



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JR 1505/23

In the matter between:

**SOUTH AFRICAN COMMERCIAL CATERING
AND ALLIED WORKERS UNION obo MANZINI,
MILDRED**

Applicant

and

**COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION**

First Respondent

COMMISSIONER KHOZA, GERALDINE

Second Respondent

CHECKERS HYPER VALENCIA

Third Respondent

Heard: 18 March 2025

Delivered: 9 May 2025 (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 is deemed to be 10h00 on 9 May 2025.)

JUDGMENT

PHEHANE, J

Introduction

[1] This is an application by the applicant union on behalf of its member, Ms Mildred Manzini (Ms Manzini) to review and set aside the arbitration award by the second respondent, in which award, the second respondent upheld the decision by the third respondent to overturn the sanction of its internal disciplinary hearing of a final written warning and replaced it with a sanction of a dismissal of Ms Manzini. Should this Court review and set aside the arbitration award, the applicant seeks reinstatement, alternatively, that the matter be remitted to the first respondent for a hearing *de novo* before a different commissioner.

[2] Although the second respondent records that she was to determine substantive fairness,¹ the second respondent was to determine both procedural and substantive fairness.² The second respondent ultimately found the dismissal of Ms Manzini to be both procedurally and substantively fair.

[3] The third respondent concedes the issue of procedural unfairness. Mr. Mndebele, for the third respondent, submits that three months' salary compensation would be a fair remedy. No counter-submissions were made by the applicant on this remedy.

[4] Therefore, the only issue that this Court is to determine is whether the second respondent's decision on substantive fairness is reasonable.

Factual background

[5] The background is largely common cause.

¹ Pleadings, arbitration award at para 3 on p 24.

² Reconstructed record, 5 5 at lines 14 to 18.

[6] Ms Manzini was employed by the third respondent as a customer services clerk at the time of her dismissal.

[7] Ms Manzini and a fellow employee, Ms Thandeka Hlatwayo (Ms Hlatwayo), engaged in a physical altercation in the workplace on 7 February 2023, when they fought in full view of customers and fellow employees. This conduct was captured on video footage, which was before the chairperson of the disciplinary hearing and the second respondent. This video footage was made available to the Court in an electronic format, as it formed part of the record of the arbitration proceedings.

[8] It was explained to the Court by Mr. Mndebele, that the video footage shows the other employee, identified in the papers as Ms Hlatwayo, pulling off the wig of Ms Manzini and Ms Manzini retaliates by holding Ms Hlatwayo down by her scarf to force her to put the wig back on Ms Manzini's head.

[9] The following is observed by the Court from the video footage: Ms Hlatwayo and Ms Manzini are inside a cubicle during operating hours, standing at a till. One other individual is present, observing. Ms Hlatwayo pulled off Ms Manzini's wig, exposing Ms Manzini's plaited hair. Ms Manzini immediately retaliated by forcibly pulling Ms Hlatwayo down to the ground with her left arm, and holding Ms Hlatwayo down; Ms Hlatwayo managed to get on her feet, and Ms Manzini, seating herself on a chair, held Ms Hlatwayo by her scarf. The scuffle ensues with Ms Manzini holding Ms Hlatwayo by the scarf while Ms Hlatwayo attempts to loosen herself from Ms Manzini's firm grip; an individual walks into the cubicle and observes the scuffle; this does not deter Ms Manzini, who retains her firm grip on Ms Hlatwayo's scarf until Ms Hlatwayo removes the scarf over her head and moves away from Ms Manzini. Ms Manzini approaches Ms Hlatwayo, wrestles with her and forces Ms Hlatwayo to pick the wig up from the ground, while holding Ms Hlatwayo forcibly by the collar, motioning her to put the wig back on her head while Ms Manzini takes a seat and continues to hold Ms Hlatwayo by the collar. When the wig is placed back on Ms Manzini's head by Ms Hlatwayo, Ms Hlatwayo moves away from Ms Manzini and picks up her scarf from the floor, as Ms Manzini fixes the wig on her head while seated.

[10] Both employees were subjected to separate disciplinary hearings before different chairpersons. Ms Hlatwayo was dismissed, but Ms Manzini was served with a final written warning for her conduct.

[11] The chairperson of Ms Manzini's disciplinary inquiry took into consideration the evidence by Ms Manzini that Ms Hlatwayo was the instigator of the violent conduct and that Ms Manzini acted in self-defence, was not the aggressor and was humiliated when the wig was removed from her head by Ms Hlatwayo.

[12] Faced with this sanction less than dismissal which, in view of the sanction of dismissal meted out against Ms Hlatwayo and the history of violent conduct in the workplace, the third respondent's Human Resources Manager, Mr Hageman considered the documentary evidence of Ms Manzini's disciplinary hearing and reviewed the decision by overturning the chairperson's decision of a final written warning and replacing it with a sanction of a dismissal. In so doing, Mr Hageman relied on the provisions of paragraph 37 of the third respondent's disciplinary procedure, which reads as follows:

'In order to ensure that there is consistency in sanction or where the sanction is too harsh or too lenient, the divisional HRM may, based on documentary evidence and the minutes of the disciplinary inquiry, vary the sanction imposed by the chairperson.'³

[13] Aggrieved with the review of the disciplinary hearing sanction by the third respondent, the applicant referred an unfair dismissal dispute to the first respondent, which was arbitrated by the second respondent, who issued the arbitration award that is the subject matter of this application.

Grounds of review

[14] The grounds of review, in essence, are:

³ Documentary record bundle, at p 66.

1. The issue before the second respondent concerned the principle of double jeopardy. The second respondent misconstrued and/or misapplied the principle of double jeopardy.

2. The second respondent found that the third respondent's reliance on clause 37 of its disciplinary code was justified. The applicant contends that failing to provide Ms Manzini an opportunity to be heard before reviewing the disciplinary hearing sanction offends against the maxim *audi alteram partem* and therefore, clause 37 is in conflict with section 35(3)(m) of the Constitution⁴ and consequently, the second respondent's decision is unlawful.

3. The second respondent disregarded the reasons that the chairperson of the internal disciplinary hearing took into account in meting out a sanction of a final written warning.

[15] In summary, the applicant categorises the conduct of the third respondent as double jeopardy. It contends that in failing to grant Ms Manzini the opportunity to be heard before replacing her sanction, the third respondent offended the principle of *audi alteram partem*, and therefore, her dismissal was both procedurally and substantively unfair. The applicant contends that the second respondent ignored the evidence relating to procedural unfairness and failed to apply her mind to the principle of double jeopardy. In the premises, the applicant contends that the arbitration award is unreasonable and therefore, reviewable.

Opposition

[16] It was submitted by Mr Mdebele that the ground of review on unlawfulness is unmeritorious, as the principle of subsidiarity requires that this review application should fall under the purview of the Labour Relations Act⁵ (LRA). Section 145 of the LRA sets out the circumstances under which an arbitration award may be reviewed and set aside, and the review test is a reasonableness test as set out in *Sidumo and*

⁴ Constitution of the Republic of South Africa, 1996.

⁵ Act 66 of 1995, as amended.

Another v Rustenburg Platinum Mines Ltd and Others.⁶ Therefore, the ground of review of unlawfulness premised on section 35 of the Constitution must fail.

[17] The third respondent further contends that the review ground premised on double jeopardy is ill-conceived, as the third respondent was empowered by clause 37 of its disciplinary code and procedure, in circumstances where there was inconsistency of discipline or where the sanction was too lenient, as in the present matter, to review that sanction of the disciplinary hearing. Therefore, the principle of double jeopardy does not arise, and this review ground ought to be dismissed.

[18] The third respondent referred this Court to *Samson v Commission for Conciliation, Mediation and Arbitration and Others*⁷ (*Samson*) where this Court dealt with the review of an arbitration award, where, as in the present case, the employer overturned a sanction of a disciplinary hearing of a warning for serious misconduct and substituted the decision with a dismissal. The Court in *Samson* held that an employer is entitled to substitute a penalty with a harsher sanction when it is fair to do so.

[19] That there was an empowering provision permitting the third respondent to review the decision on the disciplinary hearing on the grounds as stated in the empowering provision distinguishes the facts of this present case from those in *South African Revenue Service v CCMA (Kruger)*⁸ (*Kruger*) on which the applicant relies. In *Kruger*, no empowering provision existed for the employer to overturn a decision of a disciplinary hearing - the disciplinary code provided that the decision of the disciplinary hearing is final and binding.

[20] The third respondent accordingly submits that it is only where there exists no empowering provision to overturn a disciplinary hearing that exceptional circumstances must exist before such a decision may be overturned. Put differently, the third respondent submits that it is not necessary for it to have shown that exceptional circumstances exist, warranting the overturn of the sanction of a

⁶ [2007] 12 BLLR 1097 (CC) (*Sidumo*).

⁷ (2010) 31 ILJ 170 (LC).

⁸ (JA 06/11) [2015] ZALAC 62 (8 December 2015).

disciplinary hearing, as it was empowered by clause 37 of its disciplinary code and procedure to overturn that sanction for reasons mentioned in clause 37.

[21] However, the third respondent further contends that not only did it consider inconsistency and the leniency of the sanction, but four further reasons were provided by Mr Hageman in overturning the sanction of a final written warning, which were the following:

1. Ms Manzini pleaded not guilty to the charge against her, however, she chose to retaliate;
2. Ms Manzini did not show remorse during the hearing;
3. She did not give an undertaking to refrain from such conduct; and
4. The incident occurred during trading hours in full view of customers and other employees.⁹

[22] The third respondent submits that in determining whether dismissal was the appropriate sanction, the second respondent considered the evidence before her and provisions of item 3(6) of Schedule 8 of the LRA in reaching her decision.

[23] Therefore, the third respondent contends the second respondent's decision on substantive fairness is reasonable and the review application, on this leg, ought not to succeed.

Analysis

Test on review

[24] The test on review is mentioned earlier in this judgment. It is trite and need not be repeated.

Unlawfulness and the doctrine of subsidiarity

⁹ Review finding, documentary records bundle at p 61.

[25] It is now well-established that disputes under the purview of the LRA, such as the present, do not concern unlawfulness, but fairness.¹⁰ Nothing further needs to be said in his regard, save a restatement on the doctrine of subsidiarity.

[26] In *Minister for Transport and Public Works: Western Cape and Others v Adonis and Others and a related matter*¹¹, the Supreme Court of Appeal restated this doctrine:

'It is necessary, first, to highlight that the principle of constitutional subsidiarity is part of our constitutional framework. The foundational norms of the Constitution are expressed in general terms. Where legislative and other measures have been enacted to realise the rights and obligations in the Constitution, the foundational norms espoused in the Constitution should find expression in such legislative measures. By way of example, the preamble to SPLUMA recognises that many people in South Africa continue to live and work in places defined and influenced by past spatial planning, land use laws, and practices, which were based on racial inequality, segregation, and unsustainable settlement patterns. It provides that it is the obligation of the State to realise the constitutional imperatives in sections 24–26 and 27(1) of the Constitution. Section 12(1) of SPLUMA imposes an obligation on the national, provincial and local governments to prepare spatial development frameworks. The statute, rather than the Constitution, is therefore the direct source of the rights and obligations relating to preparation of spatial development frameworks. It is to its statutory provisions that litigants must look in asserting their rights and the obligations owed to them.'

[27] In a similar vein, section 23 of the Constitution provides that everyone has the right to fair labour practices. One of the pieces of legislation that gives effect to this constitutional right is the LRA. Therefore, it is impermissible on the doctrine of subsidiarity for litigants to invoke section 23 of the Constitution to enforce their labour law rights and obligations. They are first to invoke the legislation enacted to give effect to the rights espoused in the Constitution. Section 35 of the Constitution, in

¹⁰ *Steenkamp and Others v Edcon Ltd* 2016 (3) SA 251 (CC).

¹¹ [2024] 3 All SA 49 (SCA).

any event, finds no application in labour law, as section 35 deals with the rights of arrested, detained and accused persons in the criminal justice system.

[28] That being said, the ground of review on unlawfulness premised on section 35 of the Constitution lacks merit.

Evidence at arbitration

[29] Ms Manzini faced an internal disciplinary inquiry in which she had to answer to charges of serious misconduct relating to having fought with a fellow colleague in full view of customers and staff members in breach of the third respondent's workplace rules and regulations.¹² The workplace rules and regulations of the third respondent as set out in the charge sheet, state that employees must at all times maintain the good reputation of the company, must not conduct themselves in any manner that may negatively affect the company's name; misconduct which brings the name of the company in disrepute is viewed in a serious light and may result in summary dismissal; misconduct that may affect the employment relationship, may result in summary dismissal; employees must at all times treat customers and all other employees with respect; the company does not tolerate any violent conduct whether verbal or physical in the workplace, and employees must refrain from threatening or acting in a violent or aggressive manner towards management, fellow employees, customers or suppliers; the company views any violent or aggressive conduct in a serious light and a breach of this rule may result in summary dismissal; finally, employees have a duty at all times to act in the best interest of the company which includes notifying the company of misconduct by other employees.

[30] The applicant admitted the incident as it was captured in the video footage.¹³

[31] Mr. Hagemann testified during the arbitration proceedings that he viewed the video footage and documents of the hearing when he reviewed the sanction of the disciplinary hearing.

¹² Founding affidavit at pp 4 to 5.

¹³ Reconstructed record, p3 at lines 1 to 8.

[32] After viewing and considering the video footage, the second respondent found, and correctly so, that the applicant's version that she was provoked by Ms Hlatwayo did not align with what the video footage depicted and that Ms Manzini's reaction was very violent.

[33] On the evidence before the second respondent, Ms Manzini admitted being aware that physical altercations or violent conduct were not allowed in the workplace. Ms Manzini further admitted being aware that employees were required to report violent conduct. However, she failed to do so. The reason provided by Ms Manzini for failing to report the incident was because Ms Hlatwayo apologised and the issue had been resolved – her wig had been returned to her, therefore, there was no need to report the incident to management.

Double jeopardy and managerial review of a sanction

[34] The principle of double jeopardy applies in situations where an accused employee is subjected to more than one disciplinary hearing on charges arising from the same set of facts.

[35] The managerial review of a sanction occurs when the decision of a disciplinary chairperson is overturned and a harsher sanction is imposed by a higher authority. Strictly speaking, this does not amount to double jeopardy, as a second disciplinary hearing is not held.

[36] Therefore, the decision in *BMW (SA) (Pty) Ltd v van der Walt*¹⁴ (*BMW*), on which the applicant relies in support of its review ground of double jeopardy is irrelevant. This is because in *BMW*, a second disciplinary hearing was held on new facts, thus triggering the principle of double jeopardy. This is not what occurred in the present case. Rather, there was a review of the disciplinary hearing sanction on the same facts, and no second hearing was held.

¹⁴ [2000] 2 BLLR 121 (LAC).

[37] If I am wrong that *BMW* does not apply and that the principle of double jeopardy is triggered on the facts of this case, then, as the Court held in *BMW*, an employee may be subjected to further disciplinary action provided that it is fair in the circumstances to do so.

[38] Our Courts have dealt with the overturning of disciplinary sanctions by management in higher positions and have held that fairness is the ultimate yardstick.¹⁵

[39] In *National Union of Mineworkers obo Members and Others v ArcelorMittal South Africa Limited and Others*,¹⁶ this Court confirmed that where there is no collective agreement regulating discipline in place, an employer may substitute the sanction of a disciplinary chairperson if it is fair to do so and after engaging the employee, either in another disciplinary inquiry or by having the employee make submissions.

[40] The Court in *Samson* held that *'the law as it presently stands is that an employer is entitled, when it is fair to do so (subject to the qualification that it is only in exceptional circumstances that it will be fair) to revisit a penalty imposed and substituted with a more severe sanction'*.¹⁷

[41] Therefore, the finding by the second respondent that clause 37 of the third respondent's disciplinary code and procedure entitled it to review the sanction less than dismissal and replace it with a harsher sanction, cannot be faulted and is reasonable on the totality of evidence before her.

[42] In determining substantive fairness and whether dismissal was the appropriate sanction, the second respondent considered Ms Manzini's version that she was not the aggressor, which version she found, in view of the video footage, to be false. In addition, the second respondent considered the inconsistent application

¹⁵ *Samson supra*. See also: *Branford v Metrorail Services (Durban) and Others* (2003) 24 ILJ 2269 (LAC); *Member of the Executive Council for Finance, KwaZulu-Natal and Another v Dorkin NO and Another* (2008) 29 ILJ 1707 (LAC).

¹⁶ (JR802/18) [2020] ZALCJHB 167 at para [30].

¹⁷ *Samson supra* at para [12].

of discipline in view of Ms Hlatwayo's dismissal for the same offence and found that dismissal was the appropriate sanction.

[43] In view of the foregoing, on the totality of evidence before the second respondent, the decision on substantive fairness is reasonable and there is accordingly no basis for this Court to interfere with this finding.¹⁸

[44] Although the third respondent's disciplinary code and procedure does not make a provision for representations to be submitted by the employee during a review of a disciplinary sanction, in keeping with the foregoing authorities that fairness is the yardstick, the concession by the third respondent regarding the challenge of procedural fairness is frank and has narrowed the issues this Court is to decide. The offer by the third respondent to pay Ms Manzini compensation equivalent to three months' salary is very generous in the circumstances of the seriousness of the offence of a physical, violent altercation in the workplace and in view of her lack of remorse, which she persisted with in these proceedings.¹⁹

Conclusion

[45] In view of the foregoing, the review application partially succeeds.

[46] In the matter of *Union for Police Security and Corrections Organisation v South African Custodial Management (Pty) Ltd and Others*²⁰, the Constitutional Court stated that, in labour law disputes, generally, costs do not follow the result. The requirements of the law and fairness indicate that this is a matter where the payment of costs should not be awarded. Therefore, I exercise my discretion not to make an order as to the payment of costs.

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

Order

¹⁸ *Sidumo supra*.

¹⁹ *Nelson Mandela Bay Metropolitan Municipality v Independent Municipal and Allied Trade Union on behalf of Tshabalala and Others* (2019) 40 ILJ 1021 (LAC).

²⁰ (2021) 42 ILJ 2371 (CC).

1. The review application relating to substantive fairness is dismissed.
2. The review application relating to procedural fairness succeeds.
3. The finding in the arbitration award relating to procedural fairness is set aside and is substituted with an order that the dismissal of the applicant member, Ms Mildred Manzini is procedurally unfair.
4. The third respondent is to pay Ms Manzini compensation equivalent to three months' remuneration calculated as at the date of her dismissal.
5. There is no order as to costs.

M. T. M. Phehane

Judge of the Labour Court of South Africa

Appearances:

For the applicant: Mr. Piet Ngoato of SACCAWU.

For the third respondent: Adv V. Mndebele

Instructed by: Wilken Incorporated