



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JR288/22

In the matter between:

TRANSNET SOC LTD (TRANSNET ENGINEERING)

Applicant

and

NTM OBO JOHN MOLOPE

First Respondent

TRANSNET BARGAINING COUNCIL

Second Respondent

MAPALO TSATSIMPE NO

Third Respondent

TIMOTHY KGORI JEBETLE

Fourth Respondent

Heard: 21 July 2025

Delivered: 24 October 2025

JUDGMENT

SCHENSEMA, AJ

Introduction

- [1] This is an opposed review application brought by the applicant in terms of section 145 of the Labour Relations Act¹ (LRA) to set aside the arbitration award made by the third respondent, in respect of which the third respondent (Commissioner) determined that the first and fourth respondent's dismissal was substantively and procedurally unfair.
- [2] The arbitration award ordered that the first and fourth respondents be retrospectively reinstated, effective from 1 February 2022, together with back pay of 18 months.

Background

- [3] The first and fourth respondents (respondents) were employed by the applicant as a senior technical worker and a stock controller, respectively.
- [4] The respondents were dismissed following a disciplinary hearing in which they were found guilty of numerous allegations of misconduct relating to the contravention of the applicant's Acceptable Use and Electronic Communication Policy, insubordination, insolence, intimidation, threatening behaviour, defamation of character and misrepresentation of facts.
- [5] The disciplinary hearing had proceeded in the respondents' absence in respect of which the respondents had submitted medical certificates, as a basis for their nonattendance.
- [6] Dissatisfied with the outcome of the disciplinary hearing, the respondents referred an unfair dismissal dispute to the Bargaining Council. Extensive evidence was led through a number of witnesses together with supporting documents, at the conclusion of which the Commissioner determined the respondents' dismissal to be procedurally and substantively unfair and awarded reinstatement and backpay.

¹ Act 66 of 1995, as amended.

The Award

- [7] The Commissioner determined in respect of the procedural fairness challenge that since the chairperson had himself described the charges as 'complex', the respondents' challenge that the charges were vague was substantiated. This concern was further compounded by the fact that the respondents had not received the bundle of documents, which hindered their ability to prepare for the enquiry.
- [8] The Commissioner further determined that the chairperson and the applicant's numerous witnesses wrongly stated that the respondents' union NTM lacked *locus standi* on the basis that the applicant did not recognise NTM.
- [9] The Commissioner further raised an issue with the fact that the chairperson had not properly considered the medical certificates submitted in support of the respondents' absence. Instead, the chairperson had appeared to simply focus on the fact that the respondents had launched an urgent application in the Labour Court to interdict the proceedings, rather than considering the medical certificates to determine whether a postponement was justified. In this regard, the Commissioner held that the chairperson should have verified the respondents' health status rather than focusing on their application to the Labour Court.
- [10] In respect of the substantive fairness of the first respondent's dismissal, the Commissioner determined that the applicant had failed to lead any evidence that he had utilised the applicant's email facility or received an instruction which he had ultimately defied. In light hereof, there was no basis to have determined that the respondents were 'acting in unison' and that derivative misconduct does not apply when the actual perpetrator is known. The Commissioner further determined that the applicant had failed to prove that there had been a breach of the Acceptable Use and Electronic Communication Policy or the Recognition Agreement.
- [11] In respect of the second charge, the Commissioner determined that the applicant had failed to lead any evidence to demonstrate that the first

respondent had authored or even co-authored the emails and accordingly the dismissal was determined to be substantively unfair.

- [12] In respect of the substantive fairness of the fourth respondent's dismissal, the Commissioner determined that he had authored emails on behalf of NTM members in which he raised workplace complaints. The applicant's instruction to the fourth respondent to desist from using its email facility for purposes of conducting union activities was determined to be unfair, unreasonable, invalid, and this instruction was therefore unlawful.
- [13] The Commissioner determined that the fourth respondent's language as contained in his emails was inappropriate, but the underlying issues raised were legitimate employee concerns. Furthermore, there was no basis for the applicant to refuse to engage with him on the basis that NTM was not recognised, which the Commissioner considered to be misguided, as the employees have a legal right to union membership and representation.

Analysis of the award

- [14] In effect, the Commissioner found that the respondents' dismissals were procedurally unfair due to vague charges, denial of representation, and failure to consider a postponement.
- [15] In respect of substantive fairness, the first respondent's dismissal was unfair as no evidence had been led in support of the charges. Similarly, the fourth respondent's dismissal was also substantively unfair, despite his conduct not being appropriate, however, the instruction that he had allegedly defied was not a lawful one, coupled with the fact that the applicant's stance in respect of union recognition was legally flawed.

Grounds of Review

- [16] The applicant's grounds of review can be summarised as follows:

16.1 The Commissioner's finding that the chairperson had not considered the medical certificates despite Mrs Matlepeng's (Matlepeng) evidence confirming that the medical certificates had been submitted to the

chairperson is absurd. In this regard, the Commissioner had failed to take into consideration that the hearing had previously been postponed on several occasions, that the respondents had stated that they wished to be dismissed in absentia, together with their intention to launch an urgent application in the Labour Court. In light of these facts, the chairperson was justified in proceeding with the hearing in the absence of the respondents, and the Commissioner's findings in this regard demonstrate a reviewable irregularity.

16.2 The applicant further challenges the Commissioner's findings that notwithstanding the fact that the respondents had not attended the hearing and at no stage had raised their concerns in relation to the charges, it was not possible to have amended the charges or to have provided further particularity in light of the respondents not being in attendance to make this request. In this regard, the Commissioner had failed to consider the applicant's witnesses' evidence that the annexures in support of the charges had been provided to the respondents and that the Commissioner had incorrectly assumed that the respondents were not aware of the incidents referred to in the charge sheet. In light hereof, the applicant considers that these findings amount to a gross irregularity.

16.3 In respect of substantive fairness, the applicant challenges the award on the basis that the Commissioner failed to consider the actual charges, with particular reference to the emails. The Commissioner had failed to consider the fact that the emails were threatening, intimidating, undermining and defamatory. The evidence clearly demonstrated that the respondents had not reported to the seniors to whom the emails were addressed, and as such had no authority to address these emails.

16.4 The Commissioner found that the language used in the emails was that of *"an angry person who failed to control his anger- an energy which, when not controlled, could later be regretted"*. It is therefore unclear as to how the Commissioner had determined that the respondents had

been influenced by their belief that the employees believed that they were treated badly. The Commissioner, in this regard, had determined the charge as one concerning the emotions of the respondents and thereby misconstrued the nature of this charge and the impact of the emails on the employment relationship.

- 16.5 The Commissioner further failed to take into consideration the evidence of the applicant's witnesses (which evidence was undisputed) that the respondents could have utilised the grievance procedure.
- 16.6 The Commissioner further did not consider the applicant's evidence that the allegations contained in the emails were false and/or baseless and instead focused her findings on the fact that the applicant's witnesses had stated that NTM is not a recognised union. By doing so, the Commissioner misdirected herself in dealing with the actual charge and the fact that the respondents were *inter alia* in breach of the applicant's policy.
- 16.7 The Commissioner further disregarded the evidence of the applicant's witnesses and placed more emphasis on the reason as to why the emails were addressed, and therefore failed in her duties and obligations to be impartial. The Commissioner had therefore stripped the applicant of its right to impose discipline in the workplace and instead rewarded the respondents for their conduct.
- 16.8 The Commissioner further failed to consider the material evidence when determining whether the dismissal was an appropriate sanction, and had she done so, she would not have come to the conclusions that she had reached.
- 16.9 The Commissioner further does not explain and/or question how the fourth respondent's email account with its unique password was used to send emails to the applicant's managers without his knowledge or authorisation. In response, the fourth respondent had simply denied the allegation, and the Commissioner had simply concluded that other

unions that the applicant recognises are permitted to use the email facility and have not been reprimanded.

- 16.10 The Commissioner further seems to rely on the parity principle, namely that the respondents testified that the other unions that the applicant recognises are permitted to use its email facility for whatever purpose and are not reprimanded for doing so. However, it is the applicant's submissions that the Commissioner had failed to comprehend whether consistency was one of the issues for determination, as this had never been raised as an issue for determination at the commencement of the proceedings. It was accordingly improper for the Commissioner to have permitted evidence to be led on inconsistency when it had not been raised. In light hereof, the Commissioner failed to appreciate the true nature of the allegations.
- 16.11 The Commissioner further incorrectly determined that the question that needed to be answered was whether the instruction to the fourth respondent was fair, reasonable, valid and lawful. At all material times, the fourth respondent had been charged with misconduct relating to gross misconduct pertaining to the contravention of the Acceptable Use and Electronic Communication Policy, insubordination, insolence, intimidation, threatening behaviour, defamation of character and misrepresentation of facts.
- 16.12 At no stage had the respondents been charged with a failure to accede to an instruction to refrain from using the applicant's email facility to advance NTM's interests. The applicant's witnesses had clearly testified that whilst the emails may have been sent using the fourth respondent's email account, they breached the policy, were co-authored by the first and the fourth respondent, the wording of which amounted to insubordination, insolence, intimidation, threatening behaviour, defamation of character and a misrepresentation of facts.
- 16.13 Notwithstanding that the Commissioner correctly found that the emails referred were sent on behalf of NTM, that the language used was

inappropriate and that the fourth respondent had been defensive and had tried be overly technical on the subject, the Commissioner failed to consider in totality the evidence that had been submitted, which led to an unreasonable conclusion.

16.14 The Commissioner had determined that in light of the fact that the first respondent had not been assigned an email account, he could not be guilty of co-authoring emails, which was inappropriate given that the evidence clearly demonstrated that the respondents had acted in unison. In light hereof, the Commissioner had misconstrued the evidence and the nature of the charges, and the evidence submitted.

[17] In opposition, the first respondent challenges the applicant's review application *inter alia* on the following basis:

17.1 The award is reasonable and justifiable, having regard to the totality of the witnesses' testimonies during the proceedings;

17.2 The chairperson had failed to apply his mind to the medical certificates;

17.3 That the chairperson ought to have provided a reason for rejecting the medical certificates;

17.4 That the Commissioner's determination that his dismissal was both procedurally and substantively fair on the basis that the first respondent had not breached any of the applicable policies;

17.5 That the emails addressed were not malicious but addressed the employees' complaints and concerns;

17.6 The aforementioned complaints and concerns were not addressed by the applicant on the basis that they were NTM members, a union which was not recognised by the applicant;

17.7 That the instruction to the effect that the employees were not permitted to raise the complaints and concerns was unlawful; and

17.8 The applicant's witnesses had failed to demonstrate what was threatening, intimidating, undermining and defamatory in the emails.

[18] The fourth respondent challenges the applicant's review application *inter alia* on the following basis:

18.1 The dismissal was procedurally unfair in light of the fact that a medical certificate had been submitted to substantiate his absence, and the charge sheet was too vague, therefore not allowing him an opportunity to properly prepare his defence;

18.2 The dismissal was further substantively unfair in that he had not transgressed a valid or reasonable rule or standard pertaining to his workplace; and

18.3 The Commissioner had properly applied her mind to the evidence before her and came to a reasonable conclusion.

Test for review

[19] In a range of cases, starting with *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*² and the jurisprudence that followed,³ the test on review and as set out in the matter of *Herholdt v Nedbank Ltd*⁴, the Supreme Court of Appeal has defined with greater clarity the standard of review:

19.1 It must be established either that the arbitrator has misconceived the nature of the enquiry or that they arrived at an unreasonable result.

19.2 For an award to be unreasonable, the arbitrator's conclusion must be one that a reasonable decision-maker could not reach on the material that was before the arbitrator.

² [2007] ZACC 22; (2007) 28 ILJ 2405 (CC).

³ *CUSA v Tao Ying Metal Industries and Others* [2008] ZACC 15; 2009 (2) SA 204 (CC); *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others (Fidelity Cash)* [2007] ZALAC 12; (2008) 29 ILJ 964 (LAC); *Herholdt v Nedbank Ltd (Herholdt)* [2013] ZASCA 97; 2013 (6) SA 224 (SCA); *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others (Gold Fields)* [2013] ZALAC 28; [2014] 1 BLLR 20 (LAC).

⁴ *Herholdt supra*.

19.3 Material errors of fact, including errors concerning the weight and relevance to be attached to certain facts, are only of consequence if their effect is to render the outcome unreasonable.

19.4 If the arbitrator's reasons provide a reasonable 'route' leading towards the conclusions, it must follow that the decision is one that could have been reached (and in fact was) made by a reasonable decision-maker. A review application would, in such circumstances, not succeed.

19.5 Even if there are flaws in the arbitrator's reasons, a review must still consider whether, apart from the arbitrator's reasons, "*the result is one that a reasonable decision maker could reach in light of the issues and the evidence*".

19.6 A review court is required to examine the merits "*in the round*" only.

[20] It is thus obvious that reasonableness can only be assessed with regard to the evidence before the decision-maker.

[21] It is further uncontroversial that the review test is whether an arbitrator has misconceived the nature of the enquiry or arrived at an unreasonable result.⁵ A result will be considered to be unreasonable if it is one that a reasonable arbitrator could not reach on all the material presented to him or her.⁶

[22] The court on review is therefore not required to consider each and every issue raised during arbitration. Instead the Court must decide whether the commissioner considered the principal issue before him, evaluated the material evidence and concluded that the outcome is reasonable.⁷

[23] In *Head of the Department of Education v Mofokeng and others*⁸ (Mofokeng) Murphy AJA said the following:

'The determination of whether a decision is unreasonable in its result is an exercise inherently dependant on variable considerations and circumstantial

⁵ *SA Rugby Union v Watson and Others* [2018] ZALAC 57; (2019) 40 ILJ 1052 (LAC) at para 25.

⁶ *Ibid.*

⁷ *Gold Fields supra* at paras 15 and 16.

⁸ [2015] 1 BLLR 50 (LAC); (2015) 36 ILJ 2802 (LAC) at paras 31 and 33.

factors. A finding of unreasonableness usually implies that some other ground is present, either latently or comprising manifest unlawfulness. Accordingly, the process of judicial review on grounds of unreasonableness often entails examination of inter-related questions of rationality, lawfulness and proportionality, pertaining to the purpose, basis, reasoning or effect of the decision, corresponding to the scrutiny envisioned in the distinctive review grounds developed casuistically at common law, now codified and mostly specified in section 6 of the Promotion of Administrative Justice Act ("PAJA"); such as failing to apply the mind, taking into account irrelevant considerations, ignoring relevant considerations, acting for an ulterior purpose, in bad faith arbitrarily or capriciously etc. The court must nonetheless still consider whether, apart from the flawed reasons of or any irregularity by the arbitrator, the result could be reasonably reached in light of the issues and the evidence...'

Further:

'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 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.'

[24] As Myburgh and Bosch suggest:

'This passage makes it clear that errors of fact and law may translate into a commissioner misconceiving the inquiry, and that this leads to the losing parties being deprived of its right to a fair trial, which constitutes in itself a basis for review (without the reasonableness of the outcome having to be assailed). But in order for it to be held that the Commissioner misconceived the inquiry, it must be established that the errors of fact or law committed by him or her cause the commissioner to diverge from the correct and failed to address the question raised for determination.'⁹

[25] The primary task of a commissioner is to take into account the totality of the circumstances. It is uncontroversial that the review test is whether an arbitrator has misconceived the nature of the enquiry or arrived at an unreasonable result.¹⁰ A result will be considered to be unreasonable if it is one that a reasonable arbitrator could not reach on all the material presented to him or her.¹¹

[26] The Labour Appeal Court (LAC) in *Gold Fields*¹² affirmed the test to be applied in 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.'

Application to the Facts

[27] When applying the review test, the Court follows a logical sequence:

⁹ A Myburgh, C Bosch, 'Reviews in the Labour Courts', LexisNexis at p 77.

¹⁰ *Watson supra*.

¹¹ *Ibid*.

¹² *Gold Fields* at para 16.

27.1 First, it must be determined if there is a failure or error on the part of the commissioner.

27.2 Second, where there are errors, it must be shown that, but for the errors, the outcome would have been different.¹³ Errors of fact, by themselves, may not be sufficient to vitiate the award. What matters is the materiality of such errors.

[28] Importantly, it is only where the award cannot be sustained on any of the evidence properly before the commissioner that the review should succeed.¹⁴

[29] The applicant contends that the award *inter alia* stands to be reviewed and set aside on the basis of the Commissioner's failure to properly and/or adequately consider the evidence before her.

[30] The evidence presented before the Commissioner was clear: (i) any aggrieved employee would be able to submit a grievance in terms of the applicant's grievance procedure; (ii) the concerns raised by the respondents related to employees' complaints and therefore required the matter to be dealt with by way of a grievance; (iii) the emails were co-authored; (iv) there is no dispute that the fourth respondent had an email account with his own unique password; (v) the emails were addressed to senior management to whom the respondents did not report to; (vi) the evidence of the applicant's witnesses specifically deal with how they felt when they received the emails, and that they had perceived the emails to be threatening, intimidating, undermining and defamatory thus resulting *inter alia* in the charge of intimidation and threatening behaviour; (vii) the Commissioner determined that inappropriate language was used, however was justified on the basis that the fourth respondent was acting on behalf of the employees who had complaints; (viii) the Commissioner focused on whether the concerns raised in the emails had been dealt with; (ix) in respect of procedural fairness, the Commissioner *inter alia* determined that the chairperson had failed to consider the health status of

¹³ *Fidelity Cash* at para 96; *Mofokeng* at paras 32 and 33.

¹⁴ *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); [2014] ZALCJHB 495 at para 12.

the respondents and instead focused on the urgent application that the respondents had launched in the Labour Court.

- [31] It is clear from the award, coupled with the reading of the transcript, that the Commissioner failed to properly consider the true nature of the matter before her, together with the evidence.
- [32] Ultimately, the Commissioner focused her attention on why the emails had been sent and not the contents of the emails and the impact these emails had on the recipients. Furthermore, the aggrieved employees on behalf of whom the respondents purported to address their concerns had ample opportunity to utilise the applicant's grievance procedure, which the respondents elected not to do and instead addressed emails that can only be described as highly inappropriate.
- [33] The impact the emails had on the applicant's witnesses was clearly not considered, and the Commissioner's reasoning demonstrates that she misconstrued the true nature of the dispute before her. In so doing, the Commissioner failed to properly consider the evidence before her and elected to rather interpret the dispute as one that related to the employees' complaints and the respondents right to raise these complaints in the form of the emails and in the manner that they did, thereby justifying the respondents' misconduct and effectively awarding their misconduct by reinstating the respondents together with backpay.
- [34] With regard to the finding of procedural unfairness, the Commissioner appears to have assessed what the chairperson ought to have determined, rather than considering the chairperson's actual decision. Moreover, the Commissioner's conclusion that the respondents' challenge, that the charges were vague, was substantiated because the chairperson had deemed the charges complex, which is itself unsupported. Given that the respondents did not attend the inquiry and had not previously raised any challenge to the charges, the Commissioner's determination in this regard can only be characterised as one that no reasonable decision-maker could reach.

- [35] In addition, the Commissioner failed to account for the fact that the inquiry had been postponed on multiple occasions, and that the chairperson had the discretion to determine whether sufficient evidence existed to justify either proceeding with or postponing the inquiry. The Commissioner's failure to consider all relevant circumstances constitutes an error that materially affected the outcome.
- [36] The award is one that no reasonable decision maker could have reached on the evidence before the Commissioner. It is evident that the Commissioner failed to properly consider all relevant evidence and to address all the issues before her. In this matter, the respondents deliberately chose to raise the issues in the emails to senior management, individuals to whom they did not report, and disregarded the obvious remedies available to both themselves and the aggrieved employees. Their conduct cannot be justified merely because they purported to act on behalf of the aggrieved employees. This underscores that the Commissioner did not adequately consider the true nature of the matter before her, nor the impact of the respondents' actions on the employment relationship.
- [37] The applicant has submitted the Court with a complete record of the proceedings, enabling the Court to determine the dispute, which serves the interests of justice and promotes the expeditious resolution of the matter.

Costs

- [38] This Court has a wide discretion in awarding costs. I am of the view that this is a matter where the interests of justice will be best served by making no order as to costs.

- [39] In the premises, I make the following order:

Order

1. The arbitration award issued by the second respondent under case number BC.NTM/TE(GR)/15046 and 15134 are reviewed and set aside.

2. The dismissal of the first and fourth respondents by the applicant was procedurally and substantively fair.
3. There is no order as to costs.

H Schensema

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant: Puke Maserumule Attorneys

For the First Respondent: In person

For the Fourth Respondent: Advocate Bucksteg

Instructed by: Carel J Schoeman Incorporated

LABOUR COURT