



THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable
Case No: C517/2022

In the matter between:

NATIONAL UNION OF MINeworkERS

(NUM) obo MARIO DE JONGH

Applicant

and

BLACK MOUNTAIN MINING (PTY) LTD

First Respondent

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

Second Respondent

HENDRIK OLIPHANT N.O.

Third Respondent

Heard: 28 August 2025

This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing down judgment is deemed to be 10h00 on 13 October 2025.

JUDGMENT

DE KOCK, AJ

Introduction

- [1] This matter arises from a tragic incident in the mining sector - a sector already burdened by a history of loss and sacrifice. The death of an employee, arising from an incident involving the conduct of a fellow employee who was subsequently dismissed, serves as a sobering reminder of the human cost that often accompanies industrial operations. Whilst this judgment is concerned with assessing the reasonableness of an award that upheld the sanction of dismissal, this Court cannot ignore the broader context in which this dispute unfolds. The loss of life in the workplace is never merely incidental; it reverberates through families, communities, and the conscience of our labour system. I proceed with this judgment mindful of that reality, and with empathy for all those affected.
- [2] The matter came before the Court as an application to review the arbitration award issued by the third respondent (the commissioner) in terms of section 145 of the Labour Relations Act¹ (LRA). The review application brings to the fore allegations of some irregularities by a commissioner in the conduct of the arbitration proceedings and allegations that the outcome reached were one a reasonable decision-maker could not reach. Insofar as there is a challenge to the applicant's late filing of the supplementary affidavit, this Court is of the view that the late filing must be condoned, and the review application be considered based on all the pleadings filed.

¹ Act 66 of 1995, as amended.

Background

- [3] The applicant was employed as an Advanced Mining Operator in the first respondent's (BMM) Cut and Fill Production Department. He commenced employment with BMM on 3 December 2007 and was dismissed on 17 September 2021. As part of his duties, De Jongh was required to operate a Sandvik Boltec DS311 machine (the Boltec Machine), an electro-hydraulic rock bolter designed for rock reinforcement of the roof and side walls in underground mines with small and medium cross-sections.
- [4] On 10 January 2020, at approximately 23h00, an incident occurred at 49 Level West / 100 / Lense 2 / Lift 3 (Deep Shaft), which led to the death of Ms. Venessa Plagg (Plagg), a Mining Operator and Working Place Safety Representative in the employ of BMM. This resulted in an internal investigation in terms of section 11(5) of the Mine Health and Safety Act² and disciplinary action against the applicant.
- [5] During the section 11(5) inquiry conducted by BMM, it was discovered that the applicant asked Plagg to untie a resin capsule discharge hose (the resin hose) from the boom of the Boltec whilst the power pack of the Boltec was running. As Plagg was untying the resin hose, she sustained multiple injuries as a result of blunt-force trauma which ultimately caused her death.
- [6] On 21 August 2020, a disciplinary hearing was held to deal with allegations of serious misconduct against the applicant relating to the fatality. The charges were formulated as follows:
- 'Offence(s):
1. Dishonesty in that you made false statements and/or withheld information relevant to the investigation into the happenings of 10 January 2020.

² Act 29 of 1996.

2. Gross negligence in that during the night shift of 10 January 2020, you failed to adhere to work standards and the Mine Health and Safety Act, in that you instructed your colleague to do work in front of the machine you were responsible for whilst the power of the machine was switched on and not isolated. You thereby placed your colleague's health and safety at risk.'

[7] The applicant was found guilty on both charges and dismissed. He appealed the finding and sanction. On 12 October 2021, an appeal hearing was held. The finding and sanction were upheld as both substantively fair and procedurally fair. The applicant thereafter referred an unfair dismissal dispute to the CCMA.

Arbitration award

[8] The commissioner, after considering the evidence and arguments, made some key findings. In relation to the dishonesty charge, the commissioner found that he could not conclude that the applicant acted dishonestly with the requisite intention to deceive. The commissioner noted that the applicant had voluntarily returned to the police to correct his statement, which demonstrated a measure of honesty. BMM delivered a cross-review in respect of this finding, which cross-review only needs to be determined in the event of the applicant's review on the gross negligence charge being successful.

[9] However, the Commissioner reached a different conclusion in respect of the charge of gross negligence. The Commissioner found that it was clear from the applicant's own version that he told Plagg to work in front of the machine. The commissioner accepted the evidence that no one is permitted to work in front of the Boltec when the power pack is running, as it is too risky – the machine's boom moves very fast with the power pack on. The commissioner accepted the uncontested evidence of Mr Carstens that the Boltec machine's power pack was running between 22h55 and 23h06 on the night in question, and that no one had reported that the machine had malfunctioned.

- [10] The Commissioner, having considered the applicant's credibility as a witness and the contradictory testimony he gave, found that the applicant was not honest and that his evidence was unreliable. The Commissioner concluded that a reasonable inference from the applicant's evidence was that he had no issue asking a person to work in front of the machine with the power pack on. The Commissioner accepted BMM's version as more probable and found it probable that the applicant told Plagg to work in front of the machine whilst the power pack was still on.
- [11] The Commissioner found further that the applicant acted grossly negligently by failing to adhere to work standards and the Mine Health and Safety Act. The applicant placed his colleague's health and safety at risk by instructing Plagg to loosen the resin hose in front of the machine. Plagg was struck by a blunt object, the rocks present did not strike her, she fell and died. The Commissioner drew the reasonable inference that it was the machine that caused the incident.
- [12] In relation to whether the sanction was too harsh, the Commissioner found that it was common cause that gross negligence was not tolerated in the workplace. The applicant had ignored a critical safety rule and, in doing so, his conduct involved a departure from the standard of a reasonable person to such an extent that it may properly be categorised as extreme. It demonstrated a complete obtuseness of mind or a total failure to take care. His negligence placed his colleague's health and safety at risk and resulted in a fatality. The gravity of the conduct was severe.
- [13] The Commissioner found that the applicant remained defiant in that he maintained he would allow a person to work in front of a machine with the power pack on. The applicant showed no remorse and his "the job must go on" approach created a real danger for him and his colleagues. The Commissioner found that the applicant could not be trusted with health and safety matters. His conduct constituted a serious breach of health and safety rules in circumstances where the mine is an inherently dangerous workplace.

- [14] The Commissioner concluded that BMM's interest outweighed that of the applicant and that a lesser sanction would not rehabilitate the applicant. The Commissioner found that the sanction of dismissal was appropriate and that the dismissal was substantively fair.

Grounds of review

- [15] The applicant challenges the arbitration award on several grounds, which may be summarised as follows:

15.1 The award is defective and is such that no reasonable decision-maker could have made while applying his mind to the facts.

15.2 The Commissioner misconstrued the proceedings and reached a conclusion not supported by any evidence or facts presented.

15.3 The Commissioner misdirected himself and failed to apply his mind preferring one party's version to the uncontested evidence of the other regarding breakdown of the relationship. There was no evidence that the relationship had broken down irretrievably.

15.4 The Commissioner drew an inference where there was no evidence to support the conclusion reached in the following respects:

15.4.1 The Commissioner drew an inference of gross negligence that was neither consistent with the proven facts, nor the most plausible inference to be drawn.

15.4.2 In arriving at this conclusion, the Commissioner drew an inference which was unsupported by the facts let alone the evidence which was presented by BMM's witnesses.

15.4.3 The Commissioner assessed the circumstantial evidence on a piecemeal basis and thus failed to assess the cumulative effect of items of circumstantial evidence and arrived at the

unreasonable conclusion which no reasonable Commissioner based on the evidence which was presented before him could have arrived at such decision.

- 15.5 The Commissioner made findings not based on the evidence put before him.
- 15.6 The Commissioner misunderstood the evidence presented.
- 15.7 The Commissioner failed to address or consider critically relevant evidence and failed to discharge his duty regarding the necessity for oral or documentary evidence.
- 15.8 The Commissioner exceeded his powers by deciding not to make any finding on the credibility of witnesses.
- 15.9 The Commissioner failed to apply section 193(2) of the LRA properly by not ordering reinstatement when there was no evidence that the employment relationship had irretrievably broken down.
- 15.10 The sanction of dismissal is too harsh for a first-time offender.
- 15.11 The Commissioner failed to consider the applicant's personal circumstances, including his age and the difficulty of finding alternative employment in conditions of high unemployment.
- 15.12 The Commissioner failed to consider that where dishonesty has not been established, corrective discipline short of dismissal is warranted even where misconduct is proven.

Review Test

[16] In *Sidumo & another v Rustenburg Platinum Mines Ltd & others*,³ the Court held that “the reasonableness standard should now suffuse section 145 of the LRA”,

³ (2007) 28 ILJ 2405 (CC); 2008 (2) SA 24 (CC).

and that the threshold test for the reasonableness of an award was: “... *Is the decision reached by the commissioner one that a reasonable decision maker could not reach?...*”⁴. In *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)*⁵ the Court applied this reasonableness consideration as follows:

“In summary, the position regarding the review of CCMA awards is this: A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in s 145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2)(a)(ii), the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. 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.”

[17] This test has thus been applied as a two-stage review enquiry. Firstly, the review applicant must establish that there exists a failure or error on the part of the arbitrator. If this cannot be shown to exist, that is the end of the matter. Secondly, if this failure or error is shown to exist, the review applicant must then further show that the outcome arrived at by the arbitrator was unreasonable. If the outcome arrived at is nonetheless reasonable, despite the error or failure, that is equally the end of the review application. In short, in order for the review to succeed, the error or failure must affect the reasonableness of the outcome to the extent of rendering it unreasonable.

[18] Further, the reasonableness consideration envisages a determination, based on all the evidence and issues before the arbitrator, as to whether the outcome of the arbitrator arrived at can nonetheless be sustained as a reasonable outcome,

⁴ Id at para 110.

⁵ (2013) 34 ILJ 2795 (SCA); [2013] 11 BLLR 1074 (SCA) at para 25.

even if it may be for different reasons or on different grounds.⁶ This necessitates a consideration by the review court of the entire record of the proceedings before the arbitrator, as well as the issues raised by the parties before the arbitrator, with the view to establish whether this material can, or cannot, sustain the outcome arrived at by the arbitrator. In the end, it would only be if the outcome arrived by the arbitrator cannot be sustained on any grounds, based on the material, and the irregularity, failure or error concerned is the only basis to sustain the outcome the arbitrator arrived at, then the review application would succeed.⁷

- [19] In *Goldfields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA & Others*⁸ the Labour Appeal Court further explained the reasonableness test in the following terms:

“[15] A ‘process-related review suggests an extended standard of review, one that admits the review of an award on the grounds of a failure by the arbitrator to take material facts into account, or by taking into accounts facts that are irrelevant, and the like. The emphasis here is on process and not result. Proponents of this view argue that where an arbitrator has committed a gross irregularity in the conduct of the arbitration as contemplated by s145(2), it remains open for the award to be reviewed and set aside irrespective of the fact that the decision arrived at by the arbitrator survives the Sidumo test. I disagree. What is required is first to consider the gross irregularity that the arbitrator is said to have committed and then to apply the reasonableness test established by Sidumo. The gross irregularity is not a self-standing ground insulated from or standing independent of the Sidumo test. That being the case, it serves no purpose

⁶ *Fidelity Cash Management Service v Commission for Conciliation Mediation and Arbitration & Others* [2007] ZALAC 12; [2008] 3 BLLR 197 (LAC); (2008) 29 ILJ 964 (LAC) at para 102.

⁷ See *Campbell Scientific Africa (Pty) Ltd v Simmers & others* (2016) 37 ILJ 116 (LAC); [2016] 1 BLLR 1 (LAC) at para 32; *Anglo Platinum (Pty) Ltd (Bafokeng Rasemone Mine) v De Beer & others* (2015) 36 ILJ 1453 (LAC); [2015] 4 BLLR 394 (LAC) at para 12.

⁸ (JA 2/2012) [2013] ZALAC 28; [2014] 1 BLLR 20 (LAC); (2014) 35 ILJ 943 (LAC) (4 November 2013).

for the reviewing court to consider and analyse every issue raised at the arbitration and regard failure by the arbitrator to consider all or some of the issues albeit material as rendering the award liable to be set aside on the grounds of process-related review.”

and

“[20] To do it differently or to evaluate every factor individually and independently is to defeat the very requirement set out in section 138 of the LRA which requires the arbitrator to deal with the substantial merits of the dispute between the parties with the minimum of legal formalities and do so expeditiously and fairly. This is also confirmed in the decision of CUSA v Tao Ying Metal Industries. Failing to consider a gross irregularity in the above context would mean that an award is open to be set aside where an arbitrator (i) fails to mention a material fact in his award; or (ii) fails to deal in his/her award in some way with an issue which has some material bearing on the issue in dispute; and/or (iii) commits an error in respect of the evaluation or considerations of facts presented at the arbitration. The questions to ask are these: (i) In terms of his or her duty to deal with the matter with the minimum of legal formalities, did the process that the arbitrator employed give the parties a full opportunity to have their say in respect of the dispute? (ii) Did the arbitrator identify the dispute he was required to arbitrate (this may in certain cases only become clear after both parties have led their evidence)? (iii) Did the arbitrator understand the nature of the dispute he or she was required to arbitrate? (iv) Did he or she deal with the substantial merits of the dispute? and (v) Is the arbitrator’s decision one that another decision-maker could reasonably have arrived at based on the evidence?”

and

“[21] Where the arbitrator fails to have regard to the material facts it is likely that he or she will fail to arrive at a reasonable decision. Where the

arbitrator fails to follow proper process he or she may produce an unreasonable outcome (see Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others 2006 (2) SA 311 (CC)). But again, this is considered on the totality of the evidence not on a fragmented, piecemeal analysis. As soon as it is done in a piecemeal fashion, the evaluation of the decision arrived at by the arbitrator assumes the form of an appeal. A fragmented analysis rather than a broad based evaluation of the totality of the evidence defeats review as a process. It follows that the argument that the failure to have regard to material facts may potentially result in a wrong decision has no place in review applications. Failure to have regard to material facts must actually defeat the constitutional imperative that the award must be rational and reasonable - there is no room for conjecture and guesswork”

- [20] The Labour Appeal Court in *Head of the Department of Education v Mofokeng and Others*⁹ provided the following exposition of the review test:

“[33] 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 inquiry. 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 inquiry, 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

⁹ (JA14/2014) [2014] ZALAC 50; [2015] 1 BLLR 50 (LAC); (2015) 36 ILJ 2802 (LAC) (1 October 2014).

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. By the same token, an irregularity or error material to the determination of the dispute may constitute a misconception of the nature of the enquiry so as to lead to no fair trial of the issues, with the result that the award may be set aside on that ground alone. The arbitrator, however, must be shown to have diverted from the correct path in the conduct of the arbitration and as a result failed to address the question raised for determination.”

- [21] The court will now proceed to consider the review application against the above principles and the test applicable to review applications.

Evaluation of grounds of review

Ground 1: Award defective – no reasonable Commissioner could have made it

- [22] This ground is formulated in general terms, and it essentially encapsulates the applicant’s overall challenge to the award. It does not identify a specific defect but rather asserts the conclusion that the award should not have been made. This is too broad as a ground of review and must be assessed in light of the more specific grounds of review that follow. This Court shall return to this ground after considering the substantive challenges raised in grounds 2 to 12 hereunder.

Ground 2 – Misconstrued proceedings and reached conclusion not supported by evidence

- [23] The applicant contends that the Commissioner misconstrued the proceedings and reached a conclusion not supported by any evidence or facts. This ground of review must fail as the arbitration record reveals that the Commissioner was presented with the following:

23.1 Detailed evidence of BMM’s witnesses (Carstens, McCoy and Stoffels).

23.2 The applicant's own evidence.

23.3 Extensive documentary evidence including DCU data from the Boltec machine; investigation reports; autopsy report; training manuals and procedures; the applicant's two police statements; and pre-use inspection checklists.

[24] The Commissioner's award demonstrates that he carefully considered the evidence. He set out the background to the incident; the charges and the parties' respective cases; a detailed analysis of the evidence on the dishonesty charge; a detailed analysis of the evidence on the gross negligence charge; and an analysis of the appropriate sanction. The Commissioner further made specific findings on disputed factual issues such as whether the applicant instructed Plagg to untie the hose; whether the power pack was running at the time; whether the machine was in proper working order; what caused Plagg's death; and whether the applicant's conduct was negligent or grossly negligent.

[25] Each of these findings on disputed factual issues was based on evidence that was before the Commissioner. The applicant may disagree with how the Commissioner evaluated conflicting evidence or which witnesses he found more credible, but that does not mean that the findings were not supported by evidence. The suggestion that there was no evidence to support the Commissioner's conclusions is demonstrably incorrect. There was substantial evidence before the Commissioner, which he clearly considered. The real issue is whether the Commissioner was entitled to prefer that evidence over the applicant's version – which goes to the reasonableness of the decision and not the absence of evidence.

[26] This ground of review accordingly fails.

Ground 3 – Misdirection regarding breakdown of relationship – no evidence of irretrievable breakdown

[27] The Commissioner, under the heading “Was the sanction too harsh” explains why the relationship has broken down irretrievably. The Commissioner might not have used the exact words “irretrievable breakdown”, but he noted that gross negligence was not allowed in the workplace; that the applicant ignored a safety rule; that the applicant’s actions involved a departure from the standard of the reasonable person; that the actions are to such an extent that it may properly be categorised as extreme; that it demonstrates a complete obtuseness of mind or a total failure that his negligence placed his colleague’s health and safety at risk, which resulted in a fatality as far as the gravity of the conduct is concerned; that the applicant remained defiant in that he will allow persons to work in front of the “power pack machine”; the applicant did not show remorse; that the applicant’s “the job must go on” approach creates a real danger for him and his colleagues; it is obvious that the applicant cannot be trusted with health and safety and that his action is a breach of the health and safety rules, considering the mine being a very dangerous workplace; and that Carstens confirmed the conduct caused a breach of trust and that a different sanction will not rehabilitate the applicant.

[28] There is therefore no merit in this ground of review and must accordingly fail.

Ground 4: Drew inference where there was no evidence and ground 5: Made findings not based on evidence

[29] These two grounds of review will be addressed together as they raise similar challenges. The specific inferences challenged is that the applicant instructed Plagg to work in front of the machine, that the power pack was running at the time, and that the machine caused Plagg’s death. The applicant contends that these findings rest on hearsay evidence from witnesses who did not directly observe the events (Carstens, McCoy and Stoffels). This Court must evaluate whether the Commissioner’s inferences were reasonable.

Applicant instructed Plagg to untie the hose

- [30] The Commissioner found that the applicant told Plagg to work in front of the machine. This finding was based on the applicant's own signed statement in which he stated that he asked Plagg to untie the resin hose and the applicant's concession during cross-examination that he asked Plagg to loosen the resin hose. The argument on behalf of the applicant that asking someone to untie a hose is different from instructing them to work in front of the machine while it is running does not carry any conviction. Whether Plagg was instructed, told, or asked does not take the matter any further. The fact remains that the applicant is the person responsible for the machine, who told Plagg to loosen the hose whilst the machine was still running. The applicant must accept full responsibility for this and cannot hide behind the allegation that he did not have authority to instruct Plagg.
- [31] The evidence shows that the resin hose was attached to the boom at the front of the machine and that, to untie it, Plagg would need to be in front of the machine. The applicant admitted asking her to untie the hose and it is clear from the uncontested evidence, which the Commissioner accepted, that the power pack was running at the time.
- [32] The inference drawn by the Commissioner was entirely reasonable and consistent with the proven facts, including the applicant's own admissions. This Court finds that there is no merit in this ground of review, and the ground accordingly fails.

The power pack was running

- [33] The Commissioner's decision that the power pack was still running when Plagg went in front of the machine to untie the hose is based on verified DCU data showing the power pack ran from 22h56 to 23h06; the applicant's statement that the incident occurred around 23h00; and the emergency call log showing Mr Molale called at 23h05.

[34] It is clear from this time sequence that the incident occurred within the window when the DCU data proves the power pack was running. It is immaterial that McCoy never examined the machine and that he relied on reports from Mr Herbst and Mr Steyn who were not called as witnesses. This Court does not regard this evidence as hearsay evidence, as the evidence is directly corroborated by the DCU data, which was verified and tested on 23 January 2020. The applicant did not challenge the accuracy of this data or the verification process and neither did he present any expert evidence to contradict the correctness of the data.

[35] This Court therefore finds that the inference drawn by the Commissioner that the power pack was running at the time of the incident was not only reasonable – it was the only inference consistent with the objective DCU data and timeline of events. Notably, the applicant conceded during cross-examination that there were many instances where he would let someone work in front of the machine when the engine and power pack were on, and that he understood what the training required but testified that “the work needed to be done”. This concession directly supports the Commissioner’s finding and, as such, there is no merit to this ground of review.

The machine caused Plagg’s death

[36] The Commissioner found that Plagg’s injuries were caused by the Boltec machine and not by falling rocks. This decision was based on Dr Stoffel’s interpretation of the autopsy showing injuries from blunt trauma consistent with being struck by a machine; the fact that two rocks nearby were removed by Mr Louw during “safe-making” before the incident; the size and distance of the rocks making them an implausible cause given the limited damage to Plagg’s hard hat; and the applicant’s own statement on 29 January 2020 in which he conceded the machine could have caused the death.

[37] The applicant’s challenge that Dr Stoffels never conducted the tests on the body and relied on Dr Fouche’s report is rejected as a valid challenge to Dr Stoffels’ testimony. This Court finds that the Commissioner’s reliance on Dr Stoffels’

testimony, supported by the autopsy, was reasonable and so too is the Commissioner's inference drawn from this evidence. There is no merit to this ground of review.

- [38] In summary therefore this Court finds, in respect of the review grounds 4 and 5 that the Commissioner did not draw inferences in the absence of evidence and that each key finding was supported by evidence presented to the Commissioner. The inferences drawn were reasonable, rationally connected to the evidence and within the range of reasonable decision-making. These grounds of review accordingly fail.

Ground 6 – Misunderstood the evidence

- [39] The applicant contends that the Commissioner misunderstood the evidence presented. No specific example is pleaded in the founding affidavit and reference is made to hearsay evidence in the supplementary affidavit, which will be addressed in ground 7. Without any specific particulars of what evidence was misunderstood and how, this ground is too vague to be sustained.

- [40] Moreover, having reviewed the award carefully, this Court is satisfied that the Commissioner understood the evidence before him. The award reflects that he understood the applicant's defence; understood BMM's case; understood the technical evidence; understood the expert medical evidence about the cause of death; and understood the safety training and procedures. The fact that the Commissioner rejected the applicant's version does not mean that he misunderstood the evidence. This ground therefore has no merit and must fail.

Ground 7: Failure to address critically relevant evidence / failed to discharge duty regarding oral or documentary evidence

- [41] This ground in essence refers to the applicant's challenge to the award insofar as inadmissible hearsay evidence is concerned. The applicant contends that Carstens, McCoy and Dr Stoffels' evidence was hearsay evidence. This Court is of the view that their evidence was admissible given that Carstens testified based

on documentary evidence, the applicant's own and uncontested evidence, his investigation, and about facts falling within the scope of his role and knowledge; McCoy testified about verified DCU data within his area of expertise and based on being qualified to interpret the DCU data, which he testified cannot be tampered with; and Stoffels, who is a medical practitioner, provided an expert interpretation of an autopsy report. In respect to Stoffels' evidence, the autopsy report is the evidence, Stoffels is qualified as a medical practitioner to interpret it, and he explained the basis for his interpretation. In this Court's view, the Commissioner's reliance on their evidence was reasonable and does not render the award reviewable on the ground of unreasonableness.

[42] Commissioners, in any event, are allowed to admit hearsay evidence, but need to decide what weight to attach to such hearsay evidence. In this matter, the witnesses' testimony was supported by documentary evidence and the Commissioner acted reasonably in attaching the weight that he did to their evidence, which cannot be said to be hearsay evidence in the true sense. The documentary evidence, in any event, was not seriously challenged regarding its veracity and its admissibility during the arbitration hearing.

[43] This Court therefore finds that the Commissioner did not fail to address critically relevant evidence, nor did he fail to discharge his duty. He carefully considered all the evidence before him, including the applicant's evidence, and arrived at a reasonable conclusion.

Ground 8: Exceeded powers by deciding not to make findings on credibility

[44] The applicant contends that the Commissioner exceeded his powers by deciding not to make any finding on the credibility of witnesses. This contention is simply incorrect, as the Commissioner did make credibility findings in his award. The Commissioner found the applicant's evidence regarding the differing statements by the applicant as credible. He explicitly rejected the applicant's version that the applicant did not instruct Plagg to work in front of the machine, which is a credibility finding.

- [45] The Commissioner found the defence about machine modification not credible, as McCoy's evidence, which he accepted, showed that the machine was in proper working order. The Commissioner further, throughout his award, constantly preferred BMM's evidence over the applicant's evidence. It is not required for a Commissioner to explicitly state that he finds specific witnesses' evidence not credible, as credibility findings are evident from which version the decision-maker accepts or rejects. The Commissioner implicitly found BMM's witnesses' to be more credible than the applicant on key disputed issues. This ground accordingly also fails.

Ground 9: Failed to apply section 193(2) – should have ordered reinstatement

- [46] The applicant's contention that the Commissioner failed to apply his mind to section 193(2) of the LRA and should have ordered reinstatement because there was no evidence that the employment relationship had irretrievably broken down was already addressed above. The Commissioner found that the applicant's dismissal was substantively fair and that finding, if found to be reasonable, means that reinstatement is not an appropriate remedy.
- [47] This ground of review therefore fails as a standalone ground of review, but is relevant to the overall assessment of reasonableness, especially insofar as the finding that the dismissal was substantively fair is concerned.

Ground 10: Sanction too harsh for first-time offender

- [48] The applicant contends that the sanction of dismissal is too harsh for a first-time offender, and that corrective discipline should have been imposed. This Court is not required to determine whether the sanction of dismissal is one that this Court would have imposed but is to determine whether the sanction of dismissal falls within the range of sanctions that a reasonable decision-maker could impose.
- [49] This Court is of the view that the sanction of dismissal imposed, based on the reasons provided by the Commissioner, is certainly a reasonable sanction. In fact, this Court finds it difficult to comprehend how any other sanction of

dismissal could have been imposed based on the evidence placed before the Commissioner. The Commissioner, in assessing sanction, considered the extreme gravity of the conduct; the fatal consequences of the conduct; the breach of trust in a safety-critical role; the mining environment which is inherently dangerous; that Schedule 8 reserved dismissal for such serious offences; the applicant's attitude of "the job must go on"; and the absence of remorse.

- [50] This Court is therefore satisfied that the Commissioner's finding of dismissal was reasonable, fair and appropriate given the circumstances of the matter. This ground of review must accordingly fail.

Ground 11: Failed to consider personal circumstances

- [51] The applicant contends that the Commissioner failed to consider his personal circumstances, including his age and the difficulty of finding alternative employment in conditions of high unemployment. Although it may be so that the Commissioner did not explicitly mention that he considered the applicant's personal circumstances, this does not in itself result in a conclusion that the Commissioner's conclusion regarding sanction was one that a reasonable decision-maker could not reach.

- [52] The applicant's personal circumstances, as testified to, are outweighed by the seriousness of the applicant's conduct, and the fatality that occurred due to a deliberate serious breach of health and safety procedures. The Commissioner concluded that, given the seriousness of the applicant's conduct, BMM's interests outweigh the interests of the applicant. This could only have referred to the applicant's personal circumstances.

- [53] This Court is of the view that the Commissioner's failure to explicitly mention the personal circumstances does not result in the outcome, i.e., to uphold the sanction of dismissal, being unreasonable. The Commissioner's finding is one that falls well within the bands of reasonableness, and this ground of review must fail.

Ground 12: Failed to consider that without dishonesty, corrective discipline warranted

- [54] The applicant contends where dishonesty has not been established, and even if misconduct is proven, corrective action short of dismissal is warranted. This, as a general proposition, is simply incorrect. The absence of dishonesty does not mean that dismissal is inappropriate. There are many offences that do not involve dishonesty which can justify dismissal for a first offence. These are, for example, gross negligence, assault, sexual harassment, serious breach of safety rules and gross insubordination, to mention but a few examples.
- [55] The test is not whether dishonesty was proven, but whether the proven misconduct was so serious that dismissal is justified. The Commissioner found the applicant guilty of gross negligence and, given that in this Court's view this finding is reasonable, the Commissioner was entitled to impose dismissal as a sanction. As stated, the question is whether the proven offence – gross negligence resulting in a fatality - was serious enough to warrant dismissal. In this Court's view, the offence was sufficiently serious to warrant dismissal and the Commissioner's decision cannot be said to be one that a reasonable decision-maker could not reach. This ground of review must therefore fail.

Conclusion

- [56] For the reasons set out above, this Court is satisfied that the Commissioner did not commit any gross irregularity in the conduct of the arbitration proceedings. The Commissioner properly understood the nature of the inquiry before him, considered the relevant evidence and legal principles, and reached a conclusion that was reasonable and defensible.
- [57] The mere fact that the applicant disagrees with the outcome, or might have preferred a different result, does not render the award reviewable. The threshold for review is high, and rightly so. The Commissioner's findings and conclusions fall comfortably within the range of reasonable outcomes available on the evidence and the law.

[58] The review application must therefore be dismissed.

Costs

[59] The applicant has been unsuccessful. In the ordinary course, costs would follow the result. However, this is a matter involving a trade union acting on behalf of a member who has suffered significant consequences - the loss of employment and the trauma associated with a workplace fatality. While the review application was unsuccessful, it cannot be said that it was frivolous or vexatious. Furthermore, the matter raised important issues regarding workplace safety in the mining sector and the proper application of the *Sidumo* review standard to fatality cases. It was appropriate that these issues be ventilated before this Court. In the circumstances, it is appropriate that each party bears its own costs.

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

Order

1. The application for the arbitration award to be reviewed and set aside is refused.
2. There is no order as to costs.



C. de Kock

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

M Malematja from Mashabela Attorneys

For the First Respondent:

E Ellis from Edward Nathan Sonnenbergs Inc.

LABOUR COURT