



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JR1633/21

In the matter between:

IDWALA HOLDINGS (PTY) LTD

Applicant

and

NATIONAL UNION OF MINEWORKERS

First Respondent

J BOOYSEN

Second Respondent

**COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION**

Third Respondent

COMMISSIONER M RABIE N.O

Fourth Respondent

Heard: 22 May 2025

Delivered: 15 July 2025

JUDGMENT

SCHENSEMA, AJ

Introduction

[1] This is an opposed application brought by the applicant to review and set aside the arbitration award of the fourth respondent (the Commissioner) in terms of which it was found that the second respondent's dismissal by the applicant was both substantively and procedurally unfair.

[2] The applicant was further ordered to reinstate the second respondent in the same position and on the same terms and conditions of employment that existed prior to his dismissal, together with backpay in the amount of R33 374.08. The reinstatement was effective from 1 June 2021.

Background

[3] The applicant has submitted that it is a mining and manufacturing operation with mines and plants in Johannesburg, Vereeniging, Phalaborwa, Port Shepstone and Danielskuil.

[4] The second respondent was employed at the applicant's Danielskuil operations at the time of his dismissal.

[5] At all material times prior to the events leading to the second respondent's dismissal, the level 5 national lockdown had been declared. In light of the fact that the applicant was deemed an essential service, it was permitted in terms of the Disaster Management Act¹ to continue with its production of lime and limestone, which is used *inter alia* for water purification, generation of electricity and in the food and packaging industries.

[6] Owing to its designation as an essential service, the lime operation situated in Danielskuil was permitted to continue its operations.

¹ Act 57 of 2002.

[7] Several meetings were held at the plant during the week of 20 March 2020, with the trade unions and employee teams to ensure their understanding that the applicant was permitted to continue working during the lockdown and that all the required health and safety measures had been implemented at the plant.

[8] In summary, the misconduct for which the second respondent was charged and dismissed emanated from a voice note which the second respondent caused to be distributed to the workforce on 26 March 2020, while the applicant was making arrangements to continue production after the country went into lockdown during the first wave of the COVID-19 pandemic.

[9] During the evening of 26 March 2020, the general manager, Mr Jaco Swanepoel, received a telephone call from Mr Cornelius Mahne of the NUM regional office. The purpose of his call was to ascertain whether the applicant's operations would be continuing. Mr Swanepoel explained the situation to Mr Mahne and further agreed to meet with Mr Mahne on Sunday or Monday to discuss any further issues that were of concern to the union.

[10] Some time later that evening, Mr Swanepoel received a voice note that had been distributed by the second respondent, in which the second respondent advised the applicant's employees, (without the applicant's authorisation) that only the artisans and burners would be working during the weekend and specifically mentioned that dispatch, raw stone, quarry and crushing were not going to work. The second respondent further informed via the voice note that the night shift would be leaving at midnight.

[11] Mr Swanepoel, in response to the voice note in various WhatsApps, requested Mr Mahne to intervene. The applicant further addressed the employees on site about the production plans, and Mr Magawu, a NUM shop steward, was also asked to intervene.

[12] Notwithstanding the second respondent's voice note, the applicant's management was satisfied that all employees understood that the plant would

continue to run. During this time, the second respondent was on sick leave and was therefore not present during the various engagements with the employees.

[13] At midnight on 26 March 2020, four NUM members working in the quarry department went home before the end of their shift and were subsequently issued with warnings.

[14] The following day, the quarry manager, Mr Fitzpatrick, was informed by Ms Potelo, a supervisor, that the employees were not working as they sought clarity in respect of the voice note which had been circulated by the second respondent. After being addressed by Mr Swanepoel, the employees returned to their workstations.

[15] Despite the employees returning to their workstations, the second respondent and Mr Magawu, the NUM branch secretary, began to address the employees and informed them that they must not work until they had received “in black and white” the authorisation for the applicant’s operations to continue. Mr Fitzpatrick attempted to intervene the second respondent’s address for the purpose of informing him that the applicant was in possession of the certificate, but the second respondent refused to let him speak.

[16] By this stage, more than four hours of production had been lost, and the second respondent was subsequently suspended and charged with incitement and gross insolence and dismissed on 3 June 2020 at the conclusion of a disciplinary enquiry.

[17] It is common cause that the second respondent was on sick leave from 20 March 2020 and that he was still on sick leave on 26 March 2020. As a result of his absence, the second respondent had not participated in any of the meetings the applicant had held in respect of the lockdown preparations.

The award

[18] The Commissioner determined that, on a balance of probabilities, the dismissal of the second respondent was procedurally and substantively unfair.

[19] The procedural unfairness finding was confined to the second respondent's objection concerning the internal chairperson's reliance on a letter that had not been introduced during the disciplinary enquiry for purposes of determining a sanction. Given that the second respondent was not granted an opportunity to respond to the document in question, the dismissal was rendered procedurally unfair.

[20] In terms of substantive fairness, the Commissioner's analysis of the evidence, arguments and findings which dealt with the three charges individually, can be summarised as follows:

Charge 1

20.1 In respect of charge one, the Commissioner determined that it was common cause that the second respondent sent out the voice note on 26 March 2020;

20.2 It was further common cause that, in light of the National lockdown, NUM sought clarity from the applicant as to the status of the applicant's business and whether it was permitted to continue operating. NUM further requested confirmation of the permission granted to the applicant in writing;

20.3 In response to the request, the applicant informed NUM that, given the essential service status of the business, it was not required that it apply for permission to continue operating. The Commissioner records at paragraph 57 of his award that despite the applicant's essential service status, this did not detract from the fact that the uncertainty remained as to the status of the applicant;

20.4 The Commissioner rejected the applicant's argument that there was no basis for NUM to engage with the applicant on its operation before the commencement of the lockdown. The Commissioner held the view that it is the union's duty to ensure compliance with laws affecting the well-being of its members;

20.5 On 26 March 2020, while the second respondent was on sick leave, he was contacted by Mr Magawu regarding the matter of a permission letter for the applicant in respect of the lockdown period, which he was asked to address with Mr Mahne, the Regional Secretary of NUM;

20.6 Mr Mahne communicated as to what he thought was an agreement between himself and Mr Swanepoel. Mr Mahne subsequently instructed the second respondent to communicate with NUM's members. The second respondent complied by sending the voice note;

20.7 The voice note reflects that there was an agreement between Mr Mahne and Mr Swanepoel that only artisans and burners would work from midnight on 27 March 202 and that there would be further engagement with the applicant's management and NUM over the weekend;

20.8 The dispute relates to whether Mr Mahne and Mr Swanepoel reached an agreement on the terms as explained in the voice note. Mr Swanepoel denied that he had reached such an agreement with Mr Mahne and that both parties conceded during the proceedings that there may have been a misunderstanding. The Commissioner further records at paragraph 61 that it would not be fair for the second respondent to bear the brunt for the misunderstanding between Mr Mahne and Mr Swanepoel;

20.9 The applicant submitted through its evidence that the second respondent had not conveyed the message as he had received it from Mr Mahne. This, the Commissioner disagrees with on the basis that he accepted Mr Mahne's evidence that the voice note contained the correct message and therefore accepted that the second respondent had simply carried out the instruction he had received from Mr Mahne;

20.10 The applicant was adamant that the second respondent was in no position to communicate such a decision (as contained in the voice note) and that the applicant would never use NUM or its shop stewards to communicate instructions. The Commissioner in this regard is of the view that the second respondent was not acting on his own behalf but on behalf of NUM, and as the branch chairperson, he was entitled to execute his union responsibilities without having to defer to the applicant;

20.11 In summary, the Commissioner considers the applicant's opposition to this version as *'tantamount to denying the union the right to check the respondent's (applicant's) compliance with legislation'*; and

20.12 The applicant had failed to demonstrate through its evidence that the voice note was sent to encourage the employees *'to participate in unlawful conduct by withholding their labour'* and that NUM through its actions was

merely acting in the interests of its members to ensure their safety and wellbeing and found the second respondent not guilty of charge 1.

Charge 2

20.13 The second respondent had been on sick leave when he was instructed to come to site to address the members on 27 March 2020. The purpose of the address was for the second respondent to provide clarity to NUM's members, in respect of the voice note that he had sent out on 26 March 2020;

20.14 At the time of the meeting on 27 March 2020, the second respondent had yet to receive the "permission" letter from the applicant that it was permitted to operate during the lockdown;

20.15 Mr Mahne had not communicated to the second respondent that there had been a misunderstanding in respect of the agreement reached with Mr Swanepoel that gave rise to the voice note;

20.16 In light of the misunderstanding and the fact that the second respondent was not aware of this misunderstanding, it was not unreasonable for the second respondent to send out the voice note. This failure must be attributed to Mr Mahne;

20.17 There is no substance to the claim that the second respondent had incited NUM's members in the meeting to withhold their labour. The Commissioner bases this finding on the fact that the meeting was adjourned when the second respondent was called by management to attend a meeting. The Commissioner further considers it to be unfair that the second respondent had been fetched from home whilst on sick leave to clarify the voice note and to use the clarification he provided as a means to issue a charge of incitement. The only person who could have clarified the misunderstanding was Mr Mahne;

20.18 No evidence was led by the applicant to support its charge that the employees were incited to withhold their labour. Ultimately, had the applicant not made the arrangements to fetch the second respondent from his home, these events would not have occurred; and

20.19 Having considered the evidence in totality, the Commissioner determined that the second respondent was not guilty of the second charge.

Charge 3

20.20 During the meeting on 27 March 2020, the second respondent did not permit Mr Fitzpatrick to speak when asked to do so. The Commissioner determined that, notwithstanding procedures for meetings, there was no basis for the second respondent not to have provided Mr Fitzpatrick with an opportunity to be heard; and

20.21 Furthermore, given Mr Fitzpatrick's position and the fact that this occurred during the meeting, the Commissioner held the view that the second respondent's conduct constitutes gross insolence. In light hereof, the second respondent was found guilty of the third charge.

Sanction

20.22 The Commissioner holds the view that the evidence demonstrates a cordial relationship between the second respondent and Mr Fitzpatrick. This assessment is primarily based on the fact that Mr Fitzpatrick drove the second respondent to the exit gate, and whilst driving there, Mr Fitzpatrick was making jokes; and

20.23 Having considered the applicant's disciplinary code, which provides for a written warning for insolence, that a dismissal was not appropriate and issued a final written warning. In conclusion, the Commissioner determined that the second respondent's dismissal was substantively unfair.

Analysis of the award

[21] In effect, the Commissioner found that the second respondent's conduct did not constitute a significant operational risk to the applicant's business and that the second respondent's conduct during the meeting on 27 March 2020, whilst grossly insolent, did not justify a dismissal.

[22] The Commissioner provided no further reasons for his conclusion. He did not state what evidence made it clear that, on a balance of probabilities, the second respondent and his witnesses' versions were more credible than those of the applicant. He made no attempt to place into proper context the numerous discussions held with the union and the employees prior to the second respondent's return to the workplace on 27 March 2020, with reference to what measures had been implemented by the applicant to ensure the health and safety of all.

[23] The Commissioner further failed to consider the impact of the second respondent's gross insolence, which gross insolence took place in an open forum and was further directed at a senior manager.

[24] In short, the Commissioner failed in his primary task to properly assess the credibility and probabilities of the respective versions.

Grounds of review

[25] The applicant holds the view that the Commissioner's award fails to meet the standard of reasonableness required by the authorities and denied the applicant a fair trial for the following reasons:

25.1 The Commissioner's conclusion that the second respondent's dismissal was substantively unfair, based on the premise that he merely relayed a message on behalf of his Union at the applicant's invitation, and that his only fault was "rudely" interrupting the quarry manager during the meeting, an act deemed not to have damaged the trust relationship, amounts to a sanitised portrayal that does not align with the law, the facts or the inferences to be drawn on for the following reasons:

25.1.1 the finding of procedural unfairness is based purely on the presiding officer's reference to a letter dated 20 May 2019, which indicated that the relationship between the applicant and the shop stewards needed to be improved. The Commissioner failed to explain how this sustained an allegation of bias by the presiding officer, who is a layperson;

25.1.2 the Commissioner further failed to explain why NUM alleged that reference to this document tainted the proceedings in any way;

25.1.3 the applicant does not take issue with the Commissioner's finding that the employee was grossly insolent, but submits that he underplayed its effect on the assembled employees, and to take into account the context in which this insolence occurred;

25.1.4 while trade unions might have had a right and duty to engage the applicant before the lockdown, the Commissioner ignored the fact that

management had gone to great lengths to do so and to explain how the lockdown measures would affect operations at the plant;

25.1.5 the Commissioner's finding that the employee had merely carried out the instructions of his Union when he sent out the voice note flew in the face of the evidence led by the applicant on this issue in the following respects:

25.1.5.1 the second respondent was on sick leave at the time and had taken no part in the discussions between management and unions which preceded the circulation of the message. He made no effort to clarify the position with management before circulating the voice note or addressing the meeting he had convened without authority;

25.1.5.2 it was not possible for Mr Swanepoel to have conveyed the detailed references set out in the voice note to Mr Mahne, who could not have had such intimate knowledge of the applicant's operation in that short period;

25.1.5.3 Mr Mahne could therefore not have dictated the message to the second respondent. Mr Mahne did not produce notes of what he was allegedly told by Mr Swanepoel. Furthermore, a decision to stop the entire operation and its ability to dispatch, and therefore generate revenue, would not have been taken during a telephone call with a union official, particularly after the time and effort that had gone into ensuring that the applicant's operations continued;

25.1.5.4 the only inference to be drawn from the evidence is that the second respondent took it upon himself to distribute the voice note with the intention of ensuring that all employees, apart from artisans and burners, would stay away from work despite the clear evidence that all employees knew that the plant would be fully operational;

25.1.5.5 the second respondent had no authority to call an impromptu meeting with the employees, without first reporting to management; and

25.1.5.6 evidence was led that the applicant would never use the shop stewards to convey operational decisions to the workforce.

25.1.6 Due to the above errors, the remaining findings drawn by the Commissioner were inevitably unreasonable and unjustifiable in that:

25.1.6.1 there had been no 'misunderstanding' between Mr Swanepoel and Mr Mahne about whether they had agreed to the contents of the voice note. The voice note and what the second respondent conveyed at the

meeting were clearly aimed at persuading all employees, other than artisans and burners, from reporting for duty. This plainly amounts to incitement;

25.1.6.2 the second respondent's conduct was not aimed at preventing NUM from checking the applicant's compliance with legislation. At that point, neither the second respondent nor the union officials knew anything about the regulations, other than that some employers would be required to shut down;

25.1.6.3 the voice note and the employee's words in the meeting he had convened was nothing more or less than a 'call to the workforce' to withhold their labour. As a result, the applicant's entire operations were halted, and significant production time was lost; and

25.1.6.4 even if Mr Fitzpatrick and the second respondent had parted on seemingly cordial terms after the latter was suspended, the Commissioner failed to have any regard to the employee's flagrant disregard of management's authority and the lack of remorse he displayed at the disciplinary enquiry.

[26] The applicant considers that the above reasons demonstrate that the manner in which the Commissioner approached the matter constituted '*misconduct in relation to the performance of his duties as a commissioner*' and/or a '*gross irregularity in the proceedings*' and the authorities by misconstruing the evidence and issue before him and the applicable law, and that the outcome was therefore unreasonable.

[27] In opposition, the first respondent takes issue with the following:

27.1 at the time of the national disaster declared by the President during March 2020, there was uncertainty in the mind of the second respondent as to the applicant's entitlement to operate as an essential service;

27.2 the applicant had not produced a permit to operate as an essential service in the days prior to the lockdown commencing, but only its application to the Department of Mineral Resources;

27.3 the respondent considers the discussion between Mr Mahne and Mr Swanepoel as having concluded an agreement that the artisans and employees working at the kiln were considered essential and that only they would continue rendering services until such time as the follow-up discussions were held;

27.4 the finding in relation to procedural unfairness based on bias on the part of the internal chairperson was the correct conclusion in law, which is based on the conceded fact by the applicant's representative that the letter which was considered by the chairperson had not been admitted into evidence. This letter was considered in aggravation of sanction, resulting in a more severe sanction being imposed. The respondents should have been permitted an opportunity to influence the chairperson's reasoning in this regard by being afforded an opportunity to pose questions with regards to the letter and to make submissions in respect thereof;

27.5 in summary given the unpredictability during this time, the fact that the applicant was not able to produce substantial proof in the form of a permit to operate, which proof was only produced once the lockdown had commenced, coupled with the fact of the uncertainty, workers were concerned about their health and entitlement to continue working;

27.6 the second respondent had simply conveyed what had been communicated to him by Mr Mahne, and the second respondent had not been in a position to consult with management prior to circulating the voice note, as he was off sick;

27.7 the second respondent had received permission from the applicant to address the employees for the purposes of providing clarity; and

27.8 as a result of the dispute of fact in relation to the discussion held between Mr Mahne and Mr Swanepoel, there is no basis upon which the applicant can suggest that the Commissioner ought not to have rejected Mr Swanepoel's evidence.

[28] In reply to the answering affidavit, the applicant takes issue with the fact that Mr Lekhonkhobe played no part in the activities as set out in the answering affidavit, and no confirmatory affidavit is attached. Accordingly, a number of paragraphs constitute inadmissible hearsay and fall to be struck out or disregarded. For the reasons set out below, there is no need for this Court to make a determination in relation to the preliminary point raised by the applicant.

Test for review

[29] In a range of cases, starting with *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*² and the jurisprudence that followed³, the test on review and as set out in the matter of *Herholdt v Nedbank Limited*⁴, the Supreme Court of Appeal has defined with greater clarity the standard of review:

29.1 It must be established, either that the arbitrator has misconceived the nature of the enquiry, or that they arrived at an unreasonable result.

29.2 For an award to be unreasonable, the arbitrator's conclusion must be one that a reasonable decision-maker could not reach on the material that was before the arbitrator.

29.3 Material errors of fact, including errors concerning the weight and relevance to be attached to certain facts, are only of consequence if their effect is to render the outcome unreasonable.

29.4 If the arbitrator's reasons provide a reasonable 'route' leading towards the conclusions, it must follow that the decision is one that could have been reached (and in fact was) by a reasonable decision-maker. A review application would, in such circumstances, not succeed.

29.5 Even if there are flaws in the arbitrator's reasons, a review must still consider whether, apart from the arbitrator's reasons, '*the result is one a reasonable decision maker could reach in the light of the issues and the evidence*'⁵.

29.6 A review court is required to examine the merits '*in the round*' only.

[30] It is thus obvious that reasonableness can only be assessed with regard to the evidence before the decision-maker.

[31] It is uncontroversial that the review test is whether an arbitrator has misconceived the nature of the enquiry or arrived at an unreasonable result.⁶ A result

² (2007) 28 ILJ 2405 (CC).

³ *Cusa v Tao Ying Metal Industries and others* 2009 (2) SA 204 (CC); *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and others* (2008) 29 ILJ 964 (LAC); *Herholdt v Nedbank Ltd (COSATU as amicus curiae)* 2013 (6) SA 224 (SCA) (*Herholdt*); *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and others* [2014] 1 BLLR 20 (LAC).

⁴ *Herholdt* supra.

⁵ *Ibid* at para 12.

⁶ *SA Rugby Union v Watson and Others* (2019) 40 ILJ 1052 (LAC) at para 25.

will be considered to be unreasonable if it is one that a reasonable arbitrator could not reach on all the material presented to him or her.⁷

[32] In respect of irreconcilable versions, the Labour Courts have generally held that the duty of a commissioner mirrors that of a judge in a trial court, as expressed by the Supreme Court of Appeal in *Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others*⁸ (*Stellenbosch Farmers' Winery*):

'To come to a conclusion on the disputed issues a court makes findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be latter. But when all factors are equipoised probabilities prevail.'

⁷ *ibid.*

⁸ 2003 (1) SA 11 (SCA) at para 5.

[33] In *Sasol Mining (Pty) Ltd v Nggeleni NO and Others*⁹ (*Sasol Mining*), Van Niekerk J (as he then was), after quoting the abovementioned passage from *Stellenbosch Farmers' Winery*, held as follows:

'[9] One of the commissioner's prime functions was to ascertain the truth as to the conflicting versions before him. As I have noted, this much the commissioner appears to have appreciated. What he manifestly lacked was any sense of how to accomplish this task, or which tools were at his disposal to do so. The commissioner was obliged at least to make some attempt to assess the credibility of each of the witnesses and to make some observation on their demeanour. He ought also to have considered the prospects of any partiality, prejudice or self-interest on their part, and determined the credit to be given to the testimony of each witness by reason of its inherent probability or improbability. He ought then to have considered the probability or improbability of each party's version.'

[34] The Labour Appeal Court cited and applied *Stellenbosch Farmers' Winery* and *Sasol Mining* with approval in *South African Breweries (Pty) Ltd v Hansen and others*¹⁰:

'[16] ... There are, however, two irreconcilable versions on the evidence in relation to this question. In resolving the dispute of fact, the Commissioner was, accordingly, required to make findings on the credibility of the various factual witnesses; their reliability; and the probabilities. The Commissioner was, as such, obliged to assess the credibility of each of the witnesses who testified at the arbitration, and in doing so, was required to consider the prospects of any partiality, prejudice or self-interest on their part and the weight to be attached to their testimony by reason of its inherent probability or improbability. At the very least, in relation to the witnesses who testified in favour of SAB, the Commissioner ought to have considered (i) their candour and demeanour; (ii) their bias, latent and blatant compared to that of Hansen; (iii) internal and external contradictions in their evidence; (iv) the probability or improbability of particular aspects of their versions; and (v) the calibre and cogency of their performance compared to that of Hansen. It is, however,

⁹ (2011) 32 ILJ 723 (LC) at para 9.

¹⁰ (2017) 38 ILJ 1766 (LAC).

clear from her award, that the Commissioner failed to consider any of these things.’

[35] The Labour Appeal Court found that the failure by the commissioner to conduct a proper assessment of the probabilities of the competing versions, and (as a key part of that inquiry) the credibility of the various witnesses and versions, amounted to a reviewable irregularity, sufficient to warrant setting aside the arbitration award:

‘[28] To sum up, there were a number of gross irregularities in the proceedings, which included the Commissioner’s: (a) failure to evaluate significant common cause facts; (b) arbitrary and unreasonable rejection of corroboratory evidence tendered on behalf of SAB; (c) disregard of Hansen’s latent or blatant bias; and (d) unreasonable and arbitrary reliance on documentary evidence which was shown on the unchallenged evidence to be inaccurate and unconfirmed. But for these irregularities, the Commissioner would have arrived at a different conclusion. The Labour Court’s approach to the review, in my view, was to unduly defer to the findings of the Commissioner as opposed to considering whether there were irregularities in the proceedings, and if so whether they were material to the outcome. Thus, had the Labour Court followed the two-stage approach to the review, as articulated by this Court in *Gold Fields*, it would have concluded that the irregularities committed by the Commissioner were material to the outcome, and that having regard to the evidence before her, her decision was not one which a reasonable decision-maker would have arrived at. Simply put, the Labour Court ought to have found that the award was unreasonable as it was entirely unsupported by the evidence.’¹¹

[36] In *Platinum Mile Resources (Pty) Ltd v CCMA and Others*¹², Prinsloo J held:

‘[54] The arbitrator had to follow the approach as set out by this Court and he had to conduct an assessment of the credibility of the factual witnesses, their reliability and overall assessment of the inherent probabilities of the irreconcilable versions before him.

¹¹ Ibid at para 28.

¹² (JR 427/20) [2023] ZALCJHB 52 (1 March 2023)

[56] Glaringly absent from the arbitration award is an assessment of the versions, of the credibility of the witnesses and the inherent probabilities of the versions presented. In fact, there is no consideration of any of the factors set out in *Sasol Mining*.

[57] The arbitrator merely recorded that, on a balance of probabilities, the Applicant failed to prove that Mr Maegala was guilty of the charge. This finding of the arbitrator is astonishing given the arbitrator's failure to consider the evidence holistically. There was evidence of the Applicant's two witnesses, which was uncontested in material respects, yet there is no consideration of their testimony. How the arbitrator could make a finding on a balance of probabilities without any consideration of the probabilities, is shocking.

[58] The arbitrator failed to take cognisance of the material evidence placed before him and he had failed to assess the totality of the evidence presented. It was incumbent upon him to make credibility findings and to state why he accepted one version and rejected another, which he dismally failed to do. The arbitrator had no sense of how to accomplish this task and he failed in his duties as arbitrator. There was no analysis in the arbitration award and evidently, the arbitrator was wholly incapable of analysing the evidence.

[59] The essential ingredients of an assessment of the credibility of the witnesses and the inherent probability or improbability of the versions before him are not there in the arbitration award. The arbitrator did not undertake a full analysis of the evidence and the probabilities as they presented themselves during the arbitration proceedings and he did not consider the evidence in light of the probabilities, self-interest and credibility of the witnesses.

[60] The arbitrator was required to make a factual adjudication on the issue of misconduct and he had to do that by considering and assessing all the facts placed before him. The arbitrator did none of that. Glaringly absent from

the award is any consideration of the probability of the versions, considered against all the evidence presented.

[67] In summary: the arbitrator failed to consider the central dispute that served before him, he ignored relevant evidence, he failed to take into account the totality of the evidence, he failed to conduct a proper appraisal of the evidence, he rejected the Applicant's version without any proper analysis and evaluation of the evidence, and he had no regard to evidence that was material and relevant. All of these constitute material misdirections.

[68] The relevant authorities indicate that misdirections of this sort invariably have the consequence that an award will be unreasonable in its result. Whether the award stands to be set aside is a second-stage enquiry which requires an assessment of the reasonableness of the outcome. A review court may intervene if and only if the outcome or result of the proceedings under review represents a decision to which no reasonable decision maker could come on the available evidence. What this requires is for the review court to determine whether on the evidence, and regardless of any reviewable irregularity committed by the arbitrator, the result should nevertheless be sustained because it represents a reasonable outcome.

[69] For the reasons already alluded to *supra*, I am not persuaded that the outcome of the proceedings under review can be sustained. It is unreasonable and does not pass the test as set out in *Sidumo*.'

Application to the facts

[37] The common cause evidence is that the second respondent had addressed the workers by way of a voice note, without an attempt to first clarify the situation with management and further rudely rejected the attempt by Mr Fitzpatrick to clarify the position during the meeting on 27 March 2020.

[38] Given the evidence of Mr Mahne and his uncontested lack of knowledge of the applicant's operations, it would not have been possible for him to have conveyed

the detailed information he had to the second respondent. There was accordingly no basis upon which the Commissioner could have rejected this evidence.

[39] The detailed voice note could further not be considered to convey a misunderstanding given the level of detail contained therein. The second respondent had no authority to inform the employees who would or would not be working, and the undisputed evidence was that the applicant would never use NUM or its shop stewards to convey messages to its workforce.

[40] The second respondent, during his testimony, confirmed that he had no knowledge of the Disaster Management Act and applicable regulations, and due to his absence, had not received any training in health and safety protocols. Accordingly, the second respondent's insistence that the applicant required a permit (despite the applicant being considered an essential service) was baseless.

[41] The Commissioner fails to evaluate the credibility of the evidence of the second respondent or Mr Mahne. Furthermore, given its essential service status, it would have been improbable and nonsensical for the applicant to have agreed to what was stated in the voice note.

[42] The failure by the Commissioner to conduct a properly reasoned analysis of the credibility of the respective versions resulted in a gross irregularity that taints the entire award.

[43] The oral evidence, together with the bundle of documents, does not support the Commissioner's conclusions that, on a balance of probabilities, the applicant failed to discharge its onus in proving the second respondent's dismissal as being procedurally and substantively fair.

[44] Furthermore, the Commissioner's failure to assess whether the sanction of dismissal was fair in the circumstances clearly demonstrates his failure to properly analyse the evidence before and to further take into consideration the operational risk/s the second respondent posed to the applicant's operations and what impact his conduct had on the trust relationship.

[45] In respect of the procedural fairness challenge, the Commissioner similarly failed to take into consideration the fact that the document was a letter to the first respondent complaining about strained relations between management and the union. No evidence was led to demonstrate how the consideration of a letter dated 20 May 2019 would result in the chairperson of the internal disciplinary enquiry being biased.

[46] Furthermore, any so-called procedural defect that had occurred during the initial enquiry, if any, would have been cured given the fact that the second respondent lodged an internal appeal. This evidence was clearly not considered by the Commissioner.

[47] As a result, the award must be set aside. The Commissioner's irregularities are such that they result in a misconceived decision which no reasonable decision-maker could reach on the material that was before him.

[48] In exercising my discretion and given that the complete record of the arbitration proceedings is before me, I have decided to substitute the arbitration award rather than remit the matter for a fresh hearing.

Costs

[49] This Court has a wide discretion in awarding costs. I am of the view that this is a matter where the interests of justice will be best served by making no order as to costs.

[50] In the premises, I make the following order:

Order

1. The arbitration award issued by the fourth respondent under case number NC 1654/20 is reviewed and set aside in its entirety, and is replaced with an award in the following terms:

'The second respondent's dismissal is procedurally and substantively fair.'

2. There is no order as to costs.

H Schensema

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Advocate JG Grogan instructed by Joubert Galpin
Searle Attorneys

For the Third Respondent: Advocate MS Monene instructed by Mohale
Incorporated