



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

CASE NO: JR2220/23

In the matter between:

**ASSOCIATION OF MINeworkERS AND
CONSTRUCTION WORKERS UNION (“AMCU”)**

OBO ZONDO, ZM AND 81 OTHERS

Applicant

And

THE COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

WERNER KRUGER N.O

First Respondent

Second Respondent

VIBRO BRICKS AND PAVING

Third Respondent

Heard: 3 June 2025

Delivered: This judgment was handed down electronically by circulation to the Applicant and Third Respondent’s Legal Representatives by email, publication on the Labour Court website and release to SAFLII. The

date and time for handing - down is deemed to be 15h30 on 14 October 2025.

JUDGMENT

LALLIE J

[1] The individual applicants were employed by the third respondent. Owing to a mutual interest dispute which included wage increase and night shift allowance the applicant trade union, AMCU, approached the first respondent (the CCMA) in an effort to conclude an agreement on picketing rules with the third respondent. On 10 August 2021 the applicant and the third respondent agreed on picketing rules under CCMA case numbers GATW8787-21 and GATAW8786-21. On 7 March 2022 the applicant issued the third respondent with a notice of intention to strike. The protected strike commenced at the third respondent's Rosselyn premises on 9 March 2022. As a result of incidents which occurred during the protected strike, the third respondent instituted a disciplinary enquiry against the individual applicants. The following charges were preferred against the individual applicants:

"Rule 34 insubordination – refusal to obey reasonable instructions related to work, specifically picketing rules under case number GATW8787-21 and GATW8686-21.

IN THAT: Despite picketing rules signed under the auspices of the CCMA (case numbers GATW8787-21 AND GATW8686-21), AMCU and its members are in total disregard of these rules, specifically paragraph 4 - location of

picket and number of picketers, paragraph 6.4 - pickets may not, and paragraph 7 – controls of pickets. The company needs to investigate this matter in the form of a disciplinary hearing.”

- [2] The chairperson of the disciplinary enquiry found the individual applicants guilty of the acts of misconduct they were charged with and they were dismissed on 11 April 2022. The applicant referred an unfair dismissal dispute to the CCMA. An effort to resolve the dispute through conciliation did not succeed and it was referred to arbitration. Having arbitrated the dispute, the second respondent (the commissioner) issued an arbitration award dated 25 September 2023 in which he found the individual applicants’ dismissal fair. In this application the applicant seeks an order reviewing and setting the arbitration award aside. The application is opposed by the third respondent.
- [3] The applicant’s main grounds for review are that the commissioner committed gross irregularities in the conduct of the arbitration which rendered his arbitration award unreasonable. The correct legal position in adjudicating review applications based on gross irregularities committed by commissioners in the conduct of arbitrations is that errors commissioners make in conducting arbitrations do not necessarily render their awards unreasonable. In addition to proving that a commissioner erred when conducting the arbitration, the applicant must establish that the error lead the commissioner to reach an unreasonable
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decision. The principle is re-affirmed as follows in *Head of the Department of Education v Mofokeng and Others*¹:

"[32] However, sight may not be lost of the intention of the legislature to restrict the scope of review when it enacted section 145 of the LRA, confining review to "defects" as defined in section 145(2) being misconduct, gross irregularity, exceeding powers and improperly obtaining the award. Review is not permissible on the same grounds that apply under PAJA. Mere errors of fact or law may not be enough to vitiate the award. Something more is required. To repeat: flaws in the reasoning of the arbitrator, evidenced in the failure to apply the mind, reliance on irrelevant considerations or the ignoring of material factors etc. must be assessed with the purpose of establishing whether the arbitrator has undertaken the wrong enquiry, undertaken the enquiry in the wrong manner or arrived at an unreasonable result. Lapses in lawfulness, latent or patent irregularities and instances of dialectical unreasonableness should be of such an order (singularly or cumulatively) as to result in a misconceived inquiry or a decision which no reasonable decision-maker could reach on all the material that was before him or her."

- [4] The reasons given by the commissioner for finding the individual applicants' dismissal fair were that the third respondent correctly took disciplinary action against them for committing misconduct which constituted a breach the picketing rules. He rejected the applicant's contention that the third respondent should have relied on clauses 10 and 11 of the picketing rules and approached this court for appropriate relief. He found it common cause that the individual applicants left

¹ [2015] 1 BLLR 50 (LAC) at para 32.

the designated picketing area. He noted that the question whether the individual applicants prevented people from entering the gate, burnt tyres or threw stones constituted factual disputes which did not require the interpretation of the relevant clauses of the picketing rules. He found clauses 10 and 11 of the picketing rules inapplicable.

[5] The commissioner observed that the individual applicants conceded that they breached the picketing rule which required them to picket at the designated area. The explanation for their conduct was that they wished to get the result they wanted so that they could end the strike. He interpreted the breach to be an attempt to pressure the third respondent to accept the individual applicants' demands. He found that the individual applicants were in flagrant disregard of the picketing rules on more than one occasion. Their non-compliance resulted in other employees feeling that they were held hostage and other people being prevented from entering and leaving the third respondent's premises. He found that the individual applicants' conduct made the employment relationship intolerable and concluded, based on those reasons that the individual applicants' dismissal was fair.

[6] The gross irregularities the applicant sought to rely on include the submission that the commissioner failed to consider the binding nature of the picketing rules particularly the dispute resolution clause. The applicant further submitted that had the commissioner properly considered the law of contract and the binding nature of invoking the dispute resolution clause he would have come to a vastly different finding on the substantive fairness of the dismissal. The third respondent

denied that the error was made and submitted that the commissioner was well aware of his statutory duties, assessed the evidence properly and issued a reasonable award.

[7] The conflict resolution clause in the picketing rules reads thus:

“11.1 Any dispute about the interpretation or application of these Rules or any alleged breach thereof shall be dealt with in accordance with section 69(8),(9) and (11) of the Act or section 158(1)(g) of the Act. This does not affect any other right that any person may have in terms of the Act or any other law.

11.2 It is recorded the employer, the union and persons taking part in the picket are subject to the protections and provisions set out in section 67 of the Act”

[8] The applicant's contention that the commissioner failed to consider the conflict resolution clause of the picketing rules is incorrect. It overlooks the last portion of clause 11.1 of the dispute resolution clause which expressly states that the obligation to have the provisions of section 69(8), (9) and (11) as well as section 158(1) of the LRA does not affect any other right any person may have in terms of any other law. The parties therefore agreed that the third respondent would retain its power to take disciplinary action against the individual applicants in clause 11.1 of the picketing rules. Further, section 67(5) of the Labour Relations

Act² (the LRA) grants employers the right to dismiss fairly an employee who commits an act of misconduct during a protected strike.

- [9] The applicant further submitted that the commissioner erred in finding the sanction of dismissal appropriate. It was argued that the sanction was severe and based on the commissioner's erroneous finding that AMCU and the individual applicants flagrantly breached the picketing rules. The allegations were denied by the third respondent.
- [10] Clause 4 of the picketing rules provided that picket may be held at the designated places. The applicant conceded that the individual applicants breached clause 4 in that they congregated at the third respondent's gate outside the designated area. It, however, justified the conduct by stating that the individual applicants needed to give their trade union official a mandate. Clause 6.5.5 of the picketing rules precluded the individual applicants from using or possessing any inflammable substance. It is common cause that the individual applicants made a fire in front of the third respondent's gate in breach of the picketing rules. The applicant alleged that the conduct was justified because it was cold.
- [11] I accept the applicant's submission that the commissioner erred in finding that some employees were held hostage by the individual applicants because no admissible evidence was led in support of the hostage taking. The reasonableness of an arbitration award is determined on the totality of the

² Act 66 of 1995, as amended.

evidence led. For an error to justify the setting aside of an arbitration award it must have the effect of leading the commissioner to reach an unreasonable decision. Section 191 read with section 138 of the LRA grant commissioners the authority to determine the fairness of dismissals for misconduct. Commissioners therefore use their sense of fairness in exercising the authority. The commissioner found the individual applicants' disregard for the picketing rules flagrant and that it happened more than once.

[12] The commissioner found the violation of the picketing rules serious. The finding is supported by common cause evidence. Contrary to the applicant's submissions, the commissioner considered the appropriateness of the sanction of dismissal. He relied on *Pailpac (Pty) Ltd v De Beer NO & Other*³ where the LAC found the dismissal of employees for carrying weapons during a strike in breach of the picketing rules fair.

[13] I accept the applicant's submission that the commissioner erred in not making an express finding that the individual applicants' dismissal was procedurally unfair. Section 193(2)(d) provides that the relief of reinstatement may not be granted to an employee whose dismissal is unfair because the employer did not follow a fair procedure. A commissioner's obligation to state expressly whether a dismissal is procedurally fair assists in determining whether the decision on the relief granted in an arbitration award is reasonable.

³ [2021] 6 BLLR 570 (LAC).

- [14] The third respondent denied that the commissioner's omission to make a finding on procedural fairness was unreasonable. The basis of the argument was that the record and award reflect that the commissioner applied his mind to the procedural fairness of the dispute and his decision is subsumed in the finding that the dismissal was fair. In *Fidelity Cash Management Service v CCMA & Others*⁴ it was held that the rationality of an award must be determined on all the evidence properly tendered at arbitration including facts not expressly relied on by the commissioner in the award.
- [15] The commissioner noted the evidence on the procedural fairness of the individual applicants' dismissal. It was tendered by Ms Briedenham (Briedenham), the chairperson of the individual applicants' disciplinary enquiry. She testified that because the situation at the third respondent was volatile she and the third respondent's representative had to be fetched by security personnel from a garage 5 kilometers from the third respondent's premises. She added that at the disciplinary hearing the only objection by the applicant's representative, Mr Mohamose (Mohamose), was that the disciplinary enquiry should not have been held as the third respondent was supposed to have acted in terms of the dispute resolution clause in the picketing rules. When the objection was dismissed Mohamose stopped participating in the disciplinary enquiry which was proceeded with and concluded.
- [16] In determining the procedural fairness of the dismissal the commissioner had to establish whether the individual applicants' dismissal was effected in accordance

⁴ [2008] 3 BLLR 197 (LAC).

to a fair procedure. The evidence tendered at arbitration was that the third respondent afforded the applicant an opportunity to state a case before taking the decision to dismiss the individual applicants. The opportunity was not seized but the applicant's representative elected not to participate when his objection on the procedure to be followed was dismissed. The third respondent's evidence that the opportunity was granted was not refuted and no evidence was tendered at arbitration which supported the finding that the dismissal was procedurally unfair. The totality of the evidence tendered at arbitration proves that the commissioner considered the procedural fairness of the dismissal and that his decision on it is included in his final decision that the dismissal was fair. The commissioner's omission to make an express finding that the dismissal was procedurally fair did not constitute an irregularity. It did not have the effect of distorting his decision.

- [17] I accept the third respondent's submission that the applicant's contention that commissioner incorrectly upheld the dismissal of faceless and nameless employees is invalid as it is inconsistent with the evidence led at arbitration. The record reflects that the commissioner applied his mind to the issue of the identity of the dismissed employees. He dealt with it as follows:

"COMMISSIONER: Thank you. One thing that is just important for me and I want to make 100% sure. At the beginning when I saw the pre-arb it was the Union's case that it was not misconduct. That whole thing about it. During one of your questions you said that all 89 people were not there. Did you change your

position? Because I need to know whether The Respondent needs to know whether they must go through an identification exercise.

Mr MOHAMOSE: No, no Commissioner we were just putting it as a question. I think our case still remains as our opening that whether there was misconduct or a breach of Picketing Rules.

COMMISSIONER: Okay. So I can put it on the record there is no need for an identification that we now need to go through every single video footage and identify the employees.

MR MOHAMOSE: I confirm on record so Commissioner.

COMMISSIONER: Okay.”

[18] The applicant’s attempt to rely on the commissioner’s omission to consider mitigating circumstances before reaching his decision on the fairness of the dismissal cannot succeed. Item 7 of schedule 8 to the LRA which provided guidelines in cases of dismissal for misconduct at the time the arbitration was held provided as follows:

“Guidelines in cases of dismissal for misconduct

Any person who is determining whether a dismissal for misconduct is unfair should consider-

- (a) whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the workplace; and
 - (b) if a rule or standard was contravened, whether or not –
 - (i) the rule was a valid or reasonable rule or standard;
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- (ii) the employee was aware, or could reasonably be expected to have been aware , of the rule or standard;
- (iii) the rule or standard has been consistently applied by the employer;
and
- (iv) dismissal was an appropriate sanction for the contravention of the rule or standard.”

[19] It can be seen from the above guidelines that the commissioner was not specifically expected to consider the individual applicants’ mitigating circumstances. A reading of the arbitration award reveals that the commissioner complied with the provisions of item 7 of schedule 8 to the LRA. Section 138(7)(a) required the commissioner to issue an arbitration award with brief reasons. He fulfilled that requirement.

[20] The totality of the evidence before the arbitrator was that the individual applicants breached picketing rules deliberately and committed misconduct in the process. I accept the third respondent’s argument that the commissioner justifiably found that the gravity of the individual applicants’ conduct justified dismissal. The right to strike is enshrined in the constitution. The LRA regulates the way in which it must be exercised. Part of that regulation is found in section 69 of the LRA which grants registered trade unions the right to authorize a picket by its members and supporters to peacefully demonstrate in support of a protected strike. The letter of the LRA requires the right to strike to be exercised peacefully in a manner that does not disturb the employer’s efforts to conduct business during the protected strike. The commissioner’s decision that the individual applicants’ conduct

rendered the continued work relationship between the parties before him intolerable is consistent with the purpose and letter of the LRA. The errors he made in the conduct of the arbitration did not render his decision unreasonable. The arbitration award is based on evidence properly placed before the commissioner and reasonable.

[21] The applicant and third respondent have a continuing relationship. A costs order against the applicant will therefore be inappropriate.

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

1. The application for review is dismissed.

2. There is no order as to costs.

MZN Lallie

Judge of the Labour Court of South Africa

Appearances

For the Applicant: Advocate Cook

Instructed by LDA Inc Attorneys

For the Third Respondent: Advocate P. Bekker SC

Instructed by Maritz Smith Inc

LABOUR COURT