



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

Signature

Date

IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

Case no: D 538/2023

In the matter between:

BELGOTEX FLOORS (PTY) LTD

Applicant

and

CCMA

First Respondent

COMMISSIONER YANDE NGWANE

Second Respondent

SACTWU obo ZUNGU, BHEKINHLANHLA

Third Respondent

Heard: 17 February 2026

Judgment Delivered: 17 April 2026

JUDGMENT

WHITCHER J

Introduction

[1] This is a review application in terms of section 145 of the Labour Relations Act, 1995.

[2] The third respondent (Zungu) was dismissed from the employ of the applicant following a disciplinary hearing in which he was found guilty of the following charge:

“Gross misconduct in that on 28 October 2022...he struck a female co-worker, Noluthando Masinga, on the neck”.

- [3] The matter went to arbitration whereupon the commissioner, substantially on adverse credibility findings, rejected Masinga’s version, and that of her supervisor who had testified that immediately after the incident Zungu admitted that he had “pushed” Masinga. The commissioner found that even if Zungu had “struck” Masinga, “the circumstances surrounding the incident are such that the sanction of dismissal would have been unfair” because of his 9 years of service, his clean disciplinary record and her findings that he had a good reputation in the workplace and had presented himself as a “very restrained and respectful person throughout the hearing”. The review lies against these findings.
- [4] The test in *Sidumo* dictates the resolution of the controversy, i.e. was the decision one to which no reasonable arbitrator could come on the issues and evidence that served before the commissioner. At the heart of the exercise is a fair reading of the award, in the context of the body of evidence adduced and an even-handed assessment of whether such conclusions are untenable. Only if the conclusion is untenable is a review and setting aside warranted.¹

The record

- [5] The record reveals the following critical testimony (irrelevancies omitted):

Mr Duma, the employees’ supervisor

[Masinga] came to me crying...said [Zungu] had pushed her. Zungu was still on the machine. I asked [Zungu] what had happened, because the lady [inaudible] is saying you pushed her, and [Zungu] admitted, he said: Yes, I did push her”.

Did [Masinga] show you how she was struck?

Yes, she did.

Can you demonstrate?

Like she...[inaudible] her neck and pushed her.

¹ *Makuleni v Standard Bank of South Africa Ltd and Others* (2023) 44 ILJ 1005 (LAC).

Cross-examination

[Zungu] denies pushing [Masinga], and even at the hearing he denied pushing [Masinga]. So, what will support your statement that he admitted...?

[Zungu] admitted to me that he did push the lady. Why would I send [Zungu] home if he told me that – if he denied pushing the lady? The only reason I sent him home, because he admitted pushing the lady. If I had asked and [Zungu] denied, I would never have asked [Zungu] to leave the factory. I was going to take it forward to my superiors and they were going to take it from there.

- [6] The record reveals that in the absence of any foundation having been laid, the following was put to Duma, with no opportunity to respond thereto:

Ok Mr Duma, I will ask this commission to take your evidence as not true and take you as an untrustworthy witness on this matter, because all what you are saying contradicts what really took place. And even contradicts what is written on your statement...No more further questions?

Re-examination

- [7] Duma was referred to the minutes of the disciplinary hearing [the statement referred to above]:

You said to the chairperson – you asked [Zungu] and [Masinga] what had happened. His response was he never hit the lady, but he admitted pushing her...Yes, I sent [Zungu] home...I had to send him home to calm the situation. And another thing is because he admitted pushing the lady.

Masinga

- [8] Her evidence in chief painted the following general background. She and Zungu were assigned a job which required the use of a 'splicing gun'; before the alleged incident they had a disagreement about who had brought one of the guns to the job; the job was located upstairs while the socket to charge the guns was located downstairs; three other employees were present at the job, referred to in the hearing as Michael, Martin and Johnson.

- [9] She stated that Zungu claimed the gun was his and "*rudely took*" it from her. In retaliation, every time he went to charge it, she followed and unplugged it to a point where he warned her:

Just unplug the gun” and [You] will see what happens...

[10] She continued:

I unplugged the gun, and that’s when he punched me here [indicating to the neck area] after I unplugged the gun, and he was using two hands.

...for him to put his hands on me, I was shocked.

[11] Masinga was asked to demonstrate the above, on, it seems, a female attendee at the arbitration. During the demonstrated she stated:

And you can see, on the neck, but by force, using both hands. But now the thing is I cannot do it by force, because...[inaudible] I’m beating the person that I’m demonstrating on, but anyway, it was by force, using both hands.

[12] When asked if anyone had witnessed the incident, she said she asked Michael, Martin and Johnson but they told her: “they didn’t see anything”.

[13] After a long and confusing cross-examination about immaterial details, Masinga was questioned as follows:

If you say the incident happened, why the company failed to bring them as witnesses?

You’re asking the wrong person.

...Why...?

Because your question ...[indistinct] and you can’t force a person to talk or to speak.

Do you agree with me if I would say there is no one who witnessed what happened?

No

Will you agree with me that the reason they refused to come and testify, because they wanted to tell the truth, which would be against what you are telling this commission?

No, I don’t know.

...

You told this commission that [Zungu] punched you, and you said he used both hands on your neck. [Duma] the supervisor, told this commission he strangled and pushed you. Who is telling the truth?

[14] Following an objection, Zungu’s representative conceded that the supervisor did not use the word “strangle” but then insisted the supervisor had used the words “choke” [which the record shows he clearly had not].

[15] Notable, when the cross-examination resumed, the question, even in an amended form was not re-put to Masinga.

[16] She was instead subjected to long questioning designed to show she had deliberately and repeatedly unplugged the gun, a fact she had already volunteered in her evidence-in-chief. Nevertheless, she again confirmed it, and the cross-examination continued as follows.

...As he was plugging it and you were unplugging it, why you kept on doing the same thing?

It was my gun. I arrived with the gun.

If there was a misunderstanding, why you didn't go and report it to the supervisor, instead of provoking [Zungu]?

May I don't understand the question [speaking vernacular] ... It was my gun...

[Zungu] will tell this commission that he came with a splicing gun, and you kept on unplugging it, up until he told you that if you keep on unplugging his gun, he will end up going to report you?

... [inaudible]...

[Zungu] will tell this commission that after he told you [to stop unplugging the gun], you became angry and you tried to hit him. Then he tried to protect himself. You then screamed and run to your supervisor...?

...[inaudible]

I can't hear you ma'am please speak louder.

Okay [Notable, Masinga was not asked to repeat her response for the commissioner's record]

The manger, Mr Francis, came here and said [Zungu] is a good guy. Even the IR sitting next to you confirmed that [Zungu] is a good person who gets along...You've been at Belgotex for a year and a half, but you saying [Zungu] is a violent person now, who is assaulting women. What made you come to that conclusion?

[17] Following an objection, the commissioner bizarrely stated:

Ja, that question will be struck out...I don't know what this woman identifies as, never once did I hear her say this applicant is a violent person...I heard her tell us her story. But maybe she identifies as a man. I don't know, but now you are saying she is seen

[the applicant] as a violent person who assaults woman. It's your conclusion, and indeed I had not heard her say that...

[18] It is noted that at no stage did Francis and the IR say Zungu is a “good person” “a good guy”.

[19] The cross-examination then continued in the following vein:

You said you are seeing a psychologist. Can you tell us why....is it because of the splicing gun you ended up having a psychological problem?

I cannot “take it” any longer

[20] At this point Masinga asked and was given permission to leave the room for a while.

[21] On her return:

You told this commission that you are seeing a psychologist. Is it because of the issue of the splicing gun or you had your personal problem before...?

For starters, no man has ever put his hand on me. And, secondly, I've not thought of seeing a psychologist...the nurse from work recommended it...

Are you saying no man had ever laid a hand on you, but when you were trying to hit [Zungu] what did that mean?

I dispute what you are saying, I've never tried to hit [Zungu], or I have never tried to assault him.

You say after the incident your life was hard at work...why are they awful to you, if it's [Zungu] who did a wrong thing?

It's obviously because I reported.

If [Zungu] did a wrong thing, why people are awful against you, instead of directing that to [Zungu].

In their eyes I was the wrong for reporting.

[22] It bears mention here that the above questions improperly presumed prior proven facts or adduced evidence that “they” witnessed the incident and did not see Zungu doing anything wrong, but it was allowed.

You said [Micheael...Johnson and Martin] saw everything that happened...but after they refused to come and give evidence that [Zungu] was the wrong person. Do you understand what that means.

What does that mean?

It means that it is not true that [Zungu] hit you.

I'm disputing what you are saying.

[Zungu] will tell this commission that all what you said, that Michael, Johnson and Martin saw what transpired, is not correct, because there was no one. Those guys were upstairs and it was only the two of you.

That's not true

And let's go to awful things. Can you tell us what those awful things they are saying about you.

The first is that I'm a contract employee and I've made a permanent employee to be dismissed because I reported. And then also not empathising with him that he got kids or family to feed, and also – they are also saying that we were playing.

So that's the reason you are attending a psychologist.

...when people are sidelining you it's painful.

Is it your way of doing things, that when things don't go your way, you cry or show tears.

Can you explain how do you mean, or what do you mean.

When you failed to hit [Zungu], you ran to the supervisor crying. The same thing you did during the disciplinary hearing...the same thing you've been doing in front...

I can't anymore [emotional]

Commissioner: Please will you step out [Masinga leaves the room]

[23] A discussion followed in Masinga's absence in which Zungu's representative stated:

...I don't know if this is on record, because I know that she was told that when she comes here, she must cry. by you...I've been expecting it to happen.... that was the arrangement, that when she comes here, she must perform this way.

[24] The commissioner ruled that the questions are in order and Masinga should explain why she is crying:

That's not the truth. It's because everything, it's too much for me right now.

I put it to you that is not correct when you say...but it's your conscience that is eating at you?

If you are being hit by someone, you run to the doctor. In this case did you went to see the doctor?

No, as I indicated that he hit me, not like [inaudible]...[intervention]

After he hit you did you go see a doctor?

To do what at the doctor.

To confirm that you were hit by [Zungu] or somebody hit you.

It's the first time hearing that if you've been punched you have to go to the doctor.

Did you sustain any bruises?

It was just a punch, so there were no bruises.

But if that was so serious, for sure you were going to run to the doctor, so there would have been bruises on your neck...

I've just said before, the punch doesn't leave a bruise.

But in your statement you said he punched you hard on the neck.

Yes, I said so, but the punch doesn't leave any bruise.

But the neck is a sensitive area. If I can punch you now, for sure I can see the mark that I've punched you.

I'm disputing what you are saying.

I'm putting to you that [Zungu] never punched you, but you decided to fabricate the story, because you wanted [Zungu] to be dismissed.

I dispute what you are saying. Why must I do that? Why really must I do that?

And that is why you find it hard to work with your colleagues... they find it difficult to work with a person of your...[inaudible]

[25] After the re-examination, the commissioner asked Masinga:

Ma'am, I do have just one tiny little clarity seeking question. What do you identify as, male or female?

Me?

Are you male or female?

Female

[26] The commissioner was asked the relevance of the question but retorted that it's not practice for commissioners to explain their clarity questions and that "if its relevant" they will find it in her award.

Zungu

[27] He stated:

She refused to give me the splice gun, then I actually took it from her.

[28] And, when she kept unplugging the gun, he told her:

What you are doing is totally wrong" to which she responded: If it's wrong, whose business is that".

[29] He continued:

Then I went to the place where we plug the splicing guns, and I plugged it again. Just right before me plugging the splice gun, she was going down the stairs. By that time the splicing gun was on my right hand, and I was attempting to actually plug the splice gun. As she was approaching me, maybe quickly, but she was walking fast or approaching me like she was rushing, I didn't [?] notice that she was maybe she was irritated or angry, or maybe she was fighting, I didn't [?] notice at that time. Again I advised her, 'What you are doing is totally wrong', so [indistinct] she was coming to me, and "I will just report you to the supervisor". She was angry, like totally irritated and she said, you know what, I can go to the supervisor if I want to. I didn't [?] notice that she was angry or agitated that time, and I took the splice gun and wanted to plug it. When I turned I could see that she's approaching me, and I was not sure at that time what was she approaching me for. At the time the splice gun was on my right hand, preparing myself to plug it, and she was just right next to me. I saw her approaching, and she was next to me at that time. As I just indicated that she was close to me, and she was so close to me, in such a sense I didn't know that at that time what was in her mind or what was she willing to do. At that time I blocked, and the way she was coming towards me. I didn't even notice what happened after that, but I heard her

afterwards moving a little bit away from me, saying that I'm hitting her. So without even noticing, but I just said to her, "Haibo, don't make yourself mad now. You are driving yourself crazy".

.....

As she was approaching me and I just laughed, the way she was acting, and at the time I didn't even notice that she was angry and agitated. And that's why I said to her, 'Don't make yourself crazy, because at the end you will find yourself in trouble'.

....

The supervisor advised me that, she's saying that you hit her". I responded by saying '...[indistinct] do that'. And I advised the supervisor...that if there was any touching, it's just that because I was blocking her, the way she was approaching me or she was coming towards me, so I tried to block her. If she is saying there's any touching of each other, that's the only time that happened.

Cross examination

[30] Zungu denied he told the supervisor that he had pushed Masinga.

The award

[31] The commissioner rejected the version of Masinga because in her view:

- (i) The nature of the assault as described by Masinga would have left a bruise, but there was none.
- (ii) "The demonstration of the assault by Masinga "left much to be desired...It resembled the makings of a choke or strangling of a neck, only that she did not undo the fists to open her hands and grab the neck. Her description did not inspire confidence. It looked like a fabrication from someone who had a choke (or neck strangulation that her supervisor said she had reported) in mind but could not commit to it in demonstration – because it possibly never happened".
- (iii) Masinga was a "crafty witness". "She made snide comments in response to some questions put to her in cross-examination, such as "your question doesn't make sense", "I stand by what I said", "You are asking the wrong person", "I said what I said". Her body language also bordered on disrespect with folded arms, a tilted head, a sigh and a roll of the eyes at times. All this then to be interrupted by sobbing, storming out of the room and returning ready to proceed as if nothing ever happened. Against the backdrop of her cheeky

responses and the body language described above, I find her claims that she is now afraid of the applicant...questionable. There was a total disconnect between her claim of fear and trauma and the confidence and aggression she exuded. While she was crying outside a submission was made on her behalf by Mr Maphoshe that she is known to be a very sensitive person who tears easily. On the strength of that I cannot deduce that her appearing at Mr Duma's office crying was a measure of pain suffered.

- (iv) It was "telling" that none of the three witnesses Masinga claimed saw the incident "confirmed it".

[32] The commissioner also rejected the supervisor's evidence that Zungu admitted he pushed Masinga. The commissioner stated:

Mr Duma...testified that [Masinga] reported that she had been pushed initially, he also mentioned being hit and choked. Whereas [Masinga] vehemently denied having been choked. While Mr Francis came across as well meaning, I cannot say the same about Mr Duma because he went beyond innocent explanation at times, he sometimes came across as argumentative when asked to explain the contradictions in his testimony.

[33] As for Zungu, the commissioner found:

Although he denied having hit or pushed her, the applicant conceded he may have had physical contact with Ms Masinga when he raised his left hand to shield himself from her aggressive surprise appearance near him.

Even if Zungu had "struck" Masinga, "the circumstances surrounding the incident are such that the sanction of dismissal would have been unfair" because of his 9 years of service, his clean disciplinary record and her view that he had a good reputation in the workplace and had presented himself as a "very restrained and respectful person throughout the hearing".

The review

[34] The applicant essentially contended that the commissioner palpably misused the advantage of having seen the witnesses and based her adverse credibility findings on materially flawed grounds, *inter alia*, on subjective opinions that fell outside her professional purview, on undisclosed opinions about Masinga's gender and/or physical appearance, on irrational views about Masinga's responses in cross-examination, on statements attributed to but not made by

witnesses and on mischaracterised evidence. Further, that the commissioner assessed Zungu's version solely on unreliable factors such as how he presented himself in the arbitration and on irrelevant factors such as his alleged reputation at work rather than the credibility and probability of his version. Furthermore, the commissioner failed to appreciate the true burden of proof, namely 'Was Masinga's version of events more likely to be true than not true'.

[35] I agree with these contentions.

[36] On the face of the transcript, Masinga gave a frank, straightforward and consistent version of her interaction with Zungu. She volunteered upfront that she essentially provoked the situation, by [immaturely] repeatedly unplugging the gun just because she believed it was hers. Her version that Zungu punched her in the neck with two closed fists remained consistent and straightforward and she explained why it was difficult to demonstrate the punch on the person she was called upon to conduct the demonstration and why the punch did not leave a bruise.

[37] There are also features in the evidence which bore strongly on the probabilities of Masinga's version:

- (a) The demonstration given and explained by the supervisor appeared consistent with that given by Masinga.²
- (b) Masinga's undisputed statement that just before the attack, Zungu ominously stated: *Just unplug the gun and [You] will see what happens...*
- (c) The question: Why you didn't go and report it to the supervisor, instead of provoking [Zungu]? If there was no assault, why claim provocation as a defence.
- (d) Zungu's testimony which was wholly garbled and demonstrated a person struggling to put a version and explain himself. The extracts (*supra*) speak for themselves.

² While prior consistent statements are not corroborative statements, in this case they became relevant because Masinga was accused of prior inconsistent statements in regard to what she reported to the supervisor.

(e) Zungu's statement: "If" there was any touching, it's just that I was blocking her" essentially conceded in a deceptive way that he made physical contact with Masinga.

(f) Zungu's contradictory testimony:

...and she was so close to me, in such a sense I didn't know that at that time what was in her mind or what was she willing to do. At that time I blocked, and the way she was coming towards me...As she was approaching me and I just laughed...

(g) In Zungu's version put to Masinga, *she hit him*, but his direct testimony did not say this.

(h) It was not put to Masinga how Zungu allegedly "tried to protect himself".

[38] The commissioner's adverse credibility and other findings against Masinga are fundamentally flawed.

[39] The commissioner's view that the punch would have left a bruise was based on her own subjective opinion, a view beyond the purview of her ordinary experience. Tellingly, the commissioner stated that in the demonstration, Masinga did not undo her fists when she made contact with the person on whom she conducted the demonstration.

[40] The commissioner's adverse credibility finding against the supervisor was based on a material error of fact. At no stage did the supervisor mention "choked" and the record reveals not a hint of contradictions in his testimony.

[41] No reasonable commissioner would have considered Masinga's answers as snide comments, let alone a rational basis to make an adverse credibility finding. And no reasonable commissioner would have rationally considered Masinga's alleged emotional state as a basis to make an adverse credibility finding. What is evident is that Masinga was often subjected to questions and propositions that were irrelevant, confusing, argumentative, contradictory and demeaning, the last even by the commissioner. The adverse finding about Masinga's emotional state was also based on the following non-evidential and irregular statement that:

While she was crying outside a submission was made on her behalf by Mr Maphoshe that she is known to be a very sensitive person who tears easily. On the strength of

that I cannot deduce that her appearing at Mr Duma's office crying was a measure of pain suffered.

[42] The record also reveals that Masinga asked to be excused only once and with the permission of the commissioner.

[43] As to the finding that: "it was "telling" that none of the three witnesses Masinga claimed saw the incident "confirmed it". This finding is fundamentally flawed. The three did not testify so they could not have "confirmed" that the incident did not happen. Moreover, Masinga explained that when she asked them to testify they claimed they did not witness the incident (not that it did not happen). Zungu's version on this issue was also contradictory. He first suggested to Masinga that they witnessed the issue but later claimed they did not witness.

[44] The commissioner also stated:

I find her claims that she is now afraid of the applicant...questionable. There was a total disconnect between her claim of fear and trauma and the confidence and aggression she exuded.

[45] This finding is based on a material error of fact. At no stage did Masinga make such claims. The finding that Masinga "exuded" "aggression" is not contextualised.

[46] Finally, there is the commissioner's unexplained questioning of Masinga's gender. Given the tone of the award, it would not be speculation that the credibility findings were also influenced by undisclosed views of Masinga's physical appearance and mannerisms.

[47] Ultimately, a reasonable commissioner would have found that, on a balance of probabilities, Masinga conduct of immaturely unplugging the gun, so enraged Zungu that he struck out in anger, by punching (pushing at) Masinga on the neck with his closed fists, and that the dismissal was substantively fair given the nature of the misconduct and the fact that he was a shopsteward.

[48] That Zungu allegedly had a good reputation at work and appeared to be a presentable person would not have sufficed as grounds for a lesser sanction. In any event, all Francis had stated neutrally was that he had had a good working relationship with Zungu.

[49] Accordingly, I make the following order:

1. The arbitration award handed down by the Second Respondent under case number KNPM3009-22 dated 14 August 2023 is set aside and substituted with an award that the third respondent's dismissal was substantively fair.
2. There is no order as to costs.

Benita Witcher

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: G Kirby-Hirst, from Macgregor Erasmus Attorneys Inc

For the Third Respondent: T Seery, instructed by Purdon & Munsamy Attorneys

LABOUR COURT