



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JR 21/23

In the matter between:

THARISA MINERALS (PTY) LTD

Applicant

and

**COMMISSION FOR CONCILIATION
MEDIATION AND ARBITRATION**

First Respondent

COMMISSIONER MMELI ANDRE DANISA N.O

Second Respondent

**NATIONAL UNION OF PUBLIC SERVICE
AND ALLIED WORKERS obo BONGIKOSI
MASEKO**

Third Respondent

Heard: 24 April 2025

Delivered: 14 August 2025

JUDGMENT

DJAJE, AJ

Introduction

[1] The applicant filed this application to review and set aside the arbitration award issued by the second respondent, which cleared the third respondent of guilt and granted reinstatement along with 11 months' backpay amounting to R264 333.08.

[2] The third respondent commenced his employment with the applicant on 7 January 2019 as a Face Shovel (FS) Operator earning a monthly salary of R24 030.28. Four charges were preferred against the third respondent:

- '(a) Failure to carry out a lawful instruction by the mine manager issued in a meeting;
- (b) Unauthorised or uncommunicated absence from work during a shift;
- (c) Flagrant disregard of the general safety rules of the Respondent, in that he used the LDV without doing the pre-check list and the safety of the bakkie therefore unknown [sic];
- (d) Theft and/or unauthorised possession of the Respondent's property, in the he used the LDV.'

[3] On 9 December 2021, he was found guilty and dismissed. He referred the dismissal for arbitration on 24 January 2022. On 25 November 2022, the commissioner handed an award in favour of the third respondent as stated above.

[4] The commissioner found that the dismissal was procedurally fair but substantially unfair. The third respondent was found guilty on charge 2 of '*Unauthorised or uncommunicated absence from work during a shift*', and the commissioner found that dismissal would not be an appropriate sanction. The sanction imposed was a final written warning. On the other charges, he was found not guilty, hence the award for reinstatement and payment of backpay.

[5] The applicant conducts a business of Opencast Mining Operations in the Republic of South Africa, with its mining activities located at Marikana in the North

West Province. The incident occurred on 11 October 2021, when the third respondent was directed by the Mine Manager to operate an 'FS1' machine. The applicant alleges that, instead of following these instructions, the third respondent took the applicant's light delivery vehicle (LDV) and used it for his own purposes without completing the required documentation or obtaining the necessary authority.

[6] I turn now to consider the parties' respective evidence and the commissioner's findings in light of the trite test to be applied in review applications within this Court.

Evaluation

Failure to carry out a lawful instruction

[7] The applicant argued that the third respondent was obliged to carry out a lawful instruction by the mine manager as it was issued at the meeting of 11 October 2021. The third respondent testified that at the said meeting, he was instructed to operate the F2 machine on that day to move 10 000 tons of tare. He then responded that the machine was not working. The machine that was working was the F1, which was already operated by Mr Mashaba. After the meeting adjourned, the other machine, the F1, was already taken, and the one he was supposed to operate was not working. Mr Mashaba testified that he was using the F1 machine for the entire shift on that day.

[8] It is the applicant's case that in the meeting, it was agreed that the third respondent would operate the F1 machine, and as such, the commissioner erred in finding that the instruction was unreasonable and unfair. The applicant argued that the third respondent went missing after the meeting for the entire shift, displaying a clear intent to defy the instructions by the mine manager. In addition, that the third respondent failed to inform the supervisor that the F1 machine was operated by Mr Mashaba, and he could not carry out the instruction.

[9] It was submitted that the commissioner failed to apply his mind to the version of the third respondent that he went to check if the F2 machine was being fixed, but

failed to inform his immediate supervisor about all that. According to the applicant, the commissioner's finding that the third respondent was guilty of failing to communicate his whereabouts during the shift and not guilty of failing to carry out an instruction during the same shift is unreasonable. It was argued that if the commissioner had considered that the third respondent was given an instruction to work during that shift, he would have determined that there was defiance of authority.

[10] In contention, the third respondent argued that after the instruction was given at the meeting, everyone left, and the third respondent had hope that the machine that he was supposed to operate would be fixed. He then went to check on it. He could not operate the other machine as it was already operated by someone else. As a result, he could not carry out the instruction by the mine manager.

[11] The commissioner in the award made the following findings:

'The fact that the instruction was given is common cause. The applicant was able to prove that he did not have the tools, an FS machine to execute the instruction. He was able to prove this by his own testimony which was substantiated by the operator of FS1. The applicant was able to prove that he was not a standby operator and that he operated FS2 which was broken down. He was able to prove that he tried to get FS1, but the original driver had already taken it and the actual driver came and corroborated the applicant's version. There was therefore no way in which the applicant could have executed the instruction for him to take out 10 000 tons without a machine.'

[12] In *Exxaro Coal Mpumalanga Pty Ltd (Matla Coal Mine) v Commission for Conciliation, Mediation and Arbitration and Others*¹, the court held as follows:

'...Should it be shown that the instruction was unlawful, it would be the end of the enquiry. If it is found that the instruction was lawful, the expectation is that the employee to whom such instruction was issued should have complied. It will have little, if any, to do with whether the instruction related to the

¹ Unreported judgment under case no: JR269/11 delivered 2015 at para 15.

employee's job description because it will never be a justification for an employee to refuse lawful instructions merely because the instructions are not his or her direct functions.'

[13] The Labour Court in *Independent Risk Distributors SA (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*² stated that, in order to be found guilty of insubordination, an unrepentant intransigence against a good instruction issued by a superior must be present. Moreover, for such obstinacy to be dismissible, it must be gross (serious, persistent and deliberate).

[14] In *Palluci Home Depot (Pty) Ltd v Herskowitz and Others*³, the Court stated that insubordination in the workplace involves a wilful and serious refusal by an employee to obey a lawful and reasonable instruction, or conduct that poses a deliberate and serious challenge to the employer's authority. The Court clarified that while defiance of an instruction may indicate such a challenge, this is not always the case.

[15] It is common cause in this matter that there was a lawful instruction by the mine manager to the third respondent. The instruction was reasonable, and there was no compliance. The reason for non-compliance by the third respondent was that he had no equipment to carry out the instruction. The supervisor at the hearing testified that the third respondent did not communicate his inability to carry out the instruction. The third respondent, on the other hand, insists that it was known that the F2 machine that he operates was not working as he reported in the meeting.

[16] The evidence of Mr Sethedi, who was the immediate supervisor of the third respondent, was that the third respondent was missing throughout the entire night shift. This lends credence to his evidence that the third respondent did not report to him that someone else was operating the machine the entire night, and he could therefore not carry out the instruction by the mine manager. The commissioner made a finding that the third respondent was guilty of not communicating his absence during the shift. This finding goes hand in hand with the failure to carry out the

² (JR 1906/19) [2022] ZALCJHB 282 (11 October 2022) at para 31.

³ (2015) 36 ILJ 1511 (LAC) at para 19.

instruction. The absence of the third respondent during his shift meant that he was not working and consequently not carrying out the instruction by the mine manager. If indeed the third respondent could not carry out the instruction since the machine was being used by someone else, nothing prevented him from reporting to his immediate supervisor. Instead, he went missing without being given permission.

[17] In its heads of argument, the applicant referred to *Sarrahwitz v Motor Industry Bargaining Council (DRC) and Others*⁴ where the court held that a refusal to communicate with an immediate supervisor, coupled with a failure to respond positively to persistent requests in total disregard of the employer's business, constitutes insubordination. This is quite apposite in this matter as the third respondent failed to communicate with his immediate supervisor, which resulted in him not carrying out an instruction to perform his duties, which impacted the applicant's business.

Flagrant disregard of the general safety rules of the mine

[18] The third respondent did not deny that he drove the LDV without the Artisan signs on the pre-check list. The respondent's version was that he did conduct a checklist and that he had tested the brakes before using the LDV. The only issue was that he did not obtain the artisan's signature. The evidence led during the arbitration was to the effect that the policy clearly states that '*All LDVs must have a pre-use checklist and it must be completed before using the vehicle. The LDV checklist will be signed off by the Driver and the Artisan*'. This was not denied by the respondent. However, there was evidence that a common practice within the company was for drivers to conduct a checklist in the absence of an artisan and use the LDV without obtaining his signature.

[19] The commissioner in the award concluded that the respondent successfully proved that he had carried out a checklist, which included brake checks. Additionally, the respondent demonstrated that it was standard practice for drivers to perform their own checklists without the assistance of an artisan. The commissioner also found

⁴ (PR152/2021) [2023] ZALCPE 22 (13 October 2023).

that there is no procedure in place to guide workers when the artisan is unavailable; therefore, the respondent could not have been wrong or guilty of flagrant disregard of the safety rules.

[20] During the cross-examination of the respondent's supervisor, Mr. Sethedi, it was put to him that he had previously conducted a pre-checklist on a bakkie without it being signed by an artisan, which is exactly what the respondent had done. Mr. Sethedi disputed this and testified that he did not use the bakkie, but it was different in the respondent's case, as he drove the bakkie out of the mine. This was the only evidence presented by the respondent to demonstrate the common practice of conducting a pre-checklist in the absence of an artisan.

[21] The word '*will*' in the applicant's policy clearly indicates that the LDV can only be used after an artisan has signed the pre-checklist. In this case, the third respondent failed to comply. He also did not demonstrate that it was standard practice in the company for other drivers to use the LDV without the artisan signing the pre-checklist. The issue of consistency does not arise herein, and it would be unreasonable to rely on common practice without any evidence. The commissioner relied on the evidence that the third respondent presented, which included a checklist completed by his supervisor, but it did not have an artisan's signature. However, the record indicates that the supervisor testified that he did not use the bakkie on that checklist. This finding by the commissioner was not based on any evidence and is unreasonable.

[22] The commissioner's finding that there is no policy or procedure detailing what should be done if an artisan is absent from the test bay is unfounded. The applicant's policy exists and is mandatory regarding what must be done before a driver uses an LDV. A policy addressing scenarios where the artisan is unavailable would be contradictory and would not serve the purpose of ensuring the safe use of LDVs at the mine.

Theft and/or unauthorised possession of company property

[23] On this charge, Mr Sethedi testified that the third respondent was not authorised to use the LDV on the night in question. The third respondent also testified as follows concerning authorisation to use the LDV:

‘No. No one authorised me because I believe that if I take any machine, as I mentioned that on my licence I have I can say 95 per of Tharisa equipment. So on that licence, the licence authorises me to operate any particular machine [sic].’

[24] The key controller, who was responsible for issuing the keys to the LDVs, testified that she did not issue an LDV key to the third respondent on 11 October 2021. She only realised that the third respondent had signed for the key, and she mistakenly signed next to the third respondent’s name as if she had issued the key to him. When she realised that the third respondent had taken the LDV key, she immediately contacted Sethedi, who was the foreman of the third respondent.

[25] The commissioner found no proof that the third respondent contravened any rule. The finding was also that there was no evidence of theft, only unauthorised use, as the third respondent explained that he signed for the key to the LDV and that the key controller countersigned. The commissioner did not accept the explanation by the key controller on how she came to co-sign the book after the third respondent had signed, especially after she told the third respondent that he could not take the LDV.

[26] The applicant contended that the commissioner overlooked the fact that the third respondent acquired the keys and operated the LDV without the key controller’s knowledge. This, they argued, made the third respondent guilty of unauthorised possession of the applicant’s property, a dismissible offence according to the applicant’s Disciplinary Code.

[27] The evidence before the commissioner showed that the third respondent was not authorised to possess the LDV. This was confirmed by Sethedi, the key controller, and the third respondent himself, that he lacked authorisation. The third respondent further stated that he believed he could use any machine based on the license he possessed. In response, the commissioner remarked that holding a

license does not automatically grant the authority to use the vehicle. This evidence was before the commissioner and should have been considered to determine whether the third respondent had the authority to be in possession of the applicant's property.

Dishonesty

[28] The third respondent was found to have been dishonest about the TNA parade. TNA officer, Hulisani, testified that he received instructions from Sethedi to parade the third respondent. When the third respondent arrived at the TNA office to clock off, he informed him about the parade. The third respondent then requested a speed dial to speak with Sethedi. Hulisani heard the third respondent talking on the phone and assumed he was speaking with Sethedi. After the call, he allowed the third respondent to leave, trusting that he was talking to Sethedi and did not verify with Sethedi whether he could permit the third respondent's departure.

[29] The third respondent testified that as he was clocking out, he realised that he was being paraded, and couldn't leave. He was told that Sethedi was responsible for the parade. He attempted to call Sethedi but received no answer. Later, he asked the TNA officer to lift the parade so he could go home since Sethedi was not answering his phone, and he was permitted to leave.

[30] The commissioner found that the TNA officer's reason for allowing the third respondent to leave after initially being asked to parade was unconvincing. Additionally, the officer should have verified with the foreman before granting the third respondent permission to leave. As a result, the third respondent was not considered guilty of dishonesty.

[31] There are two versions presented in this regard: that of the TNA officer and that of the third respondent. The bottom line is that the third respondent was allowed to leave the mine premises despite being paraded. The TNA officer permitted the third respondent to leave without verifying with the foreman whether he could do so. He had received an instruction to parade the third respondent, and it was prudent for him to confirm whether he was authorised to let him go or not. The explanation

provided by the TNA officer for permitting the third respondent to leave is unconvincing, and the commissioner's finding in this regard cannot be faulted.

[32] The Constitutional Court outlined the test for review in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*⁵ as follows:

‘... Is the decision reached by the commissioner one that a reasonable decision maker could not reach?’

[33] The Labour Appeal Court in *Fidelity Cash Management Services v Commission for Conciliation, Mediation and Arbitration and Others*⁶ held that:

‘The test enunciated by the Constitutional Court in *Sidumo* for determining whether a decision or arbitration award of a CCMA commissioner is reasonable is a stringent test that will ensure that such awards are not lightly interfered with. It will ensure that, more than before, and in line with the objectives of the Act and particularly the primary objective of the effective resolution of disputes, awards of the CCMA will be final and binding as long as it cannot be said that such a decision or award is one that a reasonable decision maker could not have made in the circumstances of the case. It will not be often that an arbitration award is found to be one which a reasonable decision maker could not have made but I also do not think that it will be rare that an arbitration award of the CCMA is found to be one that a reasonable decision maker could not, in all the circumstances, have reached.’

[34] As noted above, the key question is whether the commissioner's decision was reasonable, considering that the third respondent's dismissal was deemed substantially unfair.

[35] The evidence presented to the commissioner clearly indicated that the third respondent did not comply with the lawful instructions given by the Mine Manager. Additionally, he did not inform the foreman of his location. The commissioner concluded that, although the third respondent did not communicate his whereabouts, he was not guilty of failing to follow instructions. This conclusion is unreasonable.

⁵ (2007) 28 ILJ 2405 (CC) at para 110.

⁶ (2008) 29 ILJ 964 (LAC) at para 100.

According to the applicant's schedule of offences and policy guidelines, when an employee is found guilty of refusing to perform any lawful practice or obey instructions from a supervisor without reasonable cause, the sanction is a final warning or dismissal.

[36] Concerning the unauthorised use of the applicant's property, evidence demonstrated that the third respondent had no permission to use the LDV. He admitted lacking permission and merely assumed that holding a license granted him the right to use the vehicle. The key controller cannot be held liable for the third respondent's failure to secure authorisation. The applicant's policy specifies that the appropriate penalty for such an offence is dismissal.

[37] The applicant argued that the third respondent ignored safety standards when operating the LDV. Specifically, the third respondent failed to follow the policy that required prior approval from the artisan before using the vehicle. Using the non-compliance of other employees as a defence is not justified. This offence as well has a sanction of dismissal.

[38] The Supreme Court of Appeal in *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)*⁷ held that:

'..... A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.'

[39] In this case, the commissioner's conclusion overlooks the evidence introduced at the hearing, and another commissioner might have deemed the dismissal of the third respondent to be substantially fair. The third respondent's version should have been rejected as being unsubstantiated. There was overwhelming evidence against the third respondent that he failed to follow instructions, he used the applicant's

⁷ (2013) 34 ILJ 2795 (SCA) at para 25.

property without authorisation and disregarded safety measures when using the applicant's property. These are serious charges that warrant dismissal, and the commissioner's finding should be set aside in that regard.

[40] In terms of section 162 of the Labour Relations Act⁸, there is no reason for this Court to make any cost order against any of the parties.

[41] Consequently, I make the following order:

Order

1. The commissioner's award is reviewed and set aside, and substituted with the following:
"The dismissal of the third respondent was substantially fair".
2. There is no order as to costs.

J T Djaje
Acting Judge of the Labour Court Of South Africa

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⁸ Act 66 of 1995, as amended.

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LABOUR COURT