



(1) Reportable Yes/No
(2) Of interest to other Judges: Yes/No
(3) Revised

Signature

Date

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case No: JR1947/23

In the matter between

EXXARO COAL MINE MPHMALANGA (PTY) LTD

Applicant

(MATLA COAL MINE)

and

COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION

First Respondent

COMMISSIONER S.K. GUMEDE N.O.

Second Respondent

NUM

Third Respondent

B.T. SHONGWE

Fourth Respondent

Heard: 15 July 2025

Delivered: 10 March 2026

This judgment was handed down electronically by circulation to the parties' representatives by email. The date for hand-down is deemed to be on 10 March 2026.

JUDGMENT

SAUNDERS, AJIntroduction

- [1] This is an application where the applicant (the employer/the mine) seeks to review and set aside the arbitration award issued by the second respondent, and substitute it with an order that the fourth respondent's dismissal was fair, alternatively referring the matter back to the first respondent for a hearing *de novo*. There is no cross review by the third respondent (NUM) and fourth respondent (Mr Shongwe).
- [2] The dispute relates to a misconduct dismissal of Mr Shongwe for alleged gross negligence on 9 May 2022. Mr Shongwe was employed as a fitter artisan and had been in the employ of the mine for a period of approximately 12 years. During a routine inspection of the work area by three superiors, Keorapetse Malomane, Peter Toli (Mr Toli) and Vasie Leope (Mr Leope), Mr Shongwe was allegedly found on top of a feeder breaker which had not been isolated and locked out in accordance with the mine's Lock out Procedure. The misconduct charges relate to the purported failure to lock out the machine and for allegedly working on a machine in the absence of isolating and locking out that machine. Simply put, isolation requires removing a machine from a source of power and locking out requires the additional step of placing a personally issued padlock to ensure that the machine remains without power and no colleague can erroneously turn the machine back on and endanger the lives of anyone in the vicinity.
- [3] Mr Toli and Mr Leope gave evidence on behalf of the mine, stating that it was apparent that the feeder breaker was not isolated or locked out because the lights were on. The evidence from both witnesses was that Mr Shongwe was standing on top of the feeder breaker putting oil into the gearbox. In the event that Mr Shongwe was working on the feeder breaker the feeder breaker was required to be isolated and locked out in accordance with mine procedure. In the event that he was not working on the feeder breaker and was simply conducting a visual inspection it was not necessary for the feeder breaker to

be isolated and locked out. Mr Shongwe's version was that he was not working on the machine and was simply conducting a visual inspection.

- [4] The commissioner found that the dismissal of Mr Shongwe was procedurally and substantively unfair and ordered re-instatement and backpay in the sum of R277 360.00. The applicant seeks to review this award and set aside the findings of unfairness in totality.

Grounds of Review

- [5] With regards to the substantive fairness of the dismissal, the applicant argues that the commissioner committed gross misconduct, alternatively a gross irregularity in his determination of the dispute. The commissioner was faced with two conflicting versions regarding the central issues which led to the dismissal of Mr Shongwe. These were:

5.1 Whether the feeder breaker was on at the time in question (if so, it was not locked-out); and

5.2 Whether Mr Shongwe was working on the feeder breaker (which requires that the feeder breaker be locked out) or whether he was conducting a visual inspection.

- [6] The commissioner was required to assess credibility and probabilities, and in failing to do so, it was argued that he:

6.1 Failed to apply his mind to evidence,

6.2 Misapplied the test relating to mutually destructive versions and enquiries held in *absentia*;

6.3 Failed to adjudicate the probabilities;

6.4 Failed to give detailed and cogent reasons for rejecting versions;

6.5 Made findings not supported by evidence.

- [7] The supplemented grounds of review relate to the commissioner's credibility findings, and the two material facts in dispute being:

- 7.1 Whether Mr Shongwe was on top of the feeder breaker filling it with oil?
- 7.2 If so, whether the feeder breaker lights were on, indicating that it was connected to a power source and had not been isolated and locked out?

[8] The ancillary questions supporting the assessment of evidence in this respect are set out by the applicant as follows:

- 8.1 Whether welding was taking place in the section on the day? This was the defence put forward by Mr Shongwe, in which case was the feeder breaker power cable was being used for the welding machine and therefore could not have been connected to the feeder breaker?
- 8.2 Whether the Mine's lockout procedure required "isolate *and* lockout" or "isolate *or* lockout"?
- 8.3 Whether there were bystanders? (who may or may not have been close to the feeder breaker and who may or may not have been having a conversation with Mr Shongwe?);
- 8.4 Whether it is possible to fill the feeder breaker's gear box with oil without assistance? The argument by the applicant was that no assistance is required to fill a feeder breaker with oil. Mr Shongwe argued that it was a two man job and therefore the version of the applicant was improbable because he would have required help to fill the feeder breaker with oil;
- 8.5 Whether job cards are required to perform any or all tasks on the feeder breaker?

Substance on Review

[9] The applicant correctly sets out that the commissioner identified three questions for consideration. These were:

- 9.1 Was the machine isolated?

9.2 Was the machine locked out?

9.3 Was there a need for either or both?

- [10] It is trite that the employer bears the onus to prove the case against Mr Shongwe. Regarding the first question, the applicant gives evidence that the machine could not be isolated because the lights were on. Both Mr Toli and Mr Leope confirm that the lights of the machine were on. This illustrates, on the applicant's version, that the machine was not isolated.
- [11] The commissioner rejects this evidence on the basis that the witnesses were obliged to check the source of the power to ensure that the feeder breaker was connected.
- [12] This is an unreasonable rejection of evidence. The commissioner does not reject the evidence on the basis that the witnesses were unreliable, or contradictory or even that it is unlikely that the lights were on for a specific reason. He rejects the evidence on the basis that the witnesses did not perform a fundamentally unnecessary task, which was to check that power was connected or not connected when it was clear that the power must have been connected if the lights were on.
- [13] While it is an unreasonable rejection of the evidence, it is not necessarily fatal to the outcome of the arbitration award, because the resolution of the question may be largely irrelevant if it is established that Mr Shongwe was simply conducting a visual assessment and not working on the machine as alleged.
- [14] In the answering papers the union argues that the Electrical Lock out Procedure states that only authorised electricians may isolate transformers. Mr Motau gave evidence for Mr Shongwe that he, as an electrician, was permitted to isolate and he did so. On this basis, Mr Shongwe would not have been allowed to isolate the feeder breaker as he was not an electrician. Mr Shongwe would, however, have been permitted and able to lock-out. The union argues that "it is common cause that there is no need to lock-out if the machine is already isolated because isolation turns the power off."

- [15] The union further argues that on either version (whether Mr Shongwe was conducting a visual inspection or whether he was refilling the oil), this conduct did not constitute electrical work and therefore there was no need to isolate the feeder breaker from the power.
- [16] This is not common cause. This does not appear to be the case of the applicant at all. The lock out step of the “isolation and lock out” procedure is an essential pre-requisite to ensure that the machine cannot be erroneously turned on again, risking the safety of other workers.
- [17] The commissioner states that it was not sufficient for Mr Shongwe to simply rely on the say so of Mr Motau that the machine had been isolated. Having rejected the evidence of the employer that Mr Shongwe was negligent because he had not isolated the feeder breaker, the commissioner indirectly finds that he was negligent because he had simply accepted for himself the say so of Mr Motau that the machine had been isolated, and that he was obliged to check that for himself. The commissioner also criticizes Mr Shongwe for not putting on his padlock. This too, is a finding which speaks to an element of negligence.
- [18] The commissioner then finds that it is common cause that the lock-out procedure had not been utilised because both parties agreed that Mr Shongwe had not placed his padlock on the feeder breaker. It was also common cause that Mr Shongwe had his own padlock to perform lock-out functions and he had worked on the feeder breakers in the past and knew how to work on the feeder breakers.
- [19] The commissioner was required to make a finding in respect of both questions because a failure to isolate or a failure to lock out would each constitute a breach of the policy and therefore a form of misconduct, given that the rule requires one to isolate and lockout.
- [20] It was therefore common cause that at least 50% of the requisite process had not been completed (that of the lock out). The remaining question then, is whether there was just reason to isolate and lockout. There would be no basis to isolate and lock out if Mr Shongwe was not on the machine in the first place

and was merely conducting a visual inspection. There is no need to isolate and lock out a machine if no one is working on it.

- [21] The two disputed versions are quite simple. The applicant states that Mr Shongwe was standing on top of the feeder breaker and was filling it with oil. Mr Shongwe states that he was conducting a visual inspection and was not standing on top of the feeder breaker.
- [22] The applicant's version was that Mr Toli and Mr Leope approached the feeder breaker and saw Mr Shongwe on the feeder breaker. Both witnesses corroborate this version. Mr Mudau and Mr Bhembe were described as being close to the feeder breaker. One witness described them as being three meters away and the other did not specify a distance. The commissioner finds that the distance of the other parties to Mr Shongwe is significant and that it was likely too noisy for Mr Shongwe to be able to talk to bystanders who were three meters away. On that basis it warrants the rejection of the applicant's evidence.
- [23] The distinction of three meters is not a significant discrepancy. The evidence of Mr Toli and Mr Leope differed. It did not differ in the sense that it was contradictory. It differed because one witness gave greater detail as to the interactions with Mr Shongwe and the distance from the feeder breaker. On this basis, the exact position of other individuals and whether or not they were talking to Mr Shongwe cannot be evidence that sways the credibility of versions in either direction. At best it could be neutral evidence.
- [24] A further issue raised was the height at which oil would be administered. Versions vary as to whether it was on top of the feeder breaker, requiring one to stand on top of the machine, or whether it was elevated to approximately head height but not on top of the feeder breaker.
- [25] The commissioner states that the oil can is clearly light enough for one person to pick up. On that basis it is possible for one person to perform the function. He then makes a finding on a practice in respect of which insufficient evidence was led. If it is ordinarily a role for two people to fill the gearbox with oil, but it is still possible for one person to do it, it was then possible for Mr

Shongwe to be filling the gearbox with oil. An observation that two people should perform the task or that it is practice for two people to perform the task does not justify the rejection of a version simply because one person was doing it. This appears to be muddled reasoning. If the filling of oil was a two-man job and Mr Shongwe was doing this on his own, it would compound his misconduct, not be a basis to prefer one version. The commissioner is not accepting one version or rejecting one version on the basis of the facts before him, but simply deferring to one version because it aligned with the factual matrix put forward by that witness. The reasoning is circular.

- [26] In respect of the job cards, the commissioner states that it is common cause that a job card was required and that there was no job card. This fact is not common cause. Mr Leope expressly gives the evidence that job cards are not required for all tasks. This evidence was coupled by the allegation that Mr Shongwe would sometimes refuse to accept a job card.
- [27] It appeared that the feeder breaker was not being used that day because it was a maintenance day. It appeared to be uncontested evidence that there was a “no oil” sticker on the machine. If Mr Leope was correct that no job card was required, it would be a reasonable and sensible task for Mr Shongwe to attend to the refilling of the oil as a part and parcel of a maintenance task.
- [28] In respect of welding, it was argued by Mr Shongwe that there was no power on the feeder breaker because the cable was being used for welding. While the intricacies of these versions were not always put to the applicant, the broad facts were as follows. On the version of Mr Shongwe, the feeder breaker was isolated because welding was being done in the area and the power cable which would ordinarily be used for the feeder breaker was used for the welding. Ordinarily welders would use the cable from the oil tanker but the oil tanker cable had been damaged some days prior.
- [29] The commissioner rejects the employer’s evidence because one witness indicates that there was welding and the other does not and that contradiction is purportedly fatal. This is not the case. The issue of the welding is not dispositive of the matter. It may determine whether or not the feeder breaker

was isolated but it does not determine whether Mr Shongwe was working on the feeder breaker.

[30] One of the key issues in assessing the evidence of the respective witnesses is the motivation for the applicant to lie. Both of the applicant's witnesses gave coherent and largely consistent evidence of Mr Shongwe's presence on top of the feeder breaker. The witnesses for the employer and Mr Shongwe agreed that Mr Shongwe was asked why he was putting oil in the gearbox and why the feeder breaker had not been locked out. These versions are critical because they speak to the most important part of the case – whether Mr Shongwe was pouring oil or performing a visual inspection. These three corroborating versions at least suggest that the employer believed that Mr Shongwe was pouring oil, even if Mr Shongwe disputes this version. Why else would they ask the question? Mr Shongwe disputes that he was pouring oil and simply stated that they were lying and that these were “blue lies” and that Mr Toli was probably drunk.

[31] There is no basis for two individual employees to create such a lie for no apparent reason. This should have been considered by the commissioner when balancing the various versions and assessing probabilities.

[32] In the matter of *South African Revenue Service v National Education, Health and Allied Workers Union obo Kulati and another*¹, the court held that:

...To determine whether the misconduct was committed, a conventional process of factual adjudication was to be adopted, while taking into account the totality of circumstances. As a general rule, the process of factual adjudication requires that when it is suggested that a witness is not speaking the truth on a particular point, such imputation be drawn to the attention of the witness in cross-examination to afford them an opportunity to give an explanation and defend their character. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct. Adherence to this rule ensures fairness and allows a proper consideration of the evidence, with findings capable of being made on the disputed issues

¹ (2023) 44 ILJ 1929 (LAC) at para 24.

through a consideration of the credibility of the various factual witnesses, their reliability and the probabilities.

- [33] The commissioner appears to have taken an all or nothing approach to the applicant's evidence. Any discrepancies, regardless of how meaningful an impact such discrepancies would have on the evidence resulted in an outright rejection of the applicant's evidence. This is unreasonable.
- [34] There are various points at which versions were not put to the applicant's witnesses. This hampered the applicant's ability to refute certain allegations. Certain of these allegations go to the heart of the case for the applicant and the defense presented by Mr Shongwe.
- [35] The applicant's ground of review pertaining to the various misdirections of evidence has merit. The award is contradictory in certain parts and comes to conclusions not supported by the evidence. While the commissioner's identification of the questions for consideration was clear and succinct, the reasoning is less so.
- [36] The commissioner offered an irrational basis for rejecting the applicant's evidence regarding the lights on the feeder breaker. Requiring a physical check of the plug point in the face of overt power on the machine is misplaced. However, this is not fatal to the reasonableness of the award.
- [37] The commissioner's finding in respect of the isolation is similarly flawed. He finds that the feeder breaker was isolated but implied that Mr Shongwe was negligent for failing to confirm this fact for himself and relying on the say-so of Mr Motau. He is also impliedly negligent for failing to use his padlock to lockout.
- [38] The commissioner's finding that there is no need to lock out the feeder breaker in circumstances where the machine was already isolated is simply wrong. Both parties canvassed evidence of the need for TPL's (Tracking Pad Lamps) which are devices which will warn a worker when they are approaching a live machine and PDS (Proximity Detection Systems) which are put on all machines, to raise an alert that a person is approaching a live

machine. It was agreed that this was not a substitution for the isolation and lock out procedure. There is an undisputed emphasis on safety in the workplace.

- [39] The commissioner found that job cards are required for all tasks when this was not the case. The employer said that Mr Shongwe would refuse to take job cards and furthermore, they were not a requirement for the task of filling oil.
- [40] The rejection of the version regarding the distance between Bhembe and Mudau, and the degree of noise in the environment was equally as flimsy. So too was the erroneous weighing of the evidence regarding welding. At best, the existence of the welders would support the version that the feeder breaker was isolated, but no more than that.
- [41] The cumulative effect of this reasoning has a material effect on the outcome of the award. On this basis, the finding on substantive fairness is unreasonable and stands to be set aside.

Procedure on Review

- [42] In respect of procedural unfairness, the Commissioner found that Mr Shongwe's dismissal was procedurally unfair because the disciplinary hearing scheduled for 1 November 2022 was heard in absentia after a pattern of three dates being given to Mr Shongwe and his representatives.
- [43] The crux of the finding by the commissioner was that there was an obligation on the applicant to offer three dates for every proposed hearing date for the hearing to progress.
- [44] Insofar as the procedural unfairness is concerned, there was no evidence led of an agreement between the parties that three dates should be offered. While there had been a precedent of sorts, this does not give rise to an obligation to do so.
- [45] This is particularly so when one is cognisant of the time delay between the date of the incident, being in May 2022, the various attempts made by the

employer to engage with a consultation process (despite this not being a pre-requisite at the time at which the employee was charged) and the fact that Mr Shongwe was on fully paid suspension and had been for many months.

[46] It was unreasonable for the commissioner to place an obligation on the employer which does not exist in either law or practice. While a proposal of three dates may be pragmatic and courteous, this cannot be construed as either an agreement or an obligation. A finding to this effect was unreasonable.

[47] In the premise the following order is made:

Order

1. The review is granted and the arbitration award issued under case number MPEM 646-23 is reviewed and set aside.
2. The arbitration award is substituted as follows:
 - 2.1 *“The dismissal of Mr Shongwe was procedurally and substantively fair.”*
3. There is no order as to costs.

S. Saunders

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Adv M van As

Instructed by: Shepstone & Wylie Attorneys

For the Third and

Fourth Respondents: Mr Siphesihle Sibiya

Instructed by: Cheadle Thompson & Haysom Inc