



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

Signature

4 September 2026
Date

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Case no: C326/2024

In the matter between:

PREMILLA ANVARY

(MUGG & BEAN LIFESTYLE ON KLOOF)

Applicant

and

MARIE TSHIALA

First Respondent

COMMISSION FOR CONCILIATION MEDIATION AND

ARBITRATION

Second Respondent

MICHAEL MARAWU N.O

Third Respondent

Date of Hearing: 3 September 2026

Date of Judgment: This judgment was handed down electronically by circulation to the parties' legal representatives by email and release to SAFLII. The date of handing down judgment is deemed to be 4 September 2026.

Summary: An application to review and set aside an award that found the dismissal of an employee, without a hearing, for alleged 'rude and disrespectful conduct' that was not specified, to be substantively and procedurally unfair. No irregularity

warranting interference with the award. However, in relation to the section 73A BCEA claim, which was consolidated with the unfair dismissal claim, the award is partially reviewed and set aside and replaced with the correct amounts that ought to have been awarded.

JUDGMENT

GANDIDZE, J

Introduction

- [1] The applicant, Broad Market Trading 232 (Pty) Ltd, trading as Mugg and Bean Lifestyle on Kloof (the employer), seeks, in terms of section 154 of the Labour Relations Act¹ (LRA), to review and set aside an arbitration award that found the dismissal of an employee, Marie Tshiala (Tshiala), for alleged misconduct was substantively and procedurally unfair. The award also upheld claims for leave pay and outstanding salary, brought in terms of section 73A of the Basic Conditions of Employment Act² (BCEA), which addresses claims for failure to pay any amount to employees earning below the statutory threshold. If the award is reviewed and set aside, an order is sought substituting it with an order finding that the dismissal was substantively and procedurally fair; alternatively, the remittal of the dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) for a fresh hearing before a different commissioner.
- [2] Tshiala opposed the review application.
- [3] One issue raised on review can be quickly dispensed with. In the CCMA proceedings that resulted in the award sought to be reviewed, the employer's General Manager, Premilla Anvary (Anvary), was cited as a party. On review, it is alleged that an award was issued against Anvary in her personal capacity, even though she was not the employer. Anvary states that her husband is the

¹ Act 66 of 1995, as amended.

² Act 75 of 1997, as amended.

sole director of the business. As the person who runs and manages the business, she participated in the arbitration proceedings, in which she testified and repeatedly referred to it as 'our business'. Accordingly, an order rectifying the citation from Premilla Anvary (Mugg and Bean Lifestyle on Kloof) to Broad Market Trading 232 (Pty) Ltd will not prejudice the employer, and will be granted.

Background facts

- [4] Tshiala was employed by the employer as a waitress since November 2021, under fixed-term contracts, the last of which covered the period from January 2024 to 31 December 2024.
- [5] It is common cause that Tshiala initially worked six shifts per week. At some point, her shifts were reduced to three per week. She referred a section 73A BCEA claim to the CCMA, and the matter was set down for hearing on 24 June 2024.
- [6] On 13 June 2024, Anvary learnt of Tshiala's section 73A BCEA claim, which had been filed with the CCMA. Anvary called Tshiala at her office and accused her of lying in the section 73A BCEA claim. The exchange ended with Anvary telling Tshiala to leave her business immediately.
- [7] Tshiala referred an alleged unfair dismissal dispute to the CCMA. The section 73A BCEA claim was consolidated with the unfair dismissal claim.
- [8] In the arbitration proceedings that followed in July 2024, Tshiala gave evidence in support of her case. For the employer, Anvary gave evidence and called Mr Vusumuzi Sibanda, a manager, as a witness.
- [9] In an award dated 25 July 2024, the dismissal was found to be both substantively and procedurally unfair, and the commissioner awarded compensation of three months' pay. Regarding outstanding salary, the commissioner held that Tshiala's shifts were reduced from six to three between 1 June 2022 and May 2024, and that she was owed R56 740.32. Regarding leave pay, the commissioner found that Tshiala was owed 21 leave days, amounting to R3 822. The total amount awarded to Tshiala was R75 682.32, payable on or before 7 August 2024.

Grounds for review

- [10] The employer alleges several irregularities in the award.
- [11] The first concerns the commissioner's failure to inquire into the employer's identity. The issue was not pursued during oral argument, and, in any event, it was addressed in the introduction.
- [12] In the second place, it was submitted that the dismissal was common cause, yet the commissioner found it in dispute, thereby constituting an irregularity. The transcript shows that Anvary informed the commissioner that she had not dismissed Tshiala but had given her 'short shifts'. However, it also shows that Anvary conceded that she dismissed Tshiala. Therefore, this ground of review has no merit and does not advance the review application.
- [13] Thirdly, it is submitted that the finding that there was no valid reason for Tshiala's dismissal is divorced from the material and evidence properly before the commissioner. It is said that the commissioner ought to have determined whether the reasons preferred by Anvary and Sibanda constituted a fair reason for dismissal, which he did not do, and that this vitiates the award. In oral argument, Mr May clarified that the commissioner failed to assess whether the evidence before him constituted a fair reason for dismissal, and that, had he engaged in that exercise, he would have concluded that the dismissal was for a fair reason.
- [14] The further submission was that the commissioner proceeded on the incorrect premise that a failure to hold a disciplinary inquiry satisfied both the requirements of substantive and procedural fairness. Summary dismissal is justified where the misconduct is so gross or of such a nature that it constitutes a serious or material breach of the employment contract, and where holding a disciplinary hearing in such a case would serve no useful purpose. As the misconduct was committed in front of Anvary, the victim, the submission went, a disciplinary hearing would have served no purpose.
- [15] [15] The further ground of review is that even if the commissioner found the dismissal procedurally unfair, several factors militated against awarding compensation. The courts have considered several factors, which are listed,

and it is submitted that all of them applied to the matter at hand; therefore, no compensation should have been awarded.

- [16] As regards the section 73A BCEA claim for leave pay, it is submitted that the commissioner awarded 21 days' leave pay despite a lack of evidence to substantiate the claim. In oral argument, Mr May submitted that, even if Tshiala was owed leave pay, it was only for the period January 2024 to May 2024, and therefore the leave pay due could not have been the full 21 days' leave she is entitled to per annum.
- [17] As regards the alleged outstanding salary, the employer denies owing Tshiala any salary. It disputes that Tshiala earned a basic monthly salary of R5 040. It contends that she was required to work 45 hours per week, remunerated at R28.00 per hour, and that she would be paid overtime for hours worked in excess of 45 hours per week. It disputes that Tshiala was entitled to 6 shifts of 6.5 hours each for 6 days, as alleged. It alleges that Tshiala's shifts were reduced from six to three only for the period from February 2024 until dismissal in June 2024. The reason for reducing the shifts is that Tshiala had a history of volatility and displayed disrespectful and inappropriate behaviour towards management and colleagues. She is alleged to have screamed at a manager in front of customers and colleagues and to have called Manager Lee a coward after a misunderstanding. Her colleagues complained that Tshiala was constantly angry, refused to take instructions from the head waiter, was not a team player, and did not assist other waiters with their orders, thereby failing to prioritise the business's customers. However, if the court finds that the employer should not have reduced Tshiala's shifts, only R5 041 would be owed for outstanding salaries.
- [18] Therefore, the conclusion is that Tshiala was dismissed fairly, both substantively and procedurally, and that the section 73A BCEA claims ought to have been dismissed.
- [19] Further allegations against Tshiala are that, at the time of her dismissal, she was under investigation for credit card fraud and theft, and that the employer intends to recover the amounts owed to it. The commissioner issue was raised before the commissioner, who politely informed Anvary that he was

confined to the claims before him and that the employer had recourse against Tshiala. As the issue was not one for the commissioner, it is not one that can be dealt with in the review proceedings, save to note that, in oral argument, Mr May informed the court that no proceedings had been instituted against Tshiala in respect of the alleged fraud.

- [20] Finally, it is alleged that Anvary attended the proceedings under the impression that the matter would be conciliated only, and therefore did not bring any documentation, as she intended to apply for legal representation in respect of the arbitration proceedings. The application to postpone the matter on the stated grounds was refused, which prejudiced the employer in that it 'could not show him that the story concocted by the First Respondent was in fact a lie', and that the commissioner did not even record this in the award, hence an irregularity.

Evaluation

- [21] The employer bore the burden of proving that Tshiala was dismissed for a fair reason. On review, the commissioner's findings can be interfered with only if it is shown that the outcome was one that a reasonable decision-maker could not reach.
- [22] The founding affidavit alleges that Tshiala responded rudely and aggressively, shouting at Anvary. She is also said to have pointed the phone at Anvary's face, started recording the exchange, and made 'the rudest and most inappropriate remarks'. According to Anvary, there was some back-and-forth between them, but the last straw was Tshiala's racist and discriminatory remarks that Anvary must go back to India, made in front of customers and fellow staff members. Anvary states that this statement left her with no choice but to dismiss Tshiala immediately and summarily, as holding an inquiry would have served no purpose.
- [23] During the arbitration proceedings, Tshiala testified that Anvary called her to Anvary's office after receiving the CCMA documents regarding the section 73A BCEA claims Tshiala had lodged against the employer, which showed that the matter was set down for hearing on 24 June 2024. Anvary then said she would dismiss Tshiala before 24 June 2024. Tshiala returned to the floor

to serve patrons, and later Anvary called her to sign a document stating that she was being dismissed for reasons other than those communicated earlier. Tshiala refused to sign the document and began recording Anvary, who was becoming aggressive. Security was called to remove Tshiala from the restaurant.

- [24] Anvary denied Tshiala's account and stated that Tshiala had been rude and aggressive towards her, adding that 'she is speaking on the fact that my roots are from India.' After she had been sworn in, Anvary stated the following:

'So, Marie has displayed a string of bad behavior, and her behavior has caused her to be dismissed in terms of her misconduct. Ja. And she has been disrespectful towards managers, she has been disrespectful towards waiters, she has been disrespectful towards me as a person, so I do not see why I should not dismiss her for insubordination. She do not listen to the waiters, she do not listen to anybody. She comes to work angry mode, hey, and everybody has to tiptoe around her. She is not, I am not working for Marie. Marie is working for our company hey she needs to conform to the norms and standards of the, what is required for her as.... [intervenes].

- [25] Later, she repeated that Tshiala was dismissed for insubordination; that she was extremely rude and arrogant; that 'we could not see a way forward'; that 'she was aggressive'; that 'she was attacking me personally, she was attacking my family'; that she called a manager a coward; that she was 'intolerable'; and that 'I had to let her go'. She also stated that she had a witness to what happened on 13 June 2024, namely Sibanda.

- [26] When asked what he witnessed on 13 June 2024, Sibanda gave evidence that:

'During that confrontation, it degenerated into, what can I say, an argument between the two. Right. She was arguing about the hours, but we have a structure there for the waiters which maybe she might not have liked. So during that altercation the argument became a bit ugly. Then there was some disrespect on her side towards Mrs Anvary.'

[27] When the commissioner probed into what he had heard and seen, Sibanda responded, inter alia, that Tshiala did not reply 'in a way that she was supposed to.'

[28] When the commissioner inquired whether there were questions for Sibanda, Anvary responded that 'No, just the mannerism in how she speaks', and that 'we brought it to her attention, how she speaks is not correct'. She also went on to state that

'The thing just got ugly, and how she puts the phone in my face, she triggers things, and she puts the phone in my face'.

[29] Under cross-examination, Sibanda was asked what disrespectful word Tshiala had used towards Anvary, and he responded that it was the way Tshiala responded when Anvary interrogated her. When the commissioner asked exactly what Tshiala had said, Sibanda replied that she told Anvary, 'this is not India', and said many other disrespectful things.

[30] Tshiala did not challenge Sibanda's version that she told Anvary that this was not India. Therefore, it is accepted that Tshiala made the remark.

[31] In oral argument, Mr May was invited to clarify the reason for Tshiala's dismissal. He responded that it was for the 'derogatory and racist remark', a clear reference to Tshiala's remark about India.

[32] The commissioner found that the statement about India was made as Tshiala was leaving, after she had already been told to do so immediately. That must be so, because Anvary told Tshiala to leave immediately when they were in Anvary's office. Sibanda was not in Anvary's office to be able to hear what was said. On several occasions, he testified that it was how Tshiala spoke that was disrespectful, not what Tshiala said. Therefore, there had to have been another reason for dismissal.

[33] Tshiala claimed she was dismissed for referring a section 73A BCEA claim to the CCMA, and Anvary countered that Tshiala was 'rude and aggressive'. The video of the exchange between Tshiala and Anvary was played during the arbitration proceedings. The commissioner who watched it found no evidence

to support the decision to dismiss. Anvary also referred to issues predating 13 June 2024. The commissioner's finding that no evidence was presented during the arbitration proceedings to prove that the employer had a valid reason to dismiss Tshiala cannot be said to be one that no reasonable commissioner could have arrived at. It was the only decision that could be reached on the evidence placed before the commissioner.

- [34] Mr May's submission that the commissioner failed to assess the evidence placed before him to determine whether there was a fair reason to dismiss is without substance. Implicit in the finding that there was no 'valid reason' to dismiss is that the employer's reasons were considered but found not to be valid reasons for dismissal. Hence, the dismissal was substantively unfair. Therefore, it is incorrect to say that the commissioner treated the absence of a disciplinary hearing as dispositive of the dispute, without considering whether there was a valid reason to dismiss.
- [35] It was common cause that no procedure was followed before dismissing Tshiala. In oral argument, Mr May relied on the decision in *Woolworths (Pty) Ltd v Mabija and others*³ (*Woolworths*), and submitted that the court held that summary dismissal without a prior hearing is permissible where the misconduct strikes at the root of the employment relationship, rendering continued employment intolerable. I have considered the judgment, and the court did not find as Mr May submitted. In fact, in oral argument, Mr May conceded that in *Woolworths* the employee was subjected to a disciplinary hearing. The finding that Tshiala's dismissal was procedurally unfair was not only reasonable but also correct.
- [36] Having found the dismissal substantively and procedurally unfair, the commissioner awarded three months' compensation. The founding affidavit in the review application did not challenge that award. It was in the replying affidavit that, for the first time, an allegation was made that the commissioner did not determine whether to grant compensation and, if so, to what extent. This is incorrect. The award records that, in arriving at the compensation,

³ [2016] 6 BLLR 568 (LAC); (2016) 37 ILJ 1380 (LAC).

consideration was given to the fact that the dismissal was both substantively and procedurally unfair, that Tshiala was employed for two years, and that, when the arbitration proceedings were conducted, she had been unemployed (but did not wish to be reinstated) for more than a month. The commissioner awarded three months' compensation.

[37] Compensation is a matter of legal discretion, and this court's powers to interfere with an award of compensation are circumscribed and can be exercised only in limited circumstances.⁴ None of the grounds for interfering with the amount of compensation awarded was pleaded, and therefore the award of three months' compensation stands.

[38] Regarding leave pay, the commissioner awarded 21 days' leave pay. Tshiala testified that she was owed leave days. The commissioner asked when she last took leave, and she replied that, in 2024, she did not take leave and was therefore owed 21 days. Anvary responded that Tshiala wanted cash and that, in November or December 2023, she was paid out for her leave days. Tshiala confirmed that she was paid for her leave days until 2023, but that she was owed 21 days for 2024. She produced the March and May 2024 payslips, which showed she had taken 0 days of leave and was owed 21 days. Therefore, it is incorrect, as submitted by Mr May's, that no evidence was led regarding leave pay.

[39] The payslips show the amount of leave she was entitled to until December 2024. She worked until June 2024. She was entitled to 21 days of leave per annum, which equates to 1.5 days per month. Therefore, for the period in question, she accrued 7.5 days of leave, and at the daily rate of R182, she was owed R1 365. Mr Theron, for Tshiala, agreed with this method of calculating leave pay. The award will be substituted to reflect the correct amount of leave pay owed.

[40] As regards outstanding remuneration, Mr May sought to argue that the claim before the commissioner was that shifts were reduced, not that Tshiala was

⁴ *McGregor v Public Health & Social Development Sectoral Bargaining Council & Others* (2021) 42 ILJ 1643 (CC) at para 24.

owed any amounts. The submission merely needed to be stated to reveal its absurdity. Tshiala lodged a section 73A claim. The employer conceded that it reduced Tshiala's shifts from six months to three months. It submitted that the reduction was lawful and justified as punishment for Tshiala's behaviour in the workplace. The claim was for outstanding remuneration, as Tshiala was contractually entitled to work six shifts. The commissioner held that the employer had no legal grounds to withhold the amounts (for the three shifts) without complying with the BCEA. The finding is correct.

- [41] The real dispute concerns when the reduction in shifts from six occurred. Tshiala testified that this happened 'let us say some six months after we opened the shop'. The commissioner then stated 'by May 2022', and Tshiala answered in the affirmative. Later, the commissioner asked Tshiala whether she was saying she started receiving pay for only three shifts around June 2022, and Tshiala neither confirmed nor denied that it started in June 2022.
- [42] When Anvary gave evidence, the commissioner asked whether she had paid for three shifts in May or June 2022, and she responded that she was unsure and needed to check. She also stated that 'it is only this year that she is working less than 45 hours because of the contract', that Tshiala was displaying insubordination towards everybody, and that they had uncovered a whole lot of fraud.
- [43] One can accept that the version before the commissioner was less than clear.
- [44] In these proceedings, the employer contended that Tshiala's shifts were reduced from February 2024. In the answering affidavit, Tshiala pleaded that the employer reduced her shifts on or around May 2022, and later stated that shifts were reduced from February 2024. In the replying affidavit, the employer alleged that the number of shifts was reduced from six to three in February 2024.
- [45] The section 73A BCEA claim referral form did not form part of the review record. The commissioner suggested that the shift reduction took effect in May or June 2022. In my assessment of the evidence, it is more probable that the shifts were reduced in February 2024. If the reduction had started in May

or June 2022, Tshiala would have approached the CCMA sooner. If the shifts had been reduced from May 2022, Tshiala would not have conceded in the answering affidavit that the reduced shifts were from February 2024. Therefore, I find that the shifts were reduced in February 2024, not in May 2022, as the commissioner found. The award must be corrected to reflect the correct position. Mr May submitted that, if the claim is upheld, Tshiala would be owed R5014, but it is unclear how this figure was arrived at. The employer must calculate what is owed, and if the parties cannot agree on the amount, either party may approach the court for a decision.

- [46] The above analysis renders it unnecessary to determine the ground of review, namely that the employer planned to be legally represented and that the commissioner refused a postponement. Legal representation was a matter for the commissioner to decide, and any documents the employer claims it was prevented from relying on could have been attached to the review papers, but they were not.

Costs

- [47] Mr Theron, who represented Tshiala on a *pro bono* basis, submitted that costs were sought against the employer 'occasioned by the delay'. It is unclear which delay is being referred to, and no details are provided. Be that as it may, the review was partially successful. Tshiala could have, but did not, concede the errors regarding the leave pay. She was legally represented on a *pro bono* basis. A costs order in accordance with the requirements of law and fairness is that each party pays its own costs.

- [48] In the premises, I make the following order:

Order

1. The applicant's citation is corrected to Broad Market Trading 232 (Pty) Ltd, trading as Mugg and Bean Lifestyle on Kloof.

2. The review application is dismissed to the extent that it seeks to challenge the findings that Marie Tshiala's dismissal was substantively and procedurally unfair, and the award of R15 120 compensation.
3. Interest on R15 120 is calculated from 7 August 2024.
4. The award is reviewed and set aside to the extent that:
 - 4.1 it found that Marie Tshiala was owed R3 822 in leave pay, and is substituted with an order that she is owed R1 365 as leave pay.
 - 4.2 it found that Marie Tshiala was owed the outstanding remuneration of R56 740.32 for the period from June 2022 to May 2024, and is substituted with an award that she was owed for three shifts per week for the period from February 2024 to 13 June 2024.
5. Interest on the amounts referred to in paragraph 4 is to be calculated from the date of this order.
6. There is no order as to costs.

T. Gandidze

Judge of the Labour Court of South Africa

Appearances

For the Applicant: Mr May

Instructed by: BDP Attorneys

For the Respondent: Advocate Theron (acting pro bono)

Instructed by: P Melapi Attorneys