



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JR2422/23

In the matter between:

JINDAL MINING SOUTH AFRICA (PTY) LTD

Applicant

and

**ASSOCIATION OF MINEWORKERS AND
CONSTRUCTION WORKERS UNION ("AMCU")
OBO ZWANE, THOKOZANI AND 9 OTHERS**

First Respondent

**COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION**

Second Respondent

SOLOMON MPIKO, N.O.

Third Respondent

In re:

**ASSOCIATION OF MINEWORKERS AND
CONSTRUCTION WORKERS UNION ("AMCU")
OBO ZWANE, THOKOZANI AND 9 OTHERS**

Applicant

and

**COMMISSION FOR CONCILIATION MEDIATION
AND ARBITRATION**

First Respondent

SOLOMON MPIKO, N.O.

Second Respondent

JINDAL MINING SOUTH AFRICA (PTY) LTD

Third Respondent

Heard: 17 June 2025

Delivered: 19 June 2025

Summary: Opposed review application – unfair dismissal dispute – Commissioner found dismissal substantively and procedurally unfair but awarded compensation – reinstatement is the primary remedy where dismissal was substantively unfair – no evidence of reinstatement being impracticable or intolerable.

JUDGMENT

MKWIBISO, AJ

Introduction

[1] In this matter, both Jindal Mining (Pty) Ltd (the employer) and AMCU on behalf of Zwane and 9 others (the employees) have launched separate review applications under the same case number, seeking to challenge the arbitration award of Commissioner Solomon Mpiko (the Commissioner), which arbitration award was issued under the auspices of the Commission for Conciliation, Mediation and Arbitration (the CCMA).

[2] The Commissioner's award found that the dismissal of the employees by the employer was substantively and procedurally unfair. However, the employees were awarded ten months' compensation each for the unfairness of their dismissal. The

employees seek an order of reinstatement, which is ordinarily the primary remedy when a dismissal is found to have been substantively unfair. The employer, on the other hand, claims that the CCMA lacked jurisdiction to entertain the dispute owing to the employees having claimed that the reason for their dismissal was that they were targeted for being members of the trade union, AMCU.

Relevant facts and evidence

[3] The employer is in the business of mining coal. At the relevant time prior to the dismissal of the employees, the employer employed approximately 600 workers. The employer had avoided being liquidated by successfully navigating a business rescue process during or about 2016 to 2018.

[4] The employees were well experienced miners. Those with the least experience had eight years of experience.

[5] The employees were initially based at the employer's Danda Mining Shaft, and there were no issues of performance there. Towards the end of 2022, they were moved to East Alfred Mining Shaft. By then, the employer had long recovered from the incidents that landed it in the business rescue process from 2016 to 2018. At this new Shaft, the employer complained that the employees were not mining enough coal. The employees raised several difficulties, including the geological surface of the area and the machinery that was used to mine, and the employer met all the demands of the employees to ensure that there were no obstacles in the way of them reaching their targets. The employees were supposed to be mining approximately 27,000 tons per month, but they were mining around 5,000 to 6,000 tons per month, which was not enough to cover their salaries. Despite this deficiency, the employer continued to pay their full salaries.

[6] On or about 01 February 2023, the employer issued a notice of termination of employment to the employees, citing poor performance as the reason for the termination. Their contracts of employment had a termination clause allowing for the termination of employment to occur subject to one month's notice. There was no

inquiry into the employees' poor performance prior to the termination of their employment.

[7] Despite the notice of termination, the employer gave the employees time to improve their performance. However, by 10 May 2023, there was no significant improvement, and they were dismissed on that date.

[8] Aggrieved by their dismissal, the employees referred an unfair dismissal dispute to the CCMA and this case was allocated to the Commissioner to preside over as arbitrator as envisaged in section 191 of the Labour Relations Act (the LRA).¹

[9] During the arbitration proceedings, the employer called one witness, namely Mr Nevin Tunhuma. He was the Mine Manager to whom the employees reported and he had been intricately involved in assisting the employees to meet their mining targets and dismissing the employees for poor performance. His evidence was largely undisputed. Importantly, he conceded that the employees had been dismissed without a hearing due to their employment contracts providing for the right of termination on one month's notice. He also testified about the employees' poor performance, and the questions he was asked under cross-examination were an indication that the poor performance of the employees was conceded or at least not in dispute. It is not necessary to get into the employees' presentation of their case at the arbitration hearing, save to state that when they cross-examined Mr Tunhuma they did not put to him that the reason for their transfer to East Alfred Mining Shaft and their ultimate dismissal was their membership of AMCU.

[10] Upon the conclusion of the arbitration, the Commissioner issued his award, dated 19 October 2023. In the award, the Commissioner found that there was no evidence of poor performance, despite the undisputed evidence of Mr Tunhuma that the employees were required to produce 27,000 tons of coal per month, whilst they were only producing 5,000 to 6,000 tons. The Commissioner made no finding on any

¹ Act 66 of 1995, as amended.

allegation of the employees having been dismissed as a result of their union membership.

[11] The Commissioner further found that reinstatement was not appropriate, which finding he attempted to substantiate by the following reasoning:

‘20. I considered the Respondent’s evidence that it no longer has vacancies for the Applicants. Reinstatement as was requested by the Applicant, would not be an appropriate relief under these circumstances but, compensation. In calculating the amount of compensation, I considered that the Respondent recently went through business rescue. I also considered that the Applicants have not certainty in getting employment in the near future, given the country’s economic situation.’

[12] As a result, the Commissioner declared the employees’ dismissal to be substantively and procedurally unfair and awarded them ten months’ compensation for the unfairness.

[13] The employer and the employees were not happy with the outcome, and both parties launched review proceedings. The employer’s review application was filed timeously, on 01 December 2023. The employees filed their review application on 05 December 2023, which was two court days out of time. Their Counsel belatedly applied for condonation in argument before me, from the Bar, which was granted with the employer’s consent in the interests of the speedy resolution of this matter.

[14] The employer’s grounds of review, as set out in its founding affidavit, were only two. First, the employer complained that the CCMA lacked jurisdiction to entertain the dispute due to the employees having alleged that they were dismissed because of their union membership, which constituted a discrimination claim in terms of section 5 read with section 187(1)(f) of the LRA. Such a claim had to be adjudicated before this court, and it could not be arbitrated by the CCMA. Second, the employer contended that the quantum of compensation was not just and equitable, as it was too high. Upon the employer’s receipt of the transcript, it did not seek to supplement its grounds of review with reference to the record, and it stood by its grounds of review as set out in the founding affidavit. This meant that the

employer did not take issue with the Commissioner's finding that there was no evidence of poor performance, meaning there was no valid reason for dismissal.

[15] The employees' ground of review was that the Commissioner should have awarded them reinstatement because this was the primary remedy in cases where a dismissal was substantively unfair. They argued that the Commissioner unreasonably relied on the employer having been in business rescue despite the employer having long recovered from that event.

Analysis

[16] The employer's contention that the CCMA lacked jurisdiction lacks merit. The Commissioner had to determine the real dispute before him, and he correctly determined the dispute to be the fairness of the dismissal of the employees for poor performance. The Commissioner had to determine the true reason for dismissal, and he could not have determined the true reason for dismissal to be the employees' membership of AMCU when this version was not even put to the employer's witness under cross-examination. The true reason for dismissal was the employees' alleged poor performance. The referral form made no reference to discrimination. The employees' opening address at the commencement of the arbitration made no reference to discrimination. The Commissioner was correct to entertain the dispute.

[17] It is trite that a review court is limited to the grounds of review advanced by a litigant, and I am unable to go beyond the grounds of review advanced by the employer in this current matter. In *Commercial Workers Union of SA v Tao Ying Metal Industries & Others*,² the Constitutional Court held that:

'[67] Subject to what is stated in the following paragraph, the role of the reviewing court is limited to deciding issues that are raised in the review proceedings. It may not on its own raise issues which were not raised by the party who seeks to review an arbitral award. There is much to be said for the submission by the workers that it is not for the reviewing court to tell a litigant what it should complain about. In particular, the LRA specifies the grounds

² *CUSA v Tao Ying Metal Industries and Others* (2008) 29 ILJ 2461 (CC), [2009] 1 BLLR 1 (CC) paras 67 – 68.

upon which arbitral awards may be reviewed. A party who seeks to review an arbitral award is bound by the grounds contained in the review application. A litigant may not on appeal raise a new ground of review. To permit a party to do so may very well undermine the objective of the LRA to have labour disputes resolved as speedily as possible.

[68] These principles are, however, subject to one qualification. Where a point of law is apparent on the papers, but the common approach of the parties proceeds on a wrong perception of what the law is, a court is not only entitled, but is in fact also obliged, *mero motu*, to raise the point of law and require the parties to deal therewith. Otherwise, the result would be a decision premised on an incorrect application of the law. That would infringe the principle of legality. Accordingly, the Supreme Court of Appeal was entitled *mero motu* to raise the issue of the Commissioner's jurisdiction and to require argument thereon. However, as will be shown below, on a proper analysis of the record, the arbitration proceedings in fact did not reach the stage where the question of jurisdiction came into play.'

[18] The employer did not challenge the Commissioner's finding that there was no evidence of poor performance, and the dismissal of the employees was substantively unfair in the absence of a valid reason for dismissal. As a result, this finding of the Commissioner must stand. My hands are tied in this regard, despite what is contained in the record.

[19] The primary remedy where a dismissal is substantively unfair is reinstatement.

[20] Section 193(2) of the LRA provides the following:

- '(2) The Labour Court or the arbitrator must require the employer to re-instate or re-employ the employee unless –
- (a) the employee does not wish to be re-instated or re-employed;
 - (b) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable;
 - (c) it is not reasonably practicable for the employer to re-instate or re-employ the employee; or

(d) the dismissal is unfair only because the employer did not follow a fair procedure.’

[21] The employer claims that reinstatement would not be reasonably practicable because it outsourced the East Alfred Mining Shaft. Such a claim would have had to be presented during the employer’s testimony at the arbitration, to enable the employees to challenge it if they wished to do so. There is no evidence of when this alleged outsourcing took place, and the outsourcing agreement does not form part of the papers before the court. Importantly, the employer’s witness at the arbitration did not testify about the outsourcing. He only mentioned that all the employees at the East Alfred Mining Shaft had been dismissed due to poor performance. Further, the employer did not explain how it decided to select the employees for transfer to the new mining shaft and what happened to the work they were doing at the old mining shaft after their transfer. All of this should have been presented as evidence at the arbitration hearing.

[22] In *Mashaba v SA Football Association*³ this court held the following:

‘[13] The right which the LRA provides by virtue of section 193(2) is the right of an employee to be reinstated if their dismissal is found to be substantively unfair and provided none of the subsections are applicable. As discussed above, an order of reinstatement pays no heed to other contractual arrangements that might have come into existence between the employer and a replacement. That is of no concern to the arbitrator or the court and the employer is left to its own devices to sort out the mess it finds itself in having employed someone and then being ordered to re-engage someone in the same position.’

[23] In *Xstrata South Africa (Pty) Ltd (Lydenburg Alloy Works) v National Union of Mineworkers obo Masha and Others*,⁴ the Labour Appeal Court explained the meaning of the phrase “*reasonably impracticable*” as used in section 193(2)(c) of the LRA in the following terms:

³ *Mashaba v South African Football Association (SAFA)* (2017) 38 ILJ 1668 (LC).

⁴ *Xstrata South Africa (Pty) Ltd (Lydenburg Alloy Works) v NUM obo Masha and Others* (2016) 37 ILJ 2313 (LAC) at para 11.

[111] The object of section 193(2)(c) of the LRA is to exceptionally permit the employer relief when it is not practically feasible to reinstate; for instance, where the employee's job no longer exists, or the employer is facing liquidation, relocation or the like. The term "not reasonably practicable" in section 193(2)(c) does not equate with "practical", as the arbitrator assumed. It refers to the concept of feasibility. Something is not feasible if it is beyond possibility. The employer must show that the possibilities of its situation make reinstatement inappropriate. Reinstatement must be shown not to be reasonably possible in the sense that it may be potentially futile.'

[24] There is insufficient evidence that the employees' positions no longer exist or that it would be impossible to reinstate the employees.

[25] In answering the question whether the Commissioner's decision to deny the employees' reinstatement should be set aside on review, the test to be applied is that of reasonableness. In *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others*,⁵ the Constitutional Court held that section 145 of the LRA was suffused by the Constitutional standard of reasonableness:

[110] To summarise, *Carephone* held that section 145 of the LRA was suffused by the then constitutional standard that the outcome of an administrative decision should be justifiable in relation to the reasons given for it. The better approach is that s 145 is now suffused by the constitutional standard of reasonableness. That standard is the one explained in *Bato Star*: Is the decision reached by the commissioner one that a reasonable decision maker could not reach? Applying it will give effect not only to the constitutional right to fair labour practices, but also to the right to administrative action which is lawful, reasonable and procedurally fair' (own emphasis)

[26] In *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)*,⁶ the Supreme Court of Appeal summarised the review test in the following terms:

⁵ *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (2007) 28 ILJ 2405 (CC), para 110.

⁶ (2013) 34 ILJ 2795 (SCA); [2013] 11 BLLR 1074 (SCA) at para 25.

[25] In summary, the position regarding the review of CCMA awards is this: A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in s 145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2)(a)(ii), the arbitrator must have misconceived the nature of the enquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable' (own emphasis).

[27] A reasonable arbitrator would have first recognised that reinstatement was the primary remedy for a dismissal that he himself had found to be substantively unfair. It cannot be fair to deny employees reinstatement when there was according to the Commissioner no valid reason for their dismissal, as this would be an unjustifiable breach of the employees' constitutional right to security of employment in the absence of any of the exceptions specified in section 193(2) of the LRA.

[28] A reasonable arbitrator would then have awarded the employees reinstatement with full retrospective effect based on the absence of a valid reason for their dismissal, in the absence of any evidence of reinstatement being impossible or intolerable.

[29] An award of compensation was not reasonable as it deviated from the binding authorities of this court, the Labour Appeal Court⁷ and the Constitutional Court⁸ on the issue of reinstatement being the primary remedy. The Commissioner's award of compensation stands to be set aside on review, due to its unreasonableness.

⁷ *Mathebula v General Public Service Sector Bargaining Council & Others* (2024) 45 ILJ 979 (LAC); [2024] 5 BLLR 476 (LAC).

⁸ *Booi v Amathole District Municipality & Others* (2022) 43 ILJ 91 (CC); [2022] 1 BLLR 1 (CC).

[30] The employees cannot be granted both reinstatement and compensation. The award of compensation must be set aside and replaced by an order of reinstatement with full retrospective effect. The replacement of compensation with reinstatement renders the employer's second ground of review a non-issue.

Costs

[31] The general rule is that costs do not follow the result in the Labour Court. There is no compelling reason why this general rule should be deviated from in this matter.

[32] In the premises, the following order is made:

Order

1. The review application of Jindal Mining (Pty) Ltd is dismissed.
2. The arbitration award of Commissioner Solomon Mpiko issued on 19 October 2023 under case number MPEM3677-23 is reviewed and set aside only to the extent that it awarded compensation to the unfairly dismissed employees.
3. The said award of compensation is replaced by an order that Jindal Mining (Pty) Ltd must reinstate the dismissed employees with effect from the date of dismissal, being 10 May 2023.
4. There is no order as to costs.

VG Mkwibiso

Acting Judge of the Labour Court of South Africa

Appearances

For Jindal Mining:

Adv Pieter Moll

Instructed by:

Sanusha Govender Attorneys Inc

For AMCU:

Adv Ashley Cook

Instructed by:

Larry Dave Inc. Attorneys