



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

Not Reportable/Of interest to other judges

Case no: JR 589-2021

In the matter between:

**BOMBELA OPERATING COMPANY
(PTY) LTD**

First Applicant

and

**THE COMMISSION FOR
CONCILIATION, MEDIATION &
ARBITRATION**

First Respondent

**COMMISSIONER N MLSHUNGU
(N.O.)**

Second Respondent

ITUMELENG LEHLOKWA

Third Respondent

Heard: 24 October 2024

Delivered: 11 July 2025

Summary: (Review – arbitrator finding suspension substantively and procedurally unfair – disputed right to make representations before a precautionary suspension not invoked – no basis for finding of procedural

unfairness – Constitutional Court decision in *Allan Long v SAB* curtailing scope for substantive challenge to the reasons for suspension in a precautionary suspension – award set aside)

JUDGMENT

LAGRANGE, J

- [1] This is a twofold application to reinstate a review application which had lapsed, and if reinstated, to review an award in which an employee, the third respondent ('Lehlokwa') was found to have unfairly suspended for about a month and was awarded one month's salary as compensation.

Application to reinstate the review application

- [2] The review application was launched on 08 April 2021. On 16 April 2021, the CCMA lodged the record with the Registrar of the Court. By the end of July 2021, the transcript of the arbitration and Bombela's supplementary affidavit were filed and Lehlokwa filed his answering affidavit by 11 August 2021 and a replying affidavit was filed on 23 August 2021. On 5 April 2022, Bombela applied to have the application enrolled. In May 2023 Lehlokwa filed an application under Rule 11 of the Labour Court rules to 'strike off' the review application. This application was prompted by Bombela filing a bond of security in the previous month for the value of the compensation. Lehlokwa was of the view that Bombela should have furnished the security immediately the review application was launched and could not do so nearly two years later. On 28 June 2023 Bombela filed a further request to have the matter set down.
- [3] It came to the attention of Bombela's attorneys that more than a year had elapsed between the time that the review application was filed and the first request to enrol the review application had been made. In terms of clause 11.2.7 of the Labour Court Practice Manual ('the practice manual') the

review application had lapsed as Bombela was about 14 days out of time in requesting the enrolment of the matter. Detailed reasons were provided why the attorney's system for managing review matters failed, owing mainly to staff changes. Accordingly, Bombela applied to reinstate the application.

- [4] Having considered the matter I am satisfied the delay of 14 days was not unduly prejudicial to Lehlokwa in terms of prolonging the review application process, the explanation for the delay appears to be *bona fide* and Bombela's conduct of the review application demonstrates a ongoing intention to prosecute the review to finality. The reinstatement application was not formally opposed by Lehlokwa. His rule 11 application was based on the timing of the issue of the bond of security which did not trigger any of the deeming provisions in the practice manual and once the security bond was filed, he could not enforce the award, until the conclusion of the review proceedings. In the circumstances, I believe it is an appropriate to reinstate the application.

Background

- [5] Lehlokwa, a train driver and a shop steward of the trade union NUMSA was suspended on 21 September 2020 following his alleged dissemination of confidential documents. A dispute was referred to the CCMA claiming that the suspension, which was on pay, constituted an unfair labour practice.
- [6] Lehlokwa was handed his suspension letter at the end of a shift. The letter stated that he was suspended immediately pending the outcome of an investigation "*for disseminating company's confidential documents*" (sic). The letter further advised that he would remain suspended pending the outcome of the investigation and nature and purpose of the suspension was precautionary.
- [7] It is common cause that Lehlokwa had forwarded Bombela's operating contract and financial statements to NUMSA. It also appeared to be common cause that he was not the only employee who received the

documents which were sent from an unidentified person from an internet café.

- [8] He enquired of his manager what the reason for his suspension was and he was told to read the letter. When he asked the same of the HR Executive, Ms P Makhubo, he was simply asked why he had disseminated 'the documents' and she advised she could not help him.
- [9] On 22 September 2020, NUMSA wrote to Bombela asking why it had not followed the recognition agreement which required Bombela to inform the union when the company intended taking disciplinary action against a shop steward. It demanded the upliftment of the suspension. Bombela responded that it had no obligation to consult because it had suspended Lehlokwa in accordance with the *Constitutional Court decision in Long v South African Breweries (Pty) Ltd and Others*¹, which was handed down on 19 February 2019, where the court held:

[24] In respect of the merits, the Labour Court's finding that an employer is not required to give an employee an opportunity to make representations prior to a precautionary suspension, cannot be faulted. As the Labour Court correctly stated, the suspension imposed on the applicant was a precautionary measure, not a disciplinary one. This is supported by Mogale, Mashego and Gradwell. Consequently, the requirements relating to fair disciplinary action under the LRA cannot find application. Where the suspension is precautionary and not punitive, there is no requirement to afford the employee an opportunity to make representations.

[25] In determining whether the precautionary suspension was permissible, the Labour Court reasoned that the fairness of the suspension is determined by assessing first, whether there is a fair reason for suspension and secondly, whether it

¹ 40 ILJ 965 (CC); 2019 (5) BCLR 609 (CC) ; [2019] 6 BLLR 515 (CC)

prejudices the employee. The finding that the suspension was for a fair reason, namely for an investigation to take place, cannot be faulted. Generally where the suspension is on full pay, cognisable prejudice will be ameliorated. The Labour Court's finding that the suspension was precautionary and did not materially prejudice the applicant, even if there was no opportunity for pre-suspension representations, is sound."

(footnotes omitted – emphasis added)

- [10] Subsequent to his suspension, Lehlokwa referred an unfair labour practice dispute alleging that the suspension amounted to unfair disciplinary action. By the time the arbitration hearing convened, Lehlokwa's disciplinary enquiry had already been finalised, and he had been dismissed. Only the unfair suspension dispute was before the arbitrator.
- [11] At the time the Constitutional Court judgment was handed down and when Lehlokwa was suspended, Bombela had a disciplinary procedure and code which provided for suspension in circumstances where a disciplinary hearing is contemplated, which stated:

"5.6 Suspension

5.6.1 An employee may be suspended on full pay pending the disciplinary hearing, if circumstances are such that the employment relationship, or the relationship between employees or the disciplinary process could be harmed by the presence of the employee on company ubss.

5.6.2 Such suspension does not form party of the disciplinary sanction and is merely implemented as a temporary measure.5.6.

5.6.3 The employee should be given an opportunity to make representations should he/she wish to challenge

the suspension. The representation made by the employee, if any, must be taken into account by the manager prior to the decision being taken to suspend the employee.

5.6.4 Notice of suspension will be given to the employee in writing.

5.6.5 The suspension will be on full pay until the conclusion of the investigation or enquiry.”s

(emphasis added)

- [12] Lehlokwa testified and led evidence of a few former colleagues. Only the employer representative at the hearing testified for Bombela. It must be said that much of the ‘evidence’ led by both parties consisted of witnesses giving their interpretation of clause 5.6.3. and the effect of the *Long* decision. Consequently, much of it consisted of legal argument rather than addressing factual issues.
- [13] During the arbitration, Lehlokwa argued that the Constitutional Court’s decision could not alter the existing policy of the company. He claimed *Long’s* case was distinguishable from his own, because in *Long* there was no suspension provision like clause 5.6 of Bombela’s disciplinary code and procedure. He also argued that clause 5.6 did not make provision for a precautionary suspension pending an investigation. He rejected Bombela’s argument that clause 5.6 only applied if it was aligned with the case law. His response was that Bombela should have amended it if it was at odds with case law. He also said he unaware that the company was in the process of reviewing all their disciplinary codes in line with recent case law.
- [14] Bombela claimed that the policy had been drafted at a time when case law required it to provide for an opportunity for an employee facing precautionary suspension to make representations. That need fell away in light of the *Long* decision. Bombela’s representative at the arbitration, Ms V Mphagi (‘Mphagi’) also testified. She conceded that Lehlokwa had not been given a chance to make representations and that, before the

provision was updated to align with the principle in *Long*, employees would not have been aware that representations were no longer required in the case of precautionary suspensions. She disputed Lehlokwa's claim that clause 5.6.1 did not provide for precautionary suspension as the clause described the same thing, namely suspension pending the outcome of an investigation or disciplinary process.

- [15] Lehlokwa said he did not know what a precautionary suspension was, but a suspension pending a disciplinary enquiry was part of the disciplinary process and therefore amounted to disciplinary action. One of his witness, Mr M Mmbadi ('Mmbadi'), when pressed in cross-examination that there was no difference between precautionary suspension and an act of suspension under 5.6.1, answered rhetorically,

"...for us to know what is precautionary we need to know what is precaution. So for precaution to exist it means you are preventing something. So what is it that you are preventing Mr Lehlokwa not to do further for it to justify the precautionary suspension? Could Mr Lehlokwa tamper with the evidence? Could Mr Lehlokwa influence witnesses? Could Mr Lehlokwa, I don't know, jeopardise the investigation itself or witnesses, we don't know (inaudible)."

- [16] It emerged from the evidence that the investigation was concluded in just under a month and it was only after the investigation was concluded that NUMSA was notified that Bombela intended taking disciplinary action against Lehlokwa, after which it did consult with the union. This accorded with the principle that the employer should consult with a union when it intended taking disciplinary action against a shop contained both in the recognition agreement and Item 4(2) of the Code of Good Practice: Dismissal². Mphagi defended Bombela's failure to consult with NUMSA before suspending Lehlokwa because his suspension did not

² Schedule 8 to the LRA.

amount to disciplinary action. She therefore reasoned that NUMSA's objection was premature.

- [17] When Mphagi was asked why Lehlokwa's suspension was necessary, her first response was to say that by forwarding the confidential information he could not be trusted and as a shop steward he was in an influential position and potentially able to interfere with the investigation. Later, she emphasised that the primary reasons were the trust issue and the severity of the misconduct. She claimed the company had disciplined all the employees it was aware of who had circulated the information received.
- [18] The employer representative put it to Mmbadi that the reason Lehlokwa was suspended was because the company could not trust him and he also had the potential to influence employees in his position as a shop steward, by 'disharmonising the environment'. Mmbadi disputed Lehlokwa could have that influence and claimed that other people who had access to the documents were not suspended. He suspected that Lehlokwa was suspended because negotiations between NUMSA and Bombela were underway at the time.

The arbitrator's reasoning

Procedural fairness

- [19] The arbitrator found that Bombela had a valid disciplinary code in place, which it had not yet amended to align the suspension provision with the *Long* judgment. He further decided that the suspension provision in the disciplinary code was no different to a precautionary suspension. As such, Lehlokwa was entitled to be allowed to make representations when he was placed on precautionary suspension. He noted that Lehlokwa's witnesses were unaware of any different rule applying to so-called precautionary suspensions. In any event, there was no need to distinguish between suspension under the code and precautionary suspension.
- [20] In short, the arbitrator reasoned that clause 5.6 included precautionary suspensions. Accordingly, a precautionary suspension should be preceded by an opportunity to make representations, noting that the

clause had not been updated to take account of the *Long* decision when Lehlokwa was suspended. Bombela's reliance on case law rather than what was expressly stated in clause 5.6 was procedurally unfair to Lehlokwa.

Substantive fairness

- [21] The arbitrator found that Lehlokwa did not have access to the confidential documents he had forwarded and could not tamper or jeopardise the investigation in any form. Although precautionary suspension did not constitute disciplinary action, in Lehlokwa's case the employer had directly linked the suspension to the allegedly serious nature of the misconduct and the untrustworthiness he had demonstrated by forwarding the email to certain individuals in NUMSA. He did not handle the documents or the systems relating to them on a daily basis and there was no justification for excluding him from the workplace. His influence as a shop steward had no bearing on his ability to interfere with the investigation.
- [22] Accordingly, he concluded that Bombela's suspension of Lehlokwa was not for any justifiable reason apart from not being conducted in a fair manner. Consequently, he found Lehlokwa's suspension was also substantively unfair. In view of the fact Lehlokwa had already been dismissed at the time of the arbitration he awarded him one month's remuneration.

Grounds of review

- [23] Bombela's grounds of review are summarised below. Although portrayed as grounds of review, each ground is something of a composite bundle of issues and there is a degree of overlap between them. They were also cast more in the form of grounds of appeal.
- [24] Ground 1: The arbitrator erred in law in confusing the law relating to precautionary suspension with the law relating to disciplinary action. The judgment in *Long* which held that there was no requirement to afford an employee a hearing when a precautionary suspension is contemplated overturned all previous judgments to the contrary including those relied on

by the arbitrator. Secondly, the suspension provision is part of the company's own code, and part of a collective agreement. Therefore, any considerations which might apply if it was a collective agreement are not relevant.

- [25] Ground 2: The arbitrator erroneously inferred that the suspension provision conferred a right on Lehlokwa a right to be heard before his suspension. Clause 5.6 is an internal policy guideline which had never been revised. It expressly states that suspension does not form part of the disciplinary sanction and it was not necessary to demonstrate that he might have jeopardised the investigation, because the clause permits suspension in cases where the employee's conduct had harmed the employment relationship.
- [26] In so far as the code did provide for representations to be made, it leaves it up to the employee to first indicate he wished to challenge the suspension. Accordingly, Lehlokwa had to show that he had informed Bombela he wished to do so. The clause further anticipates that representations might not be made, which Bombela argues supports the interpretation that *audi alterem* is not mandatory before a suspension.
- [27] Ground 3: The arbitrator conflated pre-dismissal consultation procedures which apply to shop stewards with the pre-requisites for a suspension.
- [28] Ground 4: The arbitrator irrationally misconceived the nature and purpose of precautionary suspension when she found that the suspension provision of the code is no different from precautionary suspension and as such the employee was entitled to make representations. Further, the definition of suspension in section 186(2)(b) of the Labour Relations Act, 66 of 1995, clearly only envisaged that suspension could be construed as an unfair labour practice if it was a form of disciplinary sanction, whereas the suspension contemplated in the firm's code clearly precedes disciplinary action. Lastly, Bombela takes issue with the arbitrator's finding it could not justify the suspension, because she failed to understand that it was the very fact that he was a shop steward, which made his presence undesirable.

[29] Ground 5: Bombela argues that the relief granted was unreasonable because the arbitrator gave no reasons for the amount of compensation he awarded and ignored the principle enunciated in *Long* that suspension on full pay materially eliminates any prejudice the employee might suffer from being suspended.

[30] In argument, Bombela emphasised the following points:

30.1 The arbitrator, acknowledged the *Long* decision, but made an error of law by effectively ignoring its import and preferring to rely on *POPCRU obo Masemola and Others v Minister of Correctional Services*³ and *Mogotlhe v Premier of the North-West Province and Another*⁴, neither of which are factually comparable with Lehlokwa's case or the facts in *Long*.

30.2 The arbitrator failed to appreciate that the disciplinary code was not embodied in a collective agreement. As a unilaterally drafted policy, the code could be changed by Bombela and therefore could not be interpreted as binding on Bombela.

30.3 Moreover, clause 5.6.3 of the code only required Bombela to consider representations from an employee if they wished to challenge the suspension, which Lehlokwa never indicated he wanted to.

30.4 The arbitrator misconstrued the obligation of an employer to consult with a trade union before taking disciplinary steps against a shop steward as extending to the suspension of an employee, based on another error of law which equated the suspension with disciplinary action.

30.5 Lastly, it reiterated the complaint that the arbitrator gave no reasons for her award of compensation and could not have made such an award if she had proper regard to the principle stated in *Long* that recognisable prejudice to an employee suspended on full pay substantially ameliorates any material prejudice suffered by an

³ (2010) 31 ILJ 412 (LC)

⁴ (2009) 30 ILJ 605 (LC)

suspended employee even if they are denied a chance to make pre-suspension representations⁵.

Evaluation

- [31] A central question in this review is whether the arbitrator made material errors of law in interpreting Lehlokwa's entitlement to make representations resulted in his suspension being procedurally and substantively unfair, in circumstances where he never made any. Secondly, even if the suspension was unfair, then the rationale for the payment of compensation needs to be scrutinised.
- [32] The first point to make is that the arbitrator did not decide that Lehlokwa's suspension amounted to disciplinary action, nor did he conflate pre-dismissal procedures applicable to shop stewards with pre-requisites for suspension. Thus, Bombela's claim he conflated disciplinary action with a precautionary suspension is unfounded. It is true that NUMSA and Lehlokwa did conflate the two. However, the arbitrator found that the justification advanced for Lehlokwa's suspension was the serious nature of the misconduct and his untrustworthiness, which he did not regard as legitimate grounds for suspension. The arbitrator assessed whether there was a legitimate justification for the suspension, which is relevant to the substantive fairness thereof.
- [33] Did the arbitrator nevertheless erroneously conclude that *Long* was inapplicable? It is true that she relied on two judgments which were not on all fours with Lehlokwa's case. In *Mogotlhe* the applicant was not asserting a claim based on an unfair labour practice and in *Masemola* the application took the form of an urgent review of the employer's suspension decision and was not expressly founded on an unfair labour practice claim. However, in the latter case the court did find that the employees had a right to make representations before they were suspended⁶. Nonetheless, that principle has clearly been reversed by the decision in *Long*, in which the Constitutional Court accepted that as long

⁵ *Long* at paragraph 25.

⁶ *Masemola* at paragraph 36.

as there was a fair reason for the suspension, such as to allow an investigation to take place, and no demonstrable prejudice is suffered by the employee, the absence of a right to make representations prior to the suspension would not amount to an unfair labour practice.

- [34] Whether or not the arbitrator cited outdated precedents, the primary reason the arbitrator did not follow *Long* was that Bombela had not amended its code to do away with the right to make representations under clause 5.6.3. Bombela argues that it was irrelevant whether its code had been updated or not because *Long* nullified the right in clause 5.6.3. The problem with this reasoning is that even though a right to a hearing before a precautionary suspension is no longer required to make a suspension fair, in the absence of an express entitlement to one, that does not mean that if a collective agreement or an employer's own code specifically provides an employee with the right to make representations prior to a precautionary suspension that it will still be fair to refuse to honour that provision.
- [35] Bombela attempts to avoid the implications of its own code, by suggesting it is not binding on it. On the other hand, it admits that it required amendment in order to align it with the new approach in *Long*. It also argues that because it is not part of a collective agreement, not much store can be placed on whether Lehlokwa had any entitlement to expect it to comply with it. In *Highveld District Council v Commission for Conciliation Mediation and Arbitration and Others*⁷ the Labour Appeal Court held that in judging if a procedure was fair or not, what mattered was not so much whether the procedure followed accorded with a contractual entitlement a collective agreement but whether the actual procedure adopted was fair in all the circumstances⁸.

⁷ (2003) 24 ILJ 517 (LAC).

⁸ Viz:

"[15] Where the parties to a collective agreement or an employment contract agree to a procedure to be followed in disciplinary proceedings, the fact of their agreement will ordinarily go a long way towards proving that the procedure is fair as contemplated in s188(1)(b). The mere fact that a procedure is an agreed one does not however make it fair. By the same token, the fact that an agreed procedure was not followed does not in itself mean that the procedure actually followed was unfair. Mr Venter for the

- [36] What the arbitrator had to decide was if it was fair of Bombela to ignore the provisions of its own code, because of the decision in *Long*. What complicates the case is that Lehlokwa did not request to make representations in terms of clause 5.6.3. NUMSA challenged Lehlokwa's suspension because Bombela did not consult with it, on the supposition that the suspension amounted to disciplinary action in respect of which the firm should first have notified it of its intention to take disciplinary action against Lehlokwa.
- [37] It might have been argued that, by challenging the suspension in this way, Lehlokwa did invoke the right he relied on in clause 5.6.3. On the other, it could also be said that this challenge did not amount to making the kind of representations envisaged by the clause, and Bombela should have pointed this out to NUMSA and invited Lehlokwa to make representations on whether there was a justification for suspending him. However, these were not lines of arguments which were pursued in the arbitration and none of the witnesses were confronted with them, so they do not have a bearing on the merits of the review application.
- [38] What is not in dispute, is that Lehlokwa did not make any representations on the merits of his suspension. It follows that it cannot be said that he was actually prevented from exercising his apparent right to make representations. It is likely, given Bombela's interpretation that clause 5.6.3 no longer applied in such a case, that it would not have allowed or considered such representations, but that is no more than a supposition. The arbitrator could not assume the right to make representations was refused when no attempt was made to submit any.

respondent referred us to the arbitration award in Ned v Department of Social Services & Population Development [2001] 22 ILJ 1039 (BCA) where (at 1044B) the arbitrator said: "The failure to honour an obligation expressly undertaken, is per se unfair conduct". I must point out that an arbitrator's award does not constitute an authoritative precedent. In any event, read in its full context, especially in the context of what is said on page 1040 of the report, I do not think that the arbitrator in that case was stating a general proposition that failure to comply with an agreed disciplinary procedure in itself constitutes an unfair procedure in breach of the Act. If however Mr Venter was correct and that is what the arbitrator said in the Ned case, I cannot agree. When deciding whether a particular procedure was fair, the tribunal judging the fairness must scrutinize the procedure actually followed. It must decide whether in all the circumstances the procedure was fair. (Leonard Dingler (Pty) Ltd v Ngwenya [1999] 20 ILJ 1711 (LAC))"

- [39] Thus, irrespective of Bombela's stance on the existence of a right to make representations, in the absence of it having positively refused to entertain any, a conclusion that it had acted procedurally unfairly by not allowing Lehlokwa to make representations under clause 5.6.3 of the code is unsustainable on the evidence. As such, it was a finding no reasonable arbitrator could have made.
- [40] Turning to the question of substantive fairness, the arbitrator found that there was no evidence to suggest there was a risk that he could jeopardise the investigation if he remained at work.
- [41] Amongst other things, the rationale for excluding an employee from the workplace is that their presence at work might compromise the integrity of the investigation into the alleged misconduct because the employee might threaten potential witnesses or fabricate evidence. In some cases, such as where there was an alleged assault, there might be a risk of a recurrence or a flare up between the parties involved.
- [42] Bombela had tried to justify the need for the suspension because Lehokwa's mere status as a shop steward would enable him to interfere with the investigation. In the course of the evidence, it sought to bolster its justification for suspending him by averring that, in his capacity as a shop steward, he could 'disharmonise' the workplace environment by stressing that the alleged misconduct under investigation was serious.
- [43] Before the decision in *Long* it might have been arguable that, in order for a precautionary suspension to be substantively fair, the employer must demonstrate why the investigation might be hampered by the employee's presence at work. However, in *Long* the Constitutional Court stated that a fair reason to suspend an employee was established if it was simply for an investigation to take place⁹. The court did not qualify this by stating that the employer must also demonstrate that there was a reasonable prospect, the investigation might be hampered if the employee returned to work. In short, *Long* established that a precautionary suspension is justified simply if the employer wishes to impose one while an investigation

⁹ See paragraph 25 of the extract from *Long* cited in paragraph 9 *supra*.

takes place. *Long* has curtailed the scope for challenging whether a precautionary suspension is reasonably necessary for a proper investigation to take place. I am bound to follow that principle.

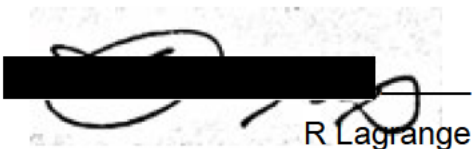
[44] Accordingly, even though the arbitrator found, not unreasonably, that the evidence did not support an inference that the investigation would have been jeopardised if Lehlokwa returned to work, she went beyond what *Long* required her to consider, namely whether the suspension was a precautionary one pending the outcome of the investigation. Her misconception of the scope of the inquiry into the reason for the suspension amounted to an error of law and her finding of substantive unfairness cannot stand.

Conclusion

[45] In view of the above, it is not necessary to consider additional grounds of review.

Order

1. The review application is reinstated.
2. The arbitration award of the Second Respondent under case number GATW 13513-20 dated 21 February 2020 is reviewed and set aside and replaced with a finding that the Applicant's suspension was procedurally and substantively fair.
3. No order is made as to costs.



R Lagrange

Judge of the Labour Court of South Africa.

Appearances

For the Applicant	L Voultsos instructed by Joubert, Galpin & Searle Attorneys
For the First Respondent	In person.

LABOUR COURT