



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

Signature

11 September 2026
Date

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case No. JR923/23

In the matter between:

SEPHAKU CEMENT (PTY) LTD

Applicant

and

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

First Respondent

MODIPA, SOLOMON N.O.

Second Respondent

NATIONAL UNION OF MINEWORKERS

Third Respondent

MAZIBUKO, BONGANI

Fourth Respondent

Heard: 26 August 2026

Delivered: 11 September 2026 (By uploading on *CaseLines* and/or circulation to the parties' legal representatives by email)

JUDGMENT

MAKHURA, J

Introduction

- [1] This is an application to review and set aside an arbitration award issued by the second respondent commissioner under the auspices of the first respondent, the Commission for Conciliation, Mediation and Arbitration (CCMA). In terms of the award, the commissioner found that the dismissal of the fourth respondent employee was substantively unfair and ordered his retrospective reinstatement.
- [2] The employee's dismissal was precipitated by statements he made during a Department of Mineral Resources and Energy (DMRE) audit meeting on 8 June 2022, which the applicant company contended were malicious and detrimental to its reputation. The review application therefore turns principally on whether the commissioner's finding that the dismissal was unfair and an award of retrospective reinstatement falls within the bounds of reasonableness.¹

Material facts

- [3] The company is involved in manufacturing and mining operations and distribution of cement. It is regulated by, inter *alia*, the Mine Health and Safety Act² (MHSA).
- [4] The employee was charged with and dismissed for the following allegation of misconduct:
- 'Maliciously bringing the Company into disrepute with your dishonest and unsubstantiated statements during the opening meeting of the DMRE Group Audit at Aganang on 8 June 2022. Your actions were inconsiderate of, and in direct conflict with Company interest.'
- [5] The employee was dismissed on 27 June 2022 after a disciplinary hearing convened and concluded on the same day. At the time of dismissal, he occupied the position of handyman in the mechanical engineering section and was also a shop steward and the chairperson of the third respondent union branch.

¹ *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] ZACC 22; (2007) 28 ILJ 2405 (CC).

² Act 29 of 1996.

- [6] The employee, represented by his trade union, subsequently referred an unfair dismissal dispute to the CCMA in which he sought retrospective reinstatement.

The arbitration

- [7] During the arbitration proceedings, the company called one witness, its Operations Manager, Mark Hector. The employee testified on his own behalf.
- [8] It is common cause that the DMRE notified the company of a Group Audit that would be conducted on Wednesday, 8 June 2022. The evidence from Hector establishes that the DMRE's communication advising the company of the 8 June 2022 audit was received on 6 June 2022. It is further common cause that the company has a general communication system called SEPCOM (Sephaku Communications), through which employees were able to raise a wide range of issues, including matters relating to health and safety.
- [9] Hector testified that at approximately 19h00 or 20h00 on 6 June 2022, he received a telephone call from the night-shift "guys" or employees, regarding a rotary kiln. He was informed that a section of the kiln had become extremely hot, indicating a refractory failure. They also forwarded him a video clip. He then contacted various heads of department (HODs) to determine whether the planned full kiln shutdown, which had been scheduled for two weeks later, could be brought forward. Following consultations, the contractors and/or suppliers confirmed that they were available to perform the work earlier than planned due to the refractory failure.
- [10] Hector explained that when a kiln develops a hot spot of that nature, it must be stopped so that the affected area can be inspected and repaired. This requires personnel to enter the kiln, remove the damaged material and reline the affected section. Where the failure occurs shortly before a planned shutdown, as was the case here, it may be preferable to undertake a more extensive relining of an entire section of the kiln, a process that is ordinarily planned and carried out annually.

[11] In this instance, he decided on the night of the incident that the kiln could not continue operating and instructed that it be stopped. Consideration was then given to whether the kiln should be repaired on a limited basis to address the immediate problem or whether the planned full shutdown, scheduled for two weeks later, should be brought forward. After contacting the contractors, it was confirmed that they were available to perform the planned shutdown work immediately, and the decision was accordingly taken to proceed with the full shutdown as originally contemplated.

[12] At 8h04 on 7 June 2022, Essie Esterhuizen, the Plant Manager, addressed an email to the HODs and stated that:

‘Good day, we experienced a red spot on the kiln last night and the kiln had to be stopped. We will be going into a 35 day KSD to replace the kiln shell and repair the refractories. This was all planned for 22 June which means we do the same work 2 weeks earlier. Our stock situation is fine and we will have 35k tons of clinker available after the KSD. As per the earlier KSD, let's ensure we maintain a safe environment and ensure ZERO harm to all our employees and contractors.’

[13] Five minutes later at 8h09, Hector also addressed an email to the HODs as follows:

‘The kiln stopped last night for a hot area around the girth gear. We had to stop the kiln as the bricks in that area ... will need to be replaced. After looking at the alternatives and availability of personnel, we are going into the full 35 day shutdown now. Today is day 1 of the shutdown. We will do all the work that was planned for the shutdown if it started on 22 June.’

[14] At 8h19 on 7 June 2022 and in response to the DMRE's notification of a group audit, Esterhuizen addressed an email to DMRE recording that the company had embarked upon a 35-day kiln shutdown to undertake replacement work on the front section of the kiln and certain refractories, and that, as a consequence, the main plant would not be operational on the day of the audit. The DMRE noted

Esterhuizen's email and advised that they would nevertheless still attend the company's premises on 8 June 2022 as scheduled.

[15] At 9h01, Ruth McGluwa addressed an email to the SEPCOM facilitators instructing them to convey to employees the contents of an email sent by Esterhuizen to the HODs at 08h04. The communication advised that the company would commence a full 35-day shutdown that day, despite the fact that the shutdown had initially been planned to commence on 22 June 2022. During arbitration proceedings, the company did not lead to confirm that the announcement regarding the plant shutdown had been communicated to employees, including the employee in this case. Its case in this regard rested exclusively on a register indicating the employee's attendance at the SEPCOM briefing. The employee, however, testified that he had no knowledge of the plant shutdown and only learnt of it on 8 June 2022 during the DMRE meeting.

[16] On 8 June 2022, the DMRE attended the company for the scheduled group audit. At the commencement of the meeting, the company informed the DMRE officials that most of the plant was not operating due to the refractory failure and that the company had commenced its plant shutdown. It is common cause that the employee was given an opportunity to speak. Hector wrote a statement dated 17 June 2022 about the event of 8 June 2022, the content of which formed part of his oral evidence. He stated, *inter alia*, that:

'Bongani Mazibuko requested to speak. He was given an opportunity. Amongst other things Bongani mentioned that himself and members (he was speaking as the leader of the Union on site) were concerned that the plant was stopped just before the DMRE came. He mentioned that they found it odd that each time before the DMRE came, the plant was stopped. He then also specifically mentioned the clinker outloading.

He also mentioned that each time the DMRE came, there was a rush to clean up the plant before the DMRE arrived.

He wanted to understand why this was only done before the DMRE arrived and not all the time.

Mr Wagamang Motlhamme replied to this saying that if this were the case then the DMRE sees this is a very serious light. He mentioned that if this were the case the DMRE may need to look at visiting Sephaku unannounced as they do at certain other Mines where the practice is to stop plant before the DMRE arrives.'

[17] It is common cause that the DMRE proceeded with the inspection and found no indication of foul play in relation to the plant closure. Hector expressed the view that the employee ought not to have raised the concerns during the DMRE meeting, as the company had adequate internal mechanisms available for the reporting of such concerns. In this regard, he testified that there were enough other structures, such as SEPCOM and health and safety meetings, where the concerns of this nature could have been reported.

[18] Hector also confirmed during cross-examination that the employee attended the meeting in his capacity as a shopsteward:

'APPLICANT REPRESENTATIVE: Sir, the applicant's version is that he said in the meeting the members were concerned that the plant was stopped prior to the DMRE visit, and that every time the DMRE comes to visit, they are being rushed to do the cleaning. That's what the applicant said. Do you recall that?

MR. MARK HECTOR: I recall that he said that the plant was stopped before the DMRE visit, yes and that there was a rush to clean the plant before the DMRE comes, yes.' (Own emphasis)

[19] Hector accepted that the DMRE is entitled to conduct unannounced inspections. He testified further that employees are entitled to communicate directly with the DMRE or regulator. He stated that employees may contact the DMRE by various means, including letters and emails, and confirmed that they enjoy open access to the regulator. His evidence was that employees are at liberty to raise concerns with the DMRE and seek its intervention where they consider it necessary. He

testified, however, that the company stood to suffer prejudice if the unannounced inspection uncovered any non-compliance or other shortcomings.

- [20] Asked what he considered to be malicious about the employee's statement, Hector testified that it conveyed the impression that the company had deliberately stopped the plant to prevent the DMRE from observing it in operation during an inspection. He said that the employee intentionally sought to create the perception that the company would halt operations in anticipation of a DMRE visit. He further stated that this impression was reinforced by Motlhamme's response, in which he indicated that, if that were indeed the case, the DMRE would have to treat the company differently. Hector's evidence was that the DMRE was consequently left with the impression that the company had intentionally suspended operations to avoid regulatory scrutiny.
- [21] It is common cause that at 14h45 on 8 June 2022, the DMRE issued a notice of its intention to issue statutory instructions in terms of the MHSA in relation to the storage area and drain trenches. The notice identified six instances of non-compliance, namely: poor housekeeping outside the storage area and the water treatment plant; improper stacking of scrap material, wire ropes and electrical cables; poor housekeeping in the Sunsurf workshop, which also served as an eating facility; the storage of a CO₂ gas cylinder inside the Sunsurf workshop; an electrical distribution box without a door or flash plate, with conductors exposed; and uncovered or exposed water drain trenches. The company was afforded an opportunity to make representations and provide reasons why the contemplated statutory instructions should not be issued.
- [22] The DMRE also issued a health and safety inspection report in respect of the Dome and Kiln areas. The report identified several instances of non-compliance, including an electrical distribution box that was exposed or uncovered and lacked a flash plate, hydraulic oil spillages, and the failure to display signage indicating the voltage rating at the substation.

- [23] The employee denied that his statement was malicious. He testified that he attended the meeting in his capacity as a union representative and considered it part of his responsibility to safeguard the interests of union members, particularly in relation to health and safety matters.
- [24] The employee further testified that, by raising the issue, he was not seeking to create a false impression or to have his remarks taken out of context. He stated that he and/or other trade union officials had been part of the numerous prior efforts to ensure the company's compliance with health and safety requirements and that his remarks should be understood against that background. In his view, there was nothing malicious in what he said.
- [25] He explained that he was raising a concern regarding housekeeping while the plant was not operating and questioning whether housekeeping standards were consistently maintained during normal operations. His evidence was that the ultimate aim was for all stakeholders to work together to provide a safe working environment for employees. He continued that:
- 'It is very sad, because now if the company silences the union or the employee representations in such matters, now we are going to end up whereby ... the company is being shut down and then we are also being held accountable because we are a stakeholder in the operations, monitoring issues of health and safety. So it does not sit well with me, given the history of where we come from. How we have assisted them in trying to make the workplace a safe working environment.'
- [26] In response to the proposition that he should have raised the issues in the health and safety meeting, he disagreed with the company's stance, maintaining that the audit meeting was also a relevant structure to raise the concerns. He said that the last health and safety meeting they had was in March 2022.

The award

- [27] The commissioner observed that the employee was a union representative and had attended and participated in the DMRE audit meeting in that capacity. He further noted the company's contention that the employee ought to have raised his concerns through established internal communication channels, such as SEPCOM, rather than during the DMRE meeting.
- [28] The commissioner questioned whether the concerns raised by the employee were matters that ought to have been addressed through internal communication channels and whether raising them through SEPCOM could reasonably have brought the company's name into disrepute. Significantly, the commissioner observed that the company had failed to adduce any evidence prescribing the manner, forum, or channels through which such concerns were required to be raised.
- [29] The commissioner then turned to the allegation that the employee's statements were malicious. He questioned what, on the facts of the case, constituted malice and whether the fact that the DMRE was entitled to conduct unannounced inspections could render the employee's statements malicious. The commissioner found that the prospect of an unannounced DMRE inspection could not, without more, be regarded as harmful to the company unless the company harboured "*malicious intentions of hiding something from the DMRE which could prejudice it in one way or another*". On that basis, he concluded that the dismissal lacked substantive fairness and ordered the employee's retrospective reinstatement

The review grounds

- [30] Apart from the broad allegations contemplated in section 145(2), namely misconduct by the commissioner, gross irregularities in the conduct of the proceedings, and the unreasonableness of the award, the company contends that the commissioner ignored material evidence, failed to undertake a proper assessment of the evidence as a whole, abdicated his duty to determine the dispute on the evidence before him, and thereby deprived it of a fair hearing.

[31] The company also attacks the commissioner's reasoning, including his scrutiny of its case that the employee should have raised the concerns through internal communication structures and his observation regarding the absence of any reliance on a relevant policy. The company submits that the commissioner failed to appreciate that the employee's failure to utilise the SEPCOM channel was indicative of the fact that his concerns were not bona fide. In its view, the employee's conduct could only have been intended to maliciously cast aspersions on the company's conduct in relation to the DMRE.

[32] The company further criticised the commissioner's treatment of its concern regarding unannounced DMRE visits. It argued that the commissioner failed to appreciate that, following the employee's statements, the company risked being viewed by the DMRE in the same light as employers who were distrusted and subjected to heightened scrutiny, including unannounced inspections. Further, that:

'The reputational harm to [the company] arising from [the employee's] statements therefore brought the risk of direct, real-life consequences in terms of [the company's] relationship with the DMRE.'

[33] Finally, the company submits that the commissioner failed to appreciate that, on his reasoning, the employee was effectively at liberty to raise allegedly false and unsubstantiated concerns with the DMRE without first ventilating those concerns through the company's internal reporting structures.

Analysis

[34] During cross-examination of the employee, the company's representative put the following proposition:

'...if this is the mandate that you had ... surely you should have put that forward and this would have been prevented. If you have said to the DMRE this is the mandate that we have, it's in writing, but you never mentioned that. You said the

plant is stopped every time the DMRE is visiting us. That's what you said. I don't see it here in your statement.'

- [35] The employee responded that he had previously never been asked to prove the mandate in writing. Indeed, to require the union representative to produce a written mandate from union members before raising their concerns is unsustainable, not in accordance with any prescript and finds no support in law or established industrial relations practice. To impose such a requirement would render collective representation impractical and would undermine the very purpose of trade union representation.
- [36] Significantly, this proposition appears to undermine the company's own case. On its own version, the employee's conduct was objectionable because he raised the concern with the DMRE, instead of SEPCOM or the health and safety structure. Yet the proposition suggests that, had he produced a written mandate from union members in support of the same concerns, the matter would have been viewed differently. This is an acknowledgement, as confirmed by Hector in his written statement and evidence, that the employee was acting in a representative capacity and raising concerns on behalf of members.
- [37] Even if the company's position is that the employee would nevertheless have faced disciplinary action even if he produced a written mandate, then the existence or absence of such written proof was ultimately irrelevant. In either event, the proposition does little to establish malice. Rather, it tends to support the inference that the disciplinary action was directed at the fact that the employee raised the concerns during the DMRE audit meeting without first utilising the company's internal reporting channels, not the substance of the concerns themselves.
- [38] The company's heads of argument put paid to any suggestion that its complaint was directed at the substance of the concerns raised by the employee. On the contrary, they confirm that the true gravamen of its complaint lay in the forum or

channel through which those concerns were communicated. The company submitted that:

‘The inevitable conclusion flowing from these events was that Mr Mazibuko had raised the above concern maliciously, given that he had had ample opportunities to raise such issues related to health and safety practices prior to the DMRE meeting, but had not done so. He used the meeting with the DMRE to make statements that were both untrue and made in bad faith.’

[39] Whatever the company’s case against the employee is, it overlooks a fundamental consideration. Although the company accepted that the employee was acting in his capacity as a union representative, it failed to distinguish between statements made by the employee in his personal capacity and those made on behalf of the employees he represented. Hector expressly acknowledged that the employee was conveying concerns raised by members of the trade union. There was no evidence that the employee acted outside the scope of his mandate or misrepresented the views of those members. In those circumstances, the employee was merely communicating the concerns of his constituency and could not legitimately be subjected to disciplinary action for doing so. That, in itself, ought to have been dispositive of the matter.

[40] Even on the assumption that the employee acted independently when making the impugned statement or that it was within the company’s right to discipline him regardless of the capacity in which he raised the concerns, the company was nevertheless required to establish that the statement was untrue, that the employee knew of its falsity or lacked reasonable grounds for believing it to be true, and that he made it with the intention of damaging the company’s reputation. The company was further required to demonstrate that the statement resulted in, or had the potential to result in, prejudice to its reputation.

[41] Mr Le Roux submitted that the employee bore the burden of proving the truth of the impugned statement. Mr Thobejane, appearing for the union and employee, submitted that the company had to prove the falsity of the statement. I agree with

Mr Thobejane. The company's submission cannot be sustained as it impermissibly reverses the onus. The company elected to charge the employee with making a malicious statement and, in seeking to justify the dismissal, bore the onus of proving the misconduct alleged. As part of establishing the substantive fairness of the dismissal, it was incumbent upon the company to prove the essential elements of the misconduct.

- [42] The company could not simply assert that the statement was false in a charge sheet and then demand that the employee prove otherwise. In the absence of evidence demonstrating falsity, the charge remained unsubstantiated. In any event, the company's case falls short on further essential elements. Even had the statement been shown to be false, which it was not, there was no evidence that the employee made it knowingly, recklessly, or in bad faith. Likewise, the company failed to demonstrate any actual prejudice arising from the statement or any credible prospect of reputational harm flowing from it.
- [43] The prejudice or potential prejudice allegedly flowing from the employee's statement was a heightened scrutiny by the DMRE resulting in unannounced inspections of the company's operations. That assertion is difficult to sustain. If the company was complying with the applicable health and safety and regulatory requirements, there would be no rational basis for fearing an unannounced inspection by the DMRE or for viewing the possibility of such an inspection as prejudicial.
- [44] If the company feared that the employee's statement might prompt unannounced visits by the DMRE, that fear may have been attributable to its own compliance history. This is because the evidence revealed that the company had been found non-compliant during DMRE audits in March and April 2022, while the audit conducted on 8 June 2022 disclosed further instances of non-compliance. In those circumstances, the employee's statement cannot be said to have unfairly exposed the company to suspicion or to have invited unwarranted regulatory scrutiny. On the contrary, the company's record of non-compliance provided an

objective basis for closer regulatory scrutiny and unannounced inspections by the DMRE. Viewed in this context, the real source of any apprehension was the prospect that increased regulatory scrutiny might uncover further non-compliance on the part of the company.

- [45] Having considered the merits of the matter, or more accurately the lack thereof, I can do no better than agree with the employee's observation that it is "very sad" that the dismissal appears to have been aimed at silencing him and/or the trade union he represented. The voices and concerns of employees, particularly when expressed during audit processes involving regulatory authorities, must not be suppressed and muted through disciplinary measures or dismissal. This is especially so where the concerns relate to health and safety matters in inherently hazardous industries such as mining. Effective regulatory oversight depends upon the participation of all stakeholders, including employees and their representatives, being able to communicate openly and candidly with each other and the regulator regarding workplace conditions, practices and risks, without fear of reprisal. To seek to silence those voices through threats of disciplinary action and dismissal is not only inimical to meaningful employee participation but also undermines the objectives of transparency, accountability and workplace safety that underpin the MHSA.

Conclusion

- [46] In conclusion, I find that the company failed to discharge its burden of proving that the employee committed the misconduct for which he was dismissed. Accordingly, the allegation of malicious conduct was not established, and the commissioner's ultimate decision and award that the dismissal was substantively unfair falls within the reasonableness threshold. The review application stands to be dismissed.
- [47] Both parties submitted that no costs order should be made. I see no reason to depart from that approach and accordingly conclude that no order as to costs is warranted.

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

Order

1. The review application is dismissed
2. There is no order as to costs.

M. Makhura

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

Mr F. Le Roux

Instructed by:

Joubert Gaplin Searle Inc.

For the 3rd & 4th Respondents:

Mr A.T. Thobejane

c/o Mashabela Attorneys