



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case No: JR 1054/2021

FISCHER TUBE TECHNIK (PTY) LTD

Applicant

and

DISPUTE RESOLUTION CENTER

First Respondent

JACKSON MTHUKWANE N.O.

Second Respondent

NUMSA obo B NTIMANE & 3 OTHERS
Respondent

Third

Heard: 24 June 2026

Delivered: 7 September 2026

JUDGMENT

MAHOMED, AJ

Introduction

- [1] The workplace is, in the main, a place of trust. An employer cannot station a supervisor at the shoulder of every operator for every hour of every shift; it must, of necessity, repose confidence in its employees to remain at their

posts and to do the work for which they are paid. This dispute is, at the bottom, about what happens when an employer comes to suspect that such trust has been abused, first by the alleged smoking of a prohibited substance in a concealed area of the factory, and second by employees allegedly deserting their workstations to do so for such purpose repeatedly, and about whether the Second Respondent (the Commissioner) who was called upon to test those allegations applied his mind to the enquiry that was before him.

- [2] This is an application brought in terms of section 145 of the Labour Relations Act¹ (the LRA) to review and set aside the arbitration award issued by the Commissioner under the auspices of the First Respondent on 20 April 2021.
- [3] In that award, the Commissioner found that the dismissal of the four employees represented by the Third Respondent (the Dismissed Employees) was substantively unfair and ordered their reinstatement with retrospective effect together with full backpay.² The primary relief granted to the Dismissed Employees is a hard won right under the LRA where a Commissioner finds that the dismissal is substantively unfair. On the other hand, such relief does not sting, but strikes deep for an employer which holds that the dismissal was substantively fair. It is precisely this very issue which is contentious and brings litigants to the Labour Court on review.
- [4] The Applicant (the Company) contends that the Commissioner committed material irregularities and reached a conclusion that no reasonable decision-maker could reach on the evidence before him. The Company seeks that the award be reviewed and set aside and substituted with a finding that the dismissals were fair. The Third Respondent supports the award in its entirety and asks that the review be dismissed with costs.
- [5] The Dismissed Employees only challenged the substantive fairness of their dismissals.

¹ Act 66 of 1995, as amended

² Arbitration award paras 43-45 .

Background facts

- [6] The four employees, Messrs Bafana Ntimane, Hunnington Mpika, Temba Skhosana and Emmanuel Tema were employed by the Company as operators on its production floor, engaged in the manufacture of stainless-steel motor-vehicle exhausts to order.
- [7] On or about 13 April 2018, Mr Kendall Hibbert, the Company's Production Manager, conducted a walkabout of the premises and, in a secluded area not covered by the fixed cameras, discovered the butt-ends of hand-rolled cigarettes together with a small plastic packet containing a leafy compound, all of which he suspected from their smell and appearance, and from his own prior familiarity with the substance to be cannabis. Commonly known in South Africa as dagga.
- [8] Mr Hibbert thereupon installed a concealed camera which focused on the secluded area. After approximately two months he reviewed the footage, which depicted the employees and others repeatedly attending the area during the night shift and smoking there. The footage was extensive: Mr Ntimane was captured on 25 clips (5 April to 3 May 2018); Mr Tema on 22 clips (29 March to 24 April 2018); Mr Mpika on 31 clips (15 March to 25 April 2018); and Mr Skhosana on 48 clips (28 March to 25 April 2018).
- [9] On 24 May 2018 the employees were charged and following a disciplinary enquiry they were dismissed on 11 June 2018 on two complaints:
- “(1) Unauthorised possession and/or use of dagga on the company premises between the months of March and May ... you were seen on camera, in possession and smoking dagga on company premises during night shift on more than one occasion.
- (2) Deliberate failure to perform your duties and/or deserting your workstation without permission. On several occasions you were away from your workstation without permission and therefore not performing your duties.” (My emphasis)

- [10] The Company relied on two witnesses: Mr Hibbert, and Mr Petrus Jacobus (Jaco) Jordaan, its Health and Safety Officer. Mr Hibbert identified the substance smoked as dagga by reference to the manner in which the items were rolled, handled and passed between the employees, that they burnt brightly on the camera image, and that the employees spat frequently because the joints were unfiltered. Mr Jordaan confirmed that he was present when Mr Hibbert collected the remnants and identified the bag of dagga and the unsmoked portions of the cigarette butts. The Company also relied on its zero-tolerance policy on substance abuse, communicated by memorandum on 5 August 2016.
- [11] Mr Hibbert explained in his evidence how he identified the recovered material and that he established that it was dagga from his own experience. Under cross-examination, however, Mr Hibbert accepted that this identification rested on opinion rather than any objective test. The record shows that he attempted to justify his conclusions by relying on the combination of:
- 11.1 the camera footage placing the applicants in the area; and
 - 11.2 the material he believed was dagga that he found in the area.
- [12] Only one witness, Mr Mpika, testified for the Dismissed Employees. His evidence was that the employees smoked ordinary *“BB Best Blend”* tobacco, never dagga; that they chose the secluded area because it was warmer at night; that they attended the area only when a machine was down; and that their night-shift supervisors, whom he identified as “Deen” and “Ty”, were aware that they were doing so and that they did not hide their conduct.
- [13] Under cross-examination, however, Mr Mpika accepted that the employees had no tea break (only a lunch break); that they left their workstations to smoke regularly whenever there was a stoppage; and after some resistance he accepted that they were not entitled to the breaks they were taking.

- [14] Mr Mpika, testified that the breaks were taken regularly and with the supervisors' knowledge. Mr Kendal Hibbert testified that employees visited the area at least daily. During the employees' case, Mr Mpika described the practice as occurring repeatedly and routinely. The Company's representative asked how Mr Mpika knew the supervisors were aware of the breaks and to this it was said that it was known to Deen and Tye.
- [15] He nonetheless accepted that the employees were not entitled to those breaks. It was expressly put to Mr Mpika that employees were not entitled to the break; and Mr Mpika did not dispute the proposition, responding that they were "*not entitled to that particular break*" and explaining the practice by reference to waiting for work.³

The arbitration award

- [16] In relation to the first complaint, the Commissioner accepted that the Company's case was founded upon circumstantial evidence. This was also accepted before this court.
- [17] The Commissioner held that Mr Hibbert's identification of the substance as dagga did not constitute objectively proven fact from which a reasonable inference could be drawn, being the opinion of a witness who was not an expert in the identification of dagga smoked and based essentially on video footage.⁴
- [18] The Commissioner further held that, because the Company had not established when the remnants were collected, the proximity in time between their collection and the employees' presence could not be fixed, with the result that the remnants could have been left by anyone, including persons Mr Hibbert could not identify. He accordingly found that the Company had failed to prove the first complaint on a balance of probabilities.

³ Transcript Pages 215-216

⁴ Arbitration award para 35-36.

- [19] In relation to the second complaint, the Commissioner found the complaint to be vague in that it did not specify when the absences occurred.⁵ He accepted Mr Mpika's evidence that the employees left their stations to smoke only during breakdowns and that their supervisors were aware of this. He reasoned that Mr Hibbert was the Production Manager and not the employees' night-shift supervisor and held that "*no direct or indirect evidence was placed before me to suggest that the supervisor ... did not give them permission as alleged on the second charge*". He accordingly found the second complaint, too, not proven. The Commissioner added, in the alternative, that even had the employees been guilty of the second complaint, dismissal would not have been an appropriate sanction.
- [20] He then proceeded to find the dismissals substantively unfair and ordered retrospective reinstatement with full backpay.⁶

The test on review

- [21] The principles governing a review under section 145 are settled and require no elaborate restatement. In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*⁷ the Constitutional Court held that the question is whether the decision reached by the arbitrator is one that a reasonable decision-maker could not reach on the material before him. That is a stringent test, and it is not for this Court to ask whether it would itself have arrived at a different conclusion.
- [22] The reasonableness enquiry does not, however, license a supine deference that overlooks how the arbitrator arrived at his result. In *Herholdt v Nedbank*⁸, the Supreme Court of Appeal explained that a gross irregularity in the conduct of the arbitration including a misconception of the nature of the enquiry, or a failure to have regard to material evidence will vitiate the award where it is of such a nature that it has distorted the outcome and rendered the result unreasonable. In *Gold Fields Mining South Africa (Pty)*

⁵ Arbitration award para 38.

⁶ Arbitration award para 43-45.

⁷ (2007) 28 ILJ 2405 (CC).

⁸ (2013) 34 ILJ 2795 (SCA).

*Ltd (Kloof Gold Mine) v CCMA and Others*⁹ the Labour Appeal Court confirmed that the arbitrator's conduct of the process must be evaluated holistically and against the totality of the evidence, and that a piecemeal or selective treatment of the evidence may render the award reviewable if, on the evidence as a whole, the result is one a reasonable decision-maker could not reach. And in *Head of Department of Education v Mofokeng and Others*¹⁰, that Court cautioned that not every error is reviewable; an error becomes reviewable only where it is material, in the sense that it has an effect on the outcome of the dispute.

[23] These authorities may be reconciled in a single proposition. This Court does not sit as a court of appeal against the factual findings of an arbitrator. However, where the arbitrator has misconceived the very enquiry before him or has failed to engage with evidence so material that its consideration would reasonably have produced a different result, the award cannot stand, because in such a case the reasonableness of the outcome cannot be tested against a process that never grappled with the true issue.

[24] I now turn to deal in broad terms with the issues raised on review:

The circumstantial evidence on the first complaint

[25] It is common cause that the Company's case on the first complaint was circumstantial. The applicable principle, correctly identified by the Commissioner himself with reference to *POPCRU obo Ndokweni v Maritz NO and Others*¹¹ and *NUM and Another v Kia Motors*¹², is that the inference sought to be drawn must be consistent with all the proved facts, and that in a civil matter the onus is discharged where the inference contended for is the most readily apparent and acceptable inference from among several possible inferences, not, as in a criminal matter, the only reasonable inference.

⁹ (2014) 35 ILJ 943 (LAC).

¹⁰ (2015) 36 ILJ 2802 (LAC).

¹¹ (JR 2777/09) [2012] ZALCJHB 38 (3 May 2012)

¹² (2007) 28 ILJ 2283 (LC)

- [26] The Company submits that, having correctly stated that principle, the Commissioner then failed to apply it, and instead required it to exclude every possible alternative explanation before it could succeed. There is some textual support for that complaint in the award, which reasons that the remnants *“could have been left there by anyone”*. Standing alone, that formulation edges towards the criminal standard. But an award must be read as a whole and in the context of the evidence. I am not persuaded that the Commissioner’s ultimate conclusion on the first complaint falls outside the band of reasonableness. Three features of the record sustain his finding. First, the identification of the substance as dagga rested entirely on the lay opinion of Mr Hibbert, drawn from the brightness of the flame, the sharing of the joint and the employees’ spitting; he was not an expert in the identification of cannabis and no forensic analysis of the recovered material was ever undertaken and there was also no proper logging of evidence which was presented to the Commissioner. Second, the video footage did not itself reveal the nature of the substance; even the Company’s own papers describe it as *“resembling cannabis”* rather than as proven dagga. This is not good enough to sustain the finding of guilt which the Company was obligated to do at arbitration. Third, and tellingly, Mr Jordaan, accepted that he could not exclude the possibility that the remnants had been discarded by employees from an adjacent factory or by those responsible for the upkeep of the garden in the secluded area.¹³
- [27] On that evidence, a reasonable decision-maker could conclude that the most probable inference that the Dismissed Employees were smoking dagga had not been established to the requisite degree, notwithstanding the suspicious location and conduct.
- [28] An investigation is an important component of the workplace disciplinary process because its outcome determines the fate of the implicated employee(s). Whilst I would describe the Company’s investigation as genuine, substantial and not superficial, it was at the end of the day

¹³ The Commissioner recorded this concession in his award at para 21, noting that Mr Jordaan *“could not exclude the possibility that the dagga butts were thrown at the secluded area by employees from the adjacent factory or employees who were responsible for the up keep of the garden in the secluded area”*.

incomplete and insufficiently rigorous in certain critical respects. Mr Hibbert conducted a walkabout, discovered suspected dagga remnants in a secluded area, installed a concealed camera to monitor the area, reviewed footage over an extended period, identified employees repeatedly attending the area, and then, together with Mr Jordaan, inspected and collected material found there. The investigation therefore involved physical inspection, surveillance, witness observations and disciplinary proceedings. The transcript demonstrates that the employer devoted significant time and effort to establishing what was occurring in the secluded area rather than acting on mere suspicion. However, the transcript also reveals important limitations in the investigation. In relation to complaint one, no forensic testing was conducted on the material recovered from the area; there was no clear chain of custody which appears from the record; the Company relied largely on the observations and opinions of Mr Hibbert and Mr Jordaan regarding the nature of the substance. There was also uncertainty regarding the precise link between the recovered remnants and the Dismissed Employees, particularly given the evidence that other persons had access to the area. These shortcomings ultimately led the Commissioner to conclude that the Company had not proved that the Dismissed Employees were smoking dagga.

- [29] The finding of the Commissioner on the first complaint is , in the Court's view, one that a reasonable commissioner could reach, and the review does not succeed on this ground.

Concessions, contradictions and probabilities

- [30] The employer's case on complaint two was that the Dismissed Employees repeatedly left their workstations during working hours and attended a secluded area of the factory without permission, thereby failing to perform their duties.
- [31] Mr Hibbert testified that the Dismissed Employees regularly visited the area during night shifts and that their absences affected production. He explained that the Company's manufacturing process depended on

continuous operation and that employees leaving their stations had an adverse impact on production levels. The Company's case was therefore that the Dismissed Employees were absent from their workstations without permission and were not performing their duties whilst in the secluded area.

- [32] The Dismissed Employees' case was presented through Mr Mpika. He did not dispute that the employees regularly left their workstations and went to the secluded area. His evidence was that they did so when machinery had broken down or when they were waiting for work. He maintained that their supervisors, identified as Deen and Tye, knew about the practice and knew where the employees were when they left their stations. To that extent, the Commissioner correctly recorded in the award that Mr Mpika's version was that the departures occurred during machine stoppages and with the supervisors' knowledge. However, the Commissioner's further statement that this version was "not specifically disputed" is more difficult to reconcile with the transcript because Mr Mpika was challenged extensively in cross-examination about the legitimacy of these breaks and the basis upon which the employees claimed they were entitled to leave their workstations.
- [33] During cross-examination, Mr Mpika made a number of significant concessions. He accepted that the employees had no tea break and ultimately conceded that they were "*not entitled to that particular break*". He also acknowledged that the employees routinely left their workstations to smoke and that this was a longstanding practice. While he repeatedly asserted that supervisors knew about the practice, the transcript does not establish that any supervisor expressly granted permission or authorisation for employees to leave their workstations. The evidence therefore establishes, at its highest, supervisor knowledge rather than supervisor authorisation. In this respect, the award moves from evidence of "knowledge" to a conclusion of "permission" without identifying direct evidence of authorisation in the transcript. I do not understand this to have been the case of the Dismissed Employees when challenging the evidence of the Company at arbitration. The Commissioner fails to engage with this evidence.

- [34] The finding that the complaint was “vague” is difficult to sustain in the face of the dated and time-stamped video clips particularised.
- [35] The Commissioner’s observation on sanction, namely that dismissal would in any event have been inappropriate gives some insight into his thought process. Whilst this observation may find some support in the transcript that the practice was longstanding and allegedly known within the workplace, the award does not meaningfully engage with evidence pointing in the opposite direction, particularly Mr Mpika’s concession that the employees were not entitled to the breaks they were taking, nor does it grapple in any detail with the evidence concerning repeated departures from workstations and the Company’s evidence regarding operational impact. There is also the issue of consistency which I turn to below.
- [36] The Company led evidence, which on the record was not seriously disputed, that the repeated desertion of workstations by groups of three or more operators, and the switching off of machinery to enable it, disrupted the production line, generated compensatory overtime and consequent cost, and given that the employees were operators carried health and safety risks. The Company subscribed to a zero-tolerance policy on the misuse of company time and substances, communicated to staff in 2016.
- [37] The Commissioner’s task was not merely to record the competing versions but to weigh them, and in particular to grapple with the concessions extracted by both parties.
- [38] These were not peripheral matters. They went directly to the credibility of the witness called and to the probabilities on the central factual dispute under the second complaint. Yet the award contains no meaningful engagement with them.
- [39] A holistic evaluation of the evidence, as *Gold Fields* requires, demanded that the Commissioner confront the concession for instance that the breaks were unauthorised and the shifting nature of the exculpatory account, and

explain why, in the face of them, he nonetheless preferred the employees' version. His failure to do so is a failure to apply his mind to material evidence, and I am satisfied that it bore directly on his conclusion on the second complaint.

- [40] There are, on the record, genuine and unresolved considerations pulling in both directions on sanction in respect of the second complaint. On the one hand, the conduct, according to the Company was repeated, deliberate, undertaken in a group over a period of months, and attended by operational prejudice. On the other, there is evidence that the practice of smoking during working hours was longstanding and tolerated; that supervisors and even a member of management engaged in it, and, most pertinently on the question of consistency, that one Mr Johan Smith was issued only with a final written warning for smoking during working hours, and that a member of management received a final written warning for the same conduct. Consistency of sanction is a recognised component of substantive fairness, and this evidence squarely engages it.
- [41] The true vice of this award lies in the treatment of the second complaint, and there the errors are neither isolated nor immaterial. The Commissioner failed to weigh material concessions and contradictions; may even have tampered with the onus of proof, misconceived the enquiry and, in consequence, also left the seriousness and operational impact of the misconduct complained about wholly unexamined, which in turn deprived his observation (as "obiter" as it was) on sanction of any proper foundation. Assessed holistically, as *Gold Fields* and *Herholdt* require, these are not the ordinary imperfections that attend even a careful award; they are interlocking failures that distorted the conduct of the enquiry and produced a result on the second complaint that a reasonable decision-maker, properly applying his mind to the totality of the evidence, could not reach. The cumulative effect of the errors accordingly renders the award in this respect reviewable in terms of section 145 of the LRA.

Conclusion

- [42] I accordingly find that the Company does not succeed in a review of the award as it concerns the first complaint. These findings by the Commissioner stand. They are not upset on review. To be clear that portion of the award remains intact.
- [43] I however find that the award is reviewable in respect of the second complaint.¹⁴ I decline to substitute on the second complaint as sought by the Company, as substitution, is appropriate only where the record admits of but one reasonable conclusion. That is not so in this case. Whether the employees can establish the tacit authorisation they assert may depend on the evidence of the night-shift supervisors, whom neither party called and whose absence the Commissioner himself remarked upon. Also, the question of an appropriate sanction in respect of such complaint (assuming the Company is able to prove the misconduct at arbitration) would then turn on several factors including the contested issues of consistency. These are quintessentially for an arbitrator to resolve on a proper hearing especially against the backdrop of the reinstatement award which the Dismissed Employees seek.
- [44] A court of review does not sit on appeal, and it should be slow to arrogate to itself findings of *inter alia* credibility and the exercise of a sanction discretion that the LRA entrusts to the arbitrator.
- [45] I am also alive to the lapse of time since the dismissals were effected and cater for same in the order.
- [46] In the circumstances, the following order is made:

Order

1. The arbitration award issued by the Second Respondent under case number MIPT27557 dated 20 April 2021 is reviewed and set aside but only in the following terms:

¹⁴ The notice of motion provides for further and/or alternative relief which provides a basis for the order granted. In *Tsosane and Others v Minister of Prisons and Others* 1982 (2) SA 55 (C) the court held "Relief may be granted under this prayer ["Further and/or alternative relief"] where what is sought is not inconsistent with the substantive relief claimed and where further the basis for such relief has been laid in the supporting papers and dealt with in the answer of the respondent". See also *Mgoqi v City of Cape Town & another* 2006 (4) SA 355 (C) para 11–13 and *MEC for the Department of Education, Eastern Cape Province v Gqebe*, [2009] 9 BLLR 896 (LAC) at para 29.

- 1.1 The finding by the Second Respondent that the dismissal of the individual employees cited as the Third Respondents (“the Dismissed Employees”) was fair in relation to disciplinary charge two which reads: *“(2) Deliberate failure to perform your duties and/or deserting your workstation without permission. On several occasions you were away from your workstation without permission and therefore not performing your duties.”*
 - 1.2 The relief awarded to the Dismissed Employees at paragraph 44 and 45 of the award.
2. The dispute is remitted to the First Respondent for an arbitration *de novo* before a Commissioner other than the Second Respondent, but only in respect of the dispute raised by the Dismissed Employees challenging the fairness of their dismissal for disciplinary charge two as set out above. (It having being determined in the award of the Second Respondent under case number MIPT27557 dated 20 April 2021 that there was no misconduct by the Dismissed Employees in respect of disciplinary charge one: *“(1) Unauthorised possession and/or use of dagga on the company premises between the months of March and May ... you were seen on camera, in possession and smoking dagga on company premises during night shift on more than one occasion”* which portion of the award is not reviewed and set aside).
3. The Second Respondent is to enrol the matter for arbitration within 90 days of this order, or a date earlier thereto, should its case roll so permit.
4. There is no order as to costs.

I. I. Mahomed

Acting Judge of the Labour Court of South Africa

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