



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

Signature

Date

THE LABOUR APPEAL COURT OF SOUTH AFRICA, DURBAN

Case no: DA27/2024

In the matter between:

GLADYS ARUNACHELLAM

Appellant

and

WOOLWORTHS (PTY) LTD

First Respondent

COMMISSION FOR CONCILIATION MEDIATION

AND ARBITRATION

Second Respondent

COMMISSIONER IAN BULOSE

Third Respondent

Heard: 21 May 2026

Delivered: 01 June 2026

Coram: MAHALELO ADJP; van NIEKERK JA and MOSHOANA AJA

Summary: This appeal is against the judgment and order of the Labour Court which dismissed an application seeking to review and set aside an arbitration award that found that the dismissal of the appellant is both procedurally and substantively fair. The Labour Court found that the dismissal of the appellant was substantively fair but procedurally unfair and ordered the employer to pay compensation to the appellant. The appellant was dismissed for misconduct in that she referred to other employees as being 'dumb.' Although the appellant disputed that she used the word 'dumb,' the commissioner reached a finding

that indeed the word 'dumb' as opposed to 'confused' was used. Having found that the word 'dumb' was used, the commissioner confirmed the sanction of dismissal as imposed by the employer.

On appeal the central issue was whether the sanction of dismissal was appropriate for the usage of the word 'dumb.' The commissioner in her arbitration award, explicitly stated the following: "*I have not been asked to determine the appropriateness of the sanction... I accordingly find no reason to interfere with the decision of the Respondent.*" Therefore, the key question in this appeal is whether the outcome that the sanction of dismissal was not to be interfered with is one that a reasonable decision maker may reach.

Should this Court, as a Court of appeal, reach a conclusion that the commissioner failed in her duties to determine the appropriateness of the sanction of dismissal, can the Court of appeal determine the appropriateness of the sanction or remit the dispute back to the CCMA for the determination of the appropriate sanction. Undoubtedly, by challenging the substantive fairness of the dismissal, the commissioner was asked to determine the appropriateness of the sanction of dismissal. Failure to do so offends section 145(2)(a)(i) and (ii) of the LRA.

The employer cross-appealed the finding that the dismissal was procedurally unfair. The key question in this regard is whether the Labour Court was entitled to determine the issue of procedural unfairness and whereafter award compensation for that. It is apparent from the arbitration award that the commissioner failed to decide the issue whether the dismissal was effected after following a fair procedure. In the arbitration award, the commissioner stated the following with regard to the issues to be decided: "*The issue to be determined and decided upon in this matter is whether the Applicant's dismissal was substantively fair and if not so, whether and to what appropriate relief is the applicant entitled to in terms of the law?*" Undoubtedly, the question whether the dismissal was effected after a fair procedure being followed was not determined by the commissioner. That being the case, the

veritable question is whether the appellant challenged the procedural fairness of the dismissal or not.

The evidence does reflect that such a challenge was mounted. In failing to determine and decide the issue, the commissioner committed misconduct in relation to the duties of the commissioner as an arbitrator or gross irregularity, within the contemplation of section 145(2)(a)(i) and (ii) of the LRA. The Labour Court's power to determine the procedural issue without the benefit of the determination of the issue by the commissioner is only questioned but not squarely decided.

Held: (1) The appeal and the cross-appeal are upheld. Held: (2) The order of the Labour Court is set aside and replaced with an order of this Court. Held: (3) There is no order as to costs.

JUDGMENT

MOSHOANA, AJA

Introduction

[1] In the present appeal, it is clear that the commissioner mistakenly assumed that the appropriateness of the sanction was not placed in dispute, when in fact it was. Generally, when dismissed employees challenge the fairness of their dismissal, they more often than not and without fail contend that dismissal as a sanction is not appropriate at all. As it shall be demonstrated in due course, it is this assumption that led to a reviewable irregularity which had the distorting effect on the outcome reached by the commissioner.

[2] As confirmed in *Engen Petroleum Limited v CCMA and others (Engen)*¹, it remains the duty of a commissioner to determine whether a dismissal is fair

¹ [2007] 8 BLLR 707 (LAC).

and that determination almost always encapsulates the question whether dismissal as a sanction is appropriate or not.

- [3] Eventually, the Constitutional Court in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*² settled the law in the following terms:

‘To sum up. In terms of the LRA, a commissioner has to determine whether a dismissal is fair or not. A commissioner is not given the power to consider afresh what he or she would do, but simply to decide whether what the employer did was fair. In arriving at a decision, a commissioner is not required to defer to the decision of the employer. What is required is that he or she must consider all relevant circumstances.’

(Own emphasis)

- [4] The above said, this is an appeal against the judgment and order of the Labour Court handed down on 25 September 2025. The appeal reached this Court with the leave of the Labour Court. The appeal is opposed by the first respondent, Woolworths (Pty) Ltd (hereafter Woolworths). Woolworths noted a cross-appeal in terms of the provisions of rule 5(1) of the Labour Appeal Court Rules³. The cross-appeal is directed at the finding of procedural unfairness by the Labour Court. Given the view I take at the end of this matter, the cross-appeal would become academic. However, since it was persisted with before us, I shall deal with it in this judgment as well.

Background factual matrix pertinent to the present appeals

- [5] The appellant, Ms Gladys Arunachellam (hereafter Gladys) was employed by Woolworths at its store situated in La Lucia Mall, Durban, as a supervisor. She has been in the employ of Woolworths for a period of 28 years at the time of her dismissal. She was dismissed on 6 May 2019 on allegations of misconduct. It was alleged by Woolworths that on or about 11 March 2019, she used the word ‘dumb’ in reference to till operators whilst in discussion with two trainees and another staff member.

² [2007] 12 BLLR 1097 (CC) at para 79.

³ Rules Regulating the Conduct of the Proceedings of the Labour Appeal Court. Published 3 May 2024 (GN 50608). Effective 17 July 2024.

- [6] On or about 09 April 2019 Gladys was charged and hauled before a disciplinary enquiry to answer to the allegations of gross misconduct relating to the breach of company policies and procedures when she made what was considered to be inappropriate comments of an insulting nature concerning the till operators. According to Woolworths such inappropriate comments of an insulting nature negatively impacted the workplace relations. I pause to mention that, notwithstanding how the charge sheet was couched, the issue was about the utterance of the word 'dumb' in the presence of other staff members. Ultimately Gladys was found guilty and dismissed.
- [7] Aggrieved by her dismissal, she referred a dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) and alleged an unfair dismissal. Conciliation failed to resolve the alleged dispute of unfair dismissal. Gladys requested the CCMA to resolve the dispute through arbitration. At arbitration, her version, which was corroborated by a witness she had called, was that she uttered the word 'confused' and not 'dumb'. Ultimately, on 05 April 2020, Commissioner Ian Bulose issued an arbitration award and found that the dismissal of Gladys was fair.
- [8] Disenchanted by the outcome of the arbitration, Gladys launched a review application on 22 June 2020. As already outlined above, the Labour Court found that the dismissal of Gladys was substantively fair but procedurally unfair. The Labour Court awarded Gladys compensation for the procedural unfairness it found she suffered.
- [9] Still aggrieved, Gladys sought and obtained leave to appeal to this Court against the judgment and order of the Labour Court finding that her dismissal was substantively fair. Authorised by rule 5(1) of the Labour Appeal Court Rules, Woolworths noted a cross-appeal seeking to reverse the findings of the Labour Court on the procedural unfairness suffered by the appellant.

Arbitration award

- [10] The commissioner rendered a long arbitration award comprising of 52 pages. What accounts for the length is that the commissioner almost *verbatim*

recorded the evidence stages of each witness. I pause to mention that where the evidence, as it was the case herein, is mechanically recorded, it is unnecessary to regurgitate *verbatim* the evidence in an arbitration award. Section 138(7)(a) of the Labour Relations Act⁴ (LRA) requires a commissioner to issue an arbitration award with brief reasons. I must remark that long arbitration awards make it difficult for a Court of review and by extension this Court to follow and appreciate the reasoning of a commissioner.

[11] Nevertheless, in analysing the evidence, the commissioner, in many instances, repeated what he stated when surveying the evidence tendered before him. Sadly, the present arbitration award is not adorned with brief reasons. Ultimately, the commissioner reached the following pertinent conclusion:

‘8.20 Having assessed the evidence and the demeanour of the witnesses and having considered it, I am of the considered view that the Applicant did in fact refer to the cashiers in her department as dumb. This assertion is corroborated by 3 witnesses ... all of whom had no personal issues against the Applicant. These witnesses confirmed that the comment was inappropriate.

8.21 The Applicant conceded that if she did say the word dumb, it would have been offensive and that the staff would have been justified to be offended... Accordingly, I am of the firm view that the use of the word dumb by the Applicant had the effect of offending employees whom she referred to and it was in breach of company values reflected in pages 18 and 19 of bundle ER.

8.22 The evidence of Natasha which was not disputed was that there were employees who were dismissed for making derogatory statements against other employees. I am satisfied in the circumstances that the Respondent had a valid reason to dismiss the Applicant and consequently the Applicant was dismissed for a fair reason. I have not been asked to determine the appropriateness of the sanction or the consistent application thereof as the Applicant specifically took the

⁴ Act 66 of 1995, as amended.

view that her dismissal was without a fair reason which was her challenge. I accordingly find no reason to interfere with the decision of the Respondent'

(Own emphasis)

- [12] Flowing from the above reasoning, it is perspicuous that the commissioner did not determine the question whether dismissal as a sanction was appropriate. For that lack of determination, the commissioner places reliance on the fact that the appellant had not asked him to determine the question of the appropriateness of the sanction of dismissal. This is troubling to this Court and ought to have troubled the Labour Court. Section 188(2) of the LRA specifically provides that any person considering whether or not the reason for dismissal is a fair reason must take into account any relevant code of good practice issued in terms of the Act. Item 7(1)(b)(iv) of Schedule 8 Code of Good Practice provides that any person who is determining whether a dismissal for misconduct is unfair should consider whether or not dismissal was an appropriate sanction for the contravention of the rule or standard.
- [13] In the body of the arbitration award, the commissioner mentions that the issue to be determined and decided upon in this matter is whether the Applicant's [appellant] dismissal was substantively unfair. Legally, the issue of substantive unfairness involves two legs; namely (a) whether an employee is guilty of the misconduct that led to his or her dismissal; and (b) whether dismissal as a sanction is appropriate for the misconduct committed. Section 136(1) of the LRA imposes a duty on a commissioner to arbitrate a dispute. Section 191(5)(a)(ii) of the LRA obligates the Commission to arbitrate the dispute at the request of the employee if the employee has alleged that the reason for dismissal is related to the employee's conduct. Given the above statutory obligations, it was not necessary for the appellant to specifically ask the commissioner to determine the leg of the appropriateness of the sanction of dismissal, the commissioner was duty bound to do so. It is common cause that the appellant requested resolution of the dispute through arbitration. Such was enough to obligate the commissioner to determine the other leg of

substantive fairness – appropriateness of the sanction of dismissal. A commissioner would be relieved of that duty if an employee unequivocally accepts that the sanction of dismissal imposed by an employer is appropriate for the misconduct involved. This rarely occurs. In this matter, the appellant did not accept that the sanction imposed on her was appropriate. The commissioner mistakenly believed that the appellant did not challenge the sanction imposed and departed from the premise that being guilty of the misconduct is enough to justify the fairness of the dismissal.

Was the commissioner nevertheless asked not to determine the leg of the appropriateness of dismissal as a sanction?

[14] It is common cause that the parties did not conclude a pre-arbitration agreement. Ordinarily, in a pre-arbitration agreement parties would reach consensus on (i) agreed facts; (ii) disputed facts; (iii) the issues that the Commission is required to decide and; (iv) the precise relief sought.

[15] Regrettably, the arbitration transcript does not bare the assertion by the commissioner out. At the opening address the issue that the disciplinary code does not contemplate dismissal was specifically mentioned. Important to note and record in this judgment is the response of Woolworths to that mention. A Mr Arnold, who represented Woolworths at arbitration, stated the following:

‘The applicant has also alluded to the fact that our disciplinary code does not specifically direct, does not specifically have a provision about this...We submit that it is so ...specific provision that says that language of an abusive nature will result in dismissal for a first offence... The applicant would obviously harp on the fact that she had more than 17 years of formal employment with us but we submit that the circumstances in which the word was used, the nature of the word was used, the nature of the word that was used, the lack of remorse that was demonstrated in totality throughout the inquiry all warranted dismissal in these circumstances...’

[16] The above submission by Mr Arnold can only mean that the appropriateness of dismissal as a sanction was squarely raised as an issue. After hearing opening addresses, the commissioner, aptly stated the position to be this:

‘COMMISSIONER: Thank you. The respondent does not dispute that the applicant was dismissed or that the respondent submits that the applicant was dismissed for a particular reason and after following a particular procedure, it therefore is evident that the *onus* in these proceedings lies with the respondent. I therefore would invite the respondent to commence adducing evidence justifying her dismissal...’

[17] As a last straw, on this troubling issue, the commissioner recorded in his arbitration award, the following:

‘3.4 The Applicant challenged her dismissal on the basis of substantive fairness.’

[18] Clearly, the commissioner misstated the facts by stating that he was not asked to determine the appropriateness of the sanction of dismissal and also that the challenge by the appellant was only confined to the fair reason – is she guilty of the offence that led to her dismissal. The commissioner was not only asked but was also obliged to determine the appropriateness of the sanction of dismissal when dealing with substantive fairness of the dismissal of the appellant. It is unclear to this Court as to why the commissioner would choose to misstate facts. This is above all, a serious misconduct on the part of the commissioner and may require the Commission to deal with such a misconduct⁵.

[19] Despite all of the above, the commissioner half-heartedly attempted to justify the appropriateness of the dismissal of the appellant by referencing the evidence of Ms Natasha Pather. The transcript reveals that the examples referred to by Ms Pather had the elements of racial undertones. In one such an instance, the word monkey was used. Ms Pather specifically testified that she was not aware of any incident where the word ‘dumb’ or ‘silly’ were used and dismissal as a sanction was imposed for that. This half-hearted attempt is far from the required probing and determination of the veritable question

⁵ Clause 3.1 of the Code of Conduct for Commissioners provides that commissioners must act with honesty, impartiality, due diligence and independently of any outside pressure in the discharge of their statutory functions.

whether dismissal as a sanction was appropriate for the usage of the word 'dumb'.

- [20] It is apparent to me that the commissioner simply ignored the pertinent evidence that the appellant was called by Dennis into the office to ask her about the incident of the usage of the word some two weeks later. This, in my considered view, should explain the testimony of the appellant that she used the word confused and not dumb. Two weeks is relatively a longer period to expect a supervisor who deals with customers and staff daily to remember what occurred two weeks ago. Taking into account the context in which the word was uttered, it cannot reasonably be said that there were any racial undertones intended by the appellant when she uttered the word. Although Woolworths attempted to attach racial undertones to the utterance, the evidence clearly demonstrated otherwise. The evidence of the appellant at arbitration, when confronted with the allegation of the usage of the word 'dumb', was as follows:

'It was two weeks later that we are having a conversation on a daily basis. I cant remember, it could have, as I said, it could have been a slip of the tongue, I really don't know, but it was two weeks later, so I don't speak like that. I have been working with customers for over 25, 30 years and I have never made a mess-up like that'

- [21] The above evidence clearly demonstrates that the appellant is not a person with a penchant of using foul or offensive language. There was no inkling that she may be a repeat offender. During her cross-examination she explained why she on her version had used the word 'confused'. She was simply implying that the group that she had was not sufficiently skilled or trained. This effectively explained the context in which the appellant used the word 'dumb' or 'confused'. All of these constitute the 'all the relevant circumstances' contemplated in *Sidumo*, when considering the fairness of a dismissal.

The Labour Court Judgment

[22] One of the grounds of review pertinently raised by the appellant was the following:

‘At the arbitration, there was general consensus that the word “dumb” was insulting and derogatory, and if it indeed was used, a more appropriate sanction would have been a final written warning or a suspension.’

[23] In a supplementary affidavit, the appellant specifically raised a ground of gross irregularity by the commissioner in failing to consider the appropriateness of the sanction. The appellant expressly testified that her 28 years of service was not taken into account as well as her clean and exemplary record. Woolworths in denying the allegation quoted above testified as follows:

‘The content hereof is denied. As set out above, there were various aggravating circumstances that contributed to the sanction being dismissal.’

[24] Of particular significance, Woolworths did not deny that the appropriateness of the sanction was not determined by the commissioner. All it did was to speculate as to what would have happened had the appropriateness of dismissal been determined. Such was not enough to rebuff the pertinent allegation of not dealing with the issue of sanction. Before us, Mr Jones, appearing for Woolworths, correctly conceded that the commissioner failed to determine the issue of the appropriateness of the sanction of dismissal, a conduct which is not to be expected of a reasonable decision maker.

[25] However, in an attempt to defend the conduct of the commissioner, he painstakingly submitted that the outcome that the dismissal of the appellant was substantively fair is nevertheless a reasonable outcome. I am unable to agree with this submission. How could it have been a reasonable outcome, I probe, when there is clear evidence that the other leg of substantive fairness was not determined? The commissioner diverted from the correct path in the conduct of arbitration and failed to address the question raised for determination – the substantive fairness of the dismissal of the appellant. Such a failure without doubt distorts the outcome ultimately reached by the

commissioner that the dismissal of the appellant is substantively fair.⁶ The limp arises because the other leg to complete a substantive fairness enquiry was, without a valid reason, amputated. Had the commissioner not amputated this required leg, a different outcome – the dismissal of the appellant was substantively unfair - would have reasonably been reached.

[26] Regrettably, the Labour Court judgment, despite a clear finding by the commissioner that there was no ask to determine the appropriateness of the sanction, held as follows:

[80] In summarising the foregoing, in considering the appropriate sanction, the Second Respondent considered that the Applicant did not provide any justification for the use of inappropriate comments of an insulting nature, she did not provide any justification for using inappropriate comments. The Third respondent took into consideration that in terms of the disciplinary code and procedure, the sanction for such offence and imprudence is dismissal for the first offence. Finally, the Third Respondent considered that the Applicant's conduct took place within hearing distance of other employees.

[81] In the circumstances, the Third Respondent properly considered that the dismissal was the appropriate sanction taking into account the nature of the offence and First respondent's disciplinary code and procedure.

[27] This finding is not only confusing, but it is incorrect and inconsistent with what happened at arbitration. The second respondent before the Labour Court was the CCMA. The third respondent was the commissioner. All that which is attributed to the commissioner did not occur. The commissioner, as explicitly recorded in the body of the arbitration award, abdicated his duty to determine the appropriateness of the sanction of dismissal. The CCMA as a body could not have considered the appropriateness of a sanction.

[28] It is clear to this Court that the Labour Court failed to deal with the pleaded ground of gross irregularity relating to failure of the determination of the

⁶ See: *Head of the Department of Education v Mofokeng and others* (2015) 36 ILJ 2802 (LAC).

appropriateness of the sanction of dismissal. For this reason alone, the judgment of the Labour Court cannot be allowed to stand. This is not a situation where the commissioner determined the appropriateness of the sanction and reached a decision that the sanction was or was not harsh. In such an instance, the threshold of intervention is relatively high.⁷ The Labour Court was not faced with the situation where, it could have held that on the same evidence it would have found different from the commissioner— the sanction was or was not harsh.

Discussion

- [29] On application of the trite review test, this Court is not prepared to interfere with a finding that the appellant is guilty of having used a derogatory word 'dumb'. Having been faced with conflicting versions – usage of dumb or confused – the commissioner was entitled to, on application of the *Stellenbosch Winery* decision, to decide which version is the most probable. Probably, this Court may have come to a different decision. But that is not the test. Generally, a court of appeal must be slow to interfere with factual findings of the court below. The commissioner's finding on that score, is one that falls within the bands of reasonableness and unassailable. In not interfering with that finding, the Labour Court did not err. Its decision is not susceptible to be set aside on appeal.
- [30] As held in *Sidumo*, the review grounds set out in section 145 of the LRA are suffused, and not, jettisoned, by a standard of reasonableness. Pertinent to the present appeal, a decision maker may not (a) commit misconduct in relation to his or her duties as an arbitrator and (b) commit gross irregularity in the conduct of the arbitration proceedings and still emerge with a reasonable decision.
- [31] There can be no doubt that in failing to determine the issue of the appropriateness of the sanction of dismissal, the commissioner either committed a misconduct or a gross irregularity in his duties or conduct of the

⁷ See: *Algoa Bus Company (Pty) Ltd v TASWU obo Mzwai and others* (2025) 46 ILJ 89 (LAC).

arbitration. The duty to determine the substantive fairness of a dismissal rests with an arbitrating commissioner. Accordingly, the Labour Court was obligated to review and set aside the arbitration award for the failure to determine the appropriateness of the sanction, which failure had the distorting effect on the outcome reached. Having failed to do so, the Labour Court erred and its decision is liable to be set aside on appeal. Accordingly, the appeal must be upheld.

- [32] The next question that this Court must turn to is, what this Court should do, now that the commissioner failed to perform his statutory duty in relation to the sanction issue. Faced with almost a similar situation, this Court in *Engen*⁸ shared the following vista:

[187] What must be done with the dispute? Must it be referred back to the CCMA for a fresh decision or must this Court deal with it itself? In the light of the long period that has elapsed since the dispute arose, the fact that we have before us all the evidence necessary for the resolution of the dispute and the fact that we have the required expertise to deal with this dispute, it seems to me that we should not remit the matter to the CCMA but we should determine it ourselves.'

- [33] This Court has no qualms in following the shared vista. The appellant was dismissed six years ago. If this dispute is remitted to the CCMA just to determine the issue of appropriateness of the sanction, effective resolution of labour disputes shall be compromised thereby. This Court, as a Court of final appeal on labour disputes has the necessary expertise to determine whether dismissal as a sanction was or was not appropriate in all the circumstances of this case. All the material relevant to determine the issue of the appropriate sanction is available to this Court. It was common cause that the word 'dumb' was only insulting and had no racial undertones. The appellant has been in the employ of Woolworths for a period of about 28 years as at the time of her dismissal. She had an unblemished record. Unlike in the *Rustenburg Platinum Mine v SAEWA obo Bester and others (Bester)*⁹, the appellant is not a person

⁸ Id fn 1 at para 187.

⁹ (2018) 39 ILJ 1503 (CC).

who disrespects the dignity of other races, as pointed out in paragraph 62 of the *Bester* judgment. In as much as the commissioner rejected the version of the appellant that she used the word 'confused', it is common cause that the alleged dumb employees were not even present when the word was uttered. It cannot be said that their feelings were hurt. The three staff members within whose earshot the word was uttered would not have been hurt by the usage of the word. That they were, is an exaggerated truth, in my considered view.

[34] This Court in *Timothy v Nampark Corrugated Containers (Pty) Ltd (Timothy)*¹⁰, had the following to say:

'Given the fact that the appellant had an unblemished record and that, until this point, there was no indication in his conduct of any dishonesty or any impropriety prior to the events that gave rise to this dispute, a form of progressive sanction would have been appropriate...'

[35] This Court cannot ignore the fact that for the type of offence the appellant was charged and dismissed for, the adopted disciplinary code of Woolworths anticipates progressive discipline. For the first offence, dismissal is not appropriate, decrees the Woolworths code. Item 6 (5) of the Code of Good Practice: Dismissal¹¹ provides that the rules adopted by an employer must create certainty and consistency in the application of discipline. As outlined in item 6 (2) of the code of good practice, courts have endorsed the concept of corrective and progressive discipline. For the offence which led to the dismissal of the appellant, Woolworths itself anticipated corrective and progressive discipline. This Court finds no reason why such an approach should not be endorsed in the circumstances of this case. The Labour Court should have endorsed progressive discipline. The approach that was adopted by the commissioner after failing to determine the appropriateness of the sanction was one of deferring to the sanction of Woolworths following a reviewable irregularity of mistakenly believing that the appropriateness of the sanction of dismissal remained unchallenged.

¹⁰ (2010) 31 ILJ 1844 (LAC) at 1849E-H.

¹¹ GN 3470 of 4 September 2025. Government Gazette No. 53294.

[36] The Labour Court also approved the mistake of the commissioner that the appropriateness of the sanction of dismissal was not challenged when it concluded thus:

[98] In my view, interfere with the sanction imposed by the employer is only justified where the sanction is unfair or where the employer acted unfairly in imposing the sanction. This would be the case where the sanction is so excessive as to shake one's sense of fairness. In such a case, the commissioner has the duty to intervene.'

[37] What the Labour Court regrettably ignored is that the commissioner failed to determine the fairness of the sanction imposed by Woolworths. This failure had the distorting effect on the outcome ultimately reached by the commissioner. Had the commissioner determined the issue of the appropriateness of the sanction, he would, given all the circumstances of this matter, have emerged with a different outcome. A reasonable outcome, given the circumstances of this case is one of imposing a sanction of a final written warning as opposed to the extremely harsh sanction of dismissal. It is for that reason that this Court must intervene as the commissioner or the Labour Court should have, since the sanction of dismissal is unfair and was unfairly imposed in all the circumstances of this case. This Court shall also impose what is to be considered as a fair sanction in all the prevailing circumstances.

The Cross-appeal

[38] The cross-appeal concerns a finding made by the Labour Court that the dismissal of the appellant is procedurally unfair and deserves compensation award of three months' salary. I have already hinted that given the view I take at the end, the determination of the cross-appeal would be academic and shall have no practical effect to the parties. Section 16(2)(a)(i) of the Superior Courts Act¹² provides that when at the hearing of an appeal the issues are of such a nature that the decision would have no practical effect or result, the appeal may be dismissed on this ground alone.

¹² Act 10 of 2013, as amended.

- [39] However, in the event this Court is wrong in the ultimate conclusion it reaches in this matter, on the authority of *Spilhaus Property Holdings (Pty) Ltd and others v MTN and Another*¹³, this Court shall deal with the cross-appeal. As a departure point, the commissioner did not determine the issue of procedural unfairness at arbitration. The issue was raised by the appellant at arbitration and the commissioner was obliged to determine it. Failure to do so amounted to misconduct and or gross irregularity. Generally, a Court of review is not entitled to act as a Court of first instance and determine an issue that was not determined by the arbitrator. The power in section 145(4) of the LRA is available to the Labour Court only after an award is set aside.
- [40] In the present matter, the commissioner did not make any award regarding procedural unfairness, as such there was nothing to set aside. Like on the appropriateness of the sanction issue, the commissioner simply renounced his duties. The commissioner acted as if there was no challenge for procedural fairness, when in fact, there was. Therefore, in determining the dispute around procedural unfairness, the Labour Court acted outside its powers. The Labour Court simply acted as a court of first instance and not a court of review as statutorily empowered. Regrettably, the cross-appellant, Woolworths did not plead this as a ground of appeal. Given the view this Court takes on the merits of the cross-appeal, it shall be a futile exercise to afford parties an opportunity to deal with this legal issue¹⁴.
- [41] Assuming that the Labour Court was empowered to determine the dispute of procedural unfairness, this Court takes a view that the Labour Court erred when it concluded that Woolworths did not afford the appellant a reasonable time to prepare a response to the allegations. If the fifteen minutes afforded to the appellant was not enough, more time could have been asked for. Accordingly, the cross-appeal must be upheld. The appellant did not suffer any procedural unfairness and her claim for procedural unfairness ought to

¹³ 2019 (6) BCLR 772 (CC).

¹⁴ See the vista shared in *CUSA v Tao Ying Metal Industries and Others* (2008) 29 ILJ 2461 (CC) para 67

have been dismissed. This Court is in a good position to dismiss the claim for procedural unfairness.

Conclusion

[42] In summary, as held in *Sidumo* section 145 is now suffused by the constitutional standard of reasonableness. When the commissioner failed to determine the fairness of the sanction imposed by Woolworths, the commissioner certainly committed a misconduct or a gross irregularity within the contemplation of section 145(2)(a)(i) and (ii) of the LRA. This conduct definitely had a distorting effect on the outcome reached by the commissioner to the effect that the dismissal of the appellant was substantively fair. A reasonable decision-maker will not commit misconduct or act irregularly by not determining the fairness of the sanction and defer to the sanction imposed by an employer.

[43] Where, as it is the case herein, the sanction of dismissal is unfair, a dismissal is bound to be substantively unfair. It is then the finding of this Court that the dismissal of the appellant was substantively unfair. Taking into account all the circumstances of this case, the appropriate sanction to have been imposed for the offence of using the word 'dumb' is that of issuing the appellant with a final written warning valid for twelve months. Gladys wished to be reinstated and there is nothing that prevents this Court to order Woolworths to reinstate her from the date of her dismissal.

[44] Regarding procedural unfairness, the dismissal was procedurally fair and the Labour Court erred in finding that the dismissal was procedurally unfair and awarded the appellant compensation.

[45] Because of all the above reasons, the appeal and the cross-appeal must be upheld.

Order

1. The appeal and the cross-appeal are upheld

2. The order of the Labour Court is set aside and replaced with the following:

2.1 'The arbitration award dated 05 April 2020 issued by Commissioner Ian Bulose under case number KNDB6222-19 is hereby reviewed and set aside.'

2.2 The dismissal of Ms Gladys Arunachellam is procedurally fair but substantively unfair.

2.3 Woolworths (Pty) Ltd is ordered to reinstate Ms Gladys Arunachellam with effect from her date of dismissal of 6 May 2019.

2.4 Woolworths must issue Ms Gladys Arunachellam with a final written warning valid for a period of twelve months for the offence of using inappropriate language in the workplace.'

3 There is no order as to costs.

G N Moshwana

Acting Judge of the Labour Appeal Court of South Africa

Mahalelo ADJP and van Niekerk JA concurring.

APPEARANCES:

For the Appellant : Ms S Naidu (heads by Mr NG Winfred)

Instructed by: Jay Reddy Attorney, Durban.

For the Respondent : Mr J Jones

Instructed by: Macgregor Erasmus Attorneys
Durban.

LABOUR APPEAL COURT