Not Reportable

THE LABOUR COURT OF SOUTH AFRICA,

HELD AT CAPE TOWN

Case no: C97/2022

In the matter between:

NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA obo B GXESI & OTHERS Applicant

And

FAURECIA EMISSION CONTROL TECHNOLOGIES (PTY) LTD First Respondent

DISPUTE RESOLUTION CENTRE (A DIVISION OF THE MOTOR INDUSTRY BARGAINING COUNCIL) Second Respondent

W RIEKERT N.O. Third Respondent

Date of Hearing: 03 July 2025

Date of Judgment: 06 August 2025

Summary: Review of determination of arbitrator in MIBCO DRC in respect of unfair dismissal claim

JUDGMENT

STELZNER AJ

Introduction

[1] This is an application in terms of section 145 of the Labour Relations Act, 66 of 1995 (LRA) to review and set aside the arbitration award issued by the Third Respondent (the arbitrator) under the auspices of the Second Respondent, the Dispute Resolution Council of the Motor Industry Bargaining Council (DRC MIBCO), dated 21 January 2022 under case number MICT31244 (“the award”).

[2] In terms of the award the arbitrator held that the First Respondent’s (the company’s) dismissal of the Applicants was substantively fair.

[3] The reference herein to the Applicants is intended to be a reference to the individual applicant employees who were dismissed and on whose behalf their union referred the unfair dismissal dispute to arbitration before the DRC MIBCO and on whose behalf the union has now referred that decision of the arbitrator to this Court on review.

[4] A total of 15 employees were dismissed. Two of the dismissed employees referred their dismissal disputes separately and as individual dismissal disputes using their own representatives to arbitration. In the one case the dismissal was found to have been fair, in the other the dismissal was held to have been substantively unfair and the employee was reinstated. This review is in respect of the arbitration which was held to determine the fairness of the dismissals of the 13 employees identified in paragraph 4 of the Arbitration Award.

Common cause facts in the arbitration

[5] The parties' representatives filed a detailed pre-arbitration minute setting out the agreed facts for purposes of the arbitration. [1]

[6] In terms of their pre-arbitration minute the parties agreed on a number of facts. Those most pertinent to the arbitrator's award and this review are recorded hereinbelow:

6.1 The Respondent operates the business of manufacturing automotive exhaust systems.

6.2 There are two main departments in respect of the respondent's direct operations, Production (P) and Production Control & Logistics (PC&L).

6.3 The operational staff in direct operations other than support staff consist of managers, supervisors, team (GAP) leaders and the rest of the employees (UAP's).

6.4 A normal workday during the week is three 8 hour shifts in a 24hr period, from 7 am to 3 pm, 3 pm to 11 pm and 11 pm to 8 am.

6.5 Work on weekends is considered overtime. Work during the week over and above 40 hours is also considered to be overtime.

6.6 Transport is provided to, and from work before and after every shift unless an employee elects to organise their own transport.

6.7 When a stock take needs to be done, the general rule is that it takes place over a 12-hour shift, that it is from 7am until 7pm. Stock take has continued until 11pm in the past.

---

1 The applicant's legal representatives in the review provided the Court with a copy of that minute. The minute had to be retyped. This has assisted the Court in its preparation of this judgment.

6.8 On 21 November 2019 the Respondent's Cape Town PC & L Manager Quentin Prieur ("Prieur") informed certain employees of the Cape Town plant via email that the annual stock take would take place from the 24th to the 27th of November. It did not occur on those dates. On 28 November 2019 these employees were advised that the stock take had been postponed from the 1st of December until the 4th of December 2019 (as per notice of 28 November 2019).

6.9 The Applicants were not recipients of this e-mail. The Respondent's annual stock take for 2019 took place from the 1st until the 4th of December 2019.

6.10 Before that, the 2019, stock take had been postponed on at least two occasions. Initially it was scheduled to take place on 17 November. It was then cancelled and rescheduled for 24 - 27 November and then cancelled and rescheduled again for 1 - 4 December 2019.

6.11 Some of the employees did not attend work the week / days preceding the stock take due to being either on short time or leave or sick leave. Thobani Rodney and Kholosani Mdingi were on leave the week of 25 - 29 November 2019. Kyle Petersen was on short time 28 and 29 November 2019. Two other GAP leaders were also on leave that week, being Graham Africa and Khaya Sam.

6.12 Preparations for the stock take commenced on 1 December 2019. Applicants Gxesi, Dawethe, Bonga, Peter and Mankanku took part in this preparation for the stock take.

6.13 All the Applicants save for Mlahlwa and Mdingi arrived at work at 07H00 on 2 December 2019.

6.14 The two named employees arrived at work later that morning.

6.15 All the Applicants (except one, which is disputed by the Respondent) engaged in stock take activities from their arrival.

6.16 At around 10:00am on the 2nd of December 2019, a dispute arose relating to the provision of a free meal to employees participating in the aforesaid stock take.

6.17 The Respondent had provided meals at all previous stock takes.

6.18 On an ordinary working day, employees are responsible for their own meals.

6.19 The dispute about meals was resolved when the Respondent agreed to provide food to all employees who would be participating in the stock take.

6.20 Meals were provided to those employees who indicated their willingness to participate in the stock take.

6.21 During the course of the day, an overtime sheet / list was circulated by the supervisors (Ruan Haggard and Baseer Volkwyn) for signature.

6.22 The reason this was done is in dispute.

6.23 On 2 December, the Applicants clocked out around 15H00 and did not take part in the stock take after 15H00.

6.24 The other employees in PC & L worked beyond 15H00, continuing with the stock take.

6.25 When leaving the Respondent's premises, employees clocked out of the area where they had worked and then out of the gate.

6.26 The clock-out times for the Applicants on 2 December 2019 were agreed – all within some minutes of 3 pm, and no later than 3.15.

6.27 In previous years, employees in Production had assisted with stock takes.

6.28 The Applicants (except Chad Schippers) made us of company subsidised transport. For employees knocking off at 15H00, the transport leaves at 15H15.

6.29 The Applicants reported for work on the 3rd of December 2019 and were issued with suspension notices for having participated in a concerted and collective cessation of work in the presence of fellow employees and in defiance of requests and instructions by management.

6.30 The aforementioned notice of suspension further stated that the matter was currently being investigated and that if any of the individual Applicant's employees wanted to make representations on why they should not be suspended, they could do so at the first opportunity after receiving the notice of suspension.

6.31 A disciplinary enquiry was held on the 6th of December 2019 and concluded on the 17th of December 2019.

6.32 The aforementioned disciplinary enquiry was chaired by Quinton Matheson (hereinafter "Matheson") of LabourNet.

6.33 Applicants Kyle Petersen and Chad Schippers testified on 06 December 2019, and on 11 December 2019, Trevor Langton, Shahied Stoffels and Shilton Lewis testified.

6.34 The Applicants were informed that they were found guilty and dismissed for 'gross insubordination in that on 2 December 2019 they had participated in a concerted and collective cessation to work in the presence of fellow employees and in defiance of requests and instructions of management by abandoning a scheduled stock take'.

6.35 The Respondent's stock take policy requires that all stake holders be given a least two weeks' notice of stock take.

6.36 In previous years, the Respondent posted the names of those scheduled to take part in a stock take on the notice board.

6.37 There was no notice posted for the 2019 stock take.

6.38 Most of the Applicants had participated in the stock takes conducted in previous years.

6.39 There had been prior notice of these stock takes.

6.40 Overtime is voluntary.

6.41 There is no contractual provision or collective agreement compelling the Applicants to work overtime.

6.42 The applicable collective agreement requires an employer who requires employees to work overtime for a stock take, to give 7 days' notice.

6.43 At the time of the dismissals, all the Applicants except Trevor Langton and Kholosani Mdingi earned below the earnings threshold set out in the Basic Conditions of Employment Act. The named employees earned R110.60 per hour.

6.44 Ruan Haggard, a supervisor, was not at work during the period 24 November and 30 December 2019.

6.45 At the time of the December 2019 stock take, the Respondent had implemented short time.

6.46 As recorded above, Employees are paid for 40 hours a week and hours worked over and above the 40 hours are considered overtime.

6.47 Sunday work is remunerated at Sunday rates.

6.48 While short time was in place, any overtime worked was used to top up an employee's weekly normal hours and that overtime would only be paid at overtime rates if an employee had worked the full 40 normal hours a week.

6.49 The previous stock takes happened over weekends.

6.50 The 2019 stock take was not an emergency.

6.51 All Applicants had clean disciplinary records.

6.52 Years of service ranged between 6 years (shortest) and 19 years (longest).

6.53 Procedural fairness was not in dispute.

6.54 Due to the way the workplace was set up, Applicants would have known it was stock take when they arrived at work on 2 December.

Disputed facts in the arbitration

[7] The following facts were recorded in the pre-arbitration minute as being in dispute:

7.1 The Applicants were aware of the requirement to work twelve hour shifts on three consecutive days in order to complete the annual general stock take.

7.2 The Applicants [in plain sight of their colleagues and without permission of Management] clocked out and left the Respondent's premises despite an announcement on the company intercom to attend a meeting with the PC&L Manager.

7.3 The Respondent's annual stock take was announced in a notice on 26 October 2019, however postponed until the 2nd of December 2019.

7.4 (Assisting with) The annual stock take was compulsory.

7.5 The only issue that was ventilated with management on 2 December 2019 was whether food would be provided – management was not asked to assess whether adequate notice had been given.

7.6 GAP leaders informed staff of the compulsory annual stock take during the "Top 5" meetings.

7.7 On 28 November 2019, the Respondent's Cape Town PC & L Manager, Quentin Prieur (hereinafter "Prieur") advised various employees of the Cape Town plant's general stock take via email correspondence and that the compulsory annual stock take would take place from the 2nd until the 4th of December 2019.

7.8 Mzwakhe was not engaged in work on the production line.

7.9 Employees were given a time and reason for the meeting which the Respondent avers was scheduled for 3pm and announced by Ruan Haggard.

7.10 The list (which was circulated amongst employees on 2 December 2019 for them to sign) did not seek to secure agreement to work overtime, but was rather part of a risk assessment when rumours of a walk-off surfaced.

7.11 Although the shop steward indicated to management that the food issue had been resolved (and this is also the Respondent's version in that regard), it is the Respondent's version that the Applicants remained disgruntled that the company had wanted to withhold food at all.

7.12 Due to how shift scheduling and rotation works (which would be testified to), B Peter, C Schippers, K Gxesi and K Mdlingi, L Dawethe, M Bonga, T Mlahlwa, T Langton and W Kutshwa would not have been scheduled to be at work at 7am – yet they all climbed into company transport and reported at 7am (on the day of the stock take).

7.13 K Petersen testified that at the disciplinary hearing that he had been aware of the scheduled stock take as he had been informed the previous week while on night shift.

7.14 He also testified that he had resolved to leave at 3pm once he had heard about the food issue.

7.15 S Lewis testified at the disciplinary hearing that he had been unhappy about the food because he had only brought one meal for teatime – and that this was the first time that no food was provided.

7.16 Employees have never been requested to participate in a stock take – they have always been informed that it had been scheduled.

7.17 Applicants were all engaged in stock take activities upon their arrival at work on 2 December.

7.18 No employee tendered an excuse before they clocked out at 3pm.

7.19 No one complained of a lack of knowledge of the stock take or not being able to stay.

7.20 It is the Applicants' version that they were not grossly insubordinate as alleged or at all.

7.21 With the exception of GAP leaders (Mdingi and Langton), who earn above the BCEA threshold, for 11 of the Applicants, overtime is voluntary and therefore they could not be compelled or instructed to work overtime in circumstances where there was no emergency.

7.22 Cumulatively (for the 11 Applicants) and for the GAP leaders, at no point were they instructed to work overtime on 2 December.

7.23 Until Sunday 1 December 2019, there was no confirmation that the stock take would continue on 2 December and that employees would be required to work overtime.

7.24 Prior notification is required both in terms of the stock take policy, the collective agreement and as per practice.

7.25 Because there had been no reasonable prior notification of the stock take, the Respondent informed the employees that they had a choice whether or not to work overtime that day.

7.26 Those who were willing and available to work overtime signed on the overtime sheet to indicate as much.

7.27 Those who were unwilling and/or unavailable to work over time did not complete the overtime sheet.

7.28 There was never an instruction issued to work overtime and the Respondent is put to the proof thereof.

7.29 The instruction / request to work overtime, if any, (which is denied) without giving reasonable notice and in circumstances where there was no legal obligation to work overtime was unreasonable and unlawful and therefore the Applicants acted reasonably in not complying with same.

7.30 Their reasons for leaving after 15H00 on 2 December 2019 had nothing to do with the provision of meals.

7.31 The starting time of and agenda for the meeting announced around 14h50 were not shared when the meeting was announced over the intercom.

7.32 All Applicants except for Bongani Peter, Mzwakhe Thukuthezi and Gxesi presented themselves for the meeting which was announced around 14H50 but they left after no one arrived to address the meeting.

7.33 Those members of management who were present stood by and did not address the meeting.

7.34 The Applicants specifically deny participating in a concerted or cessation of work as alleged.

7.35 They clocked out at different times and not in a single file as alleged by the Respondent.

7.36 Each one of them did not and could not work overtime on 2 December 2019 for reasons that were not collective but rather for individual reasons.

7.37 The versions of the respective Applicants, which were to be amplified in evidence, were as follows:

7.37.1 Thukuthezi – there were some unconfirmed reports that everyone must report for duty on Monday morning 2 Dec. He did and discovered that it was stock take. He worked on the production line until 15H00 and clocked out. He had other plans which he could not re-arrange. He did not attend the meeting at the end of the shift as he did not hear the announcement.

7.37.2 Mlahwa – since he arrived at work around 10am and had already lost 3 hours of paid work, his inquiry about how the lost hours due to no fault of his was not responded to. Haggard was informed about this concern.

7.37.3 Gxesi – he worked on 1 December preparing for stock take. He specifically inquired from Faizel Martin whether stock take would continue the following day and the response was that there was uncertainty but that everyone was required to report for duty on Monday morning. He reported for duty and learnt that stock take was continuing. There were times when there were preparations for stock take but then the actual stock take is cancelled. He understood that he had a choice whether or not to work overtime and he chose not to. He informed Haggard of this fact and he did not tell him that he didn't have a choice in the matter. He did not hear the announcement made around 14H50 to attend the meeting and therefore did not attend the meeting.

7.37.4 Langton – On Friday 29 November, despite his efforts, there was no clarity on whether stock take would take place on Monday 2 December. He came in on Monday morning as instructed by Roland Da Rocha even though this did not suit him due to other family responsibilities. He was scheduled to be on short time 5 and 6 December and he opted to work overtime as his overtime hours would be allocated as normal hours to make up the 40 hours a week. He told management of his concern.

7.37.5 Lewis – he was off sick on Friday 29 Nov and only found out about the stock take on Monday 2 December. He could not work unplanned overtime due to family responsibility duties and on two occasions he told Haggard about this. He was not aware of the meetings held earlier regarding meals.

7.37.6 Schippers – he worked on Friday 29 November and Langton told them to report for duty on the Monday morning and he did. He found out that it was stock take. Initially the thought he work overtime but on further reflected, he decided against it, unhappy about the several changes made without consideration.

7.37.7 Petersen – he was sick leave the Thursday and Friday before the week of stock take. He arrived at work on the morning of 2 December and learnt that he it was stock take. Initially he indicated that he would work overtime and received the meal voucher but later changed his position after his wife informed him that he needed to babysit as she was finishing work at 6pm and their child minder leaves at 4pm. He returned the meal voucher. He understood that he had a choice whether or not to work overtime and for this reason, did not explain his reasons for not being able to work overtime.

7.37.8 Mdingi – GAP leader but unaware of the stock take as he was on leave the previous week. He only came in on Monday 2 December because Thukuthezi telephoned him whey there were at Mdingi's pick up area and he was not there. He telephoned work and was instructed to come in. He went and arrived just after 08H00. He was aggrieved that even as gap leader he had not been informed about the stock take. From what was explained, he also understood that he had a choice whether or not to work overtime.

7.37.9 Bonga – he worked the week before the stock take week and there were unconfirmed rumours of a stock take. The stock take as confirmed on Monday 2 December. When he realised that he was scheduled to work short time later in the week, he decided against working overtime on 2 December.

7.37.10 Dawethe – he worked the week prior to stock take as well as on 1 December. On Sunday Martin confirmed the stock take but he could not work over time on 2 December due to family responsibility duties. He needed to fetch his son from school.

7.37.11 Peter – he worked the week preceding stock take. Schedule work night shift on Monday 2 December but came in the morning as instructed by Martin. Before the overtime sheet was circulated, he learnt that there might be issues with his child's whereabouts. When the overtime sheet was circulated, he realised that he might be able to work for this reason. Then later in the day he learnt that his child was missing and he left immediately after shift to look for his child. He did not tell anyone as he did not think it was necessary since he had already indicated that he cannot work overtime.

7.37.12 Mankanku – He did not know about the stock take. He decided against working overtime as he was scheduled to be on short time on Thursday and Friday in the week of the stock take. Also understood that they had a choice whether or not to work overtime.

7.37.13 Kutshwa – (his explanation was not part of the minute)

7.38 In some cases management was made aware of the inability / unwillingness of the Applicants to work overtime, as set out above.

7.39 The version of the Applicants during the disciplinary hearing.

7.40 More specifically, the versions of K Petersen and S Lewis as alleged by the Respondent and whether Mankanku testified at all.

7.41 Whether the annual stock take was compulsory.

7.42 More specifically, whether the employees were obliged to work overtime during stock take.

7.43 Whether with previous stock takes, all employees were required to take part in stock take or only those required to do so took part in stock take.

7.44 Whether Mankanku worked on 1 December 2019.

7.45 Whether the Applicants were notified or made aware of the annual stock take scheduled to take place on 2 December 2019 and if so, when and by whom.

7.46 The reason those Applicants who were scheduled to work the afternoon or evening shift on 2 December reported for duty in the morning.

7.47 Whether any of the Applicants left the Respondent 's premises on 2 December 2019 for reasons related to the provision of meals.

7.48 The reasons each Applicant employee left work around 15H00 on 2 December 2019.

7.49 Whether the Respondent was made aware of the reasons some of the Applicants could not work overtime on 2 December 2019.

7.50 Who called for the meeting on the 2nd December 2019 towards the end of the morning shift over the Respondent's intercom system and whether the agenda for this meeting was also announced.

7.51 Whether all PC& L employees heard the announcement to attend the meeting.

7.52 Whether, other than a single line for morning shift, no employees related to direct Production attended work on 2 December 2019.

7.53 Those who did not work left at the end of the shift which ended at 15H00 and whether all other employees were involved in stock take activities.

7.54 The lawfulness of the Respondent's conduct in how it paid overtime for employees who had not worked a total of 40 hours a week due to short time.

7.55 When the employees who took part in the stock take on 2 December finished work.

7.56 Whether there was any stock take in 2019.

<u>Issues in the arbitration</u>

[8] The Third Respondent was required to determine:

8.1 All facts in dispute

8.2 Whether the Applicants' dismissal was substantively fair.

8.3 In this regard the Third Respondent was required to decide whether the employees committed misconduct as alleged or at all. [2]

8.4 If the Third Respondent found this to be the case, he was required to decide whether dismissal was a fair sanction in the circumstances.

8.5 If not, the Applicants asked for reinstatement alternatively compensation.

8.6 The First Respondent asked for dismissal of the claim.

<u>The approach of the arbitrator to the dispute before him</u>

[9] The charges which were presented at the disciplinary hearing conducted by an outside consultant for the Respondent against the Applicants (and

[2] The alternative is significant. This will be returned to when discussing the approach which the Arbitrator adopted in deciding the dispute before him.

against two other employees who as stated at the outset referred their disputes to arbitration separately from the Applicants) was that of “Collective Gross Insubordination” in the form of a “concerted and collective cessation of work” in “defiance of requests and instructions of management by abandoning a scheduled stock take”. They were dismissed on these charges. The reasons for the sanction of dismissal having been imposed are also set out in the written determination of the chairperson of the disciplinary hearing.

[10] These dismissals were referred as individual dismissals to the MIBCO DRC - for not working overtime (misconduct) and not as strike related dismissals over which the arbitrator would potentially not have had jurisdiction if the claim was one of automatically unfair dismissal.

[11] Neither the union on behalf of the Applicants nor the First Respondent suggested in either the MIBC or in this review that the employees had in fact been dismissed for unlawful strike action. [3]

[12] In any event, no one claimed that the third requirement for strike action, namely that there was a common purpose on the part of the employees, that of obtaining redress for the first respondent’s decision to require them to work overtime, when they refused to work beyond 3 pm on 2 December, was met.

[13] It was never claimed by any of the parties to this application that the purpose of the refusal to work was to place pressure on the employer to remedy a grievance or to resolve a dispute, for example to not require them to work overtime on that day or the days thereafter, when the stock take was set to continue.

[14] The unfair dismissal claim of the Applicants before the arbitrator was premised on the argument that their refusal to work overtime for the stock

---

3 Cf the definition of ‘strike’ in section 213 of the LRA - strike' means the partial or complete concerted refusal to work, or the retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee, and every reference to 'work' in this definition includes overtime work, whether it is voluntary or compulsory. The refusal may have been to work overtime, but no one suggested in the arbitration, or in this review, that that refusal had been for the purpose of remedying a grievance or resolving a dispute in respect of a matter of mutual interest.

take in issue on 2 December was in response to a failure on the part of the employer to perform its obligations, i.e give them proper (timeous written) notice to work overtime, as required under their contracts of employment, the MIBCO Collective Agreement and the past practice of the employer.

[15] The defence of the Applicants to the charges before the DRC was therefore that there was a lawful refusal to work overtime and that this did not amount to a breach of contract or misconduct on their part.

[16] In short, the employees claimed they were legally entitled to refuse to carry out their side of the employment contract on that day and it was the employer who breached their employment contract by unlawfully failing to perform its reciprocal obligation(s).

[17] In the alternative, in respect of the sanction of dismissal which was imposed in the disciplinary hearings, the claim was that on the facts the sanction of dismissal was too severe.

[18] This approach of the parties to the dispute before the arbitrator and in this review therefore removes the need to consider the issue which was decided in *National Union of Mineworkers Obo 112 Employees v Commission for Conciliation Mediation and Arbitration and Others* (CA 11/2007) [2011] ZALAC 7 (1 May 2011), and in which the dictum in *Nkutha and Others v Fuel Gas Installations (Pty) Ltd* [2000] 2 BLLR 178 (LC) at paras 69 – 72 was held by the LAC to "not adequately reflect the position as encompassed in section 213".

[19] The Applicants in this matter in effect claimed that their refusal to work overtime on 2 December was in response to the failure on the part of their employer to perform its obligations, i.e give them proper notice of the fact that overtime work would be required on that day. This was a lawful refusal (to an unreasonable and unlawful demand / instruction) which did not amount to a breach of contract or misconduct. In other words, the employees were legally entitled to refuse to carry out their side of the employment contract. In fact, it was the employer who breached the employment contract by unlawfully failing to perform its reciprocal obligation(s).

[20] It is to be noted in all of this that the Applicants avoided placing any reliance on the issue about the employer providing them with a meal on the day as being the cause of their displeasure and the reason for their refusing to work beyond 3 pm.

[21] This would have required an investigation into whether the employees had been informed that during the stock take that year, which was to be on weekdays, the employer would not be providing a meal as in the past, when it was over a weekend, whether the grievance was then that the meals which were provided were not provided timeously on the day (after the employer had relinquished and agreed meals would be provided but there was some delay in this occurring on the 2nd of December).

[22] These issues were not relied on in the arbitration before the Third Respondent as being grounds for justification or mitigation of sanction. The food issue was not relied on as a defence for the employees' conduct on the day. The review itself, as will be explained later in this judgment, relied on other factual and legal contentions.

[23] The arbitrator, relying on *EOH Abantu (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (JA4/18) [2019] ZALAC 57; (2019) 40 ILJ 2477 (LAC); [2019] 12 BLLR 1304 (LAC) (15 August 2019), adopted the "not too formalistic or technical approach" to the charges against the Applicants, stating that "some careful navigation of the facts" was required in deciding the issues before him.

[24] The arbitrator understood that "it will normally be sufficient if the employee has adequate notice and information to ascertain what act of misconduct he is alleged to have committed. The categorisation by the employer of the alleged misconduct is of less importance". [4]

[25] In paragraph [16] of *EOH Abantu* the LAC held further that "The principle in such cases is that provided a workplace standard has been contravened, which the employee knew (or reasonably should have

[4] Para [15] of *EOH Abantu* referring to *Durban Confectionary Works t/a Beacon Sweets v Majangaza* (1993) 14 ILJ 663 (LAC); and *National Arbitrator, SAPS v Myers* [2012] 7 BLLR 688 (LAC) at para 97.

known) could form the basis for discipline, and no significant prejudice flowed from the incorrect characterisation, an appropriate disciplinary sanction may be imposed. It will be enough if the employee is informed that the disciplinary enquiry arose out of the fact that on a certain date, time and place he is alleged to have acted wrongfully or in breach of applicable rules or standards."

[26] The arbitrator can accordingly not be faulted for the approach which he adopted in deciding whether the dismissals were substantively unfair on the basis that they needed to be seen as acts of alleged misconduct by some 15 employees as opposed to collective action in support of a demand or grievance.

[27] Before dealing further with the specific grounds of review on which the Applicant relies in this review, it is apposite to set out the general principles which find application in a review such as the present.

<u>The principles</u>

[28] It is important to note that the present application is a review, not an appeal, and although unreasonableness as ground of review requires consideration to be given to the facts which were established in evidence before the arbitration hearing and the arbitrator's evaluation of those facts in a manner which comes close to deciding whether the arbitrator was correct in his approach to and evaluation of the facts, the distinction between appeal and review still exists and needs to be appreciated.

[29] The same applies to the further grounds relied on in the present application, namely that the arbitrator failed to apply his mind to certain issues / failed to consider certain material facts and ignored others.

[30] As explained in *Head of Department of Education v Mofokeng & others* (2015) 36 ILJ 2802 (LAC) at para [32] – "….. sight may not be lost of the intention of the legislature to restrict the scope of review when it enacted s 145 of the LRA, confining review to 'defects' as defined in s 145(2) being

misconduct, gross irregularity, exceeding powers and improperly obtaining the award. Review is not permissible on the same grounds that apply under PAJA. Mere errors of fact or law may not be enough to vitiate the award. Something more is required. To repeat: flaws in the reasoning of the arbitrator, evidenced in the failure to apply the mind, reliance on irrelevant considerations or the ignoring of material factors etc must be assessed with the purpose of establishing whether the arbitrator has undertaken the wrong enquiry, undertaken the enquiry in the wrong manner or arrived at an unreasonable result. Lapses in lawfulness, latent or patent irregularities and instances of dialectical unreasonableness should be of such an order (singularly or cumulatively) as to result in a misconceived enquiry or a decision which no reasonable decision maker could reach on all the material that was before him or her." [5]

[31] The Constitutional Court explained the test further in *Duncanmec (Pty) Ltd v Gaylard NO and others* [6], as follows: "This test means that the reviewing court should not evaluate the reasons provided by the arbitrator with a view to determine whether it agrees with them. That is not the role played by a court in review proceedings. Whether the court disagrees with the reasons is not material. The correct test is whether the award itself meets the requirement of reasonableness. An award would meet this requirement if there are reasons supporting it. The reasonableness requirement protects parties from arbitrary decisions which are not justified by rational reasons."

5 See also paras [30] ff in *Mofokeng* and the references therein to *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)* 2013 (6) SA 224 (SCA); (2013) 34 ILJ 2795 (SCA), *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation & Arbitration & others* (2014) 35 ILJ 943 (LAC); [2014] 1 BLLR 20 (LAC) which held that before an irregularity will result in the setting aside of the award, it must in addition reveal a misconception of the true enquiry or result in an unreasonable outcome. The LAC further relied on *Commercial Workers Union of SA v Tao Ying Metal Industries & others* 2009 (2) SA 204 (CC); (2008) 29 ILJ 2461 (CC); [2009] 1 BLLR 1 (CC) at paras 76 and 134 where the Constitutional Court held that it is now axiomatic that a arbitrator of the CCMA (or an arbitrator of a bargaining council) is required to apply his or her mind to the issues before him or her and that failure to do so may result in the ensuing award being reviewed and set aside. The irregularity must however result in an unreasonable outcome or misconception of the true enquiry resulting in no fair trial of the issues. See also *Sidumo & another v Rustenburg Platinum Mines Ltd & others* 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 (CC)

6 [2018] 12 BLLR 1137 (CC) at paras 42 - 43.

[32] Mere errors or irregularities are not sufficient to vitiate the award. To warrant interference from a review court, the award must be disconnected from the evidence resulting in an unreasonable outcome[7] and / or the failings, errors, irregularities or misconduct must have resulted in the award ultimately being unreasonable. [8]

[33] These governing principles applicable to a review, in which the reasonableness of an arbitrator's findings are at issue, were most recently summarised in *Sulzer Pumps SA (Pty) Ltd v Nomxanya & others* (2024) 45 ILJ 2398 (LC) as follows:

26.1 The result will only be unreasonable if no reasonable arbitrator could have reached the conclusion they did on the material before them. [9]

26.2 A mere failure by an arbitrator to apply their mind to issues material to the determination of a dispute will usually amount to an irregularity, but to set aside an award that failure must either result in an unreasonable outcome or a misconception of the true enquiry. [10]

26.3 Erroneous factual findings or erroneous weighing of evidence by an arbitrator will not warrant setting aside an award unless the effect of those errors is to render the result unreasonable.

26.4 A failure to mention material facts or deal with a material issue or an error in the assessment of evidence is insufficient to set aside an award and a review must be evaluated in relation to the totality of the evidence, not on a piecemeal basis. To do otherwise would be tantamount to treating a review as an appeal and would undermine the requirement of s 138 of the

---

7 Duncanmec (Pty) Ltd v Williams Itumeleng NO and others [2020] 7 BLLR 668 (LAC) at para 23.

8 See Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae) [2013] 11 BLLR 1074 (SCA) at para 25

9 Sidumo & another v Rustenburg Platinum Mines Ltd & others 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 (CC) at paras 110 and 119.

10 Head of Department of Education v Mofokeng & others (2015) 36 ILJ 2802 (LAC) at para 30

LRA, which requires an arbitrator to deal with the substantial merits of the dispute with a minimum of legal formalities and to do so expeditiously and fairly. [11]

26.5 If the arbitrator misconceives the nature of the enquiry, that amounts to a gross irregularity as contemplated in terms of s 145(2)(a)(ii) of the Labour Relations Act, rendering the award reviewable. [12]

26.6 An irregularity or error, which results in a misconception of the dispute by the arbitrator, must be one that is material to the determination of the dispute, such that it distorts the arbitrator's conception of the enquiry, the delimitation of issues for determination and the final outcome. It must result in the arbitrator failing to address the question raised for determination, which means that there was no fair trial of the issues. [13]

26.7 Notwithstanding the flawed reasoning of an arbitrator or any irregularity committed, the court itself must still consider if the result could reasonably be reached considering the issues and evidence before the arbitrator.

26.8 The review court must not be swayed by an argument that the result could have been different, which is something that can only be considered in appeal proceedings.

<u>The specific grounds of review</u>

[34] The Applicants submit that the arbitration award is unreasonable and should be reviewed and set aside on essentially three grounds. It is

---

11 Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation & Arbitration & others (2014) 35 ILJ 943 (LAC) at paras 19 and 20.

12 Mofokeng at paras 32 and 33, reaffirmed and emphasised in Makuleni v Standard Bank of SA (Pty) Ltd & others (2023) 44 ILJ 1005 (LAC) at para 3.

13 Further footnotes in this extract from the *Sulzer Pumps* decision omitted

submitted that the arbitrator committed gross irregularities in that he made material errors of fact and law in finding that:

34.1 The company instructed the Applicants to work overtime beyond 15h00,

34.2 To the extent that there was an instruction, the instruction was lawful and reasonable,

and

34.3 To the extent that the Applicants committed misconduct, dismissal was an appropriate and fair sanction under the circumstances.

[35] The defence of the Applicants was in essence that they were entitled to written notice of 7 and 14 days of the employer's stock take and the overtime requirement on those days on which the stock take was to take place, this was not provided and therefore the employees were not required to work overtime on the day in question and were permitted to return home at 3 pm that day.

[36] The arbitrator noted in paragraph 1 of his award, a 33 page document which dealt extensively with large parts of the evidence before him, that the hearing before him had taken place over 12 days from May to December 2021, of which 5 days had been via a virtual hearing platform.

[37] The parties were represented by attorneys on both sides.

[38] He noted further that he "considered all the evidence (more or less 60 hours of audio recording)" but because s 138(7) of the LRA requires brief reasons he would only refer that part of the evidence which he considered top be necessary to determine the dispute and substantiate his findings. As set out above he was not only entitled to adopt this approach, but was required to do so.

[39] In his survey of the evidence he dealt with the material issues by way of overview. The facts as determined by him in this part of his award correspond in material parts largely with the facts as recorded in the pre-arbitration minute to which reference is made hereinabove and to which reference was also made in this part of his award.

[40] Under separate headings he dealt with the issues of "Notice to the employees" (being their entitlement to 7 days' written notice in respect of overtime (in terms of the Collective Agreement for the industry, MIBCO's Main Collective Agreement) and 14 days' notice in terms of the employer's policy.

[41] He also dealt separately with the general practice of stocktakes being done over a 12 hour shift, Overtime being voluntary, the employees' tacit agreement (at first) to work overtime on the day in question, their deciding to leave, the relevance of the overtime sheet they were asked to complete, the position of each of the 13 Applicants, separately and with reference to their respective evidence each time, and the instruction to them to gather at 15h00 in order for the employer to address them (which did not happen, because the employer was some 15 minutes late in arriving, by which time the Applicants had left work, using the company transport which was scheduled to leave at that time.

[42] The arbitrator made *inter alia* the following findings based on the evidence before him:

42.1 The arbitrator found that the employees received notification and were aware of the stock take on 2 December 2019.

42.2 This was *inter alia* based on the fact that notice of the stock take had been given before for earlier scheduled stock takes, the dates for which had been postponed, with the employees having been informed of the postponed dates, if not directly via their managers.

42.3 Be that as it may, on the day in question the Applicants all attended the premises (save for two who arrived at later) at 07h00, when the 12 hour shift was to commence, at which time the premises had already been prepared for the stock take.

42.4 The Applicants would have seen from this that the stock take was scheduled for the day, and from past experience would have known that it was scheduled for a 12 hour shift on that day.

42.5 No complaints were raised about this at that time.

42.6 The only complaints came about when the Applicants became aware of the fact that no meals would be provided.

42.7 That was the issue for them at first, not the fact that overtime work / the stock take was set to follow.

42.8 When the Applicants reported for duty on 2 December 2019, they did not register any objection to working on the stock take that day on account of not having received proper notice.

42.9 On the contrary, the evidence established that they participated in the stock take.

42.10 The additional 4-hours of overtime in the context of the 12-hour stock take shift was agreed to and accepted by the applicant employees.

42.11 That had been the general practice, and the Applicants reported for duty on 2 December 2019, commenced their duties on the basis that they would need to work for 12 hours on that date, only to abandon the stock take at 15h00.

42.12 In that process the arbitrator in effect found that the Applicants had acceded to the Respondent's over time / stock take demand and had waived whatever rights they may have had to insist on written notice to them for a longer period.

42.13 The arbitrator considered the Applicant's contention that they were offered a choice whether to work beyond 15h00 or not by the employer on the day.

42.14 The alleged 'choice' was based on an informal meeting at the loading bay.

42.15 After the food issue had been resolved, the Respondent's supervisor, a certain Ruan Haggard, went around to employees with the list and upon handing out food vouchers to the employees for the meal which had previously been the source of their complaint, and asking the employees to indicate by signing the list that they were going to stay on for the stock take beyond 3 pm, the Applicants refused to sign the list.

42.16 Haggard testified that the purpose of this was a risk assessment exercise in order to establish which of the applicants were going to stay now that the promised food was being provided (in the form of the vouchers) after there had been threats from employees that they were going to leave (upon realising during the course of the stock take that no food was being provided that day).

42.17 Once again, the issue in dispute was the food question, not a dispute about having to work overtime.

42.18 There was no evidence that anyone from management gave any employee permission to leave at 3 pm.

42.19 This was all consistent with the general practice that stock takes took place over a 12-hour shift and that employees were not permitted to leave half-way through the stock take.

42.20 The evidence also established that it was not a requirement that an employee had to sign the list in order to work overtime.

42.21 The evidence established further that it was improbable that the Respondent would provide its workforce with a choice in the circumstances where it required “all hands on deck” in order to complete the stock take within the allocated time for this, given that its usual production was interrupted by the stock take.

42.22 As a result of the Applicants being suspended from work as a result of their refusal to continue with the stock take on the day in question, the stock take taking longer than would otherwise have been the case and replacement labour having to be employed for that purpose in order to complete the stock take, the employer / Respondent suffered hundreds of thousands of Rand in lost production.

42.23 The Applicants who relied on the alleged choice also tendered “dubious excuses” regarding why they could not continue with the stock take, according to the arbitrator.

42.24 None of these excuses for employees having to leave work on the day (as raised in the arbitration) was brought to management's attention on the day nor was any of them raised during the disciplinary hearing.

42.25 Certain of the excuses, for example one of the Applicants' daughter having gone missing on the day, and ultimately having to be collected from the police station (in support of which a letter from the headmaster of her school was tendered in the arbitration), would have met with understanding and sympathy by the employer had the request to be excused been made by the father at the time of this happening (which was some hours before 3 pm in any event). That was not done, leading the arbitrator to conclude that the explanation was not a credible one.

[43] Ultimately, in the Court's view, with the arbitrator having had proper regard to the evidence before him, the arbitrator reasonably found that when Haggard handed out meal vouchers and conducted a risk assessment, he did not present the employees with a choice to leave at 15h00, but simply sought to ascertain whether the employees would be complying with their duties now that the food issue had been resolved.

[44] The fact that the Applicants decided to leave at 3 pm and sought to justify their decision to do so with reference to their being asked to sign the list suggests that they were indeed still aggrieved about the food issue (with the Respondent's kitchen only being able to provide the promised food somewhat later that day, at about 14h00).

[45] This lends further support to the arbitrator's finding that the Applicants had at first agreed to work the overtime in question, but then refused to do so, in breach of that which their contracts of employment required of them, and in disregard of that which the employer required of them.

[46] The claim that that which was presented to them (the signing of the list) being the employer asking for an indication from them, at that late stage, as to whether they were prepared to work over time on the day, i.e asking them to volunteer to do so, was highly improbable and the arbitrator acted reasonably in concluding that which he concluded on this score.

[47] Regarding the announced Top 5 (“T5”) meeting just before 15h00, the arbitrator reasonably found that it was *“strange”* that only 2 employees out of a workforce of 42 did not hear the announcement over the intercom.

[48] It was similarly strange that 5 of the 13 Applicants alleged they did not hear the announcement but made no enquiries regarding the reason all other employees were gathering at the T5 area.

[49] By leaving the meeting, the arbitrator reasonably determined that the Applicants’ defiance of the instruction to remain at work in order to continue with the stock take beyond 3 pm was persistent and deliberate.

[50] When the Applicants decided not to wait at the T5 area for management and, furthermore, proceeded to clock out, they deprived the employer of an opportunity to place them on terms and explain the seriousness of their refusal to work overtime to them.

[51] Prior to that, by arriving at work at 7 am on the day and commencing with the stock take without objection, the Applicants had accepted the instruction on the part of the Respondent to do the stock take without objection and in that process agreed to working overtime, without objecting to whatever short notice thereof there may have been.

[52] Having regard to the totality of the evidence before him, the arbitrator, in the Court’s view on reasonable grounds and after a proper consideration of the facts before him, determined that:

52.1 The Applicants committed serious misconduct.

52.2 They knew they were required to work the 12 - hour shift on the day for the annual stock take (and for the days following on 2 December);

52.3 They did not have permission to leave at 15h00;

52.4 They left in wilful disregard of their instructions.

[53] His finding that the Applicants were required to work overtime on the day, that the instruction to do so had been given to them by their employer and had been accepted by them, that that instruction was not unlawful, and had in any event been accepted by the employees when they arrived at

work on 2 December or by arriving at work on 2 December at 07h00 without raising any objection then or thereafter, which prevented them from claiming at the arbitration that the original instruction was unlawful and could have been ignored, was in my view also a reasonable determination based on a proper assessment of the facts as presented to him in evidence.

[54] Having regard to the totality of the evidence before him, the arbitrator in my view on reasonable grounds and upon a proper consideration of the facts before him, determined the following issues too (if not expressly, by necessary implication) –

54.1 the instruction to work overtime was given by the employer (expressly)

54.2 it was accepted (expressly, tacitly / through conduct and without objection) by the employees

54.3 the instruction was clear

54.4 it was lawful

and

54.5 the Applicants had no good cause / excuse for not complying with the instruction.

[55] They were accordingly held to have committed the disciplinary offences with which they were charged, if not in the same form, in substance and on the same facts, that of wilful disregard of a reasonable instruction – insubordination.

Sanction

[56] The next issue for determination in this review is whether the arbitrator's finding that the employer's sanction of dismissal was justified / reasonable in the circumstances.

[57] The Third Respondent in conclusion found that the employees had committed serious misconduct on the grounds that :

57.1 they knew they had agreed to work the 12 hour stock take shift,

57.2 they did not have permission to leave at 15h00

and

57.3 they “wilfully abandoned the stock take”.

[58] Elsewhere in his award he expresses the view that “When one walks off a shift and there could be the slightest doubt that one does not have permission to leave one should make sure that permission is expressly granted. It must be remembered that the employment relationship is a subservient one.”

[59] And “It simply makes no sense to lose 30% of the employer’s workforce when there are still 4 hours left in a 12-hour shift, especially considering the time that was lost as a result of the dispute about food.”

[60] And “…it is more probable that the employees’ leaving the stock take was a wilful act. Their excuses / reasons for leaving were fabricated after the event.”

[61] This in my view amounts to a finding of gross insubordination, a wilful and serious refusal to obey a lawful and reasonable command alternatively conduct by the employees which posed a deliberate and serious challenge to the employer’s authority.

[62] The Respondent proved before the Third Respondent that the employees had been instructed to do the stock take on the day and that they knew and accepted that they were required to work a 12 hour shift (4 hours of overtime) in order to do so.

[63] The framing of the charge against the employees included the phrase ‘(in) defiance of requests and instructions by abandoning a scheduled stock take’.

[64] The finding of the chairperson who conducted the disciplinary hearing included a reference to the “Company submitted that the trust relationship is absolutely broken”, “….. the misconduct was harmful in that it placed the Company in a difficult position with regard to stock take ….”, all of which amounted to a finding of gross insubordination justifying dismissal.

[65] The chairperson of the disciplinary hearing and the Third Respondent both gave proper consideration to the severely adverse consequences of a dismissal for the employees, their personal circumstances and other factors in mitigation of sanction.

[66] They ultimately decided the dismissals were justified, the chairperson in the disciplinary hearing also finding that the Applicants were unremorseful for their conduct.

[67] The same or similar considerations were taken into account by the Arbitrator in upholding the dismissals, finding them to have been substantively fair and dismissing the claim of substantively unfair dismissals which had been placed before him for determination.

[68] In this regard too it cannot be said that the determination of the arbitrator that the sanction of dismissal was substantively fair was so unreasonable that no reasonable commissioner could have come to that conclusion on the same facts.

[69] The fact that one of the employees' referral of his dismissal to separate arbitration suffered a similar fate to that of the Applicants in the case before the arbitrator is further proof that the findings of the arbitrator in this matter were within the broad band of reasonableness which renders an award such as his unassailable on review.

[70] The arbitrator complied with his duty to, *inter alia*, deal with the substantial merits of the dispute.

[71] The award demonstrates that he grappled with the merits of the dispute before arriving at a reasonable conclusion, having had proper regard to the evidence which had served before him.

[72] It also apparent from the arbitrator's assessment of the evidence that he was alive to the disputes of fact that existed in relation to the parties' respective versions.

[73] The award plainly reveals that the arbitrator, *inter alia*, properly assessed the credibility of the various factual witnesses; their reliability; and the probabilities.

[74] The award is reasonable and justifiable if regard is had to the material which was placed before the arbitrator and the extensive evidence which was led, assessed by him. This demonstrated that the Applicants' dismissal was substantively fair.

[75] Third Respondent (the arbitrator) therefore:

75.1 properly identified the dispute he was required to arbitrate,

75.2 understood the substantive nature of the charges which had been brought against the Applicants in their disciplinary hearing,

75.3 understood the nature and ambit of the dispute he was required to arbitrate,

75.4 identified the issues correctly and applied his mind to the relevant issues,

75.5 gave the parties, who were represented by attorneys, a full opportunity to have their say in respect of the dispute, over the course of many days of evidence,

75.6 considered the material evidence properly and thoroughly,

75.7 dealt with the substantial merits of the dispute,

and

75.8 arrived at a decision that another decision maker could reasonably have arrived at based on the evidence properly assessed in similar fashion.

Conclusion

[76] In the result the application for the review of the award issued by the Third Respondent is dismissed.

[77] Given that the Applicant trade union is representing its members in this dispute and they (the union and its members) are entitled to have the determination of the Third Respondent in this matter challenged by way of

this review, the Court is satisfied that the requirements of law and fairness dictate that each party should pay its own costs in this review.

[78] An adverse costs order in this matter may serve as disincentive to other applicants and their unions in similar circumstances when deciding whether to approach this Court for relief in respect of a similar finding, the consequences of which it is accepted would have been severely prejudicial to those who lost their jobs as a result of their conduct. They are entitled to have that issue properly ventilated and determined in the various *fora* available to them, as has been the case here.

<u>Order:</u>

1. The application is accordingly dismissed.
2. There is no order as to costs.

[redacted]

Stelzner AJ
Acting Judge of the Labour Court of South Africa

Representatives:

For the Applicants:	Jeremy Phillips from Cheadle Thompson and Haysom
For the First Respondent:	Adv L Voultsos instructed by Joubert Galpin Searle