



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JR986/23

In the matter between:

ELIZABETH SABI MODIBA

Applicant

and

CLICKS RETAILERS (PTY) LTD

First Respondent

MICHAEL HOWITZ

Second Respondent

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

Third Respondent

Heard: 25 July 2025

Delivered: 31 July 2025

JUDGMENT

ERASMUS, AJ

Introduction

[1] This is an application for the review and setting aside of an arbitration award issued by the Second Respondent (the Commissioner) under case number GAJB26626-22 dated 15 March 2023 in terms of which the Commissioner found that the dismissal of the Applicant was substantively fair and dismissed the case.

[2] The application is in terms of section 145 of the Labour Relations Act¹ (the LRA) and was opposed by the First Respondent (Respondent).

[3] The Applicant's application for review as well as her supplementary affidavit were filed late and two applications for condonation were made which were not opposed.

[4] In light of the short periods of delay and the explanations proffered for the delays, it would be just and equitable to grant condonation in respect of the late filing of both sets of pleadings.

Factual background

[5] The Applicant held the position of manager at the Respondent's Trade Route Mall branch in Lenasia at the time of her dismissal for gross misconduct on 23 December 2022. By then, she had been in the employ of the Respondent for 26 years.

[6] An incident occurred on 17 November 2022 involving the Applicant and one of her subordinates, Ms Jeanette Sithebe (Sithebe). Sithebe was approximately seven months pregnant when the incident occurred. There were two witnesses to the incident, being Mr Themba Danisa (Danisa) and Mr Roraney Mathye (Mathye).

¹ Act 66 of 1995, as amended.

[7] The Applicant, Danisa and Sithebe were at some stage on the day in question present in the stockroom. The Applicant wanted the stockroom to be tidied and some items to be moved. In this regard, she gave instructions to Danisa and Sithebe.

[8] At one point after Danisa had left the storeroom to call Mathye to assist them, it appeared that Sithebe became frustrated with changing instructions from the Applicant upon which the Applicant started making derogatory remarks towards Sithebe with words to the effect that the baby or her pregnancy was making her angry and that she is not the one who had impregnated Sithebe.

[9] It was in dispute whether these comments were hurled as insults or whether they were made in a joking manner. Either way, they were uncalled for.

[10] What transpired thereafter is in dispute, with the Applicant stating that Sithebe then assaulted her and she warded off the assault, whilst Sithebe's version was that it was indeed the Applicant who had assaulted her and it was she who had warded off the blows from the Applicant.

[11] It was common cause that Danisa and Mathye had returned to the storeroom during the physical interaction between the Applicant and Sithebe and witnessed at least a part of the physical interaction. Danisa separated the Applicant and Sithebe.

[12] Both Sithebe and the Applicant were charged with assaulting each other. Separate disciplinary hearings were held for Sithebe and the Applicant and both were dismissed for assault.

[13] The matter came before the Second Respondent (Commissioner) where he was tasked with determining whether the Applicant's dismissal was substantively unfair and if so, what remedy should be awarded.

[14] The arbitration proceedings were concluded in one day. The Applicant was granted legal representation after an application for same to be allowed was made at the onset of the arbitration proceedings.

[15] The Commissioner found the Applicant's dismissal to have been substantively fair and dismissed the matter.

The review

[16] As correctly pointed out by the Respondent, the grounds of review as contained in the Applicant's founding affidavit were more akin to an appeal than a review. However, in the supplementary affidavit, the Applicant's grounds of review were clearly canvassed in the manner and form of a review application.

[17] The grounds of review related specifically to the Commissioner having allowed hearsay evidence with regards to Mathye and Sithebe and also the fact that the Commissioner indicated that Mathye did not have to testify, despite being available at the arbitration hearing, waiting outside for his turn to testify.

[18] The Respondent called only two witnesses during the arbitration proceedings, being Danisa and Ms Pavashnee Govenden (Govenden). Govenden was the initiator in the disciplinary enquiry. She relayed the details of the investigation she conducted, as well as the disciplinary hearing. She also confirmed that both Danisa and Mathye had testified at the Applicant's disciplinary hearing and that both of them had stated that it was indeed both the Applicant and Sithebe that had been assaulting each other.

[19] Whilst the Commissioner acknowledged in his award that the arbitration was a hearing *de novo*, a great deal of the evidence presented during the arbitration hearing related to what was said by witnesses in their statements or during the disciplinary hearing.

[20] Sithebe was not called by the Respondent to testify and the Applicant did not have an opportunity to test her evidence with regards to events by means of effective cross-examination during the arbitration proceedings.

[21] The Respondent intended calling Mathye to testify. However, after an interjection by the Commissioner, Mathye was released without being called and without his testimony being tested under cross-examination.

[22] In this regard, the transcribed record reads as follows immediately after Govenden's testimony was completed with reference to Mathye:

COMMISSIONER: Is it possible for us to hear the applicant's side.

MS ZAMA: So I must chase away my witness.

COMMISSIONER: Okay.

MS ZAMA: No it is ok we can do that.

COMMISSIONER: I am just thinking of the time, I think I have to otherwise, we are going to have to have another day.

MS ZAMA: I also don't want that, let me tell them to go.

MS NAIDOO: Can you give me 10 minutes Mr Commissioner.

COMMISSIONER: Yes.'

[23] In his award, the Commissioner stated as follows:

'The other witness, Roraney Mathye, who had testified at the disciplinary inquiry has corroborated what Mr Danisa had seen on 17 November 2022 at the store's stockroom. Mr Roraney Mathye was at the arbitration hearing with the intention of being called to testify. When I heard that he would be stating exactly what Mr Danisa had testified I told the respondent's representative that it would not be necessary to hear the same information as it would only be a repetition of what I had heard from Mr Danisa. The respondent then closed its case and the applicant went on to testify and explain her version of what had happened.'

[24] What the Commissioner has stated in his award clearly does not accord with the record of the proceedings.

[25] Although the Respondent contended that no objection was raised during the arbitration in Mathye not testifying and the Commissioner being allowed to rely on hearsay evidence insofar as Mathye's testimony is concerned, the record reflects that when the Applicant was confronted with Roraney's testimony during cross-

examination, Ms Naidoo who represented the Applicant during the arbitration proceedings objected and said that he was not called as a witness during the arbitration, to which Ms Cele for the Respondent responded by indicating that Mathye was present earlier in the day to testify. Ms Naidoo then again raised the objection which the Commissioner ignored and allowed Ms Cele to continue cross-examining the Applicant.

[26] In his award, the Commissioner confirmed that the Applicant and Sithebe had been blaming each other. Rather than determining whose version is the more probable, he states that if he were to accept both of their versions, then one would have to conclude that neither one of them were in a physical fight, which was not plausible.

[27] The Commissioner then, in the absence of evidence to support a logical reasonable finding, started speculating with regards to what he thinks may have transpired. In this regard, he stated as follows:

‘...The applicant could very well have been telling the truth that it was [Sithebe] that had started with the actual physical fight. In this instance it would not have been unusual for the applicant to fight back and hit [Sithebe] whilst [Sithebe] was hitting her. Both egos would have been out of control thus making them guilty of assaulting each other. The assaulting part is what the witness, Mr Themba Danisa, had testified that he had seen, as he entered the stockroom entrance.’

[28] He then refers to Mathye having corroborated the evidence of Danisa in the disciplinary hearing and the finding of the hearing chairperson, followed by his finding as follows:

‘The respondent has the onus to prove that the dismissal was both procedurally and substantively fair. The chairperson had listened to both sides and had, on a balance of probability, found the applicant guilty. The chairperson could have found the applicant not guilty, but chose to find the applicant guilty. When deciding on which direction the verdict should go one weighs what is being argued against the facts that were presented. The whole case went around the issue of whether the applicant had in fact assaulted her

subordinate or not. On a balance of probability, I was persuaded that there was a strong possibility that both employees were involved in a fight. Anything could have happened had Mr Danisa not intervened and quickly separated them.’ (Own emphasis added)

[29] Rather than letting Mathye testify and for his testimony to be subjected to and be tested under cross-examination, the Commissioner was pressurised by time. He ignored the objection by the Applicant’s representative and simply let the proceedings continue without ruling on the matter, knowing that he was the cause of the conundrum. He then made decisions based on his speculation of the events and on possibilities, rather than probabilities.

[30] As a result, his award falls outside the bounds of a reasonable award and stands to be set aside.

[31] To allow the parties a full opportunity to ventilate and test all the evidence, it is appropriate to remit the matter back to the Third Respondent for a new hearing.

Costs

[32] Given the requirements of fairness and equity and considering that the Applicant is not completely innocent in that she admitted to having made uncalled for remarks towards Sithebe, I do not believe a costs order is justified in the circumstances.

Order

1. Condonation is granted for the late filing of the review application and the late filing of the supplementary affidavit.
2. The arbitration award dated 15 March 2023 and issued by the Second Respondent under case number GAJB26626-22 is reviewed and set aside.
3. The matter is remitted back to the Third Respondent for a hearing before a commissioner other than the Second Respondent.
4. There is no order as to costs.

L. Erasmus

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

M Sadike

Instructed by:

Oosthuizen, Du Toit, Berg & Boon Attorneys

For the First Respondent:

Ackermann

Instructed by:

Bradley Conradie Halton Cheadle Attorneys