



THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable
Case No: C473/2023

In the matter between:

NELWORX (PTY) LTD t/a OK FOODS STRAND

Applicant

and

**COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION**

First Respondent

W CONNAN N.O.

Second Respondent

LUCAS MENI

Third Respondent

Heard: 4 September 2025

Delivered: 12 September 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 judgment is deemed to be 10h00 on 12 September 2025.

JUDGMENT

DE KOCK, AJ

Introduction

- [1] This matter came before the court as an application to review the arbitration award issued by the second respondent (hereinafter referred to as “the commissioner”) in terms of section 145 of the Labour Relations Act¹. This review application is in essence what is referred to as a ‘penalty review’, which means that the subject matter of the review is the appropriateness of sanction given an act or acts of misconduct. The challenge in a review application is then based on a decision-maker’s alleged failure to properly consider and apply the evidence in support of the decision that they arrived at.

Background

- [2] The third respondent (hereinafter referred to as “the respondent”) was employed as security officer by the applicant on 1 September 2018. On 2 March 2023, the respondent and a colleagues Mr. Mtumtum (hereinafter referred to as “Mtumtum”) were involved in a physical altercation at the workplace in full view of other employees and customers. Some time prior to the altercation, some tension existed between the respondent and Mtumtum to the extent that they were warned by management not to speak to one another unless it was for work purposes. During the incident on 2 March 2023, the two employees became involved in a verbal confrontation which led to the respondent grabbing Mtumtum and pushing him up against a wall. A manager had to step in to separate the two employees.

¹ Act 66 of 1995, as amended.

- [3] Mtumtum laid a criminal complaint with the SAPS. He was eventually issued with a final written warning for his involvement in the altercation. The fact that the incident had taken place, the existence of the workplace rule against assault, and the prescribed sanction of dismissal for breaching the rule, were common cause. The respondent was charged and eventually dismissed on 8 March 2023. The respondent referred an unfair dismissal dispute to the first respondent (hereinafter referred to as “CCMA”), and the commissioner, after arbitration, issued an award ruling that the sanction of dismissal was too harsh and that the respondent’s dismissal was substantively unfair. The commissioner ordered the applicant to pay compensation in the amount of R48 000.00.

Arbitration award

- [4] The commissioner, after surveying the parties’ respective evidence, notes *inter alia* that employers must exercise caution before dismissing employees on charges of assault, even where the assault was serious. Too often employers act emotively because of the nature of such a transgression which diverts them from the facts that they need to assess before considering whether dismissal is an appropriate sanction in those circumstances. The commissioner refers to a quote where it was stated: ‘Assault is generally accepted as a valid ground to dismiss the assailant. The legal requirements for the offense are the intentional and unlawful application of physical force, however slight, to the complainant’s body or threat that such force will be applied.’
- [5] The commissioner notes that in an employment context, various factors should be considered before a sanction is imposed on an employee who was found guilty of assault. These are amongst others the circumstances in which the assault occurred, the degree of force, the relationship between the employee and the complainant coupled with the effect of the assault on the interpersonal relations and the business of the employer. ‘Provocation can be described as an act whereby a person acts out of anger due to being taunted by another person,

ultimately resulting in retaliation to the taunting. Provocation is often called the temporary “loss of control” due to being taunted by another person.’

- [6] The commissioner continues and states that ‘Provocation may occur through either verbal or physical actions and being provoked may be used as a valid defense to assault. However, the assault arising from the provocation should be an immediate and sudden act. The offender should not have had time to “cool off”, as our laws suggest that should a “cooling off” period exist, the defence of provocation may not be successful, as it may be construed that the offender had time to think about his actions, resulting in the eventual assault being intentional.” In conclusion, once provocation was proved, it should be considered as mitigation in that assault case.
- [7] The commissioner turns to the matter before him and finds that the respondent acknowledged that what he did was wrong, and he regretted it. He went as far as reporting the incident to management right after it happened and told them that he fought with Mtumtum. The commissioner finds that he is satisfied that the respondent is guilty of the charge.
- [8] The commissioner then turns to the appropriateness of sanction. He notes that it is common cause that Mtumtum provoked the respondent for which he was issued with a final written warning. It is stated that the respondent did walk away from the provocation, but that Mtumtum followed the respondent inside. The respondent then, as can be seen from the video, suddenly turned around and grabbed Mtumtum and pushed him to the wall. That was the assault. The commissioner states that he believes that if Mtumtum did not follow the respondent inside the store, the assault would not have happened. Why? The provocation would have stopped. The respondent testified that it was at that point when Mtumtum told him that he was not one of those he killed, that he lost his temper and grabbed him.
- [9] The commissioner finds further that the degree of force of the altercation did not go beyond mere grabbing and pushing Mtumtum against the wall. Surely this

should have been considered against the part that Mtumtum played in the orchestration of the incident. The applicant did not. The commissioner finds that he is satisfied that the assault has arisen from the provocation and that it was an immediate and sudden act by the respondent as shown in the video clip. Mtumtum's attack of words towards the respondent was no less than verbal abuse.

- [10] The commissioner finds that, although the rule is fair, employer must be careful before they impose a sanction of dismissal, as assault can be mitigated by provocation in context. He finds that all the factors that mitigate assault in matters of provocation are applicable in this incident. The applicant's witness did not demonstrate how the assault broke the trust relationship. She also did not demonstrate that the applicant considered any other factor other than the assault. Had she considered the aforesaid considerations, she would have seen that both employees were equally guilty of what had transpired and if a sanction short of dismissal was good for one, it should also have been good for the other. The commissioner therefore finds the dismissal to be substantively unfair.

Grounds of review

- [11] The applicant's challenges to the arbitration award were summarised in their heads of argument to the effect that his ruling on the appropriateness of sanction falls outside the band of reasonableness due to the following:
- a. The commissioner's failure to understand and accept that the applicant's earlier reprimand of the two employees and the warning to them not to speak to one another unless it was work-related, constituted an earlier warning.
 - b. The commissioner's unfounded and illogical ruling that the applicant's earlier reprimand of the employees and the warning to them not to speak to one another unless it was work-related, did not resolve the issue but rather perpetuated same.

- c. The commissioner's failure to consider and correctly apply the principles relevant to provocation to the matter before him.
- d. The commissioner's finding that the physical assault by the respondent on Mtumtum was not sufficiently serious to warrant dismissal, despite his position, an earlier warning and the juvenile reason for the assault, did not warrant the sanction of dismissal.
- e. The commissioner's apparent finding of inconsistency despite the fact that the issue of inconsistency was never raised as an issue in dispute or addressed by the respondent in his evidence.

Review Test

[12] In *Sidumo & another v Rustenburg Platinum Mines Ltd & others*,² the Court held that *"the reasonableness standard should now suffuse section 145 of the LRA"*, and that the threshold test for the reasonableness of an award was: *"... Is the decision reached by the commissioner one that a reasonable decision maker could not reach?..."*³. In *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)*⁴ the Court applied this reasonableness consideration as follows:

"In summary, the position regarding the review of CCMA awards is this: A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in s 145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2)(a)(ii), the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not

² (2007) 28 ILJ 2405 (CC); 2008 (2) SA 24 (CC).

³ Id at para 110.

⁴ (2013) 34 ILJ 2795 (SCA); [2013] 11 BLLR 1074 (SCA) at para 25.

in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.”

- [13] This test has thus been applied as a two-stage review enquiry. Firstly, the review applicant must establish that there exists a failure or error on the part of the arbitrator. If this cannot be shown to exist, that is the end of the matter. Secondly, if this failure or error is shown to exist, the review applicant must then further show that the outcome arrived at by the arbitrator was unreasonable. If the outcome arrived at is nonetheless reasonable, despite the error or failure, that is equally the end of the review application. In short, in order for the review to succeed, the error or failure must affect the reasonableness of the outcome to the extent of rendering it unreasonable.
- [14] Further, the reasonableness consideration envisages a determination, based on all the evidence and issues before the arbitrator, as to whether the outcome of the arbitrator arrived at can nonetheless be sustained as a reasonable outcome, even if it may be for different reasons or on different grounds.⁵ This necessitates a consideration by the review court of the entire record of the proceedings before the arbitrator, as well as the issues raised by the parties before the arbitrator, with the view to establish whether this material can, or cannot, sustain the outcome arrived at by the arbitrator. In the end, it would only be if the outcome arrived by the arbitrator cannot be sustained on any grounds, based on the material, and the irregularity, failure or error concerned is the only basis to sustain the outcome the arbitrator arrived at, then the review application would succeed.⁶

⁵ *Fidelity* at para 102.

⁶ See *Campbell Scientific Africa (Pty) Ltd v Simmers & others* (2016) 37 ILJ 116 (LAC); [2016] 1 BLLR 1 (LAC) at para 32; *Anglo Platinum (Pty) Ltd (Bafokeng Rasemone Mine) v De Beer & others* (2015) 36 ILJ 1453 (LAC); [2015] 4 BLLR 394 (LAC) at para 12.

[15] In *Goldfields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA & Others*⁷ the Labour Appeal Court further explained the reasonableness test in the following terms:

“[15] A ‘process-related review suggests an extended standard of review, one that admits the review of an award on the grounds of a failure by the arbitrator to take material facts into account, or by taking into account facts that are irrelevant, and the like. The emphasis here is on process and not result. Proponents of this view argue that where an arbitrator has committed a gross irregularity in the conduct of the arbitration as contemplated by s145(2), it remains open for the award to be reviewed and set aside irrespective of the fact that the decision arrived at by the arbitrator survives the Sidumo test. I disagree. What is required is first to consider the gross irregularity that the arbitrator is said to have committed and then to apply the reasonableness test established by Sidumo. The gross irregularity is not a self-standing ground insulated from or standing independent of the Sidumo test. That being the case, it serves no purpose for the reviewing court to consider and analyse every issue raised at the arbitration and regard failure by the arbitrator to consider all or some of the issues albeit material as rendering the award liable to be set aside on the grounds of process-related review.”

and

“[20] To do it differently or to evaluate every factor individually and independently is to defeat the very requirement set out in section 138 of the LRA which requires the arbitrator to deal with the substantial merits of the dispute between the parties with the minimum of legal formalities and do so expeditiously and fairly. This is also confirmed in the decision of CUSA v Tao Ying Metal Industries. Failing to consider a gross irregularity in the above context would mean that an award is open to be set aside

⁷ (JA 2/2012) [2013] ZALAC 28; [2014] 1 BLLR 20 (LAC); (2014) 35 ILJ 943 (LAC) (4 November 2013).

where an arbitrator (i) fails to mention a material fact in his award; or (ii) fails to deal in his/her award in some way with an issue which has some material bearing on the issue in dispute; and/or (iii) commits an error in respect of the evaluation or considerations of facts presented at the arbitration. The questions to ask are these: (i) In terms of his or her duty to deal with the matter with the minimum of legal formalities, did the process that the arbitrator employed give the parties a full opportunity to have their say in respect of the dispute? (ii) Did the arbitrator identify the dispute he was required to arbitrate (this may in certain cases only become clear after both parties have led their evidence)? (iii) Did the arbitrator understand the nature of the dispute he or she was required to arbitrate? (iv) Did he or she deal with the substantial merits of the dispute? and (v) Is the arbitrator's decision one that another decision-maker could reasonably have arrived at based on the evidence?"

and

"[21] Where the arbitrator fails to have regard to the material facts it is likely that he or she will fail to arrive at a reasonable decision. Where the arbitrator fails to follow proper process he or she may produce an unreasonable outcome (see Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others 2006 (2) SA 311 (CC)). But again, this is considered on the totality of the evidence not on a fragmented, piecemeal analysis. As soon as it is done in a piecemeal fashion, the evaluation of the decision arrived at by the arbitrator assumes the form of an appeal. A fragmented analysis rather than a broad based evaluation of the totality of the evidence defeats review as a process. It follows that the argument that the failure to have regard to material facts may potentially result in a wrong decision has no place in review applications. Failure to have regard to material facts must actually defeat the constitutional imperative that the award must be rational and reasonable- there is no room for conjecture and guesswork"

- [16] The Labour Appeal Court in *Head of the Department of Education v Mofokeng and Others*⁸ provided the following exposition of the review test:

“[33] Irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide a compelling indication that the arbitrator misconceived the inquiry. In the final analysis, it will depend on the materiality of the error or irregularity and its relation to the result. Whether the irregularity or error is material must be assessed and determined with reference to the distorting effect it may or may not have had upon the arbitrator’s conception of the inquiry, the delimitation of the issues to be determined and the ultimate outcome. If but for an error or irregularity a different outcome would have resulted, it will ex hypothesi be material to the determination of the dispute. A material error of this order would point to at least a prima facie unreasonable result. The reviewing judge must then have regard to the general nature of the decision in issue; the range of relevant factors informing the decision; the nature of the competing interests impacted upon by the decision; and then ask whether a reasonable equilibrium has been struck in accordance with the objects of the LRA. Provided the right question was asked and answered by the arbitrator, a wrong answer will not necessarily be unreasonable. By the same token, an irregularity or error material to the determination of the dispute may constitute a misconception of the nature of the enquiry so as to lead to no fair trial of the issues, with the result that the award may be set aside on that ground alone. The arbitrator, however, must be shown to have diverted from the correct path in the conduct of the arbitration and as a result failed to address the question raised for determination.”

- [17] The court will now proceed to consider the review application by the applicant against the above principles and the test applicable to review applications.

Evaluation of grounds of review

⁸ (JA14/2014) [2014] ZALAC 50; [2015] 1 BLLR 50 (LAC); (2015) 36 ILJ 2802 (LAC) (1 October 2014).

- [18] In commencing the evaluation of the grounds of review this court notes that it is common cause that the respondent assaulted Mtumtum and that Mtumtum provoked the respondent. What is in dispute is whether Mtumtum's provocation was sufficiently serious to justify the assault on him by the respondent and whether the said provocation was a sufficient mitigating factor for the assault that took place. It is also necessary to look at what exactly the assault entailed, and the circumstances surrounding the assault such as the assault taking place in front of other employees and customers.
- [19] It will be appropriate to refer to some case law on provocation as a mitigating factor to an act of assault before applying same to the facts of this matter. It is also necessary to evaluate the commissioner's finding in relation to provocation when he analysed the evidence and arrived at the conclusion that the respondent's dismissal was substantively unfair.
- [20] The Labour Court in *Nampak Products (Pty) Ltd t/a Megapak v CCMA and Others*⁹ held as follows:

"[35] ... The mere existence of provocation is obviously not the end of the inquiry. When provocation is advanced as a mitigating factor in an assault, a critical question is whether the extent of the provocation was such that it would have caused any reasonable person in the position of the assailant to have responded in that way."

and

"[36] In the case of Tedco Plastics (Pty) Ltd v National Union of Metalworkers of SA & others (2000) 21 ILJ 2710 (LC), the Labour Court summarised the principles governing provocation as applied in the criminal and delictual contexts and applied them in the employment

⁹ (C512/2018) [2021] ZALCCT 99 (24 June 2021).

context. The court found in the matter before it that there was no evidence to support a finding of provocation. Moreover, it held, albeit obiter, that the arbitrator had failed to understand and correctly apply the law relating to provocation as a mitigating factor:

“[15] ... Provocation is recognized in our criminal law and law of delict as a basis for excusing or mitigating the consequences of what would otherwise clearly be criminal or delictual conduct. The debate has not been settled as to whether provocation removes the unlawfulness of the conduct, or merely mitigates (or extinguishes) the punishment or damages arising therefrom. (See Neethling, Potgieter & Visser *Law of Delict* (3 ed) at 91-2 and Snyman *Criminal Law* (2 ed) at 183ff.) Whatever the correct legal categorization, however, the very fact that a person's actions were a reaction to the conduct of another does not mean that the law will come to their aid. Certainly, in the case of delictual liability, it appears that two requirements will have to be met, namely, that the provocative conduct must be such that the reaction to it by way of physical assault was reasonable, ie would a reasonable person in the position of the person have acted as he did in the face of the provocation; and, that the conduct must be an immediate and reasonable retaliation, ie it must follow immediately on the provocation and not be out of proportion to the nature and degree of the provocative behaviour (Neethling et al at 94).”

In that case, the court found that the arbitrator could not have concluded that provocation could be advanced as a mitigating factor or as a defence because:

36.1 the assault in question was not defensive but aggressive in nature;

36.2 it occurred after the victim had already left the scene and was thus not an immediate reaction, but marked the commencement of the new chain of events;

36.3 it was completely out of proportion to the conduct of the victim of the assault, and

36.4 was contrary to the arbitrator's own finding that the employee had decided to take the law into his own hands, which implied a rational decision to retaliate and not simply an immediate response."

and

"[37] In this case, the arbitrator appears to have assumed that the mere existence of provocative conduct, as such, mitigated the seriousness of the assault on Yengo. What she failed to consider was whether Yengo's conduct was reasonable in the context and whether it was an immediate response to the provocation."

- [21] The Labour Appeal Court in *Nelson Mandela Bay Metropolitan Municipality v Independent Municipal & Allied Trade Union on behalf of Tshabalala & others*¹⁰, a case which involved a physical fight between two senior employees in the presence of their subordinates, said the following:

"[26] The employee's further argument that he acted in self-defence cannot avail him. The commissioner's conclusion that 'any reasonable person would have reacted in the manner [the employee] did' and that 'as a man he could not walk away from the fight', goes against the grain of conduct expected of an employee. In our law every person is expected to control his/her temper. In addition, there is no obligation on an individual to

¹⁰ (2019) 40 ILJ 1021 (LAC).

accept a challenge. Either employee could have walked away from the scene.”

- [22] Keeping in mind the case law dealing with provocation as a mitigating factor to an act of assault, it is necessary to consider the evidence presented, and to then decide whether the commissioner failed to consider and correctly apply the principles relevant to provocation to the matter before him.
- [23] The evidence of the respondent will be considered first insofar as he claimed that he was provoked leading to the act of assault on Mtumtum. The respondent testified that he started working at 11h00am when Mtumtum asked “who was not present yesterday” to which he responded, “I was not here yesterday”. Mtumtum then started shouting and coming close to him and asked him to move into the shop to leave the position where he was. On the way inside the shop Mtumtum continued shouting and swearing at him. He kept moving and Mtumtum kept moving and was following him. The respondent testified that he thinks the thing that made him lose his temper is when Mtumtum said that “I am not one of those the one you are killed”. Meni testified that this was where he lost his temper. He went back at Mtumtum, grabbed him, and pushed him against the wall.
- [24] During cross-examination, the respondent agreed that the initial discussion was between Rasemetsi and Mtumtum and that he decided to make himself part of the conversation. The respondent conceded that he did so knowing that he was previously spoken to about issues he had with Mtumtum and that management told him to stay away from Mtumtum. The respondent’s explanation was that Mtumtum was speaking about him, which was disputed. The respondent also agreed that, at that point, he could have just walked away to management to say that Mtumtum was taunting him. There was also an issue with Mtumtum speaking in Sotho and the respondent stating that why did he speak in Sotho thinking that the respondent did not understand what he was saying. The respondent also agreed that he decided to engage Mtumtum.

- [25] This led to the two of them shouting at each other with Rasemetsi, in the middle between them, saying “leave it guys, leave it”. The respondent also agreed that he lost his temper even though Mtumtum did not touch or attack him. The respondent disputed the applicant’s evidence that he pointed at Mtumtum and said to a customer that he would sort that guy out, which led to Mtumtum saying that he is not the person the respondent can just kill. The respondent also agreed that he attacked Mtumtum in front of the store and in front of the customers. He also agreed that what he did by grabbing Mtumtum on the neck and pushing him against the wall was not the right thing to do and that his actions constituted assault. The respondent also agreed that assault is a criminal act, which he committed inside the workplace.
- [26] The respondent further agreed that, as a security guard, it was his job to keep the premises safe, and that he knew that if he assaults someone, he would be fired. He agreed that by assaulting Mtumtum he did not keep the workplace safe and that he endangered people. The respondent also accepted that the applicant could fire him for the act of assaulting Mtumtum.
- [27] In analysing the respondent’s own evidence and considering the admission made during the applicant’s closing argument before the commissioner, this court must accept that there was provocation. There can be no dispute about this, as Mtumtum was issued with a final written warning for provoking the respondent. During Joubert’s own closing submissions to the commissioner (applicant’s representative during the arbitration proceedings), he conceded that provocation can be a mitigating factor to be considered in favour of the respondent. However, it was disputed that the provocation was sufficient to justify the respondent’s actions in physically assaulting Mtumtum.
- [28] This court is of the view that the commissioner committed an irregularity and failed to properly and correctly apply the law in respect of provocation in accepting that the provocation by Mtumtum justified the assault. This is so because the commissioner failed to take into consideration that the respondent

firstly involved himself in the discussion between Rasemetsi and Mtumtum. He failed to consider that, despite Mtumtum following the respondent into the store and telling him that he is not a person that you can just kill, Mtumtum did not physically touch or assault the respondent. The court notes that there is a dispute about whether Mtumtum said that he is not a person that the respondent could just kill, or that the respondent could do nothing to him.

- [29] This court also does not accept the respondent's denial that he said to a customer that he will sort that guy out, pointing to Mtumtum. According to the applicant's witness, Rasemetsi, that is what he did, and this is what caused Mtumtum to retaliate and say that "you cannot do me nothing". They continued, however, and Mtumtum continued following the respondent.
- [30] The commissioner further failed to consider and accept that the respondent lost his temper and physically assaulted Mtumtum in front of other staff members, and in front of customers. The commissioner failed to consider that the respondent knew that assault is a dismissible, and in fact a criminal offence, and that despite the respondent's duties being to keep the workplace safe, he did exactly the opposite.
- [31] The physical assault of another person is a serious offence and in fact a criminal offence. The reliance on provocation to justify a physical assault must meet strict criteria as emanating from the case law referred to above. As held in *Tedco Plastics*¹¹, the very fact that a person's actions were a reaction to the conduct of another does not mean that the law will come to their aid. There are two requirements to be met. The first requirement is that the provocative conduct must be such that the reaction to it by way of physical assault was reasonable, i.e., would a reasonable person in the position of the person have acted as he did in the face of provocation. The second requirement is that the conduct must be an immediate and reasonable retaliation, i.e., it must follow immediately on the

¹¹ *Supra*.

provocation and not be out of proportion to the nature and degree of the provocative behaviour.

- [32] This court is unable to agree with the commissioner that the nature of the provocation was such that the respondent's reaction was reasonable. In any event, the commissioner appears to overlook the fact that the respondent is the one who involved himself in a discussion between Mtumtum and Rasemetsi, and that the respondent, on a balance of probabilities, told a customer, pointing to Mtumtum, that he would sort him out. The provocation of shouting between the two employees and Mtumtum following the respondent do not justify an act of physical assault. This is especially so when the assault is done in front of other staff members and in front of customers. It will create a bad precedent if this court is to accept provocation, as relied on in this case, to justify a physical assault on a co-employee. The applicant is required to ensure a safe working environment for all its employees and, allowing such provocation to justify a criminal offence of assault, is unacceptable. There was no need for the respondent to physically assault Mtumtum and insofar as the commissioner found that the provocation justified the assault, he failed to understand and correctly apply the law relating to provocation as a mitigating factor.
- [33] In relation to the second requirement that the conduct must be an immediate and reasonable retaliation, this court cannot find that the respondent's act of physical assault was a reasonable retaliation. The respondent's physical assault of Mtumtum was out of proportion to the nature and degree of the provocative behaviour. The respondent was aware of the serious consequences of any act of physical assault in the workplace. There was no need for him to physically assault Mtumtum as a reasonable response to the provocative behaviour, especially in front of other staff members and customers and given the respondent's primary duty to ensure a safe working environment. The respondent, knowing the seriousness of any physical assault in the workplace, must bear the consequences of his actions. It is not a surprise that the act of

physical assault in the workplace is regarded as a dismissible offence for a first offence.

- [34] This court will not address the issue of the previous discussions that took place with Mtumtum and the respondent, although separate from one another, given the court's conclusion that the commissioner had failed to understand and correctly apply the law relating to provocation as a mitigating factor. The court will also not address the issue of inconsistency, as inconsistency was never raised as a defence. It is sufficient for this court to note that Mtumtum, who received a final written warning, did not physically assault the respondent. The respondent, in turn, physically assaulted Mtumtum and there is no reason to criticise two different sanctions applied.
- [35] Although the commissioner did not specifically refer to the Code of Good Practice: Dismissal (the Code), this court must determine whether the commissioner's findings are in line with the provisions of the Code. Item 3(4) provides that 'generally, it is not appropriate to dismiss an employee for a first offense, except if the misconduct is serious and of such gravity that it makes a continued employment relationship intolerable'. In this court's view, the act of physical assault on a co-employee in the workplace and in front of customers and fellow staff members was sufficiently serious to make a continued employment relationship intolerable. The applicant, despite being aware that it is a dismissible offence to physically assault another employee, and the potential consequences thereof, nonetheless proceeded to physically assault Mtumtum. An employer cannot tolerate a situation where an employee, with such knowledge, continues to breach the rule regarding physical assault in the workplace. Insofar as the commissioner found that the applicant did not demonstrate how the trust was broken down, this is not entirely correct. The applicant provided evidence of the seriousness of the offence, and why such action cannot be tolerated in the workplace.

- [36] Item 3(5) of the Code provides, in turn, that ‘when deciding whether or not to impose the penalty of dismissal, the employer should in addition to the gravity of the misconduct consider factors such as the employee’s circumstances (including length of service, previous disciplinary record and personal circumstances), the nature of the job and the circumstances of the infringement itself’. Due to the commissioner’s unreasonable decision that the provocation justified the physical assault of Mtumtum, he did not consider these factors. The court, however, considered the evidence and finds that the respondent’s circumstances, as presented during his evidence, are not sufficient to depart from the penalty of dismissal. It may be so that the respondent showed remorse, albeit after the fact, but the showing of remorse after a serious act of physical assault does not justify a departure from the normal penalty of dismissal.
- [37] Item 3(6) provides that ‘the employer should apply the penalty of dismissal consistently with the way in which it has been applied to the same or other employees in the past, and consistently as between two or more employees who participate in the misconduct under consideration’. The respondent did not challenge the consistent application of the rule and there is no need for this court to address this issue other than reiterating that there was a clear reason to distinguish between Mtumtum and the respondent when it came to issuing of sanctions.

Costs

- [38] In terms of the provisions of section 162(1) of the LRA, this court has wide discretion when it comes to the issue of costs. The court is mindful of the *dictum* of the Constitutional Court in *Zungu v Premier of the Province of Kwa-Zulu Natal and Others*¹² when it comes to the issue of costs in employment disputes. In the matter before this court, this court can find no reason, in law and fairness, to make any order as to costs. This is especially so since the respondent opposed the review of an award that was issued in his favour.

¹² (2018) 39 ILJ 523 (CC).

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

Order

1. The application for the arbitration award to be reviewed and set aside is granted.
2. The respondent dismissal was substantively fair.
3. No order is made as to costs.



C. de Kock

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

J Foster

Instructed by:

M Kruger from M Kruger Attorneys

For the Third Respondent:

K Cato from Cato Attorneys