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**THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

NOT REPORTABLE

CASE NO: JR193/2022

In the matter between:

**SIYANDA BAKGATLA PLATINUM MINE**

Applicant

and

**COMMISSION FOR CONCILIATION,  
MEDIATION AND ARBITRATION**

First Respondent

**MOLOKO EPHRAIM PHOOKO NO**

Second Respondent

**SIBUSISO NHLABATHI**

Third Respondent

**Heard:** 17 February 2026

**Delivered:** 20 April 2026

**Summary:** Application to review and set aside an arbitration award. Outcome unreasonable. Application successful. Dispute referred to CCMA for rehearing.

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## JUDGMENT

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### DANIELS J

#### Introduction

- [1] This is an application brought to review and set aside an arbitration award issued by the second respondent (hereafter the “commissioner”). In an arbitration award under case reference NWRB1751-21, the commissioner found that the dismissal of the third respondent, by the applicant, was substantively unfair<sup>1</sup> and reinstated him.

#### Reinstatement of the matter

- [2] The review was launched on 25 January 2022. The reconstructed record was filed on 21 February 2023, the answering affidavit on 21 April 2023, and the replying affidavit on 17 July 2023. It is clear there was non-compliance with clause 11.2.7<sup>2</sup> of the Practice Manual which requires that all the necessary papers in the review must be filed within 12 months of the launch of the review, and the Registrar must be advised that the matter is ready for hearing.
- [3] The applicant applied for the reinstatement of the review, which was unopposed. The applicant explained that the delay was caused by the CCMA, which failed to file the complete record when it was required to do so. Ultimately it was necessary to reconstruct part of the record. It is

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<sup>1</sup> Third respondent abandoned his challenge to procedural fairness. See Transcript p141 lines 14 - 17

<sup>2</sup> Clause 11.2.7 requires no action on the part of the Registrar. The court file is automatically archived when there is non-compliance. See *Gololo v Limpopo Department of Economic Development, Environment & Tourism & others* (2025) 46 ILJ 1895 (LAC) at para 8

unnecessary to traverse all the details of the application. It suffices to state that the explanation was comprehensive, and the prospects of success were properly canvassed, and were reasonable. The delay, it seems clear, was due to no fault of the applicant or its representatives. In the circumstances, the application is granted and the review is reinstated.

#### Application for postponement

[4] When the matter was heard, the applicant's representative sought a postponement from the bar. She stated that her colleague, who had been dealing with the matter, had handed her the file about an hour earlier and she was unprepared. She stated that her colleague decided to attend to another matter and their counsel was sick. This was the full extent of the reasons for the request. Third respondent's representative vigorously opposed any postponement, on the basis that the hearing was long overdue, and third respondent would be prejudiced by further delays. It must be noted that the parties were notified of the hearing date on 23 June 2025.

[5] In *Lekolwane and Another v Minister of Justice*<sup>3</sup> the Constitutional Court stated "*An applicant for a postponement seeks an indulgence from the court. A postponement will not be granted, unless this Court is satisfied that it is in the interests of justice to do so. In this respect the applicant must ordinarily show that there is good cause for the postponement.*"

[6] Having considered all the relevant factors particularly the paucity of the explanation and the prejudice to the third respondent, I found that the applicant had not shown good cause and it was not in the interest of justice to grant a postponement. Accordingly, the review proceeded.

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<sup>3</sup> 2007 (3) BCLRA 280 (CC)

### Background facts

[7] The third respondent was appointed by the applicant (hereafter “the Mine”) as a section engineer on 1 August 2018.

[8] During late March 2021, the Mine gave to the applicant a document titled “notification of alleged transgression”, in which it alleged that the applicant had committed the following offences:

“(i) gross negligence in that he appointed a company / supplier to perform the crucial job underground and the said company / supplier did not meet the safety requirements i.e. no training / induction and no safety file<sup>4</sup> to work underground,

(ii) corrupt / fraudulent practices in that he appointed incompetent suppliers to do the belt splicing which was substandard at inflated rates.”

(own emphasis)

[9] Further details of the alleged misconduct were provided through a document titled “Charge Sheet”, which contained a summary of the incident. It read:

(a) Conduct unbecoming of an official: in that you became involved in appointing a company / supplier to perform the crucial job underground and the company / supplier did not meet the safety requirements which includes training and no induction to go underground.

(b) Acting against company regulations: in that you failed to adhere to company policies and procedure by not following the procurement policy when you appointed Fikra to do the load testing underground at Richard Shaft.

(c) Gross negligence: in that you took suppliers to work underground without shaft induction and training which is a safety risk to the company, you

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<sup>4</sup> The safety file must include inter alia a certificate of competence to do the job and a list of employees and their qualifications. See Record Bundle p190

compromised the values of the company and that could (sic) had potentially serious consequences to the company if any safety incident should occur underground to the supplier.

- (d) Corrupt / fraudulent practices: in that incompetent suppliers were appointed to do the belt splicing which was substandard and other suppliers had to redo the same job.

(own emphasis)

- [10] At the bottom of the charge sheet, the Mine stated: *“Disciplinary action to be taken as per above”*.
- [11] In summary, the case of the applicant was as follows. The third respondent submitted to it a ‘single source motivation’ and a motivation to create a vendor (“the motivation”). In essence, the applicant motivated for the appointment of a new vendor, a company named Fikra, to do load testing. In his motivation, the third respondent indicated to it that Fikra complied with the directives issued by the SANS and the Department of Mineral Resources.<sup>5</sup> At that time, the applicant already had a supplier which was doing load testing, Premier Load Testing (“Premier”). Fikra quoted lower than Premier and was appointed. Ultimately, however, Fikra charged significantly more than Premier. The work done by Fikra was substandard and another supplier was appointed to redo the work. The third respondent was instrumental in ensuring the appointment of Fikra despite not checking that it had a safety file. The third respondent did not ensure that the new supplier was put through the mandatory safety and induction processes. When appointing new suppliers there must be at least three quotes from different suppliers and the third respondent was aware of this requirement in the procurement policy.

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<sup>5</sup> Documents Bundle p27

[12] For the applicant, there were five witnesses. Mr Kgomotso Itumeleng (“Itumeleng”), Mr Palane Morwana (“Morwana”), Mr Kopano Tau (“Tau”), Mr Thulasizwe Mlambo (“Mlambo”), and Ms Tsholofelo Maimela (“Maimela”).

12.1 Itumeleng was employed by the applicant as an investigator. He testified that the third respondent’s motivation to appoint Fikra was misleading because it suggested that it related to safety.<sup>6</sup> Mlambo was disciplined for the same issue, but his conduct was different and that is why he was not dismissed.

12.2 Morwana was employed by the applicant as a foreman. Morwana testified that he had signed the forms motivating for the appointment of Fikra but he did so on instructions from the third respondent. Fikra did not comply with the safety and induction processes of the applicant.

12.3 Tau testified that Fikra was introduced to him by the third respondent who informed him that he would be working with Fikra from that time onwards. Tau testified that, as a rigger, he is a relatively junior and didn’t check whether Fikra had been through the safety induction because he did not expect them to be introduced to him without them having gone through the safety induction.

12.4 Mlambo was a section engineer. Fikra was introduced to him by the third respondent. Mlambo was told by the third respondent that he wished to bring Fikra onboard because he was experiencing problems with his equipment.<sup>7</sup> Mlambo testified that the end user

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<sup>6</sup> Transcript, p16, lines 14 – 25, see ‘Single Source Motivation’ at Document Bundle, p24

<sup>7</sup> Transcript p75 lines 1 – 5

motivates for the appointment of a vendor and is responsible for checking that their safety file is in order.<sup>8</sup>

12.5 Maimela was a shaft accountant employed by the applicant. She testified about the procurement processes. Maimela was approached by the third respondent who enquired about how to go about appointing new vendors or suppliers. Maimela testified that the appointment of Fikra proved costly, but conceded that she could not prove that their rates were inflated. Maimela testified that Fikra did substandard work.

[13] The case for the third respondent was, in brief, as follows.

13.1 He wanted to achieve savings through the appointment of Fikra. He testified that he needed to change the vendor “due to the scope of work”.<sup>9</sup>

13.2 He was unaware of how to treat contractors for the purposes of training or induction.<sup>10</sup>

13.3 He was aware of Fikra because he had previously been employed by it. He was not aware of the procurement policy and had requested a copy but never received it.

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<sup>8</sup> Transcript p77 lines 14 - 22

<sup>9</sup> Transcript p152 lines 5 - 9

<sup>10</sup> However the documentary evidence before the commissioner demonstrated that he had been taken through a health and safety training course by the applicant. Mr Nhlabathi confirmed his earlier written statement which stated that he was the legal appointee and had certain safety functions delegated to him by the employer under the Mine Health and Safety Act (MHSA). Section 5(2)(b) of the MHSA states that as far as reasonably possible every employer “must ensure that persons who are not employees, but who may be directly affected by the activities at the mine, are not exposed to any hazards to their health and safety.”

13.4 Mlambo was also charged for negligence, in relation to the same incident, but was not dismissed. This suggested that the applicant applied discipline inconsistently.

#### Arbitration award

[14] The commissioner made the following findings:

14.1 The applicant did not prove the charges against the third respondent. There is insufficient evidence that Fikra inflated prices or performed substandard work. There was no evidence of corruption on the part of the third respondent. The supply chain office was the responsible functionary to appoint vendors and suppliers. Although the third respondent played a crucial role in bringing Fikra to the Mine, someone else made the appointment.

14.2 The applicant did not act inconsistently in its application of discipline.

14.3 The dismissal of the third respondent was substantively unfair, and he must be reinstated with effect from May 2021. He must be paid backpay for the period between May and December 2021.

#### Legal principles

[15] The arbitration process and the resulting arbitration award both constitute administrative action. Accordingly, section 33(1) of the Constitution requires that the process and the outcome must be lawful, reasonable, and procedurally fair. It is in this context that the review test<sup>11</sup> applicable to arbitration awards issued by the CCMA and Bargaining Councils, was formulated, as follows: *is the arbitration award one which no reasonable*

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<sup>11</sup> *Sidumo and another v Rustenburg Platinum Mines Ltd & others* (2007) 28 ILJ 2405 (CC) at para [110]



*commissioner could reach on the material before him or her?* It is known as the “reasonableness test.”

- [16] As to what is reasonable, this must be determined by the circumstances of each case. It is important to remember that reasonableness embraces a wide range of outcomes several of which may be reasonable.<sup>12</sup> Our courts have warned that the award, or outcome, must not be evaluated on a piecemeal basis, but on the totality of all the evidence.
- [17] Where a commissioner fails to apply his mind to the material issues, this will usually indicate that the outcome is unreasonable or that the nature of the enquiry was misconceived. When a mistake of fact or law occurs, what matters is its materiality – and whether it had a distorting effect on the outcome.<sup>13</sup>

#### Analysis of the grounds of review

- [18] The applicant alleges that the award is unreasonable. The primary contention is that the commissioner irregularly adopted a strict interpretation of the charges when he was required to take a more flexible and nuanced approach. As a result, the commissioner did not consider whether the applicant had committed any misconduct which was not expressly foreshadowed in the charges.
- [19] In *Woolworths (Pty) Ltd v CCMA and others*<sup>14</sup> the Labour Appeal Court stated that —

‘[t]he misconduct charge on and for which the employee was arraigned and convicted at the disciplinary enquiry did not necessarily have to be strictly framed in accordance with the wording of the relevant acts of misconduct as

<sup>12</sup> *Goldfields Mining SA (Pty) Ltd v CCMA and others* (2014) 35 ILJ 943 (LAC) at para [14]

<sup>13</sup> *Head of the Department of Education v Mofokeng and others* [2015] 1 BLLR 50 (LAC) at para [33]

<sup>14</sup> (2011) 32 ILJ 2455 (LAC) at 2467

listed in the appellant's disciplinary codes, referred to above .... It was sufficient that the wording of the misconduct alleged in the charge-sheet conformed, with sufficient clarity to be understood by the employee, to the substance and import of any one or more of the listed offences.'

(emphasis added)

[20] Thus, provided that the employee knows that which conduct allegedly constitutes misconduct and is not significantly prejudiced by an incorrect characterization of the offence, discipline may be imposed appropriate to the misconduct.

[21] As previously explained, through the "Charge Sheet", the applicant clarified the full extent of the alleged misconduct. The third respondent could have been under no illusion as to the misconduct he allegedly committed. The commissioner was required to decide whether the third respondent committed the alleged misconduct described in the 'notification of alleged transgression' *and* the 'charge sheet'.

[22] Among other things, the applicant alleged that the third respondent "became involved in appointing" a supplier who did not meet safety requirements. Although the commissioner accepted that the third respondent played a crucial role in the appointment of Fikra, he did not consider whether such conduct was negligent.

[23] There are several other important disputes which the commissioner failed to resolve. The commissioner failed to consider whether Fikra failed to meet the applicant's safety requirements and, if so, whether the third respondent was negligent in that respect. The commissioner did not consider whether the third respondent failed to follow procurement policy. And finally, the commissioner did not decide whether the third respondent took suppliers to work underground without shaft induction and training.

[24] The abovementioned omissions are glaring and indicate that the commissioner failed to apply his mind to the issues. These errors were material and had direct bearing on the outcome. This suffices to render the award unreasonable. Thus, the award falls to be reviewed and set aside. In my view, given that a significant part of the evidence had to be reconstructed, and there are many instances where the audio record was inaudible, it is appropriate to refer the dispute back for hearing de novo.

[25] As an aside, I note that the commissioner failed to consider the different explanations by the third respondent as to why he motivated for the appointment of a new vendor. In the motivation, he mentioned safety. He also talked about cost savings. He told his colleagues he was concerned about his equipment. In evidence, he talked about the scope of the work.

[26] The applicant has been successful, but costs do not follow the result in this court. There being no reason in law and fairness to award costs, I make no order as to costs.

### Conclusion

[27] In the circumstances, for the reasons set out above, I make the following order:

27.1 The review application is reinstated,

27.2 The arbitration award issued by the second respondent under case reference NWRB1751-21 is reviewed and set aside,

27.3 The dispute concerning the fairness of the third respondent's dismissal is referred to the CCMA for arbitration *de novo* before a commissioner other than the second respondent.

**Reynaud Daniels**  
**Judge of the Labour Court of South Africa**

Appearances:

For Applicant:  
Ms K Mogale  
Khanyisa Mogale Attorneys

For Third Respondent:  
Mr C Goosen  
Parsons Inc