



- (1) Reportable No
(2) Of interest to other Judges: No
(3) Revised

Signature

Date

THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Case no: JA31/25

In the matter between:

UNIVERSAL PRODUCT NETWORK (PTY) LTD (UPN)

Appellant

and

COMMISSIONER PATRICK MBATSANA N.O.

First Respondent

COMMISSION FOR CONCILIATION MEDIATION AND

ARBITRATION (CCMA)

Second Respondent

NATIONAL UNION OF FOOD BEVERAGE WINE

SPIRITS AND ALLIED WORKERS (NUFBWSAW)

Third Respondent

SIMON RIKHOTSO AND OTHERS

Fourth to Further Respondents

Heard: 12 March 2026

Delivered: 31 March 2026

Coram: DJAJE AJA; COLLIS AJA and MOSHOANA AJA

JUDGMENT

MOSHOANA, AJA

Introduction

- [1] This appeal concerns itself with an important legal question of whether gross procedural unfairness can mutate into substantive unfairness. The Labour Court reviewed and set aside an arbitration award which had found that the dismissal of the employees was procedurally unfair but substantively fair. For procedural unfairness, the commissioner had awarded the employees one month salary as compensation. The Labour Court after reviewing the arbitration award found that the dismissals were substantively unfair and ordered the appellant, Universal Product Network (Pty) Ltd (UPN) to reinstate and compensate the employees and the estates of the deceased employees.
- [2] The appeal reached this Court with the leave of the Labour Appeal Court (LAC) granted on 06 May 2025. The appeal is opposed by the trade union and its members.

LABOUR APPEAL COURT

Background Facts

- [3] UPN is the logistics arm of the national retailer, Woolworths. On 12 October 2015, National Union of Food Beverage Wine Spirits and Allied Workers (NUFBWSAW), hereafter, the trade union, called a protected strike action in support of wages and condition of service demand. The trade union and the appellant agreed on picketing rules.
- [4] On 19 October 2015, the appellant obtained an interdictory relief against the trade union and its members from committing certain acts of misconduct and from being within three hundred meters of the appellant's premises. The picketing endured until 27 October 2015. Some employees accepted the wage offer and returned to work.
- [5] Approximately 256 employees were charged with acts of misconduct allegedly committed over the period 20 to 27 October 2015. The appellant alleged that the employees in question breached company policies and procedures and the agreed picketing rules; breached the interim court order; prevented

vehicles from entering and leaving the appellant's premises and causing loss or damage to the appellant, despite repeated warnings concerning their acts of misconduct.

- [6] Over a period, twenty-three disciplinary enquiries, chaired by different chairpersons took place. Almost all, save for three employees were found guilty as charged. They were all dismissed on 28 December 2015. Aggrieved by the dismissals, the trade union challenged the fairness of the dismissals at the Commission for Conciliation, Mediation and Arbitration (CCMA). Conciliation failed to resolve the dispute. Commissioner Patrick Mbatsana was appointed to resolve the dispute through arbitration. Arbitration proceedings were conducted from 20 March 2016 to 2 June 2020.
- [7] On 12 June 2020, the appointed commissioner published his arbitration award. The commissioner found that the dismissal of the employees was substantively fair but procedurally unfair. As stated above, each of the employees were awarded one month's remuneration as compensation for the procedural unfairness.
- [8] Disenchanted with the arbitration award, the trade union launched a review application in the Labour Court. As stated before, the trade union became successful before the Labour Court hence the present appeal.

Judgment of the Labour Court

- [9] The judgment of the Labour Court is tediously long. It comprised of ninety-eight pages and 367 paragraphs. Sadly, the judgment veered off the pleaded case by a proverbial mile. The finding by the commissioner that the dismissal was procedurally unfair was not challenged by any party. The pleaded case of the trade union on procedural unfairness was limited to the quantum of compensation. The trade union pleaded thus:

'33 Despite these adverse and substantive findings, which do not list most of the reasons for UPN's disregard of the law and the requirements for procedural unfairness, the Commissioner ordered UPN to pay each of the individual applicants one month's salary.

34 I respectfully submit that the Commissioner's award is not commensurate with his findings and that no reasonable commissioner could have made such an award in this context.'

(Own emphasis)

[10] Conspicuously absent from the pleaded case, is a case that the procedural unfairness is so gross that it mutated to substantive unfairness. The substantive unfairness challenge was confined to the contention that the employees were not guilty as charged and that the sanction of dismissal was inappropriate.

[11] It is trite that a court is not entitled to decide an unpleaded case¹. The bulk of the Labour Court's reasoning was confined to the grossness of procedural unfairness that rendered the dismissal to be substantively unfair. This was, with due respect an unnecessary excursion given the pleaded case. On procedural unfairness, the gripe of the trade union was the compensation awarded. On that challenge, the Labour Court, with considerable regret and utmost respect, reached the following convoluted and contradictory conclusion:

'[324] Roskam argued that in coming to an award of one month compensation under the circumstances, the commissioner exercised his discretion capriciously and his decision is accordingly not rational and therefore not reasonable. I agree.

[325] I, however, do not intend to interfere with the award of one month's compensation.

[326] I intend, for reasons discussed above and below, to review and set aside the commissioner's finding that the dismissals were procedurally unfair and substitute the finding with a finding that due to gross procedural defects in the hearing process followed by UPN, the

¹ See *Vodacom (Pty) Ltd v Makate and Another* [2025] BLLR 1105 (CC) at para 99; *Director of Hospital Services v Mistry* 1979 (1) SA 626 (A) at 635H-636B; *Minister of Safety and Security v Slabbert* [2010] 2 All SA 474 (SCA) para 11; and *De Nysschen v Government Employees' Pension Fund and others* [2024] 4 BLLR 349 (SCA) para 16-18.

outcome of the proceedings were vitiated rendering the dismissals substantively unfair.

(Own emphasis)

- [12] In a review application, a court may only interfere if the arbitration award falls outside the bands of reasonableness. The finding that the dismissals were procedurally unfair was not attacked. As to why the Labour Court chose to review and set aside that unimpeached finding, this Court is at a complete loss. The Labour Court correctly did not interfere with the award of one month. That should have been the end of the matter for the trade union given the parameters of its impugn of the arbitration award. When it comes to compensation, a commissioner obtains guidance from section 194(1) of the Labour Relations Act² (LRA). The compensation must be just and equitable in all the circumstances and may not be more than the equivalent of 12 month's remuneration.
- [13] In other words, a just and equitable compensation is anything between 0 to 12 months' remuneration³. An exercise of discretion is involved when it comes to the number of months to be awarded. An award for compensation is an equivalent of a *solatium*⁴. Indeed, the one month's compensation award was not interferable.
- [14] The Labour Court erred in reviewing and setting aside a finding of procedural unfairness, in the circumstances where no one challenged that finding. The appellant had not launched a counter-review. The trade union could not impugn a favourable finding. The finding of substantive unfairness by the Labour Court is not aligned to the attack by the trade union. The attack was two-fold; namely (a) the employees are not guilty as charged; and (b) the sanction of dismissal was inappropriate. As indicated above, nowhere did the trade union raise a challenge that the procedural unfairness is so gross that the commissioner should have considered it to constitute substantive

² Act 66 of 1995, as amended.

³ See *Johnson & Johnson (Pty) Ltd v Chemical Workers Industrial Union* (1999) 20 ILJ 89 (LAC).

⁴ See *ARB Electrical Wholesalers (Pty) Ltd v Hibbert* (2015) 36 ILJ 2989 para 24.

unfairness. This challenge was germinated by the Labour Court *mero motu* (on its own). A Court is entitled to on its own raise a legal issue foreshadowed in the papers and give parties an opportunity to address it⁵. A party who seeks to review an arbitral award is bound by the grounds contained in the review application⁶.

[15] As it shall be demonstrated below, the issue raised by the Labour Court is not strictly a legal point. The issue required to be pleaded and evidence in its support would have been required to be led. The Labour Court erred in germinating an unpleaded case and not allowing the parties to lead evidence for and against that case. Certainly, this is at variance with the functions of a reviewing court⁷.

[16] Returning to the substantive unfairness issue, the commissioner reached the following unassailable finding:

[492] All the represented applicants in these proceedings were positively identified. All the videos are captured within the vicinity of the respondent which is not in compliance of the picketing rules or the court order. It is irrelevant whether they were blocking roads and trucks or whether they are respondents to the court interdict. They violated the picketing rules and are all guilty thereof. The respondent had a valid reason to dismiss the applicants.'

(Own emphasis)

[17] In its judgment, the Labour Court acknowledged that the evidence demonstrated that the trucks were blocked and such constituted a serious misconduct. Despite a laborious referencing of the decisions of the Constitutional Court and the LAC, nowhere does the Labour Court expressly conclude that the employees were not guilty as charged and that their

⁵ See *CUSA v Tao Ying Metal Industries and Others* (2008) 29 ILJ 2461 (CC) at para 66.

⁶ *CUSA* at para 66.

⁷ See *Makuleni v Standard Bank of South Africa Ltd and others* (2023) 44 ILJ 1005 (LAC) at para 13 – 'To meet the review test, the result of the award has to be so egregious that, as the test requires, no reasonable person could reach such result...'

dismissal sanction was inappropriate. Instead, the Labour Court furnished a barrage of reasons why in its view the award is not that of a reasonable commissioner. All those reasons demonstrate appeal grounds as opposed to review grounds. For instance, where the commissioner found that the employees were positively identified, the Labour Court finds that the finding is disconnected with the evidence before him. A court of review is not entitled to substitute reasonable findings of an arbitrator, who listened to the evidence and observed the witnesses. It is not about what a court of review would have done with such evidence, but whether the conclusion is one a reasonable decision maker would reach.

- [18] The crux of the Labour Court's finding on substantive fairness is that set out in paragraph 326, quoted above, of its judgment. That finding has nothing to do with whether the employees were guilty or not guilty of the misconduct that led to their dismissal, nor does the learned judge find that dismissal as a sanction was inappropriate. I now turn to consider the legal question raised and decided by the Labour Court on its own.

LABOUR APPEAL COURT

Does a grossly procedurally unfair dismissal morph into a substantively unfair dismissal?

- [19] On this question the Labour Court was heavily influenced by the decision of the Labour Court in *CVO School VIVO v Christoffel Daniel Pretorius and others*⁸. That decision reached a conclusion that as a matter of general principle, gross procedural failures in the conduct of proceedings could in itself serve to vitiate the outcome of the proceedings, no matter what the merits of the matter may be. The Labour Court in *CVO School* had relied on the decision of *Yichiho Plastics (Pty) Ltd v Muller*⁹ and *Satani v Department of Education, Western Cape and others*¹⁰.

⁸ (JR1006/15; JR1004/15) [2017] ZALCJHB 412 (6 April 2017).

⁹ (1994) 15 ILJ 593 (LAC).

¹⁰ (2016) 37 ILJ 2298 (LAC).

[20] In terms of the old Labour Relations Act¹¹ of 1956, the bifurcation between substantive and procedural unfairness was unknown. The old LRA only knew an unfair labour practice which was any act or omission other than a strike or lock-out which may have an effect that any employee or class of employees is or may be unfairly affected or that his or their employment opportunities or work security is or may be prejudiced or jeopardised thereby. As such, a dismissal could under the old LRA be declared to be an unfair labour practice. Accordingly, the *Yichiho* decision was decided under the old LRA. With regard to *Satani*, the LAC was concerned with the procedural irregularities in the arbitration proceedings. In particular the Court in *Satani* said:

‘[37] In my view, the award must be reviewed and set aside because the scope, nature and effect of the arbitrator’s interventions and dominance were such that she failed to afford the parties a fair hearing. Her conduct gave rise to a reasonable apprehension of bias.’

(Own emphasis)

LABOUR APPEAL COURT

[21] The legal statement coined in *CVO Schools* that gross procedural unfairness may vitiate the outcome of the proceedings is correct as far as it refers to a gross irregularity in an arbitration hearing to a point that the parties to an arbitration process are not afforded a fair hearing. There is a clear and necessary distinction to be drawn between procedural fairness and gross irregularity in the proceedings. A gross irregularity is a severe, fundamental failure to follow proper procedures or legal principles in a decision-making process. Such an irregularity is capable of denying an affected party a fair hearing¹². The statement in *CVO Schools* is not authority for the proposition that the gross procedural unfairness renders the dismissal substantively unfair. To the extent that the Labour Court reached such a conclusion, it erred and its decision on that is liable to be set aside on appeal.

[22] Section 188(1)(a)(i) of the current LRA is clear that a dismissal is unfair if the employer fails to prove that the reason for the dismissal is a fair reason –

¹¹ Act 28 of 1956.

¹² See *Ellis v Morgan*; *Ellis v Desai* 1909 TS 576.

related to the employee's conduct. This is in line with article 4 of the International Labour Organisation's (ILO) Termination of Employment Convention No 158 of 1982 (Convention). Section 188(1)(b) specifically provides that a dismissal is also unfair if that dismissal was not effected in accordance with a fair procedure. Also, this is in line with article 7 of the Convention. Therefore, under the current regime a dismissal without a fair reason is one that is substantively unfair and one without a fair procedure is one that is procedurally unfair¹³. No matter how gross the procedural defect is, procedural unfairness cannot morph into being substantive unfairness. Were that to be the case, a dismissal for theft for instance, effected without any hearing must by reason of a complete lack of a hearing become a substantively unfair dismissal, even in the circumstances where an employer would have had a fair reason – misconduct of theft – to have dismissed an employee. This is unsustainable and inconsistent with the LRA as well as the Convention.

LABOUR APPEAL COURT

[23] It is completely illogical and uncoordinated with section 188 of the current LRA to accommodate a situation where, depending on the grossness of the procedural unfairness, a dismissal with a valid reason would become substantively unfair. Arbitration proceedings are a hearing *de novo*. Proper reading of the Labour Court judgment demonstrates that the alleged gross procedural unfairness, is related to what happened at the internal hearings. Such is of no moment given the fact that an arbitration process is a hearing *de novo*.

[24] I pause to remark that in an instance where a dismissal related to operational requirements is involved, issues of procedural unfairness may be inextricably intertwined with substantive unfairness to a point that a dismissal may be found to be substantively unfair¹⁴. However, such does not extinguish the bifurcation between substance and procedure as known in the current LRA. In a dismissal related to operational requirements, procedural fairness is

¹³ See item 4(1) of Schedule 8 of the LRA.

¹⁴ See *Woolworths (Pty) Ltd v SACCAWU and others* (2018) 39 ILJ 222 (LAC) at para 22.

governed by section 189 of the LRA. Egregious departure from a section 189 process shall never turn a dismissal supported by economic; technological; structural or similar needs to be substantively unfair, unless if a dismissal is not a measure of last resort¹⁵.

[25] Such an unlegislated formulation of gross procedural unfairness morphing into substantive unfairness will also make section 193(2)(d)¹⁶ of the current LRA incongruent. On the Labour Court's reasoning, the subsection must be read to be excluding gross procedural unfairness. Accordingly, this Court disagrees with the approach adopted by the Labour Court to convert a "*gross procedural unfairness*" into a substantive unfairness. That is not only at odds with the current LRA but it is simply untenable. Even if there was such a legal basis for substantive unfairness, the trade union should have clearly and unequivocally presented such a case at arbitration, it being a hearing *de novo*. It was improper for the Labour Court to make the appellant to content with a new case of substantive unfairness other than the one determined by the arbitrating commissioner. As required by section 192(2) of the LRA, the onus lies on an employer to prove that the dismissal is fair. Section 188 effectively directs an employer as to what to prove in order to attain fairness.

[26] Firstly, an employer must prove a fair reason. Secondly, prove that the dismissal was effected in accordance with a fair procedure. It bears emphasis that section 188(2) specifically provides that any person considering whether or not the dismissal was effected in accordance with a fair procedure must take into account any relevant code of good practice issued in terms of the LRA. This simply means that the commissioner was to be guided by the code of good practice and nothing more. Expressly and conspicuously absent in the code is the degree of procedural unfairness.

¹⁵ See *Atlantis Diesel Engines (Pty) Ltd v NUMSA* (1994) 15 ILJ 1247 (A).

¹⁶ (2) The Labour Court or the arbitrator must require the employer to re-instate or re-employ the employee unless – (d) the dismissal is unfair only because the employer did not follow a fair procedure.

[27] As correctly held in *Avril Elizabeth Home for the Mentally Handicapped v CCMA and others*¹⁷, what is required is not a formal enquiry. What is required is an investigation into any alleged misconduct by the employer, an opportunity by any employee against whom any allegations of misconduct are made, to respond after a reasonable period with the assistance of a representative, a decision by the employer and notice of that decision. Unlike in a gross irregularity situation, as expounded above, there is no room for the possibility of gross procedural unfairness in the scheme of the current LRA.

Analysis

[28] There was no legal basis for the Labour Court to have interfered with the arbitration award. Sadly, the judgment of the Labour Court extensively considered decisions under the old LRA when the bifurcation between substance and procedure was absent in determining the fairness of a dismissal. The lengthy judgment of the Labour Court is unfortunately contradictory in many respects. It was a futile exercise for the Labour Court to consider a barrage of authorities that dealt with procedural unfairness, in the circumstances where, the finding of the commissioner on procedural unfairness remained unchallenged.

[29] The commissioner considered the principal issue and afforded the parties an opportunity to address him on the principal issue¹⁸. He thereafter reached a justifiable and reasonable decision. Therefore, the Labour Court erred in reviewing and setting aside the commissioner's award. Since the arbitration award is unimpeachable, the Labour Court was not empowered to invoke section 145(4) of the LRA powers. Its substitution of the arbitration award is a *brutum fulmen* – void on its face.

[30] Most importantly, the Labour Court erred in deciding a case that is not foreshadowed in the pleadings – gross procedural unfairness equating

¹⁷ (2006) 27 ILJ 1644 (LC).

¹⁸ See *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine v CCMA and others* (2014) 25 ILJ 943 (LAC) at paras 14 -16.

substantive unfairness and one which was not ventilated at arbitration. Accordingly, the order of the Labour Court must be set aside.

Conclusion

[31] Because of all the above reasons, the order set out below is made.

Order

1. The appeal is upheld.
2. The order of the Labour Court is set aside and replaced with an order:
 Dismissing the review application with no order as to costs.
LABOUR APPEAL COURT
3. In respect of this appeal, this Court awards no order as to costs.

G N Moshwana

Acting Judge of the Labour Appeal Court of South Africa

Djaja AJA and Collis AJA concurring.

APPEARANCES:

For the Appellant : Mr C Watt-Pringle SC

Instructed by: Macgregor Erasmus Attorneys
Inc, Johannesburg.

For the Respondent : Mr A Roskam

Instructed by: Haffegée Roskam Savage
Attorneys, Johannesburg.