



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR1088/20

In the matter between:

NATIONAL UNION OF MINeworkERS (NUM)

obo HOWARD MATHEBULA

Applicant

and

**COMMISSION FOR CONCILIATION
MEDIATION AND ARBITRATION**

First Respondent

SEBOLELO TSHABALALA N.O

Second Respondent

KHUTALA COLLIERY-SOUTH 32

Third Respondent

Heard: 2 July 2025

Delivered: 28 August 2025

Summary: The Applicant seeks to review and set aside an arbitration award dated 29 June 2020.

JUDGMENT

PRETORIUS, AJ

Introduction

[1] This is an application to review and set aside an arbitration award dated 29 June 2020, which was received by the Applicant, the National Union of Mineworkers (“NUM”) acting on behalf of Howard Mathebula (“Mr Mathebula”), under case number MPEM5908-19 (“the Award”). In the Award, the First Respondent (“Arbitrator”) found that the dismissal of Mr Mathebula was substantively fair.

[2] Dissatisfied with the Award, the Applicant launched this review application on 7 September 2020. This application has been brought in terms of section 145 of the Labour Relations Act¹ (“LRA”).

[3] The Third Respondent opposed this application for review.

Evidence adduced at arbitration

[4] The Third Respondent called one witness during the arbitration, namely Mr Clement Matshavha (“Mr Matshavha”). The Applicant called Mr Hlabirwa Mashabele (“Mr Mashabele”) and thereafter testified himself.

[5] Mr Mathebula commenced his employment with the Third Respondent in October 2003 as an Engineering (Maintenance) Supervisor and held appointments in terms of Regulation 2.9.2 and Section 7(4) of the Mine Health and Safety Act² (“MHSA”). He was dismissed on 22 January 2019 after a disciplinary enquiry where he was charged with the following transgressions:

- ‘1. On or about 4 October 2018, you [Mr Mathebula] worked and / or allowed subordinates to work under unsafe conditions and disregarded codes of good practice issued by the company [the Third Respondent].

¹ Act 66 of 1995, as amended.

² Act 29 of 1996.

2. Violation of the lock-up Procedure in that on or about 4 October 2018, you [Mr Mathebula] failed to isolate and lock-out.
3. Alleged act of dishonesty in that you [Mr Mathebula] changed the description of the works order post incident of 4 October 2018.'

[6] Aggrieved by the dismissal, Mr Mathebula, through the assistance of the NUM, subsequently referred an unfair dismissal dispute to the First Respondent, where he only challenged the substantive fairness of his dismissal. The Award was rendered on 29 June 2020, which award is the subject of this review application.

[7] In order to assess the Arbitrator's findings and the grounds of review raised by the Applicant, it is necessary to consider the evidence at the arbitration proceedings as well as the charges levelled against Mr Mathebula, which dismissal was found to be substantively fair by the First Respondent.

[8] It is this decision that the Applicant seeks to be reviewed and set aside.

Background

[9] On 4 October 2018, Mr Mathebula was on duty, and on the instructions of his supervisor, Desire Shikwambane (hereinafter "Mr Shikwambane"), he attended to the repair of the damaged nip guard bracket together with Jan Veldsman (hereinafter "Mr Veldsman") and Mr Mashabela. Before the repair could commence, the scope of the work and risk assessment were verified, all controls were effectively applied, the correct tools and equipment were made available, and the work was deemed safe to start.

[10] Messrs Veldsman and Mashabela, under Mr Mathebula's supervision, electrically isolated the machine, and Clement Matshavha ("Mr Matshavha"), who is Mathebula's immediate supervisor, authorised the work to commence. However, when the work began, an incident occurred where Mr Veldsman was trapped between the belt and the machine and sustained serious injuries. As a result of this incident, Mathebula was charged with the aforesaid transgressions.

[11] In the Award, the Arbitrator found, *inter alia*, the following:

11.1 Mr Mathebula uses the allegation of appointments that were backdated to shy away from his responsibilities and taking accountability for his actions;

11.2 the allegation that Mr Mathebula was not trained on the machine he worked on as a supervisor is improbable;

11.3 Mr Mathebula was negligent in carrying out his functions, breached the lifesaving rules when conducting the inspection, and failed to determine shortcomings he was reasonably expected to have identified as a supervisor; and

11.4 Mr Mathebula's version that he was instructed by Mr Matshavha to change the work's order is highly improbable, as he had no recollection of the instruction.

The Applicant's case

[12] The Applicant alleges that the Arbitrator's incorrect finding was based upon several grounds.

[13] Firstly, in the Applicant's founding affidavit, he alleges that the Arbitrator failed to properly consider and/or ignored crucial evidence placed before him regarding the incident of 4 October 2018, namely:

13.1 the Applicant alleges that the Arbitrator ignored both Mr Mathebula's and Mr Mashabela's evidence. They both alleged that they were asked by the senior foreman of the Third Respondent, Mr Shikwambane, to backdate their appointment letters after the incident in question;

13.2 the Arbitrator ignored both Mr Mathebula's and Mr Mashabela's allegations that they were not trained by the Third Respondent on certain aspects of their job. The Applicant took particular exception to the Arbitrator's finding that Mr Mathebula's version was highly improbable;

13.3 the Arbitrator's finding that Mr Mathebula was negligent in carrying out his functions is unreasonable and not supported by the evidence. The Applicant contends that the Arbitrator ignored a statement made by Mr Mathebula wherein he set out the events of the incident, which statement was not challenged by the Third Respondent in evidence;

13.4 the Arbitrator ignored the evidence that employees were allegedly allowed to make changes to work orders, and that Mr Mathebula was instructed by Clement to make such changes.

[14] In its supplementary affidavit, the Applicant added two additional grounds for review, namely:

14.1 the Arbitrator's finding that the evidence of the Applicant's witness, Mr Mashabela, was irrelevant is incorrect and inconsistent with the evidence placed before him. Mr Mathebula alleges that Mr Shikwambane ordered him, together with Mr Mashabela, to backdate their job descriptions after the incident in order to portray compliance with the laws and regulations imposed by the Department of Mineral Resources. The Applicant emphasises the fact that Mr Shikwambane was not called as a witness to rebut such an allegation.

14.2 The second supplementary ground was that the Arbitrator ignored Mr Mathebula's evidence by finding that he did not ensure that proper safety procedures were followed before embarking on the work done on the belt, which led to the injuries of Mr Veldsman.

The Third Respondent's case

[15] The Third Respondent contends that Mr Mathebula's appointment described his area of responsibility as the 4 Seam Underground Inbye.

[16] Mr Mathebula was instructed to repair a broken nip guard bracket, which required welding and a Permit to Work: Hot Work was required, which required a permit that was issued by the Applicant.

[17] Whilst performing the work on 4 October 2018, energy was introduced into the belt, causing serious injury to a fellow worker, Mr Veldsman.

[18] Mr Mathebula was subsequently charged and dismissed for his (i) transgression of lifesaving rules, and (ii) his act of dishonesty.

[19] The alleged transgression of lifesaving rules related to the Applicant allowing subordinates to work in unsafe conditions and/or against the standards and rules of the Third Respondent.

[20] The charge of dishonesty relates to the alteration of the Hot Work permit to read '*Hot Work permit section belt drive feed breaker welding*', which alteration was made after the incident.

[21] In accordance with his appointment, Mr Mathebula was obliged to comply with all applicable legislation, including but not limited to the MHSA, as well as the Third Respondent's policies and codes of practice (particularly its mandatory code of practice for lockout of systems, machinery, equipment or apparatus). He was also obliged to take all steps to ensure that the persons under his control were fully conversant with the MHSA and to provide and maintain a working environment that is safe without risk to health.

[22] A 'permit to work' was issued by Mr Mathebula on 4 October 2018. As issuer of a permit to work, Mr Mathebula was in charge of the particular job and was obliged to oversee all controls associated with that job, and was responsible for the subordinates working under him.

[23] The permit to work confirmed that controls were verified in the field, including isolation and that people have the required skills and competency, correct tools and equipment, to perform the work.

[24] The Third Respondent has in place a mandatory code of practice for the lockout of systems, machinery, equipment, or apparatus. It provides for the minimum requirements that must be adhered to. Its objective is to meet the relevant requirements of the MHSA and its regulations, and to ensure no person encounters any live wiring or components or moving machinery.

[25] The Code of Good Practice defines 'lockout' as the steps taken to physically render any circuit incapable of being made alive or being set in motion by an unauthorised person.

Test on review

[26] I have to deal with the grounds for review within the context of the test that this Court must apply in deciding whether the Arbitrator's decision is reviewable. The test has been set out in *Sidumo & another v Rustenburg Platinum Mines Ltd & others*³ (*Sidumo*). The Constitutional Court held that the Arbitrator's conclusion must fall within a range of decisions that a reasonable decision maker could make. The test is therefore whether the decision reached by the commissioner is one that a reasonable decision maker could reach, having regard to the evidence before him/her.

[27] The Labour Appeal Court (LAC) in *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation & Arbitration & others*⁴ affirmed the test to be applied to review proceedings and held that:

'In short: A reviewing court must ascertain whether the arbitrator considered the principal issue before him/her; evaluated the facts presented at the hearing and came to a conclusion that is reasonable.'

[28] The LAC authoritatively considered the *Sidumo* review test in *Fidelity Cash Management Service v Commission for Conciliation, Mediation & Arbitration & others*⁵ (*Fidelity Cash*), and stated the following –

'The Constitutional Court has decided in *Sidumo* that the grounds of review set out in s 145 of the Act are suffused by reasonableness because a CCMA arbitration award, as an administrative action, is required by the Constitution to be lawful, reasonable and procedurally fair. The court further held that such an award must be reasonable and if it is not reasonable, it can be reviewed and set aside.'

³ (2007) 28 ILJ 2405 (CC) at para 110.

⁴ (2014) 35 ILJ 943 (LAC) (*Goldfields*) at para 16.

⁵ (2008) 29 ILJ 964 (LAC) at para 96.

[29] As to what would be considered to be unreasonable, the LAC in *Fidelity Cash* held as follows⁶:

'The Constitutional Court further held that to determine whether a CCMA commissioner's arbitration award is reasonable or unreasonable, the question that must be asked is whether or not the decision or finding reached by the commissioner 'is one that a reasonable decision maker could not reach' (para 110 of the *Sidumo* case). If it is an award or decision that a reasonable decision maker could not reach, then the decision or award of the CCMA is unreasonable, and, therefore, reviewable and could be set aside. If it is a decision that a reasonable decision maker could reach, the decision or award is reasonable and must stand. It is important to bear in mind that the question is not whether the arbitration award or decision of the commissioner is one that a reasonable decision maker would not reach but one that a reasonable decision maker could not reach...'

[30] The LAC in *Fidelity Cash* formulated the '*outcome-based review test*' which, the LAC held, is what the *Sidumo* review test envisaged. The LAC held⁷ -

'It seems to me that... there can be no doubt now under *Sidumo* that the reasonableness or otherwise of a commissioner's decision does not depend - at least not solely - upon the reasons that the commissioner gives for the decision. In many cases the reasons which the commissioner gives for his decision, finding or award will play a role in the subsequent assessment of whether or not such decision or finding is one that a reasonable decision maker could or could not reach. However, other reasons upon which the commissioner did not rely to support his or her decision or finding but which can render the decision reasonable or unreasonable can be taken into account. This would clearly be the case where the commissioner gives reasons A, B and C in his or her award but, when one looks at the evidence and other material that was legitimately before him or her, one finds that there were reasons D, E and F upon which he did not rely but could have relied which are enough to sustain the decision.'

⁶ Ibid at para 97.

⁷ Ibid at para 102.

[31] The LAC concluded⁸:

‘.... Whether or not an arbitration award or decision or finding of a CCMA commissioner is reasonable must be determined objectively with due regard to all the evidence that was before the commissioner and what the issues were... before him or her. There is no reason why an arbitration award or a finding or decision that, viewed objectively, is reasonable should be held to be unreasonable and set aside simply because the commissioner failed to identify good reasons that existed which could demonstrate the reasonableness of the decision or finding or arbitration award.’

[32] Our courts have repeatedly stated that, in order to maintain the distinction between review and appeal, an arbitrator’s award will only be set aside if both the reasons and the result are unreasonable. In determining whether the result of an arbitrator’s award is unreasonable, this Court must broadly evaluate the merits of the dispute and consider whether, if the arbitrator’s reason is found to be unreasonable, the result is, nevertheless, capable of justification for reasons other than those given by the arbitrator. The result will, however, be unreasonable if it is entirely disconnected from the evidence, unsupported by any evidence and involves speculation by the arbitrator.

[33] Unreasonableness is thus the threshold for interference with an arbitrator’s award on the review.

Analysis of the Arbitrator’s findings

[34] The Arbitrator had to determine whether Mr Mathebula’s dismissal was substantively fair, and she ultimately agreed that the dismissal was substantively fair.

[35] To reach such a conclusion, the Arbitrator found that Mr Mathebula and his witness, Mr Mashabela, contradicted each other’s respective versions. It is also

⁸ Ibid at para 103.

apparent that the Arbitrator preferred the evidence presented by the Third Respondent over that of the Applicant. Such a credibility finding is not easily overturned on review.⁹

[36] The Arbitrator also found that on the day of the incident, Mr Mathebula failed to ensure that the mechanical lockout was done, which ultimately resulted in the incident in which Mr Veldman was seriously injured.

[37] Mr Mathebula conceded that both he and Mr Veldsman were responsible for ensuring that adequate health and safety measures were complied with, and that employees have the right to refuse an unreasonable instruction, when asked about having signed an appointment letter after the incident.

[38] Despite Mr Mathebula's contention that he was not trained to operate the machine, he was nevertheless responsible for the skilled people on his team, and therefore, the Arbitrator reasonably inferred that he would be equally competent and capable to perform such tasks.

[39] Mr Mathebula's version that he was instructed by Mr Shikwambane to change the work's order was highly improbable, as he gave testimony that he had no recollection of this instruction, but instead saw it unfolding in a dream. He further admitted in his evidence to having changed the work's order and submitted that it is allowed in the company.

[40] There was no evidence from the Third Respondent that Mr Shikwambane issued such an instruction to Mr Mathebula to change the works order, and no written instruction to this effect was available. The Arbitrator therefore concluded that Mr Mathebula contravened the Third Respondent's rule and changed the work order without proper authorisation.

⁹ *Standerton Mills (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration & Others* [2012] 1 BLLR 84 (LC) at para 18; See: *National Union of Mineworkers & another v Commission for Conciliation, Mediation & Arbitration & others* (2013) 34 ILJ 945 (LC) at para 30.

[41] Insofar as Mr Mathebula alleged that the Third Respondent inconsistently disciplined employees involved in similar incidents, he failed to submit any evidence supporting such alleged inconsistency. The Arbitrator thus found this to be hearsay evidence and therefore inconclusive.

The grounds for review

[42] The question this Court must ask on review is whether the way the Arbitrator dealt with the evidence constituted an irregularity or error which was material and whether it impacted the determination of the question of whether Mr Mathebula's dismissal was fair and whether this distorted the Arbitrator's ultimate decision. The ultimate question is whether, holistically viewed, the decision taken by the Arbitrator was reasonable based on the evidence placed before him.

[43] The findings at paragraphs 33 to 41 of the Award do not, in my view, appear to be open to attack. The evidence before the Arbitrator was that Mr Mathebula was responsible for performing the mechanical lockout, alternatively ensuring that a person with competent skills performed the mechanical lockout, in accordance with workplace rules as well as health and safety standards.

[44] Mr Mathebula's allegation that he did not receive sufficient training was found by the Arbitrator to be unlikely due to his having subordinates under him required to perform such tasks. In any event, should Mr Mathebula have not possessed the necessary training then as Engineering (Maintenance) Supervisor, it was incumbent on him to disclose this rather than entering a contract whereby he assumed responsibility for such functions, particularly in circumstances where such responsibilities bear significant risks and dangers to fellow employees, which, as Engineering Supervisor, Mr Mathebula was well aware. It is significant that Mr Mathebula was appointed as Supervisor Maintenance as long ago as 24 June 2011. This also militates against a contention of a lack of training. Moreover, if he felt he lacked the skills to conduct this task, he could have refused to attend to it. In any event, there was evidence tendered that Mr Mathebula had attended a Conveyor System Safety Training Assessment on 1 December 2017. Accordingly, the finding

of the Arbitrator that it was unlikely that Mr Mathebula did not receive sufficient training cannot be criticised.

[45] It was put to the Third Respondent's witness that he had asked Mr Mathebula to backdate the appointment letter. He denied this. After the Third Respondent had closed its case, both Mr Mashabela and Mr Mathebula then testified that it was in fact Mr Shikwambane who asked them to sign their appointment letters. This inconsistency renders it impossible, on the facts, to conclude whether a backdating in fact occurred. Moreover, the conclusion of the Second Respondent that it is a red herring put up to deflect from Mr Mathebula's obligations to ensure the safety of his team members, which, on the objective facts he failed to do, cannot be faulted.

[46] The Labour Court has considered a breach of safety rules, and in *Sasol Mining (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & Others*¹⁰, the court concluded:

'Safety of employees at the workplace is paramount, it cannot be compromised. An employer cannot be expected to wait until an employee has maimed or has lost his or her life before taking decisive action against an employee who has exposed fellow employees to danger. Procedures which are intended to prevent injury and fatality, particularly in the mining industry, need to be complied with properly because the lapse has disastrous consequences. In exercising his power to determine the fairness of the [employees] dismissal, the commissioner had to decide the appropriateness of the sanction of dismissal. His decision that dismissal was inappropriate disregards the value of the lives and safety of the employees, the third respondent had the responsibility of protecting. It is not supported by the evidence before him. It constitutes a decision a reasonable decision maker could not reach on the facts before him and stands to be reviewed and set aside.'

¹⁰ (2015) 36 ILJ 2359 (LC) at para 6.

[47] In such a case taking place in the mining industry, it is reasonable to highlight the importance of safety rules, considering the potential life-threatening consequence/s of a breach of such rules.

[48] Workplace safety must always be given due consideration, and in *Samancor Chrome Limited (Tubatse Ferrochrome) v Metal and Engineering Industries Bargaining Council and Others*¹¹, the court concluded:

‘It is evident from the evidence that there are considerable risks associated with the appellant’s operations at the smeltery. It carries a high risk of potential danger to the safety of its employees which in turn may hold serious consequences for the appellant as the employer. The issue of safety and the rules pertaining thereto are accordingly of considerable importance to both the appellant and its employees. ...’

Conclusion

[49] Having regard to the facts and circumstances of this case, I am not convinced that the result is one that a reasonable decision maker could not reach in light of the issues and the evidence placed before her. As such, the review application must fail.

Costs

[50] Even though costs were not argued before me, it was sought in the Applicant’s notice of motion.

[51] This Court has a discretion in terms of Section 162 of the LRA to order costs in accordance with the requirements of the law and fairness. Furthermore, in the *Union for Police Security and Corrections Organisation v South African Custodial Management (Pty) Limited and others*¹², the Constitutional Court has made it clear that costs should only be awarded by this Court in exceptional circumstances. In the present instance, there are no exceptional circumstances, and I am of the view that

¹¹ (2011) 32 ILJ 1057 (LAC).

¹² 2021 (11) BCLR 1249 (CC) at para 40.

this is a matter that, in the interests of fairness and equity, does not warrant a cost order being made.

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

Order

1. The Applicant's review application is dismissed.
2. There is no order as to costs.

D. O. Pretorius

Acting Judge of the Labour Court of South Africa

Appearances:

For the applicant: Mr. S. Makalima of Cheadle Thompson & Haysom Inc.

For the third respondent: Mr. M.G Maeso of Shepstone & Wylie Attorneys