



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

Signature

Date

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case No: JR2200/23

In the matter between:

MAMMA VICTORIA MATJIU

Applicant

and

RUSTENBURG PLATINUM MINES LTD

First Respondent

T/A ANGLO AMERICAN PLATINUM,

MOGALAKWENA MINE

COMMISSION FOR CONCILIATION, MEDIATION

Second Respondent

AND ARBITRATION

MATTHEWS RAMOTSHELA N.O.

Third Respondent

Heard: 6 August 2026

Delivered: (This judgment was handed down electronically by emailing a copy to the parties' representatives by email. The 9 September 2026 is deemed to be the date of delivery of this judgment).

Summary: Review of a CCMA arbitration award — application in terms of section 145 of the Labour Relations Act 66 of 1995 — employee dismissed for unauthorised absence treated as desertion after a prolonged, medically-certified absence culminating in a diagnosis of major depressive disorder (severe) — pre-arbitration minute reserving the categorisation of the dismissal

as one of misconduct or of incapacity as an issue in dispute — commissioner ruling the employee's ill-health incapacity irrelevant, excluding the evidence directed at it and declining to hear the employer's human-resources witness — whether, on evidence of serious mental illness, an employer may dismiss for misconduct without first conducting an incapacity enquiry — commissioner misconceiving the nature of the enquiry, disregarding a binding pre-arbitration minute and failing to determine an issue he was required to decide — gross irregularity having a distorting effect on the outcome — award not one that a reasonable decision-maker could reach — award reviewed and set aside — substitution refused and the dispute remitted for a fresh enquiry, approached as one of incapacity, before a different commissioner — no order as to costs.

JUDGMENT

MHAMBI, AJ

Introduction

[1] This is an opposed application to review and set aside an arbitration award of the third respondent, Commissioner Matthews Ramotshela (the commissioner), issued under the auspices of the second respondent, the Commission for Conciliation, Mediation and Arbitration (the CCMA), under case number LP2666-23 and dated 5 September 2023 (the award). The application is brought in terms of section 145¹ of the Labour Relations Act² (the LRA).

[2] In the award the commissioner found that the dismissal of the applicant, Ms Mamma Victoria Matjiu, by the first respondent, Rustenburg Platinum Mines Ltd t/a Anglo American Platinum (the employer), was both substantively and procedurally fair and dismissed her claim of unfair dismissal.

¹ A defect is defined in section 145(2)(a)(ii) as the commissioner committed a gross irregularity in the conduct of the arbitration proceedings.

² Act 66 of 1995, as amended.

- [3] The applicant seeks an order reviewing and setting aside the award; substituting it with a finding that her dismissal was procedurally and substantively unfair, together with compensation equivalent to twelve months' remuneration; alternatively, remitting the dispute to the CCMA for hearing before a commissioner other than the third respondent. She also seeks costs. The employer opposes the application and has applied to strike out portions of the founding affidavit.
- [4] For convenience I refer to the parties as they stood before the CCMA: the applicant as "the employee" and the first respondent as "the employer". The second and third respondents abide the decision of the Court.

Background

- [5] The employee was employed by the employer at its Mogalakwena Mine from 2018 as a Load and Haul Assistant. Her duties involved controlling the movement of heavy mining vehicles and ensuring the safety of pedestrians on the mine, work that required alertness and concentration, and that she performed largely on foot.
- [6] There is an unusual, and in this matter material, feature of the background that is common cause. Before the employee was engaged, the employer had relocated her community from Motlhotlo to make way for the expansion of the mine. That relocation entailed the exhumation and re-interment of the community's graves. The grave of the employee's late grandfather, Mr Martins Matjiu, was not among those successfully re-interred, and it has not since been located. The employee's case is that the employer's failure to locate and re-inter her grandfather's grave is the origin of the psychiatric illness that led to her absence from work: she deposed that her late grandfather visited her in her dreams, that she was unable to sleep, and that she became progressively unable to attend work.
- [7] The employee's last day of physical attendance at work was 20 May 2022. From about that time until 14 January 2023 she was continuously absent on sick leave, supported by a succession of medical certificates. It is common cause that she submitted 22 certificates (the employee counts 23) over the

period 29 March 2022 to 10 January 2023, covering some 189 days, and that the employer accepted them and did not dispute their authenticity. The certificates reflect a progression from physical and ophthalmological complaints in the first half of 2022 to a sustained course of psychological and psychiatric treatment thereafter, including certificates from a psychiatrist, Dr M M Kewana, and from a clinical psychologist, Ms L D Madileng. The last certificate, issued by Ms Madileng, diagnosed major depressive disorder (severe), recorded that the employee's therapy was continuing, and certified that she should resume duty on 14 January 2023.

- [8] The employee did not return to work on or after 14 January 2023, and she submitted no further certificate in respect of the period 16 January 2023 to 28 February 2023. It is this period of absence a little over six weeks that gave rise to her dismissal.
- [9] On 23 February 2023, the employer addressed a pre-dismissal notice to the employee, delivered to her home on 24 February 2023, requiring her to report for duty or to communicate her whereabouts by no later than 27 February 2023, failing which she would be regarded as having absconded or deserted. The employee did not return. On 28 February 2023, the employer issued a notice terminating her employment with effect from that date for "unapproved absence". The termination notice invited the employee to lodge an appeal in writing within three working days, to a fax number stated in the notice, and required her to attend an exit medical examination in terms of section 17(3) of the Mine Health and Safety Act³ (MHSA). She underwent the exit medical on 2 March 2023.
- [10] It is common cause that no disciplinary or incapacity enquiry was convened before the employee's dismissal, and that no appeal hearing was held. The employee's attorneys faxed a notice of appeal to the number stated on the termination notice on 2 March 2023, followed by correspondence on 10 and 13 March 2023; the employer did not respond. The employee referred an unfair dismissal dispute to the CCMA. Conciliation failed, and the matter proceeded to arbitration on 29 August 2023.

³ Act 29 of 1996.

The pre-arbitration minute

- [11] Before the arbitration the parties concluded and signed a pre-arbitration minute. That minute is of central importance to this review, because it defined the issues the commissioner was required to determine. In it the parties recorded, as issues in dispute, whether the dismissal was substantively fair *“taking into consideration ... the categorisation of the dismissal by the Employer as one of Misconduct as opposed to Incapacity”*, and whether it was procedurally fair *“taking into consideration ... the application of a Misconduct Procedure instead of an Incapacity Process”*, the decision to treat the absence as desertion without convening an enquiry, and the decision not to convene an appeal hearing.
- [12] The parties, in other words, expressly placed in dispute, as a matter both of substance and of procedure, whether the employee’s dismissal ought to have been dealt with as one of incapacity arising from ill-health rather than as one of misconduct. That was the issue at the heart of the arbitration.

The arbitration and the award

- [13] The employer led the evidence of two witnesses: Ms Leshego Maila, an employee relations officer, and Mr Ben Mongalo, the employee’s line manager. A third witness, Ms Anna Sithole of the employer’s human resources department, was to testify to the employer’s Medical Incapacity and Boarding policy. The employee testified in her own case.
- [14] When the employee’s representative sought to cross-examine Mr Mongalo on the pattern disclosed by the medical certificates, and to develop the case that the matter ought to have been treated as one of incapacity under the employer’s own policy, the commissioner intervened and ruled that the line of questioning was irrelevant. The exchange, as recorded in the transcript, included the following:

“COMMISSIONER: But that is not the employer’s case ... The employer did not terminate based on medical grounds ... duly accepted that the employee is sick, and went an extra

mile to accommodate the employee ... there was a report from the doctor that [she] must resume with [her] duties. So where is incapacity in this matter? ... That's not relevant. I make a ruling."

- [15] In consequence of that ruling, the employee's representatives were prevented from developing the incapacity issue, and the employer's human resources witness, Ms Sithole, who was to speak to the incapacity policy, was not heard.
- [16] The award itself reflects the same approach. At the outset the commissioner recorded that the pre-arbitration minute's contents "*shall not be regurgitated herein but nevertheless taken into consideration*" and framed the issue for decision simply as whether the dismissal was procedurally and substantively unfair and for a valid reason. He found that the employer had proved that the employee was absent without authorisation for a period well in excess of the six consecutive working days that, under the employer's policy, constitute desertion, and that the dismissal was accordingly substantively fair. On the procedural question he found that the employer had done enough to afford the employee an opportunity to state her case, and that no appeal had in fact been lodged. He concluded that the dismissal was both substantively and procedurally fair, and dismissed the claim.
- [17] What the award does not contain, anywhere in its analysis, is any determination of the question the pre-arbitration minute reserved: whether the employee's dismissal ought to have been approached as one of incapacity rather than misconduct. The categorisation dispute is not analysed, the employer's incapacity policy is not considered, and the incapacity guidelines in the Code of Good Practice are not mentioned. The only engagement with the incapacity question is the in-hearing ruling that it was irrelevant.

The grounds of review and the parties' contentions

- [18] The employee's principal ground of review is that the commissioner committed a gross irregularity by ruling that her incapacity was irrelevant, by excluding the evidence directed at it, and by failing to determine the categorisation issue that the pre-arbitration minute required him to decide.

She contends that, on the evidence of her serious mental illness, the employer was obliged to conduct an incapacity enquiry and could not lawfully dismiss her for misconduct without doing so; and that the commissioner's failure to appreciate this misconceived the nature of the enquiry before him and rendered the award one that no reasonable decision-maker could reach. She relies, in this regard, on *LS v Commission for Conciliation, Mediation and Arbitration and Others*⁴ and on *Legal Aid South Africa v Jansen*⁵. She raises, as a further ground, that the commissioner's finding that no appeal had been lodged was reached on an incomplete and inaccurate assessment of the evidence.

- [19] The employer contends that the fairness of a dismissal falls to be determined on the basis of the reason the employer actually relied upon here, misconduct in the form of desertion, and not on some other basis that the employee contends it ought to have adopted. It relies on *Fidelity Cash Management Service v CCMA and others*.⁶ It submits that the commissioner was entitled to confine the enquiry to the misconduct charged; that *LS* is distinguishable because the employee had been certified fit to resume duty on 14 January 2023 and led no medical evidence establishing incapacity during the period of the impugned absence; and that the review is, in substance, an impermissible appeal. It also applies to strike out portions of the founding affidavit as matter that was not before the commissioner.

The test on review

- [20] An arbitration award will be set aside under section 145 of the LRA, as that section is to be understood in the light of the constitutional standard, only if the award is one that a reasonable decision-maker could not reach on the material before the commissioner.⁷ A process-related irregularity such as a failure to have regard to material evidence, or a misconception of the nature of the enquiry will not, of itself, justify setting an award aside; it will do so only

⁴ (2014) 35 ILJ 2205 (LC).

⁵ 2021 (1) SA 245 (LAC).

⁶ (2008) 29 ILJ 964 (LAC).

⁷ See: *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (2007) 28 ILJ 2405 (CC) at para 110. See also *Rustenburg Platinum Mines Ltd v SAEWA obo Bester and others* 2018 (5) SA 78 (CC).

where it is of such a nature that it has a distorting effect on the outcome, so that the result is one a reasonable decision-maker could not reach.⁸ The Court must be careful not to convert the review into an appeal, and must not set an award aside merely because it would itself have reached a different conclusion.

- [21] Reasonableness is not, however, established merely by pointing to a defensible outcome on the misconduct enquiry that the commissioner in fact undertook. Where a commissioner fails to determine an issue he was required to determine or misconceives the nature of the enquiry that the dispute called for, he does not bring his mind to bear on the question actually before him; and an award that results from such a misconception is liable to be set aside where the misconception is material to the outcome.⁹

The binding effect of the pre-arbitration minute

- [22] A pre-arbitration minute is not a formality. It records the parties' agreement on what is common cause and what is in dispute, and it defines and limits the issues that the arbitrator is called upon to decide. Both the parties and the commissioner are bound by it. A commissioner who disregards the issues that the parties have, by their minute, agreed to place in dispute, and who decides the matter on a footing the minute did not contemplate, commits a reviewable irregularity.¹⁰
- [23] Here the parties agreed, in terms, that the categorisation of the dismissal as one of misconduct or of incapacity was in issue, both substantively and procedurally. The commissioner was bound to determine that issue. He did not. He ruled it irrelevant and proceeded to decide the matter solely as one of misconduct. In doing so he departed from the very question the parties had agreed he was to decide.

⁸ See: *Herholdt v Nedbank Ltd (Congress of South African Trade Unions as Amicus Curiae)* (2013) 34 ILJ 2795 (SCA) at para 25; *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others* (2014) 35 ILJ 943 (LAC); *Head of Department of Education v Mofokeng and Others* [2015] 1 BLLR 50 (LAC) at paras 30–33.

⁹ *Mofokeng* above n 3 at paras 30–33.

¹⁰ *Association of Mineworkers and Construction Union obo Botsheleng v Maje N.O. and Others* (JR1403/16) [2024] ZALCJHB 10 at paras 15–16. It is a long-standing principle that the parties are bound by the issues defined in a pre-arbitration or pre-trial minute: see *National Union of Metalworkers of South Africa v Driveline Technologies (Pty) Ltd and Another* 2000 (4) SA 645 (LAC).

Misconduct or incapacity: the legal framework

- [24] The distinction between misconduct and incapacity is not one of nomenclature only. It determines both the substantive standard against which the fairness of the dismissal is judged and the procedure the employer is required to follow. Misconduct concerns culpable conduct, a blameworthy failure to comply with a rule or standard. Incapacity arising from ill-health concerns an employee's inability, through no fault of her own, to perform her duties. The Code of Good Practice: Dismissal, contained in Schedule 8 to the LRA, sets out separate guidelines for each; and items 10 and 11 of the Code prescribe, for ill-health incapacity, an enquiry into the extent of the incapacity, the prospects of recovery, and whether the employee can be accommodated or an alternative to dismissal found.¹¹
- [25] Our courts have held that an employer may not sidestep those obligations by the simple expedient of characterising as misconduct what is, on the evidence, an incapacity. In *LS v CCMA* the Labour Court held that where there is evidence that an employee's conduct is the product of mental illness, the commissioner must determine whether a duty to follow the incapacity guidelines was triggered, and that a failure to do so is a reviewable misdirection. The Court held that "*the need to conduct a proper incapacity enquiry prior to dismissal cannot be avoided by simply treating the incapacity as misconduct in the face of evidence of mental illness*", and that to permit an employer to escape the incapacity enquiry "*by simply choosing to characterise a medically ill employee's conduct as misconduct*" would "*render meaningless the protections provided in the Act*".¹² The Labour Appeal Court affirmed the same principle in *Legal Aid South Africa v Jansen*, holding that an employer confronted with a depressed employee is obliged to follow the incapacity guidelines in items 10 and 11 of the Code, or a process akin to them.¹³

¹¹ Schedule 8 to the LRA (Code of Good Practice: Dismissal), items 10 and 11.

¹² *LS v CCMA* (id fn 5) at paras 46–52 and 65.

¹³ *Legal Aid v Jansen* (id fn 6) at paras 41 and 50.

[26] The employer's reliance on *Fidelity Cash Management* does not displace that principle.¹⁴ *Fidelity* establishes that the fairness of a dismissal is ordinarily assessed on the reason the employer relied upon, and that an employer will not lightly be held to a reason it did not advance. But that is not the present question. The employee does not seek to have the fairness of her dismissal judged against a reason the employer did not give. Her complaint is that the employer's characterisation of her conduct as misconduct was itself the issue the parties had reserved for decision, and that the law did not permit that characterisation to be placed beyond scrutiny where there was evidence that the conduct was the product of a serious mental illness. *Fidelity* does not license a commissioner to decline to decide whether a dismissal ought to have proceeded as one of incapacity where the parties have expressly put that question in issue.

Application to the facts

[27] On the material before the commissioner there was plainly a sufficient basis to trigger the enquiry that *LS* and *Jansen* require. It was common cause that the employee had been absent for some 189 days on 22 medical certificates; that the certificates disclosed a progression into psychiatric and psychological treatment; that the last diagnosis was major depressive disorder (severe), with therapy continuing; and that the employee had shared her certificates with the employer's human resources department. On the employee's evidence, she had told her line manager that she was experiencing mental pressure that affected her ability to work, and he had directed her to consult a doctor. The employer's own Medical Incapacity and Boarding policy, which was in the bundle, applied wherever an employee's fitness to perform her normal duties "may be questionable"; it made the monitoring of sick leave patterns a responsibility of line management; and it required the human resources department to notify the occupational medical practitioner once an employee had been absent for 14 continuous days a threshold long since passed.

¹⁴*Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others* [2008] 3 BLLR 197 (LAC); (2008) 29 ILJ 964 (LAC).

- [28] Confronted with that evidence, and with a pre-arbitration minute that expressly reserved the misconduct-or-incapacity question, the commissioner was required to determine whether the employer was obliged to deal with the matter as one of incapacity, and whether its failure to do so rendered the dismissal unfair. Instead, he ruled the question irrelevant, excluded the evidence directed at it, declined to hear the witness who could speak to the incapacity policy, and decided the matter solely as one of desertion. That was a misconception of the very nature of the enquiry the dispute called for. The commissioner reasoned, in his ruling, that incapacity did not arise because the employer had not terminated on medical grounds and had “accepted” that the employee was ill; but that reasoning assumes the answer to the question the minute posed, because whether the employer ought to have proceeded on medical grounds was precisely the issue in dispute.
- [29] The misconception was not immaterial; it was determinative. By excluding the incapacity enquiry, the commissioner foreclosed the only basis on which the employee’s absence might have been shown not to be culpable, and he deprived himself of the evidence including that of the employer’s human resources witness on which the substantive and procedural fairness of the dismissal, properly characterised, would have turned. Had the commissioner undertaken the enquiry the minute required, the outcome could well have been different. The irregularity therefore had a distorting effect on the result.¹⁵
- [30] It follows that the award which found the dismissal substantively and procedurally fair without ever determining whether it ought to have been dealt with as one of incapacity is not an award that a reasonable decision-maker could reach on the material before the commissioner. It falls to be reviewed and set aside.
- [31] In the light of that conclusion, it is not necessary to decide finally whether the commissioner’s further finding, that no appeal had been lodged, was in itself reviewable. I observe only that the finding that the appeal “does not exist” sits uneasily with the material the commissioner himself acknowledged a faxed appeal to the number stated on the employer’s own termination notice, follow-

¹⁵*Mofokeng* (id fn 11) at para 33.

up correspondence, and a report of successful transmission and that the procedural fairness of the dismissal will in any event have to be revisited once the matter is approached, as it must be, as one of incapacity. I say no more about it.

- [32] As to the application to strike out portions of the founding affidavit: for the purposes of this review, I have had regard only to what was before the commissioner, as reflected in the record. To the extent that the founding affidavit traverses matter that was not before him, I have not relied upon it in reaching the conclusions above, and it has had no bearing on the outcome. In those circumstances it is unnecessary to make a separate order on the strike-out application.

Remedy

- [33] The employee asks the Court to substitute its own finding for that of the commissioner and to award her twelve months' compensation. The power to do so exists,¹⁶ but its exercise is exceptional. A reviewing court will ordinarily remit the matter to the decision-maker and will substitute its own decision only where it is in as good a position as the decision-maker to make it, where the outcome is a foregone conclusion, or where further delay would cause unjustifiable prejudice, the touchstone being always what is fair and just in the circumstances.¹⁷
- [34] This is not a case for substitution. The award falls to be set aside precisely because the incapacity enquiry was never undertaken: the evidence that bore upon it was excluded, the employer's human resources witness was not heard, and the treating practitioners were not called. The record on the decisive question is, in consequence, incomplete and untested. The Court is therefore not in as good a position as a commissioner to determine whether the employee's dismissal, approached as one of incapacity, was fair; nor is the answer a foregone conclusion. The fair and just course is to remit the dispute so that the enquiry the pre-arbitration minute always required can be

¹⁶ Section 145(4) of the LRA.

¹⁷ *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another* 2015 (5) SA 245 (CC) at paras 42–47.

conducted properly, on evidence, before a commissioner other than the one whose award is set aside.

[35] I should make clear what the remittal does and does not decide. It does not decide that the employee's dismissal was unfair. It decides only that the question whether it was fair must be determined afresh, as an enquiry into incapacity, on all the relevant evidence, by a different commissioner.

[36] For the above reasons, I am satisfied that the award stands to be reviewed and set aside, and that the dispute must be remitted to the CCMA to be determined afresh, as an enquiry into the applicant's incapacity, before a different commissioner. I decline to substitute the award.

Costs

[37] In this Court costs do not follow the result as a matter of course; they are governed by the requirements of the law and of fairness.¹⁸ The employee was represented *pro bono*; the employer resisted the review on grounds that were not unreasonable; and the parties may yet have to face one another again at the remitted arbitration. Having regard to all the circumstances, I consider that the interests of justice are best served by making no order as to costs.

[38] In the premises, the following order is made:

Order

1. The arbitration award issued by the third respondent under case number LP2666-23, dated 5 September 2023, is reviewed and set aside.
2. The dispute is remitted to the second respondent for a fresh arbitration, to be conducted as an enquiry into whether the applicant's dismissal was fair having regard to the categorisation of the dismissal as one of incapacity, before a commissioner other than the third respondent.

¹⁸Section 162 of the LRA; *Zungu v Premier of the Province of KwaZulu-Natal and Others* (2018) 39 ILJ 523 (CC).

3. There is no order as to costs.

M. H. Mhambi

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant : Mr R Spoor

Instructed by : Richard Spoor Inc, Johannesburg (pro bono)

For the First Respondent : Mr I Gwaunza

Instructed by : ENSafrica, Sandton