



- (1) Reportable Yes
(2) Of interest to other Judges: Yes
(3) ~~Revised~~

Signature

Date

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case No: JR 2328/22

In the matter between:

LACTALIS SOUTH AFRICA (PTY) LTD

Applicant

and

STEPHEN MANABE

First Respondent

COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION

Second Respondent

COMMISSIONER PAUL BOTHA

Third Respondent

Heard: 25 June 2025

Supplementary Heads of Argument: 13 October 2025

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email; and publication on the Labour Court website and released to *SAFLII*. The date for hand-down is deemed to be on 31 March 2026.

Summary: Review application in terms of s 145 of the Labour Relations Act 66 of 1995 - Disciplinary proceedings - Double jeopardy - Application of the double jeopardy rule to a disciplinary process conducted by a deemed employer in terms of s 198A of the LRA following a prior disciplinary hearing conducted by the

temporary employment service on the same charges - Held: the disciplinary action by the TES was a nullity - Double jeopardy not applicable - Relief declaring dismissal substantively fair incompetent where substantive fairness was never ventilated before the Commissioner - Court lacks power to remit that which was never before the Commissioner - Dismissal by deemed employer fair insofar as the challenge was based on double jeopardy - Arbitration award reviewed and set aside - No order as to costs.

JUDGMENT

MOTSHEKGA, AJ

Introduction

- [1] The applicant, Lactalis South Africa (Pty) Ltd (the applicant) seeks to review and set aside an arbitration award (the award) rendered by the third respondent as the duly appointed Commissioner (the Commissioner) on 25 September 2022, under the auspices of the second respondent, the Commission for Conciliation, Mediation and Arbitration (the CCMA).
- [2] The applicant further seeks an order that the dismissal of the first respondent, Stephen Manabe (the employee) was substantively fair.
- [3] The review application is brought in terms of section 145 of the Labour Relations Act¹ (the LRA).
- [4] In his award, the Commissioner ordered reinstatement, having found that the dismissal of the employee was unfair on the basis that it constituted double jeopardy.

¹ Act 66 of 1995, as amended.

[5] The review application is opposed by the employee.

Relevant Facts

[6] The employee was initially employed by Kempston Hire (Kempston), a temporary employment service provider which supplied the applicant with flexible work employees. In terms of a rostering system, the employee was deployed at the applicant's Centurion distribution centre as a driver from August 2019 until 9 February 2022.

[7] It is common cause that during the period of deployment by Kempston, the employee became a deemed employee of the applicant in terms of the operation of section 198A² of the LRA.

[8] On 29 September 2021, and following a disciplinary hearing, the employee's contract was terminated by Kempston. Thereafter, the applicant precluded the employee from reporting for duty and ceased to schedule him. Subsequently, the employee referred an unfair dismissal dispute to the CCMA, citing the applicant as the employer.

[9] In his referral document, the employee summarized the facts as follows: (a) He was dismissed by the "deemed employer" on 4 October 2021 for "no reason"; (b) he was telephonically contacted by an official of the applicant who informed him that Kempston had instructed the applicant not to allocate work to him.

[10] On 26 January 2022, the parties concluded a settlement agreement at the CCMA in terms of which the employee was to be reinstated with an amount of R16 077.24 payable to him. The settlement agreement recorded that the employee was "*to be called according to schedule, same place, Lactalis, Gauteng Distribution Centre*".

² Section 198A stipulates *inter alia* that, an employee of a temporary employment service who provides services for a client for a period exceeding three months is "*deemed to be the employee of that client and the client is deemed to be the employer*" for purposes of the LRA. (the deeming provision).

- [11] The applicant effected payment in terms of the settlement agreement. The employee was however, not "*called according to schedule*". Instead, he was informed that the applicant was investigating the allegations which Kempton had relied upon in terminating him.
- [12] On 31 January 2022, the employee was notified by the applicant to attend a disciplinary hearing at which he was charged with dishonesty and failure to comply with company regulations.
- [13] The charges are common cause and do not arise for determination in this review application; accordingly, they will not be restated. It suffices to mention that the charges were identical to those upon which Kempston relied in terminating the employee's contract of employment.
- [14] On 3 February 2022 a disciplinary hearing was held and the employee was found guilty of allegations of dishonesty and subsequently dismissed on 9 February 2022 by the applicant. The employee thereafter referred an unfair dismissal dispute against the applicant to the CCMA.
- [15] At the CCMA, the employee successfully applied for legal representation in terms of rule 25 of the CCMA Rules. Subsequent thereto, the Commissioner determined that the matter be dealt with by way of a statement of case by the employee in terms of rule 19 of the CCMA Rules, with the applicant to file a reply. The parties filed their papers accordingly.
- [16] The matter was scheduled for arbitration on 12 September 2022.
- [17] In sum, the employee contended that the sole issue for determination was whether the "second dismissal" on 9 February 2022 was unfair, having regard to the settlement agreement concluded between the parties on 26 January 2022. Thus, the employee argued that the principles of double jeopardy found application in his dismissal by the applicant.

[18] For reasons that will appear more fully in this judgment, the applicant disputed having dismissed the employee prior to February 2022 and contended that there was a single dismissal, namely that which took place on 9 February 2022, thereby refuting the applicability of the rule against double jeopardy.

[19] The record reveals that, the substantive fairness of the misconduct allegations was not placed at issue. The parties' submissions were therefore limited to the alleged unfairness of the "second dismissal" following the conclusion of the settlement agreement.

The Arbitration award

[20] The commissioner having considered the parties' submissions found that the employee was unfairly dismissed by the applicant and ordered reinstatement. In sum, the commissioner held that the employee was unjustifiably subjected to double jeopardy by the applicant. The following paragraphs from the award capture the commissioner's reasoning in that regard:

'...

11.1 Since the parties clearly accept the effect of the *Assign Services* judgment, the applicant is the employee of the respondent for purposes of determining the fairness of the dismissal. All the respondent needed to do when realizing that the TES had acted without the respondent's knowledge (if this is indeed what happened), was to instruct the TES to roster him for duties, and inform him that TES' actions were not binding and that he may report for duty as he is not dismissed. It did not do this. It specifically identified itself as the employer, and agreed in writing to reinstate the employee as a remedy to deal with alleged unfair dismissal. An employee cannot be reinstated if his services were not terminated in the first place.

11.2 It therefore follows that there were two dismissals. The respondent is responsible for the actions of a TES in respect of its employees, and cannot seek to escape that responsibility now. I find the respondent's conduct in respect of "going through the motions" with the reinstatement agreement, only to conduct a second hearing, to be

reprehensible. Why not simply defend the fairness of the dismissal at arbitration after appraising the merits of the case?

- 11.3 There were no different or exceptional circumstances that would justify a second dismissal. I further find that “genuine” double jeopardy exists in this case, which is distinguishable from the concept of double jeopardy considered by the Court in the *BMW v Van der Walt* case cited *supra*. In that case, second hearing whilst the applicant was still employed, under unusual circumstances, was at issue. In the case before me, an employee is: dismissed, reinstated and dismissed again for precisely the same allegations of misconduct. This is akin to conviction, release and conviction of a person on the same charges in a criminal case. I certainly think that double jeopardy as a legal principle applies quite obviously in this case.
- 11.4 The respondent cannot seek to rely on not knowing what its TES was doing, the respondent is the employer. It cannot be regarded as a fair dismissal, when faced with a claim of unfair dismissal, the respondent puts up its hand and identifies itself as the employer, reinstates the applicant again on the same allegations. It is not a convincing argument to say the involvement of the TES somehow displaces the responsibilities of the respondent. Any unfair conduct in the workplace, in respect of actions that are of an employer-employee nature and which affect the employment relationship, which are directed at employees by TES where the deeming provision is not disputed, will be the responsibility of the respondent who is a deemed employer.’ (Own emphasis)

Grounds for the review

- [21] The applicant’s first ground for review is that the Commissioner committed a gross irregularity and failed to reach the standards of a reasonable decision maker by: holding that the dismissal of the employee was unfair on the principle of double jeopardy, when there was no basis in law or fact to support that finding.
- [22] Secondly, the applicant submits that the Commissioner failed to properly apply his mind to the matter when he concluded that, there was an initial

dismissal by the applicant when in fact there was not as the dismissal by Kempston was a nullity.

[23] Lastly, that the Commissioner misconducted himself by attending to two personal telephone calls during the arbitration proceedings which were disruptive to the proceedings and ultimately impacted on the outcome of the award.

[24] In sum, the applicant's review of the award is premised on the Commissioner's finding of double jeopardy and the misconduct relating to answering personal phone calls during the arbitration proceedings.

Submissions on Double Jeopardy

[25] The discontent with the Commissioner's double jeopardy finding is premised on the following as submitted by the applicant: (a) the upshot of the deeming provision is that, Kempston's disciplinary process was a nullity; thus, there could be no reference to a second hearing either in fact or in law; (b) the settlement agreement concluded by the parties resolved the dispute as referred by the employee regarding the alleged dismissal by the applicant on 4 October 2021 for reasons unknown; (c) the CCMA had no jurisdiction to settle a dispute that was not before it, namely, the dismissal based on misconduct by Kempston; and (d) the settlement agreement did not preclude the applicant from investigating the misconduct allegations, discipline the employee in accordance therewith, and ultimately dismiss him for dishonesty following a disciplinary hearing held on 3 February 2022.

[26] The employee disputes the contention that Kempston's disciplinary process was a nullity. He argues that the applicant cannot rely on nullity when it acted incongruently with that position in refusing to allow him to tender his services, following his dismissal by Kempston. The employee further submitted that such refusal was premised on the dismissal by Kempston.

[27] The employee maintained that on both occasions he was charged and dismissed based on the same facts following a disciplinary.

- [28] Mr Mohlala, appearing for the employee, further argued that the applicant approved Kempston's dismissal of the employee by failing to roster him and that the two were in agreement regarding the dismissal.
- [29] The employee furthermore submitted that he is a lay person, and that the applicant's reliance on its referral form was misplaced. Furthermore, that despite having been assisted by Casual Workers Advice Office (CWAO), which is a labour centre, its personnel are not legally qualified. To amplify, it was argued for the employee that both his referral forms to the CCMA following the September 2021 and February 2022 dismissals; he cited that the reason for his dismissal was "unknown".
- [30] Finally, the employee contended that the settlement agreement resolved the dismissal relating to the misconduct allegations, maintaining that it related to the charges which led to his dismissal in September 2021.

Submissions on the Commissioner's Conduct

- [31] Briefly, the applicant further submitted, as one of the review grounds, that the Commissioner misconducted himself by proceeding to take two personal phone calls during the arbitration proceedings.
- [32] Mr. Cassels for the applicant argued that the conduct of the Commissioner in taking personal phone calls during the proceedings adversely affected the outcome of the award.
- [33] It was further submitted that, the outcome of the award confirms that the Commissioner was not properly engaged in the matter.
- [34] Moreover, the applicant submitted that the Commissioner conducted himself unprofessionally when he expressed to the parties during the arbitration that he held a particular view on the matter and that argument on the relevant legal principles may be futile.
- [35] The employee disputes that the taking of personal calls during the arbitration constitutes misconduct, submitting that it could at best be regarded as unprofessional conduct.

- [36] The employee submitted that the Commissioner apologized for the telephone calls and that this complaint could have been raised with the Commissioner or the Senior Commissioner.
- [37] To conclude on this ground of review, the employee contended that a Commissioner's or a Judge's expression of a view on a matter constitutes normal practice and does not amount to unprofessionalism.

Test for review

- [38] As stated elsewhere above, the applicant's review application is premised on the Commissioner's misapplication of the law on double jeopardy and his conduct during the proceedings.
- [39] The standard for review is as formulated by the Constitutional Court in *Sidumo and Another v Rustenburg Platinum Mines and others*³, and stipulates that the Commissioner's decision must be one that a reasonable decision-maker could reach.
- [40] The Labour Appeal Court in *Head of Department of Education v Mofokeng and Others*⁴ expounded that not every error or irregularity will justify interference; only those that are material, in the sense that they distort the arbitrator's enquiry or affect the outcome, render the result unreasonable.
- [41] The practical approach in determining reasonableness of the outcome of the award, as advanced by Myburgh⁵ is to first identify the error, then determine whether it was outcome-determinative, and if so, assess whether the incorrect result is nevertheless capable of reasonable justification.

³ (2007) 28 ILJ 2405 (CC) at para 110.

⁴ (2015) 36 ILJ 2802 (LAC) at para 33.

⁵ See A Myburgh SC 'Reasonableness Review - The Quest for Consistency' (2024) 45 ILJ 1377 at 1390. This formulation was cited with approval by the Labour Appeal Court in *National Bargaining Council for the Road Freight and Logistics Industry v Deyssel NO and others* (2025) 46 ILJ 1679 (LAC) at para 34.

- [42] Accordingly, a reviewing court is not concerned with the correctness of the award, but with the reasonableness of the outcome. Even where an error is identified, the decisive question remains whether the said error rendered the outcome unreasonable.

Evaluation

- [43] The central issue before the court is whether the Commissioner committed a reviewable irregularity in concluding that the employee was subjected to double jeopardy and in his conduct during the proceedings, such that it renders the outcome of the award unreasonable.
- [44] At the outset, the crux of the applicant's review ground on the double jeopardy finding lies in the legal status of the disciplinary process by Kempston on 29 September 2021.
- [45] It is common cause that the deeming provision applied, consistent with the findings of the Constitutional Court in *Assign Services v NUMSA (Casual Workers Advice Office as Amicus Curiae)*⁶.
- [46] The determinative question is therefore whether Kempston was cloaked with the requisite authority to discipline the employee. Axiomatically, if the answer is in the negative, then prior to February 2022 there could have been no valid dismissal capable of attracting the rule against double jeopardy; there being a single dismissal, namely, that effected on 9 February 2022.
- [47] Ancillary to evaluating the legal status of Kempston's disciplinary process is whether: (a) the applicant can be held responsible for the actions of Kempston as found by the Commissioner;⁷ (b) the refusal to accept the employee's services constituted an approval of the dismissal; and (c) the settlement agreement concluded between the parties in January 2022 precluded the applicant from instituting disciplinary proceedings against the employee based on the same charges proffered by Kempston in September 2021.

⁶ (2018) 39 ILJ 1911 (CC).

⁷ Pleadings, arbitration award, page 19 at para 11.2.

[48] The rule against double jeopardy is trite. It is anchored in the principles of fairness and natural justice. In the employment law context, the rule serves to protect employees from being disciplined twice for the same misconduct. Grogan captures the principle and its origin as follows⁸:

‘It is a general principle of fairness that a person should not be tried twice for the same offence. This principle is applied strictly by criminal courts, where it is expressed in the principle *autrefois acquit*. In civil law, it is expressed in the principle that a litigant may not sue in respect of a matter that has already been decided by a competent court; the issue is the said to be *res judicata*...’

[49] The Labour Appeal Court in *SAMWU obo Malatsi v South African Local Government Bargaining Council and Others*⁹ held that the application of double jeopardy in the workplace should be approached with caution as it is derived from the principles of criminal law.¹⁰ The Court in *Malatsi* nevertheless emphasized that¹¹ ‘*in labour disputes, the ultimate yardstick is fairness*’.

[50] Parenthetically, and albeit not applicable to the present matter, a second disciplinary enquiry may be permissible in exceptional circumstances, which may include the emergence of new evidence, where the initial process was materially flawed, ill-informed, incorrect, misconceived, or ultra vires the employer's disciplinary code, was a nullity, or where the second enquiry would be fair.¹²

[51] The Court notes that in arriving at their respective positions, both the Commissioner and the employee conflated the authority of the deemed employer to discipline with joint liability for the consequences of dismissal.

[52] This is evidenced by, first, the employee's contention that the applicant approved of the dismissal by Kempston when it refused to accept the

⁸ J Grogan et al *Dismissal* 4th ed (2022) pp 277.

⁹ (2026) 47 ILJ 321 (LAC) (*Malatsi*).

¹⁰ Ibid at para 15.

¹¹ Ibid at para 15 fn 9.

¹² *BMW (South Africa) (Pty) Ltd v Van Der Walt* (200) 21 ILJ 113 (LAC) at para 12; *BrandFord v Metrorail* (2003) 24 ILJ 2269 (LAC).

employee's tender of its services. This argument is untenable. Authority to act requires no subsequent approval and the suggestion that the applicant's conduct constituted an 'approval' cannot stand. If anything, the submission fortifies the applicant's contention that Kempston lacked the requisite authority to discipline on the basis of the deeming provision.

- [53] Mr Mohlala submitted during argument that the applicant's approval of Kempston's actions should be deduced from the applicant's conduct. However, the employee neither pleaded nor advanced any argument based on lawful authority or the doctrine of estoppel or acquiescence. Consequently, there is no legal basis upon which the approval can be deduced from the applicant's conduct. Therefore, applicant cannot be held responsible for the unauthorized disciplinary action by Kempston
- [54] Second and more significantly, the Commissioner unequivocally based his finding of double jeopardy on the premise that the applicant is responsible for the actions of TES with regard to "*actions that are of an employer-employee nature*"¹³. That approach is legally flawed. Absent a finding of estoppel, acquiescence or lawful authority, the applicant cannot be held responsible for the unauthorized disciplinary action by Kempston.
- [55] Without more, neither the applicant's refusal to accept the employee's services, nor the responsibility attributed to it by the Commissioner for Kempston's unauthorized actions, can retrospectively validate the latter's disciplinary process.
- [56] The disciplinary process by Kempston and the dismissal emanating therefrom were therefore a nullity and incapable of attracting the jeopardy principle.
- [57] Having concluded that Kempston's disciplinary process and the dismissal stemming therefrom were unauthorized and therefore a nullity, the Court now turns to consider the settlement agreement concluded in January 2022.

¹³Pleadings, arbitration award, page 20 at para 11.4.

- [58] The settlement agreement, considered simpliciter, resolved the practical consequences arising from Kempston's actions, including the non-scheduling of the employee. It could not, however, alter the legal status of those actions, Kempston's disciplinary process having been found to be a nullity
- [59] The Court has considered the employee's submission that reinstatement as contained in the settlement agreement presupposes a dismissal. This argument is without merit in circumstances where there was an unauthorized dismissal. It must be emphasized that, the settlement agreement cannot, in and of itself, have the legal effect of validating an unauthorized dismissal. Rather, the settlement agreement reflects the operation of the deeming provision under which the employee is treated as an employee of the client for purposes of liability under the LRA.
- [60] From the foregoing, it is clear that the employee was not subjected to double jeopardy. Consequently, the Commissioner's finding to the contrary rendered the outcome of the award unreasonable on that basis.
- [61] For completeness, the Court has considered the remaining review ground pertaining to the Commissioner's conduct. Concerning the taking of personal calls, without condoning conduct that is completely unacceptable and unprofessional, there is nothing on the record suggesting that the outcome of the award was impacted by such conduct. The same conclusion applies to the conduct of the Commissioner in expressing that he had a particular view on the matter. Although undesirable and to be avoided, as it might give rise to suspicions of bias, the Court is unpersuaded that this constitutes a valid review ground.

Appropriate Relief

- [62] Arising from the review application is the issue of appropriate relief.
- [63] The employee raised a point *in limine* that the relief sought by the applicant, that is, an order declaring that the dismissal was substantively fair, is incompetent in the circumstances.

- [64] The basis for this contention is that the arbitration was primarily decided on a narrow legal aspect of double jeopardy, and that there were no facts presented at arbitration which would enable the Court to make a determination on the fairness of the dismissal.
- [65] Accordingly, it was argued for the employee that the applicant should have prayed for a remittal to the CCMA in the event that the Court found in its favour.
- [66] The parties were directed to file supplementary heads of argument on the issue. In particular, parties were required to address the Court on (a) whether the statement of case constituted a “stated case or special case” consonant with the meaning of a statement of case as per the decisions in *Social Security Agency v NEHAWU obo Punzi and Others*¹⁴ and *Fetakgomo Greater Tubatse Local Municipality v SALGBC and Others*¹⁵?; (b) Whether the arbitration proceedings were complete in light of the applicant not having discharged the onus of proving the facts pertaining to the alleged misconduct in terms of section 188 of the LRA?; and (c) in the event that the court found in the negative in relation to (a) and (b) above, on what basis the matter should not be remitted to the CCMA to be heard *de novo* before another Commissioner?
- [67] At the time of this judgment, only the applicant has filed its supplementary heads of argument. The employee has not filed its supplementary heads of argument notwithstanding the Court’s directive.
- [68] The applicant in its heads argument submitted that the employee did not place in issue the allegations of misconduct; rather, he squarely placed reliance on double jeopardy as the basis for the unfairness of the dismissal.
- [69] The applicant contended that the factual plinth contained in the statement of case, in relation to the narrow issue of double jeopardy, was common cause and sufficient to constitute substantial compliance with the requirements of a

¹⁴ (2015) 36 ILJ 2345 (LC) at paras 7 and 8.

¹⁵ (JR 1832/19) [2022] ZALCMPP 1

stated case. On that basis, the applicant submitted that the arbitration proceedings constituted proper proceedings.

[70] The applicant submitted that there were no material disputes of fact on the narrow issue of double jeopardy. To this end, the applicant cited the appellate decision of *Motor Industry Staff Association and Another v McCarthy Ltd and Others*¹⁶ wherein the Court emphasized that where the record contains the necessary factual background and the facts are common cause, arbitration may proceed without oral evidence.

[71] Finally, the applicant contended that even if the Court found that the employee's statement of case is not a proper stated case, the Court would still be entitled to substitute the Commissioner's finding without the need to remit the matter, as the matter was decided solely on that narrow basis.

Conclusion

[72] The Court has considered the parties' submissions and is satisfied that its powers are confined to the matters placed before the Commissioner.

[73] The employee's challenge was limited to double jeopardy and no factual record or submissions were placed on the substantive fairness of the dismissal.

[74] The Court's determination that no double jeopardy arose is dispositive of the matter with respect to the issues considered by the Commissioner.

[75] In the circumstances, the Court is not empowered to determine the substantive fairness of the dismissal, as the issue was not ventilated before the Commissioner.

[76] The point *in limine* raised by the employee is accordingly upheld. The relief sought by the applicant, that is, an order declaring the dismissal substantively fair, is incompetent in circumstances where the substantive fairness of the dismissal was never ventilated before the Commissioner. By the same token,

¹⁶ (2021) 42 ILJ 117 (LAC).

the Court cannot remit to the CCMA that which was never before the Commissioner. It follows that the applicant's contention that the Court is entitled to substitute the Commissioner's finding for a finding on substantive fairness is rejected.

[77] Accordingly, the following order is made:

Order

1. The award issued by the Commissioner on 20 June 2022, under CCMA case number GATW2960-22, is hereby reviewed and set aside.
2. The Commissioner's award is substituted with the following order: "The dismissal of Stephen Manabe by Lactalis SA (Pty) Ltd is fair insofar as the dismissal was challenged on the basis of double jeopardy".
3. There is no order as to costs.

M. J. Motshekga

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr G Cassells of Maserumule Attorneys

For the First Respondent: Advocate Mohlala

Instructed by: AM Ncube Attorneys