



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR 2099/22

In the matter between:

NATIONAL UNION OF METALWORKERS OF

First Applicant

SOUTH AFRICA ("NUMSA") obo

SIPHO NKOSI & 4 OTHERS

Second to Further Applicant

and

PFG BUIDLING GLASS (PTY) LTD

First Respondent

NATIONAL BARGAINING COUNCIL FOR

Second Respondent

THE CHEMICAL INDUSTRIES ("NBCCI")

COMMISSIONER KENNETH DLAMINI

Third Respondent

Heard: 04 July 2025

Delivered: 14 October 2025

Summary: The Applicant seeks to review and set aside an arbitration award dated 9 July 2022.

JUDGMENT

PRETORIUS, AJ

Introduction

- [1] This is an application to review and set aside an arbitration award dated 9 July 2022, which was received by the Applicant on 16 August 2022, under case number CHEM 409-14/15 (Award). In the Award, the Third Respondent found that the dismissal of the Second to Further Applicants (the individual applicants) was substantively fair.
- [2] Dissatisfied with the award, the Applicants launched this review application on 27 September 2022. This application has been brought in terms of Section 145, read with section 158(1)(g) of the Labour Relations Act¹ (LRA).
- [3] The First Respondent opposed this review application.
- [4] This review application relates to whether the decision of the Third Respondent was one that a reasonable decision maker could reach in finding that the dismissal of the individual Applicants was substantively fair.

Background

- [5] The Applicants were employed by the First Respondent in different positions and were stationed at 216 Industry Road, New Era, Springs.
- [6] The Applicants were subjected to a disciplinary enquiry wherein they were found guilty of misconduct and subsequently dismissed.
- [7] The Applicants referred their dispute of unfair dismissal to the National Bargaining Council for the Chemical Industry (the Council) on 19 May 2015, accompanied by a condonation application which was refused by the Council.

¹ Act 66 of 1995, as amended.

- [8] An application was filed at the Labour Court to set aside the refusal by the Council. The Labour Court set aside the condonation ruling by the Council and remitted the matter to the Council for arbitration.
- [9] The dispute was arbitrated before the Third Respondent, and an arbitration award was issued on 9 July 2022, and received by the Applicants on 16 August 2022.
- [10] The Applicants approached this Court for the review and setting aside of the arbitration award on 27 September 2022 in respect of substantive fairness only.
- [11] On 10 and 13 April 2015, the First Respondent preferred two charges of incitement and gross insubordination against the individual Applicants.
- [12] Charges 1 and 2 read as follows:
- “Incitement in that on 19 March 2015, on or about 05h50, they refused to join the meeting that was scheduled, causing other employees to feel intimidated to carry on with the meeting and also influence them towards negative behaviour”.
- “Gross insubordination serious disrespect, impudence, or insolence by refusing instruction to join a meeting that was scheduled on the 19th of March 2015 and used racially offensive language towards the team leader.”
- [13] At the conclusion of the disciplinary hearing, the individual Applicants were found guilty of the two charges by the Chairperson and dismissed.
- [14] On 1 November 2019, the matter came before the Third Respondent wherein the Applicants alleged that the sanction issued by the Chairperson of the disciplinary hearing was too harsh.
- [15] On 9 July 2022, the Third Respondent issued his award which award is now the subject of these review proceedings.

The issues before the third respondent

- [16] Only substance was in dispute.

- [17] The individual Applicants conceded that they refused to attend the meeting on the day in question. They gave reasons and raised concerns whilst giving evidence as to why they refused to join the scheduled meeting.
- [18] The arbitration hearing took some nine days to complete.
- [19] The First Respondent called four witnesses and produced a bundle of documents upon which it relied. The Applicants called four witnesses and did not file a separate bundle.
- [20] Ultimately the Third Respondent issued an extensive award running into some 20 pages. In the Award, the relevant evidence of all the witnesses is succinctly summed up. I do not intend to repeat such exercise herein.

The alleged reviewable irregularities

- [21] The individual Applicants raised primarily the following alleged reviewable irregularities:

The arbitrator failed to enquire whether there was incitement on the part of the individual Applicants

- [22] Firstly, the individual Applicants raised that the arbitrator failed to apply his mind at all to the reasons advanced by the individual Applicants for refusing to attend the meeting. Such reasons do not fall within the definition of “Incitement” which entails “*the act of encouraging somebody to do something violent, illegal, or unpleasant*”².
- [23] The individual Applicants further argued that the evidence did not prove at all that there was any incitement or intimidation of any employees who attended the meeting.
- [24] The First Respondent countered these submissions by conceding that the two charges were so closely linked that it could constitute an impermissible splitting of charges.
- [25] However, the First Respondent contended that the arbitrator was satisfied that

² Oxford Advanced Learner’s Dictionary 7th edition p 754.

the employees were guilty of the second charge they faced (“*gross insubordination, serious disrespect, impudence or insolence*”) and that dismissal was justified under the circumstances. As such, it contended that his award was reasonable.

Arbitrator’s failure to apply his mind to the applicable legal principles.

[26] In relation to whether the individual Applicants were guilty of intimidation, it was contended that the facts must be considered with reference to the pronouncements made in *Matemane v Driscoll NO and Others*³.

[27] It was submitted that the arbitrator did not apply the principles / approach in the *Matemane* matter in determining whether the individual Applicants were indeed guilty of intimidation. It was contended that the arbitrator deferred to the position of the First Respondent by agreeing that the dismissals were fair without even scrutinizing the facts within the parameters of the legal issues.

[28] The individual Applicants contended that the commissioner having referred to the relevant case law regarding gross insubordination, failed to apply his mind to the principles provided in the said case law.

[29] As a matter of law, the Constitutional Court⁴ has described insubordination in the workplace as “*the disregard of an employer’s authority or lawful and reasonable instructions*”.

[30] The individual Applicants contended that the Third Respondent failed to apply his mind to the legal principles which would have required him to consider whether:

30.1 the instruction conveyed by the employer to convene at the meeting venue in the height of safety concerns raised by the individual Applicants was reasonable.

30.2 there was a “*defiant challenge of the employer’s authority in the presence of other employees.*”

³ (JR1690/13) [2016] ZALCJHB 199 (25 May 2016).

⁴ *NUPSAW obo Mani and Others v National Lotteries Board* [2014] 7 BLLR 621 (CC) AT PARA 57.

[31] The individual Applicants contended that had the Third Respondent applied the legal principles to the evidence before him, he would have found that:

31.1 Firstly, the individual Applicants feared getting injured as there were moving forklifts transporting broken glass to be re-processed. Furthermore, there was a cold storage for vinyl used in the making glass process as well as a noisy extraction fan for SP3 plant. As such the venue was not conducive for a meeting. This alone, the individual Applicants submitted, rendered the instruction unreasonable.

31.2 Secondly, the canteen was customarily used as a venue for meetings as there were chairs and a white board which could be used to write and share handover information. As a result, there existed no reasons against the heightened safety concerns to have changed the venue to a place which was not conducive at all for a meeting.

31.3 Thirdly, the employer provided no evidence demonstrating the reasonableness of its instruction. This despite it having a duty to prove the fairness of the dismissal.

[32] The individual Applicants contended that the arbitrator ought to have found that the safety concern that the individual Applicants had was warranted. This was so because there had been a safety incident whereby a large piece of glass had fallen.

[33] The individual Applicants further contended that the arbitrator in paragraphs 111 and 112 of his Award simply recorded the evidence of the individual Applicants' refusal to heed the instruction but failed to enquire as to whether such refusal amounted to a defiant challenge to the employer's authority in the presence of other employees⁵. They further contended that such defiance must be to other employees adopting a different stance to that of the individual Applicants.

[34] Furthermore, according to the individual Applicants, the Third Respondent

⁵ As alluded to in *SAMWU and Another v Rand Water and Others* (JR 173/13) [2015] ZALCJHB 138 (29 April 2015)

failed to apply his mind to the issue of whether the perceived insubordinate behaviour by the individual Applicants was persistent⁶.

[35] Lastly, the individual Applicants contended that the Third Respondent did not pronounce on the reasonableness of the instruction or make a finding that the defiance by the individual Applicants were gross.

[36] With reference to this heading, the First Respondent countered that:

36.1 a perusal of the award makes it clear that the Third Respondent had regard to a number of judgments, that dealt directly with the issue of gross insubordination.

36.2 the Third Respondent also had regard to the Code of Good Practice: Dismissal⁷.

36.3 whatever criticisms levelled at the Third Respondent regarding the applicable legal position, is of no assistance to the Applicants because they have not demonstrated that such failures resulted in incorrect reasoning or an unreasonable award for any other reason.

36.4 with reference to the individual Applicants' safety concerns, the First Respondent contended that the Third Respondent in fact applied his mind in reaching the conclusion that "*no evidence was also presented to establish that the new meeting venue was not safe*".

36.5 regarding whether or not the individual Applicants' conduct amounted to a defiant challenge of the First Respondent's authority in the presence of other employees, it was common cause that there were other employees present when the various instructions were given and defied. Also, the Third Respondent was satisfied that the instructions were given to the individual Applicants by more than one senior person, that the instruction was work-related, and that the individual Applicants had persistently relied on their own reasons for not attending the

⁶ As alluded to in *National Union of Mineworkers obo Selemela v Northam Platinum Ltd* [2014] 9 BLLR 870 (LAC).

⁷ Schedule 8 to the LRA.

meeting. As such (so it was contended), the Third Respondent had regard to the fact that they were defiant and that the misconduct was committed in the presence of other employees.

36.6 lastly, the Third Respondent found that the individual Applicants “persistently relied on their own reasons for not attending the meeting”.

The commissioner failed to apply his mind and committed a gross irregularity when finding that Tyuluba was not a credible witness

[37] The individual Applicants contended that on this topic, the Third Respondent failed to employ the technique required to make the credibility finding prescribed by this Court in *Harmony Gold Mining Company Ltd v Commission for Conciliation, Mediation and Arbitration and Others*⁸.

[38] It is contended further, that it is not clear why the commissioner found that Tyuluba was not a credible witness.

[39] The First Respondent countered this contention by stating that the Third Respondent set out brief reasons for finding him not to be a credible witness, and that was sufficient.

The Arbitrator’s failure to find that the employer failed to apply discipline consistently

[40] The individual Applicants contended that the failure of Mr Stanley Duze to testify should not overshadow the undisputed evidence led by all the Applicants’ witnesses that Mr Duze and Mr Tyuluba were indeed not disciplined despite them being part of the group who remained in the canteen in the face of the instructions to attend the meeting.

[41] Furthermore, it was also contended that the Third Respondent failed to apply his mind to the fact that the First Respondent failed to prove that it consistently applied its discipline because Mr Tyuluba was never dismissed whilst the individual Applicants were dismissed.

[42] The First Respondent contended that the Third Respondent correctly rejected

⁸ (2018) 39 ILJ 1059 (LC).

the evidence that formed the basis for the alleged inconsistency challenge. Further, the Third Respondent correctly found that no evidence was led that the First Respondent was made aware of the inconsistency issue before the pre-arbitration meeting which occurred more than six years after the dismissal of the individual Applicants.

The arbitrator's failure to embark on the enquiry as to whether dismissal is an appropriate sanction in the circumstances

[43] The individual Applicants submitted that a positive approach to discipline is required rather than a punitive one.

[44] It was further contended that the Third Respondent failed to consider that in terms of the First Respondent's disciplinary code the appropriate penalty for refusal to obey reasonable instructions related to work for a first offence is a first written warning. As such the Third Respondent should have enquired whether the employer's departure from the standard set by the disciplinary code was fair. If he did, he should have found that such departure was not warranted.

[45] The approach taken by the arbitrator was reviewable in that it amounted to a dereliction of the duties placed upon him by the Constitutional Court.

[46] According to the First Respondent the following were relevant findings justifying the sanction of dismissal:

46.1 on their way to the plant, the individual Applicants walked past the venue where the other employees, who had heeded the instruction, was attending the meeting.

46.2 those who attended the meeting felt intimidated and uncomfortable by those who refused to attend, when they walked past the meeting venue.

46.3 the individual applicants blatantly refused an instruction from their direct superiors to attend the meeting at the alternative venue.

46.4 the reasons for their refusal were refuted by the First Respondent's witnesses.

46.5 the individual Applicants showed no remorse.

[47] The First Respondent also pointed out that the individual Applicants were not dismissed for failure to obey a reasonable instruction. They were dismissed for "*gross insubordination, serious disrespect, impudence or insolence*". The First Respondent's disciplinary code prescribed dismissal even for a first offence.

[48] As such, the First Respondent contended that the award of the Third Respondent was one that a reasonable decisionmaker could reach.

Test on Review

[49] I have to deal with the grounds for review within the context of the test that this Court must apply in deciding whether the Arbitrator's decision is reviewable. The test has been set out in *Sidumo and another v Rustenburg Platinum Mines Ltd and others (Sidumo)*.⁹ The Constitutional Court held that the Arbitrator's conclusion must fall within a range of decisions that a reasonable decision maker could make. The test is therefore whether the decision reached by the Commissioner is one that a reasonable decision maker could reach, having regard to the evidence before him/her.

[50] The Labour Appeal Court (LAC) in *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and others*¹⁰ affirmed the test to be applied to review proceedings and held that:

"In short: A reviewing court must ascertain whether the Arbitrator considered the principal issue before him/her; evaluated the facts presented at the hearing and came to a conclusion that is reasonable."

[51] The LAC authoritatively considered the *Sidumo* review test in *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration*

⁹ (2007) 28 ILJ 2405 (CC) at para 110.

¹⁰ (2014) 35 ILJ 943 (LAC) (*Goldfields*) at para 16.

and others¹¹ (*Fidelity Cash*) and stated the following:

“The Constitutional Court has decided in *Sidumo* that the grounds of review set out in s 145 of the Act are suffused by reasonableness because a CCMA arbitration award, as an administrative action, is required by the Constitution to be lawful, reasonable and procedurally fair. The court further held that such an award must be reasonable and if it is not reasonable, it can be reviewed and set aside.”

[52] As to what would be considered to be unreasonable, the LAC in *Fidelity Cash* held as follows¹²:

“The Constitutional Court further held that to determine whether a CCMA commissioner's arbitration award is reasonable or unreasonable, the question that must be asked is whether or not the decision or finding reached by the commissioner 'is one that a reasonable decision maker could not reach' (para 110 of the *Sidumo* case). If it is an award or decision that a reasonable decision maker could not reach, then the decision or award of the CCMA is unreasonable, and, therefore, reviewable and could be set aside. If it is a decision that a reasonable decision maker could reach, the decision or award is reasonable and must stand. It is important to bear in mind that the question is not whether the arbitration award or decision of the commissioner is one that a reasonable decision maker would not reach but one that a reasonable decision maker could not reach...”

[53] The LAC in *Fidelity Cash* formulated the “*outcome based review test*” which, the LAC held, is what the *Sidumo* review test envisaged. The LAC held¹³:

“It seems to me that... there can be no doubt now under *Sidumo* that the reasonableness or otherwise of a commissioner's decision does not depend - at least not solely - upon the reasons that the commissioner gives for the decision. In many cases the reasons which the commissioner gives for his decision, finding or award will play a role in the subsequent assessment of whether or not such decision or finding is one that a reasonable decision maker could or could not reach. However, other reasons upon which the

¹¹ (2008) 29 ILJ 964 (LAC) at para 96.

¹² *Ibid* at para 97.

¹³ *Ibid* at para 102.

commissioner did not rely to support his or her decision or finding but which can render the decision reasonable or unreasonable can be taken into account. This would clearly be the case where the commissioner gives reasons A, B and C in his or her award but, when one looks at the evidence and other material that was legitimately before him or her, one finds that there were reasons D, E and F upon which he did not rely but could have relied which are enough to sustain the decision.”

[54] The LAC in *Fidelity Cash* concluded¹⁴ -

“.... Whether or not an arbitration award or decision or finding of a CCMA commissioner is reasonable must be determined objectively with due regard to all the evidence that was before the commissioner and what the issues were before him or her. There is no reason why an arbitration award or a finding or decision that, viewed objectively, is reasonable should be held to be unreasonable and set aside simply because the commissioner failed to identify good reasons that existed which could demonstrate the reasonableness of the decision or finding or arbitration award.”

[55] Our courts have repeatedly stated that in order to maintain the distinction between review and appeal, an award of the Arbitrator will only be set aside if both the reasons and the result are unreasonable in determining whether the result of an Arbitrator’s award is unreasonable. This Court must broadly evaluate the merits of the dispute and consider whether, if the Arbitrator’s reason is found to be unreasonable, the result is, nevertheless, capable of justification for reasons other than those given by the Arbitrator. The result will, however, be unreasonable if it is entirely disconnected from the evidence, unsupported by any evidence and involves speculation by the Arbitrator.

[56] Unreasonableness is thus the threshold for interference with an Arbitrator’s award on the review.

Analysis of the Arbitrator’s Findings

[57] The following aspects or findings in the Third Respondent’s Award is important in making an assessment whether his award can be set aside on

¹⁴ Ibid at para 103.

the basis of unreasonableness:

57.1 In my view, the case law referred to by the Third Respondent sufficiently set out the prevailing legal position regarding gross insubordination and serious disrespect.

57.2 I am in agreement with the discomfort of the Third Respondent about the almost seven-year time lapse from dismissal to actual arbitration. The reference to *SACCAWU v Irvin and Johnson Ltd*¹⁵ is equally apposite. The Courts have begun to set a high threshold for inconsistency challenges and have warned that the parity principle must not be applied willy-nilly¹⁶. In the *ABSA Bank Ltd v Naidu and others*¹⁷ the Labour Appeal Court indicated that consistency is only one factor to be considered when assessing the fairness of the dismissal. It is not in itself decisive. The parity principle was never intended to create chaos in the workplace. Moreover, the fact that the inconsistency challenge was only raised for the first time at the pre-arbitration stage which occurred more than six years after the dismissal of the individual Applicants, is problematic as an inconsistency challenge should be raised at the outset. I agree with the Third Respondent that this inconsistency challenge was in all probability an after-thought.¹⁸

57.3 It must also be pointed out that only one of the persons who allegedly also refused to attend the meeting was called to testify by the individual Applicants, namely Gracious Tyuluba. The Third Respondent found him to be not credible by comparing his evidence with that of the other witnesses who testified on behalf of the individual Applicants and because his version was highly improbable.

57.4 The Third Respondent was alive to the following common cause facts:

¹⁵ (2000) 21 ILJ 1583 (CC).

¹⁶ See: *Singh v eThekweni Municipality (Treasury Department) and others* (2015) 36 ILJ 769 (LC) and *ABSA Bank Ltd v Naidu and others* (2015) 36 ILJ 602 (LAC) at para 35-42.

¹⁷ (2015) 36 ILJ 602 (LAC) at para 35-42.

¹⁸ See: *National Union of Mineworkers obo Botsane v Anglo Platinum Mine (Rustenburg Section)* (2014) 35 ILJ 2406 (LAC) para 39.

- 57.4.1 The instruction to attend the meeting was given to the individual Applicants by more than one senior person at the Third Respondent. Those persons who issued the instruction to the individual Applicants had the authority to give such instructions.
- 57.4.2 The instruction was work-related and was defied on more than one instance in the presence of other fellow employees.
- 57.4.3 Those who refused to attend the meeting, walked past the venue where those who heeded the instruction attended the meeting, and they were visible to those attending the meeting.
- 57.5 The evidence of the witnesses of the First Respondent was not challenged on any material grounds and the Third Respondent accepted the evidence of the First Respondent's witnesses over that tendered on behalf of the Applicants. Such a credibility finding is not easily overturned on review¹⁹.
- 57.6 Two of the First Respondents witnesses testified that when the individual Applicants walked past the meeting venue at the entrance of the plant, it intimidated those who attended the meeting and created a sense of discomfort with those in the meeting.
- 57.7 The individual Applicants never lodged a grievance or formal complaint regarding the change of venue. In my view the bases put up for refusing to attend the meeting cannot be sustained especially as the correct approach would have been to attend the meeting and thereafter raise an objection or a grievance as to the venue.
- 57.8 The individual Applicants showed no remorse for their refusal to attend a work-related meeting. As such and given their persistent and collective refusal to heed a legitimate instruction, the First Respondent cannot be expected to put up with such conduct.

¹⁹ *Standerton Mills (Pty) Ltd v CCMA and others* [2012] 1 BLLR 84 (LC) at para 18; See: *NUM and another v CCMA and others* (2013) 34 ILJ 945 (LC) at para 30.

[58] For the above reasons, the Third Respondent concluded that the dismissal of the individual Applicants was substantively fair. This was clearly a conclusion that a reasonable decisionmaker could reach.

[59] With reference to the main grounds of review, I conclude as follows:

59.1 Having regard to his award, it is clear that the Third Respondent dealt with the matter as one regarding gross insubordination and not incitement. I cannot fault this approach.

59.2 Secondly, the Third Respondent was satisfied that:

59.2.1 the instructions were given to the individual Applicants by more than one senior person;

59.2.2 the instruction was work-related, and

59.2.3 the individual Applicants had persistently relied on their own unwarranted reasons for not attending the meeting.

As such, the Third Respondent had regard to the fact that they were defiant and that the misconduct was persistently committed in the presence of other employees. As such, I am satisfied that the individual Applicants' conduct constituted gross insubordination.

59.3 I have already expressed my views above in regard to the credibility finding made by the Third Respondent against Mr Tyuluba. I reiterate that such finding is very difficult to overturn on review.

59.4 Similarly, I also agree that the belated raising of an inconsistency challenge by the individual Applicants was in all probability an after-thought.

59.5 Lastly, the Third Respondent did embark on an assessment if dismissal was warranted. His positive conclusion, based on the facts before him, was reasonable.

Conclusion

[60] Having regard to the facts and circumstances of this case, I am not convinced that the result is one that reasonable decision maker could not reach in light of the issues and the evidence placed before him. As such, the review application must fail.

Costs

[61] Even though costs were not argued before me, it was sought in the review papers.

[62] This Court has a discretion in terms of section 162 of the LRA to order costs in accordance with the requirements of the law and fairness. Furthermore, in the *Union for Police Security and Corrections Organisation v South African Custodial Management (Pty) Limited and others*²⁰, the Constitutional Court has made it clear that costs should only be awarded by this Court in exceptional circumstances. In the present instance, there are no exceptional circumstances, and I am of the view that this is a matter that, in the interests of fairness and equity, does not warrant a cost order being made.

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

Order

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

D. O. Pretorius

Acting Judge of the Labour Court of South Africa

²⁰ 2021 (11) BCLR 1249 (CC) at para 40.

Appearances:

For the applicant : Mr X. Ngako of Ngako Attorneys

For the respondent : Mr C. Kirchmann of Kirchmanns Inc.

LABOUR COURT