



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JR114/23

In the matter between:

LYMON SIBUSISO VILAKAZI

Applicant

and

AVRAGYSTIX (PTY) LTD

First Respondent

KHULULEKANI HOPEWELL XAMESI

Second Respondent

**THE COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION (CCMA)**

Third Respondent

Heard: 23 July 2025

Delivered: 01 August 2025

JUDGMENT

ERASMUS, AJ

Introduction

[1] This is an application for the review and setting aside of an arbitration award dated 19 December 2022 which award was rendered by the Second Respondent (Commissioner) under the auspices of the Third Respondent, the Commission for Conciliation, Mediation and Arbitration (CCMA).

[2] The review application was opposed by the First Respondent (Respondent).

Preliminary issues

[3] The application did not follow the usual process due to the Applicant being a layperson representing himself. More so, he filed his notice in terms of rule 7A(8) of the Rules for the Conduct of Proceedings in the Labour Court (the rules) to stand by his papers on 24 February 2023 after the CCMA had issued their notice in terms of rule 7A(3) confirming that the record had been dispatched to the Court, on 15 February 2023.

[4] After a request by the Respondent that the Applicant comply with the Court rules, more specifically that he files the record of the proceedings at the CCMA, and the Applicant not complying with same, the Respondent lodged its answering affidavit in the absence of having been provided with the record of the CCMA proceedings.

[5] The Applicant initially submitted that the Respondent's answering affidavit was late as it had not been filed within 10 days of the rule 7A(8) notice, but during argument accepted that the Respondent was not obliged to lodge its answering affidavit in the absence of having been provided with the record. The point was therefore abandoned.

[6] The Respondent raised the point that the Applicant's application was deemed to have been withdrawn due to the late delivery of the record. Although this point was not raised or addressed in the heads of argument, it was raised in Court based on a notice to that effect having been filed by the Respondent.

[7] In this regard, Ms Moyo for the Respondent initially submitted that the record should have been filed within 60 calendar days after the notice in terms of rule 7A(3) had been filed on 15 February 2023, but during argument correctly conceded that the requirement is what has conveniently been referred to as Court days, being the days excluding Saturdays, Sundays and Public Holidays.

[8] She then contended that the record should therefore have been delivered on or before 8 May 2023 and that it had only been served on 9 May 2023 and filed on 12 May 2023.

[9] In calculating the requisite number of days from 15 February 2023, excluding Saturdays, Sundays and Public Holidays, it is clear that the Respondent was mistaken in their calculations as the record was only due on 17 May 2023.

[10] The record was therefore filed and served within the requisite time period and the review is not one that can be regarded as deemed withdrawn.

[11] The application therefore proceeded on an opposed basis on the merits of the review application.

Background facts

[12] The Applicant was employed by the Respondent with effect from 7 June 2022 as a sales agent in terms of a one-month training agreement.

[13] On 12 July 2022, the Applicant and Respondent concluded a permanent indefinite contract of employment subject to a three-month probation period.

[14] On 19 August 2023, the Applicant was served with a notice of suspension and a notice to attend a disciplinary inquiry.

[15] The notice of suspension stated as follows:

'You are hereby informed that you are suspended with immediate effect from your employ pending the outcome of an investigation to be conducted by the Company.' (own emphasis added)

[16] It also advised the Applicant, amongst others, that his suspension would be on 'full pay' and it provided details of two charges against him as follows:

'Gross insubordination

Gross insubordination in that on the 18th August 2022, you refused to obey a reasonable and lawful instruction relating to a request to work in an extra hour which was going to be replaced on the 19th August 2022 by leaving 1 hour early.

Gross negligence

In that you failed, without proper cause to perform your duties with the proper care required in that you used the incorrect dispositioning of hot leads allocated to you, which resulted in an escalation from your client.'

[17] The notice to attend a disciplinary inquiry stated as follows:

"KINDLY TAKE NOTICE THAT an inquiry will be held to investigate the alleged offence/s as detailed below." (own emphasis added)

[18] It then notified the Applicant of his rights in respect of the inquiry and reiterated that the same charges as being the nature of the complaints against the Applicant. The notice recorded the date of the inquiry as being 29 August 2022 at 08h30.

[19] On 22 August 2022, the Applicant addressed an email to the Respondent's Human Resources Manager, Ms Neo Makhene, raising concerns regarding premeditation, bias and presumptuousness insofar as his suspension was concerned. He requested Ms Makhene to respond to certain questions which he had posed to her in his email. He sent another email to her on 23 August 2022, advising that her failure to respond was hindering his ability to prepare.

[20] Ms Makhene replied to his email on 24 August 2022, responding to the questions and advising that details of the charges would be provided in the hearing.

She also advised him that he could be given access to his work 'machine', should he need access for purposes of preparation.

[21] The reply did not find favour with the Applicant, which he made known on 24 August 2022, and on 25 August 2022 he referred an unfair labour practice dispute to the CCMA, claiming that he had been unfairly suspended. He sought upliftment of his suspension and that the Respondent attend to a grievance he had lodged and which he felt was overlooked.

[22] The CCMA notified the parties on 29 August 2022 that the matter had been set down for Con/Arb on 12 September 2022.

[23] The Applicant did not attend the disciplinary inquiry on 29 August 2022 as scheduled. When contacted to enquire about his non-attendance, the Applicant advised the chairperson and Ms Makhene that he will not be attending the inquiry on that day and that the CCMA proceedings in respect of his unfair suspension claim must be concluded first, before the disciplinary inquiry could proceed.

[24] The Applicant was not willing to concede to the request and the hearing proceeded in the Applicant's absence. The outcome of the inquiry was rendered on 31 August 2022 in terms of which the Applicant was found guilty of both charges and summarily dismissed and the outcome was communicated to the Applicant on 1 September 2022.

[25] The alleged unfair suspension dispute was set down for arbitration for 20 October 2022 after conciliation had failed.

[26] After the first day of arbitration, the Applicant applied for the recusal of Commissioner Cebekhulu who was the first commissioner appointed to arbitrate the matter. The Applicant alleged that Commissioner Cebekhulu was biased and he listed a number of reasons in support of his contention of bias. These included that the Commissioner did not follow the provisions of sections 192(1) and (2) of the

Labour Relations Act¹ (LRA) in that he made the Applicant lead his evidence first. This, the Applicant construed as having been done by the said commissioner to test the waters for the Respondent in respect of the strength of the Applicant's case. The Applicant refused to accept that section 192 of the LRA applies only to dismissal disputes and not to unfair suspension disputes.

[27] In brief, the Applicant also contended that Commissioner Cebekhulu was biased in expressing the view that the disciplinary charges were not relevant to the unfair suspension dispute; in asking questions; in not acting in an inquisitorial manner for the establishment of facts but instead to exploit the Applicant on behalf of the Respondent and to deliberately confuse the Applicant; in indicating that the arbitration will probably only be set down for continuance in January 2023 due to Commissioner Cebekhulu being fully booked for the following weeks and December being a short month; that the said Commissioner wasted time with fruitless conciliation; that the Commissioner did not afford him an interpreter; that the commissioner did not take the Respondent to task for calling only one witness when they promised to bring two and thereby showing that he was willing to accept false testimony from the Respondent.

[28] Commissioner Cebekhulu considered the application and found that no sound basis had been laid to show apprehension of bias, but that he would nonetheless recuse himself.

[29] The arbitration therefore started afresh before the Second Respondent (Commissioner). The arbitration commenced and was concluded in respect of evidence on 6 December 2022. The Respondent presented oral closing arguments but the Applicant insisted in presenting written closing arguments, despite the proceedings having stood down for 30 minutes to enable him to gather his thoughts for purposes of closing arguments. Rather than presenting closing arguments, the Applicant lodged yet another recusal application.

¹ No. 66 of 1995, as amended.

[30] In doing so, the Applicant alleged amongst others that the Commissioner had “arrogantly” kept the Respondent’s witness in the room whilst the Applicant testified, the witness being the Respondent’s HR representative Ms Makhene who was also the person providing instructions to the Respondent’s representative. In the Applicant’s view, such ruling was “*messing with the whole process and curbing the applicant from probing the respondent’s witness*” and thereby suggesting that the Commissioner “*had a mission to complete on behalf of the respondent*”. The Applicant also stated, amongst others, that he tried to bring the Commissioner to his senses, to no avail; that the Commissioner was aggressive towards him; that the Commissioner did not give reasons during the arbitration proceedings for his decisions which indicated that the Commissioner did not have respect for the Applicant; that the Commissioner treated him like a commoner ranking below him; that he has lost all respect for the Commissioner and could not rely on his judgement.

[31] The Commissioner issued his award on 19 December 2022 wherein he dealt with the rulings he had made during the arbitration proceedings, the recusal application and the merits of the unfair suspension dispute.

Analysis

[32] The Applicant raised several grounds of review, which are dealt with below.

[33] It needs mentioning from the onset that it is evident from the transcribed record of the proceedings that the Applicant treated the Commissioner with disrespect. He was argumentative, would not accept guidance by the Commissioner, often interrupted the Commissioner, would not accept rulings made by the Commissioner and continued challenging and arguing about rulings long after the Commissioner had made them. On occasion, he also turned the Commissioner’s attempts to assist and guide him into allegations against the Commissioner. It is clear from the record as a whole that the Applicant wanted to be in control of the proceedings instead of allowing the Commissioner to control the proceedings.

Commissioner ignored section 192 of the LRA

[34] The Applicant contended that the Commissioner was “*acting on behalf of the company*” by “*deliberately ignoring Section 192*” of the LRA. He further alleged that the Commissioner unfairly claimed that this section does not apply to unfair suspensions. He contended that the Commissioner, in the absence of section 192, had no other law to “*back his arrogance*” that the Applicant was to lead his evidence first.

[35] The Commissioner conducted a pre-arbitration conference between the parties during which the Commissioner indicated to the Applicant that he needed to testify first as the onus to prove the unfair suspension rested with the Applicant.

[36] The Applicant challenged this view of the Commissioner which resulted in the Commissioner ruling that the Applicant was to testify first due to the Applicant bearing the onus to prove that an unfair labour practice, more specifically an unfair suspension, had been committed. Despite the ruling, the Applicant continued to challenge the commissioner during the arbitration proceedings.

[37] Section 192 of the LRA provides as follows:

‘192. Onus in dismissal disputes

(1) In any proceedings concerning any dismissal, the employee must establish the existence of the dismissal.

(2) If the existence of the dismissal is established, the employer must prove that the dismissal is fair.”

[38] It is common cause that the Applicant’s dispute was an alleged unfair labour practice dispute, more specifically an alleged unfair suspension dispute.

[39] In the absence of the LRA expressly stating who bears the onus in unfair labour practice disputes, the Commissioner resorted to the well-known principle in our law that he who alleges, must prove. He therefore required the Applicant to prove that his suspension was unfair and as a result, that he had to testify first. The

Commissioner also justified his decision in his award with reference to this Court's decision in *Randles v Chemical Specialities Ltd.*²

[40] In addition to the abovementioned well-known principle, this Court through Moshwana J in *Moloko v Commission for Conciliation, Mediation and Arbitration and Others*³ analysed the provisions of the LRA, distinguishing between Section 192 and matters relating to unfair dismissals on the one hand and those relating to unfair labour practices on the other hand, and confirmed that an employee who alleges that an unfair labour practice has been committed, bears the onus to prove same.

[41] This ground of review therefore holds no water.

Respondent's witness in the room

[42] Also during the pre-arbitration conference, the Applicant asked whether the Respondent's HR Manager, Ms Makhene, could wait outside until it was her turn to testify. The Commissioner ruled that Ms Makhene could stay in the hearing room from the onset.

[43] Once again, the Applicant continued to challenge the Commissioner on his ruling. During such, he also made remarks such as that the Commissioner seems upset and impatient rather than explaining himself to the Applicant. The Applicant contends in his papers that he was trying "*to bring the [Commissioner] back to his senses*" with these comments. At one stage, the Commissioner did inform the Applicant that his decision with regards to the ruling on Ms Makhene's presence can be taken on review should the Applicant disagree with the ruling.

[44] The Applicant contends that the Commissioner was aggressive towards the applicant by "*dictating without reasons*" that the witness should stay inside the room and that the Commissioner responded aggressively by stating that the process will proceed in the manner he dictates, rather than providing reasons for his decision in the hearing.

² [2011] 8 BLLR 783 (LC).

³ (JR 1534/20) [2022] ZALCJHB 76 (9 March 2022).

[45] He further alleges that the Commissioner “*arrogantly*” kept Ms Makhene in the room, that the Commissioner exceeded his powers in doing so and that the Commissioner had a “*mission to complete*” on behalf of the Respondent in doing so.

[46] As correctly confirmed by the Commissioner in his award, section 138 of the LRA provides that he may conduct the proceedings in a manner that he considers appropriate.

[47] The Commissioner reasoned in his award that the Respondent’s HR Manager was entitled to stay in the room and hear what case the Respondent had to meet, just like an employee would have the right to stay in a hearing room and listen to an employer’s evidence being led first in a dismissal dispute, so that the employee knows what case he/she has to meet.

[48] Any party to a dispute has a right to hear what case he/she/it has to meet and/or counter. That party is therefore entitled to be present throughout the proceedings. In the case of an employer which is a legal entity, the person that sits in on behalf of the employer is normally the person that is best placed to provide instructions to the employer’s representative, which often includes persons such as the HR Manager.

[49] The Commissioner’s ruling that Ms Makhene can remain in the hearing room throughout the whole arbitration is therefore a reasonable decision and certainly falls within the range of reasonableness.

Recusal of the Commissioner

[50] During cross-examination of the Applicant, the Commissioner faced challenges in getting the Applicant to understand the proceedings and continuously provided guidance to the Applicant when necessary. The Applicant however wanted none of it. He sought to control the proceedings, irrespective whether he was in the wrong.

[51] At some stage during the Applicant's cross-examination, the following conversation came to the fore after the Commissioner asked the Respondent's representative to give the Applicant an opportunity to answer the question and the Commissioner rephrased the question to ensure that the Applicant understood what was being asked:

"[Applicant]: Why are you taking part here, if I may ask?

[Commissioner]: Please can you...My part is to make sure that every evidence is heard, including those that you have not been given a chance to answer.

[Applicant]: But to save us time, you can recuse yourself because now it seems like since we started like you have been taking part here.

[Commissioner]: That is fine.

[Applicant]: And you have been now putting in emotions and so forth and now I have been trying to put up with all of this. So now, if you see that now you are not patient enough and you see you cannot save yourself from taking part, why do you not recuse yourself and have another commissioner deal with the matter because now it seems like the time will now be on and on. It will now be too long dealing with the same matter.

[Commissioner]: No, it is fine sir. Do you want to make [an application? 1:27:10] to recusal?

[Applicant]: No, I did not say.

[Commissioner]: If you are not, I am not recusing myself. No, I am not. I am not recusing myself.

[Applicant]: I did not say I want to make an application.

[Commissioner]: What you say? You say I must recuse myself.

[Applicant]: But the matter, the matter...No but-

[Commissioner]: No, I am not. I am not recusing myself sir. Whoa. I am not recusing myself. Let us move on. If you are not making an application for recusal, please bear in mind that I am not recusing myself.

[Applicant]: The matter is very heavy for you, I can see.

[Commissioner]: Okay, it is fine. That is your view. Next question please.

[52] From the above, it is clear that the Commissioner was not going to recuse himself in the absence of an application for recusal, at which point the Applicant confirmed that he was not making an application for recusal.

[53] The application for recusal was only made after conclusion of the evidence.

[54] It is clear that the Applicant's application was founded in his view that the Commissioner was wrong in the rulings he had made. The Commissioner having ruled that the Applicant bore the onus to prove that his suspension was unfair and therefore had to testify first, as well as the ruling that Ms Makhene may remain present during the proceedings, was not acceptable to the Applicant and had set the stage for the remainder of the arbitration proceedings wherein the Applicant viewed these rulings as arrogance by the Commissioner and the Commissioner having a mission to complete on behalf of the Respondent, creating a feeling by the Applicant that he had the duty to bring the Commissioner to his senses.

[55] The Commissioner in his award dealt extensively with the application for recusal and he did so with reference to case law relating to the subject-matter. It is unfortunate that the Commissioner at one stage advised the Applicant to "*shut up and listen*", but that in itself, does not make the Commissioner biased.

[56] From a reading of the transcripts, it is clear that the Applicant had difficulty in accepting guidance from the Commissioner and the Applicant's approach throughout the whole process was guided by his mistrust of the Commissioner due to the Commissioner having ruled at the onset that he had to testify first and that Ms Makhene could remain present.

[57] It is important to note that two similar rulings made by the first commissioner appointed to arbitrate the matter, also resulted in a recusal application being made against that commissioner.

[58] It is therefore clear that the Applicant was not going to accept any commissioner that made any findings against him and that all commissioners that ruled against him ran the very real risk of facing recusal applications.

[59] It is trite that findings against a party cannot constitute reasons for recusal.

[60] This ground of review is also not upheld.

Evidence

[61] The Applicant contended that the Commissioner overlooked all the evidence submitted by him and that, considering all the evidence, a “*reasonable decisionmaker in the position of the [Commissioner] would not have committed such a series of egregious irregularities in conducting the arbitration proceedings and that it therefore stands to be reviewed and set aside*”.

[62] It is common cause that the Applicant’s suspension was a precautionary suspension, pending the outcome of the disciplinary inquiry.

[63] The Court in *South African Municipal Workers' Union obo Dlamini and others v Mogale City Local Municipality and Another*⁴ had the following to say with regards to suspension:

‘I will firstly deal with the issue of suspension. I simply cannot agree with Mr Buirski that in order for an employer to suspend an employee, the employer must have determined or accepted that misconduct exists. In a nutshell, the existence of misconduct is not a sine qua non for an employee to be legitimately suspended.’

[64] The criteria to be considered in determining whether a precautionary suspension was unfair, has been set out in *South African Breweries (Pty) Ltd v Long and Others*⁵ as follows:

‘[47] As opposed to this, suspension as a holding operation, or otherwise called a precautionary measure, is not a disciplinary measure. It cannot be

⁴ [2014] 12 BLLR 1236 (LC) at paras 31 and 32.

⁵ (PR 121/16; PR 122/16) [2017] ZALCPE 36 (8 June 2017). This decision was upheld by the Constitutional Court in *Long v South African Breweries (Pty) Ltd and Others* (2019) 40 ILJ 965 (CC)

seen as disciplinary action, therefore all the requirements relating to fair disciplinary action under the LRA cannot find application.

...

[52] It is in my view clear that in the case of a holding operation (precautionary) suspension, there is no requirement, as a general principle of fairness, that an employee must be heard or otherwise be given an opportunity to make representations before it is decided to place the employee on such kind of suspension. Whether such a suspension is fair or unfair is dependent upon three other criteria, which I will next set out.

[53] The first criteria relates to the reason for this kind of suspension, and flows from the very nature of this kind of suspension itself, being that of 'precaution'. 'Precaution' contemplates safeguarding a process or action that is pending. It means that for precautionary suspension to be fair, it must be directly linked to a pending investigation or process, whether relating to misconduct, incapacity, or for operational requirements. And then, the suspension must serve to protect the integrity of the investigation or process, or mitigate risks to the employer whilst such an investigation or process is ongoing. It does not serve to dispense punishment upon the employee, but is done in the interest of good administration. The absence of these considerations would mean there is no basis or reason for precautionary suspension, and it would be unfair.

[54] It is not necessary for the employer, at this stage, to substantiate the misconduct or complaints against the employee. All that is required is a reasonable belief on the part of the employer that it exists, even if such belief may be subjective...

[55] When it is true that there is a fair reason for precautionary suspension, the second criteria comes into play. This relates to the issue of prejudice to the employee and is linked to the requirement that the precautionary suspension must be on full pay. Where the suspension is on full pay, prejudice to the employee is curtailed and it will not readily be seen to be unfair. Suspension without pay is of course possible, for example where it is provided for in a contract of employment, collective agreement or agreed disciplinary code and procedure, but then in that case the issue of prejudice would normally be mitigated by a limited period of suspension or other

conditions imposed in these regulatory measures, so as to mitigate prejudice. But as a matter of principle, and to satisfy the second fairness criteria in the case of precautionary suspensions, it should be on full pay.

...

[58] Finally, and if there is a fair reason for the precautionary suspension, and this suspension is on full pay, the third fairness criteria contemplates that the duration of this suspension should not be unduly long...'

(Own emphasis)

[65] The Applicant was notified in his letter of suspension that a disciplinary inquiry would take place 10 days later and the two misconduct charges that would be "*investigated*" at the inquiry was set out in both the notice of suspension, as well as the accompanying notice to attend the disciplinary inquiry.

[66] The evidence also showed that the suspension was necessary to prevent further incidents of incorrectly operating the dialler. In this regard, the evidence showed that the dialler was used by sales consultants such as the Applicant to call prospective clients based on hot leads received. At the end of the call with the client, the Applicant had to log the outcome of the call by means of the dialler, indicating whether the client is not interested or whether the client for example requested to be called back at a more convenient time. Due to incorrect operation of the dialler, the Respondent and its client were losing business to the extent where the client raised it as a concern with the Respondent.

[67] The Applicant however felt that he was not guilty of the charges and that he was being singled out and victimised by his supervisor. However, in the Applicant's affidavit he referred to the events on the morning prior to his suspension and stated:

'Charles called us into Aschwyn's office for a meeting in which Aschwyn was the only person talking, bragging that some of the team members were going to be suspended that day and he wished they could be suspended without pay, but he still had to find out with The Labour Net if that would be possible.'

(own emphasis added)

[68] The evidence by the Respondent also confirmed that a few people were indeed suspended that day, with pay, and after conclusion of the disciplinary inquiries, some employees were dismissed whilst others were issued with final written warnings and had their suspensions lifted.

[69] The Applicant made much of the issue with regards to the investigation and whether same took place prior to or after his suspension. The Respondent clearly demonstrated that a complaint was received by the client which caused them to investigate. The result of such investigation was that the Applicant and other employees were suspended, pending the outcomes of the inquiries.

[70] The notice of suspension stated that the suspension was pending an "investigation". The notice to attend the inquiry made it clear that the inquiry was being held to "investigate" the charges against the Applicant.

[71] There was therefore a fair reason for the suspension, which brings us to the prejudice to the Applicant. It is common cause that the Applicant was suspended with pay. The Applicant also did not illustrate any prejudice that he has suffered otherwise. Although he felt that his previous grievance had not been dealt with and needed to be deal with prior to his suspension, the evidence showed that his grievance and complaint had indeed been addressed and that he did not indicate any dissatisfaction with the outcomes for a few weeks thereafter and only raised it when he was suspended.

[72] That leaves the length of the suspension. The Applicant received the notice to attend the inquiry simultaneously with the letter of suspension, which notice confirmed that the inquiry would take place 10 calendar days later. The inquiry proceeded on the scheduled date with the Applicant electing not to participate in the enquiry and the outcome of dismissal was rendered two days later. The length of the suspension was not inordinate and cannot form the basis of an unfair suspension.

[73] The Commissioner's award is reasonable in relation to the evidence that served before him and the reasons given.

Costs

[74] Although the Applicant's application borders on being frivolous, I do not believe that the Applicant should be burdened with a costs order.

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

Order

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

L. Erasmus

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

In person

For the First Respondent:

T Moyo of Snyman Attorneys