



**THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

Not Reportable  
Case No: JR 262/22

In the matter between:

**SACCAWU obo RAMOGOTWANE KAMOGELO**

**Applicant**

and

**COMMISSION FOR CONCILIATION, MEDIATION  
AND ARBITRATION**

**First Respondent**

**COMMISSIONER DHELIWE MAVUMBA**

**Second Respondent**

**CHECKERS (PTY) LTD**

**Third Respondent**

**Heard:** 17 June 2025

**Delivered:** 19 June 2024

---

**JUDGMENT**

---

**LENNOX, AJ**

[1] The Applicant (SACCAWU) seeks to review an arbitration award on behalf of its member Mr Kamogelo which was issued by the Second Respondent (the Commissioner) under case number GATW 6511-21 on 10 December 2021.

[2] The matter was called and only Ms Maitland, who appeared for the Third Respondent, Checkers (Pty) Ltd (Checkers) appeared. The matter stood down for Ms Maitland to establish why no representative from SACCAWU was present. Ms Maitland was advised that a representative of SACCAWU would be attending and later that there would be in attendance. As such the matter proceeded with only Ms Maitland making submissions.

[3] This matter harks back to the heady days of the Covid-19 pandemic when the wearing of face masks was a requirement when one was outside ones residence. Against this background Mr Kamogelo was charged by Checkers with failing to wear a mask. I pause to reflect that the charge as reflected in the arbitration award reflects a charge brought against another employee and that although this has been relied on by the Applicant, it is not the actual charge. This error on the part of the Commissioner is regrettable but not fatal to the award.

[4] Mr Kamogelo, in the arbitration proceedings, did not deny failing to wear the mask, he however argued that he should not have been dismissed, but rather that he should have been issued with a warning. The Commissioner found that the Applicant was aware of the rules imposed by Checkers as well as the relevant government regulations.

[5] The Commissioner further found that the witnesses for the Applicant provided contradictory versions as to whether the rule imposed by Checkers was known as Mr Mamogelo stated that he was aware of same whereas Mr Gumbi, a SACCAWU shop steward stated that no awareness of the rule was promoted by Checkers.

[6] The Commissioner found that a dismissal was appropriate due to the consequences which could follow from the failure to wear a mask.

[7] In respect of the evidence led before the Commissioner by Ms Boucher she stated the following in respect of the rule:

“Yes, we had internal memos and every Wednesday we had meeting complying with the Covid rules, explaining how far the progress is and the company expects of us. And in one of the internal memos.”

[8] What Ms Boucher was unable to refer to in cross-examination was an actual rule imposed by Checkers in respect of wearing masks but the record reflects a briefing note recording the discussion at a staff meeting held on 27 January 2021 in which employees were told to wear a shield and mask.

[9] It is appropriate to again record that at the time of the incident the wearing of masks was compulsory, and whatever debates raged about the benefits thereof, it was required. By extension it was known that masks had to be worn at work. This Mr Kamogelo accepted and stated:

“I know the rules but at least the company could have given me a warning for.”

[10] Ms Boucher dealt with this submission in her evidence as follows:

“No the company has dismissed people prior for not following the Covid regulations and rules.”

and

“It was not to determine, it is not up to me to determine the results of the hearing. That was up to the chairman.”

[11] Thus, the question before this Court in respect of the review is limited to whether the Commissioner committed a gross irregularity in finding that the dismissal was justified.

[12] In *Sidumo and another v Rustenburg Platinum Mines Ltd and others*<sup>1</sup> the test for review was stated as follows:

---

<sup>1</sup> [2007] 12 BLLR 1097 (CC).

“To summarise, Carephone held that section 145 of the LRA was suffused by the then constitutional standard that the outcome of an administrative decision should be justifiable in relation to the reasons given for it. The better approach is that section 145 is now suffused by the constitutional standard of reasonableness. That standard is the one explained in *Bato Star*: Is the decision reached by the commissioner one that a reasonable decision-maker could not reach? Applying it will give effect not only to the constitutional right to fair labour practices, but also to the right to administrative action which is lawful, reasonable and procedurally fair.”

[13] In *Sidumo* at paragraphs 78 and 79 the following test was stated by the majority in respect of the duties of a commissioner when determining the fairness of a dismissal:

“In approaching the dismissal dispute impartially, a commissioner will take into account the totality of circumstances. He or she will necessarily take into account the importance of the rule that had been breached. The commissioner must of course consider the reason the employer imposed the sanction of dismissal, as he or she must take into account the basis of the employee’s challenge to the dismissal. There are other factors that will require consideration. For example, the harm caused by the employee’s conduct, whether additional training and instruction may result in the employee not repeating the misconduct, the effect of dismissal on the employee and his or her long-service record. This is not an exhaustive list.

To sum up. In terms of the LRA, a commissioner has to determine whether a dismissal is fair or not. A commissioner is not given the power to consider afresh what he or she would do, but simply to decide whether what the employer did was fair. In arriving at a decision, a commissioner is not required to defer to the decision of the employer. What is required is that he or she must consider all relevant circumstances.”

[14] The Commissioner evaluated the fairness of the dismissal as follows:

“I accept the Respondent’s argument that the consequence of failure to wear a mask in the workplace has and could have dire consequences. As such, I find that the sanction of a dismissal be an appropriate sanction.”

[15] This matter differs from the facts in *Penbro Kelnick (Pty) Ltd v Commission for Conciliation Mediation and Arbitration and Others*<sup>2</sup>. In that case the employer issued warnings for not wearing masks, leading this Court to view a dismissal to be unfair after an initial final written warning was upgraded to a dismissal. The Court correctly concluded that:

“It has long been stated in *De Beers Consolidated Mines Ltd v CCMA & others*, that a dismissal should not be an expression of moral outrage or an act of vengeance, but rather should be a sensible operational response to risk management in the enterprise.”

[16] In this case Checkers led evidence that it dismissed other employees for the same offence. Different employers may approach the treatment of transgressions differently. They simply may not be inconsistent in applying same to their employees.

[17] There is no evidence of Checkers operating in a vengeful manner or from a position of moral outrage. As such there is no reason to conclude that the decision of the Arbitrator was outside the band of reasonableness and as such the review must fail.

[18] In respect of costs this is not a matter in which costs should follow the result.

[19] Accordingly, the following order is made:

Order

1. The application for review is dismissed.
2. There is no order as to costs.

M. A. Lennox  
Acting Judge of the Labour Court of South Africa

---

<sup>2</sup> [2024] 7 BLLR 759 (LC).

Appearances:

For the applicant: No appearance

For the respondent: /Ms S Maitland

Instructed by :

LABOUR COURT