

In the matter between

UASA OBO MABENA ANANIAS KOUS

Applicant

and

BMC ENGINEERING (PTY) LTD

Respondent

Case number: MEGA62020

Arbitrator: MAPALO

Date of award: 15 June 2025

Centre for Dispute Resolution

Gauteng and Northwest (011) 834 4660

Tshwane, Mpumalanga and Limpopo (012) 320 2566

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DETAILS OF HEARING AND REPRESENTATION

1. The matter was referred to in the Centre for Dispute Resolution (CDR), a division of the Metal and Engineering Industries Bargaining Council (MEIBC) in terms of section 191 of the Labour Relations Act 66 of 1995 as amended (LRA). Arbitration took place on 07 April and 02 June 2025. Mr. Ananias Kous Mabena (hereinafter referred to as the "Applicant") attended and was on 07 April 2025 represented by the former official of UASA Mr. Siphon Sigabi and was on 02 June 2025 represented by Ms. Noxolo Magwasa another UASA official. BMC Engineering (Pty) Ltd (hereinafter referred to as the "Respondent") was represented by Mr. Victor de Kock, an official from AHI Employers' Organisation.
2. The parties had at the onset of arbitration with my persuasion reverted to conciliation (section 138(3) of the LRA). The Respondent offered, based on the length of time the Applicant had worked for it, to re-employ him - an offer he flatly rejected. He indicated that there is no way he could go back to work and work with the owner of the business. He opted for compensation, which the Respondent was not prepared to offer. The proceedings were electronically recorded. I also took notes. My notes are, however, not verbatim. The parties exchanged bundles of documents, R for the Respondent and A for the Applicant. Both bundles were accepted as they are. The Applicant submitted a video footage. The Respondent had no issues with it.
3. The Respondent on 02 June 2025 augmented its bundle (R) by submitting page 3 pages talking about the cost it incurred in replacing shafts/cables that were replaced after the Applicant had allegedly damaged them. The Applicant objected to the relevance of these documents. He said they are talking to replacements of shafts/cables damaged by the other employees and not him. The Respondent conceded that only of them (page 44) has relevance to his case. The Applicant conceded that this document has relevance to his case. This document - page 44 - was consequently accepted and added to the Respondent's bundle (R). There was an interpreter throughout the proceedings. The parties and I agreed that they would submit their written arguments by 09 June 2025.

BACKGROUND TO THE DISPUTE

4. The Applicant worked for the Respondent for 21 years. He was an operator. His hourly rate was R144, 00. He was charged with misconduct, found guilty thereof and dismissed on 06 November 2024.

5. The Respondent is a South African registered company. It is a manufacturer of stainless-steel tanks and vessels. It falls under the MEIBC. It is among other laws subject to the LRA.

ISSUES TO BE DECIDED

6. I am required to decide whether the Applicant's dismissal is substantively fair. The Applicant had in his referral also challenged procedural fairness. He at arbitration indicated that procedural fairness is not in dispute. He in his referral indicated that he seeks reinstatement but in arbitration stated he no longer wishes to be reinstated. He indicated that he seeks maximum compensation. It should be mentioned that he stated that he would like to be reinstated.

SURVEY OF EVIDENCE AND ARGUMENTS

Respondents

7. **Mr. Andre Pretorius (AP):** He is the owner and founding member of the Respondent. He learnt the skill in the United States of America (USA). He had, although the operators did not attend formal training on how to operate the machines, passed the skill he learnt from the USA to them by showing them how to do the job. He is very particular when coming to doing the job right and observing safety. The Applicant had been in his company for 21 years. He was, until 2024, one of the trusted employees who performed the job the way they should. He is confident that he has been well trained. The problem started in 2023. He had in this year seen him and others doing the job not the way they should not and had every time he had observed that he corrected them. He had emphasised to them the importance of observing safety and doing the job the way he had shown them. The other operators improved after he had corrected them. The Applicant on the other hand continued doing the job the way he should not have.
8. The Respondent produces stainless steel tanks and vessels. These tanks and vessels are polished after being made. The process of polishing a machine (tank or vessel) is that a cable that holds a handpiece that polishes it must be straight and not bend. A bent cable gets hot and could be a danger to an operator and others in the workshop. It could also swing around, tangle other cables, get damage and cause huge damage to machines. It can also lead to a machine getting jammed. A jammed machine could burn out a motor causing the Respondent to purchase a new one or some parts at an exorbitant cost. Making sure that a cable is straight is a necessary safety measure which all operators must observe.

9. The Applicant was on 17 September 2024 polishing the outer shell of a 4000-liter tank. The cable that he was using for polishing is imported and it cost R6000, 00. He saw him picking that cable, wound it around his arm and bending it - almost 90 degrees. He approached the Applicant, tapped him on the shoulder, and told him that it will break if he bends it. The Applicant stood back, picked up that cable and again wound it around his arm and bent it. He, since it was clear that the Applicant would not listen to him, took that cable from him. The Applicant asked him what he must do and said he must tell him what he must do. The Applicant had in a meeting with employees said he does not want to see him in the workshop. He based on what the Applicant had said about him in the presence of those employees, he said to him why he should tell a guy who said he does not want him in the workshop what to do. The Applicant told him that the machine can break, and he will *fuck off*. He told the Applicant that he could go if he wanted to. He left the Applicant there still doing the wrong thing.
10. He later came back with his cell phone and took a video of the Applicant still doing the wrong thing him. The Applicant was, instead of doing the job the way he was on many occasions shown how to do it, insolent towards him by telling him that the machine can break and that he will *fuck off*. It was clear that he would not do as instructed. He, AP, told him for safety reasons to stop working on that machine. He picked up the tank, put it on a trestle so that it could not be damaged and instructed another operator to finish the polishing. The Applicant walked away and started cleaning the workshop - a job he was neither employed to do nor instructed to do. That showed that he was prepared to do things his way and not listen to his superiors.
11. His relationship with the Applicant prior to 2024 was well. The Applicant was there for the Respondent when things were not okay. Things changed when the union got involved and after he became a shop steward. He had at a meeting which employees attended said that he did not want him in the workshop. He said he would not listen to him. He had warned the Applicant for his unacceptable conduct, but the behavior persisted. He never wanted the Applicant to be dismissed, and he could have, based on his length of service, forgiven him if he came to him to apologise for his behaviour on 17 September 2024. He gave him four opportunities to apologise. The Applicant's fellow employee instead came to him and said he would like to apologize to him. He did not accept an apology from the Applicant's fellow employee. He testified that an employee who cannot accept wrongdoing and fails to show remorse cannot be trusted. The fact that he had offered to re-employ the Applicant was only based on his length of service and his previous record before 2023/24. The Applicant would have to, had he accepted to be re-employed, prove that he could be trusted.

12. During cross-examination he explained the process of polishing. The Applicant had bent the cable and that was what he did wrong which he told him not to do. He maintained that he had shown the Applicant how to use the cable. His response when it was put to him that the Applicant will testify that the way he had used the cable on 17 September 2024 was the same way he had used it since 2003 was bending a cable is wrong and that he told him to never again bend it. He disputed that the Applicant was not trained. He explained that there was on the job training and said he had personally shown the operators what he learnt from the USA. He argued that he had on 17 September 2024 pushed the Applicant down. He maintained that he had tapped him on his shoulder.
13. He disputed that the Respondent never buys handpieces. He stated that handpieces are serviced internally, and new ones are bought when they cannot be serviced. He conceded that he and the Applicant had before the short time meeting a good relationship. He said the Applicant was badly influenced by others. The Applicant had in the presence of fellow employees and Sigabi said he does not want him in the workshop. Sigabi was a bad influencer. He maintained that the Applicant and other operators were not doing the job the way they were expected and were all told and showed how to do their job. The other operator started doing the right thing and the Applicant continued doing wrong.
14. He disputed that the relationship with the Applicant soured when the Respondent introduced short time. He said it soured before the introduction of short time. He maintained that he had several times warned the Applicant about his unacceptable conduct. He disputed that the machine has not been changed because the Respondent wants to save cost. He explained that the machines are serviced and some are purchased.
15. **Mr. Barry Pretorius (BP):** He is the Respondent's Director. His relationship with the Applicant was incredibly good. He was close to him and his relatives who also work for the Respondent. The Applicant was before he became a shop steward, one of the trusted and diligent employees. He was there for the Respondent when it was not in a good financial position. He as the Director had, based on the Applicant's loyalty and diligent work given him 35% increase, an increase that others did not get. He believed that he needed to be rewarded for his hard and unselfish work.
16. Things got tough for the Respondent around 2023/2024. The period was financially challenging and difficult. It had a meeting with workers for a short time. Workers understood the need for a short time, and they were okay with it. It was around that time when the Applicant was elected a shop steward. After the short meeting he asked for a meeting. Permission for that meeting was granted. An official from UASA, Mr. Siphon Sigabi, attended

it. The meeting ended up in chaos. The Applicant changed, from being an understanding employee to being an unruly employee. He in that meeting said he does not want AP - the owner and founder of the Respondent in the workshop. He said he was not happy with how AP managed. Sigabi instigated him. He could not understand how the owner and founder of the Respondent was not expected to be in the workshop of a company he had started. He Applicant's behaviour in that meeting took him aback. The Applicant was from that meeting completely different. He would challenge AP and openly undermines his authority.

17. AP is strict when coming to safety issues. He wants all to perform in a safe manner and does not compromise on safety. He did not witness the incident on 17 September 2024. He does not, however, believe that it was unreasonable for AP to tell the Applicant that he should not bend a cable. The Applicant was wrong to, when told to work in terms of safety measure, behave in the manner he behaved. The products that the Respondent produces are custom-made. AP has the right to, as the owner of a business, ensure that they are of quality and that safety is not compromised. He has the right to be in the workshop to manage. The Applicant showed no remorse. He cannot, when he lacks remorse, be trusted as he was before 2023/24. He is aware that he was given many opportunities to apologise for his unacceptable behaviour. It is unfortunate that he did not. His length of service, good past records, the fact that some of his family members are still working for the Respondent and apology, would have mitigated against a dismissal and he would have been given a chance to rehabilitate.
18. He in cross-examination conceded that the problem started at a short time meeting. He conceded to having said the Applicant would not have, had he apologised, been dismissed. He said people do make mistakes and they are forgiven when they show remorse. He conceded that the Applicant was not the only who was polishing. He disputed that the Applicant was never warned.

The Applicant's

19. He was on 17 September 2024 doing his job as normal. He was polishing a tank, leaning down, and holding the cable in the usual way. He saw AP walking up and down. AP pushed him down. He could have, if he was not balanced, fallen. AP told him that he was using the machine the wrong way. He asked AP what he must do but he failed to tell him what he must do. He told him that he knows what he should do. He told AP that he would work the way he has been working. AP told him to carry on and he carried on working. AP left and came back again with his cell phone. He told him to switch off the machine. He took the cable from him. He asked AP what he should do when he took the machine from him. His response was that

he stands by the corner. He the Applicant took a broom and cleaned the shop to keep himself busy. He had for the whole month after that incident kept himself busy by cleaning and doing maintenance.

20. AP was micromanaging them. He shouted at them when they were doing something wrong. He would say to them, *"You don't listen, I have told you several times.* He disputed saying he does not want AP in the workshop. What he had said was that AP should not run after him. He was shown how to use the machine but was never trained. The machine they worked with is four wheeled. A cable is flexible and bendable and has three layers – a spring inside, hose and shaft. A shaft turns inside a spring. It is connected to a handpiece which is used for polishing or grinding. This handpiece is the one that gets hot. A cable does not get hot. The problem was that Respondent did not change handpieces. It serviced them internally. The only thing it has replaced is a shaft. The tank he was polishing was too and that was the reason he was kneeling. It is not true that a tank can be lifted. He has never seen anyone lifting it up as alleged.
21. The reason he was charged and dismissed has nothing to do with the alleged bending of a cable and insolence. He was dismissed based on a meeting that he and the other employees had had where they aired their complaints. Employees wanted to know why the Respondent was silent about their increase. Its answer to their question was there was no increase. The Respondent had during the Covid 19 pandemic given employees three options to choose from. They were (i) to be paid and later pay back that money (ii) not paid at all, or (iii) be paid half and return what was paid. He had opted not to be paid. The Respondent, however, deducted Covid 19 payment from him as if he was paid. He asked why money was deducted from his pay. The Respondent decided, based on his unhappiness about money being deducted from his pay, to charge him with misconduct and dismiss him. The problem started when he became a shop steward. Being a shop steward is what led to his dismissal. He was also dismissed for being vocal and using his right to air his dissatisfaction.
22. He in cross-examination conceded that AP had asked him why he was incorrectly using the machine. He disputed that AP has the expertise of working on a machine. He has no proof that AP has learnt the skill from the USA. When asked if he was given the machine in 2003 and told to operate it without any training was, he was shown how to use it. He disputed that AP had trained him or shown him how to use a machine. Other employees and not AP showed him how to use a machine. AP only showed him how to use a machine when he used it incorrectly.

23. His response when asked if it would make sense for AP, the owner of the Respondent, to switch off the machine if he was operating it the correct way and risk losing income was, he does not know. His answer to why he was kneeling was that the tank was low. He disputed that a cable is not supposed to bend. He disputed that it was because it was bending hot and was about to break. He explained that what was hot was the handpiece and not the cable. He explained that the bearings inside the handpiece are what made it hot. Those bearings were old and were never replaced. His answer when asked if he thinks he knows better than AP was he would not say that. He added that he worked based on how he was shown to do the job. His answer to if his belief about the bearings surpasses AP's knowledge was, he would not say that.
24. He conceded that AP had on 17 September 2024 stopped him from using the machine. He maintained that he had not bent the cable. He also maintained that he was dismissed because he was a shop steward. His response when asked if they are allowed to bend the cable was in the positive. He disputed that he was told four times not to bend the cable.

NB: Both parties submitted their written arguments. Their arguments are, for the sake of brevity, not summarised herein. They will however be considered when evidence is analysed.

ANALYSIS OF EVIDENCE AND ARGUMENT

25. The Applicant's dismissal is common cause. He challenged its substantive fairness. The LRA does not prevent employers from disciplining their employees. Discipline must, however, be fair. This Act protects employees from arbitrary conduct by their employers and gives employers the right to expect their employees to behave in an acceptable manner and perform as expected. Schedule 8 of the LRA, codified in the LRA, is a guide on how to deal with an employee's discipline. Its introductory part is intentionally general. Each case must be dealt with based on its own merits. It is about fairness, to both an employer and employee. It is also about the efficient and effective operation of businesses.
- .
- 26 Schedule 8 requires a decision maker to consider whether an employer has a rule, policy, standard; if that policy, rule, or standard is valid, reasonable, and lawful; if an employee is or was aware of that policy, rule or standard or s/he ought to have known about it and if that policy, rule, or policy is consistently applied. The Applicant's case is that he did not bend the cable and was not insolent towards AP. My focus would therefore be on whether he was guilty of having bent a cable and if he was insolent towards AP.

27. An employer for whom it is common cause has dismissed an employee must on the balance of probabilities prove the fairness of that employee's dismissal. This means there must, mathematically speaking, be at least 51% proof of something alleged to have happened having happened. Both parties led oral and documented evidence. A video footage was also shown, accepted, and spoken to at arbitration. There is, since evidence is sufficiently summarised above, no need to repeat its verbatim. The question that needs answering is whether the Applicant's dismissal is substantively fair. This question is dealt with below.

Substantive fairness

28. **Charge 1:** *Serious Safety Breach in that on 17 September 2024 you were found wrongly using/bending the cable of the polishing machine, you were verbally instructed to refrain from doing this which you ignored and continued wrongfully using/bending the cable which is considered a serious safety breach.* It needs to be mentioned that BP did not witness the incident on 17 September 2024. He was told about it. His evidence about the charges could therefore not help determine if the Applicant had or had not bent the cable and if he was on this day insolent towards AP. AP's evidence and that of the Applicant is relevant to the issue before me. AP- the founder and owner of the Respondent, talked to the procedure relating to polishing a tank or vessel. He stated that a cable with a handpiece attached to it is used when polishing. A cable must be straight. A bent cable gets hot; it could break; it could spark fire and hurt the one using it and others and damage property. Requiring operators to keep a cable straight when polishing or using it is a safety rule which is reasonable, valid, and lawful. It is an industry policy which all should abide by. It is common cause that the Applicant was an operator.
29. AP testified that he had on 17 September 2024 seen the Applicant bending a cable whilst polishing. He told him that the cable should not be bent. The Applicant asked what he must do. He told the Applicant that he knows what to do and that he could not, since he had said he does not want him in the workshop ask him what he should do. The Applicant stood up, wound himself with the cable, bent it again and did what he was found doing wrong. The Applicant told him when the AP told him that the machine will break that it can break and that he will *fuck off*. The Applicant's evidence is that AP was going up and down, came to him and pushed him down. He disputed that the cable was bent. His version was the cable was how he had used it all along and how he was shown to use it. He stated that a cable is flexible and bendable. He had, when AP alleged that he was not working the right way, asked him to show him how he should work. AP's response was, instead of showing him how he should work, that he knows how to do his job. He told AP that he would continue with his work, and he did.

30. It is difficult to, based on AP's evidence and that of the Applicant to determine if the cable had bent. The video footage which the Applicant submitted and was shown at arbitration has, although not audible, helped. It shows AP going to the Applicant, tapping him on his shoulder, and talking to him. It on the contrary does not show him pushing the Applicant down as alleged. It supports AP's version that the cable that the Applicant was using to polish the machine had bent. It does not support his version that it was not bent. His version is that the cable is flexible and bendable. That could be true. It is, however, an operator's job to make sure that it does not bend.
31. I agree with AP that a bent cable could be dangerous to the one using it, others, and property. A bent cable could increase resistance and heat generation and possibly cause short circuits or electrical fires. He argued that he was not trained. I am not, although he may not have attended a training institution, convinced that he was not trained. Knowledge of the job may be acquired through on the job training or through a training institution. AP testified that he showed him and the other operators how to work and the fact that a cable should not bend. The fact that he was not sent to a training institution does not, when he was shown how to do his job and when he was an operator for more than twenty years, support his argument that he was not trained. He did not have to go to a training institution to know that he should not bend a cable when using it. He did not challenge AP's testimony on the safety procedure and the fact that safety must be complied by all. His argument that the Respondent failed to submit proof of the safety procedure at arbitration does not help his case.
32. The Applicant argued that the fact that the Respondent stated he would not have, had he apologized, been dismissed shows that he was dismissed to settle personal vendetta that AP had against him. Both AP and BP testified on the relationship they, before 2023/2024, had with the Applicant. They both testified that he was before this period a diligent worker who was, when the business was not doing well, there for it. They testified that the Applicant would have, based on his long service, his good record before this period and a show of remorse, been forgiven and given a chance to prove himself. BP testified that showing remorse, especially when an employee has been employed if the Applicant was, is an acceptance of wrongdoing, accountability, and willingness to change.
33. As stated above, the footage showed that the Applicant had bent the cable he was using to polish the tank. His argument that he was dismissed because he was a shop steward and based on the personal vendetta which he alleges AP had against him is not supported by facts. BP testified that the Applicant was the one who had a problem with AP. He testified

that he had at a meeting employees had attended stated that he does not want AP in the workshop. The Applicant did not dispute this version. He conceded that he did say that and qualified that by saying AP would shout at them when they did something wrong and was micromanaging them. AP is the founder and owner of Respondent. He and his company would, if safety is not adhered to and if anything, bad happens, be the one accountable. I see no problem with him being in the workshop to ensure that work is being done as expected and that safety procedure is adhered to. I am not persuaded that the Applicant was dismissed due to AP's personal vendetta against him.

34. **Charge 2:** *Insolence in that along with the above-mentioned charge, your behaviour and attitude towards your superiors have deteriorated to the extent that the trust and working relationship have become nonexistent.* AP's testimony is that the Applicant had when he told him not to bend the cable back talked and said he should show him how to use the machine. He testified that his relationship with the Applicant was exceptionally good before 2023/2024. The Applicant had no problem carrying out his instructions. The problem started after he became a shop steward. He had openly said he would not listen to him and did not want to him in the workshop. The Applicant disputed having been insolent to AP. His version is that AP came to him, pushed him down and the reason he did not fall was because he was balanced. He conceded that AP told him that the cable should not bent. He asked AP what he must do. AP told him he was the guy who did not want him in the workshop and refused to tell him what he must do.
35. Page 18A of bundle R, the bundle that the Applicant accepted, is the chairperson's type notes. AP had according to these notes tapped the Applicant on the shoulder and told him not to bend the cable because it would break. The Applicant stood back, picked the cable up and did exactly what AP told him not to do. The Applicant according to these notes told AP, *it's a machine and it can break... I will fuck off.* The Applicant in his evidence (in chief and cross examination) stated that AP – the founder and owner of the Respondent, does not know how to do the job. He argued that he failed to submit proof that he had learnt the skill from the USA. He did not when both AP and BP testified that he had said he did not want AP in the workshop dispute this. His explanation in cross-examination was he did not want AP in the workshop because he shouted at employees when they did wrong things and micromanaged them. The fact that he had told AP that he would *fuck off* when told not to bend the cable supports the Respondent's version that he was insolent towards AP.
36. As stated, I had in terms of section 138(3) of the LRA suggested to the parties to revert to conciliation. Conciliation is without prejudice and whatever was said during this process cannot be used against a party. It, however, needs to be mentioned that when offered re-


employment during this process he rejected the offer and his reason for rejecting it was that there was no way he would work with AP. The fact that he indicated that he will not work with AP (the owner and founder of the Respondent) proves that he was insolent towards him and was not prepared to carry out his lawful, reasonable, and valid instructions. He in his evidence stated that AP does not know how to do the work and questioned his expertise. The fact that he questions AP's expertise demonstrates that he was insolent towards him.

37. A decision maker is required to determine if the sanction against an employee is appropriate. AP and BP testified that an employee who cannot accept wrongdoing and fails to show remorse cannot be trusted. Remorse is one of the ingredients of self-correct. An employee who shows no remorse when wrong is incapable of rehabilitation. The charges against the Applicant are serious making his dismissal appropriate. A bent cable could lead to insulation cracking, jacket deformation or damage or energy dissipation. It could lead to fire which in turn could lead to fatalities, bad injuries, and/or damage of property. AP is the owner and founder of the Respondent and subsequently the most senior employee of the Respondent. It was therefore fair to find the Applicant guilty of refusing to obey AP's lawful, valid, and reasonable instruction and challenge his authority and expertise.

AWARD

38. The Applicant's dismissal is substantively fair. Procedural fairness was not an issue.
39. His case is dismissed.

Dated and signed at Johannesburg on 15 June 2025



Mapalo Tsatsimpe
Commissioner