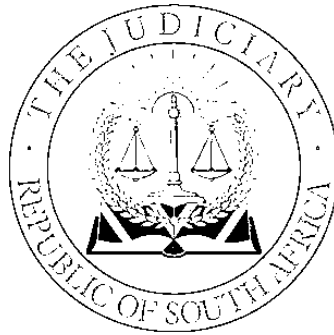




THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR 1997/21

In the matter between:

WEIR MINERALS AFRICA (PTY) LTD

Applicant

and

**NATIONAL UNION OF METALWORKERS OF
SOUTH AFRICA ("NUMSA")**

First Respondent

BULELANI MAKALENI

Second Respondent

SIPHO GALO

Third Respondent

METAL AND ENGINEERING INDUSTRIES

BARGAINING COUNCIL ("MEIBC")

Fourth Respondent

COMMISSIONER DAISY MANZANA N.O

Fifth Respondent

Heard: 25 June 2025

Delivered: 1 October 2025

Summary: Review and cross-review application in terms of section 145 of the Labour Relations Act 66 of 1995 – Test for review restated – Commissioner erred in placing reliance on an apology which did not materialise.

The word ‘*Impimpi*’ in the employment context considered – Outcome of the award found to be unreasonable – Award reviewed and set aside – Held that the dismissal is substantively fair – Cross-review dismissed – No order as to costs.

JUDGMENT

MOTSHEKGA, AJ

Introduction

- [1] Serving before the Court are two applications, a review and cross-review of the arbitration award (award) rendered by the fifth respondent as the duly appointed Commissioner (the Commissioner) on 25 June 2021, under the auspices of the fourth respondent, the Metal and Engineering Industries Bargaining Council (MEIBC). The review applications are brought in terms of section 145 of the Labour Relations Act¹ (the LRA).
- [2] The applicant, Weir Minerals Africa (Pty) Ltd (the employer), seeks an order reviewing and setting aside the award, and in the alternative that the matter be remitted to the MEIBC for a fresh hearing before another commissioner.
- [3] At the outset, it is apposite to record that the employer’s review application is prefaced by an application for condonation of the late filing of the record and an application for the uplifting of the file from archives in terms of Clause

¹ Act 66 of 1995, as amended.

11.2.7 of the now-repealed Practice Manual of the Labour Court². These interlocutory applications were not opposed by any of the respondents. For the sake of brevity, it suffices to state that the Court accordingly granted the relief as prayed for on the previous sitting, following submissions to the effect that late filing of the record was attributed to the failures of the MEIBC, which submissions the Court accepted as plausible.

- [4] The first, second and third respondents (the respondents), oppose the applicant's review application and have simultaneously launched a cross-review of the commissioner's award. Similarly, the applicant opposes the respondents' cross-review application.
- [5] The second respondent, Bulelani Makaleni and the third respondent Sipho Galo are members of the first respondent, National Union of Mine Workers of South Africa (NUMSA) and will be referred to collectively as 'the employees'.

Relevant Facts

- [6] The employees at the time of their dismissals were union shop stewards and on 21 August 2020, they were charged as follows:

'Gross Misconduct in one or more of the following categories:

Breach of Duty to act in good faith

And /or

Failure to promote the interests of the Company:

In that a message was sent to the employees of Wier on WhatsApp group on behalf of shop stewards with cell phone no 0[...] on or about 04 July 2020 which read as follows;

"Comrade from Warehouse let's stop mpimping please, what is the benefit of losing or of assisting company to fire our members. I just want to warn those who continually working hand in hand with supervisors to destroy other

² Clause 11.2.7 provided that a review application lapses and the file is to be archived where an applicant has failed to file the necessary papers within a period of 12 months, unless good cause can be shown for the removal of the file from archives.

employees, there was an incident last night as rubber warehouse, where the supervisor confronted comrade Freddy, as he claimed that Freddy was sleeping, during the argument, the supervisor told Freddy he is not fighting with him but he was called by one of our members, he must come to a particular spot where he will find comrade sleeping. As shop stewards we condemn such kind of behavior and we are not going to lead divided comrade. Let's be careful because we will expose those individuals because it seems it is consistent."

The content of the message misleads/threatens employees implying that they should not report acts of misconduct.'

- [7] A disciplinary hearing was held on 26 August 2020, wherein the employees were assisted by Mr Anthony Manaka, a NUMSA official. It is further recorded that the employees declined to enter a plea but fully associated themselves with the message.
- [8] At the conclusion of the disciplinary hearing, the chairperson found the employees guilty of gross misconduct and recommended that they be dismissed. Accordingly, the employees were dismissed on 1 September 2020.
- [9] Dissatisfied with the outcome of the disciplinary hearing, the employees referred the matter to the MEIBC, alleging unfair dismissal.

The Arbitration award

- [10] The commissioner held that the respondent had proven that the applicants breached the Rules. However, she found that the dismissal was substantively unfair and ordered reinstatement without retrospective effect. The following salient paragraphs from the award provide insight to the reasoning behind the commissioner's finding:

'...

- 54. ... The evidence that the applicants were offered an opportunity to apologize does not support the version that they cannot be trusted but indicate on a balance of probabilities that the apology would have settled the dispute.

...

56. The Code of Good Practice on dismissals promotes progressive discipline however; the Code also states that each case must be treated on its own merits. Based on common cause that the applicants had clean disciplinary records in their period of employment, and were offered an opportunity to apologize but did not, I find that the sanction of dismissal was harsh as the offer to apologize indicates that there were still prospects of a continued employment relationship.
57. The applicants seek retrospective reinstatement, and I find it fair and reasonable to order the respondent to reinstate the two applicants to the positions they occupied or any similar positions with the same terms and conditions of employment that existed before their dismissal. The reinstatement is not retrospective i.e. period of dismissal is as unpaid suspension...' (Own emphasis)

[11] It is against these findings of the commissioner that the employer has approached this Court for a review, with the employees similarly launching a cross-review.

Grounds for the review

[12] In the main, the employer's disconcert with the commissioner's award is directed at the sanction, thus making its application that which is commonly known as a 'sanction review'.

[13] The employer contends that the finding of the commissioner is not one which a reasonable commissioner would have arrived at for the following reasons; (a) the commissioner's finding that an offer for an apology negated that a trust relationship had been broken is not supported by evidence that there was no apology received from the employees and (b) the employees persistently failed to acknowledge any wrongdoing and showed no remorse.

[14] The employer submitted that whether or not the apology would have led to a finding of any existence of a trust relationship or to have had any bearing on a determination of an appropriate sanction could not be assessed absent the apology having materialised.

- [15] Furthermore, Ms Kok argued for the employer, it is trite that the acknowledgement of wrongdoing and showing remorse are imperative differential treatment factors in deciding whether progressive discipline is appropriate in the circumstances. In the current matter, the commissioner erred by ignoring the employees' non-acknowledgement of wrongdoing and lack of remorse *in toto* and on that basis, her finding is grossly unreasonable.
- [16] It was argued on behalf of the employees that the commissioner failed to properly discharge her duties regarding the finding of guilt by deferring to the employer's interpretation of the threatening nature of the WhatsApp text. The argument continued, she ought to have made her own determination with due regard to the evidence before her, including the employees' testimony at arbitration, absent which, this failure is a reviewable irregularity. To this end, the employees urged the Court that the word '*Mpimping*' was used 'informally' in the context of a fellow employee member, Freddy, who had been falsely accused of sleeping. Furthermore, submitted Mr Ngako, although the WhatsApp message could have been drafted differently, its context needs to be taken into consideration.

Grounds for the cross-review

- [17] The employees, in their answering affidavit to the employer's review application, deny the submissions made thereat and contend that they were not guilty of misconduct.
- [18] In their application for a cross-review, the employees persist with their contention that they did not breach any rules; however, the ground for their cross-review is premised on the non-retrospectivity of their reinstatement and not the commissioner's guilt finding.
- [19] In the result, the only pertinent ground in relation to the cross-review is found in the employees' founding affidavit and reads as follows³:

³ Pleadings Index at page 55.

'24. The first to third respondent submit that the fifth respondent's award is reviewable on one or all of the following grounds:

24.1 The first to third respondent [the employees] submit that the fifth respondent [the commissioner] committed misconduct in that she committed an error of law and/or fact when she found that the individual respondents' dismissal was substantively unfair but failed to grant the individual respondents the primary relief of retrospective reinstatement.

24.2 The fifth respondent should have found that the primary relief of retrospective reinstatement should have been awarded because:

24.2.1 The fifth respondent is compelled to require the applicant to reinstate the individual respondents retrospectively to a date not earlier than the date of dismissal unless they do not wish to be reinstated

...

24.3 The first to third respondent submit that the fifth respondent committed misconduct in that she came to a conclusion that no reasonable arbitrator could have reached.'

[20] It was submitted on behalf of the employees that the appropriate primary relief for their unfair dismissal is reinstatement without any loss of benefits unless the provisions of section 193 (2)(b) of the LRA are applicable, that is, a continued employment relationship would be intolerable.

The test for review

[21] In sum, the grounds for review pleaded by the respective parties, albeit for different reasons, is directed at the reasonableness of the commissioner's finding on sanction. Strictly speaking the cross-review is predicated on the alleged error of law. Differently put, the commissioner failed to apply the section dealing with the remedy of reinstatement appropriately.

- [22] The test for review is well-settled and derived from the seminal judgment of *Sidumo & another v Rustenburg Platinum Mines Ltd & others*⁴ wherein the Constitutional Court posited⁵: “*Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?*” This has come to be known as the ‘Sidumo test’.
- [23] The Sidumo test has since been the subject of copious exposition in subsequent authorities. However, as per Van Niekerk J⁶ (as he then was), the *locus classicus* on reviews is the LAC judgment of *Head of Department of Education v Mofokeng and Others*⁷ (*Mofokeng*). The following passage in *Mofokeng* is instructive for purposes of determining unreasonableness by a review court:⁸

‘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 determination of the dispute. A material error of this order would point to at least a *prima facie* unreasonable result. The reviewing judge must then have regard to the general nature of the decision in issue; the range of relevant factors informing the decision; the nature of the competing interests impacted upon by the decision; and then ask whether a reasonable equilibrium has been struck in accordance with the objects of the LRA. Provided the right question was asked and answered by the arbitrator, a wrong answer will not necessarily be unreasonable.’

⁴ [2007] 12 BLLR 1097 CC; (2007) 28 ILJ 2405 (CC).

⁵ Ibid at para 110.

⁶ In *Intercap Ferreira Mainliner (Pty) Ltd v McWade & others* (2020) 41 ILJ 208 (LC); [2020] 2 BLLR 199 (LC) at para 9; see A Myburgh SC ‘Reasonableness Review - The Quest for Consistency’ (2024) 45 ILJ 1377 at 1390.

⁷ (2015) 36 ILJ 2802 (LAC); [2015] 1 BLLR 50 (LAC).

⁸ Ibid at para 33.

[24] Myburgh aptly crystallises the above dictum into a methodology for a review court when deciding the reasonableness of the outcome of an award, as follows:⁹

- ‘(i) having identified an error or irregularity (for example, the ignoring of material facts), the first inquiry is whether it was material, which would be the case if, but for it, the commissioner would have come to a different result; (ii) if this is established, the (incorrect) result arrived at by the commissioner is *prima facie* unreasonable; and (iii) a second inquiry must then be embarked upon — it being whether the result is nevertheless capable of reasonable justification... Instead of asking in an abstract way whether the result of the award is reasonable (which is a difficult inquiry), one is required to identify what went wrong; whether the result would have been different but for this; and, if so, whether the wrong decision is capable of reasonable justification.’
(Own emphasis)

Evaluation

[25] It is overtly evident *ex facie* the award that the commissioner’s finding of substantive unfairness rested on an apology which never materialised.

[26] The commissioner erred in attaching any weight to a non-existent apology and more particularly in finding that the offer to apologise is indicative of any prospects of a continued working relationship. An opportunity to apologise is only the beginning of a conciliatory process within a dispute resolution process; it would normally be followed by the actual apology, then a consideration of the said apology – however it may be framed – and finally an acceptance or rejection of the apology depending on the circumstances.

[27] *In casu*, no apology was tendered. The employer was therefore deprived of the opportunity to weigh the nature of any such apology against the gross misconduct and determine whether it would have been acceptable for purposes of a continued employment relationship.

⁹ Myburgh above n 6 at 1391. This formulation was recently cited with approval by the Labour Appeal Court in *National Bargaining Council for the Road Freight & Logistics Industry v Deysel NO & others* (2025) 46 ILJ 1679 (LAC); [2025] 8 BLLR 790 (LAC) at para 34.

- [28] To conclude on this aspect - for an apology to have formed part of a determination on sanction, it needed to have materialised, absent which, the commissioner's reliance on an offer to apologise as a panacea to dismissal is misconceived and led to the outcome being *prima facie* unreasonable. In essence, a reasonable decision maker may not, in the absence of a demonstration of remorse, arrive at a decision that the sanction of dismissal is inappropriate. Inasmuch as a commissioner is not supposed to defer to the sanction of an employer, he or she must interfere with the sanction if it is unfair. Absent unfairness, a commissioner is not at large to interfere with the sanction of an employer.
- [29] Therefore, in having identified the error committed by the commissioner, the first enquiry in determining unreasonableness thereof is to establish whether this error was material. The Court finds that but for the aspect of the apology, the commissioner, having found that the employees were guilty of gross misconduct, would have arrived at a different sanction.
- [30] The subsequent enquiry, as per the *Mofokeng* dictum¹⁰, is determining whether, notwithstanding a finding that the commissioner's error led to a *prima facie* unreasonable result, the latter is capable of a reasonable justification. This Court finds that the commissioner's result is not so capable. The only other reason cited by the commissioner for finding the dismissal as 'harsh' is the employees' clean disciplinary record. A clean disciplinary record alone cannot shield unremorseful employees from the consequences of their gross misconduct.
- [31] As stated elsewhere above, Mr Ngako for the employees argued that the commissioner ought not to have deferred to the employer's decision that the WhatsApp message was threatening without imputing her own interpretation. This was raised from the bar and not as a ground in the employees' cross-review. Thus the employees are bound by their pleadings and the Court cannot make a determination on this ground, as it was not pleaded and the employer was not afforded an opportunity to respond to it in its own pleadings.

¹⁰ *Mofokeng* above at n 7.

- [32] Notwithstanding the above finding and without interfering with the commissioner's finding on guilt, the use of the word '*Mpimping*' in the WhatsApp message requires careful consideration by the Court. *Mpimping* is a verb derived from the word '*Impimpi*'. With its origins from isiNguni languages (isiZulu and isiXhosa), it denotes to spy or informer – that is – someone who secretly provides information to the authority regarding the activities of others. While not endemic to the apartheid era, it is, as correctly argued by the employer, patently threatening. The word is part of a painful history where those so labelled were the subject of severe retaliation, with consequences that were sometimes fatal. In the employment context, no employee should fear being labelled an *Impimpi* for reporting wrongdoing by a fellow employee. Union activities do not exist outside the social milieu in which they operate, and their presence in a workplace ought to strengthen the collective bargaining process and not foster an atmosphere of intimidation.
- [33] Finally, the employees' failure to appreciate their wrongdoing is regrettable. This failure demonstrates that the trust relationship has, therefore, broken down, and thus the commissioner's finding that employees should be reinstated is not a decision which a reasonable decision-maker could reach.
- [34] The Court, in its conclusion above, finds refuge in the following passage from the Labour Court in *National Union of Metalworkers of SA & another v Commission for Conciliation, Mediation & Arbitration & others*:¹¹
- '... an employee is obliged to act to protect the interests of the employer and where an employee fails to do so and the failure constitutes serious misconduct, the sanction of dismissal will be fair, as the employer is entitled, as an operational imperative, to rely on its employees to act in good faith and to protect the interests... In such a case, dismissal becomes an operational imperative and way of a managing risk.'
- [35] Axiomatically, the Court, having found that the employer has proven the unreasonableness in the outcome of the commissioner's award in her finding

¹¹ (2023) 44 ILJ 1575 (LC); [2022] 3 BLLR 209 (CC) at para 54.

that the dismissal was substantively unfair, the employees' cross-review must fail.

[36] Accordingly, the following order is made:

Order

1. The award issued by the commissioner on 18 August 2021 under MEGA case no 56632 is reviewed and set aside.
2. The following award is substituted for it: 'The dismissal of the applicants is found to be substantively fair'.
3. The respondents' cross-review is dismissed.
4. There is no order as to costs.

M. J. Motshekga

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Ms L. Kok of Van Zyl Attorneys

For the First Respondent: Mr X. Ngako of Ngako Incorporated Attorneys

LABOUR COURT