



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case no: JR 1169/22

In the matter between:

AVENG AFRICA (PTY) LTD

Applicant

and

KOBUS BURGER

First Respondent

COMMISSIONER BONGIKOSI ZULU N.O.

Second Respondent

**COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION**

Third Respondent

Heard: 2 February 2025

Delivered: 05 September 2025

JUDGMENT

MPHAHLELE, AJ

Introduction

[1] Mr. Kobus Burger ("Mr. Burger"), the First Respondent in this matter, has been employed by the Applicant ("Aveng Africa (Pty) Ltd or "Aveng Africa") as a New Business Development and International Executive of the business unit known as Aveng's Infraset business unit. Infraset business unit is part of Aveng's Manufacturing Operating Group.

[2] Mr. Burger has been so employed by Aveng Africa since 1996 and would have reached the age of 60 on 3 September 2018. His retirement age was changed from 60 to 62 by agreement, and as a result, if it were not for his dismissal, he would have retired on 30 September 2020. The incident that led to his dismissal occurred during the two-year period of his extended retirement.

[3] During 2019, Mr. Wouter De Gidts ("Mr. De Gidts"), Aveng Africa's interim Managing Director of Aveng Manufacturing Operating Group, was also the acting Managing Director of the Infraset business unit whilst Aveng Africa undertook a process of appointing a permanent Managing Director of the Infraset business unit.

[4] Mr. De Gidts, for obvious reasons, was involved in this appointment process for a permanent Managing Director of the Infraset business unit.

Submissions on behalf of Aveng Africa

[5] It has been submitted on behalf of Aveng Africa that:

5.1 On 10 October 2019, at the executive committee (Exco) meeting of the Infraset business unit, Mr. De Gidts announced that Mr. Quayle had been appointed as Managing Director of the Infraset business unit with effect from 1 October 2019.

5.2 The announcement led to an outburst by Mr. Burger, who alleged that Mr. De Gidts lied to the Infraset Exco; lacked integrity; was dishonest; did not uphold Aveng Africa's values; that he inappropriately influenced the Aveng Africa group's thinking; and that he (Mr. De Gidts) did not reply to his e-mails.

Mr. Burger concluded by questioning what value, if any, he is adding to Infraset. The following day, on 11 October 2019, at a meeting, Mr. Burger continued with the same utterances he had made on 10 October 2019.

5.3 It is not in dispute that on 6 November 2018, Mr. Burger attacked Mr. De Gidts and Mr. Barrett during a meeting held with the then-managing director of Infraset and that on 15 November 2018, Mr. Burger sent Mr. De Gidts and Mr. Barrett an apology for his personal attack on them. What seems to be a dispute about this incident is whether Mr. De Gidts demanded an apology from Mr. Burger, whether such an apology was tendered by Mr. Burger on his own accord, and whether Mr. De Gidts attempted to escalate the matter.

[6] Mr. Burger was suspended on 17 October 2019 and subsequently charged with misconduct in the form of gross insubordination and/or gross insolence for his behaviour during the meetings of 10 and 11 October 2019. He was found guilty and summarily dismissed on 10 December 2019.

[7] Mr. Burger subsequently referred the matter to the Third Respondent ("CCMA").

Submissions on behalf of Mr. Burger

[8] It has been submitted on behalf of Mr. Burger that:

8.1 Infraset Exco was kept in the dark concerning the appointment of the new Managing Director (MD), and on 26 July 2019, he heard from Hennie Breedts that Aveng Africa was seeking a new MD. As Infraset Exco, they then decided to stop the rumour by confronting Mr. De Gidts, and they were taken aback when Mr. De Gidts told them that there was a possibility of appointing Mr. Quayle to the position.

8.2 Mr. Quayle was an outside person, white, and did not fit in terms of the BBBEE requirements, as well as the Infraset succession plan.

8.3 Mr. Burger, on 6 September 2019, wrote an email to Mr. De Gidts highlighting his concerns, but there was no response to the email; thus, he escalated the email to the group CEO and Group CFO.

8.4 Mr. De Gidts failed to proffer a proper response to Mr. Burger's outburst of 9 September 2019, which was found by the Commissioner to have been a *'quite emotionally charged meeting'* and that Mr. De Gidts has conceded under cross-examination that the meeting *'was a heated meeting and people were angry'*. During the said meeting of 9 September 2019, Mr. Burger called Mr. De Gidts 'a liar', and Mr. De Gidts conceded that he had felt 'embarrassed' after having called a liar and after everything that had been said to him.

8.5 On 10 and 11 October 2019, the meetings were those of Infraset business unit Exco, chaired by Mr. De Gidts in his capacity as acting Managing Director of Infraset Exco.

8.6 The alleged attack on Mr. De Gidts was on him personally and not in his capacity as Group Manufacturing MD. The Exco meetings were conducted in a manner which purposely precluded reliance on seniority, encouraged free and open criticism and called for accountability without fear of reprisal.

8.7 There were no limitations placed on what was said or how it was said during Exco meetings. Aveng Africa has, for many years, consistently tolerated Mr. Burger's conduct, outbursts and penchant for addressing issues directly with his superiors, irrespective of their hierarchical position. Mr. De Gidts has conceded that he had never indicated to Mr. Burger that his outbursts would no longer be tolerated and that if he continued with such conduct, he would be subjected to disciplinary action.

8.8 Aveng Africa applied discipline inconsistently in that it had tolerated the conduct of Mr. Burger for many years.

Arbitration award

[9] After his dismissal, Mr. Burger referred an unfair dismissal dispute to the CCMA.

[10] On 24 May 2022, the Second Respondent (“Commissioner”) issued an arbitration award to the effect that Mr. Burger’s dismissal by Aveng Africa was substantively unfair and ordered Aveng Africa to compensate Mr. Burger the amount of R1 648 199-97 by 10 June 2022.

[11] The amount of R1 648 199-97 was equivalent to nine months’ salary calculated on Mr. Burger’s monthly income of R183 133-33.

Review application

[12] Aggrieved, Aveng Africa instituted a review application in terms of section 145, read with section 158 (1) (g) of the Labour Relations Act¹ (“LRA”) against the arbitration award made by the Commissioner dated 25 May 2022 to:

- 12.1 review and set aside the award;
- 12.2 substitute the decision of the Commissioner with a decision that the dismissal of Mr. Burger was substantively fair;
- 12.3 alternatively, remitting the dispute to the CCMA for a determination *de novo* by a commissioner other than the Second Respondent.

[13] The application is opposed by Mr. Burger.

Findings by the Commissioner

[14] In his arbitration award, the Commissioner made the following findings and/or came to the conclusion that:

- 14.1 According to Mr. De Gidts, the disrespect towards him happened only on 10 and 11 October 2019. Nothing out of the ordinary happened on 9 September 2019.² Mr. De Gidts testified that none of the other Exco members disrespected him.
- 14.2 Mr. Burger’s outburst could not be looked at in isolation, considering that most of the Exco members were aggrieved and angry at the meetings of

¹ Act 66 of 1995, as amended.

² Arbitration Award at para 37.

9 September 2019, and 10 and 11 October 2019. Ultimately, Mr. De Gidts eventually conceded under cross-examination that the meeting of 9 September 2019 was indeed heated and people were angry.

14.3 Mr. De Gidts felt embarrassed at the meeting, corroborating the fact that on 9 September 2019, the Exco members were unhappy. He further testified that he was called a liar.

[15] The Commissioner made a credibility finding and found the version of Mr. Burger, with respect to what transpired on 9 September 2019, as more probable than that of Mr Gidts.

[16] Further, the Commissioner found that:

16.1 Mr. De Gidts tried to conceal the fact that people in attendance at the meeting of 9 September 2019 showed their unhappiness to the extent that Mr. De Gidts said he felt embarrassed after being called a liar and after everything that was said to him.

16.2 He was evasive when questioned about the said meeting and stated that nothing was out of the ordinary at this meeting. The Commissioner cannot be faulted for finding the version of Mr. De Gidts not to be credible. Mr. De Gidts found words uttered by Mr Burger like, *'this is the final nail in the infraset coffin'*, and *'we won't move forward with him'*, referring to Mr. Quale, and *'on previous day nasty things were said and now we could see what people at Lennings [sic] were saying about De Gidts'*, as offensive but did not find being called a liar offensive. I find that very strange.

16.3 Accordingly, the Commissioner found the above words did not constitute gross insubordination or gross insolence but were words used to communicate Mr Burger's frustration. He concluded further that Mr Burger's actions and utterances that were directed at Mr. De Gidts during the respective meetings did not constitute gross misconduct, and the issues addressed by Mr Burger were work-related, within the scope of his duties and probably overdue, and it cannot be said that the conduct of Mr. Burger was aimed at undermining the authority of Mr. De Gidts.

16.4 His reasons were based on the fact that the culture in Exco meetings was that Exco members were encouraged to speak freely, openly, without fear or favour, and their respective ranks did not count.

16.5 In my view, if this culture is to change and Exco members are expected to choose their words carefully, this fact should have been communicated to them before Mr. Burger was charged, more so that Mr. Burger, on previous occasions when he seemed to have spoken out of turn, was not disciplined.

16.6 Mr. De Gidts conceded that he had concealed the recruitment and appointment process of the MD from the Infraset Exco team until the rumour surfaced on 9 September 2019.

16.7 On 9 September 2019, Mr. De Gidts had made a remark that was perceived by Mr. Burger, Mr. Arai and some Exco members to be a racial slur. No apology has been tendered by Mr. De Gidts for that utterance. It could probably be the reasons why Mr. De Gidts made attempts to conceal what happened on 9 September 2019 to the extent of amending the minutes of the meeting.

[17] The aforementioned, including the fact that De Gidts invited Exco team to apply to the position on 9 September 2019 knowing very well that at that stage applications have closed and his overlooking of BBEEE grading and the business unit's Employment Equity Plan and Succession Plan, support the proposition that the meetings of 10 and 11 October 2019 was also emotionally charged where some Exco members were perceived to be agitated.

[18] It is not for me to agree or disagree with the findings of the Commissioner but to determine whether they are reasonable. In so doing, I must also consider whether the Commissioner failed to consider relevant evidence or considered irrelevant evidence. I find nothing that seems to suggest that, in concluding that Mr. Burger's conduct at the respective meetings did not constitute gross misconduct, the Commissioner failed to apply his mind to the evidence before him.

[19] The finding by the Commissioner that, Mr. Burger did not have a malicious intent against Mr. De Gidts's authority, cannot be faulted.

[20] Further, in my view, the utterances of Mr. De Gidts that “*Mr Burger operated above his pay grade and had an elevated impression*” are rude as opposed to what was said by Mr Burger, save for having called Mr De Gidts “a liar”, which Mr. De Gidts, however, does not find offensive.

Analysis of the matter

[21] The offence of insubordination in the workplace has, in this regard, been described by our courts as a wilful and serious refusal by an employee to obey a lawful and reasonable instruction or where the conduct of an employee poses a deliberate (wilful) and serious challenge to the employer’s authority.³

[22] The Labour Appeal Court (LAC) in *Palluci Home Depot (Pty) Ltd v Herskowitz and Others*⁴ (*Palluci Home*) held that, whereas in some cases defiance of an instruction may indicate a challenge to the authority of the employer, this is not so in every case. Insubordination may also be found to be present where disrespectful conduct poses a deliberate (wilful) and serious challenge to, or defiance of the employer's authority, even where there is no indication of the giving of an instruction or defiance of an instruction. It is, therefore, not essential for an instruction to be given or disobeyed to found a challenge to the employer's authority.⁵

[23] The Court in *Commercial Catering & Allied Workers Union of SA & Another v Wooltru Ltd t/a Woolworths (Randburg)*⁶ (*Wooltru*), emphasised the importance of distinguishing insubordination from insolence. The reason being that they are different offences. It equates the offence of insolence with conduct which is offensive, disrespectful, impudent, cheeky, rude (disrespectful in speech or behaviour), insulting or contemptuous, and insubordination with ‘*resistance to or defiance of authority; disobedience*’⁷, and ‘*refusal to obey a reasonable and lawful*

³ See: *Commercial Catering & Allied Workers Union of SA & Another v Wooltru Ltd t/a Woolworths (Randburg)* (1989) 10 ILJ 311 (IC) (*Wooltru*) at 314H-J.

⁴ (2015) 36 ILJ 1511 (LAC).

⁵ Ibid at para 19.

⁶ Ibid fn 3.

⁷ Ibid fn 3 at 315A.

command'.⁸ The refusal by an employee to carry out an employer's instruction is, therefore, not always required for a finding of insubordination.

[24] The LAC in *Palluci Home*⁹, citing with approval *Wooltru*, made it clear that although an employee can be both insolent and insubordinate at the same time, he or she can be insolent without necessarily being insubordinate.

[25] A mere disrespect for the employer (or insolence, impudence, cheekiness or rudeness) cannot, on its own, constitute insubordination, which by its very nature requires disobedience or an outright challenge to authority. Insubordination can manifest itself in the refusal to obey a reasonable and lawful command or in the challenge (or resistance) to or defiance of the authority of the employer. It is, of course, required that insubordination must be deliberate (wilful) and serious. This is not to say contemptuousness of authority (insolence, impudence, cheekiness, disrespect or rudeness) cannot constitute a ground of dismissal (provided, of course, that it is wilful and serious). One should, however, always distinguish between insubordination on the one hand and insolence on the other hand because they are not the same offence.

[26] Nevertheless, there is a fine line between insubordination and insolence, and insolence may very well become insubordination where there is an outright challenge to the employer's authority. However, acts of mere insolence and insubordination do not justify dismissal unless they are serious and wilful. A failure of an employee to comply with a reasonable and lawful instruction of an employer or an employee's challenge to, or defiance of the authority of the employer may justify a dismissal, provided that it is wilful (deliberate) and serious. Likewise, insolent or disrespectful conduct towards an employer will only justify dismissal if it is wilful and serious. The sanction of dismissal should be reserved for instances of gross insolence and gross insubordination.¹⁰

⁸ Ibid at 315E.

⁹ Ibid fn 4 at para 20.

¹⁰ See: *Mqhayi v Van Leer SA (Pty) Ltd* 1984 (5) ILJ 179 (IC) at 182A-D.

[27] Thus, unless the insolence or insubordination is of a particularly gross nature, an employer must issue a prior warning before having recourse to the final act of dismissal.¹¹

[28] The circumstances which preceded the conduct of the employee have to be taken into consideration to determine the employee's intention. They will assist in the determination of whether the conduct was '*wilful or deliberate, persistent and deliberate challenge to the employer's authority*', thus serious enough to constitute gross insubordination or '*impudent, impertinent or, disrespectful*' for it to constitute gross insolence.

[29] This is apparent from what the LAC said in *Palluci Home*, when it said the following:

'Although the respondent's conduct can be described as insolent, impudent, disrespectful, and rude, it certainly does not constitute insubordination which in law requires a persistent, wilful and serious challenge to, or defiance of the employer's authority. Nor, in my view can the first respondent's conduct towards Lambrecht be described, on the evidence, as a "calculated challenge" to the employer's authority, since it was neither deliberate nor intentional. The first respondent had been provoked by Lambrecht in two respects: firstly, by the unlawful deduction of monies from her salary which it is common cause was the basis of the impasse, and secondly, by the condescending manner in which Lambrecht had turned his back to her whilst she attempted to discuss the issue of the deduction with him. This resulted in nothing more than, at best, an isolated knee jerk in the heat of the moment by the first respondent, who had been provoked by her employer. It is clear from the evidence that she did not intend to challenge or defy Lambrecht's authority, but in her anger at the deduction coupled with Lambrecht's refusal to discuss the issue with her by inter alia condescendingly turning his back to her, she reacted precipitously by demanding, in a raised voice, that he should not turn his back to her while she was discussing the issue of the deduction with him. Whilst the first respondent's conduct was manifestly insolent, it cannot be said to be a

¹¹ *Wooltru supra* at 315 H.

serious, persistent and deliberate challenge to the employer's authority, on which to found a charge of insubordination or gross insubordination.'¹²

[30] The LAC considered the fact that the employee had been provoked, which resulted in an isolated knee-jerk reaction in the heat of the moment by the employee. This was found by the Court to negate the intention to challenge or defy the employer's authority, as it was precipitated by the employee's anger.

[31] *In casu*, the Commissioner found that Mr. De Gidts further conceded that:

31.1 deviation from the Aveng Transformation and BBBEE policy is a disciplinary offence in terms of that policy;

31.2 Mr. Quayle did not meet the criterion set out in the Transformation and BBBEE policy, and further that his appointment did not assist Aveng in securing the targeted number of points each year as per paragraph 4.3 of Aveng's Transformation and BBBEE policy;

31.3 Aveng Africa took BBBEE seriously, and Mr. Quayle's appointment did not enhance Aveng's BBBEE status; and

31.4 At a business unit level, the MD of the business unit had responsibilities to implement the Transformation and BBBEE policy.

[32] Mr. Burger, for someone who regards himself as a mentor, seems not to be very pleased by the appointment of Mr. Quayle, whom he regarded as an outsider who did not fit in in terms of the BBBEE requirements as well as the Infraset succession plan.

[33] In my view, the appointment of Mr. Quayle, which resulted in the non-compliance with the Transformation and BBBEE policy, Succession Plan and Employment Equity Plans of Infraset, is the source of the Exco members' discontentment, which led to the heated utterances. It cannot thus be said that the Commissioner misconstrued the nature of the inquiry by coming to the conclusion that Mr. De Gidts' non-compliance with the Transformation and BBBEE policy justified Mr. Burger's outburst or utterances.

¹² *Palluci Home supra* at para 29.

[34] In any event, Aveng Africa seems to have, for many years, tolerated Mr. Burgers' outbursts and alleged passionate manner of addressing issues directly with his superiors, irrespective of their hierarchical position and as alleged by Mr. De Gidts, acted with '*a very elevated impression*' of his authority and '*operat[ed] way above his pay scale*'. I find it difficult to understand how could Aveng Africa not do so a few outstanding months before his retirement on 30 September 2020.

[35] This, in my view, supports the submissions made on behalf of Mr. Burger regarding inconsistency in the application of discipline by Aveng Africa.

[36] I am also seriously perturbed, as was the Commissioner, by Mr. De Gidts' attempt to conceal and underplay what transpired in the meeting of 9 September 2019. In my view, what happened on 9 September 2019 was more serious than on 10 and 11 October 2019. As a result, I am of the view that the Commissioner considered the evidence before him, and applied his mind to the evidence arrive at his conclusion.

[37] Mr. De Gidts was found not to be a credible witness, particularly in relation to what took place on 9 September 2019. He was evasive and had amended minutes of that day, and when questioned, downplayed the issue, which to me is serious in that the deliberations of the day were omitted. Further, if he was an honest and having integrity, how could he invite Exco members to apply to a position knowing very well that applications have closed?

[38] The LAC and the Supreme Court of Appeal (SCA) have held that in review proceedings conducted under section 145 of the LRA, 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.¹³ That is not to say that the correctness is of no consequence.

¹³ See: *Herholdt v Nedbank Ltd (Congress of South African Trade Unions as amicus curiae)* [2013] 11 BLLR 1074 (SCA) (*Herholdt*).

[39] The relationship between the correctness or otherwise of the award under review and the reasonableness enquiry was the subject of the often-cited judgment of the LAC in *Head of Department of Education v Mofokeng and others*¹⁴ (*Mofokeng*), where Murphy AJA said:

‘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 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 effect of the decision, corresponding to the scrutiny envisioned in the distinctive review grounds developed casuistically at common law, now codified and mostly specified in section 6 of the Promotion of Administrative Justice Act (PAJA); such as failing to apply the mind, taking into account irrelevant considerations, ignoring relevant considerations, acting for an ulterior purpose, in bad faith, arbitrarily or capriciously, etc. The Court must nonetheless still consider whether, apart from the flawed reasons of or any irregularity by the arbitrator, the result could be reasonably reached in the light of the issues and the evidence. ...’

[40] And further:¹⁵

‘Irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide a compelling indication that the arbitrator misconceived the enquiry. In the final analysis, it will depend on the materiality of the error or irregularity and its relation to the result. Whether the irregularity or error is material must be assessed and determined with reference to the distorting effect it may or may not have had upon the arbitrator’s conception of the enquiry, the delimitation of the issues to be determined and the ultimate outcome. If but for an error or irregularity a different outcome would have resulted, it will *ex hypothesi* be material to the

¹⁴ (2015) 36 ILJ 2802 (LAC) at para 31.

¹⁵ *Ibid* at para 33.

determination of the dispute. A material error of this order would point to at least a *prima facie* unreasonable result. ...'

[41] This formulation requires the reviewing court that identifies an error or irregularity on the part of the arbitrator to determine whether it was material. This would be the case if, but for the error or irregularity, the arbitrator would have come to a different result. If this is established, the incorrect result arrived at by the arbitrator is *prima facie* unreasonable. The enquiry then moves to a consideration of whether the result is nonetheless capable of justification, having regard to the totality of the evidence.¹⁶

[42] In the present matter, I am of the view that the findings made by the Commissioner and his conclusions are rationally linked to the evidence and that the arbitration award thus meets the reasonableness threshold. It follows from *Mofokeng* that this calibration, which sets the threshold for reasonableness overall at the level only of some rational connection between the evidence and the outcome, will not always account for a decision that is demonstrably or obviously wrong. However, in the present case, the decision cannot be said to be wrong.

[43] In *Herholdt v Nedbank Ltd (COSATU as amicus curiae)*¹⁷ (*Herholdt*), which endorsed and clarified the operation of the *Sidumo* test, the SCA emphasised that an award of an arbitrator will only be set aside on review if both the reasons and the result are unreasonable. It held that in determining whether the award is unreasonable, the Labour Court must broadly evaluate the merits of the dispute and consider whether, if the arbitrator's reasoning is found to be unreasonable, the result is nevertheless capable of justification on all material before the arbitrator, including for reasons not considered by the arbitrator. The SCA in *Herholdt* further held that the result of an arbitrator's award will be unreasonable if it is entirely disconnected from the evidence, unsupported by any evidence and involves speculation by the arbitrator.

¹⁶ A Myburgh, 'Reasonableness Review — the Quest for Consistency' (2024) 45 ILJ 1377 at 1391.

¹⁷ See: *Herholdt* supra.

[44] It follows from this that an arbitrator's award will be reasonable when there is a material connection between the evidence and the result, or put differently, when the result is supported by some evidence. Thus, as observed by the SCA:

'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.'¹⁸

[45] As was emphasised in *South African Breweries Ltd v Commission for Conciliation, Mediation and Arbitration and Others*¹⁹, the test that this Court must apply in deciding whether the arbitrator's decision is reviewable has been rehashed innumerable times since *Sidumo*²⁰: it is whether the conclusion reached by the arbitrator was so unreasonable that no other arbitrator could have come to the same conclusion.

[46] Zondo JP (as he then was) in *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others*²¹ applied the *Sidumo* test thus:

'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

¹⁸ Ibid at para 25.

¹⁹ [2012] 9 BLLR 936 (LC).

²⁰ *Sidumo & another v Rustenburg Platinum Mines Ltd & others* (2007) 28 ILJ 2405 (CC) (*Sidumo*) at para 110.

²¹ (2008) 29 ILJ 964 (LAC) (*Fidelity*) at para 100.

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.’

[47] The test for review is thus trite. It is outcome-based – whether the decision reached by the commissioner is one that a reasonable decision maker could not reach.²² Mere failings, errors or irregularities on the part of the commissioner are not sufficient to review and set aside the award. Awards will be reviewed only if these failings, errors or irregularities resulted in the commissioner’s decision ultimately being unreasonable.²³

[48] Aveng Africa’s criticisms, properly examined, are nothing more than unhappiness and/or displeasure with the Commissioner’s reasons for the decision that Mr Burger’s dismissal was unfair. The criticisms are, in any event, not sustainable. The award meets the standard of reasonableness. No case has been made out to review and set it aside. It follows that the application stands to be dismissed.

[49] I also find that the Commissioner did not materially misdirect himself in the sense that, in awarding compensation, he was influenced by wrong principles or a misconception of the facts or that his decision is one that could not reasonably have been made by a commissioner on the material before him and properly directing himself to the relevant facts and legal principles. The decision has been supported by reasons. In *Duncanmec (Pty) Ltd v Gaylard NO and others*²⁴, the Constitutional Court reminded us that:

‘This test means that the reviewing court should not evaluate the reasons provided by the arbitrator with a view to determine whether it agrees with them. That is not the role played by a court in review proceedings. Whether the court disagrees with the reasons is not material.’

²² *Sidumo supra* at para 110.

²³ *Herholdt supra* at para 25; *Mofokeng* at paras 31 – 33.

²⁴ (2018) 39 ILJ 2633 (CC) at para 42.

[50] Accordingly, applying the review test²⁵ to the application, I am not persuaded that the Commissioner's decision is one that a reasonable decision maker could not have reached. Accordingly, the review application stands to be dismissed.

[51] In the premises, the following order is made:

Order

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

MS Mphahlele

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Adv MJ Engelbrecht SC
Instructed by:	Wilken Inc.
For the Respondent:	Adv T D Hitchings
Instructed by:	Charmain Gray Attorneys

²⁵ *Ibid*; See: *Sidumo* at para 110; *Fidelity* at para 100; *Mofokeng* at paras 31 – 33.