



(1) Reportable:	NO
(2) Of interest to other Judges:	NO

Signature	Date
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THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

CASE NO: JR940/2020

In the matter between:

SERITI COAL (PTY) LTD t/a NEW DENMARK COLLIERY

Applicant

and

**COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION**

First Respondent

MPIKO SOLOMON NO

Second Respondent

RASMENI GODFREY

Third Respondent

NATIONAL UNION OF MINEWORKERS

Fourth Respondent

Heard: 4 March 2026

Delivered: 18 May 2026

Headnote: Application to review and set aside arbitration award ~ grounds of review established ~ award unreasonable in relation to totality of the evidence ~ award set aside and substituted.

JUDGMENT

DANIELS J

Introduction

- [1] The applicant employed the third respondent until his dismissal on 13 August 2019. The third respondent challenged the fairness of his dismissal by the first respondent. The second respondent (“the commissioner”) found that the third respondent committed the misconduct for which he was dismissed, but the sanction of dismissal was unfair, and he should be reinstated with ten months’ remuneration as back pay. Ironically, the commissioner failed to impose any sanction on the third respondent for the misconduct. The quantum of back pay was later revised through a variation ruling. The applicant contends that the arbitration award was unreasonable and ought to be reviewed and set aside.

Background facts

- [2] The third respondent, Mr. Godfrey Rasmeni (“Rasmeni”), was employed by the applicant as a mine overseer, a managerial position to whom the shift bosses reported. He was responsible for designated work areas, including the Shosholoza section.
- [3] Mine overseers are legal appointments required by the Mine Health and Safety Act¹ (“MHSA”) and are critical for ensuring the control and management of underground mining operations, particularly health and safety. The third respondent’s letter of appointment requires that he diligently and competently observe and enforce discipline of all those under his control and supervision. He was also required to identify all risks and ensure that employees are not exposed to health and safety hazards. His duties, as

¹ No. 29 of 1996 as amended.

mandated by legislation, included the daily inspection and the signature of the shift boss's logbook ("logbook"). The logbook is a key instrument for informing the mine overseer of problems encountered and any work required to ensure employee safety.

[4] Rasmeni reported to his shaft or section manager, Mr. Lwane. However, in respect of health and safety, he reported directly to the general manager.

[5] On 10 April 2019, Rasmeni was summoned to a disciplinary hearing to face two broad disciplinary offenses, namely, his alleged failure to observe and enforce compliance in his section and his alleged dereliction of duty and responsibility. Rasmeni pleaded not guilty to both.

[6] At the disciplinary hearing, evidence was presented that Rasmeni:

6.1 Failed to take timeous steps to investigate or act against the shift bosses in his section, where they were not adhering to safety standards.

6.2 Failed to inspect and sign the logbook daily.

6.3 Failed to correct the deviations from safety standards in the section he was responsible for, where the strata control officer had reported deviations.

[7] On 3 April 2019, the strata control officer, Mr. Lucky Nkosi ("Nkosi"), conducted a routine audit of the Shosholoza section of the mine. Nkosi found that:

7.1 The work area known as "split thirty-one" had not been properly supported.

7.2 Metal equipment known as "Oslo straps" should have been installed on the roof in "split thirty-one".

7.3 So-called “telItales”² should have been installed in the intersection between splits thirty and thirty-one.

7.4 The roof of split thirty-one required a further six roof bolts.

7.5 The work area of split thirty-one was unsafe but had not been barricaded.

7.6 The “brow” of split thirty-one was unsupported.

7.7 The “support sign off book,” which is supposed to be kept at the waiting place in split thirty-one, could not be found there.

[8] The audit report indicated that Rasmeni had committed to taking the remedial steps required for split thirty-one by 10 April 2019. The deviations indicated in his report were Class A deviations, material deviations that must be fixed before employment in that area may resume.

[9] Following the disciplinary hearing, Rasmeni was found guilty of the charges. In addition, the chairperson indicated that Rasmeni was dishonest for falsifying a logbook to state that he had conducted an inspection of split thirty-one on 1 April 2019, when he had conducted it on 10 April 2019.

Arbitration proceedings

[10] Prior to the evidence, the commissioner asked the third respondent if he was amenable to being granted compensation without reinstatement, to which he responded positively.³

[11] The applicant, as the employer, called two witnesses. I deal with their evidence in turn. Mr. Xolani Lwane (“Lwane”) testified first. He testified that:

² The evidence indicated that, in mining, “telItales” are devices used to monitor roof movement and give advance warning of roof fall or collapse, allowing for timely support and adjustment of roof supports.

³ Record Transcript Vol. 1, p12

- 11.1 He was employed as a shaft or section manager, to whom the third respondent reported.
- 11.2 The third respondent, as the mine overseer, was required to inspect and sign the shift boss's logbook daily, but he had not done so for more than one week.
- 11.3 Planning meetings are held with the mine overseers, during which audits by the strata control officer (or "rock engineers") are scheduled. The audits are scheduled with all stakeholders to ensure that, when they occur, the strata control officer reports no deviations.
- 11.4 Nkosi conducted an audit on 3 April and noted various deviations at split thirty-one, but the third respondent took no action against his subordinates - until Lwane himself acted against the third respondent. After the audit, he instructed the third respondent to fix the deviations.⁴ Lwane made no mention of the third respondent giving him any reasons why the deviations could not be rectified. The deviations included the failure to barricade unsafe areas. Another deviation was the so-called "support signoff book"⁵ was not in the waiting place.⁶
- 11.5 The third respondent could not have conducted an inspection on 1 April, as he had suggested, because the profile of the rock face⁷ differed from that indicated by the strata control officer.⁸ In addition, mining was not possible in split thirty-three on 1 April, and thereafter in split thirty-one on 3 April. Mining occurs in split thirty-one before split thirty-three. At best,

⁴ Record Transcript Vol. 1, p38 lines 1 - 2

⁵ It was unclear whether the shift boss logbook is the same thing as the support sign off book.

⁶ Record Transcript Vol. 1, p44 lines 1 – 5

⁷ Record Transcript Vol. 1, p113 lines 9 – 11; p134 (lines 16 – 19) to p135 (lines 1 – 5)

⁸ Record Transcript Vol. 1, p46 lines 1 - 20

two full splits could be cut or advanced within a week.⁹ It was not possible that the third respondent could have conducted an inspection on 1 April.

11.6 The third respondent was not notified of disciplinary action within two days, as contemplated by the disciplinary code, because the applicant wanted the third respondent to address the deviations first. Furthermore, the applicant required the audit report to be signed by all relevant parties, including the General Manager.

11.7 The deviations in the audit report were Class A hazards, meaning they must be addressed urgently. Although notified of the deviations on 3 April, the third respondent undertook to rectify them by 10 April. Lwane could not recall if he informed the third respondent that this was too late. Lwane testified that mining in the area must be stopped until the telltales required were installed. Failure to install the telltales could lead to fatalities.¹⁰

11.8 Lwane testified that the reason other mine overseers were not dismissed for similar deviations was that those overseers had acted against their subordinates and held them to account.¹¹

11.9 In respect of another mine overseer, Ms Kgahliso Mokoena ("Mokoena"), she was found guilty of only one charge – failing to inspect and sign the shift boss's logbook. She was found not guilty of poor "housekeeping".¹² Mokoena admitted guilt to the charge of failing to inspect and sign the logbook. She was given a final written warning. Unlike the third

⁹ Record Transcript Vol. 1, p48 lines 1 – 12; the terminology used (cut and advanced) was not explained by the witnesses.

¹⁰ Record Transcript Vol. 1, p91 lines 16 – 19

¹¹ Record Transcript Vol. 1, p84 lines 1 – 12; p93 lines 17 – 20

¹² Record Transcript Vol. 1, p86, the term "housekeeping" is used in the mining context but is not a minor issue.

respondent, Mokoena was not disciplined as a result of an audit by the strata control officer.¹³

11.10 By 10 April, the third respondent had not fixed the deviations.

11.11 He was also disciplined for failing to install telltales. An inspector from the DMR recommended installing telltales on both sides of a slip.¹⁴ The recommendation was a guideline.¹⁵

[12] Mr. Tshepo Bonani ("Bonani") testified that:

12.1 He was employed by the applicant as a section manager. He chaired the third respondent's disciplinary hearing.

12.2 The applicant did not dismiss the third respondent for a separate act of misconduct, gross dishonesty.¹⁶ Instead, during the hearing, he believed the third respondent had given dishonest testimony.

12.3 The third respondent altered the date of his own inspection from 10 April to 1 April so that it would appear that he conducted an inspection before the audit by the strata control officer on 3 April.¹⁷ It was improbable that the third respondent conducted an inspection on 1 April.¹⁸ In addition, the third respondent was dishonest by stating that he was unable to source safety tools and equipment to quickly fix the deviations.¹⁹

¹³ Record Transcript Vol. 1, p125 lines 1 – 8

¹⁴ Record Transcript Vol. 1, p99 lines 3 – 8

¹⁵ Record Transcript Vol. 1, p101 lines 1 – 10

¹⁶ Record Transcript Vol. 2, p178 lines 10 – 19

¹⁷ Record Transcript Vol. 2, p149 lines 1 – 8

¹⁸ Record Transcript Vol. 2, p150 (line 17) to p151 (line 9)

¹⁹ Record Transcript Vol. 2, p258 lines 10 – 15

12.4 When Bonani questioned the third respondent about the alleged absence of safety tools and equipment, the third respondent said he had only checked with one of the three crews in the section (whether they had the necessary tools and equipment) because the other crews were off. That explanation was false.²⁰ Furthermore, the third respondent had the authority to source any tools and equipment he required.²¹

12.5 It takes about a week to cut a split. It was therefore improbable that the third respondent conducted his inspection on 1 April.²²

12.6 He testified about the importance of installing telltales to monitor movement in the roof. Failure to observe such standards poses a serious hazard to employees who work underground in that section. The applicant conducts mining at an average depth of 200 meters underground. Although telltales had not always been used, the applicant decided to use them after several accidents to mitigate the risk.²³ The applicant classified the failure to use telltales as a Class A hazard. The third respondent's failure to immediately fix the deviations suggested that he did not appreciate the risk.

12.7 Bonani testified about the importance of the mine overseer signing the shift boss's logbook daily, even though the manager of the mine overseer is only required to sign it once a week.²⁴

²⁰ Record Transcript Vol. 1, p151 (line 17) to p152 (line 7); V2 p233 lines 3 – 10

²¹ Record Transcript Vol. 2, p256 lines 15 – 19

²² Record Transcript Vol. 2, p198 lines 1 – 7

²³ Record Transcript Vol. 2, p160 lines 1 – 10

²⁴ Record Transcript Vol. 2, p154 (line 1) to p155 (line 9); p159 lines 1 – 5

12.8 Mokoena was disciplined and dismissed for different offenses, though the same broad categories were used. Unlike the third respondent, Mokoena was found not guilty of any failure to observe and ensure compliance.²⁵ In addition, Mokoena acknowledged her mistake and took responsibility for her conduct.²⁶

[13] The third respondent testified on his own behalf, as follows:

13.1 He did alter the date on his inspection report by changing 10 April to 1 April. He completed the report on 1 April and, in error, wrote 10 April.²⁷

13.2 He did not possess the tools and equipment (couplings and drill steel) to immediately fix the deviations. He realized the equipment was missing at some point earlier and ordered it from mine stores on 26 February 2019.²⁸ However, the couplings only arrived on 30 April 2019.²⁹ Realizing he would not receive the couplings in time, he drove to the North Shaft to request the couplings and drill steel.³⁰

13.3 Under cross-examination, he stated that after the audit revealed the deviations, he immediately contacted his shift bosses, and that is when he discovered the absence of coupling and drill steel on “some other shift”.³¹

13.4 After he discovered the deviations, he informed his manager, Lwane, that the telltales were not available.³² This version was not put to the

²⁵ Record Transcript Vol. 2, p201 lines 7 – 11; V2 p205 lines (4 – 13)

²⁶ Record Transcript Vol. 2, p211 lines 1 – 16; p214 lines 7 – 19; pp252 (line 10) to 252 (line 3)

²⁷ Record Transcript Vol. 3, p275 (line 14) to p277 (line 11)

²⁸ Record Transcript Vol. 3, p283 lines 1 – 8; p286 lines 1 – 4

²⁹ Record Transcript Vol. 3, p288 line 2

³⁰ Record Transcript Vol. 3, p289 lines 14 – 16

³¹ Record Transcript Vol. 3, p383 lines 11 – 17

applicant's witnesses. He confirmed that the installation of telltales was a grave issue and required immediate attention.³³ He also conceded that he had the necessary means and authority to carry out his responsibilities.³⁴

13.5 To cut a single split takes approximately two days with full shifts and all the necessary equipment.³⁵

13.6 He confirmed that the law required him to inspect and sign the shift boss's logbook daily.³⁶ But there were periods when he did so weekly.³⁷

13.7 Initially, he testified that his previous manager required only that he inspect and sign the logbook weekly.³⁸ This changed when he testified: *"... but the previous manager said I need my logbooks here and I need they must be signed every day."*³⁹

13.8 He testified that his new manager (Lwane) did not instruct him to sign the logbook daily but told him to have the book signed and ready for him on Fridays.⁴⁰

13.9 He sees shift bosses four out of every five days⁴¹ and receives information about what is happening underground from them.

³² Record Transcript Vol. 3, p318 lines 7 – 13

³³ Record Transcript Vol. 3, p342 line 15 to p343 line 5

³⁴ Record Transcript Vol. 3, p371 lines 1 – 7

³⁵ Record Transcript Vol. 3, p298 lines 15 – 19

³⁶ Record Transcript Vol. 3, p308 lines 15 – 16

³⁷ Record Transcript Vol. 3, p303 lines 9 – 18

³⁸ Record Transcript Vol. 3, p308 lines 1 – 10

³⁹ Record Transcript Vol. 3, p2313 lines 9 – 15

⁴⁰ Record Transcript Vol. 3, p372 lines 9 – 16

⁴¹ Record Transcript Vol. 3, p302 lines 11 – 16; p303

13.10 The commissioner noted his evidence that deviations are a regular occurrence.⁴² At one point, the third respondent testified that deviations “go with mining.”⁴³

Legal principles

[14] The arbitration and the arbitration award both constitute administrative action. Section 33(1) of the Constitution requires that the arbitral process and the outcome must be lawful, reasonable, and procedurally fair. It is in this context that the review test applicable to awards of the CCMA and Bargaining Councils was formulated by the Constitutional Court as follows: *is the arbitration award one which no reasonable commissioner could reach on the material before him or her?*⁴⁴ This is known as the “reasonableness test.”

[15] As to what is reasonable, this must be determined by the circumstances of each case. The court must consider factors such as the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved, and the impact of the decision on the lives and well-being of those affected.⁴⁵

[16] It is important to remember that reasonableness embraces a wide range of outcomes, several of which may be reasonable.⁴⁶ The reasonableness of the

⁴² Record Transcript Vol. 3, p366 lines 4 – 6, p367

⁴³ Record Transcript Vol. 3, p378 line 2

⁴⁴ *Sidumo and another v Rustenburg Platinum Mines Ltd & others* (2007) 28 ILJ 2405 (CC) at para [110]

⁴⁵ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and others* 2004 (4) SA 490 (CC) at para [45]

⁴⁶ *Goldfields Mining SA (Pty) Ltd v CCMA and others* (2014) 35 ILJ 943 (LAC) at para [14]

outcome must be evaluated not solely on the reasons given by the commissioner, but on all the evidence.⁴⁷

[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 inquiry was misconceived. However, when a mistake of fact or law does occur, what matters is its materiality – and whether it had a distorting effect on the outcome.⁴⁸

[18] More recently, the Constitutional Court, in *Vodacom (Pty) Ltd v Makate and another*⁴⁹ (“*Vodacom*”) held:

“The duty of proper consideration is an integral component of the fair hearing right. The founding constitutional value of the rule of law and section 34 of the Bill of Rights require, in my view, that a court should have regard to all material evidence and all material submissions bearing on the issues it must decide. And the court must bring its reasoning to bear on those material issues and reach a conclusion on them. The evaluation of the evidence and reasoning may – as I say – be erroneous, but there cannot be a fair hearing in compliance with the rule of law and section 34 if proper consideration of the matter before the court has not occurred.”

(own emphasis)

[19] Given that the reasons provided for the award act as the first indication of whether the evidence and the submissions received proper consideration by the commissioner, *Vodacom* held that:

“the reasons should deal with the substantial points which have been raised; include findings on material questions of fact; refer to the evidence or other material upon which those findings are based; and provide an intelligible

⁴⁷ *Fidelity Cash Management Service v CCMA & others* (2008) 29 ILJ 964 (LAC) at para [102]

⁴⁸ See *Head of the Department of Education v Mofokeng* [2015] 1 BLLR 50 (LAC) at para [33]

⁴⁹ (CCT 51/24) [2025] ZACC 13 (31 July 2025) at para [45]

explanation of the process of reasoning that has led the judge from the evidence to the findings and from the findings to the ultimate conclusion.”

Grounds of review and analysis

- [20] The applicant submits that the commissioner erred in material respects by failing to consider important evidence, thereby resulting in an award that no reasonable decisionmaker could reach on the evidence before him.
- [21] The applicant submits that the commissioner acted irrationally and unreasonably in finding, on the one hand, that the third respondent was not responsible for the deviations and, on the other hand, that the third respondent was obliged to observe and enforce the law, codes of practice, and procedures. The submission has merit. The evidence showed that the third respondent was a senior manager with the authority, resources, and obligation to prevent safety deviations and, if they do occur, to quickly fix them. If the commissioner applied his mind to the issues and the evidence, it would have been clear that deviations such as the failure to install adequate telltales and roof bolts were human failings for which the mine overseer must accept responsibility if this occurred in his area of responsibility.
- [22] The applicant submits that the commissioner failed to have regard to the importance of the rule that was breached, that breach of the rules constitutes a criminal offense, and that the MHSA imposes strict liability for non-compliance. The applicant contends that the commissioner failed to have regard to the hazards created by the third respondent's non-compliance with the rules. The commissioner failed to consider that, in this context, the third respondent's excuse that he was given more than one week to fix deviations was invalid. This submission has force. It is apparent from the award that the commissioner did not recognize the relevance of the third respondent's obligations under the legislation. If the commissioner applied his mind to the issues and the evidence, it would have been plain that the mine overseer is not permitted to blame others for his failure to take urgent action.

- [23] The applicant submits that the commissioner failed to have regard to Mbonani's testimony that the third respondent failed to raise, with the applicant, his alleged lack of equipment. In addition, the applicant contends, the commissioner failed to consider the evidence that the third respondent could have, but did not, seek the tools or equipment from other sections of the applicant. It is apparent from the award that the commissioner did not engage with this evidence. In addition, I note that the third respondent did not, during the cross-examination of Lwane, suggest that he had informed Lwane that he lacked the necessary tools and equipment to address the deviations.
- [24] The applicant contends that the commissioner demonstrated bias and ought to have recused himself. The commissioner was unhappy with the applicant's representative at arbitration, who had successfully taken a previous arbitration award that he had issued on review. Before hearing all the evidence, the commissioner indicated to the applicant that it should not have dismissed the third respondent. I do not accept the submission. There is nothing on the record that suggests the commissioner was bitter about the review application. If the applicant believed that the commissioner was compromised, it ought to have sought his recusal.
- [25] The applicant contends that the commissioner erred by refusing to allow the applicant to introduce a document into evidence that was relevant and important, on the basis that it should have been exchanged before the arbitration commenced. The commissioner failed to consider that the third respondent would not have been prejudiced by the admission of the document. I accept that the commissioner erred. While, in general, fairness dictates that documents to be used by the parties at arbitration should be exchanged beforehand, there is no absolute prohibition on producing a document during the arbitration itself. Arbitrations before the CCMA are governed *inter alia* by section 138(1) of the Labour Relations Act,⁵⁰ ("LRA"), which states: "*The commissioner may conduct the arbitration in a manner that*

⁵⁰ No. 66 of 1995 as amended

the commissioner considers appropriate in order to determine the dispute fairly and quickly, but must deal with the substantial merits of the dispute with the minimum of legal formalities.” Excessive legal formalities are discouraged in arbitrations before the CCMA. The commissioner ought to have considered why the document was not produced earlier and whether there is any prejudice to the other party arising from its late production. If prejudice existed, could this be cured by a procedural ruling – for example, a postponement, an adjournment, or recalling a witness? In fact, even in our civil courts, governed by the formal rules of evidence, failure to discover a document before trial does not automatically result in its exclusion.⁵¹

[26] The applicant submits that the commissioner failed to properly apply his mind to whether it applied discipline inconsistently in that:

26.1 The commissioner found the third respondent guilty of the misconduct for which he was dismissed.

26.2 The commissioner did not consider that the other two mine overseers, Mokoena and Lwane, had committed less serious misconduct. Mokoena was found guilty of failing to sign the shift boss’s logbook daily and received a final written warning.⁵² She was not found guilty of failing to observe and enforce compliance. Lwane was found guilty of failing to install a telltale, a recommendation by the mine inspector.

26.3 The commissioner found that Mokoena was guilty of ‘strata deviations’ though no such evidence was tendered.

⁵¹ See *Rawoot v Marine & Trade Insurance Co Ltd* 1980 (1) SA 260 (C)

⁵² Notably, as a result of the arbitration, the commissioner found that the third respondent had committed misconduct but received no sanction whatsoever. The commissioner’s failure to impose any sanction on the third respondent resulted in the inconsistent application of discipline.

26.4 The commissioner did not consider the evidence that the other comparators took steps to fix the deviations without delay.

26.5 The commissioner did not consider that the third respondent failed to show any remorse or appreciation of his wrongdoing. By contrast with the comparators, the third respondent did not believe that his failure to sign the logbook daily was problematic. Furthermore, the third respondent suggested that deviations are a natural or inevitable result of mining.

[27] The applicant contends that, if the commissioner had taken all the evidence into consideration and properly applied his mind, he would not have found that the applicant applied discipline inconsistently. Before considering the submission, the legal principles should be restated. It is correct that parity of treatment remains a basic tenet of fairness. However, this is not absolute and inflexible. In *SACCAWU and others v Irvin and Johnson Ltd*⁵³ the appeal court held:

“Discipline should not be capricious. It is really the perception of bias inherent in selective discipline that makes it unfair. Where, however one is faced with a large number of offending employees, the best one can hope for is reasonable consistency. Some inconsistency is the price to be paid for flexibility, which requires the exercise of a discretion in each individual case. If a chairperson conscientiously and honestly, but incorrectly, exercises his or her discretion in a particular case in a particular way, it would not mean that there was unfairness to the other employees. It would mean no more than his or her assessment of the gravity of the disciplinary offence was wrong. It cannot be fair that other employees profit from that kind of wrong decision. In a case of a plurality of dismissals, a wrong decision can only be unfair if it is capricious, or induced by improper motives or, worse, by a discriminating management policy.”

(own emphasis)

⁵³ (1999) 20 ILJ 2302 (LAC) at para 29

[28] Our courts have held that objective differences in the circumstances of each matter are an important consideration. In *Southern Sun Hotel Interests (Pty) Ltd v CCMA and others*⁵⁴ the court held:

‘An inconsistency challenge will fail where the employer is able to differentiate between employees who have committed similar transgressions on the basis of inter alia differences in personal circumstances, the severity of the misconduct, or on the basis of other material factors ...’

[29] In *Bidserv Industrial Products (Pty) Ltd v CCMA and others*⁵⁵ the appeal court noted that while inconsistency is a factor to be considered in the determination of the fairness of a dismissal, it is not decisive of the fairness of the decision to dismiss.

[30] In my view, the commissioner did not consider whether the comparators were disciplined for the same misconduct or whether there were material distinguishing factors. The third respondent was found guilty of serious misconduct, in addition to failing to inspect and sign the logbook. Unlike the comparators, the third respondent failed to act urgently. He failed to fix the deviations. He failed to discipline his subordinates.

[31] The applicant submits that the commissioner erred in treating the inconsistent application of discipline as decisive of the question of whether the dismissal was unfair. As was made clear in *Bidserv*,⁵⁶ the inconsistent application of discipline by an employer is not decisive of whether a dismissal was unfair. In

⁵⁴ (2010) 31 ILJ 452 (LC) at para 10

⁵⁵ (2017) 38 ILJ 860 (LAC) at para 31

⁵⁶ *Ibid.*

any event, here, several material factors distinguished the third respondent's misconduct from the comparators'.⁵⁷

[32] The applicant submits that the commissioner erred by ordering retrospective reinstatement despite finding that the third respondent had committed serious misconduct. The commissioner ought to have considered whether reinstatement was impractical or intolerable and whether compensation was an appropriate remedy. I agree. The commissioner enquired from the third respondent at the start of the proceeding whether he would be amenable to an award of compensation, but this was not considered when reinstatement was ordered. It is trite that, before awarding reinstatement for a substantively unfair dismissal, a commissioner must first consider the suitability of the remedies in s193(2) of the LRA. In *Booi v Amathole District Municipality & others*⁵⁸ the Constitutional Court held that the intolerability of a working relationship must be considered before making any order of reinstatement, and this applies even when the misconduct was not proved.

[33] The applicant submits that the commissioner erred by failing to consider that the delay in taking disciplinary action was no more than seven days (not significantly longer than the two days contemplated in the disciplinary code) and by failing to consider that the applicant provided a reasonable explanation for the delay. In my view, the award does not reflect that the commissioner engaged with these issues and applied his mind to the evidence. Before finding that the procedure was unfair on these grounds, the commissioner should have explained whether the reasons for the delay were inadequate and considered whether there was any prejudice to the third respondent. In fact, the third respondent did not even allege that he suffered any prejudice.

Conclusion

⁵⁷ See paras 26 and 30 above

⁵⁸ (2022) 43 ILJ 91 (CC)

- [34] In the circumstances, for the reasons set out above, the commissioner ignored material evidence and failed to apply his mind to the issues. He applied the incorrect legal principles, inter alia, relating to the admission of documents into evidence, the inconsistent application of discipline, and remedies for substantive fairness. The award was so unreasonable that no reasonable decision maker could have arrived at the same outcome on the totality of the evidence. The award falls to be reviewed and set aside.
- [35] Neither party actively pursued costs, and there is no reason in law or fairness that requires either of them to be mulcted in costs.
- [36] The court has the benefit of a full and complete record. It would not aid in the expeditious resolution of the dispute to refer the matter back to arbitration. In the circumstances, having reviewed and set aside the award, the court must determine the dispute itself.
- [37] On a balance of probabilities, the third respondent committed the misconduct for which he was charged. The third respondent confirmed that he had failed to sign the logbook daily, despite knowledge that the law required him to do so. This constituted a serious dereliction of his duties because daily inspection of the logbook is critical to ensuring employees' safety underground. He never explained why he failed to act against his subordinates. His evidence that he could not fix the deviations quickly was weak and contradictory. He was unclear about the tools and equipment he required, and when he became aware of the shortfall. Furthermore, on his version, he knew that he lacked the tools when he committed to fixing the deviations. In addition, the third respondent had the necessary authority to source tools himself. The evidence did not demonstrate that the applicant applied discipline inconsistently. The third respondent's misconduct was distinguishable from the comparators. He did not act against his subordinates. He failed to address the deviations promptly. He did not plead guilty to neglecting to inspect and sign the logbook daily. It is apparent that the applicant imposed the sanction of dismissal because there were several serious acts of misconduct, which reflected a

pattern of misbehaviour. The continued employment of the third respondent, particularly given his suggestion that deviations from safety standards were routine, posed a severe operational risk to the applicant. In *De Beers Consolidated Mines Ltd v Commission for Conciliation, Mediation & Arbitration & others*⁵⁹ Conradie JA stated “*Dismissal is not an expression of moral outrage; much less is it an act of vengeance. It is, or should be, a sensible operational response to risk management in the particular enterprise.*” The view of the third respondent that safety deviations were routine, and the nonchalant way he approached his duty to inspect and sign the shift boss’s logbook, suggests an absence of remorse.

[38] In my view, on the totality of the evidence before the commissioner, the dismissal of the third respondent was both procedurally and substantively fair.

Order

[39] For the reasons set out above, I make the following order:

39.1 The arbitration award issued by the second respondent is reviewed and set aside,

39.2 The arbitration award of the second respondent is substituted with a finding that the third respondent’s dismissal by the applicant was procedurally and substantively fair.

RN Daniels
Judge of the Labour Court of South Africa

⁵⁹ (2000) 21 ILJ 1051 (LAC) at para [22]

For the applicant

Adv M Van As

Cliffe Dekker Hofmeyr Attorneys

For the third respondent

[.....]