



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

Signature

1 June 2026  
Date

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

**CASE NO: JR853/22**

In the matter between:

**HARMONY MINING COMPANY**

**LIMITED**

**Applicant**

and

**ASSOCIATION OF MINeworkERS AND**

**CONSTRUCTION UNION OBO PETER MTHEMBU**

**First Respondent**

**SAFETY AND SECURITY SECTORAL**

**THE COMMISSION FOR CONCILIATION, MEDIATION**

**AND ARBITRATION**

**Second Respondent**

**COMMISSONER MICHAEL HOWITZ N.O**

**Third Respondent**

**Heard:** 11 November 2025

**Delivered:** 1 June 2026

**Summary:** An application to review and set aside an award which found that the dismissal of an employee for failing to conduct outside inspections after leaving the

plant, because he fell ill, was substantively unfair. The outcome falls within a band of reasonableness.

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## JUDGMENT

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**GANDIDZE, J**

### Introduction

[1] Mr Peter Mthembu (Mthembu), represented herein by his union, the Association of Mineworkers and Construction Union (AMCU), was dismissed because, on Friday, 20 November 2020, he and a colleague, Mr Lebohang Moshoeshoe (Moshoeshoe), obtained authorisation from the Plant Manager, Mr Nkateko Maluleke (Maluleke), to clock out of the Savuka Plant (Plant) and conduct inspections outside, but they did not do so. Their employer, Harmony Gold Mining Company Limited (Harmony or the employer), and the first respondent regarded this as dishonest conduct and charged them. They were both dismissed, and they separately challenged their dismissals at the Commission for Conciliation, Mediation and Arbitration (CCMA). A default award in favour of Moshoeshoe was issued but later rescinded. The award in respect of Mthembu, dated 17 March 2022 and under case number GAJB7229-21, found the dismissal to be substantively unfair and ordered his reinstatement. This review application in terms of section 145 of the Labour Relations Act<sup>1</sup> (LRA), by the employer, seeks an order reviewing and setting aside the award, substituting it with an order that the dismissal was substantively fair, alternatively remitting the dispute to the CCMA for a *de novo* hearing before a different commissioner.

[2] AMCU, on behalf of Mthembu, opposed the application.

### Background facts

[3] Mthembu was employed by Harmony at the Plant as a Safety Officer. At the time of his dismissal in March 2021, he had more than 24 years' service.

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<sup>1</sup> Act No 66 of 1995, as amended.

- [4] The events leading up to the dismissal can be briefly summarised as follows. Harmony appointed Maluleke as Plant Manager in August 2020. Moshoeshoe was a full-time Health and Safety Representative at the Plant. Mthembu and Moshoeshoe informed Maluleke of the arrangement they had with the previous Plant Manager that, after completing outside inspections, they were not required to return to the Plant. However, authorisation to conduct outside inspections required completion of a screen clock document, signed by Maluleke, as proof that they had been clocked out of the Plant, in line with the Time and Attendance System. This was because there was no clock-in/out system for outside Plant inspections.
- [5] When Maluleke was appointed, one of his tasks was to reduce overtime claims. Maluleke also realised that Mthembu and Moshoeshoe used their personal or contractors' vehicles for outside plant inspections. Maluleke addressed this issue with both Mthembu and Moshoeshoe on 16 November 2020.
- [6] On 20 November 2020, Mthembu reported to the Plant. It appears he was not scheduled to work at the Plant that day. Accordingly, he and Moshoeshoe completed the screen clock document, which Maluleke signed, authorising them to leave the Plant and conduct inspections outside it.
- [7] Later that day, during a meeting, Maluleke established that Mthembu and Moshoeshoe had not conducted any outside inspections. During the arbitration proceedings, the commissioner was informed that this was common cause.
- [8] On Monday, 23 November 2020, Maluleke called a meeting with Mthembu and Moshoeshoe to discuss Friday's outside inspections. The employer's version, based on notes taken by one of the attendees, was that Mthembu and Moshoeshoe claimed they had conducted the external inspections with 'Alex Modau'. Mthembu's version was that he informed Maluleke that they had not conducted inspections on 20 November 2020 because he had fallen ill, and that the inspections with Alex were on 13 November 2020. Mthembu disputed that the notes accurately reflected the discussion on 23 November 2020.

[9] On 14 December 2020, Mthembu was called to a meeting with Loyo Malatjie (Malatjie), a security officer tasked with investigating what Mthembu and Moshoeshoe had done after leaving the Plant on 20 November 2020. Mthembu informed Malatjie that he could not remember what had happened that day. Mthembu claims that he was not briefed on the purpose of the meeting with Malatjie, a contention which appears not to be disputed by the employer.

[10] It was decided to charge Mthembu and Moshoeshoe as follows:

‘Left the Plant to go do legal inspections at the outside sections with the use of screen clocking for Time and Attendance in which no legal inspections were never conducted (sic).’

[11] While Maluleke testified that, for the first time, Mthembu alleged during closing arguments that he left the Plant because he had flu symptoms and thought he had COVID-19, Mthembu testified that he informed Maluleke at the meeting on 23 November 2020 that they had not conducted inspections on 20 November 2020 because he had fallen ill.

[12] Mthembu was found guilty and dismissed. He appealed.

[13] During the appeal, Mthembu presented a note dated 8 March 2021 from Dr Adel Steyn, which read as follows:

‘RE: Mr PS Mthembu

ID: xxxxxx

Abovementioned well known to me. He is a diabetic. I initiated insulin management. I requested the My Star Care Sister to consult and educate Mr Mthembu on his use of his insulin. He was seen by the educator on 20/11/2020.’

[14] He also presented a short messaging service (SMS) dated Friday, 20 November 2020, which read as follows:

‘Hello, Mr. Mthembu. You recently had a discussion with MyStarCare diabetes educator. Out of 5 stars, where 5 is the best, how many stars would you give the educator for the discussion? Please reply with just a number from 1 to 5. Thanks! The MyStarCare Administrators.’

[15] This was the first time Mthembu had presented these documents to the employer.

[16] The appeal was dismissed, hence, the dispute was referred to the CCMA.

#### The arbitration proceedings and the award

[17] Both Maluleke and Malatjie gave evidence for the employer, while Mthembu gave evidence in his own defence.

[18] The commissioner summarised the employer's case as follows. Mthembu completed the screen clock document, indicating that he would conduct outside inspections. He did not conduct them. When asked about it on 23 November 2020, he did not come clean or admit that he had not conducted the site inspections, which the employer regarded as dishonest. This is why he was charged.

[19] Regarding Mthembu's version, he testified that he intended to conduct the external inspections but felt ill after submitting the screen clock document. He decided to consult a doctor and conduct the site inspections later that day, but did not do so. He did not intend to be dishonest about what happened and was confused by his diabetes. He was treated for diabetes that day and forgot about it. His wife went through his phone and discovered the SMS about a MyStarCare sister's visit.

[20] The commissioner recorded the issues for determination as whether Mthembu was dismissed for a fair reason and whether dismissal was an appropriate sanction.

[21] He found that the employer's case was that Mthembu had failed to conduct the required outside Plant inspections and that the employer was justified in charging Mthembu. He also accepted that the employer's concerns about employees claiming for overtime not worked were valid. However, he found that Mthembu had provided evidence that he had consulted the doctor, who arranged for a MyStarCare sister to visit him at home and show him how to inject himself with insulin. Therefore, Mthembu had a valid reason for not conducting the outside Plant inspections on 20 November 2020. At the same

time, the commissioner found that Mthembu ought to have contacted Maluleke to inform him that he was going to the doctor and would not conduct the outside Plant inspections.

- [22] Regarding the delay in Mthembu providing the version that he had consulted with a doctor on 20 November 2020, the commissioner accepted Mthembu's explanation that he was confused, as he provided proof that he had in fact consulted a doctor and seen a MyStarCare sister on the day in question. However, the commissioner also found that the employer was justified in believing that Mthembu had been dishonest.
- [23] The commissioner also took into account that Mthembu had 24 years' service and a clean disciplinary record.
- [24] Taking all of the above into account, he determined that dismissal was harsh and therefore ordered reinstatement with effect from 1 April 2022, rather than retrospectively to 30 March 2021, the date of dismissal. This was intended to express his disapproval of Mthembu's conduct.

#### Grounds for review

- [25] The founding affidavit raises two grounds for review. The first concerns the commissioner's finding that Mthembu had no intention of being dishonest, and the second concerns the sanction imposed by the commissioner.
- [26] In respect of the first ground, it was submitted that the commissioner committed a gross irregularity by failing to attach appropriate weight to the evidence before him and to have regard to the probabilities of the parties' versions. It is said that the commissioner ought to have drawn a negative inference against Mthembu, found him not a credible witness, and held that his versions were improbable. This is because he advanced conflicting versions as follows:
- 26.1 regarding his whereabouts on 20 November 2020, in that on 23 November 2020, he claimed that they met with 'Alex', yet on 14 December 2020, he informed Malatjie that he could not remember where he was.

26.2 he claimed that he felt ill after leaving the Plant, but also claimed that he felt ill before leaving the Plant.

26.3 during the disciplinary hearing, Mthembu claimed that he did not return to work because the doctor advised against it, but he also said he felt weak after a visit from a MyStarCare sister and decided to rest.

[27] The improbable versions are said to be that Mthembu did not inform Maluleke of his severe illness on 20 November 2020 and did not follow the leave procedure; that Mthembu and Moshoeshoe left the Plant in their private vehicles instead of a Harmony-owned vehicle, as per protocol; that on 23 November 2020 Mthembu was deceitful in stating that they conducted outside inspections on 20 November 2020 rather than stating that he was ill; that on 14 December 2020 Mthembu claimed not to remember where he was on 20 November 2020; that at no point did Mthembu inform Maluleke to stop the salary payment for 20 November 2020; that Mthembu's wife ought to have reminded him about the events of 20 November 2020 for the purposes of the disciplinary hearing, since he risked losing his job, and only reminded him during the appeal stage.

[28] It was also submitted that the doctor's note did not assist Mthembu because it did not record that he was ill and unfit for work, and that during the arbitration proceedings, Mthembu reverted to the initial version, namely that he did not return to work on 20 November 2020 because he had symptoms of COVID-19.

[29] Therefore, the commissioner ought to have concluded that Mthembu left the Plant knowing he would not conduct outside inspections but would run personal errands. Hence, he intended to be dishonest and was, in fact, dishonest. The submission is that the commissioner's finding that Mthembu did not intend to be dishonest is one no reasonable decision-maker could reach.

[30] Regarding the sanction, it is submitted that Mthembu committed gross dishonesty by submitting a screen clock document stating that he would conduct outside inspections, failing to do so, claiming remuneration for the shift, and withholding information about his whereabouts after he left the

Plant. The misconduct is said to have damaged the relationship of trust, that only dismissal was the appropriate sanction, and that the commissioner's failure to find as such is a conclusion no reasonable decision-maker could have reached.

- [31] Rather than merely supplementing the grounds of review, the supplementary affidavit repeats what was already set out in the founding affidavit and then adds a few other issues. Only the new issues raised in the supplementary affidavit will be addressed.
- [32] In respect of the first ground, it is submitted that the commissioner misconceived the nature of the inquiry and reached a conclusion that was disconnected from the evidence. It is further submitted that the commissioner was required to resolve the factual disputes by considering the credibility, reliability and probabilities of the evidence.
- [33] It was improbable that Mthembu fell ill 30 minutes after handing in the screen clock document. The version that he could not inform Maluleke because Maluleke was unavailable was never put to Maluleke. Mthembu had no intention of conducting the outside inspections after leaving the Plant on 20 November 2020.
- [34] Reference was made to the notes of the meeting on 23 November 2020, which Mthembu is said to have challenged for the first time during the arbitration proceedings. Mthembu did not inform Maluleke during this meeting that he was ill on 20 November 2020, but said they had met with Alex Modau during the outside inspections.
- [35] If Mthembu was sick, policy required him to submit a sick note within 7 days. The doctor's note does not record that Mthembu consulted the doctor on 20 November 2020 or that he had flu symptoms. Therefore, contrary to the commissioner's finding, which distorted the outcome, Mthembu did not prove that he consulted the doctor on 20 November 2020. The consultation with the sister from MyStarCare to be educated about insulin was not an emergency and ought to have occurred after Mthembu had knocked off.

- [36] The commissioner's conclusion that Mthembu was confused is disconnected from the evidence, and the conclusion that he did not intend to be dishonest is one no reasonable decision-maker could reach.
- [37] Regarding sanction, it was submitted that neither length of service nor a clean disciplinary record could mitigate Mthembu's dishonest conduct. It was also submitted that Maluleke stated that dishonest people put Harmony's business at risk and that Maluleke took Mthembu's misconduct seriously.
- [38] In the replying affidavit, it was submitted that Maluleke testified that Mthembu was required to submit a medical certificate for a Shift Adjustment to be signed, and that it was not necessary to lead evidence of a breakdown in the trust relationship where dishonesty was concerned.

#### AMCU's contentions

- [39] Not all of AMCU's contentions are set out herein, but only those considered pertinent to the grounds for review.
- [40] It was undisputed that on 20 November 2020 Maluleke was on a conference call and therefore unavailable.
- [41] At no point did Mthembu claim to have COVID-19. He thought he had it, but the doctor said he did not.
- [42] During the arbitration proceedings, Mthembu disputed the notes of the 23 November 2020 meeting. At the meeting, he told Maluleke that he had not conducted any outside inspections because he fell ill.
- [43] Mthembu testified that he did not submit the doctor's note because he believed it was not required, as he had attended work on 20 November 2020. In any event, Mthembu was not charged with a policy breach for failing to submit a medical certificate.
- [44] It is understandable that, on 14 December 2020, Mthembu informed Malatjie that he could not remember where he had been on 20 November 2020, as it was several weeks earlier.

[45] The employer did not lead any evidence that the trust relationship had broken down.

[46] Ultimately, Mthembu was dismissed for having high blood sugar and for attending a medical practitioner. Hence, the dismissal was unfair. He was punished by not being awarded back pay. The award is reasonable, and the review application is a disguised appeal.

### Evaluation

[47] Both parties correctly identified the trite test for review in matters such as the present, namely whether the outcome was one that no reasonable decision-maker could reach. In deciding that question, the review court takes into account all material placed before the commissioner, even if the commissioner did not refer to it in the award.

[48] As the commissioner pointed out to the parties, he was required to decide the matter afresh on the evidence before him, not on what occurred during the disciplinary hearing. That approach was correct.

[49] At the commencement of the arbitration proceedings, Mthembu's representative informed the commissioner that Mthembu and Moshoeshoe did not conduct any outside inspections on 20 November 2020.

[50] The employer's case was that Mthembu submitted the screen clock document, knowing he would not attend to outside inspections. The case was further that he had been dishonest about where he went on 20 November 2020, and that only at a later stage did he provide a version stating that he had consulted with a doctor and the sister from MyStarCare.

[51] The commissioner held that Mthembu had a valid reason for not conducting the outside inspections on 20 November 2020, namely that he fell ill and had to consult a doctor. The employer submits that it never accepted that Mthembu had consulted a doctor or had been seen by a sister from MyStarCare, and that the commissioner erred in accepting a version disputed by the employer.

[52] Maluleke testified as follows:

‘Mr. Maluleke: Commissioner, I mean, I’m not in a position to dispute the fact that Mr Mthembu might have consulted the doctor on the 20<sup>th</sup>. However, what’s not evident on this information that is before us is the time at which the consultation took place.’

[53] Therefore, according to Maluleke, the issue concerned the time at which Mthembu consulted a doctor on 20 November 2020, and not that Mthembu had not consulted a doctor on that day.

[54] Malatjie’s version was that, since it was not an emergency, Mthembu ought to have consulted the doctor and the sister from MyStarCare after work. He had no difficulty with the version that Mthembu consulted the doctor and was later seen by the nurse on 20 November 2020.

[55] Therefore, in circumstances where Harmony’s own witnesses did not dispute that Mthembu had consulted the doctor and the sister from MyStarCare on 20 November 2020, the commissioner had no basis to reject Mthembu’s version.

[56] In addition, there was no objection to admitting the doctor’s note and SMS on the ground that they were hearsay. Maluleke and Malatjie were cross-examined on the doctor’s note and SMS without any objection that they were hearsay. Similarly, Mthembu led evidence regarding the doctor’s note and SMS without objection. It was only during Mthembu’s cross-examination that Harmony’s representative put it to Mthembu that the doctor’s note was hearsay and asked whether the doctor and the sister would testify. This was too late.

[57] It was never put to Mthembu that he had not seen a doctor or a sister from MyStarCare on 20 November 2020. Therefore, the commissioner was correct to admit the doctor’s note and the SMS into evidence.

[58] It is also noteworthy that the admission of the doctor’s note and the SMS by the commissioner was not raised as grounds for review. This shows that the employer is nitpicking, which is not permitted.

- [59] What Mthembu is alleged to have testified to in Moshoeshoe's matter did not alter the fact that, before the commissioner, he gave evidence, which the employer could not dispute, that he had consulted a doctor and had been seen by a sister from MyStarCare on 20 November 2020. Similarly, whether at some point he said he had COVID-19 and had not referred to diabetes is immaterial. The version that he thought he had COVID-19, and that the doctor said it was his diabetes, which required management, is probable.
- [60] In Harmony's heads of argument, it is submitted that no version was put to Maluleke as to whether Mthembu fell ill before or after leaving the plant. Either way, Maluleke could not comment on the issue, as the information was outside his knowledge. The fact is that Mthembu did not tell Maluleke on 20 November 2020 that he had fallen ill. He conceded that he ought to have told Maluleke but testified that Maluleke was not available. The commissioner held that Mthembu ought to have told Maluleke that he had fallen ill. Implicit in that finding is that the commissioner rejected Mthembu's version that Maluleke was unavailable. This is reasonable.
- [61] The contention that the commissioner misconceived the nature of the inquiry because he accepted the doctor's note and the SMS as proof that Mthembu had consulted a doctor and had been seen by a sister on 20 November 2020 is misguided. Accepting a version does not amount to misconceiving the inquiry.
- [62] Acceptance of that version was in line with the evidence presented. It was not a finding disconnected from the evidence submitted by the employer.
- [63] The doctor's note was not a sick note, but even this does not assist the employer's case. The issue was whether Mthembu had attended the doctor and had been seen by a sister from MyStarCare on 20 November 2020. The note and the SMS were sufficient to prove this. It was not suggested that the note and the SMS were fabricated. If the employer genuinely believed that the doctor's note and the SMS were fabricated, it had more than sufficient time between the appeal and the arbitration proceedings to fact-check them. It did not do so. The authenticity of the doctor's note and the SMS was not

challenged, and the commissioner was duty-bound to accept them as proof of Mthembu's whereabouts after he left the Plant on 20 November 2020.

[64] The employer's contention that Mthembu was required to submit the sick note was answered. Mthembu testified that if one attended work and consulted a doctor later that day, a sick note or medical certificate was not required. He was not challenged on that version. Nor was he charged with contravening policy for failing to submit a sick note.

[65] The employer places considerable emphasis on the notes, which show that Mthembu made no mention of having fallen ill on 23 November 2020. Apart from Maluleke, three other employees were present, yet none were called to give evidence about what Mthembu and Moshoeshoe said at the meeting. At best, the document was a contemporaneous note by Eicker, who could have been called as a witness but was not. No weight could be placed on an undated, unsigned document.

[66] Even if the award does not use the terms 'credibility', 'reliability' and 'probabilities', the reasons for the decision make it clear that the commissioner engaged in that exercise. To recapitulate, he found that the employer was justified in charging Mthembu for failing to conduct outside inspections on 20 November 2020. He also held that Mthembu had a valid reason for not conducting the outside inspections, as he had fallen ill and consulted a doctor, and later a sister from MyStarCare. He further held that Mthembu delayed informing the employer that he had consulted a doctor and a sister and that had he done so, he would not have been charged. This is what Maluleke stated during the arbitration proceedings. The commissioner accepted Mthembu's version that he was confused at the time and that it was his wife who reminded him of his whereabouts after reviewing his phone, a version that was not disputed. Therefore, it was unnecessary to lead expert evidence on Mthembu's psychological state, as submitted by Mr Itzkin.

[67] Mr Itzkin also submitted that the evidence of excessive overtime, together with the fact that Mthembu and Moshoeshoe tended to use contractors' vehicles for outside inspections, provided relevant context. The commissioner

accepted that the evidence of excessive overtime was relevant. Evidence regarding the use of contractors' vehicles was irrelevant because the employer's version was that, on 20 November 2020, Mthembu and Moshoeshoe left the Plant in their private vehicles. Mthembu was not charged with claiming excessive overtime or with ignoring the discussion on 16 November 2020 not to use contractors' transport for outside inspections. Therefore, Mthembu cannot be criticised for failing to challenge this evidence when it was led.

[68] The fact that Mthembu was paid for the full shift despite not completing the outside inspections pales into insignificance when one considers the undisputed evidence that employees worked half a day on Fridays, and Maluleke's own evidence that employees were expected to leave after 10H00 because cleaning of the work areas starts at 12H00. Maluleke also did not deny that the outside inspection would have taken Mthembu and Moshoeshoe less than an hour. Therefore, the time lost by Harmony Gold is less than an hour's work.

[69] The commissioner made no express finding on Mthembu's guilt or otherwise. On a proper reading of the award, the commissioner found Mthembu not guilty of misconduct because he had a valid reason for not conducting outside inspections on 20 November 2020 and no intention of being dishonest about what happened on that date. Mr Itzkin supported the interpretation of the award that the commissioner found Mthembu not guilty. If that is the case, the issue of sanction fell away.

[70] But even if it could be argued that a finding of guilt is implicit, given that the commissioner did not grant retrospective reinstatement, Maluleke's own version was that, had Mthembu disclosed that he had gone to the doctor and seen a sister on 20 November 2020, he would not have been charged but would have been counselled. Therefore, Mthembu's failure to conduct outside inspections on 20 November 2020, after completing the screen clocking document, and to consult with a doctor and a nurse, was not serious misconduct warranting dismissal. Maluleke's evidence that dishonest people

put Harmony's business at risk could not outweigh his evidence that Mthembu would have been counselled.

[71] As Mr Cook correctly pointed out in oral argument, Harmony did not lead any evidence on the breakdown of the trust relationship. Therefore, it is not open to it, in the review, to argue that case. It follows that the decisions in *Autozone v Dispute Resolution Centre of Motor Industry and Others*<sup>2</sup>, and *Toyota South Africa Motors (Pty) Ltd v Radebe and Others*<sup>3</sup>, which the employer relied upon, do not advance its case on sanction any further.

[72] The commissioner did not allow Mthembu to get off scot-free. He was not blind to the fact that Mthembu was the author of his own misfortune, which is why he did not order retrospective reinstatement. He balanced the employer's interests with those of Mthembu, a reasonable approach.

[73] The award is not perfect, and it is not expected to be. On review, the correct test is whether, taking into account the totality of the circumstances, it can be said that no reasonable decision-maker could find that Mthembu's dismissal was substantively unfair and reinstate him. Nitpicking a few imperfections in an award does not suffice. To do so would be to allow a party to appeal an award, which is not permissible. The court has struggled to identify any material imperfections in the award that distorted the outcome, rendering it reviewable. In fact, the court would have reached the same conclusion as the commissioner. As a result, Harmony has not met the review test, and the award will not be interfered with.

[74] As regards costs, an order in accordance with the requirements of law and fairness is that each party pay its own costs.

[75] In the premise, the following order is made:

#### Order

1. The review application is dismissed.

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<sup>2</sup> [2019] 6 BLLR 551 (LAC); (2019) 40 ILJ 1501 (LAC).

<sup>3</sup> [2000] 3 BLLR 243 (LAC).

2. There is no order as to costs.

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T. Gandidze

Judge of the Labour Court of South Africa

Appearances

For the Applicant: Advocate R Itzkin

Instructed by: Webber Wentzel

For the Respondent: Advocate A Cook

Instructed by: LDA Inc Attorneys