LABOUR COURT

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR240/22

In the matter between:

FOOD AND ALLIED WORKER'S UNION	**First Applicant**
BRYNLEY MASEKO	**Second Applicant**

and

COCA COLA BEVERAGES SOUTH AFRICA (PTY) LTD	**First Respondent**
LUSANDA MYOLI N.O	**Second Respondent**
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	**Third Respondent**

Heard: **3 September 2025**

Delivered: **29 October 2025**

JUDGMENT

DE WITT, AJ

Introduction

[1] This is an application to review and set aside the arbitration award delivered by the second respondent in her capacity as the Commissioner of the third respondent under case number GAJB19405-20 dated 15 December 2021 (the arbitration award), coupled with an application for condonation for the late filing of the review application, to the extent necessary.

Background facts

[2] The first respondent's business is a beverage manufacturing and selling company of Coca-Cola products. The second applicant, Mr Maseko, was employed by the first respondent since 2005, and at the time of his dismissal, he held the position of a Team Leader Processing in the Process Support Department.

[3] The facts of the matter are largely common cause. Four charges were levelled against Mr Maseko, which culminated in a disciplinary hearing being held on 14 August 2020. Mr Maseko was found not guilty in respect of the first two charges, which require no further elaboration. Charges 3 and 4 were recorded in the following terms:

3.1. Charge 3: "*gross negligence and/or gross dereliction of duty and/or failure to follow company procedure and/or dishonesty in your actions of misconduct with relations to an incident where: on 4 May, you did not sort the lemonade concentrate required per the mixing instructions before authorising the mixing process to commence. Part 2A "Sprite Cucumber" was added to the batch of lemonade which resulted in tainted final syrup. You failed to verify the batch compliance before signing the release form to authorise the lines to consume the syrup.*

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You captured the final syrup data on infinity without referencing the mixing instruction and incorrectly captured Part 2A "Sprite Cucumber" as part of the lemonade batch. You did not conduct an end of shift stock count and failed to discover that Part 2A "Sprite Cucumber" was missing from the floor." This was referred to as the 'lemonade incident'; and

3.2. Charge 4: "*gross negligence and/or failure to follow company procedure in your actions of misconduct with relation to an incident where: on 11 May, you did not sort the Iron Brew concentrate required per the mixing instruction before authorising the mixing process to commence. During the mixing process it was discovered that not all the concentrate components were in Syrup Room and the mixing process was delayed. This resulted in a work stoppage on Line 04 for a total of 112 minutes which impacted out of stocks (OOS) on Coke no sugar 2250ml, Sprite no sugar 2250ml and Twist Gran 2000ml.*" This was referred to as the "Iron Brew incident".

[4] Mr Maseko was found guilty of charges 3 and 4, and the Chairman of the disciplinary enquiry issued the sanction of a final written warning.

[5] On 4 September 2020, Mr Maseko received a "*notice of appeal by the company*" which was authored by Mr Ntando Khanyile (Production Engineer) and which provided that the first respondent's *"disciplinary code is a guideline and not exhaustive of the measures that the company could take. While it is customary to only hold one disciplinary enquiry, case law provided that in exceptional circumstances, where fairness dictates, an employer could hold more than one disciplinary enquiry – particularly where the employer viewed the sanction that was meted out by the chairperson unsatisfactory and where*

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the employer regarded the process followed in the first enquiry to be flawed or irregular". The first respondent *"considered the sanction issued by the Chairman to be wrong and against all forms of acceptable progressive discipline and the company's consistent application of discipline in respect of the same acts of misconduct of which Mr Maseko had been found guilty*". The first respondent considered the offences committed by Mr Maseko to be sufficiently serious as to warrant dismissal, particularly when his disciplinary record was considered and which showed a propensity to re-engage in the same or similar acts of misconduct.

[6] Having conducted the appeal, during which Mr Maseko was permitted to state his case, the first respondent, on 22 September 2020, substituted the Chairman's sanction with a "*recommendation of dismissal*", pursuant to which Mr Maseko was dismissed.

[7] Mr Maseko referred an unfair dismissal dispute to the third respondent in terms of s191(5)(a)(i) of the Labour Relations Act[1] (the LRA). The referral form records that the dismissal was procedurally unfair because of the "*employer's consistent application of the company policy*" and substantively unfair because the "*employer could not substantiate the dismissal of the applicant*". Mr Maseko sought retrospective re-instatement.

[8] A pre-arbitration minute was concluded between the parties, which recorded the common cause facts, the facts in dispute and the legal issue to be determined. The relevant portions thereof are:

8.1. Paragraph 4.23, where it is recorded as a common cause fact that *"[the first respondent] and [the first applicant] have entered into a National Recognition Agreement effective 1 January 2020 which contains the [first respondent's] Disciplinary Code and Procedure"*; and

8.2. Paragraph 6, where it is recorded that the legal issue to be determined was *"whether [Mr Maseko's] dismissal was both substantively and*

[1] Act 66 of 1995, as amended.

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procedurally fair".

[9] In what follows, I simply refer to the National Recognition Agreement of 1 January 2020 as the Collective Agreement.

Application for condonation

[10] The test for condonation is no doubt well settled in our law following *Melane v Santam Insurance Company Limited*[2] decision where the following was said:

> '…the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated: they are not individually decisive, for that would be a piecemeal approach, incompatible with a true discretion, save of course that if there are no prospects of success there will be no point in granting condonation. What is needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. The Respondent's interests in finality must not be overlooked.'

[11] The applicants have explained that while the arbitration award was delivered on 15 December 2021, it only came to the first applicant's attention on 1 February 2022, and the review application was delivered on 11 February 2022. The application for condonation is not opposed. The review application was promptly launched upon the first applicant receiving notice of the arbitration award. Having considered the condonation application, I see no reason why condonation should not be granted in this matter, and such

[2] 1962 (4) SA 531 (A).

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condonation is hereby granted.

The merits

[12] The applicants assert that the second respondent's award stands to be reviewed on the ground that the second respondent committed gross irregularities in the conduct of the arbitration proceedings by ignoring material evidence and committing material errors of law. More particularly, it is contended that the second respondent:

12.1. found that the first respondent was entitled to deviate from the procedures established in the Collective Agreement, provided the process actually followed was fair on the basis of *Highveld District Council v Commission for Conciliation, Mediation & Arbitration & others*[3] *(Highveld)*, Grogan (2014) and the CCMA Guidelines on Misconduct Arbitration whereas it is contended that the *Highveld* case was distinguishable because it pertained only to procedural unfairness, while Mr Maseko challenged the substantive fairness of the dismissal on the basis of the first respondent appealing the sanction in contravention of the Collective Agreement;

12.2. failed to apply her mind to material evidence, including that:

12.2.1. The pre-arbitration agreement concluded between the parties provided that the Disciplinary Code was part of the Collective Agreement and was applicable to Mr Maseko;

12.2.2. The first respondent's witnesses admitted that the Disciplinary Code was part of the Collective Agreement and

[3] (2003) 24 ILJ 517 (LAC); [2002] 12 BLLR 1158 (LAC).

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applied to Mr Maseko;

12.2.3. First applicant's evidence that, in terms of discipline within the first respondent, all employees were covered by the Collective Agreement;

12.2.4. Contradictory evidence was led by one witness to the effect that the Disciplinary Code applied to all employees, including Mr Maseko, but *"only as a guideline"* for him because he did not fall within the bargaining unit;

12.2.5. Mr Mokwena of the first applicant testified that the Collective Agreement applied to all employees regardless of whether they were in the bargaining unit or not;

12.2.6. Mr Mokwena testified that there was no provision in the Collective Agreement for the first respondent to appeal the sanction;

12.2.7. Mr Maseko testified that it was three weeks after he returned to work that he was served with the notice of suspension and advised of the appeal, and the second respondent failed to consider that the first respondent had perempted its alleged right of appeal;

12.2.8. Mr Kgalusi testified that he was a party to the Collective Agreement and that it applied to all FAWU members, and there was no justification for the first respondent to appeal or deviate from the Collective Agreement; and

12.3. failed to attach any weight to the pre-arbitration agreement and preferred the evidence of the single witness who was not a member of management and who did not have first-hand knowledge of the dispute. It is contended that it ought to have been clear that the first

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respondent's about turn on the status of the Disciplinary Code and its application to Mr Maseko was an afterthought, contradicted by the facts and *"the plain reading of the document*" and all other available evidence before the second respondent.

[13] This led, so the applicants contend, to a decision which no reasonable decision maker could make on all the evidence that was before the second respondent._The applicants contend further that had the second respondent not committed these gross irregularities, she would have found that:

13.1. There was a Collective Agreement in place which prohibited an appeal by the employer of the Disciplinary Chairperson's findings;

13.2. The first respondent was not allowed to substitute the findings of the Disciplinary Chairperson, and such decision was unfair; and

13.3. The conduct of the first respondent led to both the substantive and procedural unfairness of the dismissal, and therefore re-instatement was the primary relief to be awarded to Mr Maseko.

[14] The second respondent's award states that she was called upon to determine whether:

14.1. Mr Maseko *"committed Gross Negligence and/or Gross Dereliction of duty and/or Failure to follow the company procedure and/or Dishonesty with relation to the incidents relating to charge 3 and charge 4*"; and

14.2. the first respondent *"contravened the Recognition and Collective Bargaining Agreement on disciplinary hearing between FAWU and the [first respondent] by appealing the final written warning sanction that was issued by the disciplinary hearing chairperson*".

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[15] The second respondent appreciated that the first respondent bore the onus of demonstrating that Mr Maseko's dismissal was both substantively and procedurally fair.

[16] The second respondent's arbitration award provides that while Mr Maseko had initially challenged the substantive fairness of his dismissal (on the basis that his role and responsibilities in the syrup mixing process were in dispute), this was, however, not persisted with in the arbitration. Accordingly, it was recorded in the arbitration award that only the second issue fell to be determined by the second respondent (i.e. whether the first respondent contravened the Collective Agreement). It bears emphasis that the legal issue postulated for the second respondent's determination *was whether the first respondent contravened the Collective Agreement.*

[17] In the applicants' heads of argument before this Court, it was also formulated as such:

17.1. At paragraph 3 thereof, it was submitted that: *"in the main, the central issue pertinent to this matter is the question whether an employer can legally revoke its earlier decision to impose a lesser sanction. In casu, the first respondent (Coca Cola) had issued a sanction of a final written warning and later revoked it to a harsher sanction of dismissal. <u>The applicants allege that this was a breach of the collective agreement</u>"*; and

17.2. On the strength of authorities cited in the preceding paragraphs of the head of argument,[4] the applicants also contend at paragraph 15 thereof that "*had the Commissioner considered the authorities cited above, <u>applied her mind to whether there was a binding collective</u>*

[4] *County Fair Foods (Pty) Ltd v CCMA and others* (CA12/1/2001) [2002] ZALAC31 (11 December 2002) that it is unfair for an employer to interfere with an imposed sanction in the absence of express provisions in the disciplinary code to do so; *South Africa Revenue Services v Commission for Conciliation, Mediation and Arbitration and others (Chatrooghoon)* [2014] 1 BLLR 44 (LAC); [2013] ZALAC 26 that an employer who substitutes a sanction without being authorised by the disciplinary code acts *ultra vires* and on that basis alone the dismissal becomes unfair and *South African Revenue Service v CCMA and Others (Kruger case)* [2015] ZALAC 52; (2016) 37 ILJ 655 (LAC) at para 42 thereof.

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agreement and whether [the first respondent] was permitted to deviate from the binding collective agreement, she would have found that [the first respondent] was not authorised by its negotiated collective agreement to substitute the sanction imposed by the disciplinary chairperson. Such a finding would have driven the Commissioner to a conclusion that the dismissal is invalid and substantively unfair without the need to consider if the dismissal was for a fair reason or was appropriate".

[18] Therefore, the applicants' case before the second respondent and before this Court was posited on the supposition that the Collective Agreement was binding as between the first respondent and Mr Maseko and that the first respondent had contravened the Collective Agreement. Stated differently, the legal issue for determination was, and is, posited on the basis of it being an *au fait accompli* that the Collective Agreement applied to Mr Maseko. However, that is not so and the second respondent, correctly, set out to determine for herself if the Collective Agreement was indeed applicable to Mr Maseko.

[19] In doing so, the second respondent correctly found that the Collective Agreement (with the Disciplinary Code as an annexure thereto) indisputably applied to those employees *in the bargaining unit,* but since it was common cause that (i) Mr Maseko was a non-bargaining member based on his Hey level (14) as a Team Leader and (ii) was not a bargaining unit member, the Collective Agreement did not apply to him. This finding is unassailable.

[20] It matters not that some witnesses were of the view that the Collective Agreement applied to Mr Maseko while only one witness was of the view that it did not. Interpretation remains a matter for the Court and not for witnesses[5] and the starting point is still the terms of the Collective Agreement itself. A proper interpretation thereof reveals that:

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[5] *KPMG Chartered Accountants (SA) Securefin Ltd and Another* 2009 (4) SA 399; [2009] 2 All SA 523 (SCA); *Novartis v Maphil* [2015] ZASCA 111; 2016 (1) SA 518 (SCA); *B Braun Medical v Ambsaam CC* 2015 (3) SA 22 (SCA); [2014] ZASCA 199; *University of Johannesburg v Auckland Park Theological Seminary and Another* [2021] ZACC 13; 2021 (6) SA 1 (CC).

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20.1. "*The Agreement*" means "*this agreement as amended in writing from time to time, including annexures thereto"* (clause 2.1.2);

20.2. *"Bargaining Unit*" means *"employees in job grades Peromnes 19 to Peromnes 10 (Hey Level 13 to 4), subject to the positions in Annexure F which are excluded from Bargaining Unit. Despite this definition of Bargaining Unit, the parties agree that the Union will be permitted to collectively bargain for the following additional role which fall outside of the Bargaining Unit: Cleaner, Red Surveyor, Merchandiser, General Worker, School Recycling and Sorter"* (clause 2.1.3); and

20.3. *"Employee*" means *"any person in the <u>bargaining unit</u> permanently employed by the company*" (clause 2.1.9).

[21] On the common cause facts, Mr Maseko did not fall within the Bargaining Unit, and it was never contended that he fell into any of the other categories mentioned (and on the basis of which it would result in the Collective Agreement applying to him). As such, the Collective Agreement did not apply to Mr Maseko. While it may have been common cause that the Disciplinary Code is an annexure to, and forms part of, the Collective Agreement, that common cause fact becomes entirely irrelevant as soon as it is appreciated that the Collective Agreement does not apply to Mr Maseko.

[22] The applicants contend that the pre-arbitration agreement, however, provides that the Disciplinary Code was part of the Collective Agreement <u>*and was applicable to Mr Maseko*.</u> This is stated far too strongly and is not borne out by the pre-arbitration agreement, which provides, at paragraph 4.23 thereof, simply that:

> '*the [first] respondent and FAWU have entered into a National Recognition Agreement effective 1 January 2020, which contains the [first] respondent's Disciplinary Code and Procedure*.'

[23] The above is dispositive of the applicants' ground of review that, but for the "*alleged gross irregularities*", the second respondent would have found that

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"*there was a collective agreement in place* *which prohibited an appeal by the employer of the Disciplinary Chairperson's findings"*.

[24] The second respondent's conclusion that *"the [first] respondent did not contravene the Recognition and Collective Bargaining Agreement on disciplinary hearing between FAWU and the [first] Respondent by appealing the final written warning sanction that was issued by the disciplinary hearing chairperson*" is both reasonable and unassailable.

[25] Having correctly disposed of the supposition that the Collective Agreement applied to Mr Maseko, the second respondent, however, went on to consider the fairness of the first respondent's appeal of the sanction of a final written warning.

[26] In this regard, the second respondent appreciated that the Disciplinary Code applies to *all workers*. The preamble thereto provides that *"the objective of the Code will be to ensure the fair and consistent disciplining of all workers".* The second respondent considered that the Disciplinary Code applied to Mr Maseko, not as a contractual term incorporated into the Collective Agreement, but as a guideline. The second respondent's finding to this effect is both reasonable and correct.

[27] The second respondent acknowledged that fairness dictates that a person cannot be tried twice for the same offence and that when the employer's chairperson has taken a decision, the employer generally cannot revisit that decision. The second respondent referred to *BMW (South Africa) (Pty) Ltd v Van Der Walt*[6] and stated that "*since in labour law fairness dictates, when the circumstances call for it" … "where it is fair to do so and in the circumstances where there is a code it is permissible to have a second enquiry only in 'exceptional circumstances*".

[28] The second respondent took into account that the first respondent's *"reason for appeal was that the chairperson failed to consider that Mr Maseko was*

[6] [1999] ZALAC 28; [2000] 2 BLLR 121 (LAC).

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found guilty of gross negligence and dishonesty charges and the company incurred financial loss, risk to company reputational damage and consumers given products he was responsible for as a team leader in the syrup room, his pattern of conduct per his disciplinary record with many counts of gross negligence and unchanging behaviour".

[29] She also considered that Mr Maseko did not challenge the first respondent's testimony at all, which led her to believe *"on a balance of probabilities these can be viewed as exceptional circumstances warranting the appeal*".

[30] The second respondent added that it was apparent from the process followed that it was not likely to have been prejudicial to Mr Maseko in terms of presenting his version before the decision was taken.

[31] Phehane J in *South African Commercial Catering and Allied Workers Union obo Manzini v Commission for Conciliation, Mediation and Arbitration and Others*[7] held that:

> *'[38] Our Courts have dealt with the overturning of disciplinary sanctions by management in higher positions and have held that fairness is the ultimate yardstick.*[8]
>
> *[39] In National Union of Mineworkers obo Members and Others v ArcelorMittal South Africa Limited and Others,*[9] *this Court confirmed that where there is no collective agreement regulating discipline in place, an employer may substitute the sanction of a disciplinary chairperson if it is fair to do so and after engaging the employee, either in another disciplinary inquiry or by having the employee make submissions.'*

[32] The critical question to be answered in every review application against an arbitrator's award is whether the arbitrator has rendered a reasonable award

[7] (JR1505/23) [2025] ZALCJHB 288 (9 May 2025).
[8] *Samson supra.* See also: *Branford v Metrorail Services (Durban) & others* (2003) 24 ILJ 2269 (LAC); [2004] 3 BLLR 199 (LAC); *Member of the Executive Council for Finance, KwaZulu-Natal & another v Dorkin NO & another* (2008) 29 ILJ 1707 (LAC); [2007] ZALAC 41.
[9] (JR802/18) [2020] ZALCJHB 167 at para 30.

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within the meaning of the test in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others.*[10] It follows that the second respondent's arbitration award stands to be reviewed and set aside if, and only if, it fails to meet the threshold established by that judgment.

[33] For the reasons set out above, the second respondent's findings that (i) the Collective Agreement did not apply (rendering this matter distinguishable from cases where there was a binding Collective Agreement); (ii) the first respondent therefore did not breach the Collective Agreement; (iii) on the facts before her, exceptional circumstances existed which warranted the appeal; (iv) the sanction of dismissal was accordingly not inappropriate and (v) the dismissal of Mr Maseko was not substantively unfair, cannot be faulted and are reasonable on the totality of evidence before her.

[34] In the premises, I make the following order:

<u>Order</u>

1. The application for condonation for the late filing of the review application is granted;

2. The application to review and set aside the second respondent's arbitration award under case number GAJB19405-20 dated 15 December 2021 is dismissed; and

3. There is no order as to costs.

C De Witt

Acting Judge of the Labour Court of South Africa

[10] 2008 (2) SA 24 (CC); [2007] 12 BLLR 1097 (CC).

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Appearances:

For the Applicant:	Prinoleen Naidoo
Instructed by:	Cheadle Thompson and Hayson Inc.
For the First Respondent:	Pransha Maharaj-Pillay
Instructed by:	Bowman Gilfillan Inc.

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