recorded, there is no way to establish whether the auditor actually carried out the check. There was no evidence that this risk was not addressed, but that the applicant did not record that she had addressed it. The applicant's evidence was that she had looked at the IBR report and observed that all other numbers were deregistered and that it was therefore unnecessary to note that the number was deregistered because, according to her, it was irrelevant. She did not dispute that there was no note recording what she had done. The commissioner's finding is that the applicant did not note what she had done.

[48] Risk code 4026 related to the timing and value of the input tax on capital goods. The applicant's representative challenged De Sousa's assessment of this risk concerning whether the rental income related to commercial or residential property. He referred her to the invoices from Sulnisa and pointed out that they contained a reference to the *"Toyota Cape Town Showroom"*, suggesting that the services were connected to a commercial property. De Sousa initially maintained that the invoices themselves did not specify whether the property was commercial or residential. When pressed on the reference to the *"Toyota showroom"*, she acknowledged that the wording appeared on the invoice but candidly admitted that she had not noticed it and therefore had not considered it as evidence that the property was commercial. Whilst she conceded that she had not observed the indication on the invoices linking the work to the Toyota Cape Town Showroom, she remained of the view that the nature of the services could still have capital implications because they related to a building project. Ultimately, she did not

dispute that the expenses in the invoices were for services rendered. In her testimony, the applicant said that when she looked at the three invoices, she realised that the expenses were operational and not capital goods. In my view, the record established that the applicant addressed the risk. However, she failed to record her audit notes.

[49] The third and final contentious risk is code 4039. The risk here was that MJC had outstanding returns, and the applicant was required to request their submission. De Sousa testified that the applicant did not record a note that *"she requested the outstanding returns"* or that the returns had been submitted. There was no evidence to suggest that the returns were filed late. The complaint again was that the applicant did not record her audit notes, which she had not disputed.

[50] Based on De Sousa's evidence, SARS's primary complaint was not that the applicant had failed to perform the audits or address the relevant risks, but rather that she had failed to record her audit findings notes. The commissioner found that the applicant did not record notes in respect of the contested risk items. Significantly, however, SARS's legal representative correctly conceded that contrary to the commissioner's decision that only one risk item was addressed, the applicant had in fact addressed and noted three risk codes 4001, 4017 and 4038. In those circumstances, any finding of negligence could extend no further than the applicant's failure to record her notes in relation to risk codes 4021, 4026 and 4039.

[51] For the reasons set out above, the applicant is guilty of failing to record her audit in respect of risk codes 4021, 4026 and 4039. Accordingly, her negligence and the enquiry into the gravity thereof are confined to these omissions.

<u>Sanction / Remedy</u>

[52] The next question is whether the applicant's negligence was of such gravity or serious nature that it objectively resulted in an irretrievable breakdown of the trust relationship, irrespective of whether SARS led evidence to that effect. SARS contended in these proceedings that the misconduct was, by its very nature,

destructive of the employment relationship and that it was therefore unnecessary to adduce specific evidence regarding the breakdown of trust.

[53] I do not agree that the negligence established in this case was of such gravity as to be inherently destructive of the employment relationship. Nor do I accept SARS's contention that, given the nature of the infraction, it was unnecessary to lead evidence demonstrating an irretrievable breakdown of the trust relationship. I set out my reasons below.

[54] First, negligence is not rendered gross or serious merely because an employer characterises it as such. Whether negligence rises to the level of gross negligence is an objective enquiry that must be determined with reference to the facts and evidence of the particular case. Its seriousness cannot be assumed; it must be established.

[55] Second, the allegation against the applicant has been reduced to only three instances of failing to record her audit findings. Had the commissioner properly considered the evidence of De Sousa, he would have found that the applicant considered and addressed the risk items and that only three of the six risk items were not accompanied by recorded audit notes.

[56] Third, the evidence presented by SARS does not support the conclusion that the applicant's conduct constituted gross negligence. When the commissioner specifically asked De Sousa why she regarded the negligence as gross, her answer was as follows:

> 'because of the fact that the refund was released, when she was not, she didn't prove that the refund was in actual fact valid.'

[57] Fourth, and flowing from the above, the charge against the applicant was formulated on the premise that her negligence had resulted in a financial loss to SARS in the amount of R3 608 006.26. That premise proved to be wrong. The evidence ultimately established that the amount in question was legitimate, lawfully due and payable to MJC, and was in due course paid to it. Accordingly, no financial

loss was suffered by SARS as a consequence of the applicant's conduct. What is more concerning is that SARS did not candidly place before the chairperson the fact that the refund had in fact been paid to MJC. Even during the arbitration proceedings, this issue only emerged during cross-examination. The commissioner completed ignored this evidence.

[58] Fifth, the applicant had more than 26 years of unblemished service with SARS. Significantly, the misconduct established against her involved no element of dishonesty, bad faith, or wilful misconduct. In those circumstances, there is no basis for concluding, in the absence of evidence, that her conduct was inherently destructive of a continuing relationship of trust. There are further considerations that militate against such a conclusion of an inherent breakdown of a trust relationship. The events giving rise to the charges occurred in December 2019. SARS commenced its investigation in early 2020, charged the applicant on 15 February 2021, and ultimately dismissed her only in September 2021. Throughout this period, spanning more than 18 months, the applicant continued to perform the very same duties without restriction and without any further allegations of misconduct. All these factors point away from a finding of a breakdown of trust relationship or dismissal as an appropriate sanction.

[59] Sixth, De Sousa expressly and unequivocally conveyed her continued confidence in the applicant. Her evidence was far from suggesting that the employment relationship had broken down. She testified:

> '<u>APPLICANT REPRESENTATIVE</u>: Okay, in other words, the respondent still trusted her to continue working.
>
> <u>MS. HESTER SUSANNA DE SOUSA</u>: It sounds like it, yes.
>
> <u>APPLICANT REPRESENTATIVE</u>: Okay. Do you trust the applicant?
>
> <u>MS. HESTER SUSANNA DE SOUSA</u>: This is the only case that I'm aware of that this happened. So yes, I will trust the applicant.'

[60] Seventh, Mkhoma informed SARS that she had lifted the stopper, *albeit* maintaining that she had done so inadvertently. There is no evidence that SARS took any disciplinary action against her arising from that conduct. To be clear, the applicant did not rely on this fact as an instance of inconsistent discipline, nor do I consider it to be one. I regard it, rather, as a factor that should properly be taken into account when assessing the gravity of the misconduct and the appropriateness of the sanction. The payment of the refund on 30 January 2020 occurred only because the stopper was lifted, by Mkhoma. Yet SARS elected not to take any action against her, notwithstanding her acceptance that she had lifted the stopper. That fact is relevant to an assessment of how seriously SARS itself viewed the matter.

[61] Eighth, during cross-examination, De Sousa was questioned about other employees who had failed to comply with the Guidelines when conducting audits. She acknowledged that several employees had not adhered to the Guidelines and had, as a consequence, been subjected to progressive discipline rather than dismissal. She further testified that:

> '<u>APPLICANT REPRESENTATIVE</u>: Okay, So if somebody fail to follow the guideline they will get charged?
>
> <u>MS. HESTER SUSANNA DE SOUSA</u>: No, there is - we will first issue her a - most of the times we will first issue a warning.'

[62] This evidence is significant, again, not in establishing inconsistency in the application of discipline, but to the assessment of the breakdown of trust relationship and appropriateness of a sanction of dismissal. It demonstrates that non-compliance with the Guidelines was not invariably treated as misconduct warranting dismissal and that SARS recognised, in appropriate circumstances, the suitability of corrective and progressive disciplinary measures.

[63] The commissioner either ignored the factors outlined above or failed to attach any weight or meaningful weight to them. This constituted a material misdirection. In *National Union of Metal Workers of South Africa and Another v Commissioner for*

Conciliation, Mediation and Arbitration and Others[2], this Court, per Prinsloo J, held that:

> 'The test for negligence remains the same – whether negligence, once established, is gross, is a matter of degree, to be determined considering a number of relevant factors. Those factors are *inter alia* whether the employee is persistently negligent; the seriousness of the act or omission; whether the act or omission is inexcusable; the employee's awareness of the performance standard required or the procedure to be complied with; the seriousness of the consequences of the act or omission; damages caused and the skills and experience of the employee or the position held by the employee.' (Emphasis added)

[64] This was the first allegation of misconduct levelled against the applicant in her 26 years of service with SARS. There was no evidence of persistent, repeated or habitual negligence. The misconduct established against her was confined to a failure to record audit notes, notwithstanding that she had in fact performed or substantially performed the audits and addressed the relevant risk codes. The refund at the centre of the charges was ultimately found to be legitimate, lawful, and due to MJC and was accordingly paid to MJC. SARS suffered no financial loss.

[65] Considering the totality of the evidence as discussed above, the commissioner's decision cannot be sustained. The decision was disconnected from the material facts, inconsistent with significant portions of SARS's own evidence, and one that no reasonable decision-maker, properly directing himself to the evidence, could have reached.[3] It follows that the award falls to be reviewed and set aside.

[66] This Court has the benefit of the complete record of the arbitration proceedings, save for a few immaterial mechanical interruptions that do not affect the proper determination of the matter. I am therefore satisfied that, on the record before me, this Court is as well positioned as the commissioner to determine the matter and

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[2] (2023) 44 ILJ 1575 (LC) at para 35.

[3] *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (2007) 28 ILJ 2405 (CC); *Duncanmec (Pty) Ltd v Gaylard NO and others* (2018) 39 ILJ 2633 (CC) at paras 42 – 43.

that the interests of justice favour a final resolution of the dispute. Having regard to the evidence and the findings set out above, I conclude that the applicant's dismissal was substantively unfair.

[67] The disciplinary code prescribes a written warning as the appropriate sanction for a first instance of non-compliance with workplace rules or work processes. Clause 7.2.8 further provides that such a warning remains valid for five months. The applicant is accordingly issued with a written warning valid for a period of five months from the date of this judgment.

[68] The applicant sought reinstatement. Section 193 of the LRA sets out the remedies available following a finding of unfair dismissal. It is clear from section 193(2) that reinstatement remains the default remedy and must be ordered unless one of the recognised statutory exceptions applies, namely where the employee does not seek reinstatement, the employment relationship has become intolerable, or reinstatement is not reasonably practicable.[4]

[69] The misconduct committed by the applicant was not serious. Of particular significance is the fact that the applicant continued to perform the same duties for more than 18 months after the misconduct without incident. SARS suffered no loss or damage as a result of the misconduct, and there is no evidence that the applicant posed any operational risk to SARS. Furthermore, SARS's main witness, who appears to have testified candidly, stated that she continued to trust the applicant, describing the misconduct as a once-off occurrence. She also testified that, historically, employees who committed similar misconduct were ordinarily issued with warnings rather than dismissed. In these circumstances, none of the factors contemplated in section 193(2) of the LRA militate against reinstatement. The employee is therefore entitled to reinstatement as the appropriate remedy.

[4] See: *SA Revenue Service v Commission for Conciliation, Mediation and Arbitration and others* (2017) 38 ILJ 97 (CC) at para 38; *Booi v Amathole District Municipality and Others* (2022) 43 ILJ 91 (CC) at paras 39 – 40; *Notisi v South African Police Service and Others* [2024] 4 BLLR 380 (LAC) at paras 58 – 60.

Moreover, no facts or circumstances warrant any limitation on the retrospective operation of the reinstatement order.[5]

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

<u>Order</u>

1. The arbitration award issued by the second respondent under case number GAJB20161-21 dated 31 August 2022 is reviewed and set aside.

2. The award is substituted with an order in the following terms:

   ‘1. The applicant is guilty of negligence arising from her non-compliance with SARS's audit verification procedures, in that on 24 December 2019, she failed to record notes relating to risk codes 4021, 4026 and 4039 during the VAT refund verification audit conducted in respect of MJC Land Trust for the period 04/2019.

   2. The applicant is issued with a written warning valid for five months from the date of this judgment.

   3. The dismissal of the applicant by the third respondent on 3 September 2021 is substantively unfair.

   4. The third respondent is ordered to reinstate the applicant retrospectively from the date of her dismissal on the same terms and conditions of employment that existed prior to her dismissal and without any loss of benefits.

   5. The third respondent is ordered, within 15 court days of this judgment, to pay the applicant backpay from the date of her dismissal until the date of reinstatement.

[5] See: *Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile and others* (2010) 31 ILJ 273 (CC).

6. The applicant is ordered to report for duty within a reasonable time but not later than Monday, 17 August 2026 (unless she has a valid reason) in terms of her reinstated contract of employment.'

M. Makhura

Judge of the Labour Court of South Africa

Appearances:

For the Applicant	:	Mr C. Higgs
		c/o Higgs Attorneys
For the Third Respondent	:	Mr V. Mndebele
Instructed by	:	MacRobert Inc.