



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case No: JR122/23

In the matter between:

SIBANYE RUSTENBURG PLATINUM MINES

Applicant

and

**COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION**

First Respondent

COMMISSIONER ERASMUS NO

Second Respondent

SENNE, BOIPELO FORTUNATE

Third Respondent

Heard: 16 April 2025

Delivered: 6 June 2025

Summary: Application to review and set aside the arbitration award of CCMA commissioner. Application successful.

JUDGMENT

DANIELS J

Introduction

[1] This is an application brought to review and set aside the arbitration award issued by the second respondent (hereafter the “commissioner”). The commissioner found that the dismissal of the third respondent was substantively unfair in that, although he committed the misconduct for which he was dismissed, the sanction of dismissal was not appropriate.

Material facts

[2] The facts of the matter are common cause:

2.1 The third respondent (hereafter “Mr Senne” or “the employee”) was employed by the applicant (hereafter “the company”) as an artisan electrician.

2.2 At the time of his dismissal, the third respondent had 12 years of service, and a clean disciplinary record.

2.3 On 22 September 2021, Mr Maake, a fitter, asked the employee to assist him to start one of the conveyor belts. The employee realized that the belt had tripped. The employee walked along the conveyor belt, walked over the top of the “grizzly machine” and went into the tip vibrator. The employee performed these activities without applying the safety related lockout procedure.

2.4 The safety officer, at some point, saw the employee and questioned him about whether he had applied the lockout procedure. The employee advised him that he had not, and it was unnecessary to do so. This disagreement led to the safety officer taking up the matter.

2.5 The employee was charged with two broad offences. Ultimately, the applicant was found guilty of only one offence, namely:

“Breach of health and safety rules, standards and procedures, especially the Rules of Life issued by the company: isolation and lockout – working on equipment and/or machinery without locking out / isolating, releasing any potential energy and testing, before work is to be done – in that on 22 September 2021 at ±09h30 – 10h00 you were found by the safety officers climbing on top of the conveyor belt and advancing into the tip vibrator without applying lockout procedures.” (own emphasis)

2.6 The employee was dismissed, and challenged the substantive fairness of his dismissal at the Commission for Conciliation, Mediation and Arbitration (hereafter the “CCMA”).

2.7 At arbitration, the company called a single witness, and the employee called two witnesses. The company called the safety officer, while the third respondent called Mr Maake and the employee himself.

2.8 The safety officer, Mr Thabo Rakgokong (hereafter “Mr Rakgokong”) testified that he saw the employee walking on top of the conveyor belt and asked him if he had applied the lockout procedures. The employee stated that he had not. Mr Rakgokong asked the employee if he had signed the visitors book at the waiting place, and the employee replied that he had not. Mr Rakgokong asked the employee if he had conducted a risk assessment, and the employee again responded that he had not. The employee told Mr Rakgokong that he was a safety officer for mining and he knew nothing about engineering. Mr Rakgokong requested another employee, Mr Mokgethi, to check whether the lockout procedure had been applied and Mr Mokgethi informed that it had not been applied. Mr Rakgokong asked the foreman to summon the employee to a discussion, to resolve the matter, but the employee refused to come. In his view, the trust relationship had been destroyed.

2.9 Mr Senne testified that Mr Maake asked for his assistance to start one of the conveyor belts. The employee realized that the belt had

tripped, walked along the conveyor belt, over the top of the “grizzly machine” and into the tip area. Mr Senne conceded that he had performed these activities without applying any lockout procedure. Mr Senne testified, he followed the usual steps, his conduct posed no safety risk (because there was no power being fed into the machinery), and he would have been unable to identify the tripped pull key if he had locked out the conveyor belt and vibrator. Mr Senne denied that he had walked on top of the conveyor belt, as indicated in the charge sheet.

2.10 Mr Maake confirmed Mr Senne’s version that he had not walked on top of the conveyor belt. Apart from that, the evidence of Mr Maake was of little value. Mr Maake did not testify about whether Mr Senne had followed the usual procedures, whether his conduct posed no safety risk, or whether the employee would have been unable to identify the tripped pull key if he had locked out the conveyor belt and the tip vibrator.

The arbitration award

[3] The commissioner found that:

3.1 The company’s Health and Safety Rules include the so-called “Rules of Life”, one of which relates to lockout and isolation procedures.

3.2 The third respondent had breached the rule of life which concerned lockout and isolation procedures. The commissioner stated: *“By not applying the lockout and isolation procedure on 22 September 2021, the applicant clearly contravened the Health and Safety rules, standards and procedures of the Company”*. The commissioner found that the charge sheet was broad enough to encompass the misconduct.

3.3 There are no exceptions or instances where the rules of life can be disregarded.

3.4 The breach of safety rules is “normally” a serious offence because it involves the risk of serious injury or death.

3.5 Despite this, the sanction of dismissal was not appropriate because:

3.5.1 There was a “plausible reason” why the employee had not followed the lockout and isolation procedures – he would not have been able to find the fault,

3.5.2 No harm resulted from the employee’s conduct,

3.5.3 The trust relationship had not completely broken down. The only evidence came from the Safety Officer, who was not the supervisor or senior of the employee.

3.5.4 A lesser sanction would have sufficed to correct the behaviour of the employee.

3.6 In evaluating the sanction, the commissioner also considered the LRA Code of Good Practice: Dismissal which indicated that, generally, it is inappropriate to dismiss an employee for his or her first offence. The commissioner pointed out that the company had not been referred to any part of the disciplinary code which indicated that the misconduct in question was a dismissible offence.

3.7 Accordingly, the commissioner reinstated the third respondent, subject to a final written warning valid for twelve months.

Legal issues

Grounds of review

[4] In brief, the grounds of review are as follows:

4.1 The sanction imposed by the commissioner was disproportionate and unreasonable, being one which no reasonable decision maker could reach.

4.2 The commissioner failed to adequately consider: the seriousness of the offence, that the third respondent operates in a dangerous environment, that the employer has a legal duty to provide a reasonably safe working environment, the considerable risks to both the employee and the company arising from the misconduct. The commissioner ignored the evidence of the Safety Officer indicating that the rules of life are important and necessary to prevent serious injuries and loss of life.

4.3 The commissioner contradicted himself by finding that there were no exceptions to the rule of life but then finding that the employee had a “plausible reason” for not following the rules,

4.4 The commissioner committed an error of law by finding that generally it is not appropriate to dismiss for a first offence because the rule is subject to an exception – where the offence is so serious that it renders a continued employment relationship intolerable.

4.5 The commissioner committed an error of law by stating that the company should have called a supervisor or senior manager to testify about the trust relationship. The gravity of the offence is sufficient to indicate that the trust relationship has been destroyed.

4.6 The commissioner should have considered that the third respondent’s fairly lengthy service, of some twelve years, should have counted against him because he ought to have been aware of the rules and set an example to other employees.

Legal principles

[5] The arbitration process and the resulting arbitration award both constitute administrative action. Accordingly, section 33(1) of the Constitution requires that the process and the outcome must be lawful, reasonable, and procedurally fair.

[6] It was in this context that the Constitutional Court fashioned the review test¹ applicable to arbitration awards of the CCMA in the following terms: *is the arbitration award one which no reasonable commissioner could reach on the material before him or her?* The test has come to be known as the “Sidumo test” or the “reasonableness test.”

[7] As to what is reasonable, this must be determined by the circumstances of each case. In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and others*² the Constitutional Court held:

“[45] What will constitute a reasonable decision will depend on the circumstances of each case, much as what will constitute a fair procedure will depend on the circumstances of each case. Factors relevant to determining whether a decision is reasonable or not will include the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected. Although the review functions of the Court now have a substantive as well as a procedural ingredient, the distinction between appeals and reviews continues to be significant. The Court should take care not to usurp the functions of administrative agencies. Its task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution.”

[8] Subsequently, in *CUSA v Tao Ying Metal Industries and Others*³ (“Tao Ying”) the Court held at para 76:

¹ *Sidumo and another v Rustenburg Platinum Mines Ltd and others* (2007) 28 ILJ 2405 (CC)

² 2004 (4) SA 490 (CC) at para 45

“76] It is by now axiomatic that a commissioner is required to apply his or her mind to the issues properly before him or her. Failure to do so may result in the ensuing award being reviewed and set aside. Recently, in Sidumo, the matter was put thus:

“Parties to the CCMA arbitrations have a right to have their cases fully and fairly determined. Fairness in the conduct of the proceedings requires a commissioner to apply his or her mind to the issues that are material to the determination of the dispute. One of the duties of a commissioner in conducting an arbitration is to determine the material facts and then to apply the provisions of the LRA to those facts in answering the question whether the dismissal was for a fair reason. In my judgment, where a commissioner fails to apply his or her mind to a matter which is material to the determination of the fairness of the sanction, it can hardly be said that there was a fair trial of issues.” (own emphasis)

[9] Thus, following *Tao Ying*, it is clear that the decision maker must apply his or her mind to all the issues that are material to a fair determination of the dispute. The failure of the commissioner to apply his or her mind to the material issues denies the parties a fair trial and, invariably, the outcome will be unreasonable.

[10] In *Herholdt v Nedbank Ltd (COSATU as Amicus Curiae)*⁴ the court clarified that the *Sidumo* test did not extinguish the procedural grounds for reviews contemplated in section 145(2)(a) of the Labour Relations Act No. 66 of 1995 (hereafter “the LRA”). However, the procedural defects alleged must indicate that the arbitrator misconceived the nature of the enquiry, or arrived at an unreasonable result.

³ (2008) 29 ILJ 2461 (CC) (18 September 2008)

⁴ (2013) 34 ILJ 2795 (SCA)

[11] In *Bestel v Astral Operations Ltd & others*⁵ the court considered the narrow scope of review and accepted that an arbitrator's finding would be unreasonable if it is unsupported by any evidence, based on speculation, disconnected from the evidence, supported only by evidence that is insufficiently to justify the decision, or if it was made in ignorance of evidence that was uncontradicted. The Court held that:

'... the ultimate principle upon which a review is based is justification for the decision as opposed to it being considered to be correct by the reviewing court; that is whatever this Court might consider to be a better decision is irrelevant to review proceedings as opposed to an appeal. Thus, great care must be taken to ensure that this distinction, however difficult it is to always maintain, is respected.' (own emphasis)

[12] In *Goldfields Mining SA (Pty) Ltd v CCMA and others*⁶ the court held that the concept of reasonableness embraces a wide range of outcomes, many of which may be reasonable. The outcome should not be evaluated on a piecemeal basis, but on the totality of the evidence.

[13] In *Head of the Department of Education v Mofokeng and others*⁷ the court again confirmed that where an arbitrator fails to apply his or her mind to the material issues, this will usually indicate that the outcome is unreasonable or that the arbitrator misconceived the nature of the enquiry. However, when a mistake of fact or law occurs, what matters is its materiality - whether the error had a distorting effect on the outcome.

Analysis of the grounds of review

[14] Importantly, the third respondent does not take issue with the finding of the commissioner that he breached a "rule of life". The third respondent does not contend that the offence is a minor infringement. On its own terms this is, clearly, a serious offence.

⁵ [2011] 2 BLLR 129 (LAC) at para 18

⁶ (2014) 35 ILJ 943 (LAC) at para 14

⁷ [2015] 1 BLLR 50 (LAC)

[15] It is trite that, when evaluating sanction, the commissioner must consider the position of, and interests, of the employee but also those of the employer based on the established facts and circumstances.

[16] In *Sidumo and another v Rustenburg Platinum Mines Ltd and others*⁸ at para [78] the Constitutional Court stated that the commissioner must, of necessity, “...take into account the importance of the rule that had been 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.” (own emphasis)

[17] Judging from the award itself, the commissioner shows little appreciation of the importance of the safety rules, or the reason why the employer imposed the sanction of dismissal.

[18] Our courts have found that where a commissioner fails to adequately consider the seriousness of the misconduct, such as offences involving dishonesty, this could lead to an unreasonable outcome susceptible to review.⁹ Similarly, in relation to sexual harassment, the court held that the commissioner's failure to give adequate consideration to the nature of the misconduct will result in an unreasonable outcome.¹⁰ These judgments illustrate that, where a commissioner goes horribly wrong in his appreciation of the severity of the misconduct, makes findings in mitigation that are not sustainable, or does not have proper regard to the material facts in the determination of penalty, the outcome is susceptible to review.

⁸ Cited in fn. 2 above

⁹ *Mutual Construction Company Tvl (Pty) Ltd v Ntombela NO & others* [2010] 5 BLLR 513 (LAC), *Miyambo v CCMA & others* [2010] 10 BLLR 1017 (LAC).

¹⁰ *Motsamai v Everite Building Products (Pty) Ltd* [2011] 2 BLLR 144 (LAC) at paras 23 – 27

[19] While long service remains a factor in mitigation, our courts have warned that this is no guarantee against dismissal. As Conradie JA said in *De Beers Consolidated Mines v CCMA and others*:¹¹ *'the risk factor is paramount. If, despite the prima facie impression of reliability arising from long service, it appears that in all the circumstances, particularly the required degree of trust and employee's lack of commitment to reform, continued employment of the offender will be operationally too risky, he will be dismissed'*. The LAC explained that dismissal is not an expression of moral outrage, or an act of vengeance. Dismissal is, or should be, a sensible operational response to risk management.

[20] The commissioner's finding that the employer was required to call a supervisor or manager to testify about the destruction of the employment relationship is a material error of law, one which impacted on the outcome. Recently, the LAC clarified the correct position as follows:¹² *"Both this court and the Labour Court have consistently held that there is no general obligation on an employer to lead evidence as to the appropriateness of dismissal as a sanction or any breakdown in the trust relationship, nor is there some limited category, as the Labour Court appears to suggest, in which an employer may be relieved of such an obligation (the Labour Court gave the examples of assault and dishonesty). Any deterioration in the trust relationship between employer and employee may be a relevant or even significant factor in the determination of the fairness or otherwise of a dismissal, but it is not a determinative factor. More often than not, the evidence of the nature and extent of the employee's misconduct will be sufficient for an arbitrator to exercise the required value judgment on the fairness of dismissal as a sanction."* (own emphasis)

[21] I cannot fathom how the commissioner could find that the rules of life permit no exceptions, but then find that there was a "plausible excuse" for the

¹¹ (2000) 21 ILJ 1051 (LAC)

¹² *Algoa Bus Co (Pty) Ltd v Tirisano Transport & Services Workers Union on behalf of Mzawi & others* (2025) 46 ILJ 89 (LAC)

third respondent's failure to comply with the safety rules. This was irrational. It is obvious that the third respondent was under no compulsion to comply with a request for help if this required him to place himself at risk of injury. In addition, the request for help, emanating from the fitter, was not an instruction by a senior or a supervisor.

[22] In my view, the commissioner did not apply his mind to the totality of the circumstances, despite stating that he had. The commissioner failed to appreciate the operational risk to the company, and the risk of serious injury to the employee. The commissioner failed to consider the employer's legal duty to provide a reasonably safe working environment and the consequences of a workplace injury or fatality. The commissioner failed to consider the seriousness of the offence, and he failed to consider the reasons why the employer imposed the harshest of penalties. Where the commissioner fails to apply his mind to the material issues, this is a strong indication that the outcome is unreasonable. Here, the numerous mistakes of law were material and had a distorting effect on the outcome.

[23] In the circumstances, the award is not one a reasonable decisionmaker could reach and it falls to be reviewed and set aside.

23.1 Where an award is set aside, section 145(4) of the LRA permits this court to determine the dispute in any manner it considers to be appropriate. Generally, it will be appropriate to substitute if all the available evidence is before the court, and little purpose would be served in a rehearing.¹³ In this matter, I have been provided with a full record and little purpose will be served with a rehearing. This approach is consistent with the expeditious resolution of labour disputes, one of the primary objects of our labour dispensation.

Conclusion

¹³ *Auto Industrial Group (Pty) Ltd & others v Commission for Conciliation, Mediation & Arbitration & others* (2019) 40 ILJ 550 (LC) at para 60

[24] In the circumstances, I make the following order:

24.1 The application to review and set aside the arbitration award, issued under CCMA case reference NWRB 145 – 22, is successful.

24.2 The arbitration award is substituted with a finding that the dismissal of the third respondent is substantively fair.

Reynaud Daniels
Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

Mr J Kent

Solomon Holmes

For the Third Respondent:

Adv C Goosen

Parsons Attorneys