



IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

Case No: D163/2022

Not Reportable

In the matter between:

SINGISI FOREST PRODUCTS (PTY) LTD

Applicant

and

COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION

First Respondent

COMMISSIONER M KHAWULA

Second Respondent

MZUZILE INNOCENT NDZIMANDE

Third Respondent

AMCU

Fourth Respondent

Heard: 8 May 2025

Delivered: This judgment was handed down electronically by circulation to the parties and / or their legal representatives by email. The date and time for handing-down is deemed 10h00 on 26 November 2025

JUDGMENT

ALLEN-YAMAN J

Introduction

- [1] Dissatisfied with an award handed down by the second respondent in which the dismissal of the third respondent (Mr Ndzimande) was found to have been substantively unfair and the appropriate remedy that of reinstatement, the applicant applied to this court for orders reviewing and setting aside or correcting it. The applicant further sought that the award be substituted with an order that Mr Ndzimande's dismissal be found to have been substantively fair, alternatively, that his dispute be remitted to the first respondent to be arbitrated *de novo* before a commissioner other than the second respondent. Ancillary to the main application, the applicant initiated two interlocutory applications, for reinstatement and condonation.
- [2] The third and fourth respondents opposed both the review and the condonation application.
- [3] This court was unable to consider the transcribed portion of the record prior to the hearing of the matter, by reason of the manner in which it had been compiled which resulted in, *inter alia*, portions of the transcribed evidence not having been placed before the court. The applicant's attorney procured that portion of the transcribed record which had not previously been made available to the court shortly prior to the hearing, and the parties were *ad idem* that the matter could proceed notwithstanding that this court had not then been able to consider the entire transcription of the oral evidence prior to the hearing.

Reinstatement

- [4] The recordings provided to the applicant by the first respondent were incomplete, which led to a delay in the delivery of the record and the concomitant lapsing of the review application. This led to the applicant having initiated an application in which it sought the reinstatement of the review application, together with condonation for the late delivery of the record. Such application was unopposed and this court can discern no reason why such order ought not to be granted.

Condonation

- [5] The second of the applicant's interlocutory applications related to its non-compliance with Rule 3(1) of the Rules which were in force until 16 July 2024, in circumstances in which the Notice of Motion and founding affidavit had been transmitted to the third and fourth respondents prior to a case number having been assigned to the application by the Registrar.
- [6] The applicant applied for and was assigned a case number on 5 April 2023, the day after its application papers had been served on the third and fourth respondents. Once assigned, the applicant notified the third and fourth respondents thereof. On 21 April 2022 the third and fourth respondents' attorneys addressed correspondence to the applicant's attorneys in which its oversight was drawn to its attention, and in which it was invited to remedy the situation by serving a copy of the application, with a case number, on its offices. The applicant's attorney's response on 11 May 2022 was to assert that its application was properly before the court, notwithstanding that it had by then initiated the present application.
- [7] In opposing the application for condonation the third and fourth respondents asserted that Rule 12 did not provide for condonation to be granted in circumstances other than those relating to time periods, and as such, the applicant's non-compliance could not be condoned. Whilst they are correct that Rule 12 related only to time periods, Rule 11 provided further that,
- (3) *If a situation for which these rules do not provide arises in proceedings or contemplated proceedings, the court may adopt any procedure that it deems appropriate.*
- (4) *In the exercise of its powers and in the performance of its functions, or in any incidental matter, the court may act in a manner that it considers expedient in the circumstances to achieve the objects of the Act.'*

[8] These provisions, coupled with the trite principle that high courts enjoy inherent powers to regulate their own processes, in effect means that this court has the power to condone non-compliance with the processes established in terms of its own Rules.

[9] In support of its further argument that, without a case number, the application itself was a nullity, the third and fourth respondents relied on the decision in Motlounq and Another v The Sheriff, Pretoria East and Others 2020 (5) SA 123 (SCA), in which the Supreme Court of Appeal was required to determine what effect, if any, the failure on the part of a registrar to affix his signature to a summons had. The court concluded that the failure on the part of the registrar to have signed the summons, despite having assigned a case number and having affixed his stamp thereto, did not render the summons a nullity. The court concluded,

*'In my view, the present matter clearly falls within the ambit of a peremptory requirement whose breach can be condoned under rule 27(3). Despite not complying with a peremptory provision of Rule 17(3)(c), it is not visited with nullity. It can be condoned. The court of first instance was thus wrong to treat a failure to sign on the same basis as a failure to issue.'*¹

[10] The requirement of signature was found in Rule 17(3)(c) of the High Court Rules which provided,

'After paragraph (a) or (b) has been complied with, the summons shall be signed and issued by the registrar and made returnable by the Sheriff to the court through the registrar.'

[11] Rule 3(1), on the other hand, previously provided,

'Any party initiating any proceedings must apply for a case number before serving any documents.'

¹ At paragraph 29

[12] The requirements set forth in each of the rules differed; where Rule 3(1) imposed no requirement that the Registrar be in physical possession of the initiating document prior to assigning a case number, in contrast to Rule 17 which required physical possession by the registrar in order for the initiating process to be issued. Under Rule 3(1), the litigant simply applied for a case number using a standard form document, which case number would be allocated to the litigant as a matter of course by the registrar.

[13] In circumstances in which the Supreme Court of Appeal declined to declare a summons without the registrar's signature a nullity, where such summons was required to be issued before acquiring the status of a summons, this court is disinclined to do so in respect of an application which required no more than a case number, seemingly assigned for no more than the purposes of this court's internal processes of control. In Motloung, the SCA enjoined courts in matters such as the present to act with a degree of latitude,

*'All of these dicta emerged from general principles of our common law applied prior to the coming into effect of the Constitution. But it accords with the principles of the Constitution and thus complies with the approach to interpretation referred to in Cool Ideas. It supports the constitutional right to have disputes adjudicated in a fair public hearing. Overly technical approaches to hinder the courts deciding of genuine disputes between parties are to be strongly discouraged. The need for condonation to show good cause allows for a consideration of prejudice. If courts are to err at all they should do so in finding that irregularities are susceptible of condonation rather than being necessarily visited with nullity.'*²

[14] In consideration of the applicant's explanation for having served the application without a case number, and that the third and fourth respondents were notified thereof the following day; that the applicant cannot be said to enjoy no prospects of success; and the third and fourth respondents suffered no prejudice as a result of the initial omission, this court is of the opinion that the interests of justice would be best served by granting condonation.

Background

- [15] On 2 May 2019 a grievance form was completed and lodged with the functionaries of the applicant responsible for actioning employees' complaints. The grievance in question related to certain conduct which was alleged to have been perpetrated by the applicant's Plantation Manager, Mr Adam Felix, and was submitted jointly by Mr Mzuzile Ndzimande and his co-employee, Mr Thandoxolo Biyela, who were co-signatories to the document.
- [16] It was common cause that the incident which had led to the initiation of the grievance had occurred on 15 April 2019, in the course of a visit by Mr Felix to the area of the plantation at which Mr Ndzimande was then working. The purpose of the meeting had been to convey the outcome of recent wage negotiations which had been concluded between the applicant and a recognised trade union, CEPPWAWU, to the employees. Mr Felix had then taken the opportunity to address Mr Ndzimande and Mr Biyela (who were then both shop stewards of fourth respondent, 'AMCU') about an email he had received from one of AMCU's officials, Mr Ngunze, in which he had blamed Mr Felix for having refused to allow Mr Ndzimande and Mr Biyela to attend a recent meeting arranged by the trade union in Durban.
- [17] In their grievance form Mr Ndzimande and Mr Biyela alleged that Mr Felix had behaved inappropriately towards them in the course of their interaction, and that his behaviour warranted disciplinary action being taken against him. Mr Felix, in subsequent hearings relating to the issue, disputed that his conduct had been untoward in any way.
- [18] Mr Marius Jonker, the chairperson of the grievance hearing which was convened to investigate the claim that Mr Felix had misconducted himself concluded that the employees' allegations that Mr Felix had grabbed Mr Ndzimande violently by the jacket and that he had committed an act of intimidation were highly unlikely. He concluded further that the allegations were most probably fabricated as a deliberate attempt on the part of the employees to discredit Mr Felix. In the result, he recommended that disciplinary action be

² At paragraph 28

taken against Mr Ndzimande, Mr Biyela, and another employee, Mr Doko, who had supported their version during the grievance hearing. Mr Jonkers' recommendation led to the institution of disciplinary action against those employees.

[19] The chairperson of Mr Ndzimande's disciplinary enquiry, Mr Ian Viviers, found that he had committed the act of misconduct alleged. He concluded that the dishonest nature of Mr Ndzimande's conduct, the fact that he was a shop steward who ought to have been expected to have led by example, and the absence of any remorse on his part had resulted in the destruction of the trust relationship, and that the appropriate sanction was that of dismissal.

[20] Pursuant to Mr Ndzimande's dismissal on 17 September 2020 he referred a dispute to the first respondent in which he challenged the fairness of that decision and sought to be reinstated to his position. It was the outcome of those proceedings which led to the initiation of the present application. The second respondent concluded that Mr Felix,

'As a result of anger, he pointed a finger at the applicant and Biyela, and attempted to grab the applicant with his jacket, and such violent conduct constituted an assault. It is amazing that at the grievance hearing Jonker did not deal with such conduct even though the issue of pointing with a finger was mentioned in the grievance form as one of the complaints. A reasonable inference to draw is that the grievance process was a sham, the intention not to find the truth. Pointing at an employee with a finger at close range while angry is a violent conduct. The applicant should have been allowed to take his grievance to the level where Felix was disciplined and be allowed to testify not the other way round. I reject the evidence of the respondent witnesses to the extent that there was no violent conduct perpetrated by Felix.'

[21] As a result of this finding, the second respondent found that the applicant had failed to establish the substantive fairness of Mr Ndzimande's dismissal. Having concluded that there was no impediment to his reinstatement, he made such an award.

Analysis

[22] The applicant's case in the review proceedings was premised upon its assertion that, in finding as he had, the second respondent had misconceived the nature of the enquiry before him, alternatively, had arrived at an unreasonable result in having concluded that Mr Ndzimande's dismissal had been substantively unfair.

[23] In amplification of the first ground, the applicant's case was that the second respondent failed to determine the issue before him: whether the statements made by Mr Ndzimande in the grievance had been truthful, and if not, whether the making thereof had been actuated dishonestly. In this regard, the act of misconduct alleged to have been committed by Mr Ndzimande and for which he had been dismissed was,

'Breach of duty to act in good faith in that you falsely accused your superior of manhandling or assaulting you in a staff meeting and you lodged a grievance on the 2nd of May 2019 which was found to lack the truth when it was tested through witnesses in the Grievance Hearing held on the 17/05/2019.'

[24] Such charge arose in circumstances in which Mr Ndzimande's complaint, as articulated in the grievance form was recorded in the following terms,

'On the 18/04/2019 at 14h15 Mr Felix ha a problem with me (Mr Ndzimande & T Biyela) asking us about employees who refused to sign some documents.'

The particularity of that complaint was elaborated in an appendix to the grievance form,

'Grabbed me with my jacket and pointed Biyela with a finger complaining that we told Mr Ngunze (the organizer) that he refused to release shop stewards to attend regional council meeting on the 28/03/2019. He also voiced out intimidating words that will follow us if we don't leave him alone. We must ask him from Bruce who was a

CEPPWAWU shop steward of what happened to him. Finally Mr Felix said he concluded with Mr Koekemoer that there is no AMCU that is going to operate here. We not happy the way we are treated.'

[25] Their desired outcome was stated to have been,

'Discipline action must be taken because he grabed [sic] someone violently in front of other workers.'

[26] Whilst the difference between the allegation made in the grievance, that Mr Felix had grabbed Mr Ndzimande, and the second respondent's finding, that Mr Felix had attempted to grab Mr Ndzimande, may appear to be trivial, in the context of the grievance itself together with the evidence led by the various witnesses to the incident, an appreciation of that distinction was fundamental to understanding the reasons which had informed Mr Ndzimande's dismissal. In the grievance form, Mr Ndzimande had not only categorically stated that Mr Felix had grabbed him by his jacket, but unequivocally required that disciplinary action be taken against him for that specific act which was alleged to have been perpetrated in front of other employees. Such accusation was found to have lacked any merit, and for that reason Mr Ndzimande faced the disciplinary action which resulted in his dismissal.

[27] The second respondent, in exonerating Mr Ndzimande from any form of misconduct, failed to consider the distinction between a completed act of assault in the form of actual grabbing, and what was ultimately found by him to have been an attempt by Mr Felix to have grabbed him. Having arrived at the conclusion that such an attempt had been made he found that this, coupled with 'pointing' on the part of Mr Felix (an issue not claimed to have been done to Mr Ndzimande in the grievance form) sufficed to have established that Mr Felix's conduct had been violent and had constituted an assault.

[28] In determining the fairness of Mr Ndzimande's dismissal, the second respondent had been required to determine (1) the cogency of his claim that he had been grabbed by Mr Felix as set out by him in the grievance form; and (2) if those claims were found wanting, whether a dishonest motive had informed his claim.

[29] Distinct from the complaint that Mr Felix had assaulted Mr Ndzimande by grabbing him, the allegations in the grievance form concerning Mr Felix's acts of misconduct were that, during the exchange:

- He had pointed a finger at Mr Biyela;
- He had uttered the threat to both Mr Ndzimande and Mr Biyela that if they did not leave him alone he would follow them, as a form of intimidation;
- He had advised them to enquire of Bruce, a former CEPPWAWU shop steward, what had happened to him; and
- He and Mr Koekemoer had concluded that the trade union AMCU would not operate in the applicant's business.

[30] The applicant introduced the evidence of four witnesses: Mr Felix, Ms Sphekokazi Ngubelanga, Mr Jonkers and Mr Viviers, together with certain documentary evidence. Mr Ndzimande testified in support of his own case, as did Mr Biyela.

[31] Given that the versions presented by the applicant's witnesses and those presented by Mr Ndzimande and Mr Biyela were mutually incompatible in respect of the issues which formed the subject matter of the grievance, it was incumbent upon the second respondent to determine which version was to be believed, such assessment was to be conducted in the manner established in Stellenbosch Farmer's Winery Group Ltd and Another v Martell & Cie SA and Others 2003 (1) SA 11 SCA: the credibility of the witnesses, their reliability, and the probabilities.

[32] Without having conducted such assessment, the second respondent concluded that there was,

'... no evidence nor contradictions on the part of the applicant that convinces me that he lied during the grievance hearing nor at the disciplinary enquiry.'

On the other hand, he rejected the evidence of both Mr Felix and Ms Ngubelanga, who testified on behalf of the applicant, insofar as it had related to

both the issues of Mr Felix having grabbed Mr Ndzimande and pointed at both employees.

- [33] Mr Felix testified that on 15 April 2019, he together with Ms Ngubelanga, the applicant's HR Clerk Forestry Operations, went into the plantation to provide feedback to the various teams concerning the outcome of wage negotiations which had been concluded the previous week. They were then accompanied by two students. Upon their arrival at the place where Mr Ndzimande was working together with the rest of his team, he requested Mr Ndzimande to call the supervisor, Mr Dlamini, and the rest of the team. Whilst the rest of the team was making their way to where they were standing, Mr Felix asked Mr Ndzimande if he was aware of an email which had been sent by an official of AMCU, in which he had been accused of not having wanted to release the shop stewards to attend a trade union meeting in Durban. After Mr Ndzimande denied any knowledge of the email he offered to allow him to read it as it was in the file he had with him, however Mr Ndzimande declined to do so on the basis that he is unable to understand English. In response to Mr Ndzimande, he told him that it was not good if he and Mr Biyela had lied about him having refused to release them to a meeting. Whilst he was talking, he pointed, indicating both of them. He said respect worked both ways, up and down, and told them to make sure that this did not happen again. The file was given to Mr Biyela to read. After Ms Ngubelanga had concluded her explanation of the outcome of the wage negotiations a question was asked by Mr Dlamini about representation of AMCU members. In response, he told him that there was an email in the file in which AMCU was informed to acquire more members in order to have bargaining rights, and offered to let him read the email. Mr Dlamini accepted the offer and the file was passed to him via Ms Ngubelanga and he, together with Mr Biyela, read it. After it was clear that no one else had any further questions, he began to turn around to return to the vehicle when Mr Ndzimande approached him to ask him for a copy of the collective agreement. He replied that it was a confidential document and he could not give him a copy. Mr Ndzimande accepted this, they embarked the vehicle, and left.

- [34] Mr Felix denied having grabbed Mr Ndzimande. He further denied having asked him about employees having refused to sign certain documents at that meeting having explained that that issue had been resolved by February 2019, in which month he had approached Mr Ndzimande's team to have them sign a form which was required by the Department of Labour to be completed by all employees. All the forms had been completed by 21 February 2019 and the issue was not addressed at all on 15 April 2019. The former shop steward Bruce had been dismissed for poor performance, but was never mentioned that day, as with the allegation regarding Mr Koekemoer, with whom he never colluded to exclude AMCU or any other trade union from the applicant's business.
- [35] He denied that he had arrived at the plantation angry, and had simply wanted to speak about the contents of the email for the reason that Mr Ngunze had sent previous emails which attempted to create a misperception between himself and the shop stewards, and he wished to ensure that there were no miscommunications between them.
- [36] Ms Ngubelanga testified that she, together with Mr Felix, the foreman and two students had travelled to the forestry teams to provide them with feedback about the wage negotiations. Upon arrival at the place where Mr Ndzimande and his team were working they exited the vehicle and Mr Felix asked Mr Dlamini to call the employees. Mr Ndzimande was nearby and Mr Felix asked him why he had lied about him to the union organizer, that he had refused to issue them leave to allow them to attend a union meeting. Mr Ndzimande denied knowing what Mr Felix was talking about. Mr Felix explained that he had received an email which stated that he had refused them leave to attend a union meeting. He said that they should respect him so that he will be able to respect them. Whilst she was busy with her feedback to the employees present, Mr Dlamini asked why the negotiations were done by CEPPWAWU when they were AMCU members, to which she responded that CEPPWAWU was the majority trade union. Mr Felix interjected to say that he had an email which explained by AMCU had not been part of the negotiations. He attempted to give the file to Mr Ndzimande who did not take it, saying he did not

understand English. He then passed the file to her, to pass to Mr Biyela who began to read it out loud. After the presentation was concluded and there were no further questions, they were about to leave when Mr Ndzimande approached Mr Felix and asked him for a copy of the collective agreement. Mr Felix told him that he could not give him a copy as it was for another union. After this exchange, they entered the vehicle and left the site.

[37] Ms Ngubelanga disputed the truth of the contents of the grievance: she disputed that there had been any signing of documents, stated that she had not observed any pointing, and denied that Mr Felix had made any of the statements attributed to him by the grievants.

[38] Mr Ndzimande testified that he had been working on 15 April 2019 when the supervisor, Mr Dlamini, called him and told him that he was wanted by Mr Felix. He was the last one to arrive and while he was on his way there, Mr Felix greeted him and asked him who had refused to sign the forms and who was telling lies to Mr Ngunze. He responded that he did not understand what Mr Felix was referring to, whereafter Mr Felix pointed to him and Mr Biyela with his finger and said its you and you, and that Mr Ndzimande was making people *'the mamparas'*. Mr Ndzimande asked what he had done, and in response, Mr Felix referred him to the file which he was holding and said that he must read it, all the while pointing between him and Biyela with the file. Mr Ndzimande told Mr Felix that he could not read the file and that maybe another person could interpret it for him. Mr Felix then gave the file to Mr Biyela who read it for a while before Mr Felix took it back and Mr Ndzimande was given it to look at. He saw his own name and, after Mr Felix had pointed at his name, said something not understood by Mr Ndzimande about having expected the blue, not the red file. After this, Mr Felix grabbed him on the left side of his jacket and Mr Ndzimande stepped back and folded his arms to protect himself, asking what he had done. In response, Mr Felix had said, *'If you follow me I will follow you.'* He understood this to be a threat, that Mr Felix meant that he would monitor his work closely with the intention of finding fault therein for the purpose of having him fired. Mr Felix also told him that he was, *'like Bruce'* and, when he asked him in what way, Mr Felix told him to go and ask Bruce what he does to shop stewards. He was aware that Bruce had been a CEPPWAWU shop steward

who had previously been dismissed and he accordingly understood this to be a further threat directed to him. At this time, the other employees were around them in a U-shape, but Ms Ngubelanga had already gone back to the vehicle. Whilst he and Mr Felix had previously worked well together, in 2017 he had sent security guards to his home to check on his whereabouts.

[39] He regarded himself as having been abused by Mr Felix on 15 April 2019.

[40] Mr Biyela testified that he had been pointed at by Mr Felix in the course of the incident but that because Mr Felix had been standing between him and Mr Ndzimande, his view of Mr Ndzimande was obscured and he accordingly did not witness Mr Felix either pointing at or grabbing him. He attributed various utterances to Mr Felix: he would show them who he is, because they were following him; he would follow them if they did not leave them alone; if they did not know him, they should ask Bruce who was a CEPPWAWU shop steward what happened to him, because he dismisses shop stewards when they follow him.

[41] He confirmed that the source of the unhappiness felt by him and Mr Ndzimande arose out of the manner in which they had been treated that day.

[42] In view of the fact that the witnesses to the events of 15 April 2019 had repeated their respective versions on four previous occasions, it was possible to contrast their testimony given at the arbitration with that which had previously been said by themselves as well as each other. To the extent that it was asserted by Mr Ndzimande's representative that the minutes of the grievance hearing and the various disciplinary enquiries had been inaccurate, he did not particularise where such inaccuracies lay at the outset. Mr Ndzimande likewise, save to have denied the correctness of certain parts of the minutes, did testify as to what ought to have been captured. Additionally, the salient aspects of the evidence of the witnesses who testified at those processes were introduced into evidence at the arbitration through the chairs of those enquiries (Mr Jonkers and Mr Viviers). Where such evidence was unchallenged, there was no reason for the second respondent not to have accepted their recollections as having been correct.

[43] Insofar as the issue of Mr Felix having grabbed him was concerned, Mr Ndzimande's evidence was that he himself was in possession of the file when Mr Felix had grabbed him. Under cross examination, he asserted that Mr Felix had grabbed him by the left hand side of his jacket with his right hand, whilst Mr Felix was said to have been holding the red file with his left hand. The same incident was described by him in the course of the grievance hearing as having occurred when Mr Felix had approached him with the file open, and that Mr Felix had tried to push him when he took the file back, at which point Mr Ndzimande folded his arms. Mr Ndzimande's evidence at the disciplinary enquiry convened for Mr Doko (who was dismissed for reasons relating to the evidence he had given at the grievance hearing) was that Mr Felix had accused him of not wanting to read the file, and then grabbed him on his right shoulder with his right hand. In that hearing he stated that he did not regard Mr Felix's actions as having been violent, rather, it had been the manner in which he had spoken which he had regarded as violent. In the same hearing, under cross examination, he stated that Mr Felix had attempted to grab him, but that he avoided such an outcome by stepping backwards and having folded his arms. At his own disciplinary enquiry he once again stated that Mr Felix had succeeded in grabbing him.

[44] Mr Ndzimande's evidence concerning the timing of the incident likewise lacked consistency between his various versions. In the arbitration, when first asked where the other individuals had been when Mr Felix had grabbed him, he responded that the people who had come with Mr Felix had been standing behind him, near the vehicle, whilst the other employees in his team had been standing in a U shape facing the vehicle. In that version, no mention was made of Ms Ngubelanga then already having addressed the staff; rather the incident was conveyed as having taken place at the outset, immediately upon Mr Felix's arrival at the plantation. Later, however, Ms Ngubelanga's presence at the scene of the incident was sought to be eliminated by placing her within the vehicle. Under cross examination, he confirmed that the incident transpired before the meeting but could then not explain why Ms Ngubelanga had allegedly returned to sit inside the vehicle (before fulfilling the purpose of the

site visit) or why her evidence that she had been present the entire time, and that the file had been passed to her to pass on to Mr Biyela had not been challenged. At Mr Doko's disciplinary enquiry, he had said that Ms Ngubelanga had been in the vehicle at the time of the incident, whilst at his own disciplinary enquiry, Ms Ngubelanga was said to have been addressing the employees at the time when Mr Felix was dealing with the issue of the file with Mr Biyela and, thereafter, him.

[45] Mr Biyela's evidence did not accord with Mr Ndzimande's in material respects. Despite Mr Ndzimande having asserted in his appeal form that Mr Biyela witnessed Mr Felix's assault on him, he conceded that he could not see the interaction between the two of them, as Mr Felix's body obscured his line of sight to Mr Ndzimande. His recollection of the timing of the incident also differed from that of Mr Ndzimande's previous versions in that he testified under cross examination that it had occurred after Ms Ngubelanga had finished addressing the employees and had returned to the vehicle.

[46] Mr Ndzimande's evidence concerning the issue of pointing was equally ambiguous. In the grievance form, only Mr Biyela had been named as having been pointed at by Mr Felix. When taken through the grievance form by his own representative, he confirmed that the complaint contained therein concerning pointing had been confined to Mr Biyela, without reference to himself at all. In the grievance hearing, he included himself as having been pointed at by Mr Felix, at all times with his finger. At that same hearing, Mr Biyela claimed that Mr Felix had pointed at Mr Ndzimande with the file, and himself with his finger. Mr Ndzimande reiterated the version that both he and Mr Biyela had been pointed at by Mr Felix in the course of the disciplinary hearing convened for Mr Doko. At his own disciplinary enquiry he testified that Mr Felix had first pointed at him with the file, and subsequently pointed at both of them with his finger. His final version at the arbitration was that Mr Felix began their interaction by pointing at both him and Mr Biyela, and continued pointing at both of them with both his finger and the file throughout the interaction. Mr Ndzimande was unable to provide a plausible reason why Mr Biyela had been expressly named in the grievance form as having been pointed

at, whilst no mention was made of Mr Felix having pointed at him. Moreover, Mr Biyela was very clear that the person who was pointed at by Mr Felix was him, and that he had been unable to see what gestures Mr Felix had used in relation to Mr Ndzimande, although on his version he,

'... could see because there was something that he was doing with his finger then it was turn and also point me with the finger...'

[47] The threats alleged to have been made by Mr Felix during the course of the incident likewise did not remain consistent. At the arbitration hearing, Mr Ndzimande attributed the following statements to him in the course of his evidence in chief:

- *'If you follow me, I will follow you'*; and
- *'You are like Bruce,'* and, in response to a request for clarification, that he should, *'Go and ask him, you are exactly like him.'* He was told further that he should, *'... ask Bruce what I do to the shop steward.'*

Under cross examination, he testified that Mr Felix said if he (Mr Ndzimande) did not respect him (Mr Felix), he would follow him.

[48] Although the grievance form recorded Mr Felix as having said that he would follow them if they didn't leave him alone, in his evidence at the grievance hearing, Mr Ndzimande stated that Mr Felix had said that if he didn't respect him, he wouldn't respect them, but subsequently changed the statement to having been that if he did not respect him, he would follow him. On the issue of the CEPPWAWU shop steward, Bruce, he attributed a similar statement as having been made by Mr Felix at another meeting, but only mentioned that Mr Felix had reiterated such a similar sentiment in the course of the incident on 15 April 2019 when his omission to have mentioned this issue in the course of his evidence in chief was drawn to his attention under cross-examination. He mentioned neither of these issues during the course of Mr Doko's disciplinary enquiry, whilst at his own disciplinary enquiry said only that Mr Felix had said that if he did not respect him, he himself would not respect Mr Ndzimande.

[49] Mr Biyela's evidence at the grievance hearing was likewise that Mr Felix had said, *'If you don't respect me, I won't respect you,'* however by the time of the

arbitration, recalled that Mr Felix had said that he would show them who he is, as they are following him, and also that he would follow them if he did not leave them alone. Later in his evidence he remembered the statement slightly differently, being that Mr Felix had said if they were following him, he would follow them.

- [50] Despite having expressed himself to have been cognisant of the contradictions between the versions of Mr Ndzimande and Mr Biyela regarding the timing of the incident, as well as the fact that at least four different statements concerning the same issue had been attributed to Mr Felix by both in the course of the arbitration, the second respondent explained these away as matters of mere memory or perception, concluding that,

'There is no evidence nor contradictions on the part of the applicant that convinces me that he lied during the grievance hearing nor at the disciplinary enquiry.'

- [51] On the other hand, he rejected certain of the evidence of both Mr Felix and Ms Ngubelanga, for reasons which were unsustainable in consideration of the totality of the evidence before him.

- [52] Mr Felix's evidence was rejected on the basis of the second respondent having concluded that it was highly improbable that he would have remained at a distance of approximately 5 metres away from Mr Ndzimande in circumstances in which he had handed him the file. The difficulty with such finding was that it could only have arisen from his having accepted the correctness of Mr Ndzimande's version that Mr Felix had approached him to give him the file to look at after he had already declined to look at it, in circumstances in which it had been Mr Felix's evidence that Mr Ndzimande had never accepted the file from him, having indicated that he did not read English when he offered to give it to him to read.

- [53] There was also no basis upon which the second respondent ought to have rejected Ms Ngubelanga's evidence. He found,

'On one hand she was in a better position to have witnessed the grabbing if it had happened, in other words, she implies that it did not occur, on the other hand, despite such good position, she did not witness Felix pointing either by a file, hand, or finger at Biyela or applicant. Felix conceded that he pointed at Biyela and applicant but not with a finger, he used his hand and that was in full view of Sphelokazi. She also did not want to come out clear that Felix was angry at the applicant. There is overwhelming evidence before me that when Felix was pointing at the applicant, he was angry. It is because of this contradiction that I prefer to reject the evidence of Sphelokazi in this regard.'

[54] Ms Ngubelanga's evidence was required to be assessed in the context in which it was given, in that she testified as both a witness to the incident and in her capacity as the HR Clerk Forestry Operations.

[55] In response to the question posed to her as to how she would define an incident where an employee points a finger to another employee, she distinguished two scenarios,

'Pointing of a finger is normal, more especially if you are talking with a group of employees, you want to point it out to make it clear who are you referring what you're saying to, but if you're going to point someone in their body, like, then it's provoking that employee then.'

On her own understanding, the type of pointing entailing provocation was wrong in accordance with the applicant's disciplinary code, being a form of intimidation.

[56] In her evidence in chief, she was asked to address the allegations against Mr Felix as set out in the grievance form and, in response to the allegation that he had pointed a finger at Mr Biyela, she disputed that Mr Felix had pointed anything at anyone. In the course of her evidence the second respondent took some time to interrogate her on the issue of the pointing, having informed her that the pointing was, by then, common cause. In response she accepted that if there had been pointing, she did not see it, and that it may have happened that Mr Felix's own body had obscured her view of such an event.

[57] At the time when he questioned her the second respondent had no evidence before him that any type of pointing had taken place, let alone that the happening of such an activity was by then common cause. The only person to have testified prior to Ms Ngubelanga had been Mr Jonker who, as the presiding officer in the grievance hearing and the evidence leader in the disciplinary enquiries, could do no more than convey the evidence which had been introduced in those hearings. On the issue of pointing, he conveyed the various accounts as relayed by Mr Ndzimande, Mr Biyela and Mr Doko, as well as the fact that Mr Felix had testified that he had not pointed but rather that he generally speaks with his hands. It was accordingly by no means common cause that pointing (in a manner which could be categorised as provocative) had taken place, and there was accordingly no reason to reject her evidence for the reason that she denied having seen Mr Felix pointing at Mr Ndzimande or Mr Biyela.

[58] The unreliability of Mr Ndzimande's version was compounded by the improbability of any such incident having transpired. Whereas the incident was said to have occurred in the presence of approximately 20 employees, no employee other than Mr Biyela corroborated any aspect of Mr Ndzimande's version. Despite then allegedly having been recently assaulted by Mr Felix, Mr Ndzimande had no difficulty in approaching him to ask for a copy of CEPPWAWU's recognition agreement. Notwithstanding the very serious nature of the alleged misconduct, it took the employees some two weeks to report the incident to the applicant and, when they did so, they were incapable of recalling the correct date on which it was said to have occurred. Moreover, save for Mr Ndzimande's ipse dixit, there was no evidence that they had reported the incident to AMCU, and nor was there any evidence that AMCU had raised the issue with the applicant. Given that AMCU had taken it upon itself to complain to the applicant that Mr Felix had refused to allow its shop stewards to attend a meeting, there is no doubt that it would have done the same had the employees reported the fact of Mr Felix having assaulted Mr Ndzimande to it.

- [59] The incident which formed the basis of grievance was not complex. Whilst minor inconsistencies could potentially have been attributed to memory loss or individual perception, the persistent, marked disparities between the various versions presented by and in support of Mr Ndzimande were too extreme to have led any reasonable decision maker to any conclusion other than that the incident itself had been fabricated. On the other hand, the second respondent's reasons for having rejected the versions of Mr Felix and Ms Ngubelanga were premised on his failure to have appreciated the evidence before him, and were unreasonable. In the circumstances, not only did the second respondent fail to undertake the enquiry he was required to undertake, but his conclusion that Mr Felix had indeed misconducted himself on 15 April 2019 was unreasonable.
- [60] Had the second respondent concluded that Mr Ndzimande's version was to be rejected, he would then have been required to have interrogated his motivation in having initiated the grievance. In this regard, he was required to determine whether the assertions made by Mr Ndzimande in the grievance had been actuated dishonestly, as alleged by the applicant. Mr Ndzimande's subjective intent was required to be determined by reference to the objective evidence before the second respondent together with the surrounding circumstances.
- [61] The purpose of the grievance was unequivocally stated to have been the taking of disciplinary action against Mr Felix. This was to be achieved through the mechanism of a grievance which was not only devoid of merit, but was embellished with complaints relating to extraneous incidents which had occurred prior to the incident in question, but alleged by the employees to have taken place on the same occasion. The only purpose such elaboration could possibly have served was to exacerbate the seriousness of the events. The inescapable inference to be drawn from this was that Mr Ndzimande had deliberately falsified the grievance, and the second respondent's conclusions to the contrary were unreasonable.
- [62] This court has accepted that no employer is obligated to countenance dishonesty on the part of its employees, more so where an employee

compounds his or her initial dishonest act by perpetuating a lie. Mr Ndzimande was dishonest when he signed the grievance, and perpetuated that dishonesty throughout the four processes which ensued thereafter, thereby not only having compounded his dishonesty but having deprived himself of an opportunity demonstrate contrition. Had he and his witnesses been able to maintain a consistent, plausible version, the consequence of that fabricated version could have had devastating consequences for Mr Felix: he would have been the subject of a disciplinary enquiry, facing allegations of misconduct which would likely have resulted in his dismissal. The effect of the grievance was that Mr Felix thereafter resorted to the utilisation of recording devices when conducting visits to the plantations, in an effort to ensure that the situation created by Mr Ndzimande and Mr Biyela could not be repeated. The applicant's further evidence was that the factors relied upon by Mr Ndzimande, that he was a diligent worker with an unblemished disciplinary record and a family to support, did not militate against the effect his actions had on the trust relationship between himself and the applicant in general, and Mr Felix in particular.

[63] In the circumstances, the ultimate conclusion arrived at by the second respondent, that Mr Ndzimande's dismissal had been substantively unfair, was not one a reasonable decision maker could have arrived at in consideration of the issues he was required to determine on the basis of the evidence before him. As such, the second respondent's award, that Mr Ndzimande's dismissal had been substantively unfair, falls to be reviewed and set aside. As the issues were fully canvassed in the course of the arbitration and the present proceedings, there is no reason to remit the matter to the first respondent, and the award will be substituted accordingly.

Costs

[64] Albeit that the applicant sought an order of costs against the third and fourth respondents, this court is not of the belief that either acted unreasonably in seeking to defend an award in their favour and, accordingly, each party will be required to bear their own costs.

Order

1. The review application is reinstated.
2. The applicant is granted condonation for the late delivery of the record.
3. The applicant's non-compliance with Rule 3(1) is condoned
4. The award issued by the second respondent under KNDB 10301-20 is reviewed and set aside to the extent that the dismissal of the third respondent was found to have been substantively unfair, and is substituted with an order that the dismissal of the third respondent was substantively fair.
5. There is no order as to costs.

K Allen-Yaman

Judge of the Labour Court of South Africa

Appearances

Applicant:

Mr J Whyte, Norton Rose Fulbright SA Inc

Third and Fourth Respondents:

Mr A J Prior, instructed by Futchter & Poppesqou Attorneys Inc