



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JR58/24

In the matter between:

BRAKFORTEIN MINE

Applicant

and

POOLINAH ZANELE MKWANAZI

First Respondent

**COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION**

Second Respondent

COMMISSIONER JOSHUA MASHEGO NO

Third Respondent

Heard: 7 May 2025

Delivered: 3 September 2025

JUDGMENT

ENGELBRECHT, AJ

Introduction

[1] This is an unopposed application to review and set aside an arbitration award issued by the third respondent (Commissioner), acting in his capacity as Commissioner of the second respondent, the Commission for Conciliation, Mediation and Arbitration (CCMA) under case number MPEM7137/23 (Award), and remit the matter back to the CCMA for hearing afresh before a different commissioner. The application is made in terms of section 145 and/or 158(1)(g) of the Labour Relations Act 66 of 1995¹ (LRA).

[2] The service affidavit shows that the first respondent (Ms Mkwanazi) was properly informed of the litigation. Yet, she offered no opposition.

[3] Of course, the mere fact that the review application is not opposed does not, in itself, entitle the applicant to relief as a matter of course. The Award may be reviewed and set aside only if there are cognisable grounds to justify judicial intervention. The applicant (Brakfontein) retains the duty to establish that the Award is reviewable on recognised legal grounds.²

[4] Before this Court, Brakfontein contends that the Commissioner committed gross misconduct in relation to his duties as an arbitrator, committed a gross irregularity in the arbitration proceedings, exceeded his powers, failed to apply his mind, and/or committed a material error of law. In the result, Brakfontein says that the Commissioner reached a conclusion that no reasonable decision-maker could have reached in the circumstances of the case.

Relevant facts

[5] At the time of her dismissal, Ms Mkwanazi was employed as a Plant and Weighbridge Supervisor. Her duties included overseeing that the procedures for trucks entering and exiting the Brakfontein property were followed, including

¹ Labour Relations Act 66 of 1995, as amended.

² See, for example, *MEC Public Works and Infrastructure Free State Provincial Government v GPSSBC and Others* (JR857/2017) [2018] ZALCJHB 164 at para 4.

ensuring that trucks entering Brakfontein's premises were recorded on fleet lists. Whenever trucks arrived at Brakfontein's gate, Ms Mkwanazi was supposed to be informed of their details via WhatsApp message or radio communication, and she would then have to notify the Front-End-Loader Operators about the arrival of the trucks, and ensure they loaded the correct material. Additionally, Ms Mkwanazi was required to ensure that trucks loaded with material were reflected on Brakfontein's fleet list.

[6] Ms Mkwanazi was on duty on the night of 25 June 2023. She did not report any incident during or after her shift. Then, on 29 June 2023, Brakfontein's security manager received a tip-off that coal had been stolen, prompting him to review CCTV footage. This revealed that, during Ms Mkwanazi's shift on 25 June 2023, six additional trucks, which did not appear on the fleet list, accessed the Brakfontein premises, were loaded with coal, and left the premises without authorisation. According to the evidence of Brakfontein's security manager,

'if spot checks had been done or if she just had a look at the trucks coming in and the fleet list where they were loading and that, this could have possibly been prevented'. His evidence was that "she would have to be in the area where the trucks are busy loading and going over the weighbridge. The entire area is under the supervisor's control.'

Ms Mkwanazi's own evidence was that the '*loading area*' was her '*priority*' and that she saw it '*mostly*', that she used to pass trucks as she moved around the operation. Indeed, she conceded that it is part of the duties of the supervisor to ensure that the trucks are loaded correctly. This echoed the evidence of Brakfontein's Plant Manager, who also explained that:

'The responsibilities of the supervisors are to make sure that in the absence of management the operation runs smoothly, there are no problems. If there are any suspicions or any diversions, they need to report it immediately. And on our side, there has been said although it was not on a written circular but it has been said before that there is complaints that coal is being stolen, coal is missing, we need to be vigilant. So now, as a supervisor on shift, she needed to be vigilant to make sure that nothing happens on her shift. She needed to be, to stand guard because that is what we need to do. Without the company

being, let me say, run properly, at the end of the day the company is going to close up and we are all going to lose.'

[7] Indeed, the Plant Manager's evidence was that Ms Mkwanaazi had, not long before this incident, been given a final written warning when the wrong material was loaded onto a truck, so she was well aware that she needed to be vigilant. It would appear that she was not:

7.1 According to the evidence before the Commissioner, Ms Mkwanaazi was responsible to control an area of about 500 square metres, and she would be able to see different parts of the plant even if she were in different areas throughout the night, although the Plant Manager did concede that

'If you are at the waiting area at the wash plant right at the back, you cannot see your stockpile area'

7.2 The undisputed evidence before the Commissioner was that six trucks entered the Brakfontein premises that night, loaded coal and exited, even though they were not on the fleet list. That was in addition to 13 trucks for which access sheets were registered on the night in question.

7.3 Given those facts, the rhetorical question Brakfontein asked was: how was it possible that, at no stage, Ms Mkwanaazi noticed that coal was being loaded on trucks that were not on the fleet list, and whose entry had not been reported to her on the WhatsApp group? Even if she could not be held responsible for not being informed by the weighbridge that six trucks unauthorised trucks had entered and exited fully loaded, given that she was '*supposed to be proactive or actively monitor their area*', how did the theft go undetected?

[8] Ms Mkwanaazi was charged with dereliction of duty and/or gross negligence in that she

'failed in her duties as a supervisor to ensure that standard operating protocol/procedures were followed by (her) subordinates, resulting in the trucks that were not on the fleet list as per the customer order and TITAN system being loaded with washed coal [sic]. This resulted in coal [sic] losses equivalent to R173 400.00 to the company.'

The second charge against Ms Mkwanaazi was

[9] Following a disciplinary hearing, Ms Mkwanazi was dismissed on 2 October 2023. The weighbridge clerk and one of her assistants were also dismissed as a result of the events of the night of 25 June 2023. An appeal against her dismissal was dismissed on 27 October 2023. By that stage, Ms Mkwanazi had already referred a dispute of unfair dismissal to the CCMA. Her position was that dismissal was not an appropriate sanction in the circumstances of the case.

[10] Pursuant to the arbitration before him, the Commissioner agreed. He determined that the dismissal was substantively unfair and granted compensation along with reinstatement. In reaching this conclusion, the Commissioner held the view that the loss of the coal resulted from organised corruption that did not involve Ms Mkwanazi. Since the Commissioner believed that the theft was executed by a syndicate, he concluded that it would have been '*difficult to pick up any suspicion*'. In the Commissioner's opinion, Ms Mkwanazi carried out her duties to the best of her ability on the night in question, especially considering that she did not have access to transport throughout the night.

The review test

[11] The test for review is well known. In *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine v Commission for Conciliation, Mediation and Arbitration and others*,³ the Labour Appeal Court (LAC) 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.'

[12] In *Head of Department of Education v Mofokeng and others*,⁴ the LAC said:

'[31] The determination of whether a decision is unreasonable in its result is an exercise inherently dependent on variable considerations and circumstantial factors. A finding of unreasonableness usually implies that

³ [2014] 1 BLLR 20 (LAC) at para 16.

⁴ [2015] 1 BLLR 50 (LAC) at paras 31- 32.

some other ground is present, either latently or comprising manifest unlawfulness. Accordingly, the process of judicial review on grounds of unreasonableness often entails examination of inter-related questions of rationality, lawfulness and proportionality, pertaining to the purpose, basis, reasoning or defect of the decision, corresponding to the scrutiny envisioned in the distinctive review grounds developed casuistically at common law, now codified and mostly specified in s 6 of the Promotion of Administrative Justice Act (PAJA): such as failing to apply the mind, taking into account irrelevant considerations, ignoring the relevant considerations, acting for an ulterior purpose, in bad faith, arbitrarily or capriciously etc. The court must nonetheless still consider whether, apart from flawed reasons of or any irregularity by the arbitrator, the result could be reasonably reached in the light of the issues and the evidence. Moreover, judges of the Labour Court should keep in mind that it is not only the reasonableness of the outcome which is subject to scrutiny. As the SCA held in *Herholdt*, the arbitrator must not misconceive the enquiry or undertake the enquiry in a misconceived manner. There must be fair trial of the issues.

[32] 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, evidence in the failure to apply the mind, reliance on irrelevant considerations or the ignoring of material factors 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.'...

Evaluation

[13] The starting point in the evaluation of the review before this Court must be the exposition of Justice Prinsloo in *National Union of Metalworkers of South Africa and Another v Commission for Conciliation Mediation and Arbitration and Others*⁵ (the *Lumka* case):

⁵ (2023) 44 ILJ 1575 (LC)

‘...an employee is obliged to act to protect the interests of the employer and when the employee fails to do so and the failure constitutes serious misconduct, the sanction of dismissal will be fair, as an employer is entitled, as an operational imperative, to rely on its employees to act in good faith and to protect the interests (which includes property) of the employer. In such a case, dismissal becomes an operational imperative and way of managing risk’.⁶

This, on the basis of the LAC’s explanation in *De Beers Consolidated Mines Ltd v Commission for Conciliation, Mediation and Arbitration and Others*⁷ (*De Beers*) that

‘Dismissal is not an expression of moral outrage; much less is it an act of vengeance. It is, or should be, a sensible operational response to risk management in the particular enterprise. That is why supermarket shelf packers who steal small items are routinely dismissed. Their dismissal has little to do with society’s moral opprobrium of a minor theft; it has everything to do with the operational requirements of the employer’s enterprise.’

[14] Mining operations require substantial investment and they produce valuable outputs. Mining companies are vulnerable to safety and security threats. Trespassing, illegal mining, and theft of minerals and equipment are genuine concerns. Access control and effective security measures are crucial to safeguarding the assets of mining companies. There can be no doubt that the operational requirements of a mine demand that a supervisor that is responsible for overseeing security and safety issued, such as Ms Mkwanazi, must execute that duty with due care, to prevent loss.

[15] Upon full evaluation of the record before this Court, it is evident that, at no point, Brakfontein’s case was that Ms Mkwanazi turned a blind eye because she was part of a syndicate involved in stealing coal from it. Its case was that Ms Mkwanazi was under a duty to make it her business to verify that trucks that were loading coal were authorised to do so, and that coal was being loaded correctly.

⁶ *Lumka* case at para 54

⁷ (2000) 21 ILJ 1051 (LAC) at para 22.

[16] In essence, the Commissioner asked the wrong question. Unreasonably, he focused on the fact that Ms Mkwanaazi could not possibly have been in all places at the plant at once. The question he did not ask, and which he ought to have asked, executing his duties as a reasonable Commissioner, was this: how was it possible that, at no stage, Ms Mkwanaazi noticed that coal was being loaded on trucks that were not on the fleet list, and whose entry had not been reported to her on the WhatsApp group? Bearing in mind her undisputed responsibilities and the lay-out of the area for which she was responsible, the Commissioner ought to have asked the question whether it constituted a gross dereliction of Ms Mkwanaazi's duties to have completed her shift without noticing the irregularities on the night in question.

[17] Following the reasoning of the Commissioner, Ms Mkwanaazi could not be held responsible for not being informed by the weighbridge that a truck had entered and exited fully loaded. But that was not the end of the matter. Reasonably, she could be expected, in the execution of her duties, to have sufficiently executed her oversight role to have noticed and checked the additional trucks that had not been reflected on the fleet list or reported as having entered. This, in light of the evidence that *'the supervisor is supposed to be proactive or actively monitor their area'*. The assumption from which the Commissioner appears to have proceeded appears to be that she diligently performed her duties, even though it would appear that at no stage attended at the loading site where six trucks were loaded, to check whether the right product was being loaded and whether the trucks were indeed lawfully on site.

[18] Plainly, the Commissioner failed to consider all relevant evidence. Not only that, his evaluation was flawed by legal error, as he imported a standard of proof for demonstrating gross dereliction of duty that implied Ms Mkwanaazi had knowledge of theft occurring before concluding she was not grossly negligent in failing to notice that six unauthorized loads of coal left Brakfontein's premises in question. When a supervisor has the duty to oversee security, a lack of knowledge about a security breach cannot be used as an excuse; the very fact that someone with such duties does not notice what is happening and fails to question it should be enough to establish that they have grossly failed in their responsibilities. As the LAC explained

in LAC in *National Union of Mineworkers on behalf of Botsane v Anglo Platinum Mine (Rustenburg Section)*,⁸ albeit in the context of consistency:

‘As regards the dereliction of duties by his subordinates, if any acts of misconduct were to be proven against any particular individual, it remains plain that they had no managerial role and it is illogical to draw a comparison as contemplated by the factor of inconsistency. Moreover, it would be a paradox if the appellant could legitimately invoke the failure of the very subordinates he was accountable to manage effectively to exonerate or mitigate his managerial neglect by managing them ineffectively.’ (own emphasis)

‘...Overall, the Arbitrator failed to appreciate that gross negligence or gross dereliction of duties or a material breach of a fiduciary duty will, in appropriate circumstances, be sufficient to destroy the trust and confidence which forms the bedrock of the employment relationship, particularly where an employer is dealing with a senior employee, or one who is placed in a particular position of trust, but who does not demonstrate remorse...’⁹

[19] The outcome was unreasonable, because the Commissioner made errors. Brakfontein is entitled to relief that it seeks.

[20] In the circumstances, I make the following order:

Order

1. The arbitration award issued by the third respondent, acting in his capacity as Commissioner of the second respondent on 3 December 2023 under case number MPEM7137/23 is reviewed and set aside.
2. The matter is remitted back to the second respondent to be heard *de novo* by a commissioner other than the third respondent.
3. There is no order as to costs.

MJ Engelbrecht
Acting Judge of the Labour Court of South Africa

⁸ (2014) 35 ILJ 2406 (LAC) at para 28.

⁹ See *Inxuba Yethemba Municipality v Msweli & Others* (2025) 46 ILJ 1725 (LC) at para 124.

Appearances

For the applicant:	H Wissing
Instructed by:	H Wissing Inc
For the respondents:	No appearance

LABOUR COURT