



Not reportable

**IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT CAPE TOWN**

CASE NO: **C518/22**

In the matter between:

NATIONAL UNION OF MINeworkERS obo B LEKWA

Plaintiff

and

COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION

First Respondent

COMMISSIONER BEESNAAR N.O.

Second Respondent

ASSMANG (PROPRIETARY) LIMITED

(BLACK ROCK MINING OPERATIONS)

Third Respondent

Date of Hearing: 26 June 2025

Date of Judgment: 3 July 2025

Summary: Review of decisions by CCMA Commissioner – Commissioner’s evaluation of the evidence not unreasonable, and the Award accordingly not reviewable – application dismissed.

JUDGMENT

A OOSTHUIZEN AJ

Introduction

1. This is a review of a CCMA arbitration award (*“the Award”*) handed down by the Second Respondent, a CCMA Commissioner (*“the Commissioner”*). The Commissioner found that the dismissal of Mr Lekwa, on whose behalf the Applicant brings the review, was substantively and procedurally fair.
2. Mr Lekwa was employed by Assmang (Pty) Ltd (*“Assmang”*), a mining operation. At the time of his dismissal, Mr Lekwa held the position of Manager: Safety and Risk. He was dismissed for gross negligence and failure to secure a safe workplace.
3. The Employer’s case is that, following an accident at one of the mines, a meeting was called on 24 November 2021 at which Mr Lekwa was instructed to perform a safety audit on all contractors who were working at

heights on Assmang's Nchwaning Mine. It is alleged that Mr Lekwa failed to comply with this instruction.

4. The Court may only review and set aside an award by a CCMA Commissioner if the Court is satisfied that the decision reached is not one that a reasonable decisionmaker could have made, on the available material. In **Fidelity Cash Management Service v CCMA & Others (2008) 29 ILJ 964 (LAC)** the Labour Appeal Court, at **para 100**, elaborated on this test and said the following:

“The test enunciated by the Constitutional Court in Sidumo for determining whether a decision or arbitration award of a CCMA commissioner is reasonable is a stringent test that will ensure that such awards are not lightly interfered with. It will ensure that, more than before, and in line with the objectives of the Act and particularly the primary objective of the effective resolution of disputes, awards of the CCMA will be final and binding as long as it cannot be said that such a decision or award is one that a reasonable decision maker could not have made in the circumstances of the case.”

5. The test formulated above accords with later pronouncements of the LAC and SCA (see, for example, **Herholdt v Nedbank Ltd & Another 2013 (6) SA 224 (SCA)** at **para 25**; **Goldfields Mining SA (Pty) Ltd v CCMA & Others [2014] 1 BLLR 20 (LAC)** at **paras 14 – 15**).

Instruction given on 24 November 2021

6. The Commissioner was required to find out whether Mr Lekwa had carried out the safety audit instructions given to him. A finding is required as to what instruction was conveyed to Mr Lekwa. Mr Lekwa's version was that he was instructed to perform an audit on only one of the contractors, Burger & Company.
7. In the review proceedings, Applicant contends that one of the Employer's witnesses, Mr Vermeulen, agreed that the instruction to Mr Lekwa was limited in this fashion, and that Mr Vermeulen's evidence was impermissibly ignored by the Commissioner. The argument rests on certain answers Mr Vermeulen gave to questions posed to him in cross-examination. Mr Vermeulen agreed that *"the subject matter of the day of the 24th was Burger & Company"* and that *"it is Burger & Company that one had to look specifically whether they were compliant with the report"*.
8. That evidence, properly interpreted, means no more than that Mr Vermeulen affirmed that the meeting of 24 November was convened to discuss whether Burger & Company was compliant or not. That speaks to the purpose of the meeting, but does not deal with the further issue of whether the instruction given at the meeting was limited to Burger & Company.

9. In contending that the Award was reviewable, Applicant also relied on the following question posed to Mr Vermeulen in cross-examination:

“You are dealing with Burger & Company. It is Burger & Company that should in fact be audited as to whether they are compliant. And if they are compliant, to what extent are they compliant, not so?”

10. To this, Mr Vermeulen responded by saying, “Yes, *I agree*”. It is thus clear that the focus of the question was whether Burger & Company should be audited in order to ascertain whether they are compliant. The question not asked was whether they were the only contractor who should be audited and whether, for that reason, the instruction was limited to them and did not extend to the other contractors.
11. The evidence of Mr Vermeulen highlighted in argument does not support the contention that he confirmed the version put up by Mr Lekwa, namely that he was told to limit the audit exercise to Burger & Company. On this point, I find no fault with the reasoning followed by the Commissioner in his award.
12. On the probabilities, the Commissioner also found that there is no rational reason why the scope of the audit should be limited to only Burger & Company, when there were other contractors working at heights, whose operations therefore gave rise to safety concerns. The inherent probability

mentioned by the Commissioner is a compelling factor, and no reason was suggested in the cross-examination of witnesses, or in argument before me, as to why, in a meeting dealing with safety audits, Assmang would have singled out one contractor and ignored the others.

13. On a conspectus of the evidence, and the reasoning adopted by the Commissioner in his Award, I am not persuaded that the Commissioner's award and conclusion is so unreasonable that a reasonable functionary would not have made the same award, and arrived at the same conclusion.

Sanction

14. Prior to the disciplinary hearing, Assmang had offered Mr Lekwa another position within its structures which would not have entailed the same duties as far as implementing and monitoring health and safety at the mines. Mr Lekwa turned this offer down. He now argues that, because the Employer made such an offer, this of necessity meant that the employment relationship had not broken down.
15. I am not persuaded by this contention. The question is whether the facts establish a breakdown in the relationship in respect of the position held by the employee, not in respect of that and every other conceivable position within the reporting structures of the employer. An employer who, in an endeavour to avoid a dismissal, offers an employee an alternative position,

which offer is declined, cannot be held to have waived any of the employer's rights arising from the misconduct complained of.

16. The argument that extending an offer of transfer to a lesser position is tantamount to an acknowledgment that the employment relationship has not broken down falls to be rejected.

Procedural Aspects

17. On behalf of Mr Lekwa, it is contended that the Commissioner could only reasonably have found the dismissal to be procedurally unfair because of the fact that the Chairperson *mero motu* decided to call a witness. This, it is submitted, is indicative of bias on the part of the Chairperson.
18. The record shows that, factually, the contention is unsound. The Chairperson was requested to call another witness by the Employer representative, and acceded to this request. This does not amount to a procedural unfairness.
19. Even if one ignores what in fact happens there is, to my mind, nothing inherently wrong with disciplinary chairpersons calling, of their own accord, a witness whose testimony might contribute to arriving at a fair outcome.

20. Courts have repeatedly emphasised that the procedural rules and constraints applicable to criminal prosecutions do not apply to workplace disciplinary hearings (Avril Elizabeth Home for the Mentally Handicapped v CCMA & Others [2006] 9 BLLR 833 (LC)).

Conclusion

21. The application for the review of the Award is dismissed, with no order as to costs.



AC OOSTHUIZEN A.J.

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr B Dlamini

Instructed by: Cheadle Thompson & Haysom Inc

For the Third Respondent: Adv MJ Van As

Instructed By: Cliffe Dekker Hofmeyr Inc

LABOUR COURT