Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA,

HELD AT CAPE TOWN

Case No: C 512/2018

In the matter between:

NAMPAK PRODUCTS (PTY) LTD T/A MEGAPAK	**First Applicant**
and	
COMMISSION FOR CONCILIATION, MEDIATION & ARBITRATION	**First Respondent**
BELLA GOLDMAN (*N.O.*)	**Second Respondent**
BUTSHABETHU YENGO	**Third Respondent**

Date of Set Down: 20 November 2020

Date of Judgment: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court

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website and release to SAFLII. The date and time for handing down judgment is deemed to be 12h00 on 24 June 2021.

Summary: (Review – dismissal - misconduct – assault – provocation – finding of provocation not sustainable on the evidence – test for provocation as a mitigating factor affirmed)

JUDGMENT

LAGRANGE J

Introduction

[1] The applicant ('Megapak' or 'the company') has applied to review and set aside an award in which the second respondent ('the arbitrator') found that dismissal of the third respondent, Mr B Yengo ('Yengo'), was substantively unfair and reinstated him without backpay and with a final written warning. In the event the application is successful, the company asked the court to substitute the arbitrator's findings or alternatively to remit the matter back for a rehearing.

[2] Yengo, a Key Accounts Manager at the Epping branch of the company, had been dismissed for assaulting a subordinate, Mr R Majoni ('Majoni'), and continued to threaten to assault him thereafter on 7 November 2017. He challenged the fairness of the dismissal on the basis that the sanction was too harsh.

[3] The review application was enrolled for 19 November 2020, but the hearing was conducted by means of a videoconference by means of Zoom on 20 November 2020, in view of the prevailing Covid pandemic.

Background details and the arbitrator's reasoning

Brief narrative of events

[4] Most of the chain of events leading to the assault are common cause, but there were significant disputes about some of the details of what transpired.

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What happened on that day escalated from a relatively trivial matter into a major row in which other senior staff got drawn into as they attempted to calm things down. Despite their efforts, they were ultimately unable to prevent Yengo landing a punch on Majoni.

[5] Majoni, a production superintendent, had walked into Yengo's office with a handwritten notice, which Yengo had stuck up in the men's cloakroom. The notice reminded users to flush urinals to prevent a stench developing. Majoni advised Yengo that hygiene was the responsibility of one Lizelle who reported to himself. Yengo should have spoken to her about it or reported it to him rather than putting up a handwritten notice himself. Yengo claimed he responded that he was just trying to help, which Majoni denies. Yengo testified that Majoni had said that in future he should approach Lizette if there was a problem and ask her to do it. Yengo claims Majoni had then instructed him to approach Lizelle to have the notice typed. Majoni maintains he merely reiterated that it was Lizelle's responsibility and Yengo should have engaged with her.

[6] Yengo's version was that he replied to Majoni that he should do it himself, but Majoni said he was busy running many departments. In keeping with his account, Majoni denies this exchange occurred. Yengo further said he remarked that the matter fell under Majoni's jurisdiction, and he himself was busy with a quotation. Majoni was adamant when he gave his testimony that he simply wanted Yengo to apologize for not following the correct procedure, despite being pressed by the arbitrator to concede that he wanted Yengo himself to instruct Lizelle to type up the notice. Majoni denied that Yengo ever acknowledged the correct procedure he should have followed, during this interaction between them. All he had done was tell Yengo that Lizelle 'could help him' to get it typed and explain the procedure Yengo should follow. It is true that the arbitrator later asked Majoni again whether he told Yengo that he must go to Lizelle to have the notice typed and he confirmed that he had.

[7] Majoni claimed that he wanted Yengo to apologize and acknowledge the correct procedure for placing a note. Had Yengo done that, he would have instructed Lizelle himself to put up a typed note. Curiously, if he was so

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adamant that he wanted Yengo to say this, he never alleged that he had explicitly asked Yengo to do so. In any event, their voices became raised to such an extent that Mr. A Swartz ('Swartz'), the logistics co-ordinator, came into the office.

[8] Yengo testified that he asked Swartz to remove Majoni from his office but Swartz gave up at that point and walked out, and Majoni did not leave. Majoni agreed that Yengo had asked him to leave his office, but denied he requested Swartz to remove him. Yengo claims he then told Majoni he was 'not in the mood for this matter' and did not have time for it, to which Majoni cryptically responded 'No'. Majoni alleges that as he was about to explain what was going on to Swartz, Yengo said that they should sort out the matter at the office of the Human Resources manager, Ms S Mapela ('Mapela'). In any event, Majoni agreed to they should do so.

[9] Notes of Swartz's testimony at the disciplinary inquiry were put to Majoni. According to the chairperson's notes, Swartz said that he heard the argument and heard Yengo telling Majoni to leave his office because he was busy, but Majoni refused to do so and he then asked Majoni to leave Yengo's office but they both went to Mapela's office. Majoni stuck to his version that he was not asked to leave.

[10] When they arrived at Mapela's office, Yengo told her he had tried to explain to Majoni that he agreed with him, but Majoni refused to drop the issue. Majoni retorted that Yengo was changing his version of what he had said to him earlier, and accused Yengo of lying. It is common cause this accusation made Yengo angry. Majoni claims he then left Mapela's office to avoid an argument once he realised Yengo was changing his story. As he left, Yengo, called him a coward and followed him saying (in Xhosa) he would hit him. It is common cause that Mapela followed Yengo when he left the office, though Yengo said he had initially walked in the opposite direction to his own office before following Majoni. Mapela testified that she saw that Yengo was "sort of aggravated because he was becoming angry" and that is why she followed them.

[11] Yengo stated that when he left Mapela's office, he turned left to go to his own office and Majoni turned right. However, Majoni then remarked that

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Yengo “did not make sense”. This prompted Yengo to change direction and follow Majoni He asked Majoni what did not make sense about the note. Mapela confirmed hearing Majoni saying something to the effect that Yengo was not making sense and Yengo querying why he said that. Majoni’s testimony was that he never made such comment on his way to Swartz’s office where he was heading. Rather, Yengo followed him and when he got to the door of Swartz’s office, Yengo said “I will hit you like this” and made some gesture to that effect. It was at that juncture that Majoni claimed he said that if Yengo hit him he would make sure that he was fired. Majoni admitted to being angry too at that point. It is common cause that Mapela interposed herself between them when they were at Swartz’s door. Mapela said she did so after hearing Yengo threatening to hit Majoni. She recalled that it was then that Majoni had said to Yengo “Come, hit me, then I will make sure you get fired.” She said she pleaded with Yengo to desist and told Majoni to go to his office. Majoni then moved off towards his own office, a few meters away.

[12] It appears to be undisputed that Mapela and possibly Swartz were trying to restrain Yengo, but he freed himself from their grasp, tearing the arm of his jacket or sweater in the process. Mapela confirmed that she was pulling on Yengo’s clothing to restrain him and that she tore his sweater sleeve in the attempt. She also testified that she was pleading with Yengo to desist when he was walking towards Majoni.

[13] Majoni claimed he entered his office and tried to lock the door but Yengo managed to open it. At this point, he claimed Mapela instructed Lizelle to call security. Yengo denies he forced the door open and claims that Majoni had closed the door and then opened it. There was a slight ambiguity in Yengo’s testimony as to whether he said he opened Majoni’s door himself or whether Majoni opened the door after closing it. In the reconstruction hearing, he maintained that Majoni closed the door as he was approaching it and Majoni opened the door again. Mapela confirmed Majoni’s version that Yengo forced the door open. It was common cause Majoni did not manage to lock it.

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[14] Yengo further testified that, at that stage, Majoni was holding the handwritten notice and he took it from him. Majoni then said “Do you want to hit me? Hit me.” Majoni denied uttering this taunt when they were in his office, either before or after Yengo struck him. Majoni was not questioned about whether Yengo took the note from him or whether he was holding it, but Mapela confirmed Yengo’s version and that he was asking Majoni what it was about the notice which did not make sense. She also recalled Majoni saying to Yengo “Hit me, hit me, do you want to hit me?”, at the time that she was holding Yengo, shortly before Yengo struck Majoni.

[15] Swartz and Mapela were still attempting to restrain Yengo, and Majoni attempted to escape from Yengo by going behind his desk, but Yengo shoved the desk and chairs aside to get at him. It was at that point that Yengo struck Majoni and hit him on the shoulder as Majoni turned his body away to avoid the blow. Mapela’s recollection was that she saw Yengo strike Majoni with a closed fist, and not an open hand as Yengo claimed.

[16] A security official and the plant manager, Mr P Mould (‘Mould’), arrived on the scene. Mould testified that he had pulled Majoni into his office and Swartz had escorted Yengo away from the office down the passage. Majoni said they had told him to sit in his chair and Yengo left the office while shouting on his way. Yengo claimed that when he entered Majoni’s office asking what it was that ‘did not make sense’, Majoni then said “Do you want to hit me?”, which is when Yengo says he “lost it”, “grabbed” Majoni and “hit him with a flat hand”. He then let go of Majoni and turned to leave the office, with the latter following him and still “going on”. Mapela confirmed that Yengo did not attempt to do anything further to Majoni after striking him and her impression was that “reality kicked in at that point”.

[17] Yengo testified that when Mapela came into Majoni’s office, Majoni was saying “Hit me, hit me, I will get you fired.” Mould’s version was that Majoni had said “If you hit me I am going to get you fired”, whereas Mapela recalled him uttering the more challenging version of this statement, as testified to by Yengo. She also agreed that Yengo had said to her that Majoni was messing him around”, whilst walking away from Majoni’s office, but when pressed she said that she did not know whether she agreed with him. When

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asked who provoked whom, Mapela's response was to say that Yengo was the angrier of the two of them, and that Majoni was calmer. She also was of the view that dismissal was appropriate for the kind of conduct committed by Yengo.

[18] The plant manager dissuaded Majoni from laying a criminal charge against Yengo, because it would be difficult to prosecute as Majoni had suffered no injuries and it could negatively affect Yengo's career.

Arbitrator's reasoning

[19] As Yengo had admitted assaulting Majoni, the arbitrator accepted that he was guilty of the first charge. However, she concluded that Yengo had been provoked into assaulting Majoni, who had been goading him and encouraging him to hit him so that he would be fired. Factors which appear to have informed her finding were that:

19.1 she concluded that because Majoni did not say that he had actually asked Yengo to apologize and acknowledge the correct procedure, his denial that he instructed Yengo to take the poster to Lizelle was implausible, and Yengo's evidence on this had to be preferred;

19.2 it was common cause that Majoni accused Yengo of lying when Yengo allegedly changed his story in front of Mapela, and that Majoni's remark, after leaving her office, that Yengo 'did not make sense' made Yengo angry and caused him to follow Majoni, and

19.3 it was more plausible that Majoni had goaded Yengo to hit him by saying 'hit me, hit me' and then saying 'I will get you fired rather than saying 'if you hit me you will be fired', or words to that effect.

[20] The arbitrator did find this was not a case of self-defence. However, Majoni suffered no injury as a result of being struck on the shoulder by Yengo and there was no evidence that operations at the company had been disrupted by the incident. Moreover, she decided that an apology tendered a couple of days later by Yengo, asking Majoni to forgive him, was genuine. During his suspension, Yengo sent an apology to Majoni by email which read:

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> "Dear Raymond. I hope you are well. Me being on suspension and alone have given me ample time to introspect myself and reflect on my encounter with you earlier in the week. I have gone over and over the whole incident and can only feel ashamed about my behaviour towards you being my colleague, a man, a husband and a father. My behaviour as a professional is unacceptable and I wish from the bottom of my heart that such an incident could have been avoided. I am truly sorry and ask for your forgiveness. Kind regards. Me Butsha Yengo."

[21] The company's disciplinary code recommended a sanction of dismissal for a first offense of "assaulting or fighting with any person in an environment/situation which could cause the Company or its operations to be prejudiced, whether on or off premises and this could include unruly behaviour". The arbitrator found that there was good reason to deviate from the prescribed sanction in the code taking into account the totality of circumstances, including those factors specifically mentioned by the Constitutional Court in *Sidumo & another v Rustenburg Platinum Mines Ltd & others.*[1] The arbitrator also noted that the employer had a duty to keep other employees safe but found it improbable that Yengo would engage in such conduct again and it was not argued by the company that the trust relationship had been broken nor was their evidence led to that effect.

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[1] (2007) 28 ILJ 2405 (CC), at 2342-3, viz:

> "[78] In approaching the dismissal dispute impartially a commissioner will take into account the totality of circumstances. He or she will necessarily take into account the importance of the rule that had been I breached. The commissioner must of course consider the reason the employer imposed the sanction of dismissal, as he or she must take into account the basis of the employee's challenge to the dismissal.
>
> There are other factors that will require consideration. For example, the harm caused by the employee's conduct, whether additional training and instruction may result in the employee not repeating the misconduct, the effect of dismissal on the employee and his or her long-service record. This is not an exhaustive list."

[22] In respect of the second charge, the arbitrator found that the evidence of Majoni that Yengo continued to threaten to hit him, after the assault had already taken place, was not substantiated by either Mould or Mapela.

Grounds of review and evaluation

[23] In its founding and supplementary affidavits, the company raised the following grounds of review:

23.1 The arbitrator's conclusion that Yengo was not guilty of the second charge of continuing to threaten to assault Majoni after he had already done so, in part because neither Mould or Mapela's evidence corroborated this, could not be sustained on the evidence before her.

23.2 Similarly, the circumstances relied on by the arbitrator to find that Yengo's assault on Majoni was a result of Majoni's provocation, were insufficient to justify such a conclusion and ignored the fact that Yengo had to be restrained by co-employees.

23.3 The arbitrator's finding that dismissal was not an appropriate sanction for the assault, and that she could deviate from the recommended sanction of dismissal, could only have been reached by ignoring certain evidence.

23.4 Lastly, the arbitrator improperly descended into the arena by proceeding to conduct by leading and cross-examining Majoni, and questioning Mapela in chief, which created a reasonable apprehension of bias in favour of Yengo and deprived the company of its right to present its own case in the proceedings.

Finding that Yengo was not guilty of continuing to threaten to assault Majoni [the second charge]

[24] In finding that there was no evidence to corroborate Majoni's claim that Yengo continued to threaten to assault him after hitting him, the arbitrator ignored evidence to the contrary. In fact, Mapela had testified that when Yengo returned to his office and collected his belongings he said he was going after play golf and then he "… still mentioned that I am going to hit this boy, something like that, in Xhosa."

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[25] Mapela's evidence in this regard was not challenged by Yengo. Accordingly, it is simply not correct that there was no evidence to corroborate Majoni's evidence that Yengo had still threatened he would hit Majoni, even after he had already done so. The arbitrator's finding was accordingly premised on a misconstruction of the evidence.

Finding that Yengo was provoked

[26] The principal evidence which the applicant claims the arbitrator disregarded or overlooked in reaching the conclusion that the assault was provoked, was as follows:

26.1 Even on Yengo's own version, it was only *after* he had already assaulted Majoni that Majoni challenged Yengo to hit him so that Yengo could be dismissed.

26.2 Likewise, Yengo did not claim that he had pursued Majoni to his office because Majoni had accused him of lying, but because Majoni had said the note did not make sense.

26.3 Yengo followed Majoni of his own accord to Majoni's office, forcefully entering his office and continuing to challenge him about his remark that the notice did not make sense.

26.4 Majoni stating that if Yengo struck him he would make sure that he got fired was not a provocation but merely a warning that, if he did, it would be dismissible misconduct.

26.5 Yengo admitted that he 'lost it' and struck Majoni.

26.6 Majoni never instructed Yengo to take the poster to Lizelle but merely informed him of the correct way to do things in future and offered to take Yengo to Lizelle to request a typed poster to be made.

26.7 Majoni wanted Yengo to acknowledge his mistake and apologize, but Yengo did not cooperate and kept saying that the toilet was stinking.

26.8 Majoni did not refuse to leave Yengo's office as Yengo suggested they should go to Mapela before he could do so.

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26.9 Yengo had lied to Mapela because he had never admitted his mistake in the discussion with Majoni in his office and therefore could not have been provoked by the latter's accusation that he was lying.

26.10 Yengo called Majoni a coward and told Mapela that he was going to hit Majoni.

26.11 Mapela had testified that if it had not dismissed Yengo it would have sent the wrong message to the workplace given his seniority.

26.12 There had been a previous incident of an argument between Yengo and Majoni in the boardroom, in which Majoni had prevented the escalation of matters by leaving the room and going to his office and locking himself inside. Yengo had followed him and banged on the door, but later apologised.

26.13 Yengo showed no remorse for his actions but stood by his defence of provocation.

[27] The first point that needs to be made is that on Yengo's version, Majoni taunted him to hit him when he entered Majoni's office and again after Mould came in and Yengo was on his way out. Accordingly the company's contention that Yengo only claimed that Majoni's taunting him to hit him only occurred after the assault is wrong.

[28] Similarly, other elements of the company's characterisation of the evidence it claimed the arbitrator overlooked are not altogether correct, *viz*:

28.1 It is perfectly plausible to interpret Majoni's dares to Yengo to hit him as provocative taunts and not simply as warnings about the potential disciplinary consequences of assaulting him.

28.2 If Majoni neither expressly asked Yengo to acknowledge the correct procedure and apologise, nor tried to get Yengo to take the notice to Lizelle for typing himself, it raises a question about why he overstayed his welcome in Yengo's office. It is a feasible interpretation of the evidence, on the probabilities, that he was in fact arguing with Yengo about who should take the notice to Lizelle for typing. It is consistent with Majoni trying to assert his authority over his area of responsibility

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vis-à-vis Yengo, whom he clearly saw as interfering therein, and also with what Swartz was recorded as saying at the disciplinary enquiry.

28.3 There was no evidence Majoni ever expressly asked Yengo to apologise.

28.4 The evidence tends to support Yengo's version that he wanted Majoni to leave his office and the latter was unwilling to do so.

28.5 Even if Yengo had misrepresented to Mapela what had transpired between him and Majoni, being called a liar to his face by a more junior staff member was still an insulting way for Majoni to express his disagreement.

28.6 Yengo's letter of apology was an indication of some remorse.

[29] Is it nevertheless fair to say no reasonable arbitrator could have concluded that Yengo was justifiably provoked to strike Majoni?

[30] On the day of the incident, Yengo was clearly not in the frame of mind to pick a fight with Majoni. In fact, his day had begun on a high note after winning a tender from another company. Matters started to go downhill when Majoni came and complained to him about placing the handwritten notice in the men's toilet. Majoni clearly felt that the handwritten notice reflected badly on him as the person in charge of those facilities and was trying to assert the scope of his authority. On his version, he wanted some kind of acknowledgment that Yengo should follow proper procedures for placing such a notice in the toilet, which required him to go through Majoni or his assistant Lizelle. On Yengo's account, it went further than this and Majoni was effectively trying to instruct him to take the notice to Lizelle for typing. As mentioned above, the arbitrator cannot be faulted for thinking the latter was more likely.

[31] In any event, the discussion had reached an impasse and Yengo wanted Majoni to leave his office. Plainly, Majoni did not consider their discussion was concluded. He never testified that he was intending to leave Yengo's office, at the point when Yengo said they should go to Mapela's office. It is also common cause that diverting the issue to Mapela was an appropriate

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step for Yengo to have taken, in view of the stalemate their discussion had reached.

[32] It is undisputed that on arriving in Mapela's office, Yengo began by saying that he was in agreement with Majoni and Majoni immediately claimed he was lying because he was allegedly changing what he had said a few minutes before. Mapela never got an opportunity to even find out what they were talking about before Majoni had already left her office with Yengo hot on his heels. Majoni claimed that Yengo was lying because previously he had not been willing to accept the correctness of the procedure he should have followed in putting a notice up. It is also common cause that Yengo was angry at being called a liar, and he accused Majoni of being a coward.

[33] Yengo's version is that he left the office to go to his own office. However, Mapela was clearly of the view that he was intent on following Yengo. Her evidence that she could see that Yengo was visibly angry at that point was not disputed. On the evidence, it also seems an inescapable inference that Majoni had inflamed Yengo's anger further by stating that Yengo was not making sense as he was walking down the corridor towards Swartz's office.

[34] From that point on matters simply got out of control despite the persuasive efforts and physical intervention to of Mapela to stop Yengo hitting Majoni and to prevent him pursuing Majoni into his office. It is also an unavoidable conclusion that Yengo very forcibly resisted and overcame Mapela's attempts to restrain him and to prevent him entering his office. He also forcibly shoved furniture aside to get to Majoni so that he could punch him. Majoni's taunting of Yengo to hit him did not help matters.

[35] The arbitrator cannot be faulted for finding that there was provocation by Majoni. The crux of the applicant's criticism of the arbitrator's finding whether the provocation was of such a degree that no reasonable arbitrator could have concluded that the assault was an understandable response to it. The mere existence of provocation is obviously not the end of the inquiry. When provocation is advanced as a mitigating factor in an assault, a critical question is whether the extent of the provocation was such that it would have caused any reasonable person in the position of the assailant to have responded in that way.

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[36] In the case of *Tedco Plastics (Pty) Ltd v National Union of Metalworkers of SA & others* (2000) 21 *ILJ* 2710 (LC), the Labour Court summarised the principles governing provocation as applied in the criminal and delictual contexts and applied them in the employment context. The court found in the matter before it that there was no evidence to support a finding of provocation. Moreover, it held, albeit *obiter*, that the arbitrator had failed to understand and correctly apply the law relating to provocation as a mitigating factor:

> "[15] … Provocation is recognized in our criminal law and law of delict as a basis for excusing or mitigating the consequences of what would otherwise clearly be criminal or delictual conduct. The debate has not been settled as to whether provocation removes the unlawfulness of the conduct, or merely mitigates (or extinguishes) the punishment or damages arising therefrom. (See Neethling, Potgieter & Visser Law of Delict (3 ed) at 91-2 and Snyman Criminal Law (2 ed) at 183ff.) Whatever the correct legal categorization, however, the very fact that a person's actions were a reaction to the conduct of another does not mean that the law will come to their aid. Certainly, in the case of delictual liability, it appears that two requirements will have to be met, namely, that the provocative conduct must be such that the reaction to it by way of physical assault was reasonable, ie would a reasonable person in the position of the person have acted as he did in the face of the provocation; and, that the conduct must be an immediate and reasonable retaliation, ie it must follow immediately on the provocation and not be out of proportion to the nature and degree of the provocative behaviour (Neethling et al at 94)."[2]

In that case, the court found that the arbitrator could not have concluded that provocation could be advanced as a mitigating factor or as a defence because:

36.1 the assault in question was not defensive but aggressive in nature;

36.2 it occurred after the victim had already left the scene and was thus not an immediate reaction, but marked the commencement of the new chain of events;

[2] At 2717.

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36.3 it was completely out of proportion to the conduct of the victim of the assault, and

36.4 was contrary to the arbitrator's own finding that the employee had decided to take the law into his own hands, which implied a rational decision to retaliate and not simply an immediate response.[3]

[37] In this case, the arbitrator appears to have assumed that the mere existence of provocative conduct, as such, mitigated the seriousness of the assault on Yengo. What she failed to consider was whether Yengo's conduct was reasonable in the context and whether it was an immediate response to the provocation. On any version of events, it is clear that Yengo could have walked away from Mapela's office when Majoni left. Even when Majoni commented that Yengo, or the notice, did not make sense, it is difficult to see how that could justify Yengo pursuing Majoni all the way to his office, resisting the physical efforts and pleadings of the HR manager to restrain him and overcoming Majoni's attempt to prevent him entering his office. Yengo already had a further opportunity to pause and walk away when Mapela stood between them and Swartz's door. He was being asked to desist with the aggressive conduct he was displaying, by another senior colleague. Instead of heeding Mapela's advice, he chose to follow Majoni into Majoni's office even as Mapela tore off his sleeve in an effort to restrain him. The inescapable conclusion is that he intended to 'have it out' with Majoni in a physical way. Even if Majoni taunted him to hit him, all the evidence pointed to the conclusion that this was Yengo's intended course of action in any event.

[38] In *Nelson Mandela Bay Metropolitan Municipality v Independent Municipal & Allied Trade Union on behalf of Tshabalala & others* (2019) 40 *ILJ* 1021 (LAC), a case which involved a physical fight between two senior employees in the presence of their subordinates, the LAC said the following:

> "[26] The employee's further argument that he acted in self-defence cannot avail him. The commissioner's conclusion that 'any reasonable person would have reacted in the manner [the employee] did' and that 'as a man he could not walk away from the fight', goes against the grain of conduct

[3] At 2717, para [16].

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> expected of an employee. In our law every person is expected to control his/her temper. In addition, there is no obligation on an individual to accept a challenge. Either employee could have walked away from the scene."

[emphasis added]

Nothing prevented Yengo from lodging a grievance about Yengo's conduct in so far as he perceived to be disrespectful or insulting to him. His assault on Majoni was not an instantaneous unreflective reaction to Majoni's conduct, but was a culmination of a sequence of events the path of which he could and should have altered at more than one point after the brief meeting in Mapela's office.

[39] In light of the above, I am satisfied that the arbitrator could not reasonably have concluded that Yengo's conduct, even if it was petty, insulting, irritating and challenging, could justifiably have provoked Yengo, a senior manager, to behave as Yengo did. As such, the assault could not be excused or minimized on that ground.

Conclusion

[40] In the circumstances, and given Mapela undisputed evidence of the precedent that condoning such an assault would have created, it is difficult to see how the arbitrator could have concluded that dismissal was not an appropriate sanction. This is all the more so, because the finding on the second charge must also be set aside, which means that Mapela's anger and aggression towards Majoni had not been dissipated after he had punched him.

[41] In view of this conclusion it is not necessary to determine other grounds of review which were advanced.

Order

[42] The arbitration award of the Second Respondent, dated 15 April 2018 under case number WECT21528-17, is reviewed and set aside.

[43] The findings made and relief granted in the said award are substituted with findings that:

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43.1 The Third Respondent was guilty of the first and second charges for which he was dismissed by the Applicant.

43.2 The Third Respondent failed to establish that his assault of Mr R Majoni was a reasonable response to provocation.

43.3 The Third Respondent's dismissal was substantively fair.

[44] No order is made as to costs.

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Lagrange J
Judge of the Labour Court of South Africa

Representatives

For the Applicant	A Makka instructed by Cliffe Dekker Hofmeyr Inc.
For the Third Respondent	C Kilowan of HK Law Consultants

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