



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JR1131/2017

In the matter between:

SAMWU obo S MVINJELWA

Applicant

and

CITY OF TSHWANE METROPOLITAN MUNICIPALITY

First Respondent

**SOUTH AFRICAN LOCAL GOVERNMENT
BARGAINING COUNCIL**

Second Respondent

MMAMAHLOLA GLORIA RABYANYANA

Third Respondent

Heard: 27 November 2024

Delivered: 10 October 2025

JUDGMENT

VUKEYA, AJ

Introduction

- [1] The South African Municipal Workers' Union (the applicant) brings an application to this Court on behalf of Mr. Silulami Mvinjelwa (Mr Mvinjelwa) to have the arbitration award of the South African Local Government Bargaining Council (The Bargaining Council) under case number PMD081501 dated 8 May 2017, reviewed and set aside.
- [2] It requests the Court to decide whether the commissioner's reasoning falls within the scope of reasonableness based on the conclusion that the dismissal of Mr Mvinjelwa was both substantively and procedurally fair. Whether a reasonable arbitrator presented with the evidence before her would have arrived at the very same decision reached by the second respondent, and whether the second respondent did in fact comply with item 4(2) under Schedule 8 of the Labour Relations Act¹ (LRA).
- [3] SAMWU is the trade union that represents Mr Mvinjelwa. Mr Mvinjelwa was the local office bearer and a shop steward of the applicant representing the employees in the licensing department. He has been the employee of the first respondent since 1 October 2012 until the date of his dismissal on 27 July 2015, on allegations of misconduct.
- [4] Mr Mvinjelwa was charged in terms of the Disciplinary Procedure concluded at the Bargaining Council as a Collective Agreement. He was charged with having contravened the Code of Conduct, which is referred to in the Collective Agreement. In terms of the first charge, it was alleged that Mr Mvinjelwa failed to refrain from any rude, insolent, provocative, intimidatory or aggressive behaviour to a fellow employee or a member of the public, thereby contravening clause 1.2.9 of Annexure "A" of the Collective Agreement.
- [5] The first respondent averred that Mr Mvinjelwa willfully and unlawfully assaulted Ms Monja Basson, a member of the public, by slapping her with an open hand across her face. It was alleged that this incident happened on or about 20 November 2014 at the first respondent's Centurion Licensing offices in Pretoria. Mr Mvinjelwa was found guilty after a disciplinary hearing and was

¹ Act 66 of 1995, as amended.

dismissed on 27 July 2015. The applicant then lodged a dispute of unfair dismissal under the auspices of the Bargaining Council.

- [6] The dispute could not be resolved by the Council for conciliation, and a certificate of the outcome of the conciliation was issued. After the applicant's request to have the matter arbitrated, Ms MG Rabyanyana was appointed as the arbitrator. The arbitration was heard on 4 April 2017, where Mr Mvinjelwa was represented by a Union Official, Adv J Baloyi, and the first respondent by Adv EM Ngomani.

At the arbitration proceedings

- [7] What transpired at the arbitration hearing can be briefly summarised as follows. The arbitrator determined the issues to be decided to be:

- 7.1. whether the applicant's dismissal was substantively fair;
- 7.2. whether the dismissal was procedurally fair; and
- 7.3. Appropriate relief.

- [8] It was common cause at the arbitration hearing that Mr Mvinjelwa started working on 1 October 2012 and that at the time of his dismissal, he was a Chief Licensing Officer earning R21 277 per month. He was dismissed after a disciplinary hearing was held on 27 July 2015 for assaulting a member of the public. The sanction for the offence was also common cause between the parties.

- [9] Ms Basson testified that she accompanied her sister to renew her driver's license, and after waiting in the queue for some hours, Mr Mvinjelwa refused to assist them. He, according to Miss Basson, told her sister that he would not accept a certified copy of an ID and that he would require the original. They tried to explain to him that the certified copy was accepted, but he rudely ordered them to leave. After leaving the cubicle, Ms Basson testified that she said, '*this is fu*ked up*', after which Mr Mvinjelwa walked around his cubicle and confronted her in full view of the public. He slapped her on the right side of the face, and a plainclothes policeman came to her rescue and took them

to the boardroom. Ms Basson's sister confirmed this version and denied that her sister had insulted Mr Mvinjelwa by calling him the '*mother fu*king kaffir*'.

- [10] Mr Mvinjelwa's evidence was that he did not assault anyone on that day. He said the two ladies came to renew a driver's license, and the one he was helping did not have her original ID as required. He explained to her several times that an ID was required, but they did not want to hear him out. He asked the lady to go to his supervisor to verify the information, but Miss Basson kept on interfering and called him a '*mother fu*king kaffir*'. He got outside of his cubicle to show them his supervisor. The police came to investigate the commotion and took them to the boardroom to listen to her story. He was then told to assist them, and he did.
- [11] Mr Thembile Mabinza was also working in the third cubicle from Mr Mvinjelwa on the date of the incident. He said that he heard Mr Mvinjelwa saying, '*who are you calling the 'F' word?*'. At that time, Mr Mvinjelwa was standing, and there were two ladies in front of his cubicle. After they exchanged words, he saw the applicant going out of his cubicle and walking down the passage. Mr Mabinza testified that he did not see any assault take place, and he also did not hear what the two ladies said because there were glasses obstructing his view.
- [12] In her evaluation of the evidence, the arbitrator found that the evidence of Ms Basson and her sister was consistent and that it was without contradictions. She rejected Mr Mvinjelwa's version and accepted that of the first respondent and concluded that the first respondent had successfully proven, on a balance of probabilities, that the dismissal of Mr Mvinjelwa was substantively fair. Regarding the procedural challenge of the dismissal, the arbitrator remarked that she was convinced that if the union had not been notified, it could have raised or ventilated the issue during the disciplinary hearing. This could have been submitted as evidence supporting the contention and negating the first respondent's letter. She was of the view that, in the absence of any evidence rebutting the respondent's evidence that it had dispatched the letter to the union, it satisfied her that the first respondent had successfully proven on a balance of probabilities that the dismissal was procedurally fair.

[13] The arbitrator proceeded to make an award as follows:

‘The applicant’s dismissal is substantively and procedurally fair.

The application is dismissed.’

On review

[14] The issues for determination in this application are very crisp, and they are whether the dismissal of Mr Mvinjelwa was substantively and procedurally unfair and whether the arbitration award made was one which a reasonable decision maker could make based on the facts and evidence presented to her at the arbitration hearing.

[15] In this review application, the applicant contended that the arbitrator failed to fully assess the evidence presented to her and arrived at a decision which a reasonable decision-maker in her position would not have arrived at. It further contended that the arbitrator was wrong to conclude that the dismissal of Mr Mvinjelwa was procedurally fair in the absence of evidence proving that the first respondent had duly complied with the procedure for disciplining union officials because Mr Mvinjelwa was a shop steward and a local office bearer.

[16] According to the applicant, Mr Mvinjelwa received a notice to attend a disciplinary hearing on 10 February 2015, and his hearing began on 17 February 2015. The applicant avers that it was only informed on 18 February 2015 about the disciplinary hearing and alleges that the email, which, according to the first respondent, was sent to the union to notify it, did not reach the applicant’s offices. It argues, therefore, that this was contrary to the provisions of Schedule 8, item 4(2) of the LRA and that on this basis, the dismissal cannot be said to be procedurally fair.

[17] Discipline against a trade union representative or an employee who is an office bearer or official of a trade union should not be instituted without first informing and consulting the trade union.² It is the version of the applicant that the employer failed to inform and consult the union before instituting the disciplinary hearing against Mr Mvinjelwa. On the other hand, the first

² Schedule 8, item 4(2) of the LRA.

respondent claims to have informed and consulted the union before instituting the disciplinary hearing. No proof, according to the applicant, has been filed to show that a notice to inform the union about the intention to charge the applicant was sent to the union or if it was sent, that it ever reached the union.

[18] It is the applicant's contention that the arbitrator failed to and committed misconduct by disregarding and or ignoring the procedural aspect of charging a shop steward. She erred in making a finding that the procedure followed by the respondent was fair, while the correct procedure was not followed. The applicant further avers that the arbitrator erred in stating that the applicant should have raised or ventilated the issue of non-compliance with Schedule 8 during the disciplinary hearing, further ignoring the fact that the arbitration hearing was a hearing *de novo* and that referral on unfairness is to address all aspects which were disregarded during a disciplinary hearing.

[19] The applicant referred the Court to the case of *County Fair Foods (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*³ where the Labour Appeal Court (LAC) stated as follows:

'The decision of the arbitrator as to the fairness or unfairness of the employer's decision is not reached with reference to the evidential material that was before the employer at the time of its decision but on the basis of all the evidential material before the arbitrator. To that extent, the [arbitration] proceedings are a hearing *de novo*.'

[20] Furthermore, the applicant avers that the arbitrator misdirected herself by accepting hearsay evidence that there were certain policemen in private clothes when no such police officers were called to testify and if the assault had indeed happened in the presence of the officers, they were duty-bound to arrest the applicant. The applicant further argues that the record of arbitration proceedings clearly demonstrates that the arbitrator not only misconstrued important aspects of the evidence, but she also failed to apply her mind to the absence of a J88 form, which could have proven whether the witness was indeed assaulted or not.

³ (1999) 20 ILJ 1701 (LAC) at para 11.

- [21] Relying on *Mushi v Exxaro Coal (Pty) Ltd*⁴ The applicant submitted that the arbitrator must have regard to all material before him, including the provisions of the disciplinary code which is applicable between the parties to an employment contract. It argued that the arbitrator has failed to do so and therefore, the award falls to be reviewed and set aside, it submitted.
- [22] The first respondent submitted that the award given by the third respondent was sound and well-reasoned, as she considered the evidence placed before her by both parties. She, according to the first respondent, considered the disciplinary code and procedure and applied her mind to the evidence before her. Regarding the substantive fairness of the dismissal, the first respondent submits that Mr Mvinjelwa's defence was that of a bare denial, but his version was improbable. The first respondent argued that the police who were present when the incident happened would not have intervened if he had only directed the witnesses to a particular office for further inquiries.
- [23] It is further submitted by the first respondent that Mr Mvinjelwa's evidence contradicted that of his representative, in that, although his defence was that of a bare denial, his representative stated during cross-examination of the first respondent that he would testify that he slapped her with an open hand. The first respondent's submission was that the arbitrator correctly found that it had successfully discharged its onus in terms of item 7 of Schedule 8 of the Code of Good Practice and that her finding that the dismissal was substantively fair stands to be confirmed.
- [24] Regarding the finding of procedural fairness made by the arbitrator on the ground that in the absence of any evidence rebutting the respondent's evidence that it had dispatched the letter to the union, she was satisfied that the first respondent had successfully proven on a balance of probabilities that the dismissal was procedurally fair, is correct and stands to be confirmed by this Court.
- [25] The first respondent submits that on 10 February 2015, the union was informed of the intended disciplinary hearing. It stated in its opposing affidavit

⁴ 2020 JDR 2927 (LAC).

that although the notice to SAMWU was dated 10 February 2015, it was formally sent on 18 February 2015 to M[...]. On 17 February 2015, the disciplinary hearing did not proceed to allow the parties to consult. The letter, which is attached to the pleadings as annexure “STS3”, reads as follows:

‘In terms of the Labour Relations Act (Act 66 of 1995) discipline against a trade union representative should not be instituted without first informing the union.

I therefore, hereby have to inform you that we intent (sic) to take disciplinary action against one of your Shop Stewards Mr S Mvinjelwa (180588).’

- [26] The first respondent’s submission is that it has complied with the provisions of Schedule 8 (4) (2) of the LRA, as the postponement was to consult in accordance with Schedule 8. It conceded that the letter was not sent before 17 February 2015, but stated that it was mindful that the purpose of item 4(2) was for the union to be informed and consulted when an office bearer is to be disciplined; however, the purpose of the postponement was to fulfil the consultation process. The first respondent referred the court to the case of *BIFAWU and Another v Mutual and Federal Insurance Company Ltd*⁵ (*BIFAWU*) where the LAC, as per Willis JA, stated as follows:

‘The trade union in question may not be a representative trade union in terms of the LRA and, therefore, not entitled to various of the organisational rights set out in Chapter III. Item 4(2) of Schedule 8 does not, however, confine itself to a trade union which is representative. Nevertheless, Item 1 of the Schedule makes it clear that that the Schedule serves as a guideline only. There seems to have been no prejudice to the second appellant as a result of the respondent’s failure to consult the trade union. The second appellant was ably represented during his disciplinary enquiry by a representative of his own choice, Mr Baardt. Moreover, account must be taken of the fact that the error on the part of the respondent was bona fide. There was no mischief on the part of the employer. The mischief which the item seems designed to prevent is the perception that a trade union representative may not have been dismissed for a fair reason and/or after the following of a fair procedure. Such mischief cannot be perceived here. It also seems most unlikely that the failure

⁵ [2006] 2 BLLR 118 (LAC) at para 32.

to visit an award of compensation in this case for a lack of full compliance with the requirements of procedural fairness will result either in this employer or others being indifferent to the guideline in Item 4(2) of Schedule 8 of the LRA in future.'

- [27] It was therefore submitted on behalf of the first respondent that the arbitrator's award is not reviewable because a reasonable decision-maker presented with the same evidence would arrive at the same finding. The first applicant prays for the dismissal of the application on the basis that it is not reviewable.

Evaluation

- [28] The principles in *Sidumo and Another v Rustenburg Platinum Mines Ltd and others*⁶ (*Sidumo*), becomes applicable when deciding the issue relating to the review of arbitration awards. In *Sidumo*, the Constitutional Court held that the test is whether the decision reached by the commissioner is one that a reasonable decision maker could not reach and that the arbitrator's conclusion must fall within a range of decisions that a reasonable decision maker could make.
- [29] In *Herholdt v Nedbank Ltd (Congress of South African Trade Unions as amicus curiae)*⁷, the Supreme Court of Appeal made the following remarks:

'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 section 145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by section 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 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.'

⁶ (2007) 28 ILJ 2405 (CC) at para 110.

⁷ [2012] 11 BLLR 1074 (SCA) at para 25.

[30] In *Palabora Copper (Pty) Ltd v Motlokwa Transport & Construction (Pty) Ltd*⁸ (*Palabora*), it was stated that a gross irregularity may include a decision-maker misconceiving the mandate. The court remarked as follows:

‘It suffices to say that where an arbitrator for some reason misconceives the nature of the enquiry in the arbitration proceedings with the result that a party is denied a fair hearing or a fair trial of the issues, that constitutes a gross irregularity. The party alleging the gross irregularity must establish it. Where an arbitrator engages in the correct enquiry, but errs either on the facts or the law, that is not an irregularity and is not a basis for setting aside an award. If parties choose arbitration, courts endeavour to uphold their choice and do not lightly disturb it. The attack on the award must be measured against these standards.’

[31] I first deal with the arbitrator’s finding that Mr Mvinjelwa’s dismissal was substantively fair. The arbitrator based her findings on the evidence that was before her relating to the allegations of misconduct. She accepted the evidence tendered on behalf of the first respondent and rejected that of Mr Mvinjelwa. The first contention made herein is that the arbitrator misdirected herself by accepting hearsay evidence that there were certain policemen in private clothes when no such police officers were called to testify.

[32] Hearsay evidence is ‘*evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence*’⁹. The fact that there were policemen present at the scene was testified to by the first respondent’s witnesses as a matter of fact. This was something they saw and witnessed. They did not hear from anyone that the policemen were present. The evidence of these policemen would have become relevant only to provide corroboration to the evidence of the first respondent’s witnesses, or even that of Mr Mvinjelwa. The fact that they were not called as witnesses does not affect the credibility or reliability of their evidence.

[33] In another angle, the applicant contends that if the assault had indeed happened in the presence of the officers, they were duty-bound to arrest the

⁸ 2018 (5) SA 462 (SCA) at para 8.

⁹ Section 3(4) of the Law of Evidence Amendment Act, No 45 of 1988 (LEAA).

applicant. It is important to bear in mind that even though the police may arrest any person without a warrant of arrest who commits an offence in their presence¹⁰, it is far-fetched to submit that they were duty-bound to do so. They have the discretion to arrest or not to arrest. Furthermore, the question of whether Mr Mvinjelwa committed the offence was not to be determined based on the police officer's decision not to arrest him. To expect the arbitrator to consider this in favour of the applicant would have been a deviation from the relevant issues, which were whether they witnessed the incident or not.

- [34] The applicant further argued that the record of arbitration proceedings clearly demonstrated that the arbitrator not only misconstrued important aspects of the evidence, but she also failed to apply her mind to the absence of a J88 form, which could have proven whether the witness was indeed assaulted or not. In other words, the absence of a J88 at the hearing did not support the allegations made by the witnesses for the first respondent.
- [35] Firstly, there are numerous reasons why a J88 may not be available, one of which may be that the complainant did not seek medical attention after the alleged assault, which is the case in the current application. The question, therefore, is, does it mean that the assault did not happen?
- [36] Secondly, looking at the circumstances of the case, again, a J88 would have provided corroboration to the evidence of Ms Basson, more so if she had stated that she sustained visible injuries, but she did not give that evidence. The fact that there was no J88 is not sufficient to dismiss the claims made by the complainant, especially when considering the mosaic of the evidence which was presented to the arbitrator. Simply put, the absence of the J88 form is not crucial to the case of the first respondent; she was hit with an open hand and sustained no serious injuries. This cannot justify the sort of negative inference the applicant expected the arbitrator to draw. Accordingly, I am of the view that the finding of substantive fairness of the dismissal is not to be interfered with.

¹⁰ Section 40 (1) of the Criminal Procedure Act 51 of 1977, as amended.

[37] Regarding the finding of procedural fairness of the dismissal, the applicant's contention is that the correct procedure when dismissing a shop steward or a local office bearer of a union was not followed by the first respondent. This procedure is regulated in terms of item 4(2) of Schedule 8 of the LRA, and in terms of this provision, the employer must inform the union of its intention to institute a disciplinary hearing against such an official. What is common cause in this application is that a notice was prepared dated 10 February 2015, the same date as it was served on Mr Mvinjelwa. Although Mr Mvinjelwa received his, the union did not. The disciplinary hearing was to take place on 17 February 2015, and the notice was not sent to the union until 18 February 2015. It is also common cause that the disciplinary hearing did not proceed on 17 February 2015.

[38] The purpose of item 4(2) and the question of prejudice on any of the parties becomes a significant consideration in dealing with this issue, especially when looking at the surrounding circumstances of this application. Item 1 of Schedule 8 provides that

'(1) This code of good practice deals with some of the key aspects of dismissal for reasons related to conduct and capacity. It is intentionally general. Each case is unique, and departures from the norms established by this Code may be justified in proper circumstances. For example, the number of employees employed in an establishment may warrant a different approach.'

[39] The above is a solid indication of the fact that the Code of Good Practice serves as a guideline only, and its application may differ from case to case depending on the circumstances of each case. Its key principle is that employers and employees should treat one another with mutual respect. In the circumstances of the case in consideration, it may be said that the purpose of the consultation would be to allow the parties to resolve the issues existing between them without a formal hearing because of Mr Mvinjelwa's status in the union. Common practice is that if they cannot reach an agreement, the employer will then be justified to follow the usual disciplinary process. The purpose of this provision is to protect shop stewards and other

office bearers of the union from victimisation while performing their duties, for reasons of being office bearers of a trade union.

- [40] Clearly, the main purpose is to allow the process of consultation to take place between the parties in order to try and resolve the disputes before the disciplinary action is embarked on. The disciplinary hearing did not proceed on 17 February 2015, and this means that when it finally took off on 27 July 2015, the notice had been in the hands of the union for at least five months. I am inclined to agree with the arbitrator that the applicant chose not to raise this issue at the disciplinary hearing, and therefore, a negative inference could be drawn from this, even though an arbitration hearing is a trial *de novo*.
- [41] Furthermore, none of the parties were prejudiced by the failure to strictly comply with the provisions of item 4(2), more so because they had the opportunity to consult between 18 February 2015 and 27 July 2015. It does not seem like there was any mischief on the side of the first respondent, which may have motivated it to notify the applicant union of the disciplinary hearing after 17 February 2015, because the postponement of the matter provided an opportunity for consultation. As in *BIFAWU*, no prejudice was suffered by Mr Mvinjelwa as a result of the non-compliance, as he was also able to get a representative to assist him at the disciplinary hearing.
- [42] I am therefore inclined to agree with the first respondent that the applicant's submissions relating to the finding of procedural fairness of Mr Mvinjelwa's dismissal have no merit and therefore fall to be dismissed. According to the applicant, the record of arbitration proceedings clearly demonstrates that the arbitrator not only misconstrued important aspects of the evidence, but she also failed to apply her mind and failed to fully assess the evidence presented to her, and as a result, arrived at a decision which a reasonable decision-maker in her position would not have arrived at. I am disinclined to agree with the applicant as I am of the view that the reasons I mention above clearly demonstrate the opposite of the applicant's contentions.
- [43] The arbitrator's findings on substantive and procedural fairness are, in my view, ones that a reasonable decision-maker could make. I cannot fault the

arbitrator in her findings, and therefore, this Court declines to review and set aside the arbitration award.

[44] In the result, the following order is made:

Order

1. The application to review and set aside the arbitration award issued by the third respondent dated 8 May 2017 under case number PMD081501 is dismissed.
2. There is no order as to costs.

L Vukeya

Acting Judge of the Labour Court of South Africa

Appearances:

For the applicant: Ms Phakedi (Attorney)

Instructed by: Phakedi Attorneys Inc

For the respondent:

Instructed by: Moche Attorneys

LABOUR COURT