



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

NOT REPORTABLE

Case No: JR2709/22

In the matter between:

LUFAFA HATCHERY (PTY) LTD

Applicant

and

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

First Respondent

COMMISSIONER MASETE NO

Second Respondent

FB MOHALE

Third Respondent

Heard: 18 March 2025

Delivered: 21 May 2025

Summary: Application to review and set aside an arbitration award. Outcome unreasonable. Application successful, award substituted.

JUDGMENT

DANIELS J

Introduction

[1] This is an application brought to review and set aside an arbitration award issued by the second respondent (hereafter the “commissioner”). The commissioner found that the dismissal of the third respondent, by the applicant (hereafter the “company” or “employer”), was substantively unfair but procedurally fair, and reinstated him.

Background facts

[2] The third respondent, Mr Fanaboy Bonani Mohale (hereafter “Mohale”) was charged with several acts of misconduct, all allegedly committed on 26 May 2022. It was alleged that, on that day:

2.1 Mohale abused his position as a shop steward of PTAWU¹ and he misused the privilege granted to him by management by shouting political slogans instead of merely announcing a union meeting,

2.2 He attempted to provoke the shop steward of NUFBWSAW² by making uncalled for remarks in front of co-workers. After this incident, during a meeting, he allegedly made racist and uncalled for remarks, including threats of violence, directed to the same employee.

2.3 After his suspension, he continued to intimidate and victimize the shop steward of NUFBWSAW by attempting to force him to join PTAWU.

[3] The material facts leading to his dismissal may be summarized as follows:

¹ The acronym “PTAWU” refers to the Professional Transport and Allied Workers Union

² The acronym “NUFBWSAW” refers to the National Union of Food, Beverage, Wine, Spirit and Allied Workers.

3.1 Mohale approached the director of the company and requested that he be granted permission to address the employees on the morning of 26th May 2022, in order to inform them of a meeting of PTAWU members later that afternoon. The director granted Mohale permission to do so provided this was restricted to announcing the union meeting.

3.2 On the morning of 26th May, Mohale informed the foreman, Mr Thompson Mushwana³ (hereafter “Mushwana”) that he had permission to address the workforce. Mohale then did so.

3.3 Management alleges that Mohale addressed the workforce by shouting “Amandla” twice and raising his fist in the air. Management viewed this as inappropriate because it was in breach of his undertaking to Stewart. In addition, he was addressing the entire workforce, including members of the rival union (NUFBWSAW) and non-union members.

3.4 After addressing the workforce, Mohale said to Mushwana that he must “leave the boys to do the work”. Mushwana was deeply offended by this, and raised the matter with a manager, Ms Judith Maja (hereafter “Maja”).

3.5 Maja called Mohale, and Mushwana, into a meeting to discuss the issue. She recorded the meeting. During the meeting, management alleges, Mohale apologized for using the slogan “Amandla”. Mohale began insulting Mushwana by stating *inter alia* that he protected the interests of the employer, and not the employees. According to Maja, Mohale stated, in her presence, that Mushwana would never beat the organiser for the PTAWU and he would be burnt to death.

3.6 Maja reported the incident to the operations director, Mr James Stewart (hereafter “Stewart”) who undertook to investigate. Stewart contacted his legal advisor and decided to suspend Mohale. Mohale was summoned to Stewart’s office, where he found various senior managers including Stewart, Maja, Ms

³ Mushwana was not only foreman, but also the shop steward of NUFBSAW

Carike Swart (hereafter “Swart”) and Mr Mark Scott (hereafter “Scott”). Mohale was informed of his immediate suspension and asked to leave the premises of the company. He was warned not to have any contact with employees of the company pending his disciplinary hearing. Mohale asked Stewart why he had employed Swart because she was corrupt. When Maja was asked to sign the suspension notice as a witness, Mohale commented that the company was now bringing blacks into the system.

3.7 Later that same day, after being suspended, Mohale approached Mushwana and told him that he must sign a membership form for PTAWU. When Mushwana told Mohale that he was not interested, Mohale told him that when he (Mohale) returned, the form must have been signed. Mushwana complained to Stewart that Mohale had tried to coerce him into signing a PTAWU membership form.

3.8 At his disciplinary hearing, Mohale explained that the reason he called Swart corrupt was that she had forced an employee to testify that the former shop steward of PTAWU had falsified a union membership form. The minute of the disciplinary hearing reflects that Mohale did not deny greeting the workforce, on 26 May, with the slogan “Amandla”. Maja and Mushwana both testified that Mohale had used the slogan “Amandla” that morning.

Arbitration hearing

[4] At arbitration, the company called several witnesses. The first witness, Ms Suzette Denton, an official of an employer organisation, NEOSA, testified about the consultation process in terms of Schedule 8 Item 4.2 of the LRA. Thereafter, the company called Stewart, Maja, and Swart. Their evidence is sufficiently summarized in para 3 above. Their evidence corroborated each other.

[5] Mushwana’s testimony corroborated that of Maja, but he did not testify that Mohale had threatened him to say that he would be burnt to death. Under cross-

examination about the comment “let the boys do their work”, Mushwana clarified that while the comment was directed at him, he was not being called a boy.

[6] When Maja and Mushwana were cross examined, the representative of the third respondent did not suggest Mohale had not shouted “Amandla”. Instead, the representative appears to have accepted that Mohale had indeed done so.

[7] At the end of the evidence of Swart, the last witness for the company, the company’s representative sought a postponement to produce a transcript of the meeting where Mohale stated Mushwana would be burnt. Third respondent objected because the transcript should have been prepared earlier. The company argued it only became aware the transcript would be required when, during cross examination of Maja, third respondent denied threatening Mushwana. The commissioner dismissed the application because the company should have been better prepared. At the time of the application for a postponement, all four of the company’s witnesses had testified, and the company intended to call no further witnesses. The last remaining witness was the third respondent himself. After the postponement application was denied, the company closed its case.

[8] The third respondent called only Mohale, and his testimony may briefly be summarized as follows:

8.1 Mohale admitted that he had said, to Mushwana, “let the boys do the work” though he saw nothing wrong with this.

8.2 Mohale admitted that he had called the human resources manager, Swart, corrupt, but maintained there was nothing wrong with it.

8.3 Mohale testified that another senior manager, Scott, had victimized him because of his membership of PTAWU. There was a conspiracy against him.⁴ He accused all the managers of the company, who had testified, of lying.⁵

⁴ Record: Transcript p113 lines 19 – 21

⁵ Record: Transcript p124 lines 10 – 13

8.4 Mohale never threatened to burn Mushwana. Instead, he said PTAWU would beat NUFBWSAW and would burn it to death.⁶ Importantly, Mohale also testified:

“He will burn to death, Mr Vincent.⁷ I was talking about the two unions. So the names of Vincent and Mr Baloyi⁸ was (inaudible) because you are the leaders of the organisation. But here we are talking about the challenges between the two unions.”⁹ (own emphasis)

8.5 Mohale admitted that he had approached Mushwana on the same day, following his suspension. He tried to recruit Mushwana to PTAWU, and did so in the same strong manner he had been taught by Mushwana - when he had been a member of NUFBWSAW.¹⁰ Mohale testified that he had a friendly relationship with Mushwana, they gambled together at the casinos, and approached him in that spirit.

8.6 Mohale conceded that he questioned why blacks (Maja) was being asked to sign his suspension notice, as a witness.¹¹

8.7 Mohale testified that Mushwana was the key to NUFBWSAW and *“once Mr Mushwana get out (sic) from that union it means the union of NUFBWSAW will be dead, disappear.”¹²*

8.8 Mohale repeatedly denied that he had used the slogan “Amandla”, when he addressed the workforce that morning, on 26th May.¹³ Mohale stated

⁶ Record: Transcript p113 lines 1 – 11

⁷ Mr Vincent is, or was, an official of the NUFBWSAW.

⁸ Mr Baloyi is, or was, an official of the PTAWU.

⁹ See fn. 3 above.

¹⁰ Record: Transcript p114 lines 9 – 15

¹¹ Record: Transcript p156 lines 5 – 15

¹² Record: Transcript p115 lines 17 – 19

¹³ Record: Transcript p109 lines 4 – 22

that he had previously used the same slogan and he had apologized to management for that. Mohale did not explain why he had done so again despite his earlier apology. He did not explain when exactly he had done so - given that he had only recently become a shop steward. He did not explain why management had not disciplined him earlier. And, finally, he did not explain why management permitted him to address the workforce again, when it viewed his earlier conduct poorly. Under cross-examination, Mohale could not reconcile his testimony with the minutes of the disciplinary hearing where, apparently, he had admitted using the slogan on 26 May.

Arbitration award

[9] The commissioner found that the third respondent was guilty of all the misconduct for which he was charged, except for the charge that he threatened to burn Mushwana to death. Ultimately, however, the commissioner found, the misconduct did not warrant dismissal.

[10] The commissioner made the following findings, which are significant:

10.1 The commissioner found that the third respondent used the slogan "Amandla" despite his evidence to the contrary. The commissioner did not explain why he rejected the version of the third respondent. The commissioner found that the slogan was not unreasonable conduct and caused no harm. However, the commissioner did not deal with the fact that the third respondent was addressing the entire workforce, including members of a rival union, and non-union members. The commissioner found that the third respondent had apologized for using the slogan, despite the testimony from the third respondent to the contrary.

10.2 The commissioner found that the third respondent had approached Mushwana and asked him to sign PTAWU membership forms but there was no intimidation or coercion. The commissioner reasoned that there was no

coercion because the third respondent did not return for the forms he had left with Mushwana.

10.3 The commissioner found that the third respondent called Swart corrupt, and this is a dismissible offence. However, the commissioner reasoned, the employee had a clean record, and was capable of being trained and corrected. The commissioner referred to the absence of evidence from the employer that the employee was not capable of being rehabilitated.

Legal principles

Review applications in general

[11] The arbitration process and the resulting arbitration award both constitute administrative action. Accordingly, section 33(1) of the Constitution requires that the process and the outcome must be lawful, reasonable, and procedurally fair.

[12] It is in this context that the review test¹⁴ applicable to arbitration awards issued by the CCMA and Bargaining Councils, was formulated, as follows: *is the arbitration award one which no reasonable commissioner could reach on the material before him or her?* It is known as the “reasonableness test.”

[13] As to what is reasonable, this must be determined by the circumstances of each case. The court must consider factors such as the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected.¹⁵

¹⁴ *Sidumo and another v Rustenburg Platinum Mines Ltd & others* (2007) 28 ILJ 2405 (CC) at para [110]

¹⁵ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and others* 2004 (4) SA 490 (CC) at para [45]

[14] It is important to remember that reasonableness embraces a wide range of outcomes several of which may be reasonable.¹⁶ The courts have warned that the award, or outcome, must not be evaluated on a piecemeal basis, but on the totality of all the evidence.

[15] Where a commissioner fails to apply his mind to the material issues, this will usually indicate that the outcome is unreasonable or that the nature of the enquiry was misconceived. However, when a mistake of fact or law does occur, what matters is its materiality – and whether it had a distorting effect on the outcome.¹⁷

Grounds of review

[16] The applicant alleges that the award is unreasonable because it is not grounded in the evidence. In essence, the applicant contends that:

16.1 The award was unreasonable and the commissioner reached conclusions not justified by the evidence;

16.2 The third respondent failed to put his own version, regarding his sloganeering at the meeting, with the workforce, on 26 May;

16.3 The commissioner ignored the evidence that the third respondent admitted to sloganeering at his disciplinary hearing;

16.4 The commissioner unreasonably refused to grant a postponement when this was critical to the applicant's case;

16.5 The commissioner ignored evidence that Mohale had threatened strike action if NUFBWSAW was permitted to hold meetings;

¹⁶ *Goldfields Mining SA (Pty) Ltd v CCMA and others* (2014) 35 ILJ 943 (LAC) at para [14]

¹⁷ *Head of the Department of Education v Mofokeng and others* [2015] 1 BLLR 50 (LAC) at para [33]

16.6 The commissioner ignored evidence that Mohale had insulted Swart by calling her corrupt;

16.7 The commissioner ignored evidence that Mohale had tried to coerce Mushwana into signing a PTAWU membership form;

16.8 The commissioner ignored the fact Mohale's testimony that management was conspiring against him was never put to the company's witnesses.

Analysis of the grounds of review

[17] The applicant sought a postponement on the basis that it wished to prepare a transcript of a meeting to demonstrate that the third respondent was contradicting his earlier statements. The applicant argued that it did not foresee that this would become disputed.

[18] In arbitrations, commissioners are enjoined to proceed with haste and expedition, but they are also enjoined to proceed fairly considering the interests of both parties.¹⁸ Commissioners must, of course, weigh the reasons for the postponement. Commissioners must consider whether the postponement is sought as a delaying tactic. Taking all the relevant factors into consideration, I do not accept that the commissioner exercised his discretion in a judicial, reasonable, and fair manner:

18.1 First, it was readily apparent that the reasons for the postponement was genuine. True, it is arguable that the company should have been better prepared, but this did not mean the reason was not genuine.

18.2 Second, at the time of the request, the company had already called and completed the evidence of all four of its witnesses - in less than a single

¹⁸ Section 138(1) of the LRA states: "*The commissioner may conduct the arbitration in a manner that the commissioner considers appropriate in order to determine the dispute fairly and quickly, but must deal with the substantial merits of the dispute with the minimum of legal formalities.*"

day. This was clearly no attempt to delay the resolution of the dispute. For all intents and purposes, the company was ready to close its case.

18.3 Third, the prejudice to the third respondent was not likely to be significant. A postponement would have delayed finality to no more than the next sitting. On the other hand, the prejudice to the applicant was severe, and disproportionate. It effectively prevented the company from contradicting Mohale in relation to a critical issue. It prevented the company from contradicting the version of Mohale in a manner that could not be denied, a transcript of an audio recording.

[19] Of course, CCMA arbitrations are administrative tribunals and subject to less stringent standards than courts of law, but the principles observed by our courts still serve as important guidelines.¹⁹ It is trite that “... *a court should be slow to refuse to grant a postponement where the true reason for a party's non-preparedness has been fully explained, where his unreadiness to proceed is not due to delaying tactics, and where justice demands that he should have further time for the purpose of presenting his case*”.²⁰

[20] In the circumstances, the refusal to postpone the dispute denied the applicant its right to a fair hearing. This was a reviewable irregularity and, on its own, justifies the reviewing and setting aside of the award.

[21] In addition, the commissioner misconstrued the evidence. The third respondent denied that he had use the slogan “Amandla” at the meeting of 26 May, and denied that he had apologized for its usage at the meeting of 26 May. Aside

¹⁹ In *Exxaro Coal (Pty) Ltd & another v Chipana & others* (2019) 40 ILJ 2485 (LAC) while debating the admission of hearsay evidence in arbitrations before the CCMA, at para 35, Coppel JA stated: “*While this approach appears to introduce some measure of formality one would rather have that than unfairness. Some formality is not anathema to arbitration proceedings in the CCMA. Section 138 does not ban all formality — it merely requires ‘minimal formality’. In deciding on how much formality is permissible one must be careful not to sacrifice fairness on the altar of informality. Section 138 not only requires minimal formality, but also requires fairness and speed. An equitable balance must be struck so that none of these pre-eminent values are sacrificed.*”

²⁰ *Madnitsky v Rosenberg* 1949 (2) SA 392 (A) at 399

from forming the basis of one of the charges,²¹ this should have been taken into consideration when weighing the credibility of his evidence. The version from the third respondent on this issue was not only improbable, but it appeared to contradict his own evidence at the disciplinary hearing. This ought to have counted against Mohale. Instead, the commissioner found that Mohale had used the slogan, and apologized for it, thus demonstrating that his misbehaviour was capable of correction. The commissioner failed to appreciate that Mohale had denied using the slogan, and denied apologizing for it. This material error had a clear distorting effect on the outcome of the arbitration.

[22] It was common cause that Mohale had called Swart corrupt, or corruptive. It was also clear from the evidence that he was unrepentant, and lacked remorse. Mohale maintained that Swart was corrupt at the arbitration, despite being unable to prove this. The commissioner correctly found that the offence was serious and would, ordinarily, warrant dismissal. Despite this, the commissioner found that the accusation of corruption did not cause harm and Mohale was capable of being corrected, because of his clean record and years of service. In my view, this finding was unreasonable. The comment most certainly did cause harm. Mohale deliberately undermined a manager in front of several of her colleagues. The commissioner should have taken into consideration that Mohale was unable to justify the allegation, and that he lacked remorse. Instead of demonstrating remorse, Mohale denied that calling someone corrupt was an insult. This indicated that corrective action was inappropriate. This was not a situation where Mohale was acting in his capacity as a shop steward, in the exercise of his union duties, which could possibly have operated as an excuse for his conduct.²²

[23] The commissioner irregularly and improperly approached the evidence that Mohale had tried to coerce Mushwana into signing a PTAWU membership form. The commissioner reasoned that the fact that Mohale had not returned for the signed

²¹ I make no determination of whether it was fair, or appropriate, to charge the third respondent for making this comment. He was acting in his capacity as a shop steward. On the other hand, he was also in breach of his own undertaking to simply make an announcement.

²² *Association of Mineworkers & Construction Union on behalf of Ntuli v Ferroglobe Silicon Smelters (Pty) Ltd* (2025) 46 ILJ 1160 (LC) at para 64

forms demonstrated that there was no coercion. This was irrational. Mushwana was clearly concerned about it, as demonstrated by his further complaint to management. Mohale himself conceded that he had addressed the issue in a forceful manner. In addition, the commissioner failed to consider that Mohale was acting in direct defiance of an instruction not to approach, or communicate with, fellow employees during suspension. Plainly these errors had a material distorting effect on the outcome.

[24] Having accepted that Mohale committed misconduct, the commissioner was required to consider whether reinstatement was an appropriate remedy. He was duty bound to consider whether the trust relationship was intact. He was required to consider the evidence from Mohale that he was being victimized because of his membership of PTAWU, that there was a general conspiracy against him, and his accusation that all the managers, who had testified, were lying. This should have raised alarm bells, but did not feature.

Remedy

[25] For the reasons set out above, the arbitration award is unreasonable based on the totality of the evidence. The outcome is egregious. No reasonable decisionmaker could have reached the same outcome. The award falls to be reviewed and set aside.

[26] Where an award is set aside, section 145(4) of the LRA permits this court to determine the dispute in the manner it considers appropriate. It is appropriate to substitute the decision of a commissioner if all the available evidence is before the court, and little purpose would be served in a rehearing.²³ In this matter, I have been provided with a full record and had the benefit of full argument.

[27] Where the evidence of the third respondent conflicted with the witnesses of the applicant, I accept the version of the applicant. Their evidence was clear,

²³ *Auto Industrial Group (Pty) Ltd & others v Commission for Conciliation, Mediation & Arbitration & others* (2019) 40 ILJ 550 (LC) at para 60

corroborated, without contradiction, and credible. In addition, as discussed above, such evidence was aligned with the probabilities.

[28] In any event, it was common cause that the third respondent committed various serious acts of misconduct. On several occasions, he behaved in a divisive, insulting, and disrespectful manner toward senior management. He defied instructions issued by management. He suggested that black managers were pawns. He called another manager corrupt, without provocation. He intimidated, or attempted to intimidate, the foreman. His conduct, inevitably, and unnecessarily, escalated tensions between rival unions. He remained unrepentant and unremorseful throughout. His service and clean record cannot rescue him from this kind of behaviour. In the circumstances, the only fair sanction is that of dismissal.

Costs

[29] In labour disputes costs do not follow the result. There are no special circumstances which warrant a cost order, based on the dual considerations of law and fairness. Accordingly, no cost order is made.

Order

[30] In the circumstances, I make the following order:

30.1 The application to review and set aside the arbitration award issued by the second respondent, under CCMA case number LP5855-22, is reviewed and set aside;

30.2 The finding of the second respondent is substituted with a finding that the dismissal of the third respondent was procedurally and substantively fair.

Reynaud Daniels
Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

Mr Matthee

Cranko Karp Attorneys

For the Third Respondent:

Mr T Buthelezi – Official

PTAWU

LABOUR COURT